# TOWARDS A TRULY COMMON LAW

*Europe as a laboratory for legal pluralism*

As we move towards a more global legal community, often with accompanying injustice and violence, Mireille Delmas-Marty demonstrates that there is an urgent need to reconstruct the national and international legal landscapes. Legal reasoning can be applied to concepts such as human rights for European citizens in the new world order. In this book the author argues for a rule of law that is common in every sense of the word: accessible to all rather than reserved exclusively for officials, common to the various legal sectors despite increasing specialisation, and common to diverse states. The book will be of interest to all comparative European lawyers, and to social scientists and legal theorists grappling with contemporary issues in legal pluralism and globalisation.

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## Europe as a laboratory for legal pluralism

by

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# PREFACE: TOWARDS A TRULY COMMON LAW

It must seem madness for a French legal scholar to make a plea 'for a common law', insisting on the need in today's world to move towards one that is 'truly common', then risk its translation in the very country of common law.

I hope that this book will be taken not as blasphemy, but as homage to a just concept – so just, in fact, that it has traversed centuries and oceans, even though it is still often poorly received on the European continent, where it is seen as the symbol of non-codified law, considered synonymous with arbitrariness by both the Roman-Germanic mind trained in Roman law and the Cartesian mind that inspired the Napoleonic codes.

The idea of a translation goes back to my stay at Cambridge University in 1998, where I was invited upon the kind suggestion of Professor John Spencer. Those few weeks in an atmosphere devoted to friendship and study were a privileged moment, full of fecund and varied exchanges on both comparative criminal procedure and the European *Corpus juris* project ('introducing penal provisions for the purpose of the financial interests of the European Union'), and particularly in Susan Marks' seminar on the impact of the European Court of Human Rights ('The role of the European judge in the revival of the *jus commune*: meaning and limitations'). Inspired directly by the book *Pour un droit commun*, this latter theme was the decisive occasion to test the usefulness of a confrontation of viewpoints between 'common-law' jurists and jurists of the Roman-Germanic tradition faced with common law's worldwide rise in power. The project was launched with the kind support of Cambridge University Press, and realised thanks to Naomi Norberg, who translated the French betraying neither the spirit nor the letter, and bringing the concision of a language that allows for multiple nuances while avoiding useless chatter.

In rereading the book a few years after its original publication in 1994, I am struck by two things. In this latter part of the year 2001, the move

to extend law beyond national frontiers has been amply confirmed by its primary sources (national laws, European law, law with worldwide application). It has also become more specific, between the two poles of the market and human rights, as the phenomenon called economic globalisation has been affirmed and problems have started coming to light. What has become particularly clear, especially since the terrorist attacks of 11 September 2001, is that unilateralism must give way to 'a new multilateralism'.[1]

## Confirmation

In just a few years, the movement was confirmed even beyond what I had anticipated, as the following examples will show.

### *1998: a turning point in the United Kingdom*

1998 was a turning point, but was no doubt perceived differently on opposite sides of the Channel. In France, as in most parts of the world, the two House of Lords decisions in the *Pinochet* case (25 November 1998 and 24 March 1999) were hailed as paving the way for international criminal justice. I will not go into a legal analysis here, but the commentators maintained that the Spanish judge (as well as the Belgian and French judges) who requested the former Chilean head of state's extradition, and the English judges who applied the principle of universal competence provided for by the United Nations Convention Against Torture, had 'broken a taboo': that of the impunity of heads of state. Many considered that this audacity on the part of European judges would have a 'boomerang effect', by making it possible for the Chilean Supreme Court to decide to lift General Pinochet's parliamentary immunity (which duly occurred on 10 August 2000). Of course, by showing that national judges are also guardians of international criminal justice, the *Pinochet* case raises issues, such as the risk of divergent interpretations or unacceptable interference, that only the creation of an International Criminal Court can resolve in the long term.

[1] Diane Marie Amann, 'A new international spirit: if the US can cooperate to combat terrorism, it can cooperate to pursue justice', *San Francisco Chronicle*, 12 October 2001.

But for British jurists, the incorporation of international law into domestic law poses even more urgent questions, as 1998 was, above all, the year in which the Human Rights Act was passed. The text, which entered into force in October 2000, enables British judges to apply the European Convention on Human Rights directly. As announced in the government's 1997 White Paper, this text's link with common law lies first in the traditional meaning of the term 'rights brought home'. As Lord Justice Laws stated unequivocally in the 1999 conference organised by Cambridge University: 'This is not Aladdin's lamp for old; it is Robert Browning: "Grow old along with me, the best is yet to be." Our old constitution is given new blood by the Human Rights Act. It strengthens, does not dilute, the common law. And the common lawyers must administer it, according to their ancient methods.'[2] The debate is, above all, national, because the powers thus given to judges raise the question of a new balance between parliament, the executive and judges. Some, like Professor Tony Smith, fear a 'Pyrrhic victory', as a violation of the Convention allows the judges only a 'declaration of incompatibility', and only the government can issue an order, subject to the approval of both houses of parliament. But others express the opposite fear, strongly played up by the media, of thus seeing established 'a pale shadow of one of the worst features of the American constitution, the politicising of the judiciary and the judicialising of politics'.[3] It seems in any case that a new balance should be sought by the judges between 'activism and restraint', to borrow the lord chancellor's phrase.

In this search, it is striking to note that the models envisaged are generally taken from the same family (the United States, Canada and New Zealand) rather than from European neighbours, no doubt considered more foreign. It is true that Europe itself remains a foreign idea for many jurists. Thus, when Lord Justice Auld worries about the interpretation of texts that come from the idea of 'guidance rather than regulation', he is wondering about the appropriate way to apply 'these strange foreign notions called fundamental rights'. For their part, many French jurists consider the European Convention on Human Rights as

[2] Cambridge University, Centre for Public Law, *The Human Rights Act and the criminal justice and regulatory process* (Hart Publishing, 1999).
[3] Dr P. Allot, letter to *The Times*, quoted by Prof. A. T. H. Smith, 'The Human Rights Act 1998, the constitutional context', in the conference cited above (pp. 3–9).

having a typically Anglo-Saxon spirit, as it is rife with expressions, such as 'reasonable' period of time, that are completely foreign to French culture (even though the 1996 reform introduced the term into the French *Code de procédure pénale* with regard to pre-trial custody).

The misunderstanding continues with criminal procedure. In France, British criminal procedure elicits strong reactions. Some lawyers dismiss it with an almost visceral rejection, whether it concerns the absence of civil parties or the specificity of the guilty plea that leads to an unacceptable inequality and constitutes a threat to the presumption of innocence, while others express boundless admiration. These Anglophiles are called Anglomaniacs by their adversaries, especially lawyers who dream of transposing the British system of evidence in its entirety, but who forget that it applies only in the very rare cases where the accused pleads not guilty. As John Spencer makes clear with great finesse, the lack of understanding (be it positive or negative) no doubt stems from a mutual lack of knowledge. We are not comparing the same thing when the 'Rolls Royce of trials' – the trial by jury – that so fascinates French lawyers represents barely a quarter of the criminal judgments rendered, the others being judged according to the ultra-quick procedure of the guilty plea, which the same lawyers do not want to hear about. And British jurists, so critical of French procedure, do not take into account the fact that in the vast majority of cases, the accused would be judged via the guilty plea in the United Kingdom. Clearly, the apprenticeship of a truly common law, at the confluence of diverse European traditions, is yet to be completed and Europe is still, in fact, a laboratory.

## *Revival of the* jus commune *in Europe*

The last few years have been rich in initiatives, both in scholarly works and institutions. Many books are real pleas for the revival of a method and a common vision inspired by the *jus commune* that existed from the Middle Ages to modern times on the European continent.[4] A

[4] See R. Zimmermann, 'Civil code and civil law: the "Europeanisation" of private law within the European Community and the re-emergence of a European legal science', *Columbia Journal of European Law* 63 (1994/5); C. Bar, *The common European law of tort* (Beck, 1998; German edn 1996); H. Kötz, *European contract law* (trans. T. Weir, Clarendon Press, 1997; German edn 1995); and the first book of a forthcoming series of *jus commune* case books for the common law of Europe: W. Van Gerven, J. Lever, P. Larouche, Ch. von Bar and G. Viney, *Cases and texts on national, supranational and international tort law: scope of protection* (Hart, 1998).

very concrete step was the 1995 publication by the famous Lando Commission (named for the Danish professor presiding over it) of its *Principles of European contract law*, conceived of as a sort of 'mosaïc type restatement'[5] consistent with in-depth studies in comparative law. Even in criminal law, symbol of national sovereignty, the idea of a 'European model penal code' was launched in 1996 by Professor Sieber's Memorandum under the supervision of the Council of Europe.[6] At the European Union level, the Convention on Protection of the Financial Interests of the European Union was adopted in 1995, with the aim of harmonising the definitions of fraud, as well as its sanctions and the assignment of criminal liability, but it has not yet entered into force due to insufficient ratification. Another project, called *Corpus juris*, was submitted to the European Commission and the European Parliament in 1996, then published in 1997. More ambitious, because it leans toward a certain unification of substantive criminal law and procedure around a 'European public prosecutor' in order better to fight against infringements on the European Union's financial interests, this widely debated text[7] was completed, and partially amended, by a 'follow-up study',[8] which is currently being published. It is now the subject of a feasibility study in countries that are candidates for entry into the European Union.

Such an effervescence in such a short period (less than ten years) is proof not only of the vigour of scholarship, but also of the high demand on the part of the institutions themselves. It is true that institutional reforms pave the way for a European common law: for the Council of Europe, with the 1998 entry into operation of the European Court of Human Rights in its new formation (which eliminates the filter of the Commission and imposes the jurisdictional path by excluding referral to the Committee of Ministers), and for the European Union, with the Amsterdam Treaty, which was signed in 1997 and entered into force in 1999. The treaty provides new legal bases for harmonising law and

[5] See Ch. U. Schmid, '"Bottom-up" harmonisation of European private law: *jus commune* and restatement', in Veijo Heiskanen and Kati Kulovesi (eds.), *Function and future of European law* (University of Helsinki Faculty of Law, 1999), pp. 75ff.

[6] See U. Sieber, 'Memorandum on a European Model Penal Code', *European Journal of Law Reform* 1 (1998/9), pp. 445ff.

[7] See the House of Lords, Select Committee on the European Communities, prosecuting fraud on the communities' finances – the *Corpus juris*, May 1999.

[8] See M. Delmas-Marty and J. Vervaele (eds.), *The implementation of the* Corpus juris *in the member states*, vol. I (Intersentia, 2000).

brings several sensitive areas within the remit of the Community, such as immigration policy and, partially, the protection of financial interests. Adoption of the *Corpus juris*, especially the creation of the 'European public prosecutor', could be envisaged either on the basis of an inter-state convention based on the Third Pillar, or more directly as a regulation based on the Community Pillar, but the Nice Treaty, signed in December 2000, did not, in the end, broaden the current legal base for a possible regulation.

European law itself is now faced, however, with the phenomenon of globalisation. The Lando Commission's principles must be brought in line with the Unidroit Principles of International Commercial Contracts[9] and the fight against organised crime cannot be limited to the European space,[10] particularly when it involves a problem that is global by nature, such as 'cyber crime'. The debates in 2000 on the *Yahoo* case[11] show already that European law will not suffice: neither the draft Council of Europe Convention on cyber crime (final draft adopted June 2001), nor the European Union Directive 95/46, which entered into force in 1998 and mandates an 'adequacy standard' for foreign sites, provides a definitive solution. In a peacemaking effort, the European Commission took note of the United States' adoption of an original system called the Safe Harbor Principles (Department of Commerce, 21 June 2000) and officially announced on 27 July 2000, despite the European Parliament's disagreement, that it acknowledged the adequate level of protection in the United States. But there will be no lasting solution in the absence of a truly common law applicable on a global scale.

### *Two major steps towards a global law*

One of two major steps towards a global law is the transformation of the organisations born of the GATT Accords into a permanent structure

[9] See S. Paasilehto, 'Legal cultural obstacles to the harmonisation of European private law', in Heiskanen and Kulovesi (eds.), *Function and future*, pp. 99ff.

[10] See M. Pieth, 'The harmonisation of law against economic crime', *European Journal of Law Reform* 1 (1998/9), p. 527; M. Delmas-Marty and S. Manacorda, 'Corruption: a challenge to the rule of law and democratic society' in P. Bernasconi (ed.), *Responding to corruption* (International Society of Social Defence, 2000), p. 401; *A* Corpus juris *for introducing penal provisions for the purpose of the financial interests of the European Union* (bilingual edition under the direction of M. Delmas-Marty, Economica, 1997); and Delmas-Marty and Vervaele, *Implementation of the* Corpus juris, vol. I.

[11] Order of the referee of the Tribunal de Grande Instance of Paris, 22 May 2000.

(with the creation of the WTO and the Dispute Settlement Body), which prefigures the emergence of a common law of global trade. The other is the signature, in the framework of the United Nations Conference in Rome, of the Convention establishing the future International Criminal Court.

Completing the United Nations' human rights structures, the rise in power of the new WTO structures since their creation in 1994 illustrates the market/human rights bipolarity already seen in the 'European laboratory'. The creation of the DSB, which combines negotiation and decision-making, also heightens the problems of co-ordination with the Community legal order. The Court of Justice of the European Communities (ECJ) is trying to resolve them by admitting the primacy of the WTO but, by refusing direct effect of its rules, it admits a sort of variable geometry lawfulness.[12] We may well ask ourselves if, as an echo of the national margin long admitted for the states' benefit, this is not a Community margin of appreciation contributing to the flexibility of global norms.

As for international criminal justice, in July 1998, a few months before the first House of Lords decision in the *Pinochet* case, it took the form of a new, permanent criminal court. Following on from the ad hoc tribunals created in 1993/4 by two UN Security Council Resolutions for judging the crimes committed in the former Yugoslavia and in Rwanda, the International Criminal Court will in fact be created when sixty states have ratified the Rome Convention. It will be competent to judge the most heinous crimes (genocide, crimes against humanity, war crimes subject to the transitory seven-year clause, and crimes of aggression once defined) touching the entire international community, including those committed by heads of state and provisional governments (Article 27). But we must not forget that several large countries, such as the United States, China and India, which represent close to half the world's population, have refused to sign the Convention. Despite the acceleration of history, we will have to wait many more years for the irreducible human element, which I cite as the primary foundation of a truly common law, to be fully recognised and protected. Even though the United States eventually signed the Rome Convention, it does not seem disposed

[12] See ECJ Case C-149/96, 23 November 1999, *Europe*, January 2000; Court of First Instance Case T-256/97, 27 January 2000, *Europe*, March 2000.

to ratify it, though the terrorist attacks of 11 September will perhaps speed the process. Eminent international law specialists such as Antonio Cassese (former presiding judge of the International Criminal Tribunal for Yugoslavia and professor at the University of Florence) and criminal law specialists such as George Fletcher (professor at Columbia University) believe that the proper response to those attacks is to bring the parties responsible to trial before an ad hoc international criminal court, which could be instituted by a UN Security Council Resolution similar to the 1993–4 Resolutions. In fact, it would suffice to declare the Rome Convention immediately applicable to these attacks: Article 7(1), which defines crimes against humanity, expressly states that the acts must be part of 'a widespread or systematic attack directed against any civilian population, with knowledge of the attack', and Article 7(2) specifies that the attack must be made 'pursuant to or in furtherance of a State or organisational policy to commit such attack'. In other words, even though terrorism is not targeted as such in the statute and was even set aside by the drafters because of the difficulty in distinguishing criminal terrorism from forms of resistance to forced occupation, the form used in New York in September seems to fall within the definition of crimes against humanity.[13] But this solution remains hypothetical. Most likely, the current dispositions will be maintained: according to the Convention's Preamble, the Criminal Court's competence will be only 'complementary' to that of the national jurisdictions. This is indicative of the extent to which the emergence of a common law, far from heralding the disappearance of sovereign states, expresses more this idea of complementarity between the various normative, national, international, regional and global spaces, which makes it, more than ever, necessary to adapt legal reasoning to this increasing complexity. This brings me to the questions my rereading raised.

## Questions raised

It seems to me that the problems analysed in 1994 have worsened over time and, whether they are practical (market/human rights contradiction), legal (increasing normative disorder) or political (no global democratic government), it has become impossible to ignore them.

[13] Antonio Cassese, interview in *La Justice pénale internationale*, 4 October 2001.

*Market/human rights contradictions*

The appearance of the UN/WTO institutional duality has spread the contradictions made clear in 1994 by the European example over the entire planet. One author[14] underlined the dangers of equivocation, amalgamation and even contradictions that would, according to him, oppose the 'globalisation of law', which leads to bringing national legal orders closer to the 'law of globalisation', marked by the appearance of a new legal space that overflows the states. In fact, there is a two-fold risk of contradiction: on the one hand, as to the states' respective places in each process (state impotence would be the first result of economic globalisation, though states are still a necessary relay with regard to human rights); on the other, as to the meaning of a worldwide expansion that cites either the sharing inherent in the very idea of universality, or a market society marked, conversely, by an increase in social inequality. Despite a strong move to catch up with recently industrialised nations, inequalities are increasing not only in wealthy nations, but also in most of the emerging ones: a quarter of humanity lives below the line of extreme poverty, and the spread between the 20 per cent richest and the 20 per cent poorest has more than doubled over the last three decades,[15] which leads one to wonder about economic liberalism's ability to promote general well-being by itself.

The path from contradiction to interdependence has not yet been cut, but signs indicating the conditions for realising a combined market/human rights common law are being posted. As seen throughout the book, the major landmarks are in Europe, be they the efforts of the Strasbourg and Luxembourg Courts to avoid conflicts or, when the conflicts are declared, to find solutions of co-ordination. The draft Charter of Fundamental Rights of the European Union launched in 2000 reflects this effort to conciliate – as long as we do not regress on the contents of the rights protected. In the project's current state, the Charter renounces bipartite division in favour of a construction: based on dignity and the primary freedoms, be they civil and political, or economic; equality,

[14] J. Chevallier, 'Mondialisation du droit et droit de la mondialisation', in Ch. A. Morand (ed.), *Le droit saisi par la mondialisation* (University of Geneva Colloquium, 2000); compare M. Delmas-Marty, *Trois défis pour un droit mondial* (Seuil, 1998).

[15] See the Report on Commerce and Development, United Nations Conference on Commerce and Development (UNCCED), 1998. See also the Report presented at the G8 Summit, July 2000.

which clearly applies in every area; solidarity, which fully integrates social rights; citizenship, which refers to the main political and civil rights; and justice, which refers to procedural rights, valid in every area. The way would thus be clear for enforcing fundamental rights *vis-à-vis* economic agents as well as the states, which reinforces the principle that fundamental rights are indivisible and favours interdependence between the market and human rights. This would be at the risk, however, of a normative disorder resulting from the proliferation of norms and international legal spaces that superpose and entangle themselves, leading to an even greater transfer of power to national and international judges. Hence the need for an 'ordered pluralism', a concept I develop at length in the book.

### *Disorder, or ordered pluralism?*

Beginning with a criticism of the monist conception, still utopian on a global (or even European) scale, and a dualism that does not account for the primacy of the international order and the greater interference in a society that is globalising, I suggested, as of 1994, that we move to a third, pluralist, model. Pluralism allows us to account for both the *vertical* relationship between national and international norms (marked by a normative entanglement with a return to domestic law through borrowing and express references), and the *horizontal* relationship between regional or global international norms, which are non-hierarchically juxtaposed to maintain continuity in the normative chain (for example, between the WTO and the UN or the EU and European Court of Human Rights (ECHR)). But we still must organise this pluralism, the problem being to find a pertinent rule of order, while the norms' hierarchy is weakened (vertical pluralism) or spread out (horizontal pluralism). Here, the margin of appreciation, examined in various examples, remains the primary instrument for building on multiplicity, not only between national and international norms, but also between regional, or even global, norms.

As the examples show, we can use the absence or presence of a margin of appreciation to distinguish unification, which imposes the same rule on everyone, from harmonisation, which is content to gather together around common principles. It makes room for pluralism by laying out a sort of states' right to be different, and replaces classical, binary logic with a logic of gradation that calls on fuzzy sets. In fact, many authors advise granting a national margin of appreciation to British

judges applying the new Human Rights Act 1998, as the Luxembourg Court implicitly does in its relations with the WTO. The move from classical to fuzzy logic described in the book thus more than ever becomes necessary – provided we solve the problem of democratic legitimacy, which is very much at issue, especially with regard to the WTO.

### *Plutocracy or democracy?*

Political debate underlies legal debate, and the dangers born of state impotence and the privatisation of law for the benefit of the wealthy openly raises issues of global governance and of the roles of institutions and citizens, and therefore of the agents of globalisation. What we see is state impotence: the master of the territory has lost control of its borders and economic agents, whose networks are now being organised along global strategies, openly traverse and transgress every state's borders. The same is true for controlling the rule of law, which is not adapted to transnational networks (of trade, but also of organised crime and internet communication). The economic actors will end up producing their own rules, naturally adapted to their own interests. In this world of global governance by a cosmopolitan plutocracy sufficiently flexible and mobile to exclude the states, the citizens and the judges, 'cosmopolitan democracy' has yet to be invented.[16] Improving international institutions[17] has become an urgent necessity, and the construction of European institutions, which raises the insightful question of the democratic deficit, has already brought to light a few avenues to explore.

Intended as a work in progress and not a set model, the search for a 'truly common law' constitutes a challenge to legal thinking, which is more conservative than transformational. As practices become global, at the cost of the injustices and violence we are currently experiencing, we must of course preserve the legal accomplishments of the past. But these accomplishments are not enough to respond to the issues now being raised. This book contributes to the search for adequate legal solutions: first, by describing the 'reconstruction of the landscape' seen in examples taken from France and Europe; then by trying to give a few keys for 'building on multiplicity'; and finally, by asking what the

[16] See S. Marks, 'The emerging norm: conceptualising "democractic governance"', *Proceedings of the American Society of International Law* (1997), pp. 372ff.

[17] See D. Archiburgi and D. Held (eds.), *Cosmopolitan democracy* (Polity Press, 1995); Delmas-Marty, *Trois défis pour un droit mondial.*

conditions might be for 'reinventing common law'. Whether it involves the European laboratory or the worldwide game board, the changes seen over the last few years heighten the urgency of such a search, because the answers must be found and implemented while there is still time. Since 11 September, it is clearer than ever that 'Justice and war are incompatible ideas.'[18] War means taking sides, whereas justice must remain impartial and independent. In such a conflict, war can pave the way, but it cannot replace justice. Only an International Criminal Court can offer sufficient guarantees to re-establish peace.

[18] George Fletcher, 'We must choose – justice or war', *The Washington Post*, 6 October 2001.

# ABBREVIATIONS

| | |
|---|---|
| AFNOR | *Association française de normalisation* |
| Ass. | Assemblée |
| *Bull.* | *Bulletin des arrêts de la cour de cassation* (Bulletin of Cour de cassation decisions) |
| CC | Conseil constitutionnel (Constitutional Council) |
| CE | Conseil d'Etat (State Council) |
| CNB | Conseil national des barreaux (French national bar council) |
| CPP | *Code de procédure pénale* (Code of Criminal Procedure) |
| CSCE | Conference on Security and Co-operation in Europe |
| D. | Dalloz compendium |
| ECHR | European Court of Human Rights |
| ECJ | European Court of Justice |
| ECSC | European Coal and Steel Community |
| EEC | European Economic Community |
| EHESS | Ecole des hautes études en sciences sociales (School for Advanced Studies in Social Science) |
| *EHRR* | *European Human Rights Review* |
| *ERPL* | *European Review of Private Law* |
| *Gaz. Pal.* | *Gazette du Palais* |
| HRC | European Human Rights Commission |
| INSERM | French National Institute of Health and Medical Research |
| IR | *Information rapides* (Quick references) |
| *JCI* | *Jurisclasseur* |
| *JCP* | *Juris-Classeur périodique* (or *Semaine juridique*) (French legal periodical) |
| *JO* | *Journal officiel de la République Française* (Official Journal of the French Republic) |

| | |
|---|---|
| LGDJ | *Librarie générale de droit et de jurisprudence* (French law and jurisprudence collection) |
| PUF | Presses Universitaires de France |
| *RAE* | *Revue des affaires européennes* (Review of European Affairs) |
| *RFDA* | *Revue française de droit administratif* (French Review of Administrative Law) |
| *RSC* | *Revue de science criminelle et de droit pénal comparé* (Review of Criminal Science and Comparative Criminal Law) |
| *RUDH* | *Revue universelle des droits de l'homme* (Universal Review of Human Rights) |

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