



MARITAL RAPE AND LEGAL FRAMEWORK IN INDIA: A CRITICAL LEGAL ANALYSIS

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ABSTARCT

In India, the definition of **marital rape** is the model of what we call '**implied consent**'. Marriage between a man and a woman in India means that both have consented to sexual intercourse, and it cannot be otherwise, and rape within a marriage is a concept that tortures a woman to the very heart and causes her to experience **pain and anguish**. The terror of having to face it and yet suffering it in silence is an intolerable thought that affects the psyche of women. This silence has a very damaging effect on women's emotional, psychological and mental health. The lack of legislation against the act of marital rape is one of the key reasons why marital rape is still concealed behind the **sacrosanct** act of marriage. Rape is a crime against a woman that violates her **integrity and self-respect**, and when it happens within the four walls of a matrimonial home, it reduces the status of a woman to an object used solely for sexual pleasure. Women have been granted the right to defense when the violator of her body is an outside person, but when the perpetrator is her own spouse; the rights are revoked by the legislature. This article addressed the existing legal system for the Marital Rape in India and the need to reform it. As there is no applicability of the principle of marital exemption at the present time, the mere

criminalization of marital rape will not solve the problem, but a step towards the reformation of sexual abuse in marriage will be undertaken.

Keywords: marital rape, implied consent, pain and anguish, sacrosanct, integrity and self-respect.

I. INTRODUCTION

When the word rape is mentioned, it usually inclines one to think of someone who is a stranger, a malicious person. Rape in the context of marriage usually never comes in the mind of a person. It is difficult for women themselves to accept that a husband can also rape his wife. After all, a man making use of his congeal right cannot be accused of rape and this indicates that a woman has no right to her own body, and her will are subject to that of her husband. Meanwhile the legal meaning varies, it is possible to describe marital rape as any unwanted (vaginal, genital, or oral) intercourse or penetration attained by violence, threat of force, or when the wife is unable to consent.

The word 'rape' is derived from the Latin term 'rapio', which means 'to seize'. Rape is a forced seizure, or the non-consensual of a woman, through coercion, fear or fraud without her consent. Coercive, non-consensual sexual contact with a woman is involved. Rape can be regarded by all means as an act of abuse by the private person of a woman, an outrage. In the case of **Bodhisattwa Gautam v. Subhra Chakraborty**¹, the Supreme Court of India has correctly described it as 'deathless shame and the gravest crime against human dignity'. Marital rape is particularly complicated because the complex and the personal nature

¹ AIR 1996 SC 922.



of marital relationship makes it impossible for the victim to imagine herself as a victim, by alone reporting the offending act to the authorities, which is why Marital Rape is one of the widely under-reported violent crimes. Even the women who do consider themselves victims are hesitant to approach the authorities, since they rely financially upon their husbands, and reporting the matter could very well result in withdrawal of the financial assistance leaving them and their children without food and shelter.

At present, there are several countries that either enact marital rape laws, repeal marital rape exceptions, or have laws that do not differentiate between marital rape and ordinary rape. These countries include: Albania, Algeria, Australia, Belgium, Canada, China, Denmark, France, Germany, Hong Kong, Ireland, Italy, Japan, Mauritania, New Zealand, Norway, Philippines, etc. Scotland, South Africa, Sweden, Taiwan, Tunisia, the United Kingdom, the United States and, most recently, Indonesia. Turkey criminalized marital rape in 2005, Mauritius and Thailand in 2007. The criminalization of marital rape in these nations, both in Asia and around the world, demonstrates that marital rape is now regarded as a violation of human rights. That was in 2006, it was estimated that marital rape is a criminal offence in at least 100 countries and India is not one of them. While marital rape is prevalent in India, it is veiled behind the sacrosanct curtains of marriage.

There have been many laws and enactments passed in India addressing violence against women in her own home, such as laws against dowry, cruelty, domestic violence

and female infanticide. However, the worst and most humiliating error in a marriage, where a husband pressures his wife to assume that it is his nuptial right to have intercourse with his wife (with or without her consent), 'marital rape,' has not been recognized as a crime in the eyes of policy makers.

Women who are raped by their husbands are likely to be raped a number of times. Husbands often abuse their wives while they sleep, or use intimidation, verbal threats, physical aggression, or weapons to compel their wives to have non-consensual sex with them². Marital rape is a significant issue that millions of women around the world have to confront and endure on a regular basis. Accurate statistics of rape and violence against women within the family are difficult to obtain, in part because women are reluctant to report events, as women raped by their husbands may hesitate to report due to family loyalty, fear of retaliation by their abuser, unwillingness to leave the relationship, security of the future of their children, or the lack of strict laws in force to protect the victims of marital rape. By way of comparison, the best statistical evidence on marital rape in the United States indicate that one in seven or eight married women has been raped or attempted rape by her husband.

II. LEGAL FRAMEWORK IN INDIA

Though India is well advanced in every possible field, marital rape is not considered as an offence in India. Despite amendments, legal commissions and new laws, one of the most humiliating and crippling acts i.e. marital rapes is not an offence in India.

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<http://www.taasa.org/library/pdfs/TAASALibrary104.pdf>



Looking at the choices that a woman has to defend herself in marriage, she tells us that the rules were either non-existent or vague, and it only is dependent on the interpretation by the Courts.

The Section 375 of IPC³ reads: A man is said to commit “rape” who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six descriptions⁴. The provision of rape in IPC has very primitive sentiments, mentioned as in its exception clause- “Sexual intercourse by man with his own wife, the wife not being under 15 years of age, is not rape.”

Section 376 of IPC provides punishment for rape. According to this section, the rapist should be punished with imprisonment of either description for a term which shall not be less than 7 years but which may extend to life or for a term extending up to 10 years and shall also be liable to fine unless the woman raped is his own wife, and is not under 12 years of age, in which case, he shall be punished with imprisonment of either description for a term which may extend to 2 years with fine or with both. This section in

dealing with sexual assault, in a very narrow purview lays down that, an offence of rape within marital bonds stands only if the wife be less than 12 years of age, if she be between 12 to 15 years, an offence is committed, however, less serious, attracting milder punishment. Once, the age crosses 15, there is no legal protection accorded to the wife, in direct contravention of human rights regulations. Beyond the age of 15, there is no remedy the woman has. The Indian Penal Code was amended in 1983 to make way for the criminalization of spousal rape during the period of judicial separation.⁵

As per the Indian Penal Code, the instances wherein the husband can be criminally prosecuted for an offence of marital rape are as under:

1. When the wife is between 12-15 years of age, offence punishable with imprisonment upto 2 years or fine, or both;⁶
2. When the wife is below 12 years of age, offence punishable with imprisonment of either description for a term which shall not be less than 7 years but which may extend to life or for a term extending up to 10 years and shall also be liable to fine.⁷

³ Indian Penal Code, 1860 (45 of 1860).

⁴ First- Against her will. Secondly- Without her consent. Thirdly- With her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt. Fourthly- With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married. Fifthly- With her consent, when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent. Sixthly- With or without her consent, when she is

under sixteen years of age. Explanation-Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape. Exception- Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape.

⁵ Indian Penal Code, 1860 (45 of 1860), Section 376A- Intercourse by a man with his wife during separation—Whoever has sexual intercourse with his own wife, who is living separately from him under a decree of separation or under any custom or usage without her consent shall be punished with imprisonment of either description for a term which may extend to two years and shall also be liable to fine.

⁶ Indian Penal Code (45 of 1860), Section 376(1).

⁷ Ibid



3. Rape of a judicially separated wife, offence punishable with imprisonment up to 2 years and fine;⁸
4. Rape of wife of above 15 years in age is not punishable.⁹

In 2005, the Protection of Women from Domestic Violence Act, 2005 was passed which although did not consider marital rape as a crime, did consider it as a form of domestic violence.¹⁰ Under this Act, if a woman has undergone marital rape, she can go to the court and obtain judicial separation from her husband.

Marital rape is a reflection of an individual's perversity. It is not just the rape of a woman's body; it's the rape of her love and trust. Being exposed to sexual abuse by her own husband encircles her in a sense of vulnerability and terror. Her human rights are being compromised on the basis of marriage. The Indian Penal Code dealt with this type of rape in a very fragmented manner. Various provisions of the IPC concerning sexuality affirm not only the Victorian morality, but also the non-agency of women.¹¹

It is also clear that the statute perceived to be the savior of the victimized is ineffective and insufficient to protect the rights of those suffering from marital rape. The fundamental argument put forward in support of these so-called 'rules' is that permission to marriage per se requires consent to participate in sexual intercourse. But, the tacit permission to participate with consent to sexual

intercourse does not amount to equal consent to sexual assault. It is also thought that, as in voyeuristic sexual acts, women are believed to have consented to violence in marital rape. However, rape and sex cannot be separated by violence alone. Abuse induces a sense of fear and vulnerability, and this leads women to submit to sex and cannot be interpreted as consenting to sex. The distinction between consent and non-consensus in contradistinction is important for the purpose of criminal law.¹²

The very definition of rape (section 375 of the IPC) calls for reform. The narrow definition has been criticized by Indian and international women's and children's organizations, which argue that including oral sex, sodomy and penetration of foreign objects in the context of rape would not have been inconsistent with any constitutional requirements, natural justice or equity. Even international law now specifies that rape can be accepted as 'sexual penetration,' not just 'penal penetration', but also threatening, forceful, coercive use of force against the victim, or penetration by any object, however small. "Article 2 of the Declaration on the Elimination of Violence against Women specifically includes marital rape in the concept of violence against women. Focus on these laws is not intended to discredit, but to give the victim, and not the perpetrator, the benefit of doubt.

42nd LAW COMMISSION REPORT

The Law Commission of India in its 42nd Report noted the need to exempt marital rape

⁸ Indian Penal Code (45 of 1860), Section 376A.

⁹ Indian Penal Code (45 of 1860), Exception to Section 375.

¹⁰ The Protection of Women from Domestic Violence Act, 2005, Section 3 Explanation 1 (ii).

¹¹ Kumari, Ved, "Gender Analysis of the Indian Penal Code in Engendering Law: Essays in the honour of

Lotika Sarkar" (Amita Dhanda & Archana Parashar eds.) , p. 143.

¹² Shroff, Aditya & Menzes, Nicole, "Marital Rape as a Socio-Economic Offence: A Concept or a Misnomer", Student Advocate, Vol. 6.



from the scope of Section 375. The convictions for this crime are, of course, very unusual in their terms. We conclude that it would be desirable to exclude this crime completely from the application of section 375 and not to term it rape. The penalty for this offence may also be mentioned in a separate Section.¹³

172nd LAW COMMISSION REPORT

Even the 172nd Law Commission report¹⁴ which was passed in March 2000 had made the following recommendations for substantial change in the law with regard to rape.

- a. 'Rape' should be replaced by the term 'sexual assault'.
- b. 'Sexual intercourse as contained in section 375 of IPC should include all Forms of penetration such as penile/vaginal, penile/oral, finger/vaginal, finger/anal and object/vaginal.
- c. In the light of **Sakshi v. Union of India and Others**¹⁵, 'sexual assault on any part of the body should be construed as rape.
- d. Rape laws should be made gender neutral as custodial rape of young boys has been neglected by law.
- e. A new offence, namely section 376E with the title 'unlawful sexual conduct' should be created.
- f. Section 509 of the IPC was also sought to be amended, providing higher punishment where the offence set out in the said section is committed with sexual intent.
- g. Marital rape: explanation (2) of section 375 of IPC should be deleted. Forced sexual intercourse by a husband with his wife should

be treated equally as an offence just as any physical violence by a husband against the wife is treated as an offence. On the same reasoning, section 376 A was to be deleted.

- h. Under the Indian Evidence Act (IEA), when alleged that a victim consented to the sexual act and it is denied, the court shall presume it to be so.

Notwithstanding the 172nd Report of the Law Commission of India submitted more than nine years ago to the Government of India recommending Parliament to replace the existing definition of rape under Section 376 IPC with a wider definition of sexual harassment which is both age-and gender-neutral, nothing has been done to date.

III. CONSTITUTION OF INDIA viz- a-viz MARITAL EXEMPTION TO RAPE

The Constitution of a country is a text which represents the soul of a nation. The Indian Constitution organizes and governs power, protects human rights, balances the conflicting claims of social and individual interests, represents the cultures and perspectives of the country and serves as a platform for national development and unity.¹⁶

According to the Constitution of India, any law passed in the country must be in accordance with the principles and ideas enshrined in the Constitution of India. Any law which fails to comply with this standard shall be deemed to be ultra-vires and may be found unconstitutional by the Courts.

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http://www.siu.edu.in/Research/pdf/Shaila_Daware.pdf

¹⁴ 172nd report of Law Commission of India on Review of Rape Laws, March 2000, para 3.1.2.1

¹⁵ 2004 (5) SCC 518.

¹⁶ Roy, Sudhanshu & Jain, Iti, "Criminalizing Marital Rape in India: A Constitutional Perspective", Criminal Law Journal, Apr 2008, p. 81-92.



It can now be observed how the doctrine of marital exemption from rape does not follow the standard of compliance with the provisions of Article 14 and Article 21 of the Constitution of India.

VIOLATION OF ARTICLE 14: EQUAL PROTECTION OF THE LAW

Article 14 guarantees a fundamental right of equality before the law and equal protection of laws to every citizen of India.¹⁷ However, Article 14 does not mention that every individual should be treated equally in every case but demands that the equals within a society are not treated unequally and that the unequal of the society are not treated equally. The two conditions of a valid classification have been laid down by the Supreme Court since 1952: -

- a. The classification must be founded on an intelligible differentia which distinguishes those that are grouped together from others; and
- b. The differentia must have a rational relation to the object sought to be achieved by the legislation.¹⁸

Consequently, any law which makes a classification unnecessary or irrelevant for the purposes of the legislation is considered to be beyond the framework of the Constitution. As to what is rational, it will all depend on what the judges thought, and with every new generation of judges, a new interpretation of law and rationality will arise, making the Constitution a living document. Preventing gender-based stereotyping is important in order to eliminate gender inequality in differential treatment. It is therefore necessary, when applying the test of equality that care is taken

to ensure that the stereotyping prescribed by the patriarchal ideology does not predetermine what is a rational classification. Section 375 of the IPC criminalizes the crime of rape and protects a woman from violent sexual activity against her will and without her consent. This section offers protection for women from criminal attacks on bodily autonomy and depicts the interest of the State in punishing those who abuse this bodily autonomy. It is therefore correct to assume that Section 375 of the IPC seeks to secure the right of choice of a woman as an autonomous person also able to self-expression and also to consider rape as a crime of violence that disregards all the rights accorded to the woman.

Married women, much as men and unmarried women, need the safety of the law in their private spheres. While the majority of section 375 of the IPC is concerned with protecting the right of the victim from the crime of rape, the right is excluded from marriage and instead changes the attention of the law to protecting the perpetrator of the crime of rape. It takes away the freedom of conscience of a woman and effectively deprives her of bodily autonomy and personality. Consequently, the classification is excessive, incomprehensible and infringes the mandate of Article 14. Taking away the protection of Section 375 of the IPC from victims of rape solely on the basis of their marital status is meaningless for the purposes of the legislation and is thus contrary to the classification test set forth in Article 14.

VIOLATION OF ARTICLE 21: RIGHT TO LIFE AND PERSONAL LIBERTY

¹⁷ The Constitution of India, Article 14.

¹⁸ State of West Bengal v. Anwar Ali Sarkar, AIR 1952 SC 75, 80.



Article 21 of the Indian Constitution enshrines in it the right to life and personal liberty.¹⁹ Article 21, albeit in a derogatory language, confers on all persons the fundamental right to life and personal liberty. The case of **Maneka Gandhi v Union of India**²⁰ has been the root of all forms of law aimed at the protection of human life and rights. The definition of the term ‘life’, has thus extended, and can be appropriately summed up in the words of Field J. In the celebrated judgment of **Munn v. Illinois**²¹, he held that life means ‘something more than mere animal existence’, which was further upheld by the Supreme Court of India in the case of **Bandhua Mukti Morcha v. Union of India**.²²

In the light of the widening jurisprudence of Article 21, the doctrine of marital exemption from rape infringes a number of rights which have arisen from the term ‘right to life and personal liberty’ in compliance with Article 21. There can be no more clear and blatant breach of Article 21. The marital exemption from rape infringes the right to privacy, right to bodily self-determination and right to good health, all of which have been recognized at different points of time as an integral part of the right to life and personal liberty.

RIGHT TO LIVE WITH HUMAN DIGNITY

The definition of the right to life in compliance with Article 21 of the Constitution requires the right to live with human dignity and all that goes with it,

namely the bare necessities of life, such as adequate nutrition, clothing and shelter over the head and reading, writing and expressing oneself in various ways, free movement and mixing and mingling with one's fellow human beings.²³ The right to live with human dignity is one of the most intrinsic qualities of the right to life that respects the autonomy of the person.

In a number of cases, the Supreme Court held that the offence of rape infringes the right to life and the right to live with human dignity of the victim of the crime of rape.²⁴ The Supreme Court held that rape is not merely an offence under the Indian Penal Code, but is a crime against society as a whole. Rape is less a sexual offence than an act of violence aimed at undermining and humiliating women.²⁵ Therefore, the doctrine of marital exemption is also a violation of a woman's right to live with human dignity. Any law legitimizing the right of a husband to induce a woman to have sexual intercourse against her will and without her consent is contrary to the very nature of the right to life under Article 21 and is therefore unconstitutional.

RIGHT TO SEXUAL PRIVACY

The Indian Constitution does not mention the right to privacy. However, in a variety of cases, the Supreme Court has acknowledged that the right to privacy is legally protected under Article 21.²⁶ The right to privacy referred to in Article 21 requires the right to be left alone. Any form of intense sexual intercourse violates the right to privacy. It is

¹⁹ The Constitution of India, Article 21.

²⁰ AIR 1978 SC 597

²¹ 94 US 113 (1877).

²² AIR 1984 SC 802, 811.

²³ Francis Corallie Muin v. Union Territory of Delhi, AIR 1981 SC 802.

²⁴ The Chairman, Railway Board v. Chandrima Das, AIR 2000 SC 988.

²⁵ Bodhisattwa Gautam v. Subhra Chakraborty AIR 1196 SC 922.

²⁶ Kharak Singh v. State of U.P. AIR 1963 SC 1295; Govind v. State of Madhya Pradesh, AIR 1975 SC 1378; Neera Mathur v. LIC, (1992) 1 SCC 286.



claimed that the concept of marital immunity from rape violates the right of a married woman to privacy by compelling her to engage in sexual intercourse against her wishes.

In the case of **State of Maharashtra v. Madhkar Narayan**²⁷, the Supreme Court held that every woman had a right to sexual privacy and that it was not accessible to any and every person to invade her privacy as he wished or wished. In the case of **Vishakha v. State of Rajasthan**²⁸, the Supreme Court expanded this right of privacy to the workplace. Furthermore, in the same line that there is a right of privacy to enter into a sexual relationship, even within the framework of a sexual relationship even within a marriage. By decriminalization of rape within a marriage, the doctrine of marital exemption violates this right to privacy of a married woman and is thus unconstitutional.

RIGHT TO GOOD HEALTH

Another claim against the doctrine of marital exemption from rape is that it infringes the right of the victim to good health. The right to good health has been identified as part of the right to life in accordance with Article 21.²⁹ Such a right is essential for a person's continuous intellectual and spiritual well-being. The doctrine of marital exemption violates the right to good health as a survivor; it ultimately causes serious psychological as well as physical harm in the process. It undermines a woman's psychology and drives her into a deep emotional crisis.³⁰ A

more persuasive case can be made in the event that heavy sexual contact in a marriage leads to the communication of a sexually transmitted disease (STD) to a survivor of a rape crime. The doctrine of marital exemption essentially deprives a married woman of her right to good health and is thus unconstitutional.

IV. JUDICIAL STAND

Tracing back the history of judicial decisions concerning the infliction of serious injury by the husband on the wife of the court in **Queen Empress vs. Haree Mythee**³¹, noted that, in the case of married women, the rule of rape does not apply between the husband and the wife at the age of 15; even if the wife is above the age of 15 years, the husband has no right to neglect his physical protection, for instance, if the conditions are such that the intercourse is likely to cause death. In the present case, the husband was convicted under Section 338 of the Indian Penal Code for fracturing the vagina of his eleven-year-old wife, causing hemorrhage leading to her death.

In **Saretha vs. T. Venkata Subbaih**³², it was held by the Andhra Pradesh High Court: "There can be no question that the decree of restitution of conjugal rights thus implemented offends the inviolability of the body and mind that is subject to the decree and offends the dignity of the person and invades the marital privacy and domestic intimacy of the person".

²⁷ AIR 1991 SC 207.

²⁸ AIR 1997 SC 3011.

²⁹ CESC Ltd. v. Subhash Chandra, (1992) 1 SCC 441; Regional Director, ESI Corpn. v. Francis de Costa, 1993 Supp (4) SCC 100.

³⁰ Supra note. 21.

³¹ [(1891) ILR 18 Cal. 49].

³² [AIR 1983 AP 356].



If state-forced sexual intercourse between husband and wife is a breach of the right to privacy, certainly the right to privacy of a woman is equally violated in the case of non-consensual sexual intercourse with her husband. The privileges and obligations of marriage, such as the establishment and termination of marriage, are not the terms of a private contract between two individuals. The right to privacy is not lost to a marital association.³³

In the **State of Maharashtra vs. Madhukar Narayan Mandikar**³⁴, the Supreme Court referred to the right of privacy over one's body. In that case, it was agreed that the prostitute had the right to deny sexual intercourse. What is tragic to note is that all foreign rapes have been criminalized and that all females, other than wives, have been given the right to privacy over their bodies, thus envisaging the right to withhold consent and deny sexual intercourse.

The judiciary seems to have absolutely relegated to its comfort the notion that rape in a marriage is not possible or that the stigma of rape of a woman can be remedied by marrying a rapist. The problem is that it has been believed that a marital relationship is almost sacrosanct. Rather than having a wife worship every whim of her husband, particularly sexual, she is supposed to flourish, mutual respect and trust. It's a lot more painful to be a victim of rape by someone known, a family member, and worse to have to live with him. How can the law overlook such a major infringement of the fundamental right of freedom of any married woman, the right of her body to protect her from abuse?

V. CONCLUSION

The continued exemption from criminal law from marital rape is based on the idea that the wife is the sole property of the husband. It is argued that marital rape should be criminalized in India, as this can be accomplished by the implementation of an individual rights approach to violence against women. Indian women's organizations have succeeded in raising public consciousness and passing laws on domestic violence, but marital rape has not been entirely criminalized by abolishing the distinction between marital rape and stranger rape. Yet marital rape will not be criminalized or prosecuted until legislators and society recognize women's individual rights within marriage.

If the reformers see rape as a crime against a woman and her person and physical integrity and humanity, then marital rape and retribution will be a legal possibility. To change the current legislation, individual rights rhetorical approach may be used to work towards criminalizing marital rape in India, so marital rape will not be a state issue until society and lawmakers recognize that women have individual rights within marriage. In western countries, advocates have worked within the context of individual rights to challenge social stereotypes regarding marital relations.

Marital Rape is obviously a significant form of violence against women and is deserving of public and state concern. In view of the significant implications, there is obviously an urgent need to criminalise the crime of marital rape. India needs positive legal reforms for women in general, but more steps are required to ensure both legal and social reform, resulting in the criminalization of

³³ Ibid.

³⁴ AIR 1991 SC 207.



marital rape and the change in the underlying cultural attitudes regarding women in marriage. While most Indian women feel protected under the Protection of Women from Domestic Violence Act, there are several loopholes in the Act as there is no mention of marital rape.

The woman is indeed a victim by man and society. There is a need to consider her as a human being, away from the ancient notion that she is a mere chattel, and to give her the respect and dignity she deserves. The patriarchal power structures considered marriage to be a license to legally unintentional sex. There is a complete negation of self worth of a woman.

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