



The Dispute Over Cryopreserved Embryos: A Reflection of *RAH v RAL*

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Abstract. The advancement of in vitro fertilisation technology offers hope to infertile couples seeking biological children. However, disputes over the use of the cryopreserved embryos may arise when parties divorce or separate. Despite the absence of a statute governing assisted reproductive technology in Malaysia, ethical guidelines and national policy on assisted reproduction may shed light on how to manage this complex circumstance. In an unprecedented case involving, among other things, a dispute over cryopreserved embryos after divorce, the Malaysian High Court in *RAH v RAL* [2025] 4 CLJ 132, granted the right to control and decide on the fate of two cryopreserved embryos to the applicant based on her financial responsibility, subject to conditions imposed by the Court. However, the judgment did not refer to the national policy and certain provisions in the ethical guideline on assisted reproduction, which could have influenced the outcome of the case. This may create confusion for medical practitioners in future cases. Using a legal doctrinal approach, this research examines whether the judgment of *RAH v RAL* would have differed had the Malaysian Court considered the ethical guideline issued by the Malaysian Medical Council and the National Assisted Reproductive Technology Policy. This paper suggests that future Malaysian cases involving disputes over cryopreserved embryos after divorce would have been decided differently from *RAH v RAL*, should the ethical guidelines and national policy be followed. It would provide greater certainty and consistency in handling cryopreserved embryos for divorced parties.

Keywords: Assisted Reproductive Technology (ART), Divorce, Ethical Guideline, Policy.

1 Introduction

The advancement of Assisted Reproductive Technology (ART) has provided a glimmer of hope for infertile couples, granting them improved opportunities to have their children. It offers hope and pathways to parenthood, increasingly becoming an integral part of modern healthcare. While ART is rewarding, the technology has prompted the development of countless laws, legislations and policies to govern moral boundaries in the implementation of such technology.

Cryopreserved embryos in Malaysia are not afforded legal personhood, but every legal decision made profoundly affects these “frozen futures”. On 1 March 2025, the Kuala Lumpur High Court (Family Division) in *RAH v RAL* issued an unprecedented decision on the issue of control over cryopreserved embryos harvested during

marriage, belonging to a divorced non-Muslim couple. This judgment sets a novel standard, as well as igniting significant legal and ethical questions regarding cryopreserved embryos in Malaysia, the delicate balancing of rights to procreate and parenthood, as well as the standards that are evaluated to be vested control rights over them. Most importantly, it highlights the importance of the implementation of the current guidelines and policy in managing cryopreserved embryos in the event of divorce in Malaysia.

2 Problem Statement, Research Aim, Questions And Method

2.1 Problem Statement

ART has been widely used, among other things, to overcome infertility of a party to the marriage or preserve fertility by freezing sperm and embryos before an advanced age is realised [1]. However, disputes over frozen embryos in divorce are inevitable as divorce becomes more common [2].

2.2 Research Aim, Question And Method

This research aims to address the legislative position and enforcement of medical ethics in Malaysia in relation to ART in comparison to the recent decision in *RAH v RAL*.

This research examines whether the judgment of *RAH v RAL* would have differed had the Malaysian Court considered the ethical guideline issued by the Malaysian Medical Council (MMC) and the National Assisted Reproductive Technology Policy [3].

The research method adopted is a legal doctrinal approach that mainly focuses on reviewing the case of *RAH v RAL*, supplemented with a study on various ethical guidelines issued by MMC and the National Assisted Reproductive Technology policy, together with journal articles and conference papers. The main issue arising from the case is whether an unused embryo should be considered a person or property. A comparison is also made with the approaches in the United Kingdom and the United States.

3 Literature Review

The legal and ethical status of the human embryo remains highly contentious globally, impacting decisions regarding its disposition, especially in the context of Assisted Reproductive Technology (ART).

In Brazil, embryos are considered human beings through an executive Decree (24029-S), which is also consistent with the United States approach, where in Missouri, it was recognised that “*requires unborn children, including embryos to receive the same legal protections as post-birth children*” [4].

Conversely, as per the case of *RAH v RAL*, the Court thought an embryo fell into neither of the categories. This decision is crucial, depending on whether an embryo is

a property or a person, the right to destroy differs and destroying either of them could lead to punishment under the Penal Code where per Haniwarda Yaakob (2022) the current law only protects embryos in utero under Section 312 to 314 of the Penal Code in Louisiana, a state in the United States, it clearly defines an in vitro fertilised human ovum as a juridical person and criminalises any intentional destruction of it [5], [6].

Therefore, as pointed out by Cornell and Baron (2024), categorising an embryo as neither ‘children’ nor ‘property’ is intuitively more comfortable for some in light of the undeniable significance of embryos’ potential to become children, and is compatible with the property rights framework [2].

According to Cohen and Adashi (2016), the disposition of cryopreserved embryos becomes a problem when a couple divorces or one of them dies [4]. Therefore, in the United States, there is a norm for the fertility clinics to ask patients to specify their preference for the embryos in the event of divorce or death. Among the options are discarding the remaining embryo or donating it for research. For instance, in the case of *In re Marriage of Witten* 672 N.W.2d 768 (Iowa 2003), the Iowa Supreme Court ruled that embryos will remain frozen until there is a mutual agreement [4]. Doctors are also required to inform patients of the obligations and responsibilities that may arise regarding ART use [1]. In Malaysia, the National ART Policy 2021 has put a clear-cut rule that it must be destroyed upon divorce or death [3].

The judicial challenge in embryo disposition disputes hinges on balancing the fundamental right to procreate against the right not to procreate, both of which are protected under the Fourteenth Amendment of the US Constitution.

In the State of Tennessee, United States, as per the case of *Davis v Davis* 842 S.W.2d 588 (Tenn. 1992), the Tennessee Supreme Court went with a ‘Balancing-of-interest test’ in ruling in favour of the ex-husband’s right not to procreate [4]. When a couple divorces and disagrees as to what should be done with the frozen embryos, the court must assess the rights and competing reproductive interests of each spouse. Otherwise, by putting the responsibility of raising the child, which was born either during or after the marriage comes to an end, on either one of the parents after divorce, could be considered as a “serial parenthood” [7].

Finally, in any contentious case, parties will never reach an agreement, and the question is who bears the cost of maintaining or even conceiving the embryos as opposed to the party that wishes them to be destroyed. A critical legal and ethical debate revolves around the revocability of consent for embryo disposition, particularly the right of one party to withdraw consent after the embryos have been created. Schlesinger (2021) suggested that a guideline should be provided on the lifespan of an embryo [8].

4 An Overview Of RAH v RAL

The case of *RAH v RAL* involved a non-Muslim couple disputing control over their frozen fertilised embryos following their divorce. This was an unprecedented issue for the Malaysian High Court, requiring judicial interpretation in a domain previously unaddressed by specific statutes. Though no consent was given by the former husband in *RAH v RAL*, the former wife was still able to use the embryo and claim maintenance from the former husband. However, the learned Judge had not thoroughly considered the MMC guidelines, which stipulate that when a husband and wife have been divorced or separated, the embryos that were stored during the time of marriage.

The Court's stance was not merely on the legal status of embryos, but had also considered some other factors, including the right to procreate, the right to avoid parenthood and financial perspectives. Justice Evrol Mariette Peters acknowledged the profound complexity and long-standing debate surrounding the question of when human life truly begins, a multifaceted issue influenced by medical, religious, and ethical perspectives. The Court definitively held that embryos do not possess legal personhood under Malaysian law for non-Muslims, explicitly stating that "*legal parental responsibilities and rights take effect only upon a child's birth*".

However, the Court also distinguished embryos from ordinary chattels, ruling that they "should not be regarded as ordinary property that can be freely sold, transferred, or disposed of like other assets". Consequently, embryos "should not be divided as part of matrimonial assets in a divorce or separation, as in this case, without careful consideration of the ethical and moral implications involved". Recognising the inadequacy of existing legal terminology, the judge suggested using the term "control" over "custody" or "possession" to denote authority over the embryo's disposition without attributing personal or property rights. Nevertheless, the judge acknowledged that even "control" carries problematic connotations due to its association with statutory family law terms (e.g., Law Reform (Marriage and Divorce) Act 1976), proposing "authority" as a more neutral alternative.

Faced with a legal void, the court in *RAH v RAL* did not simply apply existing, ill-fitting categories of "person" or "property" to embryos. Instead, it proposes fusing the concepts of "control" or "authority". This judicial effort to create a workable solution in the absence of legislative guidance is noteworthy. However, the judge's own acknowledgement that even "control" is problematic due to its statutory family law connotations highlights the inherent limitations of judicial improvisation and reinforces the urgent necessity for the legislature to provide clear, purpose-built definitions and frameworks for ART.

The Court's decision to grant the Applicant "*control*" over the frozen embryos was primarily "*premised on the fact that the Applicant had borne the primary financial responsibility for the freezing and storage of the embryos*". This financial commitment was interpreted as an indicator of the Applicant's "*intent and*

commitment towards their preservation, possibly for future reproductive use". Furthermore, the decision involved a delicate balancing act between the applicant's fundamental "right to procreate" and the respondent's equally important "right not to be compelled into parenthood".

The court's explicit reliance on the "primary financial responsibility" of the applicant as a key factor in her granting "control" over the embryos may appear utilitarian. While the judgment sought to balance the applicant's "fundamental right to procreate" with the respondent's right to avoid parenthood, the emphasis on financial burden seemed to suggest that, in the absence of explicit pre-agreements, economic investment, which was perceived as an objective indicator of commitment, can become a significant, if not decisive, factor in determining the disposition of embryos. This raises important questions about equity and access, particularly for parties with differing financial capacities. A former spouse with greater financial means might be more privileged in the cryopreserved embryo dispute. The underlying reasoning is ethically contestable.

The *RAH v RAL* judgment thus establishes that in the absence of a clear, explicit agreement between parties regarding embryo disposition, Malaysian courts will engage in a balancing of rights, with financial contribution emerging as a significant, albeit not exclusive, factor. The ruling implicitly underscores the critical importance of couples establishing comprehensive, legally sound pre-conception agreements to govern the fate of their cryopreserved embryos in unforeseen circumstances like divorce or separation.

5 Current Guideline And Policy On Art

In Malaysia, there is yet to have a comprehensive legislation governing the use of ART. However, medical practitioners are bound to adhere to the MMC Guideline on Medically Assisted Reproduction 2025 (MMC Guideline 2025) (MMC 2025) (previously published as MMC Guideline on Assisted Reproduction 2006 (MMC Guideline 2006) (MMC 2006)) and the National Assisted Reproductive Technology (ART) Policy 2021 (National ART Policy 2021) [3],[9]. According to the Code of Professional Conduct 2009 (the Code), these guidelines and policies shall be read in conjunction with the Code, as it sets the minimum standards of conduct where registered medical practitioners are expected to adhere to. Hence, non-adherence to the Code and guidelines issued by the MMC may result in disciplinary action against the medical practitioner as per Section 29(2)(b) of the Medical Act 1971. It should be noted that at the time *RAH v RAL* was decided, the MMC Guideline 2006 and the National ART Policy were applicable.

In the absence of comprehensive statutory law governing ART, the MMC serves as the primary regulatory body for medical practitioners involved in ART. The MMC provides guidelines that dictate the standards of practice, professional conduct, and ethical obligations for registered medical practitioners, which are binding on all

doctors engaged in ART procedures. These guidelines are intended to fill the void left by specific legislation, ensuring a degree of oversight and ethical conduct within the medical profession.

The MMC Guideline 2006, which was subsequently replaced by the MMC Guideline 2025, clearly set out that ART must only be offered to married couples. This is due to cultural as well as religious reasons, as the sanctity of marriage and the importance of having a child in wedlock are widely held beliefs in Malaysia. Pursuant to Section 112 of the Evidence Act 1950, it is conclusive proof that a person is a legitimate child if he or she is born within a valid marriage of the person's mother and a man, or he or she is born within 280 days after the dissolution of the marriage, and the mother remains unmarried. It follows that if a cryopreserved embryo is used to conceive more than 280 days after the dissolution of the marriage of its parents, the resulting child will be deemed to be an illegitimate child.

The MMC Guidelines on Assisted Reproduction 2006 (now repealed, but applicable at the time of *RAH v RAL*) articulated guiding principles for ART practice [11]. These include a profound respect for human life at all stages of its development, a recognition of the rights of sub-fertile individuals to seek treatment, a paramount concern for the welfare of children, and a commitment to promoting responsible medical and scientific advancement. Clause 15 of the MMC Guideline 2006 explicitly prohibits certain practices deemed unethical or unlawful, including prohibiting the use of ART by unmarried individuals.

A cornerstone of the MMC's regulatory approach is the emphasis on consent. Written informed consent is mandatory for all ART treatments, for the use of genetic material (including for research), and for decisions regarding the disposal or further storage of genetic material. The guidelines stipulate a maximum storage period of five years for sperm, eggs, or embryos, which may be extended to ten years with approval from the Ministry of Health. Disposal is mandated if extended storage is declined or annual storage fees remain unpaid.

Crucially, the MMC Guideline 2006 contained a specific disposition clause for scenarios involving marital breakdown: The couple must agree that in the event of separation, divorce, or death of one partner, neither party (or next of kin in case of death) can independently use the stored gametes. In such cases, the gametes will be destroyed. This information must be included when obtaining informed documented consent at the time of initial in-vitro fertilisation. This position is retained in the MMC Guideline 2025, which replaced the MMC Guideline 2006.

Currently, as of 2025, the latest guidelines contain an explicit provision for scenarios involving marital breakdown, Clause 4 of the MMC Guideline 2025, stating that *"the couple must also agree that in the event of them getting separated, divorced or one of them becoming deceased ... the stored embryos or the deceased gametes shall not be used for conception."* This information is required to be included when

obtaining informed documented consent from the couple at the time of the initial IVF procedure [10].

The explicit instruction within the MMC Guideline for embryo destruction post-divorce, in the absence of specific agreements for continued use, presents a direct contrast with the approach taken by the court in *RAH v RAL*. While professional guidelines dictated a specific outcome (destruction), the judicial precedent in *RAH v RAL* did not automatically order the destruction of the embryos but rather granted “control” to the applicant who was no longer married to the respondent. This divergence signifies a critical tension: medical practitioners are bound by the MMC’s guidelines, yet judicial decisions may consider and adopt a different course. This conflicting situation introduces significant uncertainty for clinics and doctors regarding which course to follow, as it may potentially expose them to disciplinary action. The urgent need for legislative alignment to resolve this conflict and provide clear guidance for medical professionals is evident.

6 Finding: Legal Issues To Be Addressed In The Case Of RAH v RAL

Was the MMC guideline properly adhered to by the medical practitioners?

“I will practise my profession with conscience and dignity and in accordance with good medical practice.”

- The Physician’s Pledge, Code of Professional Conduct 2009

The case of *RAH v RAL* somehow revealed the non-compliance with the guideline issued by the MMC and the national policy.’

6.1 First Timeline (2014)

In October 2014, both parties were still married, and mutually agreed to pursue an in vitro fertilisation (IVF) treatment to have children. Three embryos created were a product of the sperm from the Respondent, with ova donated by the Applicant’s sister.

Clause 8 of the MMC Guideline 2006, applicable at that material time, did not expressly prohibit the donation of gametes to treat human sub-fertility in others with the help of ART, provided the prohibited factors were not present. However, Clause 15 of the MMC Guideline 2006 was complied with. One of such prohibited practices was the use of ART by unmarried couples.

6.2 Second Timeline (2021)

In 2021, which was after four years of divorce, the parties mutually agreed to implant one of three cryopreserved embryos to be born as their child. Based on the case law,

no agreement or documentation regarding the future use of the cryopreserved embryos was tendered.

This act of implantation of the first embryo after divorce was not only unconventional but also directly violated Clause 4 of the MMC Guideline 2006 and Clause 10.3.1 of the National ART Policy 2021, which mandates the disposal of embryos upon divorce. Moreover, gamete donation is expressly prohibited under Clause 4.2.1 of the National ART Policy 2021. Nevertheless, the parties did not dispute over the implantation of the first embryo, which led to the birth of a child. It was unclear if the change of the parties' marital status at that time was disclosed to the fertility clinic.

6.3 Third Timeline (2024)

The Applicant sought the custody, care and control of the two remaining embryos. The Respondent objected and was concerned about his future financial and parental obligations regarding the remaining surplus embryos, if the Applicant proceeded to implant the embryos. Technically, his refusal to take responsibility for these embryos is legitimate since the parties had divorced, as prescribed in Clause 10.3.1 of the National ART Policy 2021 and Clause 4 of the MMC Guideline 2006. These embryos should have been destroyed upon their divorce, based on the National ART Policy 2021 and the MMC Guideline 2006.

Non-Disclosure of Written Consent. Consent to conduct any medical treatment is a mandatory procedure to be implemented as provided in Clause 4 of the MMC Guideline 2006. This provision further regulates the terms and conditions of a consent when couples opt to undergo ART treatments, for instance, the disposition and storage of embryos created through ART treatment. Especially in cases involving ART, a proof of consent from both partners must be obtained. As expressly provided in the first limb of Clause 10.3.1 of the National ART Policy 2021, the consent from both husband and wife who completed the initial ART treatment must be obtained when it is decided to use frozen embryos.

However, it is undeniable that fertility clinics face challenges in verifying the marital status of couples when they approach their clinics for ART treatment. Consent may be given, but verification of the couple's marital status may still be challenging, as it is difficult to compel the potential patient to prove their marital status. Clause 11 of the MMC Guideline 2006 provided that the consent document should contain information that stored gametes could not be used independently by either party in the case of divorce. Clause 4 of the same Guideline stated that the parties should agree that stored gametes will be destroyed upon divorce or the demise of one of the parties. Clause 11.1.1 of the National ART Policy 2021 expressly provides that an ART treatment should only be performed on couples with their written consent to the particular treatment. To further elaborate, according to the Standards for Assisted Reproductive Technology Facility - Embryology Laboratory and Operation Theatre

(Standards for ART), Clause 4.5.1 (ii) expressly provides that a separate consent form is to be signed by both partners for cryopreservation procedures, and subsequent use of the surplus embryos and gametes [11].

In *RAH v RAL*, neither party tendered any documentation or written consent as evidence to prove what was agreed between them on how to manage the cryopreserved embryos in the event of divorce.

It was unclear whether a written consent on the disposal of cryopreserved embryos upon divorce was indeed made in this case. However, if such a written consent in accordance with the MMC Guideline 2006 and Standards of ART existed, the dispute over the two cryopreserved embryos could have been avoided.

The Prohibition of ART on Unmarried Couples. In Malaysia, it is prohibited to conduct ART on unmarried couples, considering it is unethical as well as having legal impacts on both parents and the child. According to Clause 10.3.1 National ART Policy 2021, stored embryos will be disposed of if there is a divorce or the death of one or both parties. A similar position was taken in Clause 4 of the MMC Guideline 2006 at that material time. If the National ART Policy 2021 and the MMC Guideline 2006 had been followed, all three frozen embryos in *RAH v RAL* should have been destroyed, and implantation should never have taken place at all in the first place.

Although the Respondent had granted his “consent” for the implantation of the first embryo four years after their divorce, the fact remains that there was non-compliance with the MMC Guideline 2006 and the National ART Policy 2021 and the resulting child would be illegitimate. The same would apply to the two remaining cryopreserved embryos, which were the main dispute in *RAH v RAL*.

6.4 Post *RAH v RAL*

The *RAH v RAL* judgment has created a profound and direct conflict between the judicial precedent and the professional regulatory framework, which introduces significant uncertainty for all stakeholders. The core of this conflict is the irreconcilable difference between the court’s decision and the MMC guideline and the National ART Policy. The court, operating from a position of legislative vacuum, granted the applicant “control” over the embryos. The MMC Guideline 2006, which applied to the medical practitioners at that material time, stated that in the event of a divorce, the embryos “will be destroyed”. This divergence creates an impossible legal and ethical quandary for clinics and doctors, who are now caught between two conflicting directives. A fertility clinic, faced with a court order to release an embryo and an MMC Guideline to destroy it, is in a precarious position where adherence to one directive risks a legal challenge for failing to comply with the other.

The confusion arose after the *RAH v RAL* case was undesirable. With the growing number of infertile patients seeking ART services, similar disputes in Malaysia are

foreseeable. In view of the provisions in the MMC Guideline 2025 and the National ART Policy 2021, it would be prudent for the fertility clinics to be more alert and to verify the potential patient's marital status before proceeding with the ART treatment to avoid infringing the abovementioned Guideline and Policy unknowingly.

At the same time, if similar cases are brought to court, it is crucial that the relevant Guidelines and Policy are taken into consideration. This is because the judicial consideration of the Guideline and Policy would enhance the soundness of the precedent made, and further uphold the concept of ethical medical treatment as well as promote consistency.

7 Would The Judgment Differ If The Appropriate

And Latest Laws Were Taken Into Consideration?

In *RAH v RAL*, only a brief reference was made to the MMC Guideline 2006. Unfortunately, the relevant clauses, such as Clause 4 (disposal of stored gametes upon divorce) and Clause 15 (ART is prohibited for unmarried couples) in the MMC Guideline 2006, were not thoroughly referred to or discussed. Similarly, the judgment also did not refer to the National ART Policy 2021, which provided that stored embryos will be disposed of if there is a divorce. If the High Court had referred to the relevant clauses in the MMC Guideline 2006 and the National ART Policy 2021, a different decision would probably have been taken by the Court.

7.1 The Surplus Embryos

It is undeniable that ethical and legal considerations are significant in determining the fate of the cryopreserved embryos. However, the MMC Guideline 2006 and the National ART Policy 2021. were applicable at the material time of *RAH v RAL*. Hence, the remaining two surplus embryos should have been destroyed in accordance with the MMC Guideline 2006 and the National ART Policy 2021.

It is crucial to note that had the MMC Guideline 2006 been strictly adhered to at the outset, the complex legal and ethical uncertainties may not have occurred. In the first place, compliance with the regulatory frameworks from the MMC would have mandated the destruction of the embryos upon the parties' divorce.

The Malaysian law puts heavy emphasis on the "best interest of the child" whenever disputes arise in family matters, as the legal system is obligated to ensure a child's rights are protected throughout. If a cryopreserved surplus embryo is developed and is to be born when its parents have divorced and remain unmarried, the resulting child shall be considered an illegitimate child pursuant to Section 112 of the Evidence Act 1950.

8 Comparing Jurisdiction

The United Kingdom's approach is governed by the Human Fertilisation and Embryology Act 1990. This legislative framework provides a clear, consent-centric model. The central principle is that the continued storage or use of embryos requires the "mutual consent of both parties". Either party can withdraw this consent at any time, which triggers a 12-month "cooling-off" period. If mutual consent for continued storage is not obtained during this period, the embryos "will be destroyed" [12]. A key feature of the UK model is that its courts have "*no power to intervene on behalf of the party who wants the embryos to be preserved*" if the other party has withdrawn consent. This provides legal certainty by establishing that the right not to be a parent overrides the right to procreate in such disputes.

In the United States of America, there are three approaches to the disposition of embryos upon divorce [13]. The first is the contractual approach with informed consent before storing the embryo on the agreed solution upon divorce. Secondly, a contemporary approach where parties enter into the IVF agreement with the option to change their mind afterwards. In other words, an embryo may only be disposed of upon a later mutual agreement from both parties. Last but not least, there is also a balancing approach which balances the interests of the husband and wife and whether the latter was put upon a "coerced parenthood". Based on all of the options, there is one factor that prevails over everything, which is infertility [14].

Unlike the United Kingdom, Malaysia does not have specific legislation on ART. However, there are MMC Guidelines 2025 and the National ART Policy 2021 which provide the manner of handling cryopreserved embryos, which should not be disregarded.

9 Conclusion

The case of *RAH v RAL* marks a significant development in Malaysian jurisprudence on assisted reproductive technology, particularly in the context of disputes over cryopreserved embryos following a divorce. While the Court rightly addressed the immediate concerns before the case, the limited reference to the MMC Guidelines and the National ART Policy 2021 leaves an important gap in judicial reasoning.

It should be noted that these regulatory instruments, though not codified into statute, reflect the ethical and professional standards intended to guide medical practitioners and provide consistency in decision-making. It is suggested that, had the MMC Guideline 2006 and National ART Policy 2021 been considered thoroughly, the judgment may have taken a different direction, potentially reducing ambiguity in future disputes of such.

It is crucial for medical practitioners to adhere strictly to the regulatory instruments in order to uphold their ethical standards in providing medical treatment,

especially ART treatments, as it involves the life and future of the parent and the embryo. At the same time, the integration of ethical guidelines and national policy into judicial determinations is essential to ensure clarity, fairness, and predictability in resolving complex issues arising from assisted reproduction.

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