


Article

The Outline of Constitutional Regulations on the Freedom of Conscience and Religion in Poland

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Abstract: Freedom of conscience and religion is one of the fundamental freedoms of person. This freedom is a constitutionally registered freedom and its exercise, like its constitutional guarantees, is the foundation of the modern concept of a democratic state's rule of law. At the same time, the concept of a democratic rule of law is a source of limitations for this freedom, implemented in the spirit of European standards. The regulation of the freedom of conscience and religion under the Constitution of the Republic of Poland is a relatively extensive regulation, showing its own specificity, rooted in the experiences of the past, undemocratic political reality. Freedom of conscience and religion cannot be considered solely in the sphere of the psyche and in the sphere of privacy. On the contrary, it has an important public-law dimension. The issue taken up is closely related to the freedom of worldview, which determines both the behavior of the individual towards himself and the behavior of the individual towards other people and towards the community. The author presents and analyzes the regulation in question against the background of the principles determining the position of churches and religious associations in the state and their relations with the state.

Keywords: freedom of conscience and religion; guarantees of freedom of conscience and religion; relations between the state and churches and religious associations; the Constitution of the Republic of Poland



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1. Introduction

Nearly all Poles state that they believe in God. Since the end of the 1990s, 90% of respondents (92–97%) have considered themselves religious (the number in 2018 was 92%). Approximately one in two Poles is a practising adherent of their religion, while one in eight does not practise their religion in any capacity (Boguszewski 2018, pp. 1–2). Thus, Poland is among the most “religious” countries in the European Union (Bieliński 2014). Taking into consideration societal expectations (the Constitutional Tribunal, in its decision from 10 December 2014, ref. no. K 52/13, stated that: “Polish society considers religion and the freedom of its public professing to be very important, [...] freedom of religion is not only guaranteed constitutionally and conventionally but is also one of the fundamental moral values of Polish society) and acknowledging the contributions of the Catholic Church to combating communism as well as Polish historical traditions and “universal patterns of behaviour” (Łopatka 1995, p. 9), the Constitution of the Republic of Poland of 2 April 1997 makes reference to the principle of freedom of conscience and religion (Art. 53). The regulatory scope of the Constitution pertaining to freedom of conscience and religion is broader than the provisions of Art. 53, as this freedom is also referred to in Art. 25, which pertains to the legal status of churches and religious organisations in Poland, and which describes Poland as a country that is world view-neutral, in addition to Art. 48 of the Constitution, which stipulates that parents have the right to raise their children in accordance with their own convictions. The legal significance of this freedom is also accentuated by Art. 85(3) of the Constitution, which introduces the right to object to military service on the basis of religious beliefs or moral principles. Therefore, the provisions

pertaining to these freedoms remain asymmetrical to other constitutional provisions related to human rights (Complak 2014, p. 84). The Constitution of the Republic of Poland also puts emphasis on the rights of religious persons, even though Art. 53 lists freedom of conscience first. Freedom of conscience and religion is such a long-standing tradition in Poland that the Constitution also refers to it in its non-normative part—the preamble. The preamble makes reference to “all citizens of the Republic, both those who believe in God as the source of truth, justice, good, and beauty, as well as those not sharing such faith but respecting those universal values as arising from other sources”. Despite the above wording, Poland cannot be classified as a confessional state (Kuczma 2012, p. 92).

The uniqueness of the Polish constitutional regulations stems from the Polish state’s strong ties to the Catholic Church, which date back to the Middle Ages, as well as the fact that Poland has for many centuries been known as an exceptionally tolerant country with regard to matters of world view and religion, something that has always had a basis in the law. It is important to bear in mind that one of the first legal documents which guaranteed religious freedom, and constituted a breakthrough development as regards freedom of conscience and religion, was the Warsaw Confederation of 28 January 1573, whose provisions were restated in the Henrician Articles that same year. The latter document is considered “a form of constitution which elevated freedom of religion to applicable law in the Commonwealth” (Rogowska 2014, p. 239). Freedom of conscience and religion, while its definition has of course varied, has been guaranteed by every Polish constitution.

In Poland, the issue of freedom of conscience and religion is most often raised in publications analyzing individual freedoms (Jabłoński 2010; Kuczma 2012) and rights of the individual or in commentaries to the Constitution (Garlicki 2007; Haczkowska 2014). There are also articles referring to certain aspects of this freedom. There are no monographs comprehensively dealing with this issue from the Polish legal perspective. The monographs refer to the issues of freedom of conscience and religion in a comparative aspect (Schwierskott-Matheson 2013) from the perspective of religious law (Krukowski 2000; Mezglewski et al. 2006). For this reason, the issues raised in the article are an original approach to the subject. The work uses the dogmatic-legal method.

The subject of the article is to determine the content of freedom of conscience and religion in the Constitution of the Republic of Poland and Polish legislation. Is this freedom homogeneous or dualistic? What are its elements? Is this freedom absolute and, possibly, what restrictions it is subject to? The subject of the article will also be to determine whether churches and religious associations in Poland have identical rights, or whether some inequalities in the scope of rights of these registered associations can be seen? Is the state neutral towards churches in Poland?

Constitutional Provisions Pertaining to Freedom of Conscience and Religion

Freedom of conscience and religion stems from human dignity, which is referred to in Art. 30 of the Constitution of the Republic of Poland, and which is the source of all rights and freedoms. Human dignity comprises such aspects as “inherent (immanent) searching for and experiencing certain transcendental values” (Sarnecki 2003, p. 2). Therefore, freedom of conscience and religion can be described as inherent and inalienable and is the source of other religion-related rights listed in the Constitution; it can be referred to as a “right of rights” (Szymanek 2006, p. 39). The special significance of this freedom is linked to the fact that it allows an individual to choose their concept of what constitutes a good life, and also to reassess (change) it, in addition to acting in accordance with the value system of their choosing. This freedom guarantees moral integrity, which is construed as the ability to take actions that are in alignment with one’s beliefs. The individual chooses their own concept of good, whose source can be a certain worldview, religion, philosophy, interest, or goal (Włoch 2019, pp. 176–77). Freedom of conscience and religion, therefore, protects personal dignity, an aspect of which is “respect for oneself as a person responsible for making judgements in ethical matters related to [one’s] life” (Dworkin 2014, p. 106).

Article 53 of the Constitution makes reference to two types of freedom: freedom of conscience and freedom of religion (“Freedom of conscience and religion shall be ensured to everyone”—Art. 53 paragraph). This approach is commonplace in modern constitutionalism, but there is a convincing argument to be made that accentuating freedom of religion is unnecessary, as this freedom “is an example of exercising one’s freedom of conscience; this takes place when a world view is accepted which acknowledges the existence of God, which is, of course, independent of how different the image of God is in various religions” (Sarnecki 2003, p. 3). The wording of the article indicates that the legislator accepts the existence of two opposing viewpoints in the state: the atheistic and religious viewpoints; thus, freedom of conscience is identified as atheistic, and freedom of religion as religious, with God as the object of worship. Therefore, tolerance applies to all forms of religious worship, as well as lack of worship. Freedom of conscience, therefore, refers to the non-profession of any faith. The Constitution separates the concept of conscience from that of religion; this is because dictates of conscience stem from various value systems (Constitutional Tribunal decision of 15 October 2015, ref. no. K 12/14).

The Constitution of the Republic of Poland is asymmetrical in its regulations pertaining to freedom of conscience and religion, which may render the degree to which freedom of conscience is protected unsatisfactorily. “Polish legal regulations lack the necessary distinction between the individual, personal experience that is conscience, and the group experience of religion. In consequence, the wording of the relevant constitutional norm is not completely transparent, which leads to difficulties in arriving at an unambiguous interpretation” (Schwierskott 2003, p. 62).

“As noted by the Constitutional Tribunal in its decision from 15 January 1991 (ref. no. U8/90, OTK 1991, item 8), freedom of conscience does not exclusively refer to the right to profess a certain world view, but primarily to the right to act in accordance with one’s conscience, the freedom from coercion to act against one’s conscience. The institution responsible for safeguarding this freedom is known as the conscience clause, which is understood to mean the freedom not to perform an act that is legal and required but is at the same time against the individual’s worldview (be it ideological or religious). With regard to ethics, this construct can serve as proof of the precedence of conscience over statutory law, and on the legal level—it guarantees that freedom of conscience can be exercised and eliminates instances where statutory law and ethical norms are in opposition to each other, enabling individuals to act with dignity—that is in accordance with their beliefs” (Constitutional Tribunal decision of 15 October 2015, ref. no. K 12/14).

It should be noted that the relevant literature also refers to a concept according to which freedom of conscience and freedom of religion are in fact one and the same freedom which comprises two levels: internal and external. Thus, freedom of conscience constitutes the internal level of individual religious activity (*forum internum*), and is related to the formation of that individual’s religious beliefs, while freedom of religion refers to the external level of religious activity (*forum externum*), which, in a sense, is a product of conscience which manifests in the form of externalising thoughts and beliefs as religious practices, religious worship, participating in ceremonies, prayers, rituals, etc. (Lyko 1997, p. 83).

In accordance with Art. 53(2) of the Constitution, freedom of religion encompasses the freedom to profess or convert to a religion of one’s choosing, and to externalise one’s religion individually or collectively, publicly, or privately, in the form of worship, prayers, participating in ceremonies, practising and teaching. Freedom of religion also refers to access to temples and other places of worship in accordance with the needs of the believers, and the right to seek religious assistance in one’s place of stay. Therefore, the constitutional provisions pertaining to freedom of conscience and religion comprise several fundamental “[...] elements:

- the freedom to convert to, publicly and privately practise and change the religion of one’s choosing,

- living in accordance with its principles and the freedom to manifest it via individual or collective worship, prayers, participating in religious ceremonies, and learning the principles and dogmas of the religion,
- being allowed access to places of worship and temples,
- the prohibition of forcing anyone to participate or not participate in religious practices, and a ban on forcing anyone to disclose their faith” (Rogowska 2011, p. 257).

It appears that this freedom also encompasses the freedom to promote religious or atheist beliefs, as “converting” constitutes a religious duty of certain faiths, and the freedom of expression within public life of “matters of personal conviction, whether religious or philosophical or in relation to outlooks on life” is protected by Art. 25(2) of the Constitution. However, such practices should be subject to certain restrictions, which are determined by the freedom of conscience and religion of other subjects. Therefore, all “missionary activities” should require the consent of the person they are targeted at. From a constitutional perspective, violations of this freedom include all forms of indoctrination and imposing a certain worldview or religion.

Polish constitutional protections pertaining to freedom of conscience and religion apply to all activities which are religious in nature, in particular to practices, ceremonies, and rituals, including ones that deviate from the conventional behaviours which are dominant in the country, which may include practices which are unpopular and considered unacceptable by the majority. Therefore, the CT decision from 10 December 2014 confirmed their legality and constitutionality (ref. no. K 52/13). The Constitutional Tribunal ruled that public authorities should not assess the validity of religious beliefs or methods of their expression. It also confirmed that the Constitution of the Republic of Poland guarantees that religious minorities can conduct their religious practices, which includes ritual slaughter (Kuczma 2017, p. 193).

This freedom extends to every person. However, it bears mentioning that, indirectly, this freedom also applies to legal persons, namely churches and religious associations with an established legal status. It also applies to the state, as it offers free education as part of the public school system, which may include religious education (Art. 53(4)). The Constitutional Tribunal notes that freedom of religion is “not only a personal freedom enjoyed by an individual, but also a systemic principle, which lends it the appropriate significance” (CT decision of 10 December 2014, ref. no. K 52/13).

Despite attempts at regulating as broad a range of behaviours as possible as part of this freedom, the Constitution does not guarantee “freedom of thought”, which precedes freedom of conscience and religion and which is what renders it possible to exercise one’s freedom of conscience and religion in the first place (Szymanek 2007, p. 99). It appears that this stems from the original legislator’s belief that the necessity to safeguard freedom of thought is completely natural and obvious, and so it would be superfluous to include it in the Constitution (Kuczma 2014, p. 29).

2. Limitations

The Constitution of the Republic of Poland extends more protections to certain norms pertaining to individual rights as compared to others. This stems from the belief that certain rights and freedoms must be particularly protected due to their special significance from the perspective of the existence of individuals. This special status means that they cannot be suspended or limited, even in states of emergency, which in principle entail restrictions of rights and freedoms (Kuczma 2012, p. 28). However, should such a violation occur, the authorities could be accused of violating the Constitution, and those responsible would be subject to liability (Banaszak 2009, p. 990). These non-derogable rights include freedom of conscience and religion. This way, the Constitution protects individuals from being treated instrumentally, even in certain hazardous situations (Jabłoński 2010, p. 82). Treating freedom of conscience and religion as non-derogable is also valid due to the fact that this freedom appears to be neutral in relation to external and internal threats to the state, natural

hazards, and technical issues (natural disasters). Moreover, in the case of religious persons, their trust in God may help them survive a state of emergency.

Freedom of conscience and religion is not absolute, and in certain conditions may thus be subject to restrictions. The general grounds for restricting human rights and freedoms are specified in Art. 31(3) of the Constitution of the Republic of Poland, which stipulates that restrictions may be “imposed only by statute, and only when necessary in a democratic state for the protection of its security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons”. As regards freedom of conscience and religion, it is important to determine whether the above article applies to Art. 53 due to the nature of this freedom and the systematicity of the Constitution. This is because Art. 53(5) of the Constitution refers to the possibility of restricting only the “expressing of religion” by statute, and only in cases where it is necessary to ensure the security of the state, public order, health, morals, or the freedoms and rights of other persons. Thus, Art. 53(5) reiterates the majority of the grounds for restricting freedoms and rights while preserving the same wording in both articles, the only exception being the restriction of freedom of conscience and religion for reasons related to environmental protection, and without taking into consideration the proportionality principle. This legislative solution indicates that it is possible to restrict only a single aspect of freedom of conscience and religion, that is expressions of religion. Art. 53(5) thus gains a *lex specialis* status and takes precedence over the general provisions of Art. 31(3) of the Constitution. This thesis is further supported by the status of freedom of conscience and religion as non-derogable freedoms. A differing view is espoused by such authors as V. Serzhanova and E. Tuora-Schwiarskott, who note that the grounds for limiting freedom of conscience and religion are listed in Art. 31(3) and art 53(5) of the Constitution (Serzhanova and Tuora-Schwiarskott 2018, p. 309), as well as A. Rogowska, who points out that the systemic interpretation does not exclude imposing restrictions on freedom of conscience or religion based on the grounds specified in Art. 31(3) of the Constitution, or applying the proportionality principle (Rogowska 2014, p. 244).

The Constitution of the Republic of Poland specifies that freedom of conscience and religion shall be ensured to “everyone” (Art. 53(1)). In actuality, the list of beneficiaries of this freedom is subject to certain limitations, as it does not fully apply to children. This is because parents have the right to provide their children with a moral and religious upbringing that is in accordance with their own beliefs (Art. 53(3)). This restricting aspect is somewhat alleviated by Art. 48 of the Constitution, which reiterates that parents have the right to rear their children in accordance with their convictions. At the same time, it is stipulated that such an upbringing should take into consideration the maturity of the child, their freedom of conscience and religion, and their beliefs. In practical terms, parents are the ones who decide which religion their child will adhere to and express, which may include being an atheist. “The state must respect the rights of parents as regards education, and also protect the interests of children [...]. Therefore, children have a right to freedom of thought, conscience, and religion, whereas parents have the right of guidance and to oversee how their children exercise their freedoms” (Warchałowski 2004, p. 195). This approach is in line with international standards (see Art. 2 of Protocol No. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms (Journal of Laws of 1993 issue 61, item 284) and relevant court rulings. The European Court of Human Rights ruled that parents have the right to “enlighten and advise their children, to exercise with regard to their children natural parental functions as educators, or to guide their children on a path in line with the parents’ own religious or philosophical convictions” (ECHR decision of 7 December 1976 in the case of Kjeldsen, Busk, Madsen, and Pedersen v. Denmark (no. 5095/71; 5920/72; 5926/72)).

The Status of Churches and Religious Organisations

“The contents of the Constitution pertaining to freedom of conscience and religion consist of two parts: the institutional part, pertaining in particular to the relations between the state and churches and other religious organisations, regulated primarily by Art. 25 of

the Constitution, and the part which refers to the individual guarantees related to freedom of conscience and religion, arising primarily from Art. 53 of the Constitution” (CT decision of 2 December 2009, ref. no. U 10/07).

In Poland, the difference between churches and religious associations is only in the name of these organizations. The statutes of a church or religious association contain its name given in the registration process (the current list of churches and religious associations can be found on the website: <https://www.gov.pl/web/mswia/rejestr-kosciolow-i-innych-zwiazkow-wyznaniowych> [accessed on 20 November 2021]).

()The legal status of churches and religious organisations in Poland is specified in Art. 25(1) of the Constitution, which stipulates that churches and other religious organisations enjoy equal rights. Therefore, no church or religious association should have a formally privileged position in the state (Garlicki 2015, p. 67), and the legislator may not introduce criteria that would lead to differences in the legal status of churches and religious organisations. Churches and religious organisations which operate legally in Poland should therefore have the same rights and obligations (Matwiejuk 2009, p. 84). Despite this declaration, the remainder of this article may be seen as calling the above statement into a question. This is because the constitution expressly refers to the status of the Catholic Church, stipulating that the relations between the Republic of Poland and the Catholic Church are determined by the international treaty concluded with the Holy See and the relevant statutes (art. 25 (4)). On the other hand, the relations between the Republic of Poland and other churches and religious organisations are determined by statutes enacted based on treaties concluded by the Council of Ministers with their appropriate representatives (art. 25 (5))) This wording of Art. 25 indicates that the Catholic Church has a dominant position in the religious structure of Polish society and differentiates the Catholic Church from other churches and religious organisations (Włoch 2019). The Constitutional Tribunal provides the following justification for this: “The secular state model emerging in the Republic of Poland [...] had to observe the relevant normative provisions of the concordat, which, upon its ratification, became a part of the applicable law of the Republic of Poland which takes precedence over statutes” (CT decision of 23 October 2007, ref. no. 10/07). According to the Tribunal, the status of the Catholic Church cannot infringe on the freedom of conscience and religion of individuals, and neither can it justify state activities aimed at maintaining or increasing the dominance of this particular religion (CT decision of 23 October 2007, ref no. 10/07).

From the perspective of the Tribunal, “the constitutional regulation in Art. 25 of the Constitution comprehensively regulates matters related to the equality of churches, which is why no need arises to refer to Art. 32. of the Constitution” (CT decision of 2 April 2003, ref. no. K 13/02), which introduces the equality principle.

Art. 25. of the Constitution, in determining the mutual relations between the state and churches and religious organisations, specifies five principles:

- the principle of equal rights for churches and other religious organisations (paragraph 1),
- the principle of impartiality in matters of personal conviction (paragraph 2),
- the principle of respect for the autonomy of the state, churches and other religious organisations (paragraph 3),
- the principle of cooperation with churches and other religious organisations (paragraph 3),
- the principle of consensual relations between the state and churches and other religious organisations, in a form which matches their nature (paragraph 4 and 5) (Garlicki 2007, p. 7).

“The entirety of these regulations render it so that currently, churches and religious organisations can exercise their religious freedom, the scope of which is specified in individual statutes which determine their legal status (this currently applies to 15 subjects), in the act on the guarantees of freedom of conscience and religion and other applicable laws. [...] On the systemic level, the principle of equality of churches and other religious organisations excludes the possibility of establishing a state religion, which would

render Poland a confessional state” (Bielecki 2018, p. 218). This approach results in the possibility of different treatment of churches and religious organisations in Poland if they do not possess a relevant feature. Therefore, legal solutions pertaining to church legal persons do not have to be identical, and the differences between them should take into account differences related to their nature and the historical determinants of their status (Banaszak 2009, p. 125).

Despite the formal guarantees of equality between churches and religious organisations, the dominant status of the Catholic Church is noticeable. An example of this is the presence of a cross in the plenary room of the Sejm of the Republic of Poland. The cross was placed there without any consultation by two MPs on the night of 19/20 October 1997, and formal attempts at its removal have proven ineffective (the Ruch Palikota parliamentary club submitted a request for a disposition to be issued which would order the Latin cross present in the Sejm room to be removed). The Sejm Chancellery ordered four legal opinions to be issued, whose authors identified no constitutional violations in the presence of the religious symbol in the Sejm (other crosses are currently present in the Sejm building complex, as well as the plenary room of the upper house—the Senate). Among other things, the opinions noted that “in Poland, the cross not only has religious significance related to Christian symbolism, but also has patriotic significance as a sign of a national identity ‘which entails tradition and culture’” (Piotrowski 2011, p. 61). The judicature also did not identify any infringements of moral rights in the presence of crosses in public office buildings. “The fact that a religious symbol has been placed in a public office building is not sufficient to determine that a violation of freedom of conscience has occurred” (Decision of the Appellate Court in Łódź from 28 October 1998, ref. no. I ACa 612/98). Leaving a cross in an election venue made available by a primary school also cannot be considered an act of discrimination against other religions (Supreme Court decision of 15 July 2010, ref. no. III SW 124/10).

On the other hand, the principle of impartiality is specified in Art. 25(2) of the Constitution requires that the authorities treat all religions, world views, and philosophies equally and that they remain equally neutral towards all of them. This principle prohibits the authorities from displaying sympathy or antipathy towards particular religions and their communities. This principle is further expanded upon in Art. 10(1) of the Act of 17 May 1989 on the guarantees of freedom of conscience and religion (Journal of Laws 2005 no. 231, item 1965), according to which the Republic of Poland is a secular state which is neutral in relation to matters of religion and convictions (Wieruszewski 2011, p. 87). The conflict between the principle of world view neutrality of the state and freedom of conscience and religion is readily noticeable in this context. Freedom of conscience and religion allows individual MPs to express their religious convictions in the public sphere, which includes wearing religious symbols, swearing oaths that contain references to God, or participating in ceremonies. However, the Sejm, which operates as a public organ, should be free from religious symbolism, otherwise, it may become the target of a valid accusation that the state affirms a particular religion (Wieruszewski 2011, p. 84).

The principle of impartiality of public authorities in matters of religion, world view, and philosophy cannot be construed as synonymous with neutrality, however. Therefore, the state may support the activities of religious organisations, provided that such activities serve the good of the people and the common good, which are fundamental constitutional values (Complak 2014, p. 41). The constitutionally guaranteed impartiality of the state must not be treated as a reason for the state to remain passive in relation to the needs of churches and religious organisations (CT decision of 14 December 2009, ref. no. K 55/07). Thus, legal persons who are churches can apply for subsidies from the Church Fund for the purpose of conserving and renovating historical religious and church buildings, and of supporting church-led charity and caregiving efforts. However, the state cannot become involved in doctrinal disputes between individual faiths and is obliged to remain neutral with regard to worldviews (Pietrzak 1999, pp. 262–63).

3. Conclusions

Freedom of conscience and religion, despite being deeply rooted in history and the Constitution, is a source of controversy and misunderstandings. It is a paradox where “[...] that which is considered by some to be a part of exercising broadly understood ‘religious freedoms’—and even broader, ‘freedoms of religion and world view’, is seen as their violation by others, even an obvious one at times” (Czarny 2010, p. 155). This approach appears to be commonly accepted, as, during the validity period of the Constitution of 2 April 1997, no bills have aimed at amending the constitutional provisions pertaining to this particular freedom. Therefore, accurately deciphering its scope as regards constitutional norms should be free from any major difficulties or doubts.

Poland should be considered a tolerant country that tolerates religious rituals which raise moral objections (e.g., the ritual slaughter of animals), even if the people of Poland and its neighbours may view the country in a different light (Kuczma 2017, p. 199). Current trends in Europe emphasise the separation of church and state, which manifests in state churches losing their position and significance (Paprzycki 2015, p. 9). The Polish Constitution also stipulates that the two are separate. In practice, however, a special bond exists between the state and the Catholic Church. Therefore, the Polish model of relations between the state and the Church should be referred to as an intermediate stage between a secular and a confessional state, or a “model of a secular state that is friendly” towards the Church (Dudek and Stanisław 2011, pp. 93–94).

In Poland, one can speak of a specific understanding of this freedom, because the doctrine distinguishes the freedom of conscience from the freedom of religion, granting this freedom a different content. This freedom is not absolute and is subject to certain limitations. Despite the formal equalization of the legal situation of churches and religious associations, one can see the preponderance of the position of the Catholic Church. The Polish state also does not maintain complete neutrality towards churches.

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