Judicial delays can become history

Privacy a Fundamental Right ? – Article in EPW

First Define ‘Privacy’

The problem with the nine judge ruling is that after proclaiming privacy as a fundamental right, it has not defined what is privacy. It is now left to all adjudicators to give multiple interpretations in order to understand the term, writes Shailesh Gandhi.

The judgment[1] of the nine judge bench of the Supreme Court on privacy has been hailed with much enthusiasm. The right to privacy question was referred to this bench after a clutch of petitions challenging the Aadhaar Act came up before a five judge bench.This article is an attempt to look at the consequences of the privacy ruling.

All laws and institutions in India are expected to be guided by the Constitution. To ensure that the Constitution can take changing circumstances into account Parliament has been given the authority to amend it in Article 368. The constituent

assembly in its initial drafts had considered making the right to privacy a fundamental right. However, after extensive discussion, a conscious decision was taken not to do so.

An eight judge bench of the Supreme Court had clearly come to the conclusion that the right to privacy is not a fundamental right (M P Sharma vs Satish Chandra) DM Delhi)[2] in 1954. At that time, most of the members of the constituent assembly were also around, and there does not appear to have been any significant dissent with this decision. Thus it appears that the clear and conscious decision of the Constitution makers and all the Supreme Court judges (since that bench comprised all of them) was that privacy was not a fundamental right. The Supreme Court has the authority to interpret the Constitution and the law, but the authority to amend both clearly lies only with Parliament. It is worth contemplating whether a bench with about 33% strength should consider superseding an earlier judgment given by one of 100% strength. Besides, the 1954 judgment appears to be in consonance with the deliberations of the constituent assembly.

In the current judgment the apex court has recorded on page 204 at para 144:

> *On 17 March 1947, K M Munshi submitted Draft articles on the fundamental rights and duties of citizens to the Sub-committee on fundamental rights. Among the rights of freedom proposed in clause 5 were the following*
>
> *…(f) the right to the inviolability of his home*
>
> *(g) the right to the secrecy of his correspondence,*
>
> *(h) the right to maintain his person secure by the law of the Union from exploitation in any manner contrary to law or*

public authority…".

At para 148 on page 207 the apex court comes to the conclusion that

> *This discussion would indicate that there was a debate during the course of the drafting of the Constitution on the proposal to guarantee to every citizen the right to secrecy of correspondence in clause 9(d) and the protection to be secure against unreasonable searches and seizures in their persons houses, papers and assets. The objection to clause 9(d) was set out in the note of dissent of Sir Alladi Krishnaswamy Iyer and it was his view that the guarantee of secrecy of correspondence may lead to every private correspondence becoming a state paper……. The clause protecting the secrecy of correspondence was thus dropped on the ground that it would constitute a serious impediment in prosecutions while the protection against unreasonable searches and seizures was deleted on the ground that there were provisions in the Code of Criminal Procedure, 1898 covering the area. The debates of the Constituent Assembly indicate that the proposed inclusion (which was eventually dropped) was in two specific areas namely correspondence and searches and seizures. From this, it cannot be concluded that the Constituent Assembly had expressly resolved to reject the notion of the right to privacy as an integral element of the liberty and freedoms guaranteed by the fundamental rights.*

I am not able to see this conclusion flowing from Munshi's draft which has been recorded at para144. The draft which has been quoted appears to prove that the constituent assembly took a conscious decision not to accord privacy the status of a fundamental right, and this was confirmed by the Supreme Court bench in 1954.

It is true that the Constitution has to evolve with changes in the world, international covenants and changing realities and expectations of the people. But it has clearly defined the roles of the three estates, and the legislative function has been given to Parliament, which draws its legitimacy directly from the citizens who elect its members. Just as a percentage of members is specified for a constitutional amendment in Parliament, should not a percentage of judges of the Supreme Court be required to overturn an earlier ruling of this nature? There may be serious implications in future of such a transfer of powers.

What is Privacy?

It is evident that privacy is built into the common law in various ways. The real problem with the nine judge judgment is that after proclaiming privacy as a fundamental right, it has not defined what is privacy. It is now left to all adjudicators to give multiple interpretations to understand the term. Earlier in R Rajagopal vs State of TN[3] the Supreme Court had given a broad definition of privacy and its domain where it stated that:

> *The right to privacy is implicit in the right to life and liberty guaranteed to the citizens of this country by Article 21. It is a "right to be let alone".*

A citizen has a right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, child-bearing and education among other matters. The Court could have defined this in a more precise way and then allowed some matters to be adjudicated. It must be appreciated that the right to privacy has a certain tension with Article 19 (1) (a) of the Constitution which guarantees that "All citizens shall have the right to freedom of speech and expression."

From this is drawn the freedom to publish and the right to information (RTI). What can be published in matters relating to citizens in the media is the same as information from public records which can be given in the right to information. The reasonable restrictions on the exercise of this are given in Article 19 (2) and can only be "in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence." Which of these will apply to privacy? In most cases restrictions in the interest of "decency and morality" would have to be invoked for restricting publication or information in RTI in matters relating to privacy. The RTI Act also bars such information from being given under Section 8 (1) (j) which exempts information which relates to personal information the disclosure of which has no relationship to any public activity or interest, or which would cause unwarranted invasion of the privacy of the individual unless the Central Public Information Officer or the State Public Information Officer or the appellate authority, as the case may be, is satisfied that the larger public interest justifies the disclosure of such information: Provided that the information, which cannot be denied to the Parliament or a State Legislature shall not be denied to any person."

Parliament had laid down a simple acid test to determine which personal information should be denied under the RTI. If such information would assault "decency or morality" it would violate privacy and should not be given to Parliament also. Thus the R Rajagopal judgement and the RTI Act both are in consonance with Article 19 (2) of the Constitution. It would have been good if the Supreme Court had reiterated this or expanded it. Presently some of the information that is often

denied under the RTI under Section 8 (1) (j) is as follows:

i) Allocation of subsidised plots to politicians, officers and judges.

ii) Beneficiaries of various subsidy and other welfare schemes: There are many ghost beneficiaries. Some who are really wealthy also avail of these.

iii) Educational, caste, income certificates of people: There are instances where RTI has uncovered fake education certificates even of doctors working in government hospitals.

iv) Marks obtained in competitive exams: In many cases people with higher marks have not been chosen.

v) Foreign visits.

vi) Details regarding a public servant: memos, show cause notices, censure/punishment awarded, details of movable and immovable properties, details of investments, lending and borrowing from Banks and other financial institutions, and gifts received. These have been refused by the Supreme Court in the Girish Deshpande[4] judgment. On the other hand in the ADR-PUCL case the Supreme Court ruled that citizens have a right to know the assets and liabilities of those who want to become public servants (stand for elections).

vii) Income Tax returns: It is a fact that the affidavits of politicians who stand for elections are never verified with their IT returns. These are not given in RTI also.

Misinterpretation of RTI

In some instances when such information has been disclosed it

has led to the exposure of corruption. One of the objectives of the RTI (stated in its preamble) is to curb corruption. Because of the varied positions taken by the public information officers (PIO), information commissioners and Courts, the law is grossly misinterpreted. In fact, many state governments have issued directives to all the PIOs not to disclose information about public servants. With this decision of declaring privacy as a fundamental right without making any attempt to judicially define it, many wrong deeds will thus get protection. We must also understand that the same constraints will apply to the freedom to publish. If giving information about some matters is intrusion into privacy, then publication of it also cannot be permitted.

There are many more cases in which personal information is disclosed by some PIOs and denied by others on the basis of it being an invasion of privacy. All personal information does not constitute privacy. One of the most favourite exemptions to deny information is Section 8 (1) (j). In most cases the legal requirement of deciding whether it would be denied to Parliament is not applied. The right to privacy ends where the RTI and the right to publish starts. It is unfortunate that the nine member bench of the Supreme Court decided to proclaim privacy as a fundamental right, but did not take the responsibility of defining its domain. The PIOs, information commissioners and judges are now left to do this job on a "case to case" basis. There should be an attempt to make law as definitive as possible. It is evident that matters relating to a person's body, home, sexual preferences, religious or political beliefs, should generally be considered as issues relating to privacy. These could be justified by Article 19 (2) which permits reasonable restrictions on the basis of "decency or morality." However, with respect to a person's body there have been some divergent opinions. The most easily identifiable part of a person's body is the face. Can we now

argue that taking a person’s photo and disclosing it or publishing it is an invasion of privacy?

Aadhar and Privacy

One of the primary causes for this entire controversy regarding privacy has been the Aadhar card and the requirement for linking it with all other interactions with government. Most of those who read this article are likely to be in favour of the domain and importance of privacy being extended. The personal details taken for Aadhar, which may not be given in many other government records,- are the biometric identification in terms of fingerprints and iris scans. Everyone going out of the country (and a large percentage of readers of this article) give their biometric identity at the emigration counter. Universal requirement of the Aadhar card is likely to reduce benami transactions and ghost names of beneficiaries.

The argument was made before the Supreme Court that privacy is an elitist concern. The Supreme Court disagreed. Citizens have said that all their transactions may be connected with Aadhar. The fact that corruption is one of our major concerns cannot be denied. I guess we must also admit that our governments are unable to really curb this. We have a number of people having multiple PAN cards, floating shell companies, and taking illegal benefit of various welfare schemes and so on. A large number of private companies are registered at the residences of public servants. These actually snatch morsels from the mouths of the disadvantaged. There may be some inconvenience for some people and perhaps some embarrassment. Calling the house a castle and saying privacy is an essential part for a dignified life sounds really good. If this were possible without reducing the scope of the RTI and the freedom to

publish it would be fine. There is a possibility that the right to privacy will be at the cost of the right to information. Sometime in the future the freedom to publish may also be curbed.

There are perhaps two competing issues in thinking of the desirability of Aadhar: Concern for privacy and the need to curb corruption and leakages in welfare schemes. Going by the talisman of Gandhiji one should consider which step is likely to benefit the poor. It appears evident to me that having an Aadhar card linked to most government transactions will benefit the poorest in at least getting basic amenities.

Conclusions

It appears that Supreme Court, has, in claiming to interpret the Constitution, read it to claim that a concept discarded by the constituent assembly was meant to be included. In this decision the Supreme Court should have defined privacy and its contours. When deciding on the definition of privacy Article 19 (2) must be kept in mind and the RTI and the freedom to publish must not be curbed beyond what the Constitution permits.

The greater good is likely to be served by having an Aadhar card.

Notes

1. http://supremecourtofindia.nic.in/pdf/LU/ALL%20WP(C)%20No.494%20of%202012%20Right%20to%20Privacy.pdfhttp://supremecourtofindia.nic.in/pdf/LU/ALL%20WP(C)%20No.494%20of%202012%20Right%20to%20Privacy.pdf

2. https://indiankanoon.org/doc/1306519/

3. https://indiankanoon.org/doc/501107/

4. https://indiankanoon.org/doc/160205361/

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Article for getting good governance in Economic and Political Weekly

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How to get good governance by using Act 21 of 2006

Most citizens find that when they file an application, representation or complaint with any government department, there is no response. If they want to pursue the matter they keep sending reminders. Alternately they grovel before the

officers swallowing their self respect. This is a humiliating experience and often leads to a bribe being offered. The other tool used often is to file a RTI application seeking the status or progress of their missive, hoping to draw attention or shame the official. There is a more powerful tool than RTI available to citizens in Maharashtra when dealing with the State Government departments who do not respond and respect the individual citizen. If citizens use this tool consistently, they can change the face of governance in Maharashtra. Just as widespread usage of RTI by citizens made it effective, it is necessary that citizens use this law to get response within 45 days.

The full name of this law is "Government Servants Regulation Of Transfers and Prevention Of Delay In Discharge Of Official Duties." The law was passed as Act 21 of 2006 and is also known as "Transfers, Charters and Delays Act'. Since officials were not too keen about this law, the rules were notified only in November 2013. Thus the law came into effect seven years after it was passed in the legislature! This was a gross contempt of the legislature.

Section 10 of this act mandates that 'decision and necessary action' on all files should be taken within 45 days. If more than one department is involved, the 'decision and necessary action' must be taken within 90 days. Thus in most cases a decision on a file must be taken within 45 days. It also mandates that most decisions must be taken by only three officers and no officer can keep a file pending for more than seven working days. If there is a failure to meet these deadlines is brought to the attention of the head of the department, rule 3 (6) mandates that he must enquire and fix responsibility for violation of the law within fifteen working

days of the delay being brought to his notice. The law provides for disciplinary action to be taken against officers guilty of ‘dereliction of duty’ by ‘any willful or intentional delay or negligence’. This is a very powerful provision, since government servants fear disciplinary action more than financial penalties. The RTI Act works because citizens use it and it has provision for financial penalties. In the RTI Act an Information Commissioner can impose a financial penalty of 25000 rupees but can only recommend disciplinary action against the officer who has violated the law.

This law provides for disciplinary action against delinquent officers who violate the law. However, since most citizens are unaware about this law it has not been used much. For BMC there is a similar provision in Section 64C of the Mumbai Municipal Corporation Act. Other Municipal Corporations in the State have an identical provision in Section 72C of ‘The Maharashtra Municipal Corporations Act’.

The normal approach to an application, representation or complaint is one of neglect. Usually a perfectly legitimate application or complaint cannot be rejected. If it has to be rejected reasons have to be given in writing. If the missive is not defective it is difficult to reject it. Even if there is a flawed application and the defects are pointed out, the citizen can correct them. Similarly for a complaint or representation when a response has to be given in writing it has to be based on legitimate reasons. The most common technique is not giving any response. Sometimes it is due to carelessness or incompetence. At other times it is because of corruption. There are many instances where a citizen with an aversion for bribes is forced to offer a bribe to a public servant to get his legitimate work done. Most citizen interactions with their government result in a feeling humiliation, anger and frustration.

To activate this law, a citizen only needs to send a simple complaint to the head of the department, pointing out the

violation of this law. For convenience a simple format for this is given below. If this law is implemented properly, it could bring a great change in our governance. Government is not implementing it, and citizens are barely aware of it. A sustained campaign could change this, and bring a very significant change in citizen empowerment. It would also empower the citizen and bring respect back to her.

Another aspect is that many officers procrastinate even on proposals and files from other departments within the government. One such example is the way protection of corruption is practised by not responding to proposals of sanction for prosecution by Anti Corruption Bureau. There are many such instances which together result in laziness, carelessness and corruption not being curbed. Citizens can influence this working as well.

The RTI Act has been effective since citizens have used it extensively and media has popularised it. This law can empower citizens to get responses from the government and lead to better governance if they write to the head of a department about violation of the law and insist on an enquiry being conducted. Most importantly, it would bring self respect to the individual citizen. Maharashtra could become the model of democracy and better governance for the entire nation. Stop giving bribes and use this law.

Shailesh Gandhi

If any citizen has filed a complaint/application/representation with a government department, and received no response for over 45 days they should send the following complaint to the head of the department or Secretary of the department. In case of Municipal Corporations it could be addressed to the Municipal Commissioners.

Use the format given below and report this at

www.satyamevajayte.info

I had given my application/complaint/representation for …….

on ……. (copy enclosed). Since then I have received no communication. I would like to draw your attention to Section 10 of the Transfers Charters and Delays Act 21 of 2006 which mandates that no decision can be kept pending for over 45 days. In the instant case, no decision has been communicated to me despite the lapse of…… days. I request you to conduct a preliminary enquiry within 15 days to fix responsibility on the officers responsible for this delay and take appropriate disciplinary action against them. I request that the report of the enquiry may please be sent to me.

RTI Article on Editorial page of Maharashtra Times

ही जबाबदारी घ्यावीच लागेल!

शैलेश गांधी

माहिती अधिकार कायद्याच्या अंमलबजावणीला एक तप, म्हणजे बारा वर्षे पूर्ण होत असताना त्याच्या आतापर्यंतच्या महत्वाच्या उपलब्धींविषयी तसेच त्याला असलेल्या धोक्यांविषयीही काही बोलणे गरजेचे आहे.

आरटीआय या संबोधनाने लोकांपर्यंत पोहोचलेल्या या कायद्याने काय साध्य केलेय? तर त्याचे स्वरूप देशव्यापी बनलेय, देशात असा एकही जिल्हा नसेल, की जेथे आरटीआयखाली अर्ज आलेले नाहीत. या कायद्याने अनेक खासगी प्रश्न सोडवायला मदत केली आहे आणि काही महाकाय भ्रष्टाचारांचा पर्दाफाशही केला आहे. देशातील सर्वसामान्य नागरिकाला सरकार आणि प्रशासन यांच्याकडून व्यक्ती म्हणून आपला सन्मान मिळवण्यास सक्षम बनविले आहे. ते सरकारच्या कारभारावर सन्मानपूर्वक देखरेख ठेवत आहेत. यावर्षी आरटीआय अर्जांची संख्या ८० लाखांच्या वर जाण्याची शक्यता आहे आणि हा कायदा अंमलात आल्यापासून आतापर्यंत आलेल्या अर्जांची संख्या तीन ते चार कोटींपर्यंत जाईल. नागरिकांनीच पुढाकार घेतल्यामुळे आरटीआयचा प्रसार आणि वाढही होत आहे. येत्या दशकात सरकार कायद्याच्या कलम ४नुसार बंधनकारक असलेली सुओ मोटो प्रकटीकरणे (डिस्क्लोजर्स) करून अंमलबजावणीत आणखी सुधार झाल्याचे आपल्याला दिसेल.

मात्र असे असले, तरी आरटीआयवर प्रतिकूल परिणाम करू शकणाऱ्या मुख्य धोक्यांकडेही पाहणे गरजेचे आहे. सत्तेत असलेल्या बहुतेकांची आरटीआयबाबात नापसंती आहे. प्रत्येकाच्या ओठी पारदर्शी कारभार हवा असे असते खरे, पण जेव्हा ते त्यांच्या कृत्याला लागू होते, तेव्हा मात्र माहिती उघड करण्यास टाळाटाळ करण्याकडेच कल असतो. आपल्या चुका उघड होतील आणि कामात अडथळे येतील असेच त्यांना मनापासून वाटत असते. भ्रष्टाचारी व्यक्तीला ते नकोच असते. ही लोकशाही आहे आणि इथे प्रत्येक व्यक्ती ही बादशहा आणि बेगम आहे हे ते विसरतात. संसद असो की नोकरशाही की न्यायालये..या सर्वांतील अधिकारपदांना 'आम्ही या देशाचे नागरिक'(वुई द पीपल) यामुळेच वैधता प्राप्त होत असते. अगदी सुरुवातीच्या वर्षांत सार्वजनिक माहिती अधिकारी वैयक्तिक शिक्षा होण्याच्या भीतीने वाट्यापैकी माहिती देत असत. पण आता त्यांचा पवित्रा ताठर झालेला दिसतो. माहिती नाकारण्याची नवनवी तंत्रे विकसित झाली आहेत आणि त्याद्वारे ते अर्जदाराला झटकून टाकतात. माहिती आयुक्त आणि न्यायालयांच्या निर्णयांनीही याला हातभार लावला आहे.

दुसरी अस्वस्थ करणारी बाब म्हणजे पारदर्शी कारभाराबाबत असलेला न्यायालयांचा दृष्टिकोन. आरटीआय कायदा होण्याच्या आधीपासून राज्य घटनेच्या कलम १९(१)(अ)नुसार माहिती मिळवणे हा नागरिकांचा मूलभूत अधिकार असल्याचे अनेक खटल्यांच्या निकालात सर्वोच्च न्यायालयाने स्पष्ट केले आहे. मात्र गेल्या सात वर्षांत विविध न्यायालयांनी माहिती नाकारण्यासाठीची कारणे व पार्श्वभूमी यांचा विस्तार केल्याचे दिसते. सदर लेखकाने सर्वोच्च न्यायालयाने दिलेल्या १८ निकालांचा अभ्यास केला असता त्याला असे आढळले की यापैकी फक्त दोनच निकाल माहिती देण्याच्या बाजूचे होते. पैकी एका निकालात असे प्रतिपादन होते, की 'माहिती मिळवण्याच्या कृतीचा राष्ट्रीय विकासाच्या अथवा एकात्मतेच्या, नागरिकांत शांतता प्रस्थापित करण्याच्या कार्यात अडथळा होईल, किंवा शांततेचा भंग होईल अशा तऱ्हेने गैरवापर अथवा चुकीचा वापर होता कामा नये. तसेच आपले कर्तव्य बजावणाऱ्या प्रामाणिक अधिकाऱ्यांचा छळ करणारे हत्यार म्हणूनही त्याचा वापर होता कामा नये.' आपल्या नागरिकांनी अशा प्रकारे आपल्या मूलभूत अधिकारांचा गैरवापर केल्याचा पुरावा खरे तर आजवर समोर आलेला नाही. आरटीआय कायद्याच्या कलम १९(२)मध्ये ज्या सवलती आहेत त्या अभिव्यक्ती स्वातंत्र्याच्या पायमल्लीसंदर्भात आहेत. मात्र न्यायालयांचे अनेक निर्णय हे राज्यघटना, कायदा आणि नागरिकाच्या माहितीच्या अधिकाराशी विसंगत अशा सवलती देणारे आहेत.

आरटीआय कायद्याचा अन्वयार्थ लावणे आणि माहिती अधिकाराचे संरक्षण करणे या कामासाठी माहिती आयुक्त हे पद अस्तित्वात आले. पण ठिकठिकाणच्या माहिती आयुक्तांची कामगिरी असमाधानकारक असल्याचे दिसते. वेळेवर प्रतिसाद देण्याच्या कायद्यातील तरतुदीबाबत ते फारसे उत्साही नाहीत. त्यांनी ६० ते ९० दिवसांत त्यांचा निर्णय देणे अपेक्षित आहे, परंतु प्रत्यक्षात कित्येकदा त्यासाठी पूर्ण वर्ष लागते. त्यांची स्वत:ची पारदर्शकता आणि सचोटी सुमार असते. केंद्रीय माहिती आयोग तर आपल्याकडील प्रलंबित प्रकरणांपैकी ४० टक्क्यांहून अधिक अर्ज तांत्रिक कारणे देत नामंजूर करून टाकतात. कायदा दंतविहीन करत शिक्षेची तरतूद असलेली कलमे फारच कमी वेळा वापरली जातात. आयुक्तांच्या निवडीत पारदर्शकता असावी, आयोगाचे काम पारदर्शीपणे आणि सचोटीने चालावे यासाठीची पक्रिया टप्प्याने विकसित करत नेणे हा यावरील उपाय ठरू शकेल. माहिती आयुक्तांची विहीत कालमर्यादेत नेमणूक न करणे ही महाराष्ट्राची अतिरिक्त समस्या आहे. कायद्यानुसार जिथे ११ माहिती आयुक्त नेमण्याची गरज आहे, तिथे आपल्याकडे माहिती आयुक्तांची फक्त ७ पदे भरली गेली आहेत. राज्याला प्रमुख माहिती आयुक्तच नाही आणि पुणे, औरंगाबाद, नाशिक आणि अमरावती येथे ७ हजारांहून अधिक प्रकरणे सुनावणीसाठी प्रलंबित आहेत. याचा अर्थ या प्रकरणांवर निर्णय देण्यासाठी किमान १८ महिने लागू शकतात. सरासर दुर्लक्ष आणि कामाची पद्धत याद्वारे सरकारच नागरिकांच्या या कायद्याची कोंडी करत आहे. राज्य सरकारने तातडीने माहिती आयुक्तांची ११ पदे भरायला हवीत.

सर्वसामान्य नागरिकाला सन्मान देणारी आणि सुशासनाकडे नेणारी खरी लोकशाही निर्माण होऊन वैभवशाली भविष्याकडे वाटचाल करण्याची शक्यता या कायद्याच्या अंमलबजावणीत आहे. नागरिकांनी आरटीआयचा वापर आणि त्यातील चैतन्य कायम राखण्याचा अटोकाट प्रयत्न करायला हवा. तसेच कायद्याची अंमलबजावणी करताना तोंड द्याव्या लागणाऱ्या धोक्यांशी सामना करण्यासाठी आपली ऊर्जा वापरायला हवी. जर नागरिकांना उज्वल भविष्य आणि राष्ट्रासाठी सुशासन व लोकमान्य टिळकांच्या स्वप्नातील स्वराज्य मिळवणे अपेक्षित असेल, तर त्यांना ही जबाबदारी घ्यावीच लागेल.

(लेखक माजी केंद्रीय माहिती आयुक्त आहेत.)

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