

Right to Fetal Health: Criticism of Right to Child Health

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ABSTRACT

Fetal rights are mostly neglected rights. UNCRC is accepted by many nations. Health is a basic component of life. Without having good health children can't enjoy their rights. Improper health condition restricts children's rights. Indian constitution assures the right to life to all. Right to life itself includes right to Health. Various governmental and non-governmental agencies working to protect children's rights. Indian government launches many policies to provide health care services. Most of the policies has its focus on the maternal and child health.

First five years of the life are very crucial because most of the cognitive development occurs in this period. Development of child depends upon the health of women before conception and during perinatal period. Especially health during pregnancy period directly affects the development of child. Development of child starts from fetal age. Fetus is totally dependable upon its mother for the growth as all essential elements get provided by mother through umbilical cord. Proper immunization, nutritional diet, hygiene, de-addiction, and Health care of mother, are the essential factors for the fetal growth and development of fetus.

Children are awarded with various children's rights internationally by United Nations Convention of right to children. India is one of the signatory nations on UNCRC. Children are considered as human being and can enjoy all human rights. But human fetus is not considered as human

being. Growth and development of fetus directly affects the quality of child life. For the enjoyment of child right there is necessity to have fetal rights. Fetal rights should get into consideration because it is developing stage of child inside the womb.

Key words: Human fetus, right to fetal Health, Right to Child Health, consanguineous marriages.

I) INTRODUCTION

Universal declaration of human rights awards rights to all the human beings. And recognize that children are entitled to have special care and assistance. Convention on right of children awards rights to children. Children has right to health included in right to life. Beginning of life starts form fetal age. But human fetus does not consider as human being or child anywhere and does not have any specific rights. Fetus is just considered as a part of mother. Fetal stage is the developing stage of human inside the womb of mother. This stage starts from the conception and ends with birth or abortion. All organs develop step by step in this stage. Proper Growth of these organs is important for birth of healthy baby. Healthy baby can develop as a normal child and then after as good human being. Health is an important factor for the enjoyment of all legal rights. Without proper health no one can enjoy rights with full potential. Heart starts to beat inside the womb after 6 weeks from conception. It means there is presence of life inside the womb but this life does not have dignity, and not considered as a human

being or child. For the enjoyment of all the human rights and the children's rights there is necessity to have appropriate development inside the womb. Hence the dignity of fetus should get considered as it is developing human being. Some rights should get consider for human fetus, specially right to fetal Health.

II) Historical Background

Children belongs to very valuable section of society. Fetus is developing stage of children inside the womb. Long ago between 5th and 3rd century BCE unborn child get protected by abortions. Doctors take Hippocratic oath which maintain medical ethic. Every doctor took oath before starting their profession which includes the line "I will not give to a woman a pessary to cause abortion."¹ is part of oath. Right to life of fetus was considered in the oath. Geneva declaration of the right of the child 1924 describes "The child must be given the means requisite for its normal development, both materially and spiritually."² Here maternal development means the development from where the maternity starts i.e from the conception to the ending of lactation period. In 1948 Universal declaration of human rights Proclaims "motherhood and childhood are entitling to special care and assistance". Here word motherhood indicates period during pregnancy and after delivery. Past history about the right considers right of mother and right of children. But fetal rights were not into consideration.

III) Definitional Analysis

- i) "Embryo" means a developing or developed organism after fertilisation till the end of fifty-six days;³
- ii) "fertilisation" means the penetration of the ovum by the spermatozoan and

fusion of genetic materials resulting in the development of a zygote;³

- iii) "Foetus" means a human organism during the period of its development beginning on the fifty-seventh day following fertilisation or creation (excluding any time in which its development has been suspended) and ending at the birth;³
- iv) "Implantation" means the attachment and subsequent penetration by the zona-free blastocyst, which starts five to seven days following fertilisation;³
- v) "Surrogacy" means a practice whereby one woman bears and gives birth to a child for an intending couple with the intention of handing over such child to the intending couple after the birth;³
- vi) "Surrogate mother" means a woman who agrees to bear a child (who is genetically related to the intending couple or intending woman) through surrogacy from the implantation of embryo in her womb and fulfils the conditions as provided in sub-clause (b) of clause (iii) of Section 4;³
- vii) **Perinatal period:** - *The perinatal period, broadly defined, encompasses the time frame from one year before to 18 to 24 months after the birth of the child.*⁴ This period includes the period before and after birth. This period has immense importance for health of child.
- viii) **Health:** - WHO defines "Health is a state of complete physical, mental, and social well-being and not merely the absence of disease or infirmity."⁵ Health is a yardstick to measure the development of any nation. Child health has specific importance, and child health is dependable upon the fetal health.
- ix) **Child:** - According to Article 1 of the United Nations Convention on the Rights of the Child 1989, "a child

¹ https://en.wikipedia.org/wiki/Hippocratic_Oath last visited on 01/10/2022

² <http://www.un-documents.net/gdrc1924.htm> last visited in 01/10/2022

³ the Surrogacy (Regulation) Act, 2021

⁴ <https://pubmed.ncbi.nlm.nih.gov/3322517/#:~:text=The%20perinatal%20period%2C%20broadly%20defined,the%20risk%20of%20family%20dysfunction.>

Last visited on 26/09/2022

⁵ <https://www.who.int/about/governance/constitution> last visited on 06/08/2022

means every human being below the age of 18 years unless under the law applicable to the child, majority is attained earlier”.

In 2nd article “States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.”

Starting age for the consideration as child is not mentioned. There is consideration of birth or other status for non-discrimination. But still confusion is about consideration of status of unborn child as child.

The meaning of a child in different laws depends upon the maximum age limit for consideration as a child. In India, the age of a child varies under various laws.

x) **Life:** - Law does not define life. Biology and psychology are also can't define life fully. Life defines itself. According to the World Medical Association- “The life of an individual human being begins with conception and ends with death.” There is lot of confusion about consideration of life in the legal view. Questions come arise, 1. Is the human embryo considered live? 2. Is the human fetus considered as life? And 3. What about their right to life? There is need to interpret definition of life in the medical and legal view.

xi) **Mother:** - In UK, (29 April 2020) The judge in Mr McConnell case, the President of the Family Division, Sir Andrew MacFarlane, has provided the first legal definition of a mother. “Being a mother, he ruled, is the status given to the person who undergoes the physical and biological

process of being pregnant, carrying and giving birth to a child.”⁶

As medical science is growing with various innovations, fertilization is become possible outside the womb, and embryo can implant in the womb of surrogacy mother, transgender can give birth to baby. In this scenario there is need for consideration of fetal rights as well as children's rights.

IV) Right to Pregnant Women and fetal life

Pregnant women have all the human rights, as any other human being. Before 1973 pregnant women did not have right to abortion. The U.S. Supreme Court in the case Roe v Wade, a 1973 landmark decision to legalise abortion. Pregnant women have right to abortion, but this right has some restrictions depending upon the development of fetus and the risk to mother. Pregnant women have Right to abortion upto the point at which the fetus potentially become able to live outside the womb of mother, i.e. the upto 24 weeks of fetal age. She has right to abortion afterward when there is question of survival of mother arises. She has right to abortion in self defence.⁷ This right is women centric having pre consideration that ‘pregnant women do not undergo for abortion until physical, mental, social, or medical conditions does not come across to do so. Foetus which does not able to live outside the womb does not have any meaning of life.

V) Fetal Rights

Specific fetal rights did not mention. But some rights indicates as fetal rights depending upon the rights which are awarded to women and children. Some fetal

⁶https://www.familylaw.co.uk/news_and_comment/does-the-legal-definition-of-a-'mother'-suit-modern-society#:~:text=Being%20a%20mother%2C%20he%20ruled,giving%20birth%20to%20a%20child Last visited on 02/10/2022

⁷https://constitution.congress.gov/browse/essay/amdt14-S1-4-1/ALDE_00013276/f'fetus'/#ALDF_00021969 last visited on 26/09/2022

rights indirectly get protected by protecting women's and child rights.

i) International Scenario

Human foetus does not have special entity as a person under both U.S law and British law. Human foetus does not have any right as it is not legally recognised as human being or person. Human foetus gets considered as a part of the mother, and legal rights are mother centric.

UNCRC Art.24.2. b says, state parties shall take measures to ensure appropriate pre-natal and post-natal health care for mothers. It means fetal existence is accepted but its entity as human being is not accepted. Care of foetus is included in care of mother. Prenatal care of mother itself the care of foetus inside the womb.

ii) Indian Scenario

a) Article 21 of Indian Constitution: - "Protection of life and personal liberty - No person shall be deprived of his life or personal liberty except according to procedure established by law"⁸

Right to life includes right to health. Right to health is granted to all persons. As Children and women are considering as person, all human rights granted to them including right to health. Pregnant women has right to health but unborn child does not have right to health as it is not considered as human being or person. All the rights which are included in the right to life are not applicable as fetal rights.

b) The Indian Penal Code 1860:- section 312 "Whoever voluntarily causes a woman with child to miscarry, shall, if such miscarriage be not caused in good faith for the purpose of saving the life of the woman, be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both; and, if the woman be quick with child, shall be punished with imprisonment of either

description for a term which may extend to seven years, and shall also be liable to fine."⁹

In this section existence of fetus and existence of fetal life is accepted, and given importance to fetus. Fetal right to birth alive is get considered. Fetal right to protection from another person except mother is also considered. There is provision of punishment to the person who voluntarily cause harm to to pregnant women which result to miscarry.

c) The Hindu Succession Act 1956: - section 20 "Right of child in womb. —A child who was in the womb at the time of the death of an intestate and who is subsequently born alive shall have the same right to inherit to the intestate as if he or she had been born before the death of the intestate, and the inheritance shall be deemed to vest in such a case with effect from the date of the death of the intestate."¹⁰

This section acknowledges the right to unborn child. Unborn child which is going to birth alive granted same right as born child to inherit the intestate of dead person.

d) Transfer of Property Act 1882: - section 13 "Transfer for benefit of unborn person. —Where, on a transfer of property, an interest therein is created for the benefit of a person not in existence at the date of the transfer, subject to a prior interest created by the same transfer, the interest created for the benefit of such person shall not take effect, unless it extends to the whole of the remaining interest of the transferor in the property. Illustration A transfer's property of which he is the owner to B in

⁸ <https://indiankanoon.org/doc/1199182/> last visited on 30/09/2022

⁹ https://www.indiacode.nic.in/show-data?actid=AC_CEN_5_23_00037_186045_152326_6765688&orderno=350#:~:text=Whoever%20voluntarily%20causes%20a%20woman,the%20woman%20be%20quick%20with last visited on 30/09/2022

¹⁰ <https://indiankanoon.org/doc/895395/#:~:text=%E2%80%9494A%20child%20who%20was%20in,from%20the%20date%20of%20the> last visited on 30/09/2022

trust for A and his intended wife successively for their lives, and, after the death of the survivor, for the eldest son of the intended marriage for life, and after his death for A's second son. The interest so created for the benefit of the eldest son does not take effect, because it does not extend to the whole of A's remaining interest in the property."¹¹

In this section Unborn child is not considered as born child but considered as living one. And property can be transferred to baby after birth. Fetal Right to have property after birth is protected by law.

- e) **The Code of Criminal Procedure 1973: -section 416** "Postponement of capital sentence pregnant woman. - If a woman sentenced to death is found to be pregnant, the High Court shall order the execution of the sentence to be postponed, and may, if it thinks fit, commute the sentence to imprisonment for life."¹²

Pregnant women excused from capital punishment, due to existence of fetus inside the womb. In this section gives utmost importance to fetal existence, and right to birth alive get protected. Death of pregnant women ultimately cause the death of fetus. Hence for the protection of life of fetus capital punishment does not execute. Here life of women and life of fetus is considered as separate life. And existence of life considered inside the womb is considered.

- f) **PCPNDT act 1994: -** This Act prohibits selection of sex, before conception or after conception, and regulate pre- natal diagnostic techniques. This act accepts right to non-discrimination depending upon sex of fetus.

- g) **Medical Termination of Pregnancy: -**

¹¹<https://indiankanoon.org/doc/106689/#:~:text=%E2%80%94Where%2C%20on%20a%20transfer%20of,the%20whole%20of%20the%20remaining> last visited 30/09/2022

¹² <https://indiankanoon.org/doc/918612/> last visited on 30/09/2022

All women are entitled to seek abortion of pregnancy upto term of 20-24 weeks of fetal age. In this act every woman has right to abortion. Separate dignity of fetus is not considered here. After 20-24 weeks medical termination is not allowed except there is danger to life of pregnant women.

As both scenario concern various acts and judgements of court accepts the existence of fetus as a developing human being inside the womb. But does not accept dignity separated by its mother. It is considered as a part of mother. As abstract of these there are some rights which partially indicates as fetal rights. This act is mother centric and does not consider the fetal life upto 24 weeks of pregnancy.

- h) **Surrogacy (Regulation) Act, 2021: -**

"The surrogate mother is in possession of an eligibility certificate issued by the appropriate authority on fulfilment of the following conditions, namely: - (V) a certificate of medical and psychological fitness for surrogacy and surrogacy procedures from a registered medical practitioner;"

In this act there is consideration about the necessity of fitness of surrogacy mother for the development of fetus inside the womb. In surrogacy case fitness of surrogacy mother is important but in natural pregnancy there is no any rule to have fitness before undergoing to pregnancy. Only age of mother is considered.

- i) **Government Health policies which enhance fetal Health: -**

1. **Janani shishu suraksha yojana: -** provides healthcare for pregnant women during pregnancy and 42 days after delivery.
2. **Pradhan mantra matru vandan yojana: -** provides monetary benefits to pregnant women during pregnancy for proper nourishment.
3. **Pre- conception, prenatal and perinatal project for improving maternal and neonatal health in**

aspirational districts: - provides health care and reproductive education to women before conception, and during prenatal and perinatal period.

4. **Surakshit matrutva ashwasan (SUMAN):** - this policy ensures secure pregnancy, delivery, and post-natal care.

iii) Indicated fetal rights: -

In light of our recent discussion, it is evident that there are specific rights attributed to the fetus.

- a) As international and national scenario concern, it indicates that fetus has right to birth alive, when it becomes able to live outside the womb and if there is no question of survival of mother because of it.
- b) Accordingly, UNCRC Art.24.2. b human fetus has indirect right to health care via mother.
- c) Right to survival of fetus within the limit of mother's right to abortion.
- d) Right to have fitness of mother before implantation in the case of surrogacy only.

VI) Right to Child Health

Children are human being and has all human rights equally. When considering children's right to health they are in most vulnerable situation. That's why they need more attention and care. In 1966 ICESCR recognised right to health as human right, Article 24 of the UNCRC provides right to child health, and article 32 protects from harm to child's health.

Article 21 of the Indian constitution provides right to life with dignity, which itself includes right to health.

a) Impact of health status on enjoyment of other child rights

UNCRC provides various children's rights. All these rights may be classified into four groups, as 1. Right to Survival 2. Right to Development 3. Right to Protection 4. Right to Participation.

Child rights get restricted due to inadequate health status. Any child can not enjoy other rights fully when he or she does not have

good health. Health status of the child plays important role to enjoyment of other right. Most of the cognitive development occurs in the first 5 yrs. of age which is sustainable development. It means priority should be given to the protection of right to child health.

Child health depends upon his/her health status at birth, which is outcome of the overall development inside the womb.

VII) Fetal Health as a Key factor to enjoy Children's right to Health

Only healthy newborn can achieve cognitive development potentially. Health of newborn is totally dependable upon the development during fetal age, Care (physical, mental, nutritional and social) taken by mother during pregnancy and the circumstances at the time of birth. Development during fetal age has immense importance for the birth of healthy baby. If baby delivered with defects, his/her right to health get violated since birth.

a) Stages of Development of Fetus and birth defects

Most of the organs of fetus starts to develop in embryonic period. Mother should take care about nutrition which is needed for the proper development and formation of these organs. Heart develops between 3 to 6 weeks of conceptual age. If mother is not aware about the immunization, nutritional diet, hygiene and health care during pregnancy, there are chances to develop various defects in organs and system. Which then after present at birth, and becomes threatening to life and dignity. These defects can be classified into 1. Structural defects 2. Functional Defects 3. Metabolic Defects.

Period for organ development of fetus and the chances to develop defects are shows as follow.¹³

¹³

<https://perinatology.com/Reference/Fetal%20development.htm> last visited on 29/09/2022

Organs	Sensitive period to develop major birth defects (conceptual age in weeks)	Sensitive period to develop functional and minor birth defects (conceptual age in weeks)
Central nervous System	2 -6	6- 38
Heart	2-9	6-38
Ear	3-8	8-38
Eyes	3-7	7-38
Limbs	3-6	6-38
Lip	4-6	6-38
Palate	5-8	8-38
Teeth	5-8	8-38
External genitals	6-8	8-38

Most birth defects start to develop in the first 3 months of pregnancy.¹⁴ Baby delivered with one of these defects face various health issues. Very few birth defects are correctable by early intervention and timely medical or surgical management. Baby having defect at birth can't enjoy their other child rights. It means newborns rights to health which is included in right to life get violated from the time of birth because of improper development inside the womb. Fetal health is a key factor for the enjoyment of children's right to health.

b) Important Factors for fetal Health

1. Proper immunization

Immunization prevents mother as well as babies from serious diseases early in life. Antibodies develops in mothers due to the response of vaccines cross the placenta and protect babies from serious diseases. It protects mothers from serious disease and prevent passing the disease to newborn.

2. Nutritional diet: -

Nutrition means taking healthy and balanced diet. Nutrients are necessary for body function and development. For pregnant women nutrition is most important than ever. She needs more important nutrients than she needs before pregnancy. Healthy and nutritious diet increase the chances to deliver healthy baby. Lack of nutritious diet during pregnancy may leads to

malformation of organs, and functional defects at birth.

3. **Hygiene:** - Maintenance of personal and surrounding hygiene is very important for the health of fetus. Unhygienic conditions lead to various infections to fetus. Some of these diseases remains after birth and continue for lifetime.
4. **Physical and Mental health of mother:** - Psychological illness effects on the physical and functional development of fetus. Some psychological illnesses make chromosomal changes. Any physical or psychological trauma to pregnant women leads to miscarriage. Hence proper mental health of pregnant women is very important.
5. **De-addiction:** - Use of tobacco, alcohol, or misuse of prescription drugs by pregnant women may leads to severe health consequences for newborns, because many of these substances easily pass through the placenta, and reach to the fetus. smoking tobacco or marijuana, taking pain relievers, during pregnancy may increase risk of stillbirth and formation of birth defects. Some psychological defects may develop long time after birth in children due to addiction like fetal alcohol syndrome etc.
6. **Medical care of mother:** - Pregnant women should be free from illness. Any illness like high grade fever, tuberculosis etc adversely effect on the development of fetus. Timely medical

¹⁴ <https://www.cdc.gov/ncbddd/birthdefects/facts.htm>
 | last visited on 30/09/2022

care is very important for the fetal health.

7. **Avoiding consanguineous marriages:** - In the cases of consanguineous marriages there are more chances to develop chromosomal disorders or genetic health issues. During pregnancy period Proper immunization of mother, nutrition, de-addiction of mother, health care, hygiene and prevention from any physical and psychological trauma are essential factors for the health and development of fetus.

VIII) Statistical analysis of newborn's health: -

1. **Still birth:** - There is progress in reducing still births rate which declined from 21.4 per 1000 birth to 13.9 in the duration from the year 2000 to 2019.¹⁵ in India also it declined from 29.6 to 13.9 in the duration from year 2000 to 2019.¹⁶ It indicates that, right mentioned in Article 24 of convention on the rights of children is get implemented seriously about to diminish infant mortality.
2. **Women having knowledge:** -¹⁷ Mature women should have knowledge about their reproductive system, and its functions, but only 31% women have knowledge about functions of reproductive system and only 29% women have knowledge about developmental stages of fetus.
3. **Defects at birth:** - According to joint World Health Organization (WHO) and MOD meeting report, In India birth

¹⁵ <https://data.unicef.org/resources/a-neglected-tragedy-stillbirth-estimates-report/> last visited on 01/10/2022

¹⁶ <https://www.downtoearth.org.in/blog/health/topping-the-wrong-chart-india-has-highest-number-of-stillbirths-73724#:~:text=The%20country%20had%20made%20substantial,a%2053%20per%20cent%20reduction.> Last visited on 01/10/2022

¹⁷ <https://www.statista.com/statistics/1242775/us-women-s-knowledge-gap-about-reproductive-system/> Last visited on 01/10/2022

defects prevalence varies from 61 to 69.9/1000 live births.

Neural tube defects (NTDs), congenital heart defects, and hemoglobinopathies, Down syndrome, and glucose-6-phosphate dehydrogenase deficiency are the majorly found birth defects. Which causes 20% infant mortality.¹⁸ Nearly 85.3% defects are preventable.¹⁹

If calculated in number it will be huge number of children who have birth defects. Most of the Birth defects are preventable but few are curable after birth. Child having birth defect cannot enjoy the child right to health as well as other rights as normal healthy child.

4. **Low birth weight:** - In India percentage of babies having low birth weight is around 25 to 30 %. Out of which 60 to 65 % having cause intra uterine growth retardation.²⁰

IUGR occurs due to lack of appropriate nutritional diet, hygiene, immunization, and medical care taken by mother during her pregnancy period. Low birth weight leads to various physical and psychological issues which represents later on. Low birth weight adversely effects on the child health.

All these statistical data itself indicate the poor health status of newborns. Which is because of poor health of fetus. It means the child deprived form their right to child health ultimately right to life without any procedure established by law. It is the violation of Article 21 of Indian constitution.

IX) CONCLUSION

- i. Fetal existence is accepted but its dignity as human being is not accepted.
- ii. Human fetus which is able to live outside the mother's womb have only right to birth alive.

¹⁸ <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3758715/#ref1> last visited on 01/10/2022

¹⁹ <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1168872/> last visited 01/10/2022

²⁰ <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2940207/> last visited on 01/10/2022

- iii. Definition of health by WHO is only concerns to human being and not to unborn child.
- iv. No one can protect Fetal health without will of its mother.
- v. Pregnant women do not have any restrictions on their rights considering the responsibility of nourishment of fetus.
- vi. Pregnant women do not have any special right (except *Postponement of capital sentence*) according to her pregnancy.
- vii. At the age of maturity of women, Pre-conceptual education and guidance about “role of mother towards her fetus” may play efficient role to enrich fetal health.
- viii. Avoiding consanguineous marriages may reduce congenital defects.
- ix. Denying right to fetal health means denying right to health of newborns.
- x. Birth defects restrict the enjoyment of right to life and liberty. Children arriving with birth defects get deprived of his life (which includes good health) without any procedure established by law.
- xi. Absence of fetal right to health is violation of article 21 of Indian constitution.
- xii. Now a days medical technology is improving, medical science considers fetus as separate life for treatment. Hence There is need to consider fetal right to health for the protection of children’s right to health.

X) Considerations

When seeing towards the legislations and the various judgments some pre considerations comes in front, these are

1. Every pregnant woman is emotionally attached to her fetus. And she will take care of it at extreme level of possibility.
2. Pregnant women do not want to undergo abortion until the physical, mental, social, or medical situation arises to do so.

XI) SUGGESTIONS

- i. Fetus should have separate entity as a developing human being inside the womb.

Womb of pregnant mother should consider as the world of fetus.

ii. “Right to life” should recognize as fetal right.

iii. “Right to born healthy” should recognized as fetal right.

iv. “Right to born healthy” should be included with Proper immunization, nutritional diet, hygiene, de-addiction, and Health care of mother.

v. Mature women’s Pre conceptual reproductive education and counseling about “role of mother towards her fetus” should consider as right of mature women. Government should run policies for this.

vi. Fetal health should consider differently than the health of other human being. Definition of fetal health might be “fetal health is state of complete structural, functional, nutritional, physiological well-being and not merely absence of disease to it or womb or mother.”

vii. Consanguineous marriages should be restricted by law or genetic analysis should be mandatory before consanguineous marriages, and permission should be given according genetic expert’s opinion.

viii. Right of pregnant women should consider differently than other women. There should be addition of some rights and restriction for enjoyment of existing rights depending upon the development of fetus inside the womb.

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