

“Baby Donors” in India: Ethical Analysis on Commercial Gestational Surrogacy

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Abstract

This article aims to analyse surrogacy ethically and see how far this technology is helpful to the ‘good of the human beings’ in general and Indians to the particular. It is divided into three parts. The first part explains the meaning of surrogacy, types and historical development of surrogacy. The second part pictures how India becomes a leading country in surrogacy. The final part analyses the ethical issues of surrogacy. Surrogacy has attracted foreigners and non-resident Indians. Indian government encourages the medical tourism in order to get affluent income through medical technologies. Money plays a vital role in surrogacy and there is possibility for exploitation and malpractices. Surrogacy affects the relationship between the mother and child. It violates the sanctity of marriage and the dignity and rights of the child. A human life should not be an object for monetary transaction and bargaining.

Keywords

Surrogacy, gestational, reproductive technology, tourism, market, dignity, child, motherhood, exploitation, commercial.

Introduction

Human life has a priceless worth, and science and technology play a great role in promoting and enhancing human life. Technological revolution in industry, information technology, and medical has brought giant strikes and significant changes in the life-style among the inhabitants of this world. Human beings use varieties of technology for the qualitative living and for the protection of the earth. Although the improper ways of using technology results in ecological crises, yet the proper ways of using of technology really enhances the life of the people. The reproductive technologies in the medical field are widely used in different parts of the world in order to bring forth offspring. Surrogacy is one the reproductive technologies used to bring out a child. Even though this reproductive technology is much expensive, at times unsuccessful it is not only used by infertile couples but also same sex couples. Infertile couples are also looking for a place where this technology is available for cheaper price.

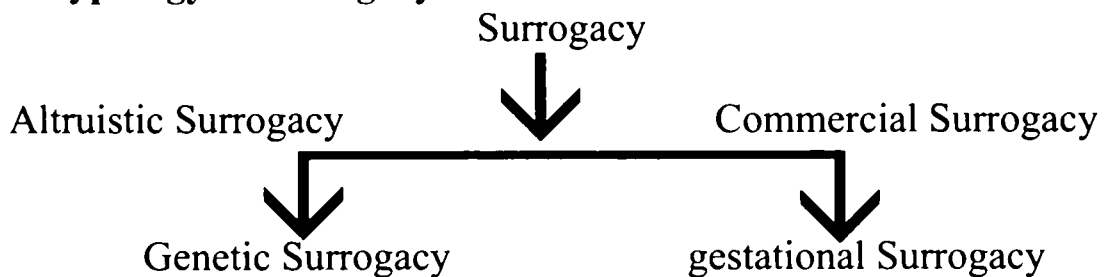
In this context, the man power and medical resources of India offer to the couples who are longing to have a child for a cheaper rate. Thus, India seems to become a leading country in surrogacy. Surrogacy has attracted foreigners and non-resident Indians travelling to India to utilize surrogacy technology to get a child. Indian government also encourages the medical tourism in order to get affluent income through medical technologies. Although this technology seems to be very attractive and may fulfil their desire of having a child for an infertile couple, many Indian scholars, writers and ethicists question the practice of surrogacy considering its ethical

1. Meaning and Elucidation of the term 'Surrogacy'

The term surrogacy originated from the Latin verb '*surrogare*' which connotes 'substitute' or 'instead of someone' or 'place someone as substitute'. According to the etymology of the term, surrogacy means substituting someone. Since 1978, the term surrogacy is being used to refer to a process of begetting a child by a pregnant woman with the fertilized egg of another woman.

Surrogacy is a circumstance in which a woman agrees or becomes a surrogate to bring forth a child for the infertile contracted couple. Surrogacy is defined as arrangement or contract or agreement to deliver a child for another couple using reproductive technologies.' Surrogacy could be seen at two levels: Partial and Full. According to the former, the sperm of the intended father is fertilized with the egg of the surrogate mother through intrauterine insemination or in vitro fertilization. And thus, the surrogate has genetic link with the delivered child. This is known as traditional surrogacy.' The Full Surrogacy suggests that the sperm and egg of the couples are fertilized through the reproductive technologies and implanted in the womb of the surrogate mother. The surrogate mother becomes an instrument to bring forth the child for the intended couple. This is also known as gestational surrogacy.

a. Typology of Surrogacy



Altruistic surrogacy means that a woman becomes a surrogate mother to complete infertile parents or partial infertile parents without any payment. This is often done within close relatives. In commercial surrogacy, the surrogate mother is paid according to the contract to bring forth a child for the commissioning couples.

In genetic surrogacy, the surrogate mother also contributes her egg to bring forth a child for complete infertile or partial infertile couples. As a result, she becomes the genetic mother of the child. In gestational surrogacy, the surrogate mother who carries the child for a period of time in her womb does not provide egg. These two methods of surrogacy could be either altruistic or commercial surrogacy.

b. A Short Historical Profile of Surrogacy

Surrogacy is very old as human beings. K. Svitnev observes that the traces of surrogacy could be seen almost in all ancient

cultures. Hagar, the handmaid of Sarah was the first surrogate mother who brought forth a child in about 1910 BC. In the Mesopotamian culture, surrogacy had been arranged on legal grounds. The ancient Babylonian code called Hammurabi code, an ancient (1760 BC) is the first legal code which presents rules and regulation for the surrogacy to bring forth a male child. Accordingly, the servant girl was offered to the husband to give birth a child for the family and the child becomes the heirs of the family. This practice of surrogacy was very common in Egyptian culture where the concubines of Pharaohs were used to bring forth male child to pharaohs. This practice was also common in ancient Greek and Roman culture.³ As well, Indian Mythology which presents that Rohini bore a child for Vasudev and Devaki in Mahabharatha is also quoted an example for surrogacy in India.⁴

Although matter of surrogacy is very ancient, the modern surrogacy with reproductive technologies began only in 1790 in Western countries. According to the available sources, USA carried out first sperm insemination by J. Marion Sims in 1886. This practice was kept secret for a longer period due to the social stigma, i.e., insemination of the sperm of someone into the womb of another woman was a shameful act. However, due to education, awareness and usefulness of this reproductive technology, now, surrogacy has become well accepted. In addition, in 1953, scientists invented and demonstrated that the human sperm could be frozen and used for insemination to bring forth normal child. As a result of the constant research in artificial reproductive technology, in 1953, Louise Brown was the first test tube baby born in England. The doctors were proud to claim that this child was the product of the first successful in-vitro fertilization. As a mile stone in the history of assisted reproductive technologies, in 1985, the first gestational surrogate pregnancy took place. Now practice of surrogacy has become very common all over the world. However, next to USA, India is the leading country in commercial surrogacy for various reasons. Thus, it is also noteworthy to look at the surrogacy in India.

2. Surrogacy in India – Bird Eye View Scenario

India has swiftly grown in Artificial Reproductive Technology (ART) and it has become an attractive country in the world to use

ART by Westerners as well as Indians settled in Western countries. As a result, the first gestational surrogacy baby was born in Chennai in 1994. The clinics who offer the service of surrogacy are committed to the service by the constant supervision and medical check-up of the surrogates with strict rules and so on. Amrita Pande, in her research, she narrates the life of a surrogate in India. According to her observation, in the surrogacy clinics in India, surrogate mothers have to remain a few months on the bed for gynaecological test.

The husbands of the surrogates can come and visit their wives but they are not allowed to stay with them. And the surrogate and her husband should not have sex for a few months. The surrogates must follow the daily timetable of the clinics.⁵ In her research, she eventually concludes that ‘hiring womb’ is a blooming business in India. Since 2002 India has become a blossoming country in gestational surrogacy. According to the literature, there are approximately 500 surrogacy centres across India. New Delhi, Mumbai, Bangalore, Ahmedabad and Kolkata are the leading cities for surrogacy clinics. However, among the Indian States Gujarath becomes an attractive state for surrogacy due to the number of surrogacy clinics in the cities like Anand, Surat and Samnagar.

As many observe, the surrogacy industry is blooming in India because of high-class super speciality hospital, English speaking doctors, healthy young poor women of child-bearing, and government regulations;⁶ in addition, many also identify some factors which contribute to the growth of the surrogacy industry in India. They are: liberal medical tourism, economic compulsion from the poor and the medical market with profit motives.⁷ Albeit there are various reasons for the growth and development of surrogacy in India, the focus is given in this article only to the contributing factors to surrogacy in India.

a. Medical Tourism

Latin American countries and some of the Asian countries such as Malaysia, Singapore and Thailand are known for medical tourism. Despite, India becomes one of the leading countries in

medical tourism by introducing 'medical visa' which allows the foreigners to stay in India for a year with their family members. In addition, Indian Government grants also concession to the hospitals by providing loan with meagre interest and very meagre import duties on hi-tech medical instruments. It is because of these, the medical tourists have increased from 150,000 to 450,000 between the years 2005-2008.⁸ In addition, as many observe the reproductive tourism has steadily increased.⁹ As Amrita Pande observes "cheap costs, large number of well-qualified and English speaking doctors with degrees of training from prestigious medical schools in India and abroad, well-equipped private clinics"¹⁰ play pivotal role in increasing the reproductive tourism. In addition, when the procedure for surrogate mother is done in USA, the total cost of this is between USD 100000 to USD 120000; whereas in India, this procedure costs one third of above mentioned amount. In addition, the absence of effective regulation to control the procedure of surrogacy could be also an attracting factor of surrogacy in India.¹¹

b. Economic Compulsion

India is the fourth largest economy of the world. However, In the Indian context, surrogacy is found as economic security for some women, especially the women of lower rang of economic background.¹² According to the sources, one third of Indian women are victims of poverty, labour market, and patrifocal social and family system of India. For such women, surrogacy becomes a financial lucrative gain. Thus due to the family pressure, the poor women are at times forced to be surrogate mother. Although some would argue that surrogacy is altruistically done, pecuniary motive becomes primary cause for it.¹³ These women agree to be a surrogate mother for money in order to alleviate the poverty and to provide sound education to their children they like to be a surrogate mother. In addition, women become surrogate mother to supplement the meagre income of their husbands.¹⁴ At times, it happens with the consultation of their husbands who supports for the economic reasons. Gujarat, one of the North Indian States of India, based survey depicts that women become surrogates because of abject poverty.¹⁵

c. Medical Market Profit

It is estimated that the reproductive tourism and commercial surrogacy generates approximately 2.3 billion American dollars annually (2012). According to the World Bank's report, in 2020 this amount would steadily increase. In America, the expenses for surrogacy which range from \$20,000, to 120,000 (this estimation differs among the authors) covers the In-vitro Fertilization test, payment to the surrogate mother, medical bill and fee of legal and agents of surrogacy.¹⁶ Modhumita Roy observes that the total cost of surrogacy contract is very much low in India. According to her analysis, surrogacy contracts are done with the maximum cost of \$25000 which includes medical and travel allowances, hotel accommodation, payment to the surrogate mother, legal agent and broker, and sight-seeing in India.¹⁷ Unlike the American surrogate women (payment ranges from \$10000 to 15000), Indian surrogate women are paid from \$2000 to \$5000. It is because of these facilities many infertile couples travel to India from different parts of the world and the overseas income of the Indian government also steadily grows every year.

d. Absence of Legal Objection

In India, surrogacy is legal but it is not regulated. In India, infertility is one of the major problems for the family relationship and Indian social structure depends on the offspring. Although hiring a surrogate to bring forth a child as a solution to the problem, the social stigma is always attached with surrogate mothers who are not well accepted among their community members. Considering the peak of the business malpractices in surrogacy, The Law Commission of India presents "It seems that wombs in India are not rent which translates into babies for foreigners and dollars for Indian surrogate mothers".¹⁸

The Commission requested the Indian Parliament intervening surrogacy clinics and to present "Assisted Reproductive Technologies (Regulation) Bill and Rules 2008 in the future. However, all the surrogacy clinics must adhere the Professional Guidelines of Indian Council of Medical Research. These guidelines protect only the intended couple than the surrogate mothers. Yet, they are not legally enforceful. According to the

guideline, the clinics must obtain the informed consent of the surrogate mother who must be well informed about the contract and payment. However, many suspect that these regulations are really kept in surrogacy. This is also a favourable condition for the growth of surrogacy business in India.

3. Ethical Analysis on Surrogacy

Surrogacy is a debatable theme among the secular as well as the Catholic ethicists. This issue becomes very vital as the rate of infertility is very high among the couples of western countries as well as the developing countries. Being a vital issue, it has been under discussion among the scholars since its origin. Most of the research scholars look at this reality from two different perspectives. Some look at surrogacy from the humanitarian perspective while others look at from the rights of an unborn child and biological/genetic perspective. Ruth Macklin, a scholar in surrogacy, accepts that if the surrogacy is done without any monetary dealings it is ethically permissible.¹⁹ Both perspectives substantiate their views with valid and sound arguments.

Literature on surrogacy presents two views. The first, the proponents of surrogacy views surrogacy in terms of “freedom, autonomy, self-determination and privacy”.²⁰ According to them, family does not depend only upon the biological elements. The concept of family must not be limited with the traditional understanding for different types of families are emerging such as single mother family, cohabiting family and family of adopting in the modern world. In addition, Russell Blackford, a proponent of surrogacy, presents that surrogacy brings happiness to the infertile couples. They argue it positively that in surrogacy two women (rich and poor) are benefitted. Surrogate mothers, often in India, reported that the income which

is obtained from surrogacy is utilized for the education, medical and other purposes of their children. According to some studies, surrogacy also alleviates poverty and wretched conditions of Indian surrogate mothers to certain extent.²¹ Russell also addsthat it could be used to create more non-traditional families,

such as single mother and other forms of couples.²² The proponents endorse the practice of surrogacy arguing from free choice and autonomy of the person. According to them, as long as the commissioned couples and surrogate mother do not harm anyone in surrogacy, they can do it.

The second, the opponents of surrogacy argue that the genetic or biological foundation of a child is needed not only for parenthood but also the family and marriage. As stated by, the self-determination should not affect the basic biological realities of marriage which are commented in sexuality and natural parenthood.²³ A person like Charlesworth opposes the practice of surrogacy which uses surrogate mothers as means to an end. In addition, surrogacy brings harm to the surrogate mother, child, and society as a whole.²⁴ Some feminists also oppose commercial form of surrogacy. For example, Debra Satz, a feminist critic of surrogacy, presents that women are counselled or at times coerced to sign the contract of surrogacy. She continues that commercial surrogacy reinforces the stereotype role of a woman in reproductive labour. She adds that motherhood would be understood as genetic relationship rather than gestational contribution.²⁵ The opponents of surrogacy, very strongly argue against surrogacy for, in reproductive technology, embryo transfer is not always successful and there is a possibility to waste human embryos.

It is very vivid that surrogacy on the one hand it is well supported by many scholars and it is also categorically rejected on the other hand. Some also are of the opinion to reject the third party who is involving in commercial surrogacy for it will not only destroy the traditional family system but also it will cause for unwed mother's family and family of same sex couples. It is not the aim of the article to present agreements and disagreements on surrogacy but the aim of the article is to pinpoint certain ethical issues which lie in the practice of surrogacy.

3.1. From the Perspective of Child

The focal concern of surrogacy is bringing forth child. Surrogacy has a great impact on the newly born child and the surrogate

mother. As far as the child concern, there is a possibility for physical harm due to the genetic defect of the surrogate mother.

a. Child – Procreation or Production?

The entire discussion of surrogacy is based on the birth of the child, and thus, birth of a child is the starting point of the ethical analysis. It has been in the human thinking in the history of human beings whether or not religious and secular, a child is the gift of the conjugal or intimate love of the couple. As William E. May states, “The Marital act, in other words, must be the “principal cause” for the conception of the child”.²⁶ As well, the Second Vatican Council reiterated that “marriage and conjugal love are by their nature ordained toward the begetting and educating of children. Children are really supreme gift of marriage” (GS, 50). Ravideranath Tagore, famous Indian poet, states “Each child that is born comes with a message that God is not yet all dissatisfied with the humanity”. Richard A. McCormick emphasises that the child must be the result of couple’s mutual self-giving. The couples become parents of a child only through their rights of mutual respect and fidelity to life and love. McCormick believes in the conjugal exclusivity and genetic components for parenthood.²⁷

Thus, the mutual self-giving in the conjugal intimacy often results in the birth of a child. In surrogacy, especially in commercial surrogacy, a third party is commissioned to beget a child; for some couples consider the reproductive technology as a substitute for sexual intimacy. In other words it could be technically called a ‘production’ of human being. We should also remember that *Donum Vitae* never advocated any reproductive technology which could be used as substitute for sexual intimacy. However, this document also states that if the certain artificial technics are used to “facilitate the conjugal act or helps it to reach its natural objectives, or ensuring the natural act normally performed achieves its proper end it can be morally acceptable” (DV, 2B, 6). But, any relaxation in marital exclusivity by using of donor’s semen or ovum, genetic asymmetry exists in the relationship between the couple and child. Based on these arguments one can conclude that a child must be a result of procreation and it should not be a production in the context of surrogacy.

Although many catholic ethicists explain child as a gift of God, as some propose, what must be done in the case of infertility of the married couple and inability to get pregnant? When the couple genuinely desire for having their genetic child what must be done? To these questions, Donum Vitae responds that “even when procreation is not possible, conjugal life does not for this reason lose its value. Physical sterility in fact can be for spouses the occasion for other important services to the life of the human person, for example, adoption, various forms of educational work, and assistance to other families and to poor or handicapped children” (DV, 2B, 8). However, these questions need further ethical discussion and deliberations.

b. Child – An Object of Money

In commercial surrogacy, the birth of the child becomes an object for money transaction. In this business, employee (surrogate woman), agent (broker of surrogacy) and factory (hospitals) involve and all of them earn money. Bargaining and negotiation on payment to the surrogate mother and the commission to the agent take place. If the payment is agreeable the parties sign the contract. In the Indian context, in surrogacy mostly the agents and the hospitals earn a lot than the women. At times, the brokers or agents minimize the cost and maximize the profit. Can a child, a gift of God, could be an object to monetary bargaining? In addition, as per the contract, the surrogate mother must hand over the child to the commissioning couple via the agents. Thus, as Purdy M. Lara rightly pointed out surrogacy is a ‘baby selling’ business.²⁸

c. Disrespecting the Dignity and Right of the Child

Surrogacy is regarded by many as a gross violation of right of the child. For, the maternal bond between the surrogate and the child is at stake. The child is treated as a contract rather than gift of their mutual conjugal love.²⁹ In other words, the surrogate mother cannot have right over the baby as the contract is over she has to submit the baby to the commissioning couple. The baby has to live without knowing the biological mother. In addition, the baby’s right is forbidden to have breast feeding for at least six months to develop the immunity in the body. It is precisely

because of this, Catholic teachings states “Surrogate motherhood represents an objective failure to meet the obligation of maternal love ...it offends the dignity and right of the child to be conceived in the womb, to be brought into the world and to be brought up by his offer won parents” (DV A3). To put it more clearly, as we analyse the proponents’ view, although it is freedom and autonomy of the couple to decide going for surrogacy, how far it is justifiable the involvement of the third party which is unknown to the couple and what about the rights of the unborn child who is completely deprived of maternal care such as breast feeding etc. Cahill also rejects the participation of third party who does not provide genetic components for reproduction.³⁰ McCormick also observes that it is a violation of the mutual commitment of the couples and essential property of marriage (unity).³¹

3.2. From the Perspective of Surrogate Mother

It is natural in all living beings, during the time of pregnancy an emotional bond is created between mother and baby. It is all the more very obvious the natural emotional bond is very strong among the human beings. When this emotional bond all on a sudden collapses as the surrogate mother gives the baby to the intended couple, it brings an emotional wound in her. Many surrogates reported that they would no longer be surrogate mothers as they suffer from emotional pain of surrendering the baby. However, there are some women who do not experience any psychological harm in surrogacy contract. Thus, we analyse surrogacy from the perspective of women who are the principal persons in the process of surrogacy.

a. Degrading the Dignity of Motherhood

Surrogacy contract often curtails the freedom and mobility of the surrogate mother. She needs to be available for all the tests and she is asked to stay in the hospital until the entire medical and technical procedures are completed. During this time, she is not allowed to take care of her own children. They are deprived of motherly love and care. Thus, the natural bond between mother and children is at stake in surrogacy. Not only the children already born but also the child is going to be born are severely affected. Thus, surrogacy distorts the natural relationship between the

mother and child. Therefore, there is a possibility of detachment of a surrogate mother from the unborn child in her womb itself. Since a surrogate mother knows very well that she is going to surrender the child to the couple, she may not be at times interested in the growth of the child. As William E. May states “Motherhood entails an irrevocable covenant between mother and child; the woman who gestates an embryo becomes its mother and enters into an irrevocable covenant with the embryo”.³² When this irrevocable covenant between the mother and child is broken the dignity of motherhood is affected. Since motherhood is God given gift and divine, can anyone sell for money? Therefore, gestating the embryo with the intention of giving the child after the birth for adoption is immoral.

b. Exploitation of women

The feminists who are criticizing surrogacy state that when women are used as object to bring baby in the reproductive factories, it goes against human dignity. This will surely result in exploitation of women. Poor women produce baby for rich women.³³ The feminist observes the possibility of the exploitation of individual women and class exploitation (poor women). Firstly, in India, the poor or impoverished uneducated and financially poor women mostly involve in commercial surrogacy contract and large sum of money is involved in this contract. In this contract, mostly the women are coercively induced to be surrogate mothers. For, mostly women are not voluntarily coming forward to be surrogate mothers in spite of all difficulties and hard times.³⁴ Secondly, the social goods must be distributed equally to all classes, races and ethnic groups. In the case of surrogacy, mostly poor women in general and Asian women in particular serve as surrogate mothers to the so-called upper class women and women of western countries. It is also low-pay service to higher social class couples. Why not other women involve in the surrogacy?

c. Surrogacy Secret and Social Stigma

Surrogacy basically questions intimacy of the couple, parenthood. The traditional notion of family, father and mother are questioned. The motherhood becomes a negotiable contract

which is contrary to human relationship.³⁵ The parenthood is being reduced to scientific experimentation. Although women accept for surrogacy for various reasons mainly for financial assistance to home in India, they have to face the social stigma; they are forced to say lie that child is dead or given for adoption.³⁶ The secrecy which is kept in surrogacy creates a negative impact on the situation that affects the family relationship in and outside the family. The elder children of the family are also being affected with this act unless they are well informed about this act.³⁷ “Some critics charge that surrogacy exploits women, particularly those from lower economic classes, thus constituting a new form of ‘slavery’”.³⁸ In addition, the part of the human body should not be used as “mere meat”.³⁹ Is it moral to convert the parts of the human body an object in the commercial reproductive market?

Conclusion

Infertility is a growing phenomenon in the world in general and in India in particular due to the food habits, working styles, polluted circumstance and use of plastic materials, etc. It is natural that the infertile couples long for a child and to satiate their parental desire. Surrogacy technology can be considered a great help for them. In this context, some would agree that the infertile couple could use this technology to bring forth a child, unless it does harm or affects the intended couples and surrogate mothers. One must be also aware that only a few rich infertile couples afford to go for surrogacy. As well, these couples are also looking for the place in which they could get child for the cheaper rate. If the money plays a vital role in surrogacy, there is possibility of exploitation and malpractices which question the sacredness of life. However, the proponents of surrogacy unfortunately fail to look at serious ethical problems. Surrogacy would have an adverse impact on marriage and family, the relationship between the mother and child, the dignity and rights of the child and motherhood.

In the Indian context, if a woman becomes a surrogate mother without the knowledge of the husband and in-laws her marital life will be at stake or even broken. She is not well accepted by the community and society. In addition, surrogacy violates the

sanctity of marriage. For, there is a danger that anyone who desires a child can pay and get the child in the surrogacy market. Just to give away the child immediately after the birth could also mean a human play in the life of the child. Surrogacy has created havoc in the life of the child. The right of the child when the child comes to know the origin of his/her birth she/he is psychologically harmed. In addition, the women who involve in surrogacy are also reduced to machines of reproductive technology. Since poor women are involving in surrogacy they are exploited by the surrogacy clinics and the agents. If any genetic defect takes place in the child, a surrogate mother has to put up with the child and it becomes additional burden to her. She is not able to concentrate on her own children during the time of surrogacy period. In spite of these ethical problems, in India, surrogacy is encouraged only for the sake of money and business. It is precisely because of that, there is no appropriate legislation to control surrogacy. Therefore, one has a right to play with the future of the child. The dignity of the child and rights must be respected. A human life should not be an object for monetary transaction and bargaining. This would bring a great ethical chaos in the society. Anything brings to the good of the human person the ethics would support, if anything brings ethical chaos and crisis all have common responsibility to protect the human life from those technologies, i.e., industrial production of children.

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