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# SPECIAL REPORT

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## ABOUT THE REPORT

This report assesses Pakistan's Anti-Terrorism Act (ATA), the country's main legislation governing the prosecution of terrorism. The law's loose definition of terrorism has resulted in an overly broad application of the ATA to a host of criminal cases, clogging up the special court system the ATA set up. At the same time, resources and training to implement the ATA's provisions are limited. This report is based on discussions in round table conferences, two with senior Pakistani police officers and one with lawyers, former judges, and academia; a study of the judgments of the Supreme Court of Pakistan and ATCs having a bearing on the ATA; and research carried out on the subject in Pakistan.

## ABOUT THE AUTHORS

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*Tariq Parvez and Mehwish Rani*

## An Appraisal of Pakistan's Anti-Terrorism Act

### Summary

- The Anti-Terrorism Act of 1997 lays down the basic legal framework for counterterrorism prosecutions in Pakistan. Despite the law's passage, the criminal justice system has seen low conviction rates and delayed cases, and it offers a very weak deterrence against terrorism.
- The lengthy delays and high number of acquittals in terrorism cases are due to a number of factors. The definition of terrorism under the act is too broad. Procedural issues, among law enforcement officers and among police and intelligence agencies, also contribute to the law's ineffectiveness.
- Unless urgent measures are taken, public confidence in the law is likely to further erode, opening the possibility of greater reliance on military instead of civilian institutions to control terrorism.
- A holistic approach is needed to improve the ATA, based on four equally important dimensions: amending the language of the law, streamlining its application, sensitizing the courts to the provisions of the law, and strengthening the infrastructure responsible for its implementation.

### Introduction

Pakistan is today one of the countries most affected by terrorism in the world.<sup>1</sup> It began experiencing terrorism on a sustained basis in 1990, in the form of sectarian killings. In the past twenty-five years more than fifty thousand people have lost their lives to terrorists, the national economy has incurred losses estimated in the billions of dollars, and the social fabric of Pakistan's society has been exposed to immense stress.<sup>2</sup>

On September 20, 2008, a suicide bomber in a vehicle laden with approximately eight hundred kilograms of explosives blew himself up at the entrance of the Marriott Hotel Islamabad, killing fifty-four people (including fifteen foreigners) and maiming 250. An intensive police investigation led to the arrest of four people accused of involvement in the attack. On May 5, 2010, however, the antiterrorist court (ATC) hearing the case acquitted all four

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accused for lack of admissible evidence. This acquittal is cause for serious concern. More alarming is that large-scale acquittals by courts in terrorism cases is the norm, symptomatic of a grave systemic weakness in the criminal justice system of Pakistan, particularly in dealing with terrorism cases. A 2010 U.S. State Department report termed Pakistan's antiterror legal system as "almost incapable of prosecuting suspected terrorists."<sup>3</sup>

Pakistan's abysmally low conviction rates shape the perception that even if terrorists are caught, the probability of getting punished is very remote. According to the Punjab Prosecutor General, during 2014, ATCs heard 785 cases of terrorism in the province, resulting in 196 convictions<sup>4</sup>—an acquittal rate of roughly 75 percent. This percentage is corroborated by U.S. State Department reporting.<sup>5</sup> The overburdening of the criminal justice system generally, and ATCs particularly, leads to abnormally long periods of time taken by police, prosecution, and completion of terrorism cases in ATCs. This delay in justice dilutes the impact of the punishment and is likely to lead to witnesses recanting their testimonies, resulting in large-scale acquittals.<sup>6</sup>

There are many areas of weakness in the different elements of Pakistan's criminal justice system, from police to prisons to the relevant antiterrorism legislation. This paper focuses on identifying the major areas of concern in the Anti-Terrorism Act (1997), or ATA, and suggests measures to enhance its efficacy in dealing with the threat of terrorism in Pakistan. The first part of this paper examines problems arising from the language of the law, including its overly broad definitions of terrorism. The second looks at the challenges facing the police and judiciary in implementing the law in practice.

## The Anti-Terrorism Act and Anti-Terrorism Courts

Over the past decade, Pakistan has followed a two-pronged approach in response to the growing terrorist threat. The military is the lead organization for dealing with the insurgency in the Federally Administered Tribal Areas (FATA). It has conducted a number of military operations there against insurgents. Presently, a full-scale military operation called Zarb-i-Azb is going on in North Waziristan and Khyber agencies, freeing more and more areas from insurgent control. While the ATA is applicable to the entire country, ATCs have not been set up in the FATA because of the warlike conditions there.

In the remaining parts of the country, combating terrorism is the responsibility of law enforcement, and a number of special laws have been enacted. The basic law, however, is the ATA. Enacted by parliament in 1997, as of February 2015, the law has been amended seventeen times to adapt to the changing nature of the terrorist threat. Other special laws have supplemented the ATA, such as the Investigation for Fair Trial Act (2013) and Protection of Pakistan Act (2014), to respond to some of the other areas of the terrorist threat not covered by the ATA. A constitutional amendment was passed in January 2015 to set up special military courts for dealing with terrorism cases for a period of two years.

The ATA, however, lays down the basic legal framework for Pakistan's national counterterrorism effort by defining offences of terrorism and terrorist acts. It also provides for the establishment of special courts to try terrorism cases and gives timelines for the finalization of investigation and trial of cases to ensure speedy disposal. Section 19 of the ATA specifies that police must finalize terrorist case investigations within thirty days, and requires ATCs to hear such cases on a daily basis, finalizing judgments within seven days.<sup>7</sup> The Supreme Court of Pakistan, through a judgment in 1998, disagreed with the original ATA design to develop a parallel judicial system for trial of terrorism cases.<sup>8</sup> The judgment laid down three basic requirements to ensure due process in trials of terrorism cases: judges appointed to ATCs have fixed tenures, ATCs are subject to the same procedural rules as regular cases, and

finally, appeals against the judgments of the ATCs are heard by the regular High Courts and Supreme Court, instead of by special appeal tribunals as the law originally envisioned.

Accordingly, ATCs are staffed by serving district and session judges, for fixed tenures. These judges are experienced in hearing criminal trials, but not cases of terrorism. Supreme Court Justice Qazi Faez has recently voiced concerns over the ATC judiciary's lack of familiarity with the ATA's provisions.<sup>9</sup> For instance, in ordinary criminal trials, the police filing of a first information report (FIR)—a written record of the criminal complaint at the outset of an investigation—has come to be accepted by the judiciary as an almost essential prerequisite for any guilty verdict. In terrorism cases, however, it becomes difficult to nominate likely suspects, as the complainant often does not immediately know the identity of the culprit. In many cases of terrorism, the judges have mentioned in their judgments that, since the accused has not been nominated in the FIR, this goes in his favor.<sup>10</sup>

### ***Terrorism's Broad Definition***

A basic flaw in the ATA is the extremely broad definition of terrorist acts, which overburdens the already overstretched police, prosecution, and courts and results in delays in disposal of "real" cases of terrorism. The preamble of the ATA describes the rationale of the law as providing for "the prevention of terrorism, sectarian violence and for speedy trial of heinous offences and for matters connected there with and incidental there to." The addition of the words heinous offenses, which are not otherwise defined in the legislation, has widened the application of the ATA to include cases other than terrorism. Although some judges have issued rulings<sup>11</sup> emphasizing the need for more precise applications of the law based on perpetrators' intent to carry out terrorizing acts, most high court judges have applied the heinous-offense standard broadly.

As one example, the Lahore High Court declared the murder of a man and woman accused of illicit relations to be a heinous offense and an act of terrorism.<sup>12</sup> According to another 2010 report, in the three ATCs based in Karachi, 199 individuals were on trial for heinous but nonterrorist offenses, compared with only thirty-five members of terrorist groups awaiting trial—meaning fully 83 percent of cases under trial in the ATCs were not of terrorists, but of normal criminals.<sup>13</sup> This suggests a serious impediment to the ATCs' ability to deal with terrorism cases within the timeframe the ATA gives. The starting point of any attempt to enhance the efficacy of ATA in dealing with cases of terrorism, therefore, is to amend the preamble.

Beyond the potentially broad mandate set out in the preamble, the ATA definition of a terrorist act is also fairly wide and creates ambiguity on what exactly constitutes a terrorist act. In section 6, subsection 1, the act defines terrorism as "the use or threat of action where

- (a) the action falls within the meaning of sub section (2) and
- (b) the use or threat is designed to coerce and intimidate or overawe the Government or the public or a section of the public or community or sect or a foreign government or population or an international organization or create a sense of fear or insecurity in society or
- (c) the use or threat is made for the purpose of advancing a religious, sectarian or ethnic cause or intimidating and terrorizing the public, social sectors, media persons, business community or attacking the civilians, including damaging property by ransacking, looting, arson or by any other means, government officials, installations, security forces or law enforcement agencies. Provided that nothing herein contained shall apply to a democratic and religious rally or a peaceful demonstration in accordance with law.

Section 6, subsection 2 further lays out seventeen types of actions (or threat of actions) covered under this definition, including those causing death, "grievous violence" or dam-

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age to property, kidnapping, extortion, intimidation, and barring public servants from their duties, among others. Section 6, subsection 3 further qualifies this by defining any of these types of actions that involve the use of firearms, explosives, or any other weapon as terrorism, whether or not subsection 1(c) is satisfied. Additionally, subsection 3(a) states that any violation of international conventions on terrorism signed by Pakistan are also considered acts of terrorism under the ATA. By making the conditions of subsection 1(c) optional for classifying a crime as an act of terrorism, the ATA loosens the criteria normally applied to terrorism—that is, a political or ideological motivation that distinguishes it from normal criminal or personal motives of profit or revenge. Thus, the police, prosecution, and ATCs are overburdened with cases that are not, strictly speaking, terrorism cases, leading to delays in decisions and large-scale acquittals.

Furthermore, section 34 of the ATA grants the government the authority to amend the list of all offenses punishable under the law (the “Third Schedule” of the ATA) through a simple notification, without any changes to the law. Following a 2004 amendment, this was broadened to give ATCs exclusive authority to try cases of

- i) abduction or kidnapping for ransom;
- ii) use of firearms or explosives by any device, including bomb blast in a mosque, *imambargah*, church, temple or any other place or worship, whether or not any hurt or damage is caused thereby; and
- iii) firing or use of explosives by any device including bomb blast in the court premises.

These three points extend ATCs’ scope significantly beyond cases of terrorism. Kidnapping for ransom and abduction may be heinous offenses, but they cannot be considered terrorist acts unless militant organizations carry them out to further their respective ideologies or political goals. The practice is widespread. There were 2,092 cases of kidnapping for ransom and 79,863 abduction cases in Pakistan reported to the police between 2008 and 2013.<sup>14</sup> Classifying these all as terrorist acts has overburdened the already overstretched criminal justice system, slowing down disposal of cases. Similarly, the use of firearms in court premises or even in worship places may be serious issues of law and order, but these incidents are not exclusively the province of terrorist actors. In a heavily weaponized society like Pakistan, use of firearms for crime is fairly common. The ATA needs further amendment to restrict the offenses covered under the Act solely to those driven by a terrorist ideology or political agenda and not by personal motives.

### ***The ATA’s Overbroad Application in Practice***

Even beyond the broad definitions in the legislation, political and police leadership across Pakistan tend to apply the ATA to criminal cases that do not fall under the act’s ambit. This tendency is fairly widespread in all the provinces and constitutes a serious hurdle to speedy and fair trial of terrorist offenses, diminishing the deterrence value of the criminal justice system. There are many reasons for this. First, by applying the ATA, the police and the political leadership convey that they are giving more attention to a particular case. Second, at times the offense is so barbaric (such as rape of a minor) that the local community demands to apply the ATA. Third, at times the police apply sections of the ATA to be able to demand higher bribes from the accused to declare them innocent in a terrorism case.

In Punjab province, only 4.6 percent of ATA cases the police investigated between 2005 and 2010 involved bomb blasts or suicide attacks, terrorists’ signature modus operandi.<sup>15</sup> This implies that in almost 95 percent of the cases where the ATA was applied, it was because

the offense was perceived to be heinous by the police or the political leadership, rather than necessarily being attacks carried out by terrorists. According to the Punjab Prosecutor General, in 2014, out of a total of 1,195 ATA cases heard by the province's fourteen ATCs of Punjab, 178 (15 percent) were transferred to regular courts because the police had wrongly applied the ATA to these offenses.<sup>16</sup>

The situation in Sindh appears to be even more serious. In Karachi, the capital of Sindh province, from January 2013 to December 2013, 391 of 565 cases (69.2 percent) heard by the city's five ATCs were transferred to the regular courts for not falling within the ATCs' ambit.<sup>17</sup> By then the police spent considerable time in investigating these cases, the prosecution on their scrutiny, and the ATCs in hearing them. In Khyber Paktunkhwa, fifty-two cases of 706 cases (7 percent) decided by the ATCs in 2014 were transferred to other courts for wrong application of the ATA by the police.<sup>18</sup>

### ***Other Limitations of the ATA Legislation***

Despite the ATA's wide scope, it also has notable blind spots. In particular, it fails to provide guidance for the use of the internet for terrorist messaging or other purposes. With militant organizations increasingly using the Internet for activities ranging from recruitment to fund-raising to teaching methods for preparing bombs, there is a need for more explicit provisions on the use of the Internet for terrorism. A number of banned militant organizations run public websites<sup>19</sup> or maintain social media presences on Facebook or Twitter, with little action taken by the Pakistan Telecommunication Authority or Ministry of Information Technology to crack down on their activities.<sup>20</sup> The FIA is supposed to investigate cases of Internet use for terrorist purposes through a Cyber Unit in the Counter Terrorism Wing. There is a cyber forensic lab also, but the unit lacks resources, manpower, and expertise to perform its lawful role as laid down in the ATA.

The ATA's existing provision dealing with Internet use for terrorist purposes is section 11W, which covers the printing, publishing, or dissemination of any material to incite hatred. The section states that

A person commits an offence if he prints, publishes or disseminates any material, whether by audio or video cassettes or any form of data storage device, FM Radio stations or by written, photographic, electronic, digital or any other method or means of communication which glorifies terrorists or terrorist activities or incites religious, sectarian or ethnic hatred or gives projection to any person convicted for a terrorist act or any person or organization concerned in terrorism or proscribed organization or an organization placed under observation.

While potentially open to application against terrorist use of the Internet to propagate messages, the section needs amending to explicitly address Internet media. A separate section of the ATA is needed to clarify Internet-related offenses. As more and more state systems, particularly in aviation, military, and the police, are digitalized, the possibility of terrorists targeting these systems for sabotage or hacking increases considerably. Hacking of computerized state systems or sabotage by terrorist organizations should also be criminalized through explicit provisions.

## **Hurdles to Implementing the ATA**

While the ATA's language and definitions need fixes, deeper challenges with the law relate to implementing and applying its existing provisions in practice. These include a failure to enforce restrictions on the activity of banned terrorist organizations; the lack of compre-

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hensive provisions to secure witnesses, police officers, prosecutors, and courts hearing terrorism cases; and the need for greater intelligence coordination between Pakistan's civilian, military, and police agencies.

### ***Restricting Militant Organizations***

The ATA lays down provisions to restrict the movements and activities of those found to be supporting or sympathizing with terrorists. For instance, section 11E (1A) directs that “if the office bearers, activists or the members or the associates of such organizations are found continuing the activities of the proscribed organization, in addition to any other action under this Act or any other law for the time being in force to which they may be liable,” they are to be barred from international travel, face restrictions on banking transactions, and are subject to a revocation of any arms licenses they may hold. This provision is not being implemented at all; no national database of such persons exists with the police or any other agency, and available lists are not shared with the relevant agencies. Lack of awareness of this provision in the police and other relevant agencies is the main reason for its nonenforcement.

It is generally agreed that funds are the lifeblood of any terrorist organization. If denied them—to buy weapons or support salaries for members and their network—the organization's capability to strike is considerably degraded. Sections 11H to 11K of the ATA deal with terrorist financing, covering those who solicit, receive, or provide funds to terrorist organizations, including cases where the participants had “reasonable cause to suspect” that their activities might be used for terrorist purposes. Punishments for these violations are specified for a minimum five years and a maximum of ten.

The Anti-Money Laundering Act of 2010 also covers some aspects of terrorist financing and sets up a Financial Monitoring Unit in the State Bank of Pakistan to act as a steering body at the national level. The Federal Investigation Agency holds lead responsibility to investigate terrorism financing cases, through a Terrorist Finance Investigation Unit (TFIU) in the FIA Counter Terrorism Wing. The unit is supposed to be headed by a professional banker, but none has been working there for the past six years. The TFIU is deficient in manpower, resources, training, and powers to ask for records from financial institutions. Not a single case of terrorist financing has been sent to the court by the FIA. For all practical purposes, the TFIU exists on paper only. According to devolution measures in the 18th Amendment to the Pakistani constitution, Pakistan's provinces can set up their own TFIUs in their respective provincial counterterrorism departments, but these have not been established to date.

### ***Protecting Witnesses, Police Officers, Courts, and Prosecutors***

Studies have highlighted the lack of security for criminal justice system participants and practitioners as a major reason for the large-scale acquittals of terrorists within the system. Section 23(c) of the ATA requires the government to provide security to witnesses, police investigators, prosecutors, and ATC judges. These measures are not sufficiently defined and have gone totally unimplemented.<sup>21</sup> A case in point is the identification of terrorist suspects by witnesses. In most cases, a witness is taken to the prison where, in the presence of a magistrate, he is asked to identify the suspect he saw committing the offense from among six or seven lined-up suspects. This is often carried out without special security for witnesses or the use of one-way glass to shield witnesses from observation, as is common practice outside Pakistan. Court rules need to be changed at the provincial level to reflect the protections laid down in the ATA.

Sindh province has come up with a law called the Sindh Protection of Witnesses Act, but it has not been implemented so far for lack of framing of rules, as well as lack of resources and adequate manpower to deal with it. Khyber Paktunkhwa experimented with carrying out trials through video link for ordinary crimes, but this does not seem to have worked and has been abandoned, primarily due to lack of interest by litigants and lawyers. Besides Sindh, no other province has any legislation on witness protection, indicating a general lack of awareness of the issue's importance. A comprehensive new section should be added to the ATA to provide guidance on protection measures for the justice system, instead of relying on the provinces to frame their own separate laws on this issue.

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### ***Role of Intelligence Agencies in Terrorism Cases***

Pakistan's civilian and military intelligence agencies do not have the legal power to arrest suspects. In practice, however, if they have some intelligence about a suspect, they often detain him for questioning before eventually transferring him to police custody. This may enable the intelligence agencies to follow up leads quickly, but the detentions do irreparable damage to the credibility of the legal case, as they violate a Supreme Court judgment of 1998 stating that all procedures laid down in the Criminal Procedure Code of Pakistan shall be followed in investigation of cases of terrorism. Police are forced to concoct a story about the arrest of the accused from a different place at a different time. This happens quite frequently, and is an important reason for acquittal in terrorism cases when initial intelligence is developed in the intelligence agencies. In one high-profile example, suspects in the 2008 Marriot Hotel bombing in Islamabad were acquitted after initially being picked up by an intelligence agency before later being transferred to the police.

The police and intelligence agencies must improve their coordination on terrorism-related arrests. The intelligence agencies need to be made aware of the serious consequences of their not following the provisions of the law. Again in the Marriott case, the accused was traced by identifying mobile phones active in the vicinity at the time of the attack, a technical capability only available to the intelligence agencies. There is a need for the provision of required technology to the police to enhance their capability to investigate and detect cases of terrorism.

Similarly, section 21EE of the ATA requires all agencies to provide all information to police officers investigating terrorism cases; a refusal to cooperate is liable to be punished under section 21 EE (3) for up to three years' imprisonment. Section 21 EE (2) states that all such information shall be kept confidential and not used for any purpose but trial in the ATC. Not many police officers are aware of this provision of law, and hardly any make use of it. Giving training to police officers in this provision can be very beneficial in getting more convictions in terrorism cases and increasing information-sharing between the police and intelligence agencies.

## **Recommendations**

The decision of the Pakistani parliament in January 2015 to set up military courts to try cases of terrorism is a serious indictment of the performance of the criminal justice system in dealing with terrorism cases. During the two-year period in which the military courts are set up, the government should take the time to evaluate and overhaul the criminal justice system's counterterrorism capabilities. This assessment should be holistic, covering the language of the law and its application by the police and judiciary, and should be independent, led by a judge of the Supreme Court.

Recommendations to make the ATA more effective in dealing with the terrorist challenge confronting Pakistan include the following:

- **Amendments to ATA definitions:** As noted earlier, the preamble of the ATA lays down the basic purpose and objective of the law, and the inclusion of otherwise undefined “heinous crimes” in the preamble widens its scope considerably. Additionally, the definitions of terrorist acts in section 6 of the legislation are in need of amendment to restrict the ATA’s application to those violent acts or attempts carried out to further a terrorist ideology, rather than broadly applied to all manner of crimes.

Additionally, amendments should be considered to widen the scope of the ATA’s restrictions on terrorist financing, kidnapping for ransom or extortion, or other crimes committed by terrorist organizations to raise funds. Amendments should be considered to the ATA to directly address the use of the Internet for terrorist recruiting or fundraising purposes, and to protect computer systems from sabotage and hacking by terrorists.

- **Enforcement of existing provisions:** The ATA lays down comprehensive prohibitions on the activities of members of banned militant organizations, but there is no implementation of these provisions regarding the prohibition of arms licenses, passports, travel abroad, and granting of financial facilities by financial institutions. There is an immediate need to develop a national database of banned organizations and their members, managed by the Federal Investigation Agency—which already maintains a national database of criminal fingerprints—and based on inputs from all national and provincial investigation and intelligence agencies. Access to this database should be granted to the relevant institutions.

Additionally, prohibitions under the ATA and the Anti-Money Laundering Act of 2010 should be enforced through the FIA’s Terrorist Finance Investigation Unit, which needs greater expertise, resources, and technology to enable it to investigate cases of terrorist financing effectively. There is also need to strengthen the existing cyber capability of the Counter Terrorism Wing of the FIA, to enable it to detect and investigate internet use for terrorist purposes.

- **Intelligence sharing and cooperation:** The role of intelligence agencies in counterterrorism needs to be streamlined in light of the judgment of the Supreme Court of Pakistan that procedures outlined in the Criminal Procedure Code of Pakistan have to be followed in cases covered by the ATA.<sup>22</sup> The intelligence agencies have to be made aware, through training and better coordination with law enforcement agencies, that arresting suspects without legal authority results in acquittal of dangerous terrorists.
- **Court case procedures:** The existing practice of appointing district and session judges as ATCs without any orientation or training is not helpful in enabling them to dispense justice under the ATA. Training programs for those judges who are appointed to ATCs are needed to familiarize them with ATA provisions. The Federal Judicial Academy has started such a course; this needs to be followed up by similar courses in the provincial judicial academies. There is an additional need to carry out orientation workshops for the superior judiciary, which hears appeals against the verdicts issued by the ATCs. It may be useful to carry out similar courses for police officers and prosecutors responsible for investigating and prosecuting cases of terrorism.

More broadly, the police are registering ordinary criminal cases under the ATA, overburdening the already overstretched criminal justice system. An advocacy campaign is needed to create awareness among the political leadership, police leadership, and civil society about the adverse effects of this practice on the fate of terrorism cases. Extensive training about the ATA needs to be organized periodically, for all ranks of police officers.

*The intelligence agencies have to be made aware, through training and better coordination with law enforcement agencies, that arresting suspects without legal authority results in acquittal of dangerous terrorists.*



- **Protection for justice system participants:** The fate of a terrorism case under the ATA rests largely on the security of witnesses. The investigation and trial procedures under the ATA need to be reviewed to ensure the greatest possible security for them, as well as for investigators, prosecutors, and judges. A case in point is the simple procedure of identifying suspects by eyewitnesses. The existing system exposes the witnesses to terrorists, so it is not possible for them to identify the suspects without grave threat to their security. These procedures are determined by the respective high court rules and orders, and can be changed by the respective high courts or proposed by the respective provincial home departments. The government can appoint a commission to study all aspects of security for witnesses in trials of ATA cases and develop measures to ensure maximum security for them.



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