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Fulfilling the Right to Have a Family and Continuing Offspring: Different Religious Marriage's Case

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Abstract

The focus of this research is on the existence of marriage as a prerequisite for the right to have a family and continuing offspring based on an analysis of the ratio decidendi of the Constitutional Court (MK) Decision No. 24/PUU-XX/2022 (MK Decision of Different Religions 2022). This research is normative legal research prioritizing a case, concept, and statutory approach. The results of the study confirm that the existence of marriage in the ratio decidendi of the MK Decision of Different Religions 2022 places marriage in two aspects, namely: the aspect of mandatory prerequisites and the aspect of the role of state regulation. As a mandatory prerequisite, marriage is an essential aspect of realizing the right to have a family and continue offspring.The dimension of marriage as a prerequisite for the realization of the right to have a family and continue offspring in the ratio decidendi of the MK Decision of Different Religions 2022 emphasizes two aspect. First, marriage is a prerequisite and not a right, which means that marriage cannot be carried out freely and at will. Second, marriage has a close relationship with religious law, which means that in carrying out marriage as a prerequisite for the realization of the right to have a family and continue offspring, it is necessary to base the laws of each religion and the beliefs held by the community.

I. Introduction

Marriage is actually one of the important aspects of human life because it is related to efforts to form a family and continue offspring (Nurul Hikmah, 2020). That is because as living things, humans need efforts to multiply in addition to continuing offspring as well as producing the next generation as nurses and builders of civilization in the future. In producing an ideal future generation in building this civilization, marriage is an important mechanism for the realization of a harmonious family that can later give birth to good offspring (Khairuddin, 2022). In this context, marriage is an important aspect of human life. Marriage in general is related to cultural and religious aspects as well as beliefs held by each individual (Bahri, 2022). As or intelligent beings who distinguish from animals and other creatures, humans make marriage a means to strengthen cultural values while basing marriage practices to conform to the religious teachings or beliefs held by each individual

That dimension of culture and religion and belief is what makes the state as the highest social institution in society set legal policies to provide space for religion and culture in regulating aspects of marriage. That is in line with the construction of Article 2 paragraph (1) of Law No. 1 of 1974 concerning Marriage (hereinafter referred to as Marriage Law). Furthermore, constitutionally, in the 1945 NRI Constitution (in Indonesian: *Undang-Undang Dasar Negara Republik Indonesia 1945*), the substance of marriage is placed in the Human Rights Chapter (Togatorop, 2023). Interestingly, in Article 28B paragraph (1) of the 1945 NRI Constitution, marriage is not categorized as a right, but rather as a means to form a family and continue legal offspring. *Latterlijk*, the formulation of constitutional norms affirms that what constitutes human rights is the right to have a family and the right to continue legal offspring in which both rights can be fulfilled through marriage (Muzakkir, 2022). The construction of the formulation of Article 28B paragraph (1) of the NRI Constitution is actually agreed by the ratio decidendi of the Constitutional Court (MK) in Constitutional Court Decision No. 24/PUU-XX/2022 (hereinafter referred to as MK Decision of Different Religions 2022).

Although the MK Decision of Different Religions 2022 is substantively a test of norms related to the validity of interfaith marriage, substantively the MK Decision of Different Religions 2022 in its ratio decidendi affirms as in the formulation of Article 28B paragraph (1) of the 1945 NRI Constitution. Therefore, the focus of this study is on the existence of marriage as a prerequisite for the right to have a family and continue offspring based on the analysis of the ratio decidendi of the MK Decision of Different Religions 2022. This study aims to answer two legal issues, namely: (i) the existence of marriage in the ratio decidendi of the MK Decision of Different Religions 2022, and (ii) the dimension of marriage as a

prerequisite for the realization of family rights and continuing offspring in the ratio decidendi of the MK Decision of Different Religions 2022. Research on the existence of marriage in relation to the prerequisites for family rights and continuing true offspring has been carried out by three previous researchers, namely: (i) research conducted by Hariati, et al. (2020) which focuses on the pros and cons of interfaith marriage carried out outside the jurisdiction of Indonesia (Fatahullah et al., 2020). The advantage of this research is in the case study effort on the phenomenon of interfaith marriage carried out outside the jurisdiction of Indonesia. The weakness of this study is that it has not elaborated on court decisions in Indonesia and abroad, especially in countries where interfaith marriages are commonly carried out by Indonesians. Further research was conducted by Eddyono, et al. (2021) which discussed the validity of polygamy associated with Constitutional Court Decision No.12/PUU-V/2007(Sitabuana et al., 2021).

The advantage of this study is the analysis of polygamy based on the case approach, namely based on Constitutional Court Decision No.12 / PUU-V / 2007. The weakness of this study is that it has not analyzed the socio-legal aspects of the causes of polygamy, one of which is caused by cultural factors. Further research was conducted by Ramadhan, et al. (2022) who explained that there was a difference in the "position" of the Constitutional Court Decision in understanding the minimum age of marriage, namely in Constitutional Court Decisions Number 74/PUU-XII/2014 and 22/PUU-XV/2017(Hadiati & Ramadhan, 2022). The excellence of this research is a comprehensive review of Constitutional Court Decisions Number 74/PUU-XII/2014 and 22/PUU-XV/2017. Even so, the weakness of this study lies in the arguments and non-legal research results that have relevance to the minimum age of marriage have not been the focus of this study. Based on the three previous studies above, this study is an original research because the study of the *ratio decidendi* of the MK Decision of Different Religions 2022 has never been carried out by the three previous studies

II. Research Method

This research is a normative legal research that focuses on the existence of marriage as a prerequisite for family rights and continuing offspring based on an analysis of the *ratio decidendi* of the MK Decision of Different Religions 2022. The main characteristic of normative legal research is the use of authoritative legal materials in the form of laws and court decisions(Negara, 2023). The primary legal materials in this study include: the 1945 NRI Constitution, the MK Decision of Different Religions 2022, the Marriage Law, and the Compilation of Islamic Laws in Indonesia (hereinafter referred to as

Kompilasi Hukum Islam or KHI). Secondary legal materials in this study are: journal articles published in the last five years, books, and research results related to marriage law. Non-legal material is a dictionary of languages. The approach used in this study are: concept, statute, and case approach.

III. Results and Discussion

The Existence of Marriage in the *Ratio Decidendi* of the MK Decision of Different Religions 2022: What and How?

Marriage as affirmed in Article 1 of the Marriage Law emphasizes two aspects, namely the birth and mind bond and the purpose of forming a family (Muhammad Romli, Nurul Huda, 2022). In the aspect of birth and mental bonding, it can generally be understood that marriage is an "engagement" carried out by a man and a woman in order to form a legal family. The engagement in this case must be interpreted specifically, unlike the engagement in general which is affirmed in Book III of the Civil Code (In Indonesian: *Kitab Undang-Undang Hukum Perdata or KUHPer)*. Marriage as a "special engagement" is emphasized in the essence of birth and mental engagement, which means that in marriage the emphasis is an inner birth alliance so that it is not as in Book III of the Civil Code which only emphasizes the dimension of marriage in the external aspect (Mariadjang, 2022). This understanding of the birth and mind alliance in marriage is emphasized in Article 2 of the KHI that marriage has a strong contractual aspect, namely *mitssaqan ghalidzan*. There are three orientations of understanding of the *mitssaqan ghalidzan* contract in marriage. *First*, will *mitssaqan ghalidzan* emphasize the nature of the continuity and permanence of marriage (Jati, 2022). Unlike other engagements that have a period of time, marriage is ideally forever or continuous. In fact, in Muslims, it is common to pray for the bride and groom not only to be a soul mate in the world, but also to be a soul mate in the hereafter. The nature of continuity in marriage also confirms that efforts to break marital relations through divorce are a "last resort" and as much as possible avoided referring to the characteristics of the *mitssaqan ghalidzan* contract in marriage (Dwi Dasa Suryantoro & Prodi, 2022).

Second, the *mitssaqan ghalidzan* contract actually emphasizes the transcendental agreement aspect, which is a study that is essentially not only witnessed by the bride and groom and witnesses, but essentially also witnessed by Allah Almighty, God Almighty (Abu Yazid Adnan Quthny et al., 2022). The essence witnessed by Allah SWT means that the bride and groom in addition to accounting for the contract that has been said to each bride and groom are also morally obliged to account to Allah SWT, God Almighty (Januario et al.,

2022). *Third*, the *mitssaqan ghalidzan* contract as a "strong contract" also has a social and cultural tendency in which marriage in addition to forming kinship also strengthens certain fraternal relations. Viewed from a social perspective, marriage is also a means to connect two large families in a strong alliance (Hamdani & Fauzia, 2022). Judging from the three understandings of the *mitssaqan ghalidzan* contract in marriage above, it can actually be concluded that marriage is not an ordinary form of marriage, but a special and holy bond because in essence it also emphasizes accountability to Allah SWT, God Almighty.

The existence of marriage can be seen from the essence of the inner birth bond or *mitssaqan ghalidzan* contract above. The word existence itself according to KBBI means everything related to existence; and related to existing things(Pusat Bahasa Departemen Pendidikan Nasional, 2008). The existence of marriage in this context is interpreted not only as "existing" or "not" marriage, but the implementation of the essence and function of marriage properly. Therefore, it can be concluded that the existence of marriage is maintained when the essence and function of marriage are well established. Referring to the formulation of the constitution, namely Article 28A paragraph (1) explicitly emphasizes that marriage is actually a "means" to realize the fulfillment of family rights and continue legal offspring. In the perspective of the constitution, human rights here are the right to have a family and continue legitimate offspring. That means the consequence is that the right must be obtained through the marriage process in accordance with the teachings of their respective religions and beliefs which are then recorded under state law (Sumarta, Edy, 2022). Referring to the Marriage Law, it is actually not emphasized whether marriage is a right or just a means to fulfill the realization of family rights and continue legal offspring. The pressure point of regulation in the Marriage Law is on affirming the essence of marriage such as the inner birth bond and aims to form an eternal and happy family (Prastini, 2022).

Implicitly, with reference to the formulation of Article 1 of the Marriage Law, the orientation of marriage to form a happy and eternal family actually indirectly confirms that marriage is a means (Andrew & Tambunan, 2022). What is the right here is to have a happy and eternal family so that the realization of this right can only be obtained through legal marriage. As a result, while Article 1 of the Marriage Law does not explicitly state that marriage is a means to fulfill family rights and the right to children, the formulation of Article 1 of the Marriage Law implies that marriage is a means rather than a right. Although not officially stated, Article 3 of the KHI underlines the orientation of marriage as a way of realizing the right to have a family and the right to reproduce. Referring to the formulation of Article 3 KHI, marriage is intended to create a household that is *sakinah, mawaddah*, and *rahmah* (Hutama Hutabarat et al., 2022). That orientation emphasizes that making a good home is part of the right to have a family, and in this case, the right to have a family can be

realized if it is carried out through marriage (Halil Khusairi, 2022). By referring to the provisions of Article 28A of the 1945 NRI Constitution, the Marriage Law, and KHI, it is possible to conclude that marriage is a way to actualize the fulfillment of the right to have a family and continue offspring. The MK Decision of Different Religions 2022 also agrees on the idea that marriage is the right to create a family and maintain one's authentic lineage.

The MK Decision of Different Religions 2022.is a decision that is a judicial review of the provisions in the Marriage Law with the 1945 NRI Constitution, which was requested by E. Ramos Petege and is substantively related to the problems of interfaith marriages. There are several tests regarding marriage in the judicial review at the Constitutional Court, namely that it has been carried out at least nine times before the MK Decision of Different Religions 2022. If added to MK Decision of Different Religions 2022, the substance of the marriage in the judicial review at the Constitutional Court has been carried out ten times. The orientation in the judicial review of the provisions in the Marriage Law is to provide arrangements and legal certainty in the future regarding interfaith marriages. Even though, in the end, the MK Decision of Different Religions 2022 confirmed rejecting the applicant's application. The vital essence of the MK Decision of Different Religions 2022 is related to the *ratio decidendi*, which emphasizes that marriage is a prerequisite for the emergence of the right to have a family and continue offspring. *Ratio decidendi* occupies an essential aspect of court decisions. As stated by Michael Zander that ratio decidendi is a legal argument made by judges in forming a decision (Dicky Eko Prasetio, 2022).

Furthermore, Sir Rupert Cross also emphasized the importance of ratio decidendi in court decisions because a court decision is formed based on ratio decidendi, which has relevance to the case at hand (Setiawan & Haryadi, 2022). The *ratio decidendi* of the Constitutional Court occupies a vital position regardless of the outcome of the decision. *Ratio decidendi* is not only valuable for theoretical legal analysis but also valuable for practical law application where sometimes there is a Constitutional Court decision that rejects or does not accept a request for judicial review, but on the other hand, orders lawmakers to make sure efforts and steps in the *ratio decidendi* That is commonly referred to as a constitutional mandate, a legal construction of the values contained in the constitution. The importance of the ratio decidendi in the Constitutional Court Decision also has relevance to the MK Decision of Different Religions 2022. Even though the MK Decision of Different Religions 2022 rejected the request from the applicant concerning the *ratio decidendi*, the MK Decision of Different Religions 2022 has relevance regarding the *ratio decidendi*, which places marriage as a prerequisite and is not a right.

Concerning the *ratio decidendi* of MK Decision of Different Religions 2022 relating to the position of marriage as a prerequisite, there are at least three substances in the MK

Decision of Different Religions 2022 that have a bearing on this matter. *First*, The Constitutional Court is of the view that even though the essence of human rights is universal, human rights have a relativity dimension in which a country's philosophical beliefs have an essential role in constructing views on human rights (Nurtjahyo, 2021). In the Indonesian context, marriage as a human right must be viewed comprehensively by referring to the legal ideals of Pancasila and its manifestations in the state constitution. That is emphasized in Article 28B paragraph (1) of 1945 NRI Constitution, that marriage is a prerequisite for fulfilling the right to have a family and continue offspring. *Second,* with the *ratio decidendi*, the MK Decision of Different Religions 2022 also emphasized that the importance of fulfilling the right to have a family and continue offspring can only be realized through marriage.

That understanding is in line with the rule of *fiqh*, which states that "*ma laa yatiimmu alwajibu illa bihi fahuwa*" is obligatory, which means something that is a condition for an obligation, the law becomes obligatory (Hakim, Lukman & Safitri, 2022). In the context of marriage, marriage is a mandatory prerequisite to fulfill the right to have a family and continue offspring, because, without a legal marriage, it is impossible to satisfy the right to have a family and continue progeny. *Third*, concerning religious rights (the right to carry out religious teachings), marriage is an external forum in which the state has the authority to "intervene" in regulating the guarantee of religious rights, of course, proportionally and taking into account the respective religious laws and beliefs. (Dwi Hidayatul Firdaus, Mufidah Ch, 2022). Based on the three orientations above, which places marriage as a prerequisite. It can be understood that this orientation is based on a constitutional view as in Article 28B paragraph (1) of the 1945 NRI Constitution which emphasizes the rights guaranteed by the constitution are the right to have a family and continue offspring and To fulfill this right, marriage is a mandatory prerequisite that must be fulfilled and the terms and conditions are met.

Based on the results of the analysis above, it can be concluded that the existence of marriage in the ratio decidendi of the MK Decision of Different Religions 2022 places marriage in two aspects, namely: the aspect of mandatory prerequisites and the aspect of the role of state regulation in matters related to external forums. As a required prerequisite, marriage is essential to realizing the right to have a family and continue offspring. Without marriage, the right to have a family and continue offspring cannot be fulfilled. Guarantees to fulfill that rights must also be protected and facilitated by the state. That is because marriage in a religious context is an external forum where the state has relevance to regulate as long as it can guarantee the fulfillment of that rights.

Marriage as a Prerequisite for Realizing the Right to Have a Family and Continuing Offspring: The Review from MK Decision of Different Religions 2022

The *ratio decidendi* of the MK Decision of Different Religions 2022 is familiar in Indonesian marriage law. That is because both in Article 28B paragraph (1) of the 1945 1945 NRI Constitution, the Marriage Law and the KHI orientation emphasize that marriage is a prerequisite for fulfilling the right to have a family and continue offspring through legal marriage (Subchi et al., 2021). the difference is whether or not the setting is explicit regarding the position as a prerequisite (Najib, Urip Triwijayanti, 2021). In Article 28B paragraph (1) of the 1945 Constitution of the Republic of Indonesia, it can be said that the provisions of the Constitution explicitly state that marriage is a prerequisite for fulfilling the right to have a family and continue offspring. However, even in the Marriage Law and in the KHI, it is not explicitly (and only implicitly), but there is an orientation that marriage is a prerequisite for fulfilling the right to have a family and continue offspring (Chusnida & Anggriawan, 2022). The affirmation regarding marriage is a prerequisite for fulfilling the right to have a family and continue offspring, further emphasized in the ratio decidendi of the MK Decision of Different Religions 2022. That underlines that marriage as a prerequisite is an interesting discussion because, with the ratio decidendi of the MK Decision of Different Religions 2022, the Constitutional Court as the final interpreter of the Constitution confirms the constitutional standing of the Indonesian Constitution in interpreting marriage (Lestari & Adiyatma, 2020).

The Indonesian Constitution, through the interpretation in the MK Decision of Different Religions 2022, emphasizes that marriage has relevance to forming a family and efforts to continue offspring. The understanding of marriage as stated in the ratio decidendi of the MK Decision of Different Religions 2022 differs from the substance in the 1948 Universal Declaration of Human Rights (UDHR), which confirmed the guarantee of human rights after the second world war (Rofii, 2021). Article 16, paragraph (1) of the UDHR substantively affirms that every man and woman has the right to marry and continue offspring (Desimaliati, 2022). The brief construction of Article 16 paragraph (1) of the UDHR when it is related to marriage has three implications. *First*, in the structure of the UDHR, marriage is a right for men and women, which means that men and women can marry as they please, both between men and women, men and men, and women and women (Hamidin & Alfitri, 2021). That is consequence can be understood considering that, in Salmond's view, rights are the free will of each individual as long as they do not interfere with fulfilling other people's rights (Allagan et al., 2020). The first implication of the UDHR is

irrelevant to how Indonesian law views marriage. For Indonesian people who emphasize religious and cultural aspects, marriage is not only considered an agreement or agreement to have sex between one party and another but marriage is permanently attached to form a family That view can be considered as Indonesia's margin of appreciation, which continues to view the universalization of human rights based on the UDHR, but still emphasizes the essence of human rights from an Indonesian perspective

Second, the construction of Article 16 paragraph (1) of the UDHR separates the right to marry and continue offspring. That means UDHR affirms marriage as a right. In addition, with the separation between the right to marry and continue offspring, the construction of the arrangement in the UDHR emphasizes that there are marriages that are not oriented towards efforts to form offspring, so this is part of human rights. In Indonesia, the understanding of Article 16 paragraph (1) of the UDHR, which separates the rights to marry and continue offspring, is irrelevant to the characteristics of Indonesian marriage law, which places religious values as the principal value of holding marriages for the community. For Indonesians, marriage is synonymous with efforts to form offspring and have a family (Dewi et al., 2022). That means that between marriage, family, and continuing offspring is a unity that cannot be separated. The consequence of the interpretation of the MK Decision of Different Religions 2022 that there may not be marriages that are not oriented towards efforts to have a family and continue offspring. *Third*, understanding Article 16 paragraph (1) of the UDHR regarding marriage above clearly needs to include religious aspects in Indonesian marriage law. For Article 16, paragraph (1) of the UDHR, the right to marry, the right to have a family, and the right to religion are separate things (Setiawan & Haryadi, 2022). That is certainly not in line with the view of marriage law in Indonesia which, based on Article 28A, actually emphasizes that carrying out marriage is a prerequisite for fulfilling that right; this also has relevance to efforts to affirm and guarantee the implementation of religious provisions (Wahyudi, 2022).

That is reinforced in the Marriage Law and KHI, which explicitly identify marriage as an effort to implement the laws of each religion. In fact, the Marriage Law and KHI also emphasize that marriage is only valid if it conforms to each religion's teachings. That understanding simultaneously shows that in Indonesian marriage law, there is an identification that marriage is a religious worship, so in carrying it out, it must be based on certain terms and conditions under religious teachings.. Referring to the *ratio decidendi* of the MK Decision of Different Religions 2022 above, efforts to emphasize the relevance of religious values to the practice of marriage are appropriate. In particular by emphasizing the relevance between religious rights, the right to enter into marriage, and the right to have a family by continuing offspring as an integral part of inseparable. That means there is a

difference between the construction of Indonesian marriage law; which is then strengthened by the *ratio decidendi* of the MK Decision of Different Religions 2022 and the UDHR's views on marriage. The *ratio decidendi* of the MK Decision of Different Religions 2022 in the context of Indonesian marriage law emphasizes the position of Indonesian marriage law, which genuinely sees marriage as part of the implementation of religious rules with three orientations. *First*, the *ratio decidendi* of the MK Decision of Different Religions 2022 confirms the constitutional standing of the Indonesian constitution in understanding marriage.

Referring to the UDHR formulation along with other western legal provisions, marriage is considered a right that is separate from the essence of religious values and the goal of forming a family and continuing offspring. The construction of UDHR, if implemented in Indonesia, can result in reduced religious values so that marriage can "go off the rails" or conflict with religious substance. The *ratio decidendi* of the MK Decision of Different Religions 2022 in Religion strengthens and confirms the constitutional standing of the Indonesian constitution in understanding marriage law which is different from the UDHR because Indonesia identifies marriage as a means to form a family and continuing offspring by the guidance and teachings of each religion. *Second*, the *ratio decidendi* of the MK Decision of Different Religions 2022 is an affirmation of the construction that has been built by Article 28B paragraph (1) of the 1945 NRI Constitution, the Marriage Law, and KHI; that marriage is a prerequisite for fulfilling the right to form a family and continue offspring (Dedihasriadi, La Ode, Ju-Lan Hsieh, 2022). The affirmation in the ratio decidendi of the 2022 Interfaith Constitutional Court Decision is essential. It can be used as a reference for the legal considerations of Constitutional Court Justices in addressing issues of marriage law in Indonesia. *Third*, the *ratio decidendi* of the MK Decision of Different Religions 2022 has an orientation toward the legislative and executive institutions about efforts to fulfill the right to form a family and continue offspring through marriage.

For the legislature, the *ratio decidendi* of the MK Decision of Different Religions 2022 can guide the formation of a law in the future which emphasizes that marriage is a prerequisite for forming a family and continuing offspring through legal marriage. As a prerequisite, marriage is a means to implement the right to start a family and continue progeny. This means that Indonesian marriage law cannot justify all types of marriages with no orientation to start a family and continue progeny. In addition, for the executive branch, the *ratio decidendi* of the MK Decision of Different Religions 2022 can be an effort by the government to establish policies as well as efforts to facilitate marriage as the main prerequisite for the right to form a family and continue offspring through legal marriage. That can be seen in problems regarding the registration of marriages in Indonesia. Based on

the results of the analysis above, the dimension of marriage as a prerequisite for the realization of the right to have a family and continue offspring in the *ratio decidendi* of the MK Decision of Different Religions 2022 emphasizes that: *First*, marriage is a prerequisite and not a right, which means that marriage cannot be carried out freely and at will. Marriage must be oriented towards forming a family and continuing offspring by the guidance of religious law and their respective beliefs. *Second*, marriage has a close relationship with religious law, which means that in carrying out marriage as a prerequisite for the realization of the right to have a family and continue offspring, it is necessary to base the laws of each religion and the beliefs held by the community.

IV. Conclusion

The existence of marriage in the *ratio decidendi* of the MK Decision of Different Religions 2022 places marriage in two aspects, namely: mandatory prerequisites and the role of state regulation in matters related to external forums. As a required prerequisite, marriage is essential to realizing the right to have a family and continue offspring. Without marriage, the right to have a family and continue progeny cannot be fulfilled. Guarantees to fulfill the right to have a family and continue offspring must also be protected and facilitated by the state because marriage in a religious context is an external forum where the state has relevance to regulate as long as it can guarantee the fulfillment of the right to have a family and continue offspring through a legal marriage. The dimension of marriage as a prerequisite for the realization of the right to have a family and continue offspring in the *ratio decidendi* of the MK Decision of Different Religions 2022 emphasizes that: *First*, marriage is a prerequisite and not a right, which means that marriage cannot be carried out freely and at will. Marriage must be oriented towards forming a family and continuing offspring by the guidance of religious law and their respective beliefs. *Second*, marriage has a close relationship with religious law, which means that in carrying out marriage as a prerequisite for the realization of the right to have a family and continue offspring, it is necessary to base the laws of each religion and the beliefs held by the community.

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