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## HOMOSEXUALITY: FROM VICTORIAN TO CONSTITUTIONAL MORALITY

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### ABSTRACT

This research paper is the overall study of homosexuality in India; from our ancient scriptures to its final decriminalization. This will give an insight on the history aspects and existence of the homosexuals in our ancient history and then also how this became a criminal offence by the implementation of the Indian Penal Code. The paper further covers the legal journey of the homosexuality from the Victorian to the constitutional morality which took 74 years and a two decade long legal journey. The role of the judiciary is also been discussed later in the paper and how judiciary of any country can change the perspective of any society is also discussed through various judicial developments in the same matter. So this paper is an insight into the complete journey of the homosexuality in India, from Codification of Crime in 1860 to decriminalization in 2018.

### INTRODUCTION

In this modern world of governance, when the basic and foremost function of any government revolves around maintaining and creating welfare state for the citizens, the concept of constitutional morality plays an important role. India being a democracy country, tries to maintain the same either through its legislature or the judiciary. The constitutional morality was

for the first time discussed by Dr. B.R. Ambedkar in our constituent assembly<sup>3</sup>. While explaining the same context, in one of his speech in the assembly, Dr. Ambedkar quoted George Grote stating that,

“The diffusion of ‘constitutional Morality’, not merely among the majority of any community, but throughout the whole is the indispensable condition of a government at once free and peaceable; since even any powerful and obstinate minority may render the working of a free institution impracticable, without being strong enough to conquer ascendance for themselves”<sup>4</sup>

While framing the constitution, the concept of constitutional morality was highlighted by Dr. Ambedkar, he said that, ‘our constitution is not only for the people holding the majority but also for the ones in the minority, this also described that the basic meaning of the constitutional morality is that the government should work in accordance with the principles or the pillars of the democracy’<sup>5</sup>. In order to enroot this principle of constitutional morality article 13(1)<sup>6</sup> was inserted in our constitution stating that if any colonial law is inconsistent with the fundamental of our constitution, be declared void. Since then this article is being helpful in safeguarding the interests of the individuals from the legislature, some examples are The Criminal Tribes Act<sup>7</sup> which used to criminalize the existence of eunuchs.

After Independence government’s priority was to frame a strong constitution and maintain the economy of the nation, so major focus was on land acquisition and similar laws, nobody paid any heed to other arbitrary provisions framed by British government based on Victorian morality; a set of principles based on the ideology and concepts of the common law and the Church. One of such legislations was section 377 of Indian Penal Code, 1860 which talks about criminalizing the act of Sodomy and the act of carnal intercourse against the order of the nature. The Section was indirectly Criminalizing homosexuality in the veil of sodomy and was proving a way to prosecute homosexuals.

The issue was widely debated, sometimes by social workers and sometimes just for political agendas. Judiciary finally in 2018 put a stop to all these debates.

## HISTORY

The victory of homosexuals of attaining the constitutional status was not the easy one; it was one long journey and also an important part in order to understand their struggle. This all started long before the filling of the first case,

**History of the Act:** When the debate of homosexuality officially started, the one common argument against this was, “this is against our Indian Culture”. This is partially true because same-sex love in India is seriously under researched as compared to other countries. But the fact that something is under researched does not deny its existence.

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<sup>3</sup>Andre Beteille, “Constitutional Morality” Vol. 43 Economic and Political Weekly 35-42 (2008)

<sup>4</sup> Grote, “A history of Greece” (Routledge, London, 2000) 93

<sup>5</sup>“ Constitution of India: Constituent Assembly Debates” available at:

[https://www.constitutionofindia.net/constitution\\_assembly\\_debates/volume/7/%C2%AD1948-11-04](https://www.constitutionofindia.net/constitution_assembly_debates/volume/7/%C2%AD1948-11-04) (Last Visited on February 14, 2021)

<sup>6</sup> The Constitution of India, 1950, Article 13

<sup>7</sup> The Criminal Tribes Act (VI of 1924)

Same-sex live is being discussed in various writing, scriptures, artworks and literatures and many of them are globally recognized works like Manu Smriti and Arthashastra talks about this as punishable offence<sup>8</sup>. But if we look into Kama sutra; the first and well known literature talked about human sexuality, 'Swarinis' is the term used there to describe two women who often get married and raised children together whereas 'kilbas' is the term used for gay men. It is said that here the same-sex relationships were 'accommodated rather than authorized'<sup>9</sup>

Cave carvings in Khajuraho confirm not only the presence but the acceptance of the homosexuality in our ancient culture as they depict women intimately embracing each other and some also depicts men doing the same to each other.<sup>10</sup> Various instances are mentioned in our mythologies as well, like Bhagirath, famous as the one who brings River Ganga to earth, was born after the sexual intercourse between two queens. As per the story due to the sudden and early death of the king, the kingdom was left with no heir, so queens prayed to lord Shiva who gave them the blessing that they will have a boy if they make love to each other and the same happened<sup>11</sup>.

The concept of homosexuality is not peculiar to Indian Culture and definitely was not the western one; instead it was prevalent and well accepted in our history. So now the question arises is this, that what happened that this became a crime.

**History of the Anti Homosexual Laws: Section 377:** Although, homosexuality was never considered as a crime in Indian society, but then in 17<sup>th</sup> century Victorian morality escalated in country's administrative and legal system. In early 19<sup>th</sup> century, the work to frame a uniform criminal legislation was assigned to the First Indian Law Commission under the chairmanship of Thomas Babington Macaulay which was passed by the legislative council in 1860 and became 'The Indian Penal Code, 1860'<sup>12</sup>. The most ironic thing about the process was, although this code was for the citizens of India, but nor there were any Indian as a member of the commission neither this code was discussed by any person of Indian roots.

Lord Macaulay being a great jurist and a man of great precision reflected all these qualities in the code. However, there was one class of offences that Macaulay found so abhorrent that it was left delightfully vague, this became section 377<sup>13</sup>. And apart from this, in his introductory report of the code, Lord Macaulay mentioned that,

“[We] are unwilling to insert, either in the text or in the notes, anything which could give rise to public discussion on this revolting subject; we are decidedly of opinion that the injury which would be done to the morals of the community by such discussion would far more than compensate for any

<sup>8</sup> “What do Manusmriti and Dharmashastra have to say about homosexuality?”, available at: <https://qrius.com/what-do-manusmriti-and-dharmashastra-have-to-say-about-homosexuality/> (Last Visited on February 15, 2021)

<sup>9</sup> Ruth Vanita, “Vatsyayana's Kamasutra”, in Ruth Vanita, Saleem Kidwai (eds.), Same-sex Love In India 54-62 (Penguin Random House, 2008)

<sup>10</sup> Charukesi Ramadurai, “India's Temple of Sex” available at: <http://www.bbc.com/travel/story/20150921-indias-temples-of-sex> (Last Visited on February 15, 2021)

<sup>11</sup> Ruth Vanita, “Krittivasa Ramayana: The Birth of Bhagiratha (Bengali)”, in Ruth Vanita, Saleem Kidwai (eds.), Same-Sex Love in India: A Literary History 115-119 (Penguin Random House, 2008)

<sup>12</sup> K. Kannan, Anjana Prakash (eds.), The Indian Penal Code 1 (LexisNexis, Delhi, 36<sup>th</sup> Edition)

<sup>13</sup> Saurabh Kirpal, “Pride and Prejudice: The Struggle Against Section 377”, in Saurabh Kirpal (eds.) Sex and the Supreme Court how the law is Upholding the dignity of the Indian Citizens 28 (Hachette India, Gurugram, 2020)

benefit which might be deprived from legislative measure framed with the greatest precision.”<sup>14</sup>

This section was framed in such a way that it does not explicitly criminalize homosexuals but just the homosexual activities. The above statement also specifically reflects that while framing this code more importance was given to the social morality than to the principles of Constitutionalism. Initially the act of oral sex was not included in this section as it would not amount to the act of sodomy, but after the case of *Khanu v. Emperor*<sup>15</sup> where a minor was forced to perform oral sex on an older man, the act of oral sex was included in the ambit of the same.

Sodomy was decriminalized by the former colonial master in 1967 through the Sexual Offenders Act 1967<sup>16</sup> and Indians were so brainwashed by the Victorian mindsets that they forgot all about their past, their Kamasutra and their Khajuraho, everything, resulting which this so-called sodomy law remained in the system. For a long time, nobody raised any voice against this and even after the suggestion of removal of the same in the 172<sup>nd</sup> law commission on Rape Crimes, neither the legislature nor judiciary bothered to act on the same.

### **AIDS AND HOMOSEXUALITY**

Half a decade had passed since the independence, the law was same and unfortunately the society too, homosexuality was still considered as sin or some sort of illness. The situations got worsened with the start of the AIDS epidemic. The conservative mindset of society gave rise to the MSM community; MSM stands for men-who-have-sex-with-men they do not want to come out of the closet, instead want to be “normal” and have a family<sup>17</sup>. So they get married, hide their sexuality from their wives and have extra-marital affair with random men. Due to such intercourse with multiple partners, the case of AIDS increased rapidly amongst them and their wives, leading to the creation of wrong image of homosexuals as the ‘bearer of AIDS’.

In 1989, ‘AIDS Prevention Bill’ was introduced in Rajya Sabha which was arbitrarily giving extraordinary and unlimited powers to the medical practitioners which might result in infringement of right to privacy of the patients and another tool in the hands of the executive to exploit AIDS patients and homosexuals, some provisions even allowed them to test, isolate and interrogate the patient and the authority to seek all the information about the patient’s sexual history and their sexual partners<sup>18</sup>. Here, if any homosexual got caught and by any chance the information about his/her partner was out, that person would be prosecuted under section 377. And even if the patient was heterosexual, still this was violating their privacy. Bill was rejected on similar grounds and thankfully never became an act.

Even rejection of the bill did not change anything, bill was merely a legislative provision; here the problem was the mind set of people, discrimination remained the same. Society was against the concept of homosexuality; even a so-called feminist organization denied even the existence of lesbians in our country. Not only the common citizens but our politicians were also against

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<sup>14</sup>Ibid

<sup>15</sup> AIR 1925 Sind 286

<sup>16</sup>Sexual Offenders Act, 1967 (1967 c. 60)

<sup>17</sup> R. Raj Rao, “Criminal Love? Queer Theory, Culture, and Politics in India” 3 (Sage Publication India, 2017)

<sup>18</sup>Supra note 13 at 4

this concept and they freely showed their disagreement by condemning the holding of “the south Asian Gay Conference”<sup>19</sup>.

The agitation continued but nothing concrete happened till 1991 when for the first time, a detailed report titled, “Less Than Gay: A Citizens’ Report on the Status of Homosexuality in India” was published by Siddharth Gautam along with his team of AIDS Bhedbhav Virodhi Andolan (ABVA) containing the brief of all sorts of discrimination, exploitation and barbarism in practice against homosexuals, especially by the authorities<sup>20</sup>. The report was extremely thorough but still it failed to make an unexpected impact because of lack of courage in the media houses to print something of this sort. There were some publications like Bombay Dost etc. who have published various pieces but they lacked viewership.

In 1994 Tihar Jail became the hotspot for the AIDS due to increase in sexual activities among the inmates, considering the same a team of medical practitioners advised the distribution of condoms in the jail cells, but this was refused by then jail In-charge, Kiran Bedi, while accepting the fact that such activities are very common among the inmates, she still refused the distribution of condoms on the ground that this may amount to the official affirmation to the homosexual activities and that would be against section 377<sup>21</sup>. The writ was filed on the ground that the section violates the right to privacy of the individual enshrined as the ‘right to life and liberty’ in Article 21<sup>22</sup> and the provision no more holds any validity as per our constitutional values as since it was drafted back in 1833. The petition was unfortunately dismissed and one major reason behind the same was this that privacy was not any established right but was still under debate. Another reason was lack of legal assistance available to the NGO and the sudden death of Siddharth Gautam, their lead advocate, made the situation much more worse and the case was duly dismissed.

### **THE DECRIMINALIZATION: NAZ FOUNDATION JUDGMENT**

The petition filed by ABVA although unsuccessful but it did encourage others to knock the doors of the courts. Another petition was filed in the Delhi High court by the Naz Foundation. The petition was filed after an incident took place in 2000’s when young man was forcefully given electro-shock treatment at one of the government hospital in order to cure his homosexuality. He approached Naz Foundation after which Naz knocked the doors of National Human Rights Commission but were dismissed on the ground that homosexuality is a penal offence under section 377 so they cannot register any complaint against the hospital<sup>23</sup>. Soon Naz realized that the boy was not the only one who was assaulted for having different sexual orientation, every second person of LGBTQ community, one time or another has faced such assault or discrimination and they have nowhere to go to demand justice because of section 377. So via writ petition they have challenged this interpretation of the section in 2001.

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<sup>19</sup>Ibid

<sup>20</sup> AIDS Bhedbhav Virodhi Andolan, “Less Than Gay: A Citizens’ Report on the status of Homosexuality in India” (1991)

<sup>21</sup>Abhiudaya Verma, “Legal Journey of Section 377- Relentless Battle of Expression and Recognition” available at: <https://lexquest.in/legal-journey-of-section-377-a-relentless-battle-of-expression-and-recognition/> (Last Visited on February 15, 2021)

<sup>22</sup>The Constitution of India, 1950; Article 21

<sup>23</sup>Supra note 13 at 4

In 2004 the Naz petition started with chaos when it was rejected by the high court on the ground that NGO not being the affected party do not have any locus standi. Then they approached the Supreme Court who ordered high court to hear the matter on the grounds of merit instead of rejecting it because of technicality and the case finally started with Chief Justice Ajit Prakash Shah and Justice Muralidhar in 2009<sup>24</sup>.

Many interesting turn of events took place during the hearing of the Naz case which started from the contradictory affidavits filled by the different ministries of the government which eventually showed that this debate of decriminalization of homosexuality is also ongoing within the government and that became the first ray of hope for the petitioners. Ministry of home affairs supported religious communities and took their stands against the decriminalization of section 377 by arguing that homosexuality is against our Indian culture and will harm our public morality whereas the affidavit filed by the National AIDS Control Authority (NACO), though the Ministry of Health and Family Welfare was contradictory to theirs and was supporting the Naz petition by arguing that it is already very difficult to control and manage AIDS and the criminalization of homosexuality made it more difficult<sup>25</sup>. The 1994 petition was also filed by taking AIDS as a major ground but was unfortunately dismissed, but this time it worked and AIDS became a major reason for the decriminalization. The High court in 2009 in a short but well briefed judgment decriminalized the sexual act between two consenting adults in private.

Apart from the fact that it decriminalized the homosexuality, this less than 100 pages judgment had many more important features, some of them were even not discussed later in the Navtej Judgment. Those were:

- **Sexual Orientation inclusive in article 15:** The section was challenged on the grounds that it was violating the fundamental rights, by interpreting article 15 and stating that ‘sexual orientation’ is inclusive in the word ‘sex’ given as the ground of the discrimination, high court nodded in affirmation<sup>26</sup>.
- **Constitutional Morality:** The concept of constitutional morality was for the first time discussed in this case. The court made this very clear that when public morality and constitutional morality were in conflict; constitutional morality shall stand out and prevail and similarly dismissed the plea of Ministry of Defense. This concept was discussed further in detail in Navtej Judgment.
- **Mention of abuse:** the point that this judgment explicitly talked about the sexual violence and discrimination against the homosexuals made it more special. Court briefly discussed two cases; ‘The Lucknow Incident-2002’ where the office of **Bharosa Trust**, an NGO was raided and the educational materials were seized as pornographic materials, the founders was alleged of running a sex racket. Another was ‘The Bangalore Incident-2004’ where a eunuch was brutally assaulted and gang

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<sup>24</sup> “A Look Back At Those Who Aided, and Hindered, the Fight Against Section 377”, available at: <https://thewire.in/lgbtqia/lgbtq-sc-section-377-homosexuality> (Last Visited on February 18, 2021)

<sup>25</sup> Anjaneya Das, “Gay and Transgender Rights in India: Naz Foundation V. Government of NCT of Delhi” available at: <http://ssrn.com/abstract=1701077> (Last Visited on February 17, 2021)

<sup>26</sup> Naz Foundation v. Government of N.C. TDelhi, (2009) 160 DLT 277

raped by a group of young men and then was stripped naked and handcuffed to the glossy window and assaulted in the police station.<sup>27</sup>

After hearing all these argument, the contentions made by the government and some private parties demanding stay of section 377 was rejected and consensual sex between two adults in private was decriminalization.

### **PLEA AGAINST DECRIMINALIZATION: KOUSHAL PETITION**

After the 2009 High Court Judgment, everybody was celebrating the perfectly briefed judgment of the high court, and the point where even the government did not file any appeal against the judgment made it more special. Homosexuality was becoming the hot topic of discussions in various news channels, pride parades and seminars were being organized, people were conduction study on the difficulties faced by homosexuals, all this change was slowly changing the mindset of the society and they were steadily accepting them homosexuality as merely a choice of living and not a crime.

Amongst all the celebrations, Suresh Koushal, a so-called woke citizen of our country filed a petition against Naz Judgment which lead to the most controversial Judgment of the Supreme Court: Suresh Koushal and ors. V. Naz Foundation<sup>28</sup>. A division bench of J. G.S. Singhvi and J. S.J. Mukhopadhyay overruled the Naz Judgment of the high Courtafter finding its declaration to be 'legally Unstable'and said that it is up to the legislature that what they want to do with that legislation<sup>29</sup>.

The Supreme Court while accepting the appeal and making homosexual act again a crime reasoned that:

- Legislations, whether pre or post constitutional, is the will of citizens of India through the legislature, it is up to the legislation to decide whether the section should remain or not.
- Reference of Khanu v. Emperor<sup>30</sup> was given to prove homosexuality as an unnatural offence.
- Section 377 was interpreted in the same way as done by Lord Macaulayand said that this does not specifically criminalize the existence of any community or group of people but something which is against the order of the nature, so there is nothing problematic.
- Further they stated that this law only criminalizes the persons who have carnal intercourse against the order of the nature and not those who have carnal intercourse in an ordinary way and the group of people falling in the former category cannot say that section is arbitrary, as they are doing things against the order of the nature. This was the most conservative reasoning by the court and shocked every single person in the court room.
- Finally while overruling the judgment and answering the question of fundamental rights, court said that people affected form this law are not even minority but the minuscule

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<sup>27</sup>Supra note 26 at 8

<sup>28</sup> 2014 (1) SCC (1)

<sup>29</sup>Oindrilla Mukherjee, "Suresh Kumar Kaushal v. Naz Foundation: A Critical Analysis" available at: <https://www.lawctopus.com/academike/suresh-kumar-koushal-vs-naz-foundation-critical-analysis/> (Last Visited on February 18, 2021)

<sup>30</sup>Supra note 15 at 4

fraction of the society, they look back at the stats that over past 150 years only 200 people were convicted for the same, so no question of any provision violating article 14, 15, 19 and 21 comes<sup>31</sup>.

And on 11<sup>th</sup> December 2013, India took a step back in the journey towards the constitutionally moral state.

### **CURATIVE PETITION: AFTERMATHS OF KOUSHAL JUDGMENT**

While the people of LGBTQ community were still trying to digest that their love is again criminal, the team of lawyers were getting ready to stand up and fight back. A curative petition was filed, but that road was harder than the usual one, the process of was very complex to avoid unnecessary flood as happened with the PIL's. The certificate from the senior council of the Supreme Court was necessary, fortunately in this case many senior counsel heartily gave the certificate, and they even approached Chief Justice requesting a priority based hearing on the same as the curative petition is a matter related to soul of both the constitution and the Supreme Court<sup>32</sup>. The curative petition was listed for hearing but that too had its own limitations, the court cannot change its own decision unless there is major fault in the interpretation of substantive question of law. So the hopes from the curative petition were diminishing. And while hearing the same, the court said we cannot understand the plea of homosexuals as they have never approached any court for any sort of relief.

Court has now already listened to every possible argument of NGO'S and from the people opposing the existence of homosexuality in the 2 decade long legal journey. The only thing which could have changed the history was homosexuals themselves by appearing in the court and proving that they are not just the minuscule minority<sup>33</sup>, but are equal citizens of the nation who deserves equal protection of the constitution. Then something happened which nobody expected but everybody prayed for, six reputed successful Indian citizens in their mid 40's all belonging to LGBTQ community, came forward and took the risk of losing everything by filled a petition in their own name, the case was registered by the name of Navtej Singh Johar v. Union of India<sup>34</sup>.

### **HOMOSEXUALITY, NO MORE A CRIME: NAVTEJ JUDGMENT**

Initially everybody expected that the curative petition and Navtej Petition will be heard together, but this time Supreme Court was in the mood of correcting every wrong. Johar case was scheduled to be heard in September 2018 separately. Meanwhile in between filling of the primary petition in 2016 and date of hearing in 2018, many other people from around the country, some homosexuals some allies, filled their own petitions and all those were merged with the Navtej Singh Johar's one. This time that 8% of the population was ready to stand tall before the court and narrate their story in their own words and that thing worked.

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<sup>31</sup>Supra note 27 at 9

<sup>32</sup>"Vishnupriya Bhandaram, "Rainbow at end of the tunnel? Curative Petition on section 377, last legal remedy to toss draconian law out" available at: <https://www.firstpost.com/india/rainbow-at-the-end-of-the-tunnel-curative-petition-on-section-377-a-last-legal-remedy-to-toss-draconian-law-out-2605384.html> (Last Visited on February 18, 2021)

<sup>33</sup>Supra note 28 at 9

<sup>34</sup>AIR 2018 SC 4321



The day of 6<sup>th</sup> September 2018, the judgment day, the court room was flooded with people, calm and anxious people, waiting to know about their future in their own country. 5 judges gave 4 different but concurring Judgments.

The major aspects of these judgments were;

- A person of any alternate sexuality is free to choose any partner of their own choice irrespective of their gender.
- Right to choose one's own sexual partner is a part of included in the right to privacy under Article 21<sup>35</sup>.
- The judgment extensively talked about the importance of dignity and autonomy for fulfillment of the right to privacy.
- It is the duty of the constitutional court to invalidate any law infringing the dignity or autonomy of any individual.
- Concept of Constitutional Mortality and Transformative constitutionalism was discussed extensively for the first time, although the mention of the same was done in Naz Foundation Judgment<sup>36</sup>.
- The judgment made it very clear that in Democracy Constitution is a holy document, no powerful organization or institution is above it and democracy treats every individual equally.

This more than 500 pages long judgment was extremely extensive and along with all these legal points there were many more aspects of the same which makes this judgment much more special like Justice Rohinton Nariman gave explicit instructions to the union to spread awareness regarding this judgment and made endeavors for removing stigma of homosexuality from society while Justice Indu Malhotra made an apology on behalf of the whole history to all the homosexuals and their allies for all the discrimination<sup>37</sup>.

## CONCLUSION

So, finally on 2018 we were freed from the bondages of a Victorian law and homosexuality was decriminalized after 70 years of independence and 2 decade long legal journey. Our 8% of the population who were considered as the potential criminals just because of their sexual orientation are now the legal citizens of India<sup>38</sup>.

This not only motivated homosexuals to come out of the closets but also helped the society in gaining a new perspective and acceptance towards homosexuality. Now although they have a constitutional status, but their fight is not over, this was only one huge milestone or we can say a kick start to the long journey ahead. India still does not have any legal rights or any anti-

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<sup>35</sup>Sakshi Tomar. "Case Comment: Navtej Singh Johar & Ors. Vs. Union of India" Vol. 5 Pen Acclaims (2019)

<sup>36</sup>Supra note 35 at 11

<sup>37</sup> Shraddha Chaudhary, "Navtej Johar V. Union of India: Love in Legal Reasoning" Rev. 3-4 NUJS Law Review (2019)

<sup>38</sup>Supra note 34 at 11

discrimination laws for homosexuals. This judgment just made the sexual activities between two consenting adults legal but what about their future, what about their marriage and children. Our legal system is still mum on that matter. But we hope that we will have some legislations for the same and this time the journey will not be two decades long one.

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