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Compensatory Jurisprudence and Its Emergence in India

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ABSTRACT

Compensation to the victim of crime by the individual or by the state gaining much importance now days. However, it has been observed that mostly Fundamental Rights provided to the citizens in the Constitution are being violated by various governmental agencies in exercise of their administrative powers. In some cases, the Fundamental Rights of the victim which are infringed may be restored, but in each and every case as well as in every circumstance the restoration may not be possible. In such situation compensation in terms of money for the suffering has to be granted. Article 32 of the Constitution of India confers power on the Supreme Court to issue order or direction including writs whichever is appropriate for the enforcement of Fundamental Rights mentioned in part III of the Constitution of India.

Keywords: *Fundamental Rights, Victim, Violation, Compensation, Enactments*

I. HYPOTHESIS

State propounded the significant idea of compensation to the victim of crime is gaining importance day by day and also have realized the importance of compensation and accordingly tapping up several programmes relating to compensation as a part of general welfare the subject of compensation to victims and abuse of power has much social and legal significance for those victims who are the silent sufferers of the consequences of crime get hardly any chance or support to relieve their problems and there is an absolute necessity to rehabilitate the helpless victims guaranteed with certain fundamental rights .

II. INTRODUCTION

Victim who has suffered the most should not be forgotten in the criminal justice system because not only the victim who suffer but the whole family of the victim get affected like loss of reputation and humiliation. Loss of life cannot be indemnified but monetary compensation will give some consolation. The objective of the government and judicial system should be the

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protection of right against the intentional infringement.

The Constitution of India does not provide any remedy to the victim of Fundamental Right specifically, except in the form of writs under Articles 32 and 226. The Supreme Court has now taken a liberal view to award monetary compensation to the victims of crime. Expansion of writ jurisdiction, award of compensation, the rule of procedure and evidence has been relaxed. It has now become an accepted principle that where the Fundamental Rights are in consonance with human rights, the former must be given functional application rather than to be merely on papers. "For the last few years The Supreme Court has attempted to evolve an innovative constitutional jurisprudence based on the necessity for giving new meaning to the rights of the people. An entrenched set of individual rights like Fundamental Rights embodied in Part-III of the Constitution of India requires awareness of its existence on the part of the general masses of the people, if it is to constitute an effective limitation on the power of the State. But unfortunately, this part is lacking in India. The Court has tried to get over this barrier through the creation of a legal regime favourable to the agitation of issues which are of vital importance to the poor section of the Indian society."

Against the cumulative tendency towards irresponsibility on the part of the executive organ of the State, leading to the State of "government lawlessness" where little importance is given to the rule of law and public law remedies available in the courts do not seem capable of combating this evil. The Supreme Court has addressed itself to this situation by fixing the monetary liability on the State for violation of the petitioner's Fundamental Right to life and personal liberty under Article 21 of the Constitution. The implications of the unanimous opinion of the Supreme Court are that it will create new remedies in its original jurisdiction under Article 32, where such remedies are vital to the defence of the Fundamental Rights.

III. RELATION BETWEEN RIGHTS AND REMEDIES-

‘If the plaintiff has a right, "he must be of necessity have a means to vindicate and maintain it; and indeed, it is a vain thing to imagine a right without a remedy;’²

The relation of rights and remedies is able to find distinction and complex and raise a number of issues. It is the inherent capacity of remedy and its availability which determine the nature of the legal right and well existence. The right emerge from the remedy and as a matter of chronological way of sequence the remedy comes before the rights as an effect of it, the absence of remedy shows the non-existence of a legal right. According to *Deniel Friedmann*, ‘The right

²Ashby v. White, 92 Eng. Rep. 126, 136 (1703) (Holt, C.J.), cited from RATANLAL & DHIRAJLAL, *Law OF TORTS*20 (G.P. Singh ed., 2002).

emerge from the remedy and as an issue of arrangement the remedy goes before the right. Subsequently, the nonattendance of the remedy focuses to the nonexistence of legitimate right. This model is in accordance with conventional approach of precedent based law under which ‘where there is a remedy, there is a right’, and the giving of the remedy by means of an activity stays to date a noteworthy vehicle for the advancement of new lawful qualifications and development of built up lawful rights. Each extensive enactment in the field of private law is probably going to start by characterizing legitimate rights and obligations. This approach which is frequently named ‘from right to remedy’ must be remedy expect that the lawful right goes before the remedy both in time and in significance. Remedy is simply subordinate and takes after from the lawful rights. Under such an approach legitimate right have a free presence and it is conceivable to think about lawful rights unsupported by lawful remedies. So, the nature of lawful rights has an effect upon the demonstration of picking the remedy, yet the effect is not unavoidably determinative. By following alternate conditions which shows that remedy however not connected to one side but rather in other perspective very autonomous of that.

A legal maxim, enunciated by William Blackstone, ‘albeit one sometimes honoured in the breach’ it means that there is remedy for every right without remedy there is no right. Law-makers provide appropriate remedies for the protection of natural and fundamental rights. It is settled and invariable principle that every right must have a remedy and every injury should be redress properly.

IV. RIGHT TO COMPENSATION, ‘A INTERNATIONAL PERSPECTIVE’

The international conventions on human rights with regard to effective implementation of them are new and revolutionary steps in the direction of the guarantee of freedom, equality and justice.

Article 9 (5) of the international covenant on Civil and Political Rights, 1966 states “Anyone who has been victim of unlawful arrest or detention shall have an enforceable right to compensation. Article 9(5) is that the victim will have an enforceable right to compensation.”

Article 8 of the UDHR, 1948 “Recognize the right to appropriate compensation”

Article 13 of the European Convention on the Human Rights 1966. “It provides the right for an effective remedy before national authorities for violation of human rights contained therein.”

The legal foundation for victims of human rights violations recognised by the international customary law and the victim of war crimes have a right to compensation, rehabilitation and restitution. It has become the obligation of international humanitarian law to provide compensation to the victims. Article 8 of UDHR state that ‘everyone has the right for effective

remedy'. Article 10 of American convention on human right states the compensation should be in accordance with law which force to recognize its importance publicly, recognize the damage caused by injustice and acknowledge the need of the victim. However, it is no necessary that compensation should be monetary only the assistance may be of psychological and social services. It is recommended by the UN that government should make available support of social services to the victims and promote cultural programs for victim assistance for instance, to provide local area treatment centres for the victim of human rights violation, community-based support, restitution and reclamation assistance for offenders.

V. JUDICIAL PRONOUNCEMENT

The Role of Indian Judiciary in Conceptualising the Concept of Compensatory Jurisprudence was that no compensation or monetary relief can be awarded by the court under Article 32 of the Constitution. But, now in a number of cases, the court has awarded compensation to the victims of the infringement of Fundamental Rights. In *Bhim Singh vs. State of J & K and Others*, the Supreme Court observed that when any person before the court complaint that he has been arrested with malicious intention and his legal rights has been violated then that mischief and malice can't be wipe away by setting him free. In such cases the court has power to grant compensate him by passing order of monetary compensation and further stated that the growing violation of the human rights by the police administration and armed forces is not only a danger to human being but also to the existence of humanity. In leading case *Rudal shah v. state of Bihar*³. Observed by the Supreme Court while exercise jurisdiction under article 32, monetary compensation consequential upon the deprivation of fundamental rights to life and freedom of a petitioner. Further observed by the Supreme Court that article 21 will be bare of its substantial content if the power of the court were limited to passing orders against illegal detention.

In *Khatri v. state of Bihar*⁴. The case also known as the Bhagalpur blinding case, in this case justice Bhagwati countered the question of compensation and emphasised on the new remedy with the object of indicating the natural rights to life and personal liberty. By invoking article 32 and 21 of the constitution the court ordered that state to meet the expenses of housing those men in blind homes in Delhi.

. In *State of Maharashtra and Others vs. Ravikant S. Patil*⁵. Where the under trial prisoner handcuffed and taken through the streets in emanation by police during investigation, the

³ AIR 1983 SCR 1086

⁴ AIR 1980 SC 1068

⁵AIR 1991 SCC 373

Supreme Court held it the violation of Human Rights under Article 21 of the Constitution and awarded Rs.10000 as compensation to be paid by the State. The responsibility of erring police officers was defended by the Supreme Court by making the observation that Police Officer responsible for the act done only as an official and assuming that he exceeds his limits; still police officer could not be personally liable to pay compensation to the victim i.e. undertrial. It is also considered that prerogative writ is of highest constitutional importance, being a remedy available to the meanest against the mightiest. The Supreme Court of India further considered that the legal rightness are no hindrance to the court if entertaining an informal communication as a proceeding for Habeas Corpus if the basic elements of facts are found. In this context as the approach of the court is concerned, anybody acting Pro Bono Publico can knock the door of the court for his relief. In another case of *Nilabati Behera vs. State of Orissa*⁶ where deceased about 22 years of age with a monthly income of Rs.1200-1500 died in police custody. The letter of the mother of the deceased was considered as writ petition. The Supreme Court granted the compensation of Rs.1,50,000 and ordered that the amount of compensation would not touch any other liability of the respondent or any other person occurring from the custodial death but could be adjusted in the amount of compensation in the event of any other proceedings by the petitioner for gaining compensation on the same ground, so that amount to that extent might not be recovered twice by the petitioner. The Court further emphasized that claim for compensation for the infringement of legal right given under the constitution is accepted remedy for the claim of enforcement of human rights based on strict liability. The defence of immunity is not applicable to sovereign, aliens are subject to the guarantee of Fundamental Rights so, and there can be no question of such a defence being available in the constitutional remedy. The impact of that historical ruling is that anyone whose fundamental right is adversely affected by the action of State can approach to the Supreme Court or High Court under Articles 32 and 226 respectively. The theme of compensatory jurisprudence was further developed in *People's Union for Democratic Rights vs. Police Commissioner, Delhi*. It is miserable case where police collected poor people for doing some work without labour charges. On demand by the labours for charges they were beaten and one of ram Swaroop injured and died. He was awarded compensation of 50000 for the support of his family. The principle is further elucidated and re-affirmed by the Supreme Court in *D. K. Basu vs. State of West Bengal*⁷. The Court observed: "claiming for compensation for deprivation of Fundamental Right of life and liberty is a claim based on strict liability. Awarding compensation for the

⁶ AIR 1993(2) SCR 581

⁷ AIR 1997 SCC 416

violation of the substantial right given under article 21. With the view of protecting the fundamental rights guaranteed under article 21 of the Indian constitution in the case of *M.C. Mehta v. Union of India*⁸ The court held that awarding the compensation for a violation of fundamental rights, it had “all incidental and ancillary power including the power to forge new remedies.” This was necessary to grant compensation for the enforcement of fundamental rights otherwise the fundamental rights provisions of the Constitution would be frustrated. The Court noted that compensation for violation of a fundamental right could be sought under Article 32 only when the breach is “gross and patent,” “incontrovertible and ex facie glaring.” Otherwise, a claim for compensation must be sought in the civil courts.

The right to receive interim compensation discussed was decided by the judiciary in the case of *Bodhisattwa Gautam v. Sudhra Chakroborty*⁹ “There is no reason to deny such right to award compensation by the court pending the final decision of the matter.

The Supreme Court as regard to the quantum of compensation has pointed out that the same will depend on peculiar facts and circumstances of each case and no straight jacket formula can be evolved in that behalf.

VI. WRIT JURISDICTION OF SUPREME COURT OR HIGH COURT AWARDING COMPENSATION

Under the Constitution of India wide powers have been conferred on the Courts to issue directions, order or writs, mainly for the enforcement of Fundamental Rights. The power to issue such directions for any other purpose also included. During the British period in India the power to issue writs was given to the Presidency High Courts established under the Charter Act of 1861. However, the power to issue writs by the High Courts was restricted to the original jurisdiction of these Courts. Later on, when Constitution of India came into force, the Supreme Court and various High Courts have been conferred powers to issue writs under Articles 32 and 226 respectively for the enforcement of Fundamental Rights. The Supreme Court delivering the judgement in *T. C. Bassappa vs. T. Naggappa*¹⁰ observed "despite having the express provision of the constitution we should not look upon the history or technical procedure of English laws. In all appropriate case a writ of certiorari may be available, if there is any error but it must be a manifest error apparent on the face of the proceedings and should keep fundamental principles of English law which regulates the jurisdiction while granting such

⁸ AIR 1987 SCR 1087

⁹ 1996 AIR SC 922.

¹⁰ Air 1954 kant 102

writs. Hence, the Indian courts have accepted the same position in deciding cases and followed the fundamental principles of English law governing these writs, but avoiding technicalities of English Law. In *State of Maharashtra and Others vs. Ravikant S. Patil*¹¹ in this case the undertrial prisoner handcuffed during investigation and taken publicly in a procession by police, the Supreme Court held it is the infringement of Human Rights under Article 21 of the Constitution and awarded Rs. 10,000 as compensation to be paid by the State. Supreme Court of India further considered that the technicalities are not obstacle to the court entertaining proceeding for Habeas Corpus, if the basic facts are found. In this context as the approach of the court is concerned, anybody acting pro bono publico can knock the door of the court for his relief.

So, all over the world, every court has a responsibility and constitutional role to protect and preserve and enforce the rights of its citizens according to the law of the country. This substantial function has also been given to the apex court and the high court of each country. Perhaps the apex court is one of the most active courts when it deals with the matter of violation and protection of rights.

VII. EVOLUTION, IMPORTANCE, SCOPE AND LIMITATION OF COMPENSATORY JURISPRUDENCE IN INDIA

The establishment of equity can be followed from the comprehensive idea of social security, relationship between freedom uniformity brotherhood and inmate pride. The restoration of the doctrine of natural rights as Human Rights over the world is an awesome advancement in the field of philosophy of law in the contemporary time frame¹². In the present scenario attention to human rights, and the privilege of a human to get such a writ habeas corpus has a state of being plural and respect for constitution for human- dignity which is checked by this ability¹³. The compensatory law introduced by the supreme court by invoking the power under article 32 of the constitution of India increased colossal significance in present scenario because of the expansion of the episodes of political lawlessness, illegal detention, barbarousness against women, ill treatment with prisoners and other cruel human rights violations. *Rudal shah v. state of Bihar* is a milestone in compensatory law developed by the court. In this case the state unlawfully imprisoned the applicant for 14 years even after the order of acquittal by the criminal court. The court granted habeas corpus against the state for the breach of petitioners,

¹¹ AIR 1991 SCC 373

¹²TECUMSEH SHERMAN, *A Compensation Law and Private Justice*. Pub. By sage publications

¹³GERALD F. GAUS, *DOES COMPENSATION RESTORE EQUALITY?* Pub. by NYU Press. (1991)

right of personal freedom and liberty. The court observed that the telling of ways to prevent violation of right and to ensure due compliance from its violators is to ask for monetary compensation. This case was one the first concrete decision with respect to compensation for violation of fundamental rights and some of the parameter used; such as compensation in exceptional cases only has given direction to the compensatory jurisprudence. The judgement is widely appreciated for making a start in this direction. Construction of the word compensation by the supreme court in article 31(2) of the constitution. The court tried to interpret the intention of the legislature but in case of contradiction or ambiguity, the other source can be taken into consideration i.e. legislative history. *State of West Bengal v. Bela Banerjee* supreme court held that the discretionary power of legislature to determine the power granted to the owner of the property, such determination should also make sure that the compensation which is payable should be equivalent of what the owner has deprived of. So, the word compensation means just equal of what the owner has been deprived of monetary compensation is a judicially recognised and a certified way of enforcing fundamental rights, by the courts for serving the lawful entitlements especially a right to benefits of person's victim of offence against human rights' abuse. Conventional law of torts provides damages as a remedy that substantiates rights, provides compensation, elevate deterrence, maintain the citizens' trust on the inviolable nature of their fundamental rights and procure corrective justice. *The Aristotelian theory* of "corrective justice" demands the award of monetary compensation in which one party keep away from the limitations set down its behaviour with regard to another party. If we talk about compensation the liability of a person depends upon the conditions of debt. Liability depends upon both conduct and subjectivity or either it may be conduct or it may be subjectivity¹⁴. The administration of compensation is also variable. To grant compensation is not the responsibility of court and judges. 4th Amendment of the constitution has provided that "no such law shall be called in question in any court on the ground that the compensation provided by that law is not adequate". The word 'compensation' means "an equivalent in money of the property acquired" and the word 'adequate' also means 'equival'. If the literal meaning of both the words is adopted, it would mean that compensation cannot be questioned in any court. We have seen earlier that this was not the intention either of the Constitution-makers or of the Fourth Amendment, and this is also clear from the use of the words 'compensation' and 'adequate' in the same clause which was adopted by the Fourth Amendment. Two different views have come to be expressed by the Court in the *Vajravelu*

¹⁴C. A. HOPKINS, *Prerogative and Compensation*. Pub. by: Cambridge University Press on behalf of Editorial Committee of the Cambridge Law Journal (2017)

Mudaliar case and the other in the Bank Nationalisation case. A third view could be as follows. Since the word 'adequate' means 'equal', the Fourth Amendment clause may be construed to mean that "the compensation provided by law cannot be called in question in any court on the ground that it is not 'equivalent' of the property acquired". This would give rise to an obvious question: on what other grounds can the compensation be questioned in the court? If the answer is to be found in Article 31(2) itself this reading would make the legislature sovereign in providing for compensation to any extent less than 'equivalent' because there is nothing in Article 31(2) which would control legislature's power to provide for compensation. The Court may apply the doctrine of fraud on power or colourable legislation and lay down the grounds on which compensation may be questioned, as it did in the *Vajravelu- Mudaliar* case. But resort to these doctrines for this purpose may be apposite only when there is no other provision in the Constitution which would determine the limits of this legislative power under Article 31(2). The answer may possibly be found by relating Article 31(2) to Article 19(1) (f) & (5),³³ and when it is so related the compensation for the property acquired may be objectify in the court on the basis of unreasonableness. A reasonable compensation need not be equivalent of the property taken. In determining the reasonableness of compensation, the Court may have to take into account not only the interest of the owner whose property is acquired, but also of the society at large; and all those principles of compensation which aim at appropriating a substantial part (leaving the rest, to the owner) of the value of the property increased not only by the particular community and Government activities but also by the overall economic and social activities of the community and Government, may claim to be upheld as yielding reasonable compensation. Compensation in rape cases: "Rape is a crime not only against the woman but also a crime against the whole society. It is, therefore, an extreme horrific crime. Violates the victim's legal right as right to life includes right to live with human dignity contained in Art. 21 of the Constitution. The Court directed that the offender ought to pay an interim compensation of Rs.1000 per month to the victim of rape till the end of the entire proceedings. The Court in addition ruled, "Compensation to victim under such conditions will be justified even when the accused was not convicted". The Supreme Court in *State of Andhra Pradesh v. Chalia Ramakrishna Reddy*¹⁵, relying on its earlier decision in *D.K. Basu*, awarded compensation against the State Government for death of a person caused while he was in judicial custody. Rejected the defense plea, that the prisoner was put in jail in exercise of State's sovereign function, the Court ruled that the concept of sovereign power is not an exception to the right to freedom of life, and constitutional guarantee of right to live overrides the theory of

¹⁵ AIR 2004

state immunity. In *Delhi Democratic Working Women Forum v. Union Of India*¹⁶ in this case six village girls were raped by seven military jawans while travelling by train. The court directed the central government to pay each victim of crime as rape compensation and ordered that the names and identity of victims be secret for the reason of social stigma. Compensation under criminal procedure code section 357 is up to the discretion of the court to grant compensation and bear the expenses of the proceeding. The provisions give the right to victim a right to get compensation but do not make it mandate for the court to record reason if not invoking the provision to compensate. In *Sarwan Singh v. State of Punjab*¹⁷ The supreme court highlighted the objective and guidelines for the exercise of power of court under section 357, formulate its purpose regarding granting the compensation, entitled to recover from the convicted offender whether fine forms the part of it. It is necessary for the court while awarding compensation to decide whether the case is fit for awarding compensation or not. The supreme court made it clear for the trial court to take into consideration the nature of crime, injury and justness of the claim, financial capacity of offender and other relevant circumstances in deciding the amount of compensation or fine just imposing default sentence for failing to pay the fine or compensation would not accomplish the object. If the accused is in position to pay compensation then court will proceed, the person who is vicariously liable is also bound to pay compensation, so it is appropriate to direct payment by the accused, guilty with necessary *mens rea*, to the victim. Apart from section 357 of Cr.P.C., the victim may approach the high court empower to exercise inherent power in the interest of justice under 482 of Cr.p.c to claim compensation. Recently a bench of justice V Gopala and AK Goel, in a recent judgment of *Suresh & Anr v. State of Haryana*¹⁸ the court stated that the court has power to take cognizance of the crime to ensure whether there is tangible material which prove the commission of crime and whether victim is able to be identified and he/she needs immediate financial relaxation. If the court is satisfied with an application or on its own motion, the court must direct interim compensation subject to final compensation which is to be fixed later.

Compensation under PIL: The Public Interest Litigation in India has been initiated by some of the judges of the Supreme Court. It is pertinent to admit that Public Interest Litigation was the result of active, innovative, almost explosive, role played by Indian judiciary to ameliorate the miseries of masses. The Supreme Court in the case of *S.P. Gupta vs. Union of India*.¹⁹ It was held by the Supreme Court that it is well established that where a legal wrong caused to a

¹⁶AIR 1995 SCC (1) 14.

¹⁷ AIR 1978 SC 1525

¹⁸ Criminal Appeal no. 420 of 2014

¹⁹ AIR 1982 SC149

persons by reason of infringement of legal right or any burden, which is inconsistent of any constitutional provision, has been imposed upon the vulnerable class or person who is incapable to approach the court for relief, any person can file an application on behalf of that person for the appropriate order under article 226 or under article 36 seeking judicial redress for the legal wrong caused to that person. The court will respond even to a letter addressed by the individual acting as *pro bono publico*. In 1981 the case of *Anil Yadav v. State of Bihar*²⁰ in this case the court exposed the extreme cruel behaviour of police. It was revealed by the news-paper report that around 33 criminals were blinded by putting the acid into their eyes by the Bihar police. Supreme court directed the state government for their medical treatment and for the speedy prosecution of policemen and directed that right to free legal aid is a fundamental right, whether compensation awarded by the state, monetary compensation by offender for the physical and mental injury caused due to the crime may be an important element for the sufferer. Recognizing the hurt by the accused towards the victim can be observed from the amount of compensation. Getting compensation from the court has also been a sign of concern of state for the sufferer, which can give an important healing effect and increase his/her confidence in the criminal judicial system.

VIII. CONCLUSION AND SUGGESTIONS

The Supreme Court has wide power under article 32 of the Indian constitution which safeguards the fundamental right of individuals. Though our constitution guarantees fundamental rights they are often referred as un-fundamental because of divert, slow, clumsy and expensive judicial system. Violation of fundamental rights goes unreported due to the sheer amount of time and money one has to spend to get justice. This is the reason people often ignore the infringement of fundamental rather than seeking legal redress and this is one of the strongest reason why exemplary and compensatory damages awarded. The trend is clearly heading towards the right direction. It will be interesting to note that how judiciary makes the smoother mechanism, by using its power, lawful and just. The basis of awarding the compensation has been rational so it is very much proved that the legal framework of giving compensation to the person suffered loss or injury is inadequate because there is no comprehensive legislative scheme for awarding compensation and a specific amount awarded to them. It does not mandate courts to retribute the victims nor create any right to them. It is the discretion of the court to compensate as well as to recover fine by initiating legal action or any specific amount of compensation to be recovered from the accused to the victim. So, we can see the entire scheme

²⁰ AIR 1982 SCR (3) 533

of awarding compensation depends upon the sweet will of the concerned court. The other noticeable aspect is that the legislative epitome joined with the lack of judicial findings has exposed various loopholes of the existing Legal system, so it is necessary for revamping once the whole legal system, the changes which are mandatory can be taken into consideration that is the law must also provide recording of reason for not providing the compensation.

So, the purpose of awarding compensation serves the important functions. Firstly, It support the victim to arrange the material aspect of their loss and monetary compensation support them in economic relief immediately and make them able to fulfil basic survival needs. In various cases monetary relief in the form of monthly payment are necessary to make them ensure for their survival. And for the rehabilitation programme it ensures that victim of extreme violation of human rights gain proper treatment. Such kind of relief may cause a deterrent effect upon the state from future abuses by levying heavy cost on such misdoing. Lastly, the system of providing compensation serves to protect and promote human rights with the aim of publicly recognize the harm caused to the victim of crime, make correct these misdeed and prevent the further happening of such kind of act.

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