

FACTS

against MYTHS



VIKAS ADHYAYAN KENDRA

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INFORMATION BULLETIN

THE MYTHS ON PERSONAL LAWS

COMMENT

A major political issue confronting the country today is the controversy over the Uniform Civil Code *versus* the Personal Laws of various religious groups. It has led to a bitter polarisation of opinion, aggravating relations between especially Hindus and Muslims. In the situation the question ultimately is how to reconcile the inherent pluralism of the Indian social order with a demand for uniformity. This assumes relevance as on the one hand the notion of legal uniformity is supposed to promote unity but it mitigates the very spirit of cultural diversity. On the other hand, existing personal laws promote cultural diversity but fail to provide social justice particularly equal rights for women. Besides, the controversies and implications of the issues have been inextricably linked with the political agendas of the various political groups. The Government policy on this has always been based on narrow, myopic political considerations.

The genesis of these controversies and diverse implications can be traced, first, to British colonial rule¹. Between 1860 and 1870 the British had carried out a number of reforms with several legislations being passed. Two of these were the *Indian Penal Code* and *Indian Contract Act* that form the bedrock of our present-day judicial system. For the British rulers these were important enactments as it helped them in their colonial policy — indirect rule in administrative affairs and divide-and-rule in military affairs — of consolidating their political control when laying down uniform laws for civil transactions and for governance of crime and punishment.¹ It was during this period the term 'personal' came to be applied in the legal sphere.

Strictly speaking, there are only two broad categories of laws — civil and criminal — and laws by their very nature are public. The British however made a distinction between 'pub-

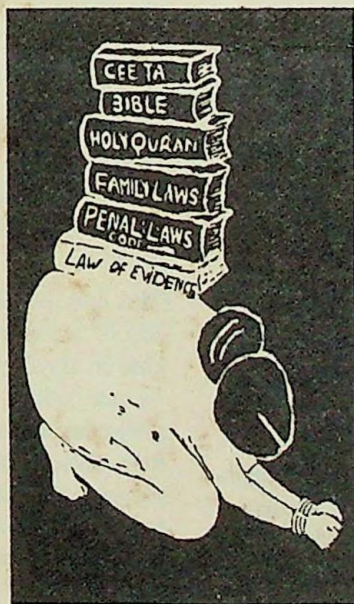
lic' and 'personal' sphere of every-day life, leaving the 'personal' domain out of the realm of uniform legislations for fear that this would spark of unnecessary conflict and unrest.¹ The relevant point, however, in the current context of the controversy is the manner and form in which the Hindu personal law had been codified and "reformed" virtually in total disregard of women's interests. And today, forty-one years later, the noble sentiments and high expectations that this reformed law was supposed to achieve for women is intrinsically male-chauvinist.

At another level, the debate on personal laws reveal an utter confusion of the scheme of values. Right from the Constituent Assembly debate on the present *Article 44* of the Constitution directing the State to endeavor to secure a uniform civil code for all citizens, to the Supreme Court Judgment on the *Sarla Mudgal* case and all that has occurred since, it becomes obvious that the major source of confusion is the obsessive and manic insistence on uniformity by especially communal groups as against the demand for equal rights and justice for women.

Reacting to the almost unanimously orchestrated view of these communal forces for a uniform civil code, deriving from their spurious concerns on appeasement of minorities and polygamy among Muslims, the Muslim fundamentalists have also been equally paranoid with the notion of their religio-cultural identity being threatened, as

if the body of laws improvised and enacted by British colonialists are the centre-piece of their identity!

Against the communal demand of the forces like the RSS for a Uniform Civil Code, any debate on the reform of personal laws and gender justice is projected as a challenge and a threat to their tenuous security by the Muslim fundamentalists. Thus, when a woman seeks justice to establish her rights, it at once becomes a subject of claims arising from these and



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other religious communities for reasons other than gender justice. And in the power play of the various communal forces, etc., women's welfare becomes the battering ram in their campaigns for and against this issue. The objectification of women in this way can be traced to a number of popular prejudices and fallacies rooted in the communal demands of not just Hindu and Muslim but in all personal laws that are heavily loaded against women.

In de-communalising these demands the need is also to expose the various misconceptions and stratagems of the communal forces on these issues.

MYTH

Personal laws are divine as they are based on religious scriptures and therefore are immutable and cannot be changed.

FACT

Formulations made by theologians, the clergy, jurists, etc., — based on values, principles that are rooted in the religious scriptures — cannot be confused to be the handiwork of god. These formulations are man-made regardless of the source from which it is inspired, etc. Like, for instance, the 'Shari'ah' of Islam or the laws of other religions on personal and family matters like marriage, divorce, succession and inheritance. These formulations have been enunciated in a very clearly defined, historical context, within a very specific social milieu and have accordingly governed theologians in the light of also their own experiences.

From time to time as experience continue to emerge from various sources these religious principles, values, etc., get re-formulated and implemented to suit present-day realities. After all, religious laws and doctrines are made more for the people and not the other way around. "What is sacred and immutable is principle, not its application. Thus while principle is divine, its application is certainly human"

On a more theoretical level a number of Islamic scholars' like Dr. Asghar Ali Engineer of the *Centre for the Study of Society and Secularism*, Bombay, among others, maintain that the Qur'an, (sometimes transliterated as "Koran"), as the *only* source of Islamic law and of a non-human origin is incorrect. The 'sunnah' or tradition of Prophet Mohammed comprises the second basic important source of law. But the sources which contributed towards its development for centuries, during which time it was formulated — 'rai' (opinion), 'qiyas' (analogy), 'ijma' (consensus) etc — are neither accepted by all Muslims alike nor claim to have divine origin. That is, while the Qur'an *elucidates* the essentials of Islam, the details of the code of rule and regulation relating to all legal aspects of a Muslim's life and cumulatively referred to as 'fiqh', cannot be regarded as divine as the Qur'an categorically rules out the possibility of any human person (including the Prophet, the Imams of the Shias and the great Islamic scholars) to be divine.

And, finally, what goes by the name of Muslim family law is actually an Anglo-Indian Islamic Law¹ as it developed in the 19th and early 20th centuries under British colonial rule; in British courts, administered by Christian judges rather

than by Muslim 'Qazis'. Today it is administered by Indian (mostly Hindu) judges who mimic this colonial legacy. The Anglo-Indian-Muslim (as also Anglo-Hindu) family laws are a hodge-podge of British court officials' records of customary practices with interpretations of the Qur'an and the 'Shariah' by European judges who misunderstood Islam, its actual customs of Indian Muslims and were even prejudiced. Yet their judicial verdicts on these matters have come to acquire the force of law because British (and now Indian) jurisprudence allow court judgments to acquire the force of binding precedents, enforced first by the colonial and now post-colonial Indian State. Pathetically enough, the Muslim leadership rallies around this ossified Anglo-Indian-Islamic law and defends it as though its judgements conform to the enunciation of the Holy Prophet in the Qur'an.

MYTH

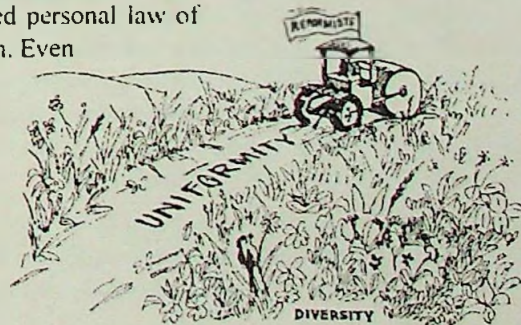
Uniform Civil Code (UCC) is a 'sine qua non' for national unity and integration — "one country, one nationality, one citizenship and one legal system".

FACT

At best, this is merely a probability. In reality, however, the necessary connection between a uniform civil code and national integration does not exist. Most laws in India are uniformly applicable to all its citizens. Yet, since the 60s especially, communal conflicts, etc., have risen rather than diminished. Common laws did not prevent the split up of old Pakistan. (Sources promoting national unity are far more complex and multifarious than just sharing common laws).

As an axiom, this claim sounds wonderful. There is however very little proof to suggest that "one legal system" is a cause for "one nationality". And, the call for national integration is different from the call to join the "national mainstream" demanded from minorities by communal groups like the RSS, BJP and others. The aggressiveness and the virulence with which they go about campaigning for it only exposes their bent to snuff out minority identities rather than in honestly promoting national unity.

This question of "unity" also manifested itself in the context of a Supreme Court judgment in the Sarla Mudgal case on May 10, 1995 relating to bigamy wherein one of the learned judges, Justice Kuldeep Singh, had observed that while the "Hindus along with Sikhs, Buddhists and Jains have forsaken their sentiments some other communities would not". This observation was in reference to the reformed Hindu law. This Law was not established for the sake of "national unity or integration". It was extended to these communities because they never had had any scripture-based personal law of their own. Even



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before 1955-56 these communities had been governed by Hindu law subject to some customary usages of their own. For obvious reasons this Law could not have been extended to Christians, Muslims and Parsis. Surely, this was not so due to any lack of feeling of national unity or loyalty on their part⁶ and incidentally, Hindus had never dissolved their separate personal laws or forsook "their sentiments", they had merely codified and "reformed" the laws.

If uniformity is the hallmark of unity why should there be a federal system? Or reservations on the basis of caste and special tax benefits to Hindu joint-families? Why should the Adivasis enjoy customary rights of their own? The uniformity thereby loses its relevance especially with regard to the existing stark inequalities between the sexes. For instance the legal inequalities in the BJP ruled States. These have not been amended. Brinda Karat⁷ reveals that a legislation which was unanimously passed by the Haryana Assembly in 1987 (including assent by both the BJP and the Congress), the equal rights granted to Hindu women in non-ancestral property were cancelled. It was also specifically mentioned that women would not have equal rights to agricultural land as it would divide and fragment families.

Indeed, how would a UCC be conducive to national unity when uniform laws for crimes, transfer, and constitutional rights have largely failed to promote it till today?! Besides, these laws in a way are comparatively more uniform than even those of the US where each State has its own laws. If this uniformity has not led to nation's integration, why should a Uniform Civil Code be any different? The unity and integrity of nation can never depend on a set of laws. This argument, incidentally, is also referred to *Article 370* on J & K. If merely laws can strengthen national unity then our nation should not be facing any challenges to its unity at all as 90% of our laws are common.

The issue of national integration thus goes beyond uniformity. The crucial factor is not uniformity but equality because it is equality that strengthens integration.

MYTH

Hindu family laws having long since been reformed, Hindus are already being governed by uniform personal laws. Thus gender justice and equality within the community already exists.

FACT

Hindu law as applicable today is *not* altogether uniform for all Hindus. It only provides a skeletal framework and leaves much to the customary laws prevalent among the various Hindu communities.

Prior to codification, Hindu law was divided between two main schools.— the 'mitakshara' and 'dayabhaga' schools. Under the *Hindu Marriage Act* there are two types of marriages*— described as religious and secular or civil marriage - *Section 7(1)* and (2). *Section 7(1)* reads: "A Hindu marriage may be solemnised in accordance with the customary rites and ceremonies of either party thereto and (2) Where such rites and ceremonies include the 'saptapadi' (i.e. the taking of seven steps by the bridegroom and the bride jointly

before the sacred fire), the marriage becomes complete and binding when the seventh step is taken".

Obviously, these Sections have nothing to do with religion. Moreover, *Section 5(iv)* and (v) of the same Act shows that there is no common civil code governing marriage among Hindus. It lays down conditions subject to which marriage may be solemnised, namely, "(iv) the parties are not within the degrees of prohibited relationship, unless the custom of, or usage governing, each of them permits of a marriage between the two, (c) the parties are not 'sapindas' of each other unless the custom or usage governing each of them permits of a marriage between the two".

Elaborating further, *Communalism Combat*⁹ illustrates the enormous diversity within all the personal laws, viz.,

- The different rules for taking a child in adoption
- Adivasis who are governed by customary law. Among the Santals and Bhils women cannot hold property. It is only recently they have begun demanding protection against polygamy;
- Christians in Assam and Coorg and other Christians among Adivasis in Bihar and Orissa have been exempted from the application of the *Indian Succession Act, 1925*;
- Even the *Shari'ah Act* of 1937 codifying Muslim law and binding civil courts to apply its provisions to all Muslims relating to matters of family laws and relations is out of bounds for Muslims of J&K where the existing customary law takes precedence over it;
- For the Muslims of Goa, the Portuguese Family Law and Succession Laws continue to apply;
- For the Sunni Bohras of Gujarat and the Muslim Ghirasis of Bharuch, Hindu customary law has been applied pre-and post-Independence "in the interest of uniformity",
- Muslims of Kerala have retained their 'marrumakadayan' system. It is not shared by Muslims in other parts of the country.

Undoubtedly the reform of Hindu law through codification did have some positive impact. It carried forward the tradition, already established during the national movement, of legitimising notions of women's equality in the policy and in society at large. It paved the way for further gradual reform, e.g. the introduction of divorce by mutual consent into the *Hindu Marriage Act*. On the whole, however, the impact of codifying law only for Hindus without giving them any option, and of trying to eradicate diversity in the name of "Hindu Unity"¹⁰ was very detrimental. In the process it diffused the myths that

- Hindu women had achieved equal legal rights;
- the reformed Hindu law is "secular", not "religious" or "personal" like the Muslim personal law which apart from being "backward" can therefore be secularised only by Hinduising it;
- Hindu men were worse off than Muslim men because the former have been deprived of 'rights' that the

latter enjoy;

MYTH

The reformed Hindu law governing Hindus today goes beyond religion and is a secular, progressive law.

FACT

The reform towards the codification of Hindu laws had met with stiff resistance both from within the Hindu Law Committee established on January 25, 1941 under chairmanship of B.N. Rau and from without. The opposition ranged from President Dr. Rajendra Prasad, Maulana Abdul Kalam Azad the Congress President (1950), the RSS chief, M.S. Gollvalkar including Shankaracharya of Sankeshwar Peeth who could not tolerate an untouchable reforming Hindu society¹¹. He alleged that Ambedkar was trying to destroy Hinduism by marrying a Brahmin girl. The other reasons for the opposition were:

- The woman always gets a sizable share in the family wealth by way of jewellery and as dowry at the time of her marriage;
- It will introduce a stranger into the family, i.e., the son-in-law, and this is very undesirable;
- It will lead to friction between the brother and the sisters;
- As her affections are transferred to her husband's family it is not advisable to give her a share in her father's property.

Even the introduction of a clause outlawing the crime of bigamy was strongly opposed even in some high courts¹² e.g. in the Bombay High Court when Chagla was a Chief Justice. The argument was that a son is an absolute necessity if a Hindu is to attain salvation and that therefore polygamy was integral part of Hinduism. One becomes polygamous in pursuit of a son and not for any other reason. Secondly, only Hindus have been singled out for this discriminatory treatment, not Muslims who practice polygamy.

However in 1952, the Congress, on winning the Elections pushed the bill after diluting it considerably, in lieu of the progressive elements, to placate these conservatives. However this led to Dr. Ambedkar resigning in protest. The Code was enacted with four different piecemeal legislations, viz.,

- The Hindu Adoption and Maintenance Act (1950)
- The Hindu Marriage Act (1955)
- The Hindu Succession Act (1955)
- The Hindu Minority and Guardianship Act (1956)

As for its secular nature, the four Acts are instead more Hindu than Secular.¹² Under the *Hindu Marriage Act, 1956* for instance, conversion from Hinduism immediately provides a ground for divorce for the other spouse. The question of reconciliation during the tendency of proceeding as a step to avert divorce is of no avail and judicial separation as an interim measure to enable the separated couples to rethink their stand and come together is not available either.

Difference in religion creates incompatibility and the statutory provision encouraging divorce is both anti-secular and is also in derogation of Article 25

Again, under the *Hindu Adoption and Maintenance Act* one must be a Hindu to be able to adopt and the person capable of being adopted should also be a Hindu. Thus the principle that persons belonging to two religions can live together is anathema.

Under the *Hindu Minority and Guardianship Act* ceasing to be a Hindu deprives either spouse to claim guardianship over the children. The law of succession though it does not deprive right of succession to a convert the children and the descendants of the convert are denied the right to succeed to the property of the Hindu relative unless such children or descendants are Hindu when succession opens.

In 1976 the *Indian Succession Act* till then compulsorily applicable to all those who voluntarily opted for the secular marriage law or the Special Marriage Act was made wholly inapplicable to the Hindus, Buddhists, Jains and Sikhs henceforth to be governed by the religion-based *Hindu Succession Act* even if they married under the *Special Marriage Act*. While in the same situation members of the other communities would be still governed by the *Indian Succession Act*. And, finally, to enact a law with a sticker, "Hindu", is hardly a secular move!

MYTH

By incorporating all the best elements from existing personal laws the Uniform Civil Code will be a model for all communities to emulate.

FACT

As far as gender issues are concerned there are no existing laws which are "best elements". There may be laws which are comparatively better but these are still based on glaring inequalities between the sexes and cannot therefore form the basis for an umbrella legislation, a Uniform Civil Code. For instance, which existing family law of a community or even the secular law would be the basis for equal laws on inheritance? Muslim women may have enhanced rights in this area as compared with Hindu women under the 'mitakshra' system but they are still not equal with men. No existing law deals with the problem of disinheritance of the female heir through a will. Which law would apply or be the basis for a law outlawing the crime of bigamy? Presently, the law is so weak that it is virtually impossible to prove the crime, which is why there are so few convictions in spite of the increase in bigamous relationship and marriages.

On the matter of divorce rights related issues of maintenance and custody of children are extremely weak. In this, Christian women are even worse off since the *Indian Divorce Act 1869* applicable to them discriminates on ground of divorce. Adultery on its own is not a basis for divorce for women although it is for men.

The so-called secular laws are also woefully inadequate. Thus, the very framework of the "finest" of laws for a UCC is severely limited. For example, the incidence of violence

within the family against women has increased alarmingly in all communities but there is no comprehensive legislation to deal with it. There is increasing problem of child abuse within the family and increasing incidence of desertion. In such cases there is no law to ensure that the property accumulated to the couple after marriage would be in both their names. At present such property is invariably claimed by the male as he is often the earning member.

Studies of the statutes of the Act reveal that the legal uniformity leads to the sacrifice of women's right by the deletion of several local customs which granted rights to women.

MYTH

Enforcing monogamy through the enactment of the Hindu Marriage Act abolished polygamy thus preventing Hindu men to enter into polygamous marriages by converting to Islam.

FACT

Hindu men do not commit the crime of bigamy *only* through their conversion to Islam. They mostly violate the Hindu law of monogamy itself and through other devious routes. For instance,

- Through the custom of 'karewa' marriage (marrying a widow to her late husband's brother) practised among the Haryanavis and Punjabi Jats with the aim of preventing the widow from inheriting her husband's share of the property. Often the brother chosen may be already married;
- Since Hindu marriage law does not require all marriages to be compulsorily registered, for most people a marriage is a marriage if the families concerned and their relatives give the social seal of approval to them as a married couple. A Hindu man may commit bigamy with impunity (as many actually do) as long as his family recognises his second marriage and his first wife lacks the necessary power and other resources to "prove" bigamy in the courts;
- Through the various loopholes in the law *itself* even while remaining within the fold of Hinduism. A number of such cases¹³ have come up for hearing in the various courts, viz.,
- In 1956 Bhaurao Lokhande married Indubai and 6 years later in February 1962 married another woman Kamlabai forcing Indubai to file a case of bigamy against him. On being convicted Bhaurao appealed to the Supreme Court. In the proceedings Indubai stated that Bhaurao's second marriage was according to a local customary marriage, 'gandharva'. The court on determining this form of marriage wherein the two most essential prerequisites for such a legitimate Brahminical Hindu marriage are (i) 'vivaha homa' (invocation before the sacred fire) and (ii) 'saptapadi' — concluded that a Indubai failed to prove that these ceremonies had been performed by Bhaurao and Kamlabai and thus the marriage between them was invalid and Bhaurao was acquitted.

- In 1948 Suresh Chandra married Priya Bala as per Hindu rites. On ill-treating her he forced her to escape to her mother's. In 1962 he married Sandhya Rani and Priya Bala charged him with bigamy but he denied in court to having married Priya Bala. He even stated that even if he had married her, so long as she could not prove that he and Sandhya Rani had had performed the two essential ceremonies, he could not be convicted. Ultimately, the Supreme Court on confirming that the two ceremonies had not been performed acquitted him even on Suresh Chandra's admission of the second marriage.

A further random citation of some reported judgements¹⁴ during the intervening period of 30 years from Bhaurao Lokhande in 1965 to Sarla Mudgal in 1995 shows the holowness of the provision of monogamy, viz.,

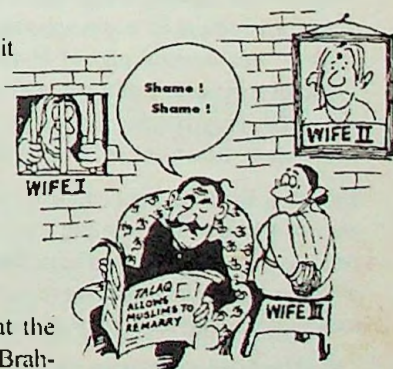
- 1965, Jammu & Kashmir - Hindu law does not penalise concubinages;
- 1969, Assam & Nagaland - Court acquits bigamous husband;
- 1970, Mysore - Courts invalidates first marriage at Tirupathi temple;
- 1972, Kerala - Nair marriage invalidated;
- 1973, Bombay High Court invalidates Neo-Buddhist marriage;
- 1975, Calcutta High invalidates marriage under the secular SMA ceremony;
- 1985, Bombay High Court invalidates first marriage
- 1989, Andhra Pradesh - marriages ceremonies of the Kamas;
- 1990, Kamataka - lingayat marriage ceremony invalidated
- 1992, Allahabad - Dalit ceremony of Raidas invalidated
- 1995, Madras - paternity of child through second marriage not recognised.

The above illustrate that the courts have upheld the Brahminical rituals of 'homa'

'saptapadi' and 'kanyadani' on the basis of the first wife failing to produce evidence of these two ceremonies. All this makes the imposition of the Hindu law of monogamy a farce.

MYTH

The recognition of her economic dependence, the right to maintenance which is legally available to women is adequate to protect especially her economic interests and compensate her for the contribution she makes to her family and society at large.



Adapted from MANUSHI No. 69 p7

FACT

For the amount of labour she provides by way of child-bearing, child-rearing, and domestic labour like cooking, washing and running the home the maintenance that has been made available to her is woefully inadequate and unenforced. As researchers Gangoli and Solanki point out (*Times of India*, 27.9.95)

- Women have known to have received maintenance as little as Rs.50/- for themselves and Rs.25/- for their minor children under HAMA (as in a 1992 judgment of the Bombay High Court in the case of *Viswanath Pundlik Chauhan vs Nirmala & others*)
- The IDA applicable to Christian women holds that a woman after divorce is entitled to an amount that "shall in no case exceed one-fifth of the husband's net income".

Above all women find it very difficult to secure these rights speedily, without going through a lengthy battle. Even under the SMA while *Section 125* has been communalised especially after the Shah Banu controversy.

At any rate, maintenance can neither in principle nor in practice adequately compensate women. Firstly, the very basis of a right to property, more specifically to matrimonial property, is a recognition of a contribution to the acquisition of property. It recognises that, but for a woman's non-monetary contribution to the family, her husband would not have been able to acquire the property.

The right to maintenance, however, is based on a recognition of women's economic dependency. It is not an entitlement based on contribution, but rather, based on providing for on economic need.¹⁵

Maintenance rights are also governed by *Section 125* of the *Code of Criminal Procedure* (Cr.P.C). However, this right is qualified by these personal laws, thus restricting the scope of a women's entitlement to the same. For example:

- *Section 25(3)* of the *Hindu Marriage Act, 1955*, providing for permanent alimony and maintenance, allows

the Court to rescind the order of maintenance if it is convinced that the wife has not remained chaste;

- *Section 37* of the *Special Marriage Act, 1954* and *Section 40* of the *Parsi Marriage & Divorce Act, 1936* provides the same;
- *Section 125* of the Cr.P.C. states that the wife's claim for maintenance would be defeated if she lives in adultery;
- The Muslim Women's (*Protection of Rights on Divorce Act, 1986*, *Section 125* has been made optional for a divorce Muslim women (though it continues to apply to Muslim married women, daughter and brothers). This Act provides that the former husband is to maintain the divorced woman during the period of 'iddat' up to 2 years from the date of the birth of their children, after which the burden is shifted to her paternal relations.

All this only reveals that the purported objective of maintenance is hardly realised.

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