

“HUMAN RIGHTS TO HUMAN TRAFFICKING”

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INTRODUCTION

“Men can co-exist on condition that they recognize each other as being all equally, though differently, human, but they can also co-exist by denying each other a comparable degree of humanity and thus establishing a system of subordination”

Claude Levi Strauss Trafficking is a word used to describe the illegal trade across borders of goods - especially contraband, such as drugs - for profit. Over the last few decades, the concept has been expanded to cover the illegal transport of human beings, in particular women and children, for the purpose of selling them or exploiting their labour.¹ Trafficking in human beings is a highly lucrative industry. It has been identified as the fastest growing criminal industry in the world.² It is a well established international phenomenon of recent times. Among the organized crimes, trafficking in human beings stands as the third largest category in terms of profit after drugs and arms smuggling. Human trafficking is a multidimensional form of exploitation which violates basic and inalienable rights of the trafficked victims.

One of the fastest growing areas of international criminal activity, trafficking in persons especially women and children has become a serious concern almost for all countries, regardless of whether they are countries of origin, transit or destination. It is a growing phenomenon involving transnational organized crime syndicates. Women and children have been trafficked for commercial sexual exploitation, forced marriages, illegal adoptions, organ trade, sex tourism and pornography, as domestic workers, labourers in sweat shops and on construction sites, as beggars, and for camel jockeys.

The increasing use of new information technology, in particular, the internet, has altogether added a new dimension to the problem faced. Poverty and economic deprivation the gap between the rich and the poor within countries and between different regions has especially made women more vulnerable to human trafficking. Lured by the hope of an improvement in their economic circumstances, they are often unwittingly duped and coerced into exploitative slave like situations. Trafficking, therefore, is regarded as a contemporary form of slavery and a gross violation of basic human rights of trafficked persons.³

Human trafficking is a highly complex process involving many actors-victims, survivors, their families, communities, and third parties that recruit, transport, harbour and use the labour of trafficked victims. Given its complex nature it has generally been found that trafficking is essentially a gender and age specific phenomenon affecting mostly women and children rather than men. There are undoubtedly instances of trafficking of men as well. However, trafficking in men in no way approximates the dimensions of trafficking in women and children. Men are generally smuggled or illegally transported, whereas, women and children are trafficked. Further trafficking has to be seen as part of the process of international migration as trafficking involves movement of people. Lopsided globalization of the late twentieth century has added to the problem by facing the movement of capital but restricting the movement of labour, by following respective migration policies. This has created extensive opportunities for illegal migrations, networks and trafficking to flourish. Trafficking also poses serious public health concerns. The victims of trafficking are most vulnerable to HIV/AIDS leading many organizations to address human trafficking issue while working on prevention of HIV/AIDS.⁴

Thus, the hypothesis of this research study rests on the presumption that human trafficking is an epidemic and the existing International and National laws do not have the teeth to curb this growing criminality. Also human trafficking is prevalent worldwide and the main reasons are said to be commercial sexual exploitation, organ trade, bonded labour, and begging. To end this menace, a comprehensive socio-legal study is required in order to strengthen existing legal setup so that there would be end to this grave form of human exploitation.

Importance and Relevance of the Study

Trafficking of human beings is an extensive problem in the modern world. It has been estimated that millions of people, the majority of whom are women and children, are trafficked worldwide each year. Virtually all states are affected by the menace of human trafficking. The traffickers are believed to make billions annually from human trafficking business. This study will address

¹ For details see: <http://asiasociety.org/policy/social-issues/human-rights/trafficking-children-prostitution-and-unicef-response>, (Accessed on 08.12.2018)

² For details see: http://en.wikipedia.org/wiki/human_trafficking, (Accessed on 08.12.2018)

³ GunjanKinnu, From Bondage to Freedom: An Analysis of International Legal Regime on Human Trafficking, National Human Rights Commission Publication, (2006), p. 1

⁴ JyotiSanghera, Trafficking of Women and Children in South Asia: Taking Stock and Moving Ahead, Project Sponsored by the UNICEF and Save the Children Alliance, New Delhi,(1999).p.7

the emerging dimensions of human trafficking with a critical evaluation of International and National legal framework. The focus however will be on the problem of human trafficking in India.

This study will help the government and the civil society to take adequate measures to curb this rising social problem and also to prevent the grave violation of basic rights of hundreds of human beings.

Moreover, this study highlights the thin line of distinction between migration, smuggling and trafficking. Many persons, who migrate willingly for various reasons are lured into trafficking and exploited beyond limits. The present study also analyses the problem as being deeply rooted in the socio-economic, political and cultural context of our society.

International Instruments

There are a variety of sources of State obligation in International Human Rights Law that potentially addresses the numerous human rights violations that accompany trafficking in persons. *The Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, 1949; the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the*

UN Convention against Transnational Organized Crime, 2000 and the SAARC Convention on Preventing and Combating Trafficking in Women and Children for Prostitution, 2000 are the thematic instruments on the issue of trafficking and hence would be analyzed in detail in separate chapters. This section therefore will focus only on other international instruments that provide basis for the special Laws on trafficking.

Universal Declaration of Human Rights (UDHR), 1948.

The United Nations Charter, which played a catalyst role in the human rights movement world over failed some how to define the fundamental freedoms and human rights. This task was fulfilled by the UDHR, adopted by the General Assembly on December 10, 1948,⁵ which elucidated the Charter provisions and defined expressly certain human rights and fundamental freedoms, which need to be protected. The Declaration is not a legally enforceable instrument, though some of the rights mentioned have become part of customary international Law, "others are merely general principles of Law and represent elementary consideration of humanity".⁶ *The rights enshrined in the Declaration in its 30 Articles are broadly divided into civil and political rights, and economic, social and cultural rights.* This Declaration, along with two other human rights Covenants that were adopted by the United Nations General Assembly in 1966, have today become the backbones of human rights jurisprudence the world-over. *The rights enshrined in the Declaration are set "as a common standard of achievement for all people and all nations". It is expected that States shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, both at national and international levels, to secure their universal and effective recognition and observance.*

International Covenant on Civil and Political Rights, 1966 (ICCPR):

This Covenant elaborates the political and civil rights identified in the Universal Declaration, which include the right to life, privacy, fair trial, freedom of religion, freedom from torture and equality before the Law. All these rights represent the first generation of human rights that are based on natural rights philosophy of the eighteenth century thinkers, like Rousseau. Some of the rights mentioned in the Covenant can be suspended in times of 'public emergency which threatens the life of the nation', provided that the derogation will not involve discrimination on grounds of race, colour, sex, language, religion or social origin. In no circumstances, in peace or war, is derogation permitted under the Covenant from the following fundamental rights: the right to life, recognition before the Law, freedom from torture and slavery, freedom of thought, conscience and religion, the right not to be imprisoned solely for inability to fulfill a contractual obligation, and the right not to be held guilty for committing a crime which did not constitute a criminal offence at the time it was committed.

Article 28 of the Covenant provides for the establishment of a Human Rights Committee, which monitors the implementation of the Covenant in a number of ways.

Two Optional Protocols elaborate on certain provisions of the Covenant on Civil and Political Rights, one provides mechanism for taking complaints from individuals, and the other advocates the abolition of the death penalty.

International Covenant on Economic, Social and Cultural Rights, 1966 (ICESCR)

The Covenant on Economic, Social and Cultural Rights, represents the second generation of human rights, which were propagated and recognized after the advent of socialism in the twentieth century. *Some of the rights recognized by this Covenant include the right to work; favourable conditions of work and equal pay for equal work; social security, an adequate standard of living including adequate food, clothing and housing.* The underlined idea behind this Covenant is that, without realization of economic, social and cultural rights, even civil and political rights cannot be realized. As human rights are interdependent and indivisible, this Covenant along with the Covenant on Civil and Political Rights needs to be looked into holistically as representing two important aspects of human rights jurisprudence. The monitoring body which oversees the implementation of the ICESCR is known as the Committee on Economic, Social and Cultural Rights. The ICESCR together with the ICCPR, Universal Declaration and the Optional Protocols comprise the International Bill of Human Rights.

Convention on the Elimination of All Forms of Discrimination against Women, 1979 (CEDAW)

⁵ GA Res. 217 (III), GAOR, 3rd Sess, official Records, Part I, Resolutions, p.71.

⁶ Cf. Corfu Channel Case (Merits) (1949) ICJ Rep., p.4 at 22. 58

The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) was adopted by the United Nations General Assembly on 18 December, 1979, and entered into force on 2 September, 1981. By now there are more than 150 States Parties to this Convention. *The object of the Convention is to implement equality between men and women and to prevent discrimination against women, in particular such specific forms of discrimination as forced marriages, domestic violence and less access to education, health care and public life as well as discrimination at work.* The Committee on the Elimination of Discrimination against Women, established under Article 17 of the Convention, considers periodic reports from States Parties regarding their compliance with the provisions of the Convention. The Committee makes general recommendations on specific Articles of the Convention, or on issues related to the Convention. In 1992, General Recommendation No. 19 was made on the issue of violence against women. The Recommendation defines gender-based violence against women to be violence as discrimination that is directed against women because she is a woman, or that affects women disproportionately. The Recommendation identifies poverty, unemployment and armed conflict as casual factors of trafficking and exploitation of prostitution of women.

The Optional Protocol to CEDAW enables individuals or groups of individuals to submit written individual complaints to CEDAW. However the complaint can only concern countries that are party to the Protocol.

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984.

Torture and other cruel, inhuman or degrading treatment or punishment are particularly serious violations of human rights and, as such, are strictly condemned by international Law. Based upon the recognition that such practices are outlawed, the Convention strengthens the existing prohibition by a number of supporting measures. *The Convention provides for several forms of international supervision in relation to the observance by States Parties of their obligations under the Convention including the creation of an international supervisory body - the Committee against Torture - that can consider complaints from a State Party or from or on behalf of individuals.*

The prohibition against torture is absolute and, according to the Convention, no exceptional circumstances whatsoever, including state of emergency or war or an order from a public authority may be invoked as a justification of torture. "Torture" is defined as:

".....any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to Lawful sanctions."

State Parties have the obligation to prevent and punish not only acts of torture as defined in the Convention, but also other acts of cruel, inhuman or degrading treatment or punishment, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

State Parties have an obligation to take effective legislative, administrative, judicial or other measures to prevent acts of torture from occurring on their territories. Measures mentioned in the Convention include the prohibition and punish ability by appropriate penalties of all acts of torture in domestic criminal Law; education and information regarding the prohibition against torture to be fully integrated into the training of Law enforcement personnel, civil or military, medical personnel, public officials and others; the systematic review by State Parties of interrogation rules, instructions, methods and practices as well as of arrangements for the custody and treatment of suspects, detainees and prisoners; guarantees for the prompt and impartial investigation by competent authorities into allegations of torture; the protection of witnesses; and the possibility for victims to obtain redress and fair and adequate compensation and rehabilitation.

In addition, State parties have an obligation not to expel, return or extradite a person to another State where he or she would be in danger of being subjected to torture. An act of torture is required to be made an extraditable offence and a State Party is to take measures to establish its jurisdiction over crimes of torture committed in any part of its territory by one of its nationals and when an alleged offender is present on its territory and not extradited.

In order to monitor and review actions taken by States parties to fulfill their obligations, the Committee against Torture has certain procedures at its disposal. The first is the obligation for all State Parties to submit periodic reports to the Committee for examination, which results in the adoption of recommendations by the Committee to the State Party in question. A particular feature of the Convention is that if the Committee receives reliable information indicating that torture is being systematically practiced in the territory of a State Party, the Committee may decide to initiate a confidential inquiry of the situation. Such inquiry would be carried out in cooperation with the State Party concerned and would include country visits. The Committee can also consider complaints from individuals who claim to be victims of a violation by a State Party to the Convention. This may be done only if the State Party concerned has declared that it recognizes the competence of the Committee to receive and examine such complaints.

The monitoring body is the Committee against Torture and the articles relevant to trafficking from the Convention are:

Torture is an act where severe pain or suffering, physical or mental, is intentionally inflicted for purposes: intimidation of coercion; by person acting in official capacity. **(Article 1)**

No expulsion or return of a person to another state if substantial grounds exist for believing that person would be in danger of torture. **(Article 3)**

Alleged victims of torture have the right to complain to and have their cases promptly and impartially examined by competent authorities. Complainants and witnesses shall be protected against any consequential ill treatment or intimidation. **(Article 13)**

Redress and Right to Compensation. **(Article 14)**

Convention on the Rights of the Child (CRC), 1989

CRC⁷ deals directly with trafficking in children especially girl children, under the age of 18, unless, majority is attained at an earlier age under domestic Laws. State Parties are to take all appropriate natural, bilateral and multilateral measures to prevent the abduction of the sale of or traffic in children for any purpose or in any form. Children are also protected from all forms of economic exploitation, sexual exploitation and sexual abuse. While the language of the CRC on these points is strong, it has been noted that the effect of these provisions is weakened by the conventions failure to require State Parties to criminalize particular forms of conduct such as trafficking or to assume extraterritorial criminal jurisdiction in respect of such conduct. The Convention's failure to explicitly protect the child from non-State interference is also problematic. Nevertheless, the fact that Convention makes provisions for Laws to be enacted in the 'best interests' of the child; it takes into account the special needs of a child.

Enforcement of the obligations set out in the CRC is mainly conducted through a reporting mechanism, similar to that for CEDAW. The State Parties report to the Monitoring Committee on the Rights of the Child. The Children's Convention broadens the possible scope of international cooperation on this Convention. The specialized agencies, particularly the United Nations Children's Fund (UNICEF) and other United Nations organizations, may be represented at the consideration of the implementation of provisions of the children's convention that fall within these organization's mandates or they may submit reports on such implementation. The relevant provisions of the convention are:

In all actions concerning children, the best interests of child shall be primary considerations. **(Article 3)**

Every child has a right to life. **(Article 6)**

Every child has a right to name and nationality. **(Article 7)**

Ensure that no child is separated from his or her parents against their will except in cases where it is determined that separation is necessary for the 'best interests' of the child. **(Article 9)**

Take measures to combat the illicit transfer and non-return of children abroad. **(Article 11)**

Legal protection from arbitrary or Unlawful interference with privacy, family home or correspondence and Unlawful attacks on honour or reputation. **(Article 16)**

Protection against physical or mental violence, injury, abuse, neglect or negligent maltreatment or exploitation, including sexual abuse. **(Article 19)**

No child is to be deprived of his or her right to health. **(Article 24)**

Every child has the right to education. **(Article 28)**

Every child has the right to rest and leisure, engage in play and recreational activities. **(Article 31)**

Children are to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education or to be harmful to the child's health or physical, mental, spiritual, moral or social development. **(Article 32)**

Protect children from the illicit use of narcotic drugs and psychotropic substances. **(Article 33)**

Protect children from all forms of sexual exploitation and sexual abuse. **(Article 34)**

Protect from abduction, sale or traffic in children for any purpose or in any form. **(Article 35)**

Protect against all other forms of exploitation prejudicial to child's welfare. **(Article 36)**

Children are to be kept free from torture or other cruel, inhuman or degrading treatment or punishment. Further, no child is to be deprived of his or her liberty Unlawfully or arbitrarily. **(Article 37)**

Promote physical and psychological recovery and social reintegration of a child victim. **(Article 39)**

Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, 2000

The *Optional Protocol to the Convention on the Rights of the Child purports to extend the reach of the Convention's provision in relation to sale of children, child prostitution and child pornography*. The Protocol addresses the weaknesses of the CRC by addressing the sale of children as an international crime and requiring States Parties to criminalize and establish extraterritorial jurisdiction over the relevant acts. Some States and NGOs have argued that certain of its provisions are, in fact, weaker than those of the Convention.

Slavery Convention, 1926.

The 1926 Slavery Convention was the first international legal instrument to refer to the undefined practices of forced and compulsory labour. State Parties to the Convention undertook to adopt all necessary measures to prevent compulsory or forced labour from developing into condition analogous to slavery.

Under the Slavery Convention,⁸ States Parties undertake to prevent and suppress the slave trade and to bring about, progressively and as soon as possible, the complete abolition of slavery in all its forms, including slavery-like practices including debt-bondage, serfdom, forced marriage and sale/transfer of children for labour exploitation. The Convention has no monitoring committee.

⁷ Convention on the Rights of the Child, UN.DOC A/RES/44/25, entered into force Sep. 2, 1990.

⁸ Slavery Convention, 212 U.N.T.S. 17, entered into force Mar. 9, 1927, amended Convention entered into force Jul. 7, 1955.

Convention on Protection of the Rights of All Migrant Workers and their Families 1990.

The Migrant Workers Convention⁹ sets out comprehensive protection standards. The Convention applies to both documented (legal) and undocumented (illegal or irregular) migrant workers. It stipulates that migrant workers must not be held in slavery or servitude and that forced labour must not be demanded of them. States Parties must provide for sanctions against persons or groups. The entry into force of the new Convention on 1 July 2003 marks advancement on the basic principles regarding laborers laid down in the two ILO Conventions. But the worrying point is that primarily emigration countries where migrants originate have ratified it since 1993. So far none of major host countries of migrants or immigrants has ratified the Convention. This has to be seen in the background that the number of people living and working outside their countries of origin has doubled since 1975 to a global total of 175 million representing about 3 per cent of world's population¹⁰. This Convention can only be helpful if the world's host countries ratify the convention and promise to provide protection to the migrant workers.

ILO Convention No. 29 on Forced Labour, 1930

The definition of forced or compulsory labour was first articulated in the 1930 ILO Forced Labour Convention.¹¹ Under the 1930 Convention, the term refers to "all work or service that is extracted from any person under the menace of any penalty and for which they said person has not offered him voluntarily".¹² The 1930 Convention requires the criminalization of forced or compulsory labour¹³ in all but a limited range of circumstances and imposes a duty on States Parties to suppress the use of such practices within the shortest possible period¹⁴ as well as to prosecute violations¹⁵.

The monitoring body of all ILO Conventions is the Committee of Experts on the Application of Conventions and Recommendations.

ILO Convention No. 105 on Abolition of Forced Labour, 1957.

The Convention¹⁶ on Abolition of Forced Labour, 1957 suppresses all forms of forced labour as a means of racial, social national or religious discrimination. It calls for effective measures to secure the immediate and complete abolition of forced labour. State Parties are held accountable for the actions of corporations and private persons.

The Convention further defines "debt bondage" as "the status or condition arising from a pledge by a debtor of his personal services or those of a person under his control as security for a debt, if the value of those services as reasonably assessed is not applied towards the liquidation of the debt or the length and nature of those services are not respectively limited or defined"¹⁷ and also defines victim of debt bondage as a "person of servile status"¹⁸.

ILO Convention No. 182 on the Worst Forms of Child Labour, 1999.

The Convention¹⁹ acknowledges that the effective elimination of the worst forms of child labour, which includes child prostitution, and all forms of forced labour for which victims of trafficking are used, require immediate and comprehensive action, taking into account the importance of free education and the need to remove children concerned from all such work and to provide for their rehabilitation and social integration while addressing the needs of their families. States Parties are required to take all necessary measures to ensure the implementation and enforcement of the Convention "including the provision and application of penal and other sanctions, as appropriate".

UN General Assembly Declaration on Violence against Women, 1993.

The Declaration on Violence against Women²⁰ covers all forms of gender based violence within the family and the general community²¹ as well as violence "perpetrated or condoned by the State wherever it occurs".²² This Declaration sets out the

⁹ International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, 30 ILM1517, adopted by General Assembly Resolution 45 /158 of 18 December 1990 entered into force on 1 July 2003.

¹⁰ The International Migration Report, 2002, United Nation Population Division, UN Publication, New York. Also available at www.un.org/esa/population/publications/ittmig2002/ittmigrep2002.htm-9k

¹¹ The ILO definition would apply, for example, to the reference of forced labour contained in the Trafficking Protocol

¹² ILO Convention No. 29 concerning forced or Compulsory Labour (1930) International Labour Conventions and Recommendations Vol. I, pp. 115-124, Article 2.

¹³ ILO Convention No. 29 concerning forced or compulsory labour (1930), Article 25.

¹⁴ ILO Convention No. 29 concerning forced or compulsory labour (1930), Article 1.1.

¹⁵ ILO Convention No. 29 concerning forced or compulsory labour (1970), Article 25.

¹⁶ Convention (No 105) concerning the Abolition of Forced Labour, adopted on Jun. 25, 1957 by the 66

¹⁷ General Conference of the International Labour Organisation, entered into force Jan. 17, 1959.

¹⁸ Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices similar to Slavery, Article. 1(a). Ibid, Article. 7(6).

¹⁹ Convention (No 182) concerning the Worst Forms of Child Labour, adopted on Jun. 17, 1999, by the General Conference of the International Labour Organisation.

²⁰ Declaration on Violence against Women, 1993 UN Doc A/RES/48/104

²¹ Ibid, Articles 1 and 2.

internationally agreed definition of violence against women as, "any acts of gender based violence that results in or is likely to result in physical, sexual or psychological harm or suffering to women including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or private life".

The Convention imposes an obligation on States to "exercise due diligence to prevent, investigate and punish acts of violence against women whether these are perpetrated by the State or private persons."²³ As a resolution of the General Assembly, the Declaration does not have force of Law. However, its potential capacity to contribute to the development of a customary international norm on the issue of violence against women should not be discounted.

CONCLUSION AND SUGGESTIONS

Human Trafficking is a modern form of slavery. Slavery which has been in long existence still continues in the present era. It is quite shame to live in a society where human of some sections of the people is not respected. The life of some of the sections of the society has been worst by people who treat such categories of person as a commodity to make monetary gain.

The researcher discussed the causes which are responsible for the existence of the problem of human trafficking. Out of various factors, the researcher considers poverty to be the main reason behind trafficking of such category of person. Women and children are targeted by the traffickers to trade these persons for commercial exploitation. Still other factors are also important which cannot be neglected.

The researcher discussed about the international instruments as well as the regional instruments to deal with human trafficking. The researcher made a comprehensive and in-depth analysis of the international mechanisms. Constant efforts are being made at the international as well as regional level to deal with this issue. But, mere having these international obligations won't suffice unless State stake imitative at the national level to frame comprehensive anti-trafficking laws in accordance with international standards. Judiciary's role has been examined in addressing the issue related to trafficking. The researcher found that even though judiciary has given many landmark judgments on this issue, still trafficking has remain neglected because of several factors like under-reporting of cases, loopholes in the existing system which allows the traffickers to escape from punishment and police machinery fail to collect wrong evidence against the accused. There exists huge scope for judicial intervention which needs to handle sensitively and not merely as technical aspect of law to ensure proper justice understanding the complexity of the situation.

At last, the researcher came to understand that human trafficking is an issue that violates the basic fundamental rights and dignity of the victims and therefore it essentially requires human rights approach while working on its eradication. The problems inherent in developing and applying rights based approach to human trafficking needs to be addressed openly and honestly. The significant obstacle is presented the fact that international, regional and national legal instruments on trafficking in human beings do not deal with the problem in any concrete and reliable way. Therefore, it becomes an ultimate responsibility of every state to take appropriate action against violators and afford remedies and reparation to those who have been injured.

As seen trafficking in persons can occur in either lawful and illicit industries or markets. India is a source, transit and destination country for these human beings who are subjected to this injustice trafficking forced labour, debt bondage, involuntary servitude and sex trafficking.

The suggestions as given by the researcher need to be effectively implemented for filling the lacunae in the system.

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