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Right to Energy

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Energy, Right to

I. Introduction

[1] The ‘human right to energy’ might be a relatively unknown human right to most international human rights law scholars and practitioners, but attention to this right has steadily increased in recent years in literature and policy practice (Tully [2006]; Bradbrook and Gardam [2006]; Clemson [2012]; Bouzarovski and Petrova [2015]; Hesselman *et al*, *Energy Poverty in the COVID-Era* [2021]; Hesselman, *Energy Poverty and Household Access* [2021]). In particular, support for a more ‘autonomously’ formulated new ‘right to energy’ in theory has been caught up by support in legal practice, whether in response to concerns about energy marketization, disconnections, price setting, energy poverty or the (just) energy transition (Hesselman, Varo and Laakso [2019]; Hesselman *et al*, *Energy Poverty in the COVID-Era* [2021]; Merkouris [2017]; *Right to Energy Coalition* [2021]).

[2] This entry discusses recent legal developments in international, regional and national law, highlighting the breadth of legal practice on the ‘right to energy’ so far, as well as remarkable variations in formulations, and different associated entitlements and obligations.

II. Right to energy in international law

1. The ‘right to electricity’ in Article 14(2)(h) CEDAW

[3] Article 14(2)(h) of the UN → Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) presently includes the only explicit reference to a right to energy in international law. Article 14 protects the rights of → women living in rural areas, and specifically mentions their ‘right to enjoy adequate living conditions’ in areas like ‘electricity and water supply, transport and communications’ (emphasis added). Curiously, CEDAW’s preparatory works do not reveal the rationale behind this (in com-

parison to Article 11 ICESCR) novel formulation (Tully, *Access to Electricity* [2006] at 558-9), but there is evidence that outcome documents of the first three UN Women’s Conferences between 1975-85 paid deliberate attention to (rural) women’s access to modern energy supplies and services, mostly for the use of time- and labour-saving appliances.

[4] The CEDAW Committee adopted its first comprehensive interpretation of Article 14(2)(h) in General Recommendation No 34 (2016), underscoring several gender dimensions of poor access to modern energy supplies and services. It stressed that due to women’s and girls’ continued primary roles in energy use and fuel collection, they are disproportionately vulnerable to the effects of fuel scarcity, high costs of energy consumption and the health and safety risks associated with indoor combustion of solid fuels on poor stoves (para 84; Karlsson [2013]; Danielson [2012]; Banda [2012]). Burning solid fuels like wood, (char)coal, dung, biomass or kerosene can release carcinogenic substances, and carries risk of fire, burns, eye disease and respiratory diseases. In fact, the World Health Organization links household air pollution resulting from solid fuel use to around 3.8 million premature deaths annually (or, up to 7 per cent of all global mortality) (WHO [2018]). The problem is severe, since the → United Nations (UN) estimates that approximately 2.6 billion persons still rely on this type of energy consumption. About 759 million persons also still lack any basic electricity access. This amounts to about 34 per cent and 10 per cent of the global population respectively (World Bank *et al* [2021] at 21-9, 53-5).

[5] In response to such concerns, several UN human rights treaty bodies have recommended states to increase awareness about the negative effects of solid fuel use; educate people on how to better protect themselves or introduce ‘clean cooking technologies’. States are expected to reduce people’s reliance on harmful fuels, for example by subsidizing other fuels, by expanding the availability of affordable alternatives to coal (including as a method of heating in winter), or by realizing reliable access to (on-grid) electricity supplies ‘generated by renewable energy’. They are also recommended to include high-efficiency particulate air (HEPA) filters in prenatal care packages (see, e.g., CRC Committee, *Concluding Observations: Haiti* [2016] paras 52-3; CRC Committee, *Concluding Observations: Timor-Leste* [2015] paras 46-7).

[6] CEDAW General Recommendation No 34 (2016) itself recommended states to extend on-grid

services to rural areas, improve access to sustainable and renewable sources of energy and develop ‘solar energy and other sustainable energy sources with low-cost technology’ (para 85). Interestingly, in issuing such recommendations, it highlighted women’s *energy needs beyond electricity*, for example, for cooking or transportation, and emphasized *access to energy sources or energy services*, rather than *electricity per se*. It could be argued that this interpretation stretches the meaning of Article 14(2)(h) CEDAW beyond its original wording or intention. Yet, it may also be argued that General Recommendation No 34 offers a meaningful ‘evolutive’ → treaty interpretation of the right to adequate standards of living in Article 14(2)(h) CEDAW, fitting in with the recent adoption of UN → Sustainable Development Goal (SDG) 7.1. on ‘universal access to modern, affordable, reliable energy services’; contemporary definitions of ‘energy poverty’ as ‘the inability to attain socially and materially necessitated levels of domestic energy services’; or women’s actual lived experiences (e.g., Bouzarovski and Petrova [2015]; Frigo, Baumann and Hillerbrand [2021]; Day, Walker and Simcock [2016]; Bhatia and Angelou [2015]).

2. An autonomous ‘right to energy’ through Article 11 ICESCR?

[7] A few authors have suggested that since energy is vital for the realization of adequate standards of living generally, and for many other rights separately, a new ‘autonomous’ right to energy may be suitably articulated through an extended interpretation of the non-exhaustive list of ‘sub-rights’ in Article 11 of the → International Covenant on Economic Social and Cultural Rights (ICESCR). This would be similar to the → ‘right to water’, and in line with Article 14(2)(h) CEDAW (Tully, *Access to Electricity* [2006] at 574; Tully, *The Contribution of Human* [2006] at 574; Langford [2006] at 474; Bradbrook, Gardam and Cormier [2008] at 540-45). Article 11 ICESCR protects people’s → ‘right to an adequate standard of living’ and to ‘the continuous improvement of living conditions’. It specifically mentions adequate → food, clothing and → housing, but not energy or electricity.

[8] By now, such a proposal may find support in the fact that energy or electricity access is often mentioned as part of wider lists of essential services for human rights, and in several concluding observations (→ state reports) on ‘gas and electricity access’ by the Committee on Economic,

Social and Cultural Rights (CESCR). The CESCR has for example recommended states to ensure that all households enjoy ‘a *minimum supply of energy*’ and are able ‘to meet their *basic electricity needs*’. States must ‘avoid power shutdowns for households that are unable to pay for *their minimum needs*’ (emphasis added), and they are expected to mobilize or allocate more resources to ensure affordability of energy, for example through social tariff schemes, and expanding their coverage (Hesselman *et al*, *Energy Poverty in the COVID-Era* [2021]; CESCR, *Concluding Observations: Germany* [2018] paras 56-7; CESCR, *Concluding Observations: Belgium* [2020] paras 42-3).

[9] According to CESCR General Comment No 24 (2017) private providers of essential services like ‘water or electricity’ must also be subjected ‘to strict regulations’ in the form of ‘public service obligations’ that require ‘universality of coverage and continuity of service, pricing policies, quality requirements, and user participation’ (paras 20-21; Hesselman, *Energy Poverty and Household Access* [2021] at 698; Hesselman *et al*, *Energy Poverty in the COVID-Era* [2021]).

[10] The UN special procedures have similarly argued in joint communications in recent years that ‘given the relevance of electricity provision’ to the rights to adequate standards of living, housing and health, the provision of electricity should comply with similar human standards as applicable to the right to water. Those include the availability of electricity in sufficient quantity, accessibility and affordability, and quality, safety and regularity. This closely aligns with the typical ‘AAAQ’ standards for socio-economic rights protection under the ICESCR (e.g., see OHCHR [2013] at 5-7; Houben and ten Oever [2017]; Hesselman *et al*, *Energy Poverty in the COVID-Era* [2021]). Standard-setting related to prices, tariffs or connection costs may then be necessary to ensure economic accessibility (affordability) for everyone, including especially for the poorest. In no case can access to essential energy services be denied or made conditional based on ‘ability to pay’; disconnection safeguards have to be provided (OHCHR [2013] at 7; Hesselman, *Energy Poverty and Household Access* [2021] at 698; Hesselman *et al*, *Energy Poverty in the COVID-Era* [2021]).

3. A customary international right to energy?

[11] Although it seems unlikely that sufficient state practice and *opinio juris* exists internationally to support the identification of an autonomous ‘right to energy’ under → customary international law,

several authors have (cursorily) entertained this possibility in the past (Tully, *Access to Electricity* [2006] at 576-86; Bradbrook and Gardam [2006] at 405, 413; Omorogbe [2014] at 385-6; Bradbrook [2018] at 35-7). Most concluded, however, that a customary right is ‘doubtful’ (Tully, *Access to Electricity* [2006] at 586), does not exist (Bradbrook [2018] at 35-7), or at best is ‘in the process of evolving into and becoming a newly-emerging human right of the twenty-first century’ (Omorogbe [2014] at 371, 385-6). Omorogbe supported that while some state practice seems evident, *opinio juris* is less clear (at 385). Tully and Bradbrook instead noted that ‘despite the recent emergence of access to energy as a topic of international concern, there has been insufficient time for any custom to develop’ (Bradbrook [2018] at 35): there is actually limited clear or uniform national regulation of household energy access, or recognition of human rights to energy in domestic law so far (Tully, *Access to Electricity* [2006] at 586; Bradbrook [2018] at 40-44). In fact, although Bradbrook and Gardam (2006) did not rule out the emergence of a customary norm over time – despite needs for ‘considerable work’ in terms of defining the content of such a norm, or its relationship to other rights (at 405, 424) – Bradbrook (2018) recently more pessimistically rejected such prospects in the ‘short to medium term’, especially when compared to the support for the customary right to water (at 35, 44).

[12] That being said, the international legal literature on the right to energy to date stems largely from 2006 to 2010, and so far has not amply or systematically considered the wider recent evidence on recognition of autonomous rights to energy in national or regional law. Especially in light of the national developments set out in section IV below, this may prove a useful line of future inquiry. Even so, it seems unlikely that sufficiently widespread evidence of *opinio juris* and state practice may be found to support an international customary right at present.

III. Right to energy in regional law

[13] Regionally, several interesting examples of support for rights to energy or electricity can be seen especially as part of wider ‘rights to basic essential services.’

[14] Article 11 of the → Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador) (1988) includes a ‘right to basic public services’, whilst the non-binding

Social Charter of the Americas (2012) of the → Organization of American States (OAS) supports realizing ‘fair, equitable, and non-discriminatory access to basic public services’ through Article 16. According to the Charter’s Action Plan (2015) this expressly implies extending coverage of ‘energy services’ to those who lack access, are underserved, have low incomes or dwell in rural areas.

[15] The → European Union (EU) has also long recognized that access to ‘services of general economic interest’ (SGEI) – such as electricity, natural gas supplies, water or telecom – constitutes a ‘shared value’ for its member states. This follows from Article 14 and Protocol 26 of the Treaty on the Functioning of the European Union (2009), which also obliges states to provide SGEI according to ‘a high level of quality, safety and affordability, equal treatment and the promotion of universal access and of user rights’. Moreover, Article 36 of the → Charter of Fundamental Rights of the European Union (2000) highlights the fundamental rights relevance of SGEI, by recognizing and respecting access to SGEI as provided for in national law (Houben and ten Oever [2017]; Hesselman, *Energy Poverty and Household Access* [2021] at 669). Principle 20 of the novel non-binding EU Pillar of Social Rights (2017) further affirms that everyone has a ‘right to access essential services of good quality’, including explicitly ‘energy’, and that ‘support shall be available for those in need’ (Hesselman, Varo and Laakso [2019] at 2). Despite such developments, the EU does not yet recognize a binding substantive right to energy (Merkouris [2017] at 88-9; Houben and ten Oever [2017] at 131-2). Nevertheless, the European ‘Right to Energy Coalition’, a group of major civil society organizations, has begun to actively lobby for legal recognition of ‘a right to clean and affordable energy’ in EU law (→ non-governmental organizations (NGOs)). In their view, such a right would entail bans on disconnections and pre-payment meters, a minimum amount of energy for all, fair energy prices, major renovation of energy-efficient housing, protection of the most vulnerable, a common definition of energy poverty ‘to understand and monitor the issue at EU-level’ and democratic control over energy systems (*Right to Energy Coalition* [2021]; (Hesselman, Varo and Laakso [2019] at 3).

[16] The → European Convention on Human Rights (ECHR), the → European Social Charter (ESC) and the African human rights system do not contain explicit references to any right to energy. Yet, Article XVIII of the Charter’s → Maputo Protocol on Rights of Women in Africa refers to

energy by promoting ‘research and investment in new and renewable energy sources and appropriate technologies’ and women’s access to and control thereof, as part of the human right to live in a healthy and sustainable environment. Whereas, the → African Commission on Human and Peoples’ Rights clarified that states’ failure to provide basic services like water or electricity may constitute a violation of the → right to health in Article 16 of the → African Charter on Human and Peoples’ Rights (ACHPR, *Free Legal Assistance Group and Others v Zaire* [1995] para 47; Owoeye [2016] at 296-7). In the Council of Europe, poor access to (safe) electricity, heating or cooking facilities, and living in cold, damp and mouldy homes, has been linked to violations of rights to health, adequate housing and to economic and social protection of the family, through Articles 11, 16, 31 ESC, and even Article 3 ECHR (e.g. ECSR, *Médecins du Monde – International v France* [2011] paras 154-63; Merkouris [2017] at 99-102).

IV. National practice on the right to energy

[17] Nationally, several constitutions explicitly recognize the right to energy. Article 48 of the Constitution of the Democratic Republic of Congo states that ‘the right to decent housing, the right of access to drinking water and to electric energy are guaranteed’. Article 23 of the Maldives Constitution obliges the state to progressively realize, within its ability and resources, the right to the establishment of an electricity system on every inhabited island, of a reasonably adequate standard, that is commensurate to that island. In Latin-America, Articles 20 and 105 of the Bolivian and Nicaraguan constitutions explicitly refer to energy or electricity as part of broader rights to basic public services, similar to the OAS. Whereas, Ecuador ties a right to ‘uninterrupted provision of public clean water services and electricity to schools and public hospitals’ to the wider constitutional ‘right to habitat and decent housing’, and to community access. Articles 313-18 of the Ecuadorian constitution additionally hold the state responsible for providing public services, including electricity. The state must guarantee equitable prices and fees, and monitor and regulate services according to ‘principles of obligation, generality, uniformity, efficiency, responsibility, universality, accessibility, regularity, continuity and quality’. These provisions are not formulated as rights *per se*, but chiefly as public service duties or objectives of the state.

[18] The latter is of interest, since in several other countries constitutional public services duties have led domestic courts to recognize (derived) constitutional rights to energy or electricity in case law. The South African Constitutional Court stands out for formulating a new socio-economic ‘right to receive electricity as a basic municipal service’ based on a set of municipal public service duties in Sections 152(1) and 153 of the Constitution (Dugard and Langford [2011] at 46). According to its judgment in *Leon Joseph v City of Johannesburg* (2009), ‘electricity is one of the most common and important basic municipal services [and] virtually indispensable, particularly in urban society’ (para 34). Electricity provision is therefore ‘a cardinal function, if not the most important function, of every municipal government’. Municipalities must develop a service capacity that can ‘meet the basic needs of all inhabitants of South Africa’ (para 34; see also Hesselman, *Energy Poverty and Household Access* [2021] at 703).

[19] In Argentina (2016) and Peru (2015), the highest courts have drawn upon consumer rights and rights to basic public services too, *along with* CESC General Comment No 4 on the Right to Housing (1991), or the ‘right to dignity’ in the Peruvian Constitution, to conclude that energy access is protected as a matter of constitutional right. The Peruvian Constitutional Court in particular stated that electricity must be viewed as a fundamental constitutional asset vital to the ‘supreme value of the person’: without electricity, people would be forced to live in situations that are absolutely incompatible with minimum, indispensable conditions for a dignified life (paras 3-4). A similar approach is visible in Chilean court judgments (2017), or in those of the Dominican Constitutional Court (2016), citing rights to dignity, health, housing and basic services, along with consumers’ rights and access to quality goods and services. The latter court argued that *electricity is an essential public service protected by constitutional rights to a dignified life* (para 10).

[20] The Dominican Constitutional Court also directly drew inspiration from a landmark case of the Colombian Supreme Court (2015) which concluded that while ‘*the right to electricity is not an autonomous right*’ under the Colombian Constitution, a ‘right to receive electricity’ can nevertheless be construed in connection with the *rights to life, health and personal integrity* (paras 4.1-4.3, emphasis added). This derived right obliges public authorities to ensure that electricity provision meets requirements of ‘quality, regularity and continuity, solidarity and universality of supply’. It

prohibits service providers from abruptly cutting electricity when the fundamental rights of people enjoying ‘constitutional protection’ might be at risk (e.g. pregnant women, → children, → older persons, → persons with severe health risks or disabilities) (paras 4-4.2). As a result, the Colombian Supreme Court has ordered full or partial reconstructions to (minimum levels of) electricity supply for vulnerable persons (paras 4.4, 6; see also Hesselman, *Energy Poverty and Household Access* [2021] at 702-03). Interestingly, Colombian case-law equally draws ample inspiration from international law, especially CESCR General Comment No 4 and its affirmation that the right to adequate housing implies a right to live somewhere ‘in security, peace and dignity’ with ‘certain facilities essential for health, security, comfort and nutrition’, including ‘energy for cooking, heating and lighting’. Adequate homes also protect against ‘cold, damp, heat, rain, wind’ or other health threats (CESCR, *GC No 4: Housing* [1991] para 8(b)(d); see also Murillo Chávarro [2017] at 268-71).

[21] In Europe and Asia, several domestic courts similarly recognized rights to energy or electricity as a matter of constitutional law, for example, in Greece, India, Pakistan or the Philippines (Mercuris [2017] at 83-6; Housing and Land Rights Network [2019]; Chakraborty [2016]; Hesselman, *Energy Poverty and Household Access* [2021] at 702-04; Hesselman *et al*, *Energy Poverty in the COVID-Era* [2021]). Both in India and in Pakistan, such rights are derived from constitutional rights to life and → human dignity. According to Pakistani courts, for example, ‘it is an established fact that the right to electricity is a fundamental right’ under Articles 9 and 14 of the Constitution because:

Energy/electricity is essentially one of the significant facilities required by the citizens for manifold purposes, namely, uplifting of their social and economic status. Non-supply of electricity to the citizen regularly is tantamount to depriving them of one of the essentials of life including the security of economic activities, [. . .] hence it has to be seen whether the state is providing or safeguarding the right of electricity of the citizens or not.

(Lahore High Court (Pakistan), *Pakistan Flour Mills Association v WAPDA and Others* [2013] paras 46-7)

[22] Lastly, the right to energy also finds support in lower level public service laws in some places, including with direct reference to international human rights law. Examples are the ‘right to basic supplies of water, electricity and gas’ recognized in

Catalan Law 24/2015 on the Housing and Energy Poverty Crisis (Spain), or the ‘right of households to access energy without excessive burden on their resources’ in the French Energy Code (see Hesselman, Varo and Laakso [2019]). Moreover, several countries are debating the adoption of new rights in law, especially through constitutional amendments. This is often inspired by prior domestic jurisprudential developments on energy as a human right. In Brazil, such discussions centre on the adoption of the ‘*right to access to electricity (upon payment of a fair price for consumption)*’, whereas in Mexico a ‘*right to sufficient, continuous, safe, acceptable electricity*’ is proposed. Interestingly, the Mexican legislative debates stress that ‘access to electricity must be recognized as a human right’ because it is an indispensable condition for enjoying multiple other fundamental rights, such as the right to food, health, housing, culture, information, (tele)communication or freedom of expression. For this reason, the view of electricity as a ‘mere commodity’ must be radically altered to that of a ‘human and social right’ guaranteed by the state (Gaceta del Senado [2019]; National Commission of Human Rights (Mexico) *Hospital ‘Doctor Manuel Campos’* [2012]).

V. Discussion

[23] A number of aspects stand out from these developments. First, recognition of rights to energy/electricity are clearly well underway in international, regional and national law, despite obvious differences in their formulation, or their manner of recognition through → treaties, → soft law instruments, constitutional law, statutory laws or (constitutional) case law. Internationally and regionally, so far only CEDAW recognizes an explicit binding human right to electricity/energy in law, whilst other legal instruments provide implicit or non-binding recognition, especially through ‘rights to essential public services’.

[24] Especially nationally, there is a growing practice towards recognition of more autonomous rights to energy/electricity, like in Argentina, Peru, Mexico, Colombia, India, Pakistan and South Africa. In quite a few instances such developments are at least partially inspired by international law, including CESCR General Comment No 4 on the Right to Adequate Housing (1991), which supports access to energy as a basic domestic service.

[25] The articulation of rights to energy or electricity however still varies remarkably, both in practice and literature, with examples of formulations including the right to:

- (access) electricity;
- (access) energy;
- (access) essential/basic public services, including electricity or energy;
- (access) (modern) energy services;
- (access) sufficient, continuous, safe, acceptable electricity or energy supply;
- free, affordable or fairly priced electricity;
- clean or renewable energy;
- affordable and sustainable energy for all; or
- warmth or a (sustainably) warm(ed) home (see, e.g., Walker [2015]).

[26] One important definitional question is whether the right to energy implies rights to any particular type of ‘energy source’ or ‘supply’ (e.g., to electricity, gas, wood, coal, kerosene, solar, wind, geothermal, etc.) or to specific ‘(modern) energy services’ (e.g., to heating, warmth, thermal comfort, lighting, cooling, cooking, refrigeration, bathing or specific ICTs for communication) (Walker [2015]; Modi *et al* [2005]). Since ‘energy’ is a more diffuse resource than ‘water’ (H₂O), and the types and amounts of ‘energy’ needed for different purposes (e.g. lighting, heating, cooking) may also depend on specific personal needs or on available relevant appliances and their efficiency, it has been increasingly argued that ‘a right to energy services’ might be the most suitable formulation (Bradbrook and Gardam [2006]; Walker [2015]; Frigo, Baumann and Hillerbrand [2021]; Hesselman *et al*, *Energy Poverty in the COVID-Era* [2021]). At the same time, a right to energy services would arguably always imply at least a *minimum level of electricity supply* to power relevant modern electrical appliances.

[27] All in all, it may be meritorious to develop a new ‘right to energy (services)’ in tandem with evolving international insights, objectives, benchmarks and indicators for the realization of ‘universal access to modern, affordable and reliable energy services’, such as those tied to UN SDG 7.1. This SDG stresses the need for access to certain modern energy services, powered by sufficient, safe, reliable, affordable, acceptable, continuous, legal, healthy and sustainable energy sources or supplies, along with relevant (efficient) household appliances. Relevant services would include heating, cooking, lighting, bathing, clothes washing, refrigeration, or the use of computing, information and communication technologies (Bhatia and Angelou [2015]). Of course, a focus on ‘energy services’ rather than ‘electricity or energy’ necessarily implies a need for definitions of what constitute basic, minimum, necessary, essential energy

services as a matter of human rights law. Here, the SDG 7 framework can play a role too, as well as other human rights, or human capabilities approaches; either way, the necessity of certain services may depend on local or personal needs and may be best decided through inclusive deliberative processes with the wider population as well (Day, Walker and Simcock [2016]; Frigo, Baumann and Hillerbrand [2021]; Walker [2015]; Hesselman *et al*, *Energy Poverty in the COVID-Era* [2021]).

VI. Conclusions

[28] This entry reveals that the idea of a ‘right to energy (services)’ is no longer just an ‘idea’, but also an actual legal development, whose time has come. Based on the developments sketched in this entry, the author can agree with Sing-Hang Ngai (2012) that ‘recognition of the right to energy as an independent human right should only be a matter of time, but not of principle’ (at 609), or conclusions by Langford (2006) and Tully (*Access to Electricity* [2006]), that ‘the human right to energy (for essential purposes)’ is sufficiently important – and also similar to the right to water – to merit explicit recognition in international law in the near future, for example, as part of Article 11 ICESCR (at 474; and at 531-8, 547).

[29] At the same time, some salient (if not necessarily unique) definitional challenges may have to be addressed when formulating this right, especially as to the right’s synergy with other existing human rights, relevant entitlements to energy sources, supplies or services, or in so far that any significant dissimilarities with ‘water’ as an essential public service exist.

[30] More research is necessary on the current breadth and depth of international, regional and national legal developments on the right to energy, focussing on comparisons of specific articulations and formulations, the rationales behind, or implications of such articulations and formulations, and on the possible content of legal rights and obligations for states, or for other actors, and the practical implementation of the right.

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