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POLITICAL OFFENSE AND THE SHAPE OF THE POLITICAL SYSTEM. REFLECTIONS ON THE MIXED THEORY, PREPONDERANCE AND CIVIL DISOBEDIENCE. PART 2

In the internal law of particular countries the fundamental division presented in the previous reflections with respect to offenses having a political provenance was based on the subject and subject matter approach. As it was stated a political offense may be correlated with the subject matter approach, and therefore, the criterion is based on the attacked legal interest, which is in a certain way protected. This interest is: the system of the country, its organs, sovereignty in relations with other international subjects, etc. The criterion can also include the subject approach, and therefore whether an act has a political status if the perpetrator acted from political motives. Finally, the act may be regarded as political, on the basis of a mixed criterion (subject and subject matter), which in turn leads to a substantial elimination of behaviors that meet the 'double condition'. This theory has its principal positive attributes since, first and foremost, it limits the number of offenses that could be considered political, primarily by the need to fulfill during 'the process of committing a crime by the offender' circumstances arising from the subject and subject matter theory. Thus, under this theory, the conditions resulting from the two earlier mentioned theories must be satisfied, and only then, the act can be regarded as a political offense. Aside from the subject, subject matter and mixed theories, the so called theory of preponderance was created in international law. It is characterized by a kind of balancing of individual acts of a criminal nature and attributing a political or criminal provenance to these acts. In the twenty-first century, except for those types of offenses of a political nature, the idea of civil disobedience as a form of social expression and at the same time a form of a political offense has gained importance. In this case, it may be correlated with the activity of social groups of different shape, whose aim is to achieve particular goals, often related to political activities.

Keywords: criminal law, criminal policy, political offense, political system.

In the international relations emerging in the late nineteenth and early twentieth centuries, and therefore, during the development of the revolutionary and anarchist movements, the concept of narrow understanding of crimes of political provenance was created. It was based on the view that criminal acts directed against the state or a particular form or type of public authority should not be instantiated as political acts, because they are an exemplification of tendencies directed at efforts to deconstruct the social organization and at the same time are a threat to the state. Therefore, they were considered relatively analogous to criminal offenses. In turn, in the second half of the twentieth century a view was formed that was a consequence of changes in the norms of

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international public law, for example, based on solutions of the Convention on the Prevention and Punishment of the Crime of Genocide of 1948², the St. James Palace Declaration of 1942³, the Hague Convention of 1970, etc., on the basis of which it was considered that, among others, the crime of genocide, war crimes or acts of terrorism and similar offenses should be excluded from the catalog of political acts⁴.

In the internal law of particular countries the fundamental division presented in the previous reflections with respect to offenses having a political provenance was based on the subject and subject matter approach. As it was stated a political offense may be correlated with the subject matter approach, and therefore, the criterion is based on the attacked legal interest, which is in a certain way protected. This interest is: the system of the country, its organs, sovereignty in relations with other international subjects, etc. The criterion can also include the subject approach, and therefore whether an act has a political

² Article 1 of the Convention states: "The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish" and Article 2 declares: "In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: a) killing members of the group; b) causing serious bodily or mental harm to members of the group; c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; d) imposing measures intended to prevent births within the group; e) forcibly transferring children of the group to another group" Convention on the Prevention and Punishment of the Crime of Genocide of 1948 enacted by the General Assembly of the United Nations (Journal of Laws of 1952, No. 2, item. 9). See. *Convention on the Prevention and Punishment of the Crime of Genocide*, <http://libr.sejm.gov.pl/tek01/txt/onz/1948a.html>, (access date 21 May 2014). Characteristically, that on behalf of the Polish Republic, on 22 September 1950 Boleslaw Bierut - as President of the Polish Republic, Józef Cyrankiewicz - as the Prime Minister and Stanislaw Skrzyszewski - Minister of Foreign Affairs, signed the document confirming the adoption of the Convention on the Prevention and Punishment of the Crime of Genocide by Poland, however, indicating that: "As regards Article IX, Poland does not consider itself bound by the provisions of this article, considering that the consent of all parties in the dispute is in each case a necessary condition for bringing a case before the International Court of Justice. With regard to Article XII, Poland does not accept the provisions of this article, considering that the Convention should apply to non-autonomous territories, including trust territories." [2] In Article IX of the Convention, the Parties recognized that: "Disputes between the Contracting Parties relating to the interpretation, application or fulfillment of the present Convention, including those relating to the responsibility of a State for genocide or any of the other acts enumerated in Article III shall be submitted to the International Court of Justice at the request of any party in the dispute"; while in Article XII the following constatation was made: "Any Contracting Party may at any time by notification to the Secretary-General of the United Nations, extend the application of the present Convention to all or some of the territories for whose foreign policy the Contracting Party is responsible." See. *Convention on the Prevention and Punishment of the Crime of Genocide ...* Art. IX and XII.

³ During a conference organized at the initiative of Polish and Czechoslovak government, in the palace of St. James in London on 13 January 1942, which was also attended by representatives of Yugoslavia, the Netherlands, Norway, Luxembourg, Greece, France and Belgium, a declaration was adopted calling for penalizing criminals who were responsible for the violation of international law. See. *Pomniki praw człowieka w historii [Monuments of human rights in history]*, edited by H. Wajs and R. Witkowski, *Anniversary Book of the Ombudsman*, Warszawa 2008, p. 337, <http://www.rpo.gov.pl/pliki/12108379880.pdf>, (access date 21 May 2014).

⁴ J.R. Kubiak, *Genesis and theories of political offense*, pp. 11-12.

status if the perpetrator acted from political motives. Finally, the act may be regarded as political, on the basis of a mixed criterion (subject and subject matter), which in turn leads to a substantial elimination of behaviors that meet the 'double condition'. This theory has its principal positive attributes since, first and foremost, it limits the number of offenses that could be considered political, primarily by the need to fulfill during 'the process of committing a crime by the offender' circumstances arising from the subject and subject matter theory. Thus, under this theory, the conditions resulting from the two earlier mentioned theories must be satisfied, and only then, the act can be regarded as a political offense. It combines both presented models acting as some kind of alternative to the exhibited interpretations of classification. It can be stated that it 'reconciles' the subject and subject matter concepts. This focus on reconciling the two concepts - as pointed out by S. Rozenband - could be noticed already in Laband, who described clearly that acts against the state, such as: "betrayal and treason should not be considered political if committed with distinctly personal and despicable motives"⁵. In this theory there is a merger of the motive and purpose of the perpetrator's action, which is political in nature, with a particular legal interest also having political properties⁶. In the latter case, the essence of this interest is politics. The advantage of such an approach to the theory classifying an offense as political is a significant narrowing of the possible interpretations of this concept, because only then it becomes political in nature when two conditions, associated with the subject and subject matter theory, are met. Thanks to a greater rigorism, which the theory postulates (i. e. the fulfillment of the double condition), various interpretations of punishable behavior⁷ are consequently eliminated. We are dealing here with a situation in which the political characteristic of an offense is based on both the subject and subject matter criterion. As a result, a direct perpetrator's action against e.g. the state policy in relation to a particular matter and the glorification of particular behavior or specific values, is complemented by the subject's awareness (the perpetrator's) that the act will trigger a real political effect, whereby this effect (political) at the same time is, correlated with the motive (political) of this action. Summing up, the characteristic of the perpetrator's action having a mental nature is connected with the subject matter of the action and only then (after meeting both conditions) the political aspect of the act is determined. Then we deal with a political crime⁸. The subject-subject matter mixed theory narrows in this case the object of study related to a political offense, however there also appear some inconsistencies, especially when we define a particular prohibited act as political in the broad perspective. It was pointed out by H. Poplawski already in the eighties of the twentieth century, and this observation seems to be still valid: if, taking into account the mixed theory, we assume that an act is a political offense, where the motive, the purpose of the offender and the subject matter of the action have a political character, then the listed determinants of the offense cannot be - and this is a prerequisite - defined broadly. Such a possibility "exists only if we accept that a political offense is the offense whose subject matter is of a political nature or which was committed for political

⁵ S. Rozenband, *Political crime*, [in:] *Handy encyclopedia of criminal law*, edited by W. Makowski, Warszawa 1936, p. 1332.

⁶ Z. Ciopiński, *Political offenses on a comparable basis*, "Scientific Papers of the Academy of Internal Affairs" 1986, No. 45, p 103

⁷v. S. Rozenband, *Political offenses* p. 1331.

⁸ v. S. Glaser, *Political crimes and extradition law*, Lvov 1925, pp. 3-4.

reasons and in the same interest. With this alternative of separating these two elements, this theory would simply be a patchwork of subject and subject matter theory, and as such - useless. Its role would be fulfilled by the two other theories"⁹.

Aside from the subject, subject matter and mixed theories, the so-called theory of preponderance was created in international law. It is characterized by a kind of balancing of individual acts of a criminal nature and attributing a political or criminal provenance to these acts. The theory of preponderance does not consider an act as a political offense, if the circumstances suggest that the perpetrator acted violently or in a repugnant manner, or if as a result of the perpetrator's actions there were casualties. Also, when the motivation of the perpetrator was strictly personal in nature, when the action was directed against bystanders disinterested in the political struggle, and when the act was only an episode that had no political significance, on the basis of this theory the offense is not considered political¹⁰. On the other hand, in order for an act to be considered political, a relationship between the purpose, the motive determining the perpetrator's behavior and – looking at the matter more broadly - between all circumstances occurring during the crime is determined. After such an analysis in connection with a particular case the relationships between criminal and political determinants influencing the act and its consequences are determined. When the advantage is on the side of political factors, particular behavior is classified as a political offense, whereas when criminal factors prevail, an act is defined as a common offense (criminal). Obviously, in the course of analysis, a maximum objectivity should be maintained, therefore criminal and political determinants should be rationally 'weighed. An important statement in this regard was presented by Z. Copiński, who stated that an act must be regarded as a political offense *de iure*, if the act was *de facto* common, but if it was in a certain (substantial) part or entirely due to political motives¹¹. Of course, the weight of each factor should be determined and assigned certain values, which ultimately affect the nature of the act. Referring to the finding by the same author, it must be assumed that because of the shape of the concluded international agreements, at least in principle, crimes whose nature is contrary to human rights, to civil rights and liberties, the ideas glorified by the United Nations, should not be regarded as political offenses¹². Restricting the use of the term - political offense - is also related to Universal Declaration of Human Rights adopted on 10 December 1948 by the General Assembly of the United Nations¹³. In article 14 of the declaration it says: "Everyone has the right to seek and to gain asylum from persecution in other countries. This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations."¹⁴.

Given the above, it should be noted that the doctrine of international law distinguishes three basic theories of political offenses constituting a specific variant of the theory

⁹ H. Popławski, *Political offenses*, "Scientific Papers of the Academy of Internal Affairs" 1986, no. 42, pp. 121-122.

¹⁰ P. Kardas, *Legal status of 'prisoner of conscience' in light of the regulation of Executive Penal Code*, "Overview of Polish Prisons", 1999, No. 1-2, p. 27.

¹¹ Z. Copiński, *Political offenses on a comparable basis*, p. 104.

¹² *ibid.*

¹³ B. Wierzbicki, *Concept of political crime in international law*, "New Law" 1973, No. 3, p. 347

¹⁴ http://www.unesco.pl/fileadmin/user_upload/pdf/Powszechna_Deklaracja_Praw_Czlowieka.pdf, (access: 15 January 2014).

preponderance. Therefore, acts that are only somehow correlated with acts - let's call them - purely political should be distinguished. They are defined as relatively political offenses. They are extremely difficult to be clearly characterized. One can in fact distinguish 'ordinary' common crimes, but which are in some way related to 'purely' political or 'almost' political offenses. This correlation may take the following form: a) an offense of purely criminal character occurs earlier than the act of political provenance and is designed to prepare the latter, for example, the collection of explosives (illegal) to prepare an attack on the constitutional authorities of the state. It may also be a situation during which a (purely) criminal offense occurs at the same time as a political offense, while it is to facilitate the implementation of political actions, such as the use of the police to prevent political supporters of the perpetrator from calling for political upheaval. Finally, a common crime occurs after a political offense in order to remove the traces of earlier action, such as giving false evidence, etc. therefore it is to protect the perpetrators of the committed political offense¹⁵.

The next type of political offenses within the theory of preponderance, indicated under international public law, are acts of relatively political character. One may distinguish here specific facts of complex character, where they affect the determination of a political offense in different ways. Thus, they include 'in themselves' a determinant defining an act as a common crime (e.g. a specific attack on the security of the state) and a (purely) political offense, which in turn is a factor determining the subject matter of an action or a political objective of the performed activity. As a rule, an offense of relatively political character, in the internal national law may qualify as a political offense - despite the absence of relevant norms¹⁶.

The third type of these acts are crimes that can be called purely political or strictly political. They are a straight 'attack' directed against the functioning of the institutions of the state, its political system, etc. The characteristic of this act lies in the fact that, in its evaluation, it is usually interpreted in a manner analogous to the approach used during the evaluation used by the subject matter theory. This means that the primary factor in determining the final assessment of an act is the interest attacked by the perpetrator, which is protected by law, and whether this interest is political in nature (e.g. the state and its institutions)¹⁷. However, there are also cases when a different interpretation is used - the act is then referred to as criminal. This interpretation arises when the perpetrator acted with selfish, ulterior motives, or used brutal methods of operation¹⁸.

In the twenty-first century, except for those types of offenses of a political nature, the idea of civil disobedience as a form of social expression and at the same time a form of a political offense has gained importance. In this case, it may be correlated with the activity of social groups of different shape, whose aim is to achieve particular goals, often related to political activities. Members of individual organizations during a given action may

¹⁵ J.R. Kubiak, *Genesis and theories of political offense*, "Palestra" 1984, No. 12, p. 11

¹⁶ For example, in Poland there is no precise definition of the term. Individual normative acts only refer to this concept, including constitution of the Republic of Poland in the art. 55, the Executive Penal Code art. 107, and the Code of Criminal Procedure art. 604. This term has been defined relatively precisely in French, Belgian and Italian law. v. L. Falandysz, *What is a political offense?*, "Res Publica", 1988, No. 2, p. 38

¹⁷ J.R. Kubiak, *Genesis and theories of political offense*, pp. 10-11.

¹⁸ *ibid.*

therefore meet the criteria of acts defined as political¹⁹. This observation can be used especially in cases where the activity of these groups is focused around the spheres of public life, such as the functioning of the public administration, the political sphere, in relation to human rights, various minorities, for example, national, and when it concerns the rights associated with the professed religion or ecological issues. The American approach is especially characteristic in this context. In the philosophical and legal doctrine developing in America, we deal with a concept based on legalism in connection with the resolution of social conflicts, but also with actions based on *civil disobedience*. They are based on a selective, but also limited breaking or 'bending' of the law in connection with the process of achieving the social objectives, including the political objectives²⁰. As a result, this civil disobedience is a specific (contemporary) variant of a political offense. It is understood here as a romantic version (referring to nineteenth century rebels fighting against the absolutist state and absolutist rule) in the common law system. Given the less radical approach, civil disobedience is - as mentioned - selective and limited violations of the functioning normative provisions, in order to achieve certain social objectives. American doctrine exhibits in this case two kinds of disobedience. Firstly, it is direct disobedience, which involves violating the normative solutions and thus the perpetrator (perpetrators) express a protest in order to achieve the intended purpose (to show abnormalities related to the execution of this law), and the so-called indirect disobedience, involving the infringement of certain normative solutions in a conscious way to protest against the use of other regulations, but also to express their opposition to unjust implementation of social practices, hindering political decisions, etc. However, these events are not directly related to the compromised regulations²¹.

Civil disobedience within the American concept is characterized by several specific features. It is primarily the very essence of illegality, which is typified by the applicable criminal law solutions. The protest is directed against a specific institution performing social or political functions, or against specific normative solutions, but also - more commonly - against the policy pursued by the state institutions, especially against the political elite managing the public sphere, also against the social customs accepted by the ruling elite. This objection stems from the fact that the perpetrators of particular acts recognize certain legal norms, but also social behavior accepted by institutions of powers as well as the very activity of these institutions, as contrary to constitutional guarantees belonging to an individual, or more broadly, as contrary to the fundamental and universally accepted human rights. Extremely symptomatic is the fact that this protest is open and at the same time public. Finally, it should be noted that actions taken on the basis of civil disobedience are conservative, therefore - as a rule - they do not go beyond the principles governing the social order, while the perpetrators of particular acts are willing to bear the legal consequences of their actions²².

¹⁹ P. Kardas, *Political offense under Polish law. An attempt of theoretical analysis on the background of the current legal status*. "The Journal of Criminal Law and Penal Sciences" 1998, no. 1-2, p. 137.

²⁰ Z. Ciopiński, *Political offenses on a comparable basis*, pp. 94-95.

²¹ P. Kardas, *Legal status of 'prisoner of conscience' ...*, p. 28.

²² S. Hoc, *Penal law and procedural issues of crimes against the Republic of Poland*, [in:] *Law. Society. Individual. Jubilee book dedicated to professor Leszek Kubicki*, edited by A. Łopatka, B. Kunicka-Michalska, S. Kiewlicz, Warsaw 2003, p. 468

Civil disobedience is today a popular social activity, and as part of this concept the development of movements fighting for the rights of an individual, for the empowerment of society, is noticeable. While assessing the development of this concept from a different perspective, within this action individuals act against the authorities not respecting the fundamental human rights and liberties²³. It seems that it is today the most common form of the so-called 'political offense' - however, assessed in positive terms, as comparable to the actions of freedom fighters in the romantic - as signaled earlier - nineteenth century version. As a political fight for the entitled (almost genetically), rights of an individual. As the fight against centers of power, which are often corrupt, and do not respect the basic human values, etc. Similar actions occur also in democratic systems and paradoxically (because of the specific opportunities that such systems give) this type of behavior occurs within them more often, but also in non-democratic systems. In the latter, under favorable geopolitical circumstances (also internal) it may lead to the deconstruction of the system. This, of course, is counteracted by the forces representing it and similar forms of protest are nipped in the bud. Then these forces treat such behaviors as acts directed against the government i.e. political offenses and give them (also their perpetrators) a negative connotation. In summary, the actions taken - in a positive meaning - by the perpetrators of civil disobedience (positively defined 'political criminals'), are associated with the actions for the idea of the rule of law, especially when it is not possible to institutionalize them within the existing normative-political order. Finally, it should be noted that the action of the civil disobedience should be correlated with the concept of the common good, thus it should be accepted by society. Moreover, in this case, it is appropriate to maintain a proportionate balance between the implemented actions: rallies, demonstrations, blocking the activity of public institutions - and realized intentions²⁴. Such an activity is not only connected with the present (Universal Declaration of Human Rights of 10 December 1948²⁵), but also with normative regulations and postulates as a consequence of political

²³ The Universal Declaration of Human Rights of 10 December 1948, preamble (UN General Assembly Resolution 217 A [III]).

²⁴ J. Utrat-Milecki, *Ius aequum?*, "Studia Iuridica" 1998, no. 35, p. 128.

²⁵ In the first article of Universal Declaration of Human Right it is said that „all human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood”. However in the second one it is marked that “Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty”. From that point of view, articles 7, 18 and 19 seem to be crucial as well. In seventh article reporting parties decided that: “all are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination”. In eighteenth article they referred to the fact that “everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance”. In the following point of Declaration it is said that “Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any

thought of past historical periods. Similar values can be found in social thought of J. Locke or in assertions contained in the Magna Carta (1215).

In summary, the various theories of political offenses: subject theory, subject matter theory, mixed, preponderance and civil disobedience in a different way, though, taking into account certain (similar) descriptions of the juridical side of the prohibited act, classify the concept of political crime. In a way they organize the very notion of 'political crime' but in a fundamental, unconditional and above all synthetic manner, it is difficult to determine – despite the introduced explanations - that they indicate what the offense of a political character is, at least in the criminal law. Therefore - in general - the legislations of individual countries (nowadays) do not determine directly this prohibited act. On the one hand, a political offense is characterized by a motive, experiences, circumstances (e.g. what happened before committing the offense, what was its consequence); on the other hand, by attacking the interest protected by law. However, despite extracting all the factors that determine the criminal behavior of the perpetrator, according to the author, they cannot be defined in a universal way (in most cases), so as to fit them within the limits set by the criminal law, and thus to be able to qualify particular behavior as a 'political offense' in the code normative solution.

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media and regardless of frontiers”. Universal Declaration of Human Right, 10.12.1948r.,art. 1-2, 7, 18-19.

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**PRZESTĘPSTWO POLITYCZNE A KSZTAŁT SYSTEMU POLITYCZNEGO.
ROZWAŻANIA NA TEMAT TEORII MIESZANEJ, PREPONDERANCJI I
CYWILNEGO NIEPOŚLUSZEŃSTWA. CZĘŚĆ 2**

W prawie wewnętrznym poszczególnych państw zasadniczy podział wyeksponowany podczas dotychczasowych rozważań względem przestępstw mających proveniencję polityczną został oparty na ujęciu przedmiotowym oraz podmiotowym. Jak uznano przestępstwo polityczne może być skorelowane z ujęciem przedmiotowym, a zatem kryterium to opiera się na atakowanym dobru prawnym, które jest w określony sposób chronione. Dobrem tym jest: ustroj państwa, jego organy, suwerenność w stosunkach z innymi podmiotami międzynarodowymi, itp. Wskazany kryterium może być również ujęcie podmiotowe, a zatem czyn posiada status politycznego, jeżeli sprawca działał z pobudek politycznych. Wreszcie jednak czyn może zostać uznany jako polityczny, na podstawie kryterium mieszane (podmiotowego i przedmiotowego), co w konsekwencji prowadzi do istotnej eliminacji zachowań spełniających ten „podwójny warunek”. Teoria ta posiada swoje zasadnicze pozytywne atrybuty, bowiem przede wszystkim ogranicza ilość czynów przestępnych, które mogą być uznane za polityczne, przede wszystkim poprzez konieczność wypełnienia w trakcie „procesu popełniania przez sprawcę przestępstwa” okoliczności wynikających z teorii podmiotowej oraz przedmiotowej. Zatem w ramach tej teorii; muszą zostać spełnione przesłanki wynikające z obu wskazanych wcześniej teorii, i dopiero wówczas, czyn można traktować jako przestępstwo polityczne. Separując się od teorii podmiotowej, przedmiotowej oraz mieszanej, w prawie międzynarodowym powstała tzw. teoria preponderancji. Charakteryzuje się ona swoistym wyważeniem poszczególnych czynów mających charakter przestępny oraz przypisaniem tym czynom proveniencji politycznej lub kryminalnej. W XXI wieku, poza wymienionymi typami przestępstw o charakterze politycznym, zasadniczego znaczenia nabiera idea nieposłuszeństwa obywatelskiego, jako forma ekspresji społecznej i jednocześnie postać politycznego przestępstwa. W tym przypadku może być ono korelowane z działalnością grup

społecznych o różnym kształcie, których celem jest osiągnięcie określonych celów, często związanych z działalnością polityczną.

Słowa kluczowe: prawo karne, polityka kryminalna, przestępstwo polityczne, system polityczny

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