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The Judges' View at Mojokerto Religious Court on Polygamous Marriage's Averment Perspective of Al-Ghazali's Maslahat

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Abstract

Islam does not prohibit a husband to have more than 1 wife, according to the word of Allah An-Nisa verse 3. Certainly, doing polygamy must use the procedures and conditions mentioned in law of concerning Marriage. The submission of Averment of polygamous marriage was declared not accepted if you do with unregistered married way. This research aims to know the views of the Mojokerto Religious Court judges on the Averment of polygamous marriage. From their opinions we will see with the Perspective Of Al-Ghazali's Maslahat. The type of this research is empirical research with a qualitative approach, then analized with perspective of Al-Ghazali's Maslahat. This study's results are the averment of polygamous marriage in this court is declared not accepted accordance with Supreme Court Circular No. 3 of 2018. So in order for unregistered polygamous marriage be recognized by state, it must be remarried to protect material rights of wife. In contrast to child resulting, that is still protected by the Constitutional Court decision No.46 of 2010. If the judges don't grant case Averment of polygamous marriage, this is when reviewed using Al-Ghazali's maslahat's theory. It's accordance with fiqh's rules because averment of polygamous marriage has more mafsadat than benefit.

Keywords: Averment; Polygamous Marriage; Unregistered Marriage; Al-Ghazali's Maslahat.

Introduction

Averment of marriage is a process of determining the marriage of husband and wife who have previously been married in sirri. The purpose of the Averment of marriage is to obtain a marriage certificate as proof of marriage's validity following Indonesia's prevailing laws and regulations. The marriage ritual can be performed if one of the partners has not married another person. Because the ceremony was formed under a legal marriage, it would become an Averment of polygamous marriage. An Averment of polygamous marriage is the legalization of a unregistered marriage in the Religious Court, but one of the partners still has a legal partner before the law. So if they do Averment of marriage, there will be an Averment of polygamous marriage or polygamy smuggling. This becomes a

separate way for men who want to do polygamy. Marriages that are not registered by the PPN indicate the smuggling of laws to facilitate polygamy without legal procedures and become problems in status, inheritance rights, or other rights over the property.¹

In principle, Article 3 Paragraph 1 of Law Number 1 Year 1974 said that in a marriage, a man only has one wife. A woman only has one husband, also. However, articles 3, 4, and 5 of Law No.1 of 1974 explain that polygamy can be implemented if the parties concerned want a polygamy process. So, these regulations often become the basis for a husband to practice polygamy. The most challenging polygamy requirements make those who want to do polygamy prefer to use the unregistered marriage route.² The issuance of SEMA Number 3 of 2018 states that applications for averment of polygamous marriage are not accepted based on unregistered marriage in any form without exception. This has become a new problem for people seeking justice on the averment of polygamous marriage. Because it is the same as closing the space for the community to obtain legal protection and certainty on this matter from the Religious Court.³

In the end, this is considered to be less solution for people who are litigating about averment of polygamous marriage. The averment of polygamous marriage is also considered contrary to the theory of Al-Ghazali's *maslahat*. Classical scholars classify Al-Ghazali's *maslahat* based on the dimensions of necessity into 5 levels, namely *Hifz al-Dien* (protection of religious), *Hifz al-Nafs* (protection of life), *Hifz al-Mal* (protection of wealth), *Hifz al-'Aql* (protection of intellect), and *Hifz al-Nasl* (protection of generation). Some scholars added *Hifz al-'Ird* (protection of honor).⁴ In this study, these 5 levels become the main pillars in implementing the averment of polygamous marriage, which then becomes a theory to review the judge's views on averment of polygamous marriage.

Several studies have been conducted on this theme, such as research Mukhtaruddin Bahrum,⁵ a journal entitled "Problematics averment Nikah Polygamy Sirri". This type of research is a normative juridical study using a qualitative descriptive approach. This study discusses the problems of unmarried polygamy, which can be seen from the positive and negative sides. This study aims to show that from the positive side, the marriage ritual is needed for the perpetrator of a sirri marriage to get legal guarantees (article 6 paragraph (2)

KHI). Meanwhile, from the negative side, if polygamy sirri is granted and or the marriage is accepted, it means that you have acknowledged and justified an act

¹ Vide Pedoman Pelaksanaan Tugas Dan Administrasi Peradilan Agama Buku II Tahun 2013, 144.

² Abdul Rahman., *Fiqh Munakahat* (Jakarta: Prenadamedia Group, 2019), 95.

³ CikiBasir, *Penanganan Perkara Permohonan Itsbat Nikah Poligamy Secara Sirri Dan Hubungannya Dengan Permohonan Asal Usul Anak Di Pengadilan Agama (Menyikapi Rumusan Hasil Rapat Pleno Kamar Agama Mahkamah Agung Dalam SEMA Nomor 3 Tahun 2018)*. (Palembang: Makalah di sampaikan dalam Diskusi Hakim Peradilan Agama- Wilayah PTA Palembang di Aula PTA 26 April 2019), 9

⁴ Muhammad Fauzinudin Faiz, "Nikah sirri dalam tinjauan teori maqashidi (Upaya mencari pemahaman komprehensif berbasis maqashid syariah)" (IAIN Jember, 2015), http://lpm.iain-jember.ac.id/download/file/NIKAH_SIRRI_DALAM_TINJAUAN_TEORI_MAQASHIDI.pdf

⁵ Mukhtaruddin Bahrum, *Problematika Isbat Nikah Poligami Sirri*, Jurnal Hukum dan Politik Islam, (Sulawesi Selatan: IAIN Bone, 2019).

that has deviated or violated the law. The indirect impact is that there is a negation (elimination/elimination) of the values intended to be protected by statutory provisions on the terms of polygamy. The similarity with this new research is that they both discuss the terms of polygamy marriage. The difference is that this study looks at the positive and negative sides of the existing polygamous marriage problems. In contrast, this new study examines the judges' views on isbat of polygamous marriage. The theory of Al-Ghazali's *maslahat* reviews this view.

Further research written by Achmad Kurniawan the students of the Ahwal Al-Asyakhshiyyah Study Program Jurusan Syari, Ah Salatiga State Islamic College in 2014 with the title of his thesis "Averment Marriage in the Context of Polygamy (Study of the Ambarawa Religious Court Decision Number: 0030 / Pdt.G / 2012 / PA.Amb)." ⁶ The type of research is literature study and the research focus is analysis of decision studies using the basis of judges' considerations and the legal basis for determining the averment of marriage. This study aims to determine whether the judge granted the request for polygamy marriage because all the terms and conditions of the applicant's marriage have not been violated and there are no indications of irregularities and abuse of the marriage. The similarity of this research is that they both research the object discussed, namely the case of marriage in the context of polygamy. However, the location of the difference is that this study analyzes the Ambarawa Religious Court Decision Study Number: 0030 / Pdt.G / 2012 / PA.Amb, which uses fundamental analysis of judges' considerations and the legal basis for determining marriage averment. Whereas in the current research, namely analyzing the judges' views on the averment of marriage and the judges' opinions are then reviewed using the Al-Ghazali's *maslahat*.

The next research is Siti 'Aisyah, Student of the Akhwal al-Syakhshiyyah Department, Syari'ah Faculty of the State Islamic University of Maulana Malik Ibrahim Malang in 2008 with the title of the thesis "The Judge's View of Polygamy Marriage Averment in Bondowoso Religious Courts." ⁷ This research is a case study using a sociological-empirical approach and this research is talking about This study explains that the judge granted the matrimony of polygamy in case No.67 / Pdt.P / 2007 / PA / Bows because every marriage must be registered to have authentic evidence. In this case, the defendant was also absent. The legal basis used by the panel of judge judges' panel KHI article 58 paragraph (3). The judge's the judge considers marriage, 4 used with birth certificates for educational administrative equipment. The similarities in this study with this new research are discussing the judges' views on polygamous marriage. However, the difference in this research uses the judge's opinion to analyze polygamous marriage cases and procedures. Meanwhile, the new research is the judge's view on the averment of polygamous marriage as material for analysis. Also, it uses the theory of Al-Ghazali's *maslahat* as material to review the judge's views.

⁶ Achmad Kurniawan, *Isbat Nikah Dalam Rangka Poligami (Studi Putusan Pengadilan Agama Ambarawa Nomor: 0030/Pdt.G/2012/PA.Amb)*, Skripsi, (Salatiga: STAIN Salatiga, 2014).

⁷ Siti „Aisyah, *Pandangan Hakim Terhadap Itsbat Nikah Poligami Di Pengadilan Agama Bondowoso*, Skripsi, (Malang: UIN Malang, 2008)

Because averment of polygamous marriage is controversial with the emergence of a new status for wives and children who are married to sirri with the existence of averment of polygamous marriage will be a particular problem for others (wives or children who are legally married and wife or children of polygamous husbands). Therefore, in this case, many things related to the legal protection of wives and children, polygamy marriage is not granted. And also legal protection related to their material rights. By looking at the judge's view of this case, it will be seen how the judge resolves such cases and the alternative way for the application for polygamy marriage isbat is not granted. So that in this study, the judge's view will use Al-Ghazali's maslahat analysis which consists of 5 levels, namely Hifz al-Dien (protection of religion), Hifz al-Nafs (protection of life), Hifz al-Mal (protection of wealth), Hifz al-'Aql (protection of reason), and Hifz al-Nasl (protection of generations). Of the five levels, it can be seen from the consideration of maslahat and mafsadat associated with the case of polygamous marriage.

Research Method

The type of research used in this research is empirical research, which is research that examines and analyzes the work of law in people's lives that always interacts and relates to social aspects.⁸ The approach used in this study is qualitative. Qualitative research is research that is intended to understand the phenomena experienced by research subjects.⁹ The researcher will involve the Mojokerto Religious Court judges on the Averment of polygamous marriage as informants in this study. The qualitative data obtained will be reviewed using the theory of Al-Ghazali's maslahat. Sources of data in this study consisted of primary and secondary data sources. Primary data were obtained from the results of interviews with the Mojokerto Religious Court Judges that are Nurul Maulidah, Abdullah Shofwandi, AH. Fudloli. Then secondary data is obtained from journals, books that support the averment of polygamous marriage. Furthermore, the results of the interview will be analyzed using a perspective Al-Ghazali's Maslahat.

The View of Judges at Mojokerto Religious Court on the Averment of Polygamous Marriage

The request for a polygamous marriage is a new problem that often occurs among men who practice polygamy. They practice the polygamy siri marriage method which aims to facilitate the polygamy process through this alternative route. This then became a controversy among the community so that in resolving this problem, researchers interviewed several judges at the Mojokerto Religious Court to see their responses and solutions for perpetrators of polygamous siri marriage. *First*, Nurul Maulidah, according to her that a polygamous marriage there is no legal protection for children and wives, so they do not have legal standing. It is not a gender bias/tendency because so that it is not done arbitrarily

⁸ Bambang Sunggono, *Metodologi Penelitian Hukum* (Jakarta: PT Raja Grafindo Persada, 2003), 43.

⁹ Lexy J. Moleong, *Metode Penelitian Kualitatif* (Bandung: PT. Remaja Rosdakarya, 1999), 6.

by men. Because women are weak and economic needs, depend on men. So that reason is used for men to carry out a polygamous unregistered marriage. The averment of polygamous marriage in any way that cannot be used. If the second wife wants to get legal protection, she must remarry her husband by polygamy and do it according to existing regulations. Only after the marriage book is issued can we propose the origin of the child. Submitting the origin of the child only checks the validity of the siren marriage if it does not meet the formal requirements, then the dictum of stipulating that child is declared valid because in Law No.1 of 1974 Article 42 states that a legitimate child is a child born in or as a result of marriage. Legitimate. If a polygamy permit is refused, then the child still gets legal protection. The Constitutional Court Decision No. 46/2010 states that children outside of marriage are served by mothers and can prove their biological father according to science so that their civil rights are not lost. Whereas for a wife who is married to a unregistered, if her polygamous permission is refused, she will be protected. However, she is still wrong and violates the rules. So that the wife's civil rights do not get legal protection.

Second, Abdullah Shofwandi, according to him, if allowed to continue, averment of polygamous marriage will be able to destroy the legal order. With all the legal consequences of the second wife, if it is not legalized, it will not get anything. Meanwhile, the child can obtain inheritance rights Women still lose money if they practice illegal polygamy, so they don't need to do it so that new problems don't arise. Most of the people who signify their polygamous marriage are related to their assets, not their marital status. Most of it His second wife and child have no legal consequences, so they are considered non-existent according to the law because the marriage was not legalized. And if the marriage is not procedural, we usually don't grant it so that there are no new legal problems. If the marriage is legal according to religion, we can legalize it, but the legalization as a child is from there a and b. We are not saying as the son of husband and wife. Because if it is written the children of husband and wife, it means that the husband and wife are recognized. This is done to protect the civil rights of the child. As with fasid marriages, fasid marriages do not diminish the position of their children, but since when was the fasid discovered and after that the marriage could not be continued, for example: marrying a mahrom, since it was known that both were mahroms, the marriage was immediately terminated but the child was still their child. both. In PA Mojokerto on average polygamy permits are granted. This is in violation of the law. If you obey the law, judges in any religious court will not grant permission for polygamy so that the judge's guidance is the old wife.

Third, AH. Fudloli, In his opinion that In the religious court there is no polygamous marriage format because Isbat nikah is voluntary and polygamy is contentious. Once there was someone who filed it because the religious court was not allowed to reject the case so when the registration was accepted, but if you adhere to SEMA, the case is not accepted, not rejected because the two are different. The case cannot be accepted because it does not meet the formal requirements, while the rejected case cannot prove the argument for the lawsuit. Because Isbat Nikah is specifically for marriages that are not tied to other

marriages because the impact will have an effect on the inheritance. The procedure is to apply for polygamy first so that the assembly considers the unregistered marriage does not exist and performs a new marriage because averment of polygamous marriage is the same as 1 submission with 2 purposes, it means the same as cutting a compass. After that they can apply for propose the origin of the child. Judges generally grant permission for polygamy because the first wife's permission is not the main requirement, the judge will look at several aspects such as financial adequacy, heredity and justice. This is because coming to the religious court to issue a polygamy permit is deemed to be of good faith. Because considering the benefits and disadvantages, especially if you are married in a siri and have children, the panel of judges will grant and suggest proposing the origin of the child.

The three judges' opinions regarding the averment of polygamous marriage, they would state that the application for polygamous marriage was unacceptable. Because in that case there was no format for the application in court because the two cases were different types of cases. So that the alternative way for this case is to remarry by applying for a polygamy permit. If the application for a polygamy permit is not accepted by the court, the wife will not be able to get her rights, because the material rights of the child are still protected by the Constitutional Court Decision Letter No.46 of 2010.

Analysis of the View of Judges at Mojokerto Religious Court on the Averment of Polygamous Marriage Perspective Al-Ghazali's Maslahat

Averment of polygamous marriage is the legalization of a marriage by a unregistered husband and wife, but the man already has a legal marriage relationship with his first wife. In fact, the law is stringent, that marriages that can be ordained are those that were carried out before Law No.7 of 1989. The fact is that after the enactment of the law, there is still the practice of unregistered marriage, then if it is submitted to a religious court, the panel of judges is based on Article 7E of the KHI (that marriages can be ordained in the Religious Courts are marriages performed by those who have no obstacle to marriage according to the law Article 7 D and E of Law No.1 of 1974). So, there are still many legalized marriages after the existence of Law No.7 of 1989. In this case, this article will analysis of the view of judges at mojokerto religious court on the averment of polygamous marriage perspective al-ghazali"s maslahat. These five goals are popularly known as (*five principles*).¹⁰ From here, the writer will analyze Al-Ghazali"s maslahat through maslahat, which is divided into 5 main points.

Protection of Religion, That is the same as being obedient to the government. The government prohibits and does not practice polygamous marriage based on existing regulations. In Ulil Amri, the law is mandatory as long as there are no things that deviate from or are contrary to the law or public benefit. Meanwhile, whether or not the acceptance of the averment of polygamous marriage is not justified is in accordance with the law and accordance with legal

¹⁰ Amir Syarifuddin, *Ushul fiqh*, 232

procedures. Legal procedures tend not to bypass legal processes. When her marriage was not legal, then she had to legalize her marriage first. If she wanted to do polygamy, then she had to get polygamy permission from the judge then she got married. She is not directly bypassing the law by using a polygamous unregistered marriage. It is the same as what Mr Fudholi said that applying for polygamous marriage is the same as cutting a compass, namely 1 submission with 2 objectives. The Mojokerto Religious Court cannot accept it because the case does not meet formal requirements and also in religious courts, there is no polygamous marriage averment format because averment of marriage is *voluntair* and polygamy is *contentious*.

Protection of Life, The first and foremost right that is considered by Islam is the right to life, where this right is a sanctified right and its glory cannot be destroyed.¹¹ marriage also aims to create a family that is *sakinah mawadah wa rahmah*. *Sakinah mawadah wa rahmah* is very influential on the psychology of husband and wife. From this explanation, it means that the peace of a family can be said to be *Sakinah* if the husband and wife have a vanity or a calm heart. So that it does not create conflict or complement each other. When the husband and wife perform a unregistered marriage, it must have the potential to cause conflict so that this is not in accordance with the purpose of the marriage, namely *sakinah mawadah wa rahmah*. Getting married aims to escape from hellfire.¹² This is in line with Mr. Abdullah's opinion, that most of the cases are the averment of polygamous marriage is second wife and children have no legal consequences so that their marriage will not receive recognition from the state. So that in Mr Abdullah's opinion it can be seen that to create a family that is *Sakinah mawadah wa rahmah*, the main requirements are the existence of a marriage book and state recognition of the marriage.

Protection of Intellect, maintaining reason impacts a person's mindset, the right to freedom of opinion, and the right to know something or add insight to improve his condition. Intelligence is also an essential element for human life because it distinguishes human nature from other God's creatures. Therefore, Allah instructs humans to always take care of it.¹³ This principle is in line with the opinion of Mrs. Nurul that her second wife will never get justice from the husband because she will not be able to feel her material rights from the husband. Because from the beginning of doing a unregistered marriage, the second wife had done the wrong action. This opinion is also in line with Mr. Abdullah's opinion that the averment of polygamous marriage is usually done when the wife does not feel justice from the husband so that in order to defend her material rights she proposes an averment of polygamous marriage. Because marriage is one of them. When someone is married, the husband has an obligation to be fair, especially when he is already polygamous. When the husband cannot be fair, it can affect a wife's psychological state.

¹¹ Jauhar, *Maqasid Syariah*, (Jakarta: Amzah, 2009), 22

¹² Zaitunah Subhan, *Membina Keluarga Sakinah*, (Pustaka Pesantren:Yogyakarta, 2004), 69

¹³ Amir Syarifuddin, *Ushul Fiqh 2.....*, 236

Protection of Generation, Nasab is identical to a family because, without family, there will be no decrease in nasab. Islam advises Muslims or their creatures not to be celibate because celibacy will not preserve offspring. Same in the Qur'an Surah An-Nur number 32 said that "marry those who are single among you and those who are good among your servants"¹⁴ The opinion of the judges was considered in accordance with this principle that Mr. Abdullah said that polygamous marriage if allowed would continue to destroy the legal system, one of which was in determining the lineage. Mr. Fudholi also argues that his determination of the origin of children due to this marriage cannot be legalized if there is no marriage book. So that if the marriage is not legalized, it is unclear who the child's lineage is passed down to. Therefore, according to the Shari'a, the status of the result of a child for adultery is attributed to the mother. Not accepting or not granting the averment of polygamous marriage is clearly aimed at maintaining the lineage.

Protection of Wealth, assets related to marriage tend to support or dowry the wife's rights, which must be fulfilled by the husband. When a marriage has occurred, the husband is obliged to provide a dowry and a living. A dhohir's livelihood, namely possessions, both clothing, food, and shelter. When the marriage starts from an unclear marriage, the wife's rights status is also unclear. Polygamy of unregistered in Indonesia is very clear that if the wife is not guaranteed a marriage, her rights are not guaranteed. In the Qur'an Surah An-Nisa number 29 said that "O you who believe, do not eat each other's wealth in an evil way, except by way of commerce that is consensual among you."¹⁵ The above argument explains that it is not permissible for someone to eat his property that does not belong to his vanity. If it is related to the problem of polygamous marriage, that is, the husband still has living support for the wife that must be fulfilled. And it is not fulfilled, so the status cannot be specified. Pendapat para hakim juga sejalan dengan prinsip ini, Mrs. Nurul is of the opinion that in a polygamous siri marriage, the wife will not get her material rights if she does not remarry through a polygamous license. This is different from the position of the material rights of children resulting from a polygamous siri marriage which is still protected by the Supreme Court Decision No.46 of 2010 that if a child can prove his biological father through science, the child gets his material rights from his biological father. .Therefore it can be seen that unregistered polygamy marriage, if not ordained, can eliminate the rights of a wife so that in this case, the judge's opinion and government regulations are in accordance with the Islamic Shari'ah.¹⁶

From the explanation of the five Maslahat's, the fiqh rules also clearly state that, in fact, not granting the averment of polygamous marriage brings Maslahat and rejects mafsadat. Since in the case of polygamy marriage averment the mafsadat is more than the benefit, it is in line with the following rules that "leaving obedience must take precedence rather than taking advantage."¹⁷ Because

¹⁴ Kementerian Agama RI, Al-Qur'an, (Jakarta: Almahira, 2011), 573

¹⁵ Kementerian Agama RI, Al-Qur'an,.....80

¹⁶ Jaih Mubarak, Kaidah Fiqh Sejarah dan Kaidah Asasi, (Jakarta: PT Raja Grafindo Persada, 2003), 63

¹⁷ Jaih Mubarak, Kaidah Fiqh Sejarah dan Kaidah Asasi,.... 72

this polygamy series is characteristic, not everyone does it. There is very little to do. Then the statistical problem must be suppressed as much as possible, which affects the general issue. This rule explains that in the event of a clash between the maslahat of the people or the general public and the benefit of the individual or special people, what is considered is the benefit of the general public or the crowd.¹⁸ So that maslahah, which is general in nature, must take precedence over maslahat, which is specific or characteristic. Because safeguarding the marriage, safeguarding the rights of the wife, and protecting the child's rights are already included in the general benefit compared to unregistered polygamy, which is a matter of personal rights only. In order not to be spared from adultery, to satisfy the rights of lust are personal rights so that they must be put second, and what must be given priority is the public benefit.

Conclusions

The opinion of the Mojokerto Religious Court Judge on the averment of a polygamous marriage, namely that in the Religious Court there is no format for cases of polygamous marriage. So that an alternative way for people who have practiced a polygamous unregistered marriage is to apply for a polygamy permit at the Religious Court. Only then do they remarry, and when the marriage book comes out, can they propose the origin of the child. Because one of the requirements to apply for the child's origin is to submit a marriage book. Because when they don't do remarry, the wife will not be able to get her material rights. In contrast to the children resulting from the polygamous marriage series. In the Constitutional Court decision No.46 of 2010 .

That Argument will analyze with the maslahat of Imam Al-Ghazali namely Protection of Religion (نَهْدًا ظَفَح) Islam does not easily allow its people to have polygamy. Because Islam really upholds the values of justice in his family. Therefore, because averment of polygamous marriage, many mudhorot, therefore there are regulations that prohibit polygamy in this way. Protection of Life (ظَفَح (سَنَدًا) in this case is related to the averment of a polygamous marriage, namely the creation of a Sakinah family of mawaddah wa rohmah. When the husband and wife perform a unregistered marriage, they must have the potential to cause conflict so that this is not in accordance with the purpose of the marriage, namely sakinah mawadah wa rahmah. Protection of Intellect (لِنَعْمًا ظَفَح) is related to one's psyche, it is indirectly in accordance with the opinion of the judges that the wife whose marriage is not legalized will not get her material rights. Protection of Nasab (لَسْرًا ظَفَح) in a polygamous unregistered marriage, the nasab will be mixed up. Therefore the judge was of the opinion that he immediately remarried by applying for a polygamy permit so that he could apply for the origin of the child. Protection of assets (لَامِلًا ظَفَح) in relation to marriage tends to support or dowry, the rights of the wife, which must be fulfilled by the husband. When a marriage has occurred, the husband is obliged to provide a dowry and a living. But the problem is that if the unregistered marriage is not legalized, then the wife's rights

¹⁸ Amir Syarifuddin, Ushul Fiqh 2,....243

will also not be recognized by the state. So, in this case, the judge's opinion with the existing regulations on the prohibition of unregistered polygamy marriage merely wants to protect the wife's material rights because the material rights of children are still protected by the Supreme Court decision No.46 of 2010.

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