

The implementation of civil actions against non-compliance with alimony obligations in Peru.

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Summary

The work developed a problem that arises in the Peruvian reality: the failure to comply with the maintenance obligations judicially established in favor of minors, which on many occasions causes the deprivation of liberty of the person liable for maintenance, due to the configuration of the crime of omission to family assistance, resulting in the continuation of said non-compliance. as well as that minors are the most affected. Therefore, through this article we sought to propose the implementation of civil actions based on Chilean legislation and the principle of the best interests of the child to make effective the fulfillment of maintenance obligations. Through the development of this article, it will be determined that the use of the aforementioned civil actions is feasible and although the Peruvian reality is not the same as that of Chile, the ideal and possible solution to the problem that affects a large part of the population, either directly or indirectly, can be observed. because although there is a judicial process for alimony, a National Registry of Delinquent Alimony Debtors and the criminal figure of the omission of family assistance in case of non-compliance; Peru is unable to effectively combat the various situations of food non-compliance that arise.

Keywords: food law, alimony, alimony obligation, alimony non-compliance.

Introduction

Family law is one of the most controversial branches of private law, noting that for some time now it has been presenting a series of innovative trends in the different legal institutions that compose it; In this sense, it can be seen that, in Peruvian legislation, compared to other Latin American States, it is not at the forefront in matters of transcendence such as the actions that the State must regulate in the face of non-compliance with the maintenance obligations judicially established in favor of minors, the problem being the lack of mechanisms to execute it.

For this reason, the crime of omission of family assistance appears, implemented by the Peruvian legislator with the intention of protecting the legal good of the family and punishing those who reoffend in the face of non-compliance with alimony debts; The favorable aspect of this criminal action would be to prevent and guarantee that the parents assume their role by complying with their duties and obligations, both moral and legal, through the threat of a custodial sentence, having as a negative side the risk that the sanction will be executed, and thus make it impossible to comply with the obligations established by the court. This generates a detriment, not only for the obligor, but also for the minor.

In this sense, the general objective of this article is aimed at analyzing how the implementation of civil actions would be necessary to effectively deal with cases of non-compliance with maintenance obligations in favor of minors in Peru; and, as specific objectives: to describe Peruvian and Chilean legislation regarding the regulations on alimony regulation, as well as to explain the Peruvian reality and the non-compliance of delinquent alimony debtors.

On the other hand, the investigation is justified, in the innumerable cases that arise of non-compliance with maintenance obligations judicially established in favor of minors in Peru; where, due to a lack of budget on the part of the State or other problems, a legal system is not properly implemented to try to alleviate this situation, even more so in the case of children and adolescents, who are considered a vulnerable population and to whom States must direct greater legal protection.

This research is of importance, taking into account that Law No. 14,908, on family abandonment and payment of alimony and its amendments, will be analyzed, being that the last one, Law No. 21,484, began to take effect as of May 20, 2023, where it is appreciated that the Chilean State, has ordered the application of certain measures or civil actions in the event that a maintenance obligor fails to pay alimony or alimony debts, such as: withholding the annual income tax refund, losing the driver's license for a period of 6 months, with the exception of the aforementioned measure, withholding up to 50% of the financial credit entered into by the

debtor, as well as the rejection of the processing of his passport, the withholding of funds held in bank accounts or other financial instruments as well as the withholding of a certain amount from the debtor's pension fund; verifying whether it is giving good results or not; All this in the light of the principle of the best interests of the child, a fundamental principle that serves as a precept for the different judicial decisions in which the child has an influential role.

Finally, this academic work seeks to propose the implementation of civil actions in Peru to guarantee compliance with judicially set alimony; having as a last resort that of resorting to other types of legal measures such as the custodial sentence; by virtue of the crime of omission of family assistance; this is based on the civil measures that the Chilean legal system has adopted in favor of the best interests of the child.

Regarding the right to alimony

Before going into the in-depth development of the subject, it is important to mention the place of belonging to the right of the child supporter, in the field of family law, which has several edges, but in spite of this it is possible to define the family as that moral manifestation of relationships between people; some may define the family as a legal person; as a legal organism and some more as an institution, but all doctrinaires reach the consensus that a family is made up of people with kinship ties, and that does not imply that they are by blood.

In contrast, if we focus on the right to alimony in its entirety, it is feasible to mention that this institution also has different angles to consider, this in the sense of being regulated in favor of minors or adults; in this order of ideas, in Peru, "a person over eighteen years of age is only entitled to alimony when he is unable to provide for his subsistence due to duly proven physical or mental incapacity [...]" (Civil Code, 1984, Article 473).

However, this is not the only case concerning adults, since Article 424 of the Civil Code also provides for the subsistence of the obligation that parents have to provide for the support of those children who are single, of legal age and with the continuation of their studies of profession or trade in a successful manner. the same prescription determines that such maintenance will only be until the age of 28 (Congress of the Republic, 1984).

On the other hand, the Peruvian legislator has provided that the notion of alimony also includes "[...] the expenses of the mother's pregnancy from conception to the postpartum stage" (Civil Code, 1984, article 472). For this reason, it can be said that extraordinary situations have been foreseen, where pre- and post-natal patients, and even adults, are subjects who also enjoy this fundamental right; however, as mentioned in the introduction to the work, the focus is limited to the affected minors.

In this order of ideas, the dual nature of the right to maintenance is announced, including the patrimonial and extrapatrimonial extremes. The first explains that this right requires sustenance that can be economically valued. However, its extra-patrimonial nature derives from its very personal nature, since it seeks the complete satisfaction of certain needs that are personal and the duty of the parents to provide them, which means that there is also a personal and family environment that integrates this right.

From the above, it is important to develop its regulations, this because food has a great legal relevance, appreciating its recognition in various international norms, which implies that the States parties to these legal provisions must respect, protect and guarantee this right, making it a human and fundamental right at the same time.

We can corroborate this in the Universal Declaration of Human Rights, hereinafter (UDHR), which states that "everyone has the right to a standard of living adequate for the health and well-being of himself and his family, and in particular food, clothing, housing, medical care and necessary social services; [...]" (United Nations General Assembly, 1948, Article 25). Remembering that the UDHR is a primordial document that many States, including Peru, consider as an ethical and moral standard, where it is possible to know the reason for the importance of seeking protection and guarantees for this right. The same is reflected years later in the International Covenant on Economic, Social and Cultural Rights, which states that: "The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. [...]" (General Assembly of Human Rights, 1966, Article 11).

It should be mentioned that the Inter-American Convention on Maintenance Obligations states that "Everyone has the right to receive maintenance, without distinction as to nationality, race, sex, religion, filiation, origin or migratory status, or any other form of discrimination" (Organization of American States, 1989, article 4); however, it is reiterated that this article will focus on the right to alimony in favor of minors, as indicated in previous lines, as they are the most vulnerable population, as they cannot meet their needs on their own, but require the help of other people; therefore, legal action must be resorted to when it is not voluntarily complied with on the basis of the principle-right of the best interests of the child, which is in fact recognized in the Convention on the Rights of the Child, which regulates the following:

In all actions concerning children taken by public or private social welfare institutions, courts, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration. (UNICEF, 2006, article 3, paragraph 1)

This ensures that there is an adequate preservation of the exercise of all children's rights, including the right to maintenance. Thus, it is necessary to point out that when referring to rights we must also point out their correlate, which are obligations; and, of course, family law is not exempt from this, since being one of the branches of civil law, it is an integral part of private law, and this means that there are legal duties and responsibilities between the members of the family, finding the right to alimony, as an obligation between relatives either by blood or by affinity or adoption; with a priority established in the Civil Code, where it states that "Alimony is owed reciprocally: 1. The spouses. 2. Ascendants and descendants. 3. The siblings" (Civil Code, 1984, article 474).

Therefore, in effect, this right establishes the natural and legal obligation of certain persons with respect to others with whom they maintain a relationship of kinship, affinity or adoption; in addition, that the alimony recipient is in one of the cases established by law, such as being in a state of need. Likewise, this right is of an inalienable and very personal nature since it helps to guarantee the well-being of the members of the family; It is important to clarify that the term alimony not only refers to food, but also to clothing, housing, education, health and other expenses that the alimony recipient may need for his or her sustenance and personal development.

Food Law in Peru

It is in the Substantive Code that the obligations of parents in relation to their children and the duty to provide them with food are established; in the case of Peru we find in the Civil Code the regulation of the right to alimony based on article 472, where said article stipulates that "alimony is understood to be that which is indispensable for sustenance, housing, clothing, education, instruction and training for work, medical and psychological assistance and recreation, according to the situation and possibilities of the family. [...]" (Civil Code, 1984, Article 472). This right can be claimed through a maintenance process, provided that the provisions of the Code of Civil Procedure and the Code of Children and Adolescents are respected.

In this case, the question would be to find a way to ensure that people comply with the payment of their maintenance obligations; that issue was of the utmost importance in Peru, as in other States. This doubt is not new since it has also been relevant in the previous regulations; that is why, as a way of alleviating non-compliance with alimony, the implementation of a Registry of Delinquent Alimony Debtors was ordered within the judicial measures or actions, only at the request of the plaintiff or plaintiff, with the main objective of providing transparency and facilities for monitoring compliance with these obligations; even more so because of its public nature.

Thus, the Registry of Delinquent Alimony Debtors, hereinafter REDAM, is a tool that was implemented on the website of the Judiciary of Peru, in order to register those delinquent debtors who have accumulated three successive or alternating installments with respect to their alimony obligations ordered by court order; allowing the authorities and interested persons to consult on the people who are registered in said system, as it is of a public nature; its purpose being to guarantee compliance with their payments, as well as the rights of the dependents of said pensions; all this following the provisions of Law 28970 of 2007, a law that creates and regulates everything related to this legal tool.

However, despite the implementation of REDAM since 2007, non-compliance with maintenance obligations continues to be verified; so that the alimony recipients to date do not have a correct execution; even more so if there is a lack of knowledge in requesting that the delinquent debtor be registered on said virtual platform.

It should be noted that recently, on April 22, 2024 to be exact, a new legal provision was incorporated into Peruvian legislation, which is contained in Law 32006, which modifies Article 564 of the Code of Civil Procedure on access to economic information of defendants for alimony, which now rules that:

The judge, ex officio, accesses online the automated information systems (electronic form) of the Ministry of Labor and Employment Promotion (Mintra) or the automated information systems of the National Superintendence of Customs and Tax Administration (Sunat) and extracts in real time the information on the defendant's workplace. their remuneration, gratuities, vacations and any freely available sum that comes from the employment relationship of the latter and, if applicable, obtains information on the commercial or independent professional activity and on the monthly income received for these, as well as the annual income affidavits that they have made for these activities. (Code of Civil Procedure, 1992, article 564, para. 1)

The first paragraph of this amended article refers to the power of the judge, without the need for a request from the parties, but ex officio to be able to access the different public institutions to verify in real time the economic situation of the defendant, both in the Ministry of Labor and Employment Promotion, and in the National Superintendence of Customs and Tax Administration. the latter is in charge of administering the taxes of the Peruvian national government and, as the legal precept says, the economic activity of a natural person who belongs to a workplace.

It is important to mention that this modification does not have a single paragraph, but in the following it specifies that the judge can also consult the Superintendence of Banking, Insurance and Private Pension Fund

Administrators, with the intention of knowing, also in real time, about the banking and financial information of the defendant (Congress of the Republic, 1992, article 564).

Following the same line, it is determined that in the same way the magistrate can obtain information from the National Superintendence of Public Registries on the assets that the defendant has, as well as from the National Registry of Identification and Civil Status on the number of minor children that the defendant has; Now it should be emphasized that the clause invoked emphasizes that the resolution where the judge orders, ex officio, that the information of said institutions be provided must be correctly motivated, in addition to that said request can be challenged.

This article provides for other cases, where this information is required of the defendant, having a period of no more than seven working days to do so, under warning, and in the event that such a request is not complied with or its falsity is proven, the judge may send the certified copies of the aforementioned so that the Public Prosecutor's Office may take the corresponding criminal measures (Code of Civil Procedure, 1992, article 564).

Having explained the entire modification of the article, it is appropriate to recognize that this represents an advance in procedural matters with respect to inquiring about the economic capacity of the maintenance obligor, which makes it possible for delinquent maintenance debtors not to evade their responsibilities, this through the power provided to the judge to promote ex officio the real-time verification of the economic capacity of the maintenance defendant, thus obtaining sufficient elements to sentence without delay; The latter is something important to consider, because although it is a great contribution and benefit to the law, as said before, it is only extremely useful at the time of sentencing, but not for the execution of the fulfillment of these obligations.

In this sense, the question arises as to how it would be convenient to implement civil actions to deal with cases of non-compliance with the maintenance obligation judicially established in favor of minors, in Peru; this taking into account that this problem is classified as a crime in the Criminal Code, which states that:

Anyone who fails to comply with his obligation to provide the maintenance established by a judicial decision shall be punished with imprisonment of not more than three years, or with the provision of community service of twenty to fifty-two days, without prejudice to complying with the judicial order [...] (Penal Code, 1991, article 149)

This measure is quite risky, but it finds its justification in the Pact of San José in its article number seven, which, although it states that no one may be deprived of his liberty by reason of debts, also states that "it does not limit the mandates of the competent judicial authority issued for non-compliance with maintenance obligations" (Legislative Assembly of Costa Rica, 1969, article 7, paragraph 7).

From the above, it is noted that the Penitentiary Establishments of the Peruvian State are totally overcrowded, and with the knowledge that a large number of cases of inmates correspond to those who have been convicted of the crime of Omission of Family Assistance, as it is called in Peru, where there are 1387 inmates for non-compliance with the maintenance obligation until December 2023 (Information System of Penitentiary Statistics of the Institute National Penitentiary, 2023); From this it can be deduced that criminal measures are not the best solution for this type of case; that is why other types of actions should be taken aimed at making compliance with the maintenance obligation effective, but how to do it without taking into account the alimony process; even more so that the REDAM does not seem to be sufficient as a compulsive measure.

About civil actions and Chilean legislation

As mentioned at the beginning of the article, what is sought is to propose the taking of civil actions to guarantee compliance with alimony obligations, taking as a reference Chilean legislation, which has had recent modifications.

The Chilean law has a certain particularity in terms of the implementation of civil actions to effectively deal with cases of non-compliance with maintenance obligations in favor of minors; everything was born from the enactment of Law No. 14,908, on abandonment of the family and payment of alimony, a law that was promulgated on September 14, 1962, published on October 5 of the same year, to enter into force on October 26, 1998, where after a series of important events, This Act established provisions relating to, as its name implies, the regulation of protection measures for the abandonment of the family and the payment of alimony, seeking to comply with these obligations and to protect the child under any circumstances.

This is where Law 20152, enacted on December 22, 2006 and published on January 9, 2007, comes into play, which seeks to strengthen the enforcement mechanisms for the fulfillment of maintenance obligations by adding modifications concerning the jurisdiction of the court that must hear alimony cases (National Congress of Chile, 2007), taking into account the recent creation of the Family Courts with the implementation of Law 19968.

Returning to the central theme, among the most outstanding mechanisms implemented by Law 20152, we find that:

The judge shall order, in the month of March of each year, the General Treasury of the Republic, to withhold from the annual income tax refund to be received by debtors of alimony, the unpaid amounts

and pensions accrued up to the date on which the refund should have been verified. (National Congress of Chile, 2007, Article 16, paragraph 1)

But without a doubt, the most important thing to highlight is that the license to drive motor vehicles is lost for a period of up to 6 months, and although there is the exception that this measure is not taken for the reason of the need to have said document for the exercise of the employment activity that generates income of the alimony; In this sense, it is a measure that for the point of view of many is radical, because it can mean a violation of the fundamental rights of the obligor; indeed, taking into account that any person who meets the requirements of the law can apply for a driver's license, regardless of whether it is to use it for work purposes or not; because if they wish to make use of their right of circulation, they can only do so using the pedestrian route (Congreso Nacional de Chile, 2007).

On the other hand, there is also Law 21389, Law that Creates the National Registry of Alimony Debtors and modifies various legal bodies to improve the Alimony Payment System, enacted on November 10, 2021 and published on November 18, 2021. Although the creation of this legal institution such as the National Registry of Alimony Debtors is not something new in the Peruvian State, some of the lines prescribed in this regulatory text are of great interest, such as the withholding of credit operations, set forth in Article 28, which stipulates that financial services that enter into a credit operation that exceeds 50 Unidades de Fomento (UF) with a registered person in the registry, they will have to withhold fifty percent (50%) of the credit or a lower amount that can cover their debt (National Congress of Chile, 2021).

Of course, the law described in the previous paragraph not only provides for this measure as the only one, adding that the National Registry and Identification Service (SRCeI), the institution in charge of identifying and accrediting significant facts and acts in the lives of Chileans, is obliged to reject the registration of ownership of any motor vehicle in the name of the debtor registered in the registry, this is corroborated in Article 31. Along the same lines, Article 32 establishes that the application to process a passport to the person who appears in the registry will be rejected, and as if this were not sufficient measure, it is mentioned in Article 39 that, at the time of the celebration of a civil union, the contracting parties must also be informed in writing of the existence of an unfulfilled maintenance obligation (National Congress of Chile, 2021).

On the other hand, we find the latest amendment to Law No. 14,908, on family abandonment and payment of alimony, and it is Law 21,484, also called the law on parental responsibility and cash payment of alimony debts, enacted on August 31, 2022, published on September 7 of the same year and effective since May 20, 2023. Article 16 of this Law states that the court is obliged to investigate the assets of the obligor, empowering the judge to order the retention of the funds that the debtor has in his bank accounts or other financial or investment instruments that are equivalent to the outstanding debt. And here a particularity stands out, since, in the event of the existence of three pensions owed, whether continuous or discontinuous, and the non-existence or insufficiency of bank accounts and other financial or investment instruments, the withholding of a certain amount from the debtor's AFP pension fund may be requested, in accordance with the law and the regulations that it has (National Congress of Chile, 2022).

Undoubtedly, there are quite unique measures or civil actions that have been regulated in our sister Chilean State, having a great dazzle for future regulations that surround the right to food, in addition to representing a continuous improvement in it; in this sense, it would be important to determine if there is the possibility of implementing the same actions in Peru; In this regard, this article will issue criteria in this regard aimed at implementing, in accordance with our social and legal reality, actions aimed at complying with the payment of judicially fixed alimony.

Discussion

The Official Gazette El Peruano (2023) indicates that until September 2023, approximately 3,299 taxpayers registered in REDAM were reported, a figure that has risen in recent times, taking into account that in 2021 there were only 422 registered in the year; and this is without taking into account the figure that was previously detailed of those who are in prison for such non-compliance. Undoubtedly, the data obtained triggers concern and the search for answers as to why these parents fail to comply; however, we are not going to dwell on the causes, since as stated at the beginning of the article, what we seek is to analyze to what extent it would be necessary to implement civil actions to effectively deal with cases of non-compliance with maintenance obligations in favor of minors, in Peru, and in any case resort to criminal proceedings in the last resort, which would culminate in the imposition of the penalty of deprivation of liberty for the crime of omission of family assistance; in order to prioritize the Best Interests of the Child, in order to guarantee that their right is protected in its entirety.

On the other hand, having knowledge of how Chilean legislation works with respect to the regulations it has implemented in terms of compliance with food regulations; we can affirm that there is the possibility of being able to resort to the same civil actions in order to make effective the payment order issued by the court; that is, it can be applied in Peruvian legislation; however, some of the measures could be considered as a restriction on the individual rights of the person liable for maintenance; therefore, in this sense, a test of

proportionality and weighting must be applied, which in the words of the highest interpreter of the Constitution, which is the Constitutional Court, states that:

The proportionality test includes, in turn, three sub-principles: suitability, necessity and weighting or proportionality in the strict sense. With regard to the procedure to be followed in the application of the proportionality test, we have established that the decision that affects a fundamental right must be submitted, in the first place, to a judgment of suitability or adequacy, that is, whether the restriction in the right is relevant or adequate to the purpose that is sought to be protected; secondly, once this first analysis has been completed, the next step is to analyse the restrictive measure from the perspective of necessity; This means, as we have pointed out, verifying whether there are alternative means to the one adopted by the legislator. It is the analysis of the medium-medium relationship, that is, a comparison between media; the means chosen by the person who is intervening in the sphere of a fundamental right and the hypothetical means that he or she could have adopted to achieve the same end. Finally, in a third moment and provided that the measure has successfully passed the previous tests or steps, the analysis of the weighting between conflicting constitutional principles must continue. Here the law of weighting applies, according to which "the greater the degree of non-satisfaction or affectation of one principle, the greater must be the importance of the satisfaction of the other. (File No. 579-2008-PA/TC, ground 25)

In this sense, and according to what is worded throughout the article, it is clear that the best interests of the child, with respect to the fulfilment of the maintenance obligation established by the court, must prevail over the individual or singular rights of the person liable to provide maintenance, such as: bank secrecy, freedom of movement, private autonomy, free development of personality, among others; this taking into account the worrying situation that arises in our reality; in this sense, it is feasible to be able to implement the measures taken by Chilean legislation; as part of the solution to the problem of prison overcrowding, given that prisons in Peru are going through this situation; especially if a large number of people who have been prosecuted for the crime of omission of family assistance are those who occupy a prison facility.

On the other hand, although it is true that these tools cannot be used from one day to the next, because they must be implemented beforehand; and in the event that a law is enacted where it is decided to apply measures or actions similar to those that Chile has provided, it would previously have to enter into *vacatio legis* in order to carry out a correct application in the different systems or electronic bases of the public and private entities involved in the fulfilment of the maintenance obligation, this in the welfare of the child supporters; In this sense, it is an issue that is already in the hands of our legislators and specialists, because from prison the obligor will continue to default on his alimony debt, thereby generating damages in the life of the minor. On the other hand, perhaps a certain type of rejection could arise in the face of what is proposed with this research, that is, the implementation of civil actions based on guaranteeing that the minor can develop fully in society, having the necessary resources so that he can develop satisfactorily. It is noted that this work does not seek to do any type of damage to the debtor; on the contrary, he is being given other alternatives so that he can comply with his judicially assigned obligations from the moment he became responsible for a minor and that in the event of his fault or non-compliance he is not punished with a custodial sentence.

Conclusions

The branch of civil law, which in fact belongs to private law, is considered a world impossible to know completely, it is updated daily and seeks to create new mechanisms that allow a bearable coexistence between the subjects that make up society and of course the right to food cannot be left behind, because it protects those minors who are in a state of vulnerability. therefore, criminal law could not be considered as the only option when there is the possibility of acting civilly, as the Chilean State is doing, using civil mechanisms to guarantee compliance with maintenance obligations.

And, as can be seen in the development of the article, through the description of Peruvian and Chilean legislation regarding the regulations on food regulation, it is possible to say that the use of the aforementioned civil actions is feasible and although the Peruvian reality is not the same as that of Chile, the ideal and possible solution to the problem that affects a large part of the population can be observed, either directly or indirectly, because although there is a judicial process for alimony, a National Registry of Delinquent Alimony Debtors and the criminal figure of the omission of family assistance in case of non-compliance; Peru is unable to effectively combat the various situations of non-compliance with food; so Justice cannot protect minors in that sense, that is why the implementation of civil actions is proposed as a possible solution; especially if it is giving good results in the neighboring country.

For this reason and to conclude, through this work the implementation of a special law is proposed that regulates the use of civil actions as in the case of Chilean legislation to guarantee the fulfilment of maintenance obligations, that debtors are not deprived of their liberty and minors are not harmed. all this because of the principle of the best interests of the child.

Recommendations

It is recommended that a law be implemented that regulates the execution stage of a maintenance obligation, so that the judge has the power to dispose of civil prosecution actions, such as withholding the

annual income tax refund, losing the driver's license for a period of 6 months, with the exception of the aforementioned measure, withholding up to 50% of the financial credit entered into by the debtor, as well as the rejection of the processing of his passport, the withholding of funds held in bank accounts or other financial instruments as well as the withholding of a certain amount from the debtor's pension fund, in conjunction with the Chilean regulations explained in this work; All this is based on the jurisdictional function granted to the courts, the *executio*, which supposes the ability of the magistrate to act coercively to carry out the enforcement of his resolutions.

As a final recommendation, it is suggested that a law be implemented to regulate the civil actions referred to in the preceding paragraph in order to guarantee the effective fulfilment of the maintenance obligations of the defendants, in order to avoid the deprivation of their liberty and not prejudice the minor's right to maintenance; also benefiting the State in the area of being able to reduce the prison population.

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