

# TRANSNATIONAL JUSTICE: IN SEARCH OF UNIVERSALIZATION OF RIGHTS

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## 1 INTRODUCTION

Notwithstanding the understanding of the Right as a human phenomenon that is intended to regulate life in society, responding to anxieties and pacifying conflicts, its modern linkage to the State - political and legal entity, territorial and sovereign - makes the idea of establishing an effective Transnational Justice is questioned.

However, there are demands that a long time extrapolate the territorial and jurisdictional boundaries established by the State-nation, and these have been fierce worldwide, and especially after the second half of the twentieth century, when technological, information and transport conditions have allowed the human relations to become global, leading to the emergence of a global society and revealing the obsolescence of so-called international or supranational institutions.

The thematic of the establishment of a Transnational Justice also raises several others questions: the need for the concept of the Right as a global human phenomenon? If current institutions of transnational character could be considered as legitimate for the demands of a globalized society? Which demands should be treated as eminently transnational? Is there a need to create transnational political and legal institutions from which a Transnational Law can emerge?

Among the several other inquiries, the present article aims to deal with the possibility of the universalization of the Right as a way to obtain an effective Transnational Justice.

The method used in the investigation phase was the inductive,<sup>2</sup> in the treatment of the data was the Cartesian,<sup>3</sup> and in the report of the results that consists of this test, the logical basis is also inductive.

The techniques employed were that of the referent<sup>4</sup>, the category,<sup>5</sup> the operational concept<sup>6</sup> and the bibliographic<sup>7</sup> and documentary research, the latter, by electronic means.

## 2 WHAT IS THE RIGHT?

Of course this is one of the most controversial issues that has been debated by scientists, theoreticians and philosophers of law over the ages, but for the context of this article, it is necessary to establish a semantic agreement for the Right category and, from that agreement, to establish the necessary links with a Justice that is intended to be Transnational.

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<sup>2</sup> The inductive method consists in “[...] researching and identifying the parts of a phenomenon and collecting them in order to have a general perception or conclusion [...]” (PASOLD, 2011, p. 86).

<sup>3</sup> The Cartesian method, according to Pasold (2011, p. 204), can be summed up in four rules “[...] 1. Doubting; 2. Decompose; 3. To order; 4. Classify and revise. Then perform the value judgment.”

<sup>4</sup> It is referred to as “[...] the prior specification of the reason(s), the objective(s) and the desired product, defining the thematic scope and approach for intellectual activity, especially for a search.” (PASOLD, 2011, p. 54).

<sup>5</sup> Category is understood as “[...] word or strategic expression in the elaboration and / or expression of an idea.” (PASOLD, 2011, p. 25).

<sup>6</sup> Operational concept means “[...] established or proposed definition of a word or phrase, with the purpose that such a definition be accepted for the purposes of the proposed terms.” (PASOLD, 2011, p. 198).

<sup>7</sup> Bibliographic research is the “technique of investigation in books, jurisprudential repertoires and legal collections.” (PASOLD, 2011, p. 207).

It is proposed to understand, in a first analysis, the Right as a human phenomenon (emanated from the human being, as a moral or ethical being, which in this first moment does not matter to us) in order to govern human life in society.

As a human phenomenon the Right, evidently, does not bound to any specific region, although it may present a lot of differences in relation to its source or origin, however, it is established spread throughout the terrestrial globe where human relations are present.

At what point, then, can we talk about the nationalization of Right? The conception of the Right linked to a region, local or national, is directly related to its perception of origin. Therefore, it is necessary to return to the moral and ethical approach. As a human phenomenon, this means that its origins is emanated from the human being as 'moral being' - moral in the sense of subjective values attached to each human being that can be diverse variations due to a series of factors such as culture, environment in which each being is inserted, religion and others; but also an 'ethical being' - as the approach passes the relation of the individual to the other, then moves the science of the Right to institute rules, norms that will govern these relations; and also as 'social being' - whose relation derives an established power over the others whose origin can be divine, tyrannical, despotic or, more modernly, by the organization of the human being itself in society with the creation of a political and juridical entity that holds the exclusivity of power and representation, the State.

From the idea of the State, as a sovereign entity, under a certain territory / region and people / population / nation in which it has the exclusive domain of coercion and sanction, the Right pass to be confused with the set of legal norms emanating from this political and juridical entity, distinguishing itself from the others kind of norms due to the force of coercion over all under penalty of economic and / or physical sanctions to the violators.

At this stage, the Right is a human phenomenon (originated in the moral and ethical human being) destined to govern life (human relationship) in society (that is, in relation to the other) that although not attached to a region / local, but present in the global human relations, ends up being more modern, with the emergence of States-nations, to be confused with the human organization created by the Society<sup>8</sup> as a set of legal norms emanated by the political and legal organization, called State, sovereign under a given territory and nation, and may require compliance by its citizens under coercion and penalty.

This way, the idea of a national right is directly linked to the emergence of the political entity of the State. The conception of the State, however, as a political entity attributed by the modern right, was unknown until the end of the Middle Ages. Italy would have been the first to use the word 'State', though with a very vague meaning, afterwards England, France, and Germany. But it was only with Machiavelli (MACHIARELLI, 2011) in 1513 that the term was definitively introduced in the scientific literature. There is evidently no single definition for State, definitions are points of view of each doctrine, of each author, regardless of that, there is certain consensus when talking about of the elements that constitute the State: population / nation politically organized within a determined territory with political sovereignty and coercion, that is, with power to legislate and establish rules that will be by the State political entity coercively collected from

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<sup>8</sup> According to Pasold (2003, p. 44), the State constitutes a "[...] instrument that must be used to serve its sponsor, that is, the Society itself."

the population / nation in general - National Right. Although the modern conception of State as a political entity appeared more effectively only from the seventeenth century,<sup>9</sup> before that there were political societies that, with superior authority, established the rules of coexistence of its members, among them we can mention the ancient kingdoms / empires of Egypt, Israel, Babylon, Persia, Greek, Roman, China.

The State-Nation, in turn, is constituted in a type of political organization arisen of the bourgeois and North-American revolutions in the XVIII and XIX centuries that presents like main characteristics the sovereignty based on a territory, to the tripartition of the powers and the gradual implantation of the representative democracy, establishing, consequently, an institution that has the power of coercion incident to the conduct of the citizens that compose the Society, determining to them, through a normative system backed by the force, what they can and cannot do,<sup>10</sup> thus constituting an order Juridical regarded as sovereign which has as objective the common good of a people situated in a certain territory.

Due to its form, the Right that is generated by the State, territorial and sovereign, is established in view of the limits by State sovereignty, on a particular people and region/territory, it occurs that, mainly from the second half of the XX century, the State-nation has been strongly pressured by the phenomenon of economic globalization, which together with the scientific and technological advances, have allowed not only economic and capital transactions but also people, organizations, governments at a planetary level, altering drastically the global human relations and allowing the emergence of transnational relations and demands that go far beyond the limits established by an idea of Justice linked to the State-nation and demanding a new civilizational pact that propitiates the construction of a new world political and legal order, more just and humane, as can be seen follow.

### 3 THE TRANSNATIONALITY PHENOMENON OF HUMAN RELATIONSHIP AND AS THE RIGHT

The Globalization, especially after the end of the Second World War, is a relatively new phenomenon, unlike any other wave of globalization (global, world, planetary) that has already occurred in the past and is multifaceted, since it does not include only one facet or a field of human life, for this reason has interfered in the daily lives of all in various ways and required us to adapt and give answers. Based on the neoliberal ideas of free competition in the market, there is a strong hegemonic tendency of capital that provokes, as a byproduct, social exclusion, concentration of wealth, increase of poverty, which constitute its origin and caused the world to arrive to the current social, political and legal reality. The phenomenon of Globalization also has the most notable characteristics of the weakening of the States-nation like: not-territoriality and the free market as their driving force (TOMAZ, 2013).

The Transnationality is born in the context of Globalization, due to the weakening of the State-nation that is withdrawn from the center of international relations, emerging new rela-

<sup>9</sup> The modern conception that only admits the existence of the State with the clear political and sovereign position, arising after the Peace of Westphalia - in 1648, in the Westphalian cities of Munster and Onsbuck, where treaties were defined that defined the territorial limits resulting from the religious wars, Moved by France and its allies against Germany.

<sup>10</sup> Operational concept formed from the lessons of Cruz and Bodnar (2011, p. 65), first part, as well Mello (2000, p. 39), second part, and Dallari (2000, p. 104, last part).

tionships that permeate the borders of the States-nations by new agents unknown until now in the world scenario, especially in relations where the interests of the development and exploitation of entrepreneurial economic activity are intertwined, coupled with strong scientific and technological growth, making ‘distances diminishing’ and becoming possible, for example, real-time global communication and facilitation of loads and people, thus allowing the formation of social spaces and so-called Transnational regulations.

Insofar as States-nation no longer have the principal role in imposing conditions and determining what kind of industrialization, development, which is appropriate to their needs and the potential of each particular country, they are faced with the only condition that they have enough: to promote the conditions necessary for transnationalization to take place and seek to manage their internal crises. In this scenario, Souza (1985, p. 16) stresses that the dreams of national development and affirmation of national sovereignty are replaced by the rhetoric of large projects that do not belong and do not fundamentally benefit the host countries of transnational projects.

Initiatives by the States-nation were being created to remain in control of borders and global negotiations. The International Right institutions can be considered as a first attempt by the State-nation to preserve its sovereignty (power of coercion over a particular people / nation and territory) which in essence establishes treaties and conventions between sovereign States on matters of importance to their immediate and direct interests.

The agreements of International Right, however, are based on conventions established between inter-nations, that is, point-to-point relations that are regulated by each States that mutually recognize themselves as sovereign nations, preserving, this way, their territorial limits. So the analysis to the International Right system reveals how insufficient is to protect the complex transnational relations, that is, in relations based on inter nationality, regulated by the International Right, the concept of State-nations, territorial and sovereign, is not exceeded and agreements treaties establish point-to-point relations to regulate their interests and possible conflicts or common disputes.

In view of the fact that *“gli Stati non hanno tutti lo stesso peso e la stessa influenza e, di conseguenza, il potere non è ripartito equamente. Essi, infine, siglano trattati e convenzioni, dando così vita al Diritto Internazionale”*, highlights Cassese (2013, p. 15). The weight of each State in international relations, demonstrates one of the problems related to the juridical system based on the idea of the inter-national, shows limitations linked to the way it was designed. Thus, in spite of propagating the idea of interrelationship, the International Right system maintains intact the interests of each State involved, which on several occasions are very different from one another.

In this form, the original endemic condition of the International Legal system, faced with the reality imposed by the phenomenon of Globalization and Transnationalization that no longer recognize “the borders” or “the sovereignty”, oblige each State to adapt and give way to the structure established by the world market, regardless of the existence of agreements or treaties, in favor of free access to capital and strengthening or weakening of local or regional “economic development”, thus revealing its obsolescence.

Another attempt by the State-nation allied to other States-nations strategically, economically and territorially placed to cope, or more competitive and with greater bargaining power, in front of a global market, to remain in control and at the center of transnational deals, was the regional organization of States and the constitution of a Community or Supranational Legal System.

Notwithstanding the fact that the borders of the Member States that make up the Community bloc in this system,<sup>11</sup> as a paradigmatic reference to an effective Transnational Legal System have been transposed, this results in the realization that this system is nothing more than a joint effort of the participating States to create a more effective single space to compete globally.

According to Stelzer's (2011, p. 47) lesson, in the Communitarian Space, as well as in the Global space, trade and economic factors assume the garb of command in the process, without which the succumbency of the Constitution (by the each member State) would not have dared to privilege of the Community legislation. According to this author, the Right (using European Community Law System as an example), in this process, goes to the economy way, which is why it succumbed to the changes that were required, so as not to be identified with an International Legal System or a National Legal System, and concludes: "*the Community Law System is therefore the falsetto of a hegemonic globalization in a regional spectrum.*"

Failure to address complexity in business has led (and leads) the States-nations to surrender to unprecedented legal alternatives arising within the intra-firm environment or to adapt to originally international organizations, but of evident transnational character, to enable decisions to be taken in the large space of business organizations, allowing the re-entry of States in the transnational business economic game.

The Globalization thus leads to the exhaustion of institutions based on the proposal of the State-nation, territorial, autonomous and sovereign, which is gradually removed from the role of the principal manager and controller of transnationalized social relations. Other agents, hitherto unknown, take center stage in the relations that permeate the borders of States-nations, especially in those where the interests of the development and exploitation of business economic activities are intertwined.

In the same way, the legal systems established to govern internal relations (National Law System) and external ones from the perspective of conflicts (International and Supranational Law Systems) prove insufficient to protect the relations that have been not-territorialized, revealing transnational demands that affect by the Globalization so much internal/national activities as well as across borders and demanding a new form of global, political and legal social organization that allows the establishment of a world standard for the distribution of a Transnational Justice.

#### 4 TRANSNATIONAL JUSTICE: THE UNIVERSALIZATION OF RIGHTS

By nature, as a human phenomenon, the Right cannot be enclosed in a limited space, but it must be erected in the service of a global, transnational dimension, and meet the fundamental demands that unite all human beings in a single great global society.

Actually what is currently seen through the questioning of the political entity State-nation, in view of the overflow of territorial boundaries due to the process of not only economic but social globalization, combined with the scientific and technological advance that allows, among other factors: the diminishing distances, real-time communication, access to information, making

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<sup>11</sup> As Saldanha points out, in the supranational legal order, to which the European Union represents, in contemporary times, the best form, it is characterized by the transcendence of the borders of the isolated Member States, without prejudice to the consultation and application of national jurisdictions (SALDANHA, 2007, p. 347-382).

demands (whether human, social, cultural or economic interests or aspirations) also transcend the territorial boundaries of the State-nation requiring its adequacy.

In the human bias, we are all participants of a single race, regardless of whether we are black or white, brown or yellow, of different languages and different cultural customs. We all have basic needs and limitations that make us depend on minimum conditions for maintaining one's life, regardless of the "nation / territory" in which we live.

In view of this reality and as come as the fact that the phenomena of Globalization and Transnationalization have caused changes in several aspects of human life, not only in the economic, cultural and social dimension, generated mainly by the intensification of the human relations that have arisen in its bosom, all this has resulted in a serious blow to political and legal organizations focused on the regulation and internal governance of social relations or, when perceived from an external perspective (beyond borders), based on a relation of conflicts of interests between nations, territories and sovereigns.

The old forms of regulation and governance, or rather those still attached to the idea of national sovereignty exercised over a given territory, have therefore proved to be insufficient to conduct this new transnational social reality that goes beyond the frontiers defined by the State-nation and also, therefore, manifest the obsolescence of national, international and supranational legal systems to protect them.

According to the lessons of Gonçalves and Stelzer (2009), the advancement of technology, economic, commercial and social relations have leverage the establishment of transnational relations that question the structure of the Law system with the state nature no longer in a position to edit norms capable of linking and disciplining progressively polycentric relations, as a result of the increasing complexity of the actions and relations established between a variety of subjects of an increasingly complex and global Society.

Trade, or even better, the development and exploitation of global business economic activities, as the flagship of the process of crossing borders (and not more interconnection) is at the heart of this process, leading to the emergence of an outline of "Transnationalised Right System", says Stelzer (2011, p. 16), born to regulate and strengthen the interests of transnational corporations outside democratic institutions, in exclusive protection of the interests of the agents involved.

That is to say, Globalization generated, beyond the Transnationalization of economic, cultural and social relations, the emergence of transnationalized rules that objectified (and objective) to govern the interests of capital and of the world-wide commerce, being a "Right of Class" generated by the agents and corporations of world trade, a kind of new *lex mercatoria* (TOMAZ, 2013, p. 177) under the guise of economic rules and world market.

Examples of the insufficiency of the internal legal system in regulating issues that go far beyond its territorial base and the so-called state sovereignty and which directly affect governance and social and political security not only local but worldwide, are several, two of which may be highlighted: (a) Increased organized crime worldwide, organizations spread across several nations facilitating the smuggling of weapons, narcotics, trafficking in persons and prostitution, as well as crimes related to the exploitation of capital or the evasion of foreign exchange that For various reasons, cannot be adequately followed by criminal law; (b) The exploitation of child labor, of women, and under subhuman and / or sub-salary conditions without minimum respect for those Rights considered as Human and Fundamental Rights and which are not accompanied by Labor

Law; (c) The uncontrolled and uncontrolled exploitation of natural resources, causing on several occasions, contamination to the environment that far exceeds the territorial limits and that cannot be protected by an Environmental Law; (d) In relation to relations aimed at the development and exploitation of business economic activities, the exploitation of labor, economy and world capital and involving dilemmas of various branches of Law such as Commercial, Labor, Economic, Consumer, Tributary, among others.

The above examples, although not exhaustive, underscore the fact that the standard legal system used by the States-nations has long been insufficient to protect locality due to the globalizing influence that will globally/planet tell the interests and conflicts that transcend borders national authorities.

The obsolescence of state legal systems in producing the Right itself in absolute form is demonstrated, as Oliviero and Cruz (2012, p. 19, our translation) say, in the condition of how it is gradually being reshaped, reformulating the very historical category of national sovereignty towards a conceptual definition still of hybrid configuration, noting that:

This is also because the political options open to parliamentary majorities are always more circumscribed to the constant transfer of sovereignty to the “national (inter) trans community”, mainly through institutions such as the International Monetary Fund, the UN and its agencies, and even the large private transnational corporations formerly called multinationals, which makes some political choices impracticable, except by forcing the barriers of a sort of “state of economic necessity” produced by the irresistible influence of these large economic groups of world significance. Which, as we know, are far more powerful than many states and capable of changing the structural characteristics of contemporary democracies themselves. Not only do these groups dominate almost the entire world political scene, but they also capture their laws and condition them in the name of market and development requirements.

Thus, due to a series of factors, including ideological, political and juridical factors already mentioned, allied to the great scientific and technological advance, the present globalizing wave imposed on the world a transnational reality that challenged (and challenge) the human political and juridical organizations created to govern life in society.

The new transnational operators of capital or the development and exploitation of entrepreneurial economic activities, assuming a central role in transnational relations, against the obsolescence of political and juridical institutions, being unable or unwilling for the dynamicity of corporate competition to be subject to the limits established institutionally by the States, constituted for the regency of their own interests, rules that could address this global political and legal “loophole”, transnational rules.

It is undeniable, however, that the phenomenon of globalization has given rise to transnational rules to guarantee greater effectiveness to the economic, commercial and world capital interests, but Transnationalization, proposed as a reflexive phenomenon of Globalization, demands the emergence of a new juridical dimension, of an effective democratic Transnational Law System that is not oriented exclusively by the cold rules of the market, ignoring to the political and economic peculiarities that the world trade reflects, especially with respect to the economic inequalities between the nations (TOMAZ, 2013, p. 177).

Although there may be some divergence about the existence of transnational, self-regulated rules, on the margins of the States-nation (OLIVIERO; CRUZ, 2012, p. 23), there is no doubt, however, of the emergence of new transnational powers, present in the world order influenced by neoliberal capital and ideas, resulting from the intensification of the Globalization phenomenon.

The emergence of new actors and transnational powers per se, according to the lesson of Oliviero and Cruz (2012, p. 23), makes it timely and necessary to discuss the establishment of a Transnational Law System that goes beyond the class representation, but that makes possible the democratization of relations between States, based on cooperation and solidarity, in order to ensure the construction of bases and strategies for transnational governance, regulation and intervention, asserting that:

The transnational normative language declares itself more as a motor of “convergences” and “dialogues” than of differences: the rhetoric of cosmopolitanism hides the imperative connotation of global law, taking advantage of the absence of an apparatus of public powers to which to attribute the function Coercive and presumed equal position of legal subjects. If we stop thinking about law according to the formal scheme in which it was represented from the modern era and, instead, examine its content with a pragmatic approach, it will be evident that it is at the global level that “constituent departure” is move. It is beyond the limits of the State that the “common practices” that can define the new public sphere capable of contrasting the technicality of governance based on the mercantile integration. (OLIVIERO; CRUZ, 2012, p. 20-21, our translation).

In Bachelet’s (1995, p. 68) words, unless the world society improves and, above all, applies the norms of a multisectoral Society to the scale of all the inhabitants of the planet, we are in the imminence of entire populations disappearing purely and simply because of the combined effects of diseases linked to destruction to the world’s economic games.

In view of this reality, but with an active position on the opportunities that it also entails, Cruz and Bodnar (2011, p. 69-70) teach about the urgency of creating new global strategies of governance, regulation and intervention, based on a paradigm of approximation between peoples and cultures, and reflective of the citizen in the political, economic and social management, that will configure a new project of civilization, revolutionary and strategic for the future, based on the critical awareness about the finitude of the environmental goods and on the joint responsibility of the global protection and in defense and continuous improvement of the whole community of life and of the elements that give it sustenance and viability.

This reality points to the urgent need to undertake and carry out the politicization and jurisdictionalisation of the phenomenon of Globalization and Transnationality in order to form a new political dimension, legitimate and democratic, from which a new juridical dimension can also originate to protect the multiplicity of interests and relationships of which constitutes the contemporary world society that establishes an effective Transnational Justice.

## 5 FINAL CONSIDERATIONS

The fact that in diverse nations, despite being organized under the same political form of representation, they nevertheless demonstrate profound differences between the habits, cus-

toms, cultures and languages of their citizens,<sup>12</sup> the human relationships that have been transnationalized from the phenomenon of Globalization make the emergence of a world Society plausible and allows the establishment of a new civilizing pact in defense of all humanity.

The social importance with the emergence of a called world society<sup>13</sup> characterized by the multiplicity of languages, cultures, agents and, consequently, by the lack of integrity, demands and require the reflection the influence by the Right as a human phenomenon to govern life in Society by envisioning a good to the greatest and a universal gain for all mankind is the establishment of a Transnational Justice.

To do so, the opportunity offered with Transnationality cannot be ignored. The moment, according to Beck (1999, p. 27), constitutes a transition period identified as a second modernity, or a reflexive modernity, in which the Society itself is having the opportunity to focus on their problems, especially with regard to technological and scientific progress, and breaking with the illusion of the Enlightenment that science would lead humanity to liberation and happiness.

Transnational capital, according to Cruz and Bodnar (2011, p. 69), has exercised its political authority using the apparatus of each state and through the transformation of existing international organizations such as the former Bretton Woods<sup>14</sup> institutions or agencies of the United Nations system, more recent institutions, such as the World Trade Organization, to convert the structural power of the global economy over the countries and the working classes in each State into direct political influence through the transnational capitalist apparatus. On the other hand, the States respond to the demands of transnational capital, but are unable, due to a lack of necessary transnational public space, to transform wealth into welfare for the population as capitalist systems of accumulation, and thus do not fulfill their Social Functions. In this way, they cannot absorb and respond to the current transnational demands arising from the transnationalized relations of the world society.

It is therefore necessary to use the opportunity arising from the transnational relations of a world society to the formation of a new transnational political order of democratic and republican representation that will give rise to a new juridical dimension that will represent this new world order, a Transnational Law System, which is distinguished from the transnational legal rules derived from the phenomenon of Globalization by the dynamics and regulation of the market, and that is arranged to govern and protect relations in the transnational space in defense of the interests of the world society and that makes possible the existence of a utopian<sup>15</sup> future of Transnational Social Justice.

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<sup>12</sup> Austria, South Africa, Belgium, Bolivia, Cameroon, Canada, Haiti, India, Luxembourg, Rwanda, Somalia, Switzerland, are some examples.

<sup>13</sup> World Society or Transnational Society are categories used as synonyms in this article.

<sup>14</sup> After the first decades of the tenth century, the liberal economic system was based on bilateral agreements; There were no international bodies that specifically looked after economic and trade aspects. Between the wars, the liberal system entered into crisis, mainly due to the mutual distrust of the governments, the strengthening of systems like the fascist and the communist, and the serious economic crisis in central European countries. Thus, at the end of World War II, the United States and the United Kingdom met with other countries in July 1944 in the American city of Bretton Woods and drew up a new economic order based on the international free trade system (CAMPOS; TÁVORA, 2013, p. 141, 142).

<sup>15</sup> The Utopia category is used here from the philosophical point of view and, in the lesson of Osvaldo Ferreira de Melo, can be defined as “[...] an ideology put into action, aiming to reach the best possible situation.” (MELO, 2000, p. 96).

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