THE IMPEDIMENTS TO THE CREATION OF NEW LOCAL GOVERNMENT AREAS UNDER THE 1999 CONSTITUTION IN NIGERIA

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ABSTRACT

This work investigates the constitutionality of the power for the creation of new Local Government Areas under the 1999 Constitution in Nigeria. It posits that the purpose of the grant of such power as "quasi-exclusive legislative preserve" to the State is to enable the Local Communities have ease opportunity to push home the demand for the local authorities of their choice as one of the cardinal principles of Federalism. The work equally examines the constitutional basis of the National Assembly in making Consequential Provisions as assent to the constitutional exercise of the power vested in the State and how the National Assembly has exercised this power to veto the valid law of the State. This is what brought the principle of Inchoate in the Supreme Court decided case exposing the obstacle to the creation of new local government areas under the constitution and therefore a basic constitutional issue. Finally, this work argues for constitutional reform in relation to the creation of new local government areas while comparing the Nigerian constitutional procedures with that of other States.

KEYWORDS

Consequential Provisions, Constitution, Federalism, Inchoate, Local Government

1. INTRODUCTION

The creation of new local government areas has been a basic constitutional issue under the 1999 Constitution in Nigeria. This Constitution undoubtedly the longest surviving constitution in the historical life of the federation has undergone many reforms and currently undergoing reform with the autonomy of local government areas in consideration.

The cardinal thrust of local government system is to bring government nearer to the people at the grassroots. Needless to say that as a system of Government, Local Government was not truly recognised under the Nigerian political arrangement until the 1976 Local Government reform which eventually resulted to its recognition under the 1979 Constitution (Oshio, 2003). This Constitution being the first to take the feelings of the inhabitants of the local communities into account established the system but how new or additional local government areas could be created was the question which the constitution did not answer. The only legal way of imagining this is by the rigorous exercise of constitutional amendment.

The 1989 Constitution attempted to correct this basic constitutional lacuna and went on to vest the power for the creation of new local government areas in the National Assembly. The provisions of this constitution vested the National Assembly to create and recognise new local

government areas in the constitution without the rigid processes of constitutional amendment. However, this Constitution did not operate in whole before its rustication by the military government.

After a decade of the military rule, the country was ushered into civilian rule as the Fourth Republic with the current 1999 Constitution (Adebisi, 2012). This Constitution tries to cure the defects in the 1979 and 1989 Constitutions particularly in the area of new local government areas creation. The Constitution reposed powers for the creation of local government in the hands of state governments but subject to recognition by the National Assembly (Danjuma and Musa, 2012). This is because the Constitution realises that the demand for the new local government areas is a central concern of the local communities and the State is thus empowered to create them in accordance with the procedures stipulated by law (Okon and Essien, 2005).

When the State creates new local government areas with a valid law, the National Assembly is required to pass an Act to update the names and headquarters of such local government areas created (Ogefere, 2006). The failure of the National Assembly to carry out this constitutional role has held such valid law of the State ineffective (A-G of Lagos v. A-G of the Federation, 2004). The implication of this is that the power granted by the constitution to the State can when exercised be taken away.

This work therefore investigates the constitutional basis for the creation of new local government areas while questioning the rationale for empowering the National Assembly to deny the efforts of the State which only delivers the message of the people from whom the constitution derives its powers and authorities.

This work equally considers the constitutional positions on the procedures for the establishment and creation of new local government areas under the law of other States. The procedures applicable in these States have been comparatively analysed with a view to suggesting future constitutional development in this regard. The entirety of this work therefore is from the legal perspective not necessarily to undermine the already available studies within the context on the shelves.

2. METHODOLOGY

The primary method for collection of data in carrying out this work is based on careful evaluation of the 1979, 1989 and the 1999 Constitutions of the Federal Republic of Nigeria. The Constitutions and Laws of other States are also used for comparative analysis to draw on the possible reform needed under the 1999 Constitution in Nigeria. The secondary method covers the reviews of judicial precedents, literatures, journals, textbooks and websites.

3. JUSTIFICATION FOR THE ESTABLISHMENT OF LOCAL GOVERNMENT SYSTEM

Interestingly, the reason for the location of government at the capital city of the country (or State) is because there are some issues with which it deals that are essentially issues of overall national concern (Nwabueze, 1993). Because these issues are of national concern, the inhabitants at the local communities are removed from their discussions but are represented by their various elected representatives at the national level or the state.

Nonetheless, there remain such other issues which the national or the state government cannot easily handle but are central to the local communities to address. Hence the need to form government at the local level becomes imperative. Mowoe (2008) captures this need accurately when she said that; "local governments have become a necessity because, despite the extent to which the modern governments have been able to widen their scale of operations, there are still certain needs which are of direct concern to the particular localities and are best dealt with locally".

In agreement with this, Campbell observes that experience has shown that even in a situation where there is lack of formally structured government at local level, communities set up their own organisations for the management of themselves (Adamolekun et al, 1988).

Apparently, the need to inject nations with good governance on the platform of democracy can best be actualised when such practice begins at the local level. This is because "for democracy to be viable, it must be rooted in the local communities, it must involve the local people in order to be able to grow and flourish" (Nwabueze, 1993). This is particularly important because "it has been documented that participation by citizens is not only crucial for democracy and development but also that when citizens participate in the planning, execution, utilisation and assessment of social amenities or facilities designed to improve their welfare, success of those efforts are assured (Igbuzor).

Hence one of the objectives of local government is that it provides for democratic and accountable government for the local communities (Adebisi, 2012 Art. 152cl.1 of SA Constitution).

From the foregoing, it is not in doubt that the establishment of local government will enable the Federal and State governments to push developments to the local communities through their various agents (Awolowo, 1966). It is upon this realisation that the 1979 and 1999 Constitutions of Nigeria provide in their pari material Section 7(3) that it is the "duty of a local government within the State to participate in the economic planning and development of the area" (S.8 of the 1989 CFRN). That is; the "area" within the territory of the local government.

4. THE CREATION OF LOCAL GOVERNMENTS IN NIGERIA: CHALLENGES AND PROSPECTS

This section aims to discussing some of the inherent constitutional challenges as well as the prospects for the creation of new local government under the Nigerian Constitutions. The reason for dabbling into cross examinations of the 1979 and 1989 Constitutions in this section is that they are the very basis upon which the foundation of the current 1999 Constitution was laid particularly with regards to the establishment of local government system and the constitutional power for its creation.

As it would be seen, the reforms under the 1989 and the 1999 Constitutions on the constitutional powers and procedures for the creation of new local government areas are on the realisation of the inherent weakness of the constitutional foundation and the contradictions created by the 1979 Constitution (Abdulhamid and Chima, 2015). The proper understanding of this will be gotten possibly after looking at these various Constitutions and discussing them on their appropriate headings.

4.1 THE CREATION OF NEW LOCAL GOVERNMENTS AREAS UNDER THE 1979 CONSTITUTION

In establishing the local government system under the 1979 Constitution, Section 7(1) of the Constitution provides that the government of every State is to ensure the existence of "democratically elected local government councils" by the law of the State "which provides for the establishment, structure, composition, finance and functions of such councils". Ensuring State exercises power over the local government, Section 7(2) provides that "the person authorised by law to prescribe the area over which a local government council may exercise authority shall-

a. define such area as clearly as practicable; and
b. ensure, to the extent to which it may be reasonably justifiable, that in defining such area regard is paid to-
i. the common interest of the community in the area
ii.traditional association of the community and
iii.administrative convenience

From the foregoing provisions, reading in community with Section 3(2) of the Constitution which provides that "each State of Nigeria named in the First Column of Part I of the First Schedule to this Constitution shall consist of the area shown opposite thereto in the Second Column of the Schedule", it is obvious that this provision expressly provides the names and the number of local government areas and directs the State governments to ensure their existence under their various enacted laws.

"The provision of Section 7(2) of the Constitution equally assumes the extent the power of the State House of Assembly to prescribe the area of authority of a local government or to delegate the power to some functionary of the State governments provided that the prescription conforms with the directives (Nwabueze, 1983).

Although the Constitution was silent on the constitutional procedures for the creation of additional local governments under the constitution, relying on the above provision of Section 7(2), the Lagos State House of Assembly vested the Governor under the Local Government Law 1980 to delimit the areas of authority of local government councils in the State. The High Court of the State (Balogun v. A-G of Lagos State, 1983) declared such delegation of power unconstitutional holding that as a basic creature of the constitution, the Constitution did not contemplate the State Assembly delegating "the power to define the areas of authority of local government without setting out the standards which an area of authority of a local government must conform with (Chiafor, 2009 Nwabueze, 1983).

The learned scholar (Nwabueze, 1983) argues that while the "standard of action" renders delegation of legislative power unconstitutional, it seems clear on the authority of the American decision on the point that the standards need not be set out in the statute itself as they can be gathered from the legislative programme (Panama Refining Co. v. Ryan, 1935). That is to say by the community reading of Section 7(2) of the Constitution and the Local Government Law 1980 of Lagos State the standard was set.

The decision in Balogun's case is also in conflict with the Privy Council decision (R v. Burah, 1878) wherein the Council held that "the Council of Governor-General was a Supreme

Legislature with plenary powers and entitled to transfer certain powers to the provincial executive. Law passed by the subordinate executive authority on the basis of such transfer of power were held to be valid (Pyke, 2013 LawTeacher, website).

It follows therefore from the above that if the State legislature has authority to make law which the constitution did not contemplate the manner of exercising the authority, to exercise "plenary and ample power" means the State legislature is at liberty and constitutionally independent to delegate such power subject to the laid down rules and standards (Pyke, 2018).

It is contended that because the Constitution in Section 3(2) expressly states the names and number of the local government under the constitution, the state creation of additional (new) local government areas different from those named in the constitution will be unconstitutional (Igwebike, 1986). In observance of this, Nwabueze (1983) said;"It is contended on the other hand that a state government has no power to at all to create local government areas. The reasoning behind this is that since the areas of each state are defined in the constitution by reference to named local areas, the creation of local government areas necessarily involves a constitutional amendment by means of legislative enactment by the National Assembly, with the resolution of the Houses of Assembly of not less than two-thirds of all the States".

The reasoning of the eminent scholar quoted above cannot be said to be "untenable" if the decision given by the Supreme Court (A-G of Lagos v. A-G of the Federation, 2004) was available at that time with regard to the creation of new local government under the 1999 constitution. An obvious overview of this case will be examined shortly.

In fact, it is even argued that because the names of all States and Local Government Areas are mentioned in the Constitution and the Constitution provides the procedures to create additional States without such contemplation for the creation of new local government areas, the Constitution intentionally fixed the number of local government areas which can only be altered by altering the constitution itself (Igwebike, 1986). Thus the local governments under the 1979 Constitution are said to be fixed and immutable.

4.2 THE CREATION OF NEW LOCAL GOVERNMENTS UNDER THE 1989 CONSTITUTION

Much discussion will not be made here for the reason that the Constitution did not operate in whole before the military truncated it and that no controversy arose as to which authority was competent enough to create additional local government areas unlike in the 1979 Constitution where the latter was silent on the issue.

Just like the 1979 Constitution, the system of local government councils was guaranteed under the 1989 Constitution with named 448 local government areas by virtue of Section 7(1) and (2) of the Constitution. Under Subsection (3) of Section 7, the government of every State is vested with the power to create not more than 7 Development Areas out of any local government by the law of the State which shall provide for the "establishment, structure, composition, financial and functions of the Development Areas". This means the Development Areas shall be the lowest administrative units within the State and their creation does affect the status of the local governments recognised by the constitution.

In effect, the 1989 Constitution empowers the National Assembly to create new local government areas by a bill for an Act of the National Assembly in that respect supported by at least two-thirds majority of the members representing the area demanding for the creation of the new local government in the Senate, House of Representative and the House of Assembly of the State demanding it together with the Local Government Councils in the respect of the area. This request to create the new local government is thereafter subjected to a referendum by the acceptance of two-thirds of the people where the demand for the proposed Local Government Area originated. If the result of the referendum is approved by two-thirds of the members of each House of the National Assembly, new local government is therefore created under the constitution (S.9(3) of the Constitution).

Nevertheless, the National Assembly is required to pass an Act to make consequential provisions for updating the names and headquarters of the new Local Government Area(s) in Section 3 and in Part I of the First Schedule to the Constitution. (S.9(5) of the Constitution). The constitutional amendment in this regard does not require the resolution of the State Houses of Assembly. Only the National Assembly which creates the local governments is required to amend the Constitution for that purpose. (S.10(2) of the Constitution). It is contended that the National Assembly will not hesitate to make the consequential provisions for the law validly made by it. This can easily be done without legal controversy.

4.3 THE CREATION OF NEW LOCAL GOVERNMENTS UNDER THE 1999 CONSTITUTION

Unlike the 1989 Constitution which provides for Development Areas to be created by the State making two tiers of Local Governments, under the 1999 Constitution, Nigeria has a single-tier system of local government in style of the 1979 Constitution (Adebisi, 2012).

In establishing the system of Local Government, the provisions of Section 7 of 1999 Constitution is in pari material with Section 7 of 1979 Constitution.
The power to create new Local Government Areas under the 1999 Constitution is vested in the State by virtue of Section 8 that provides;

(3) a bill for the law of a House of Assembly for the purpose of creating a new Local Government shall only be passed if-

a. a request supported by at least two-thirds majority of members (representing the area) in each of the following, namely-
i. the House of Assembly in respect of the area, and
ii. the Local Government Councils in respect of the area, is received by the House of Assembly;
b. a proposal for the creation of the Local Government Area is thereafter approved in a referendum by at least two-thirds majority of the people of the Local Government Area where the demand for the proposed Local Government Area originated;
c. the result of the referendum is then approved by a simple majority of all the Local Government Councils in the State; and
d. the result of the referendum is approved by a resolution passed by two-thirds majority of members of the House of Assembly

After complying with the constitutional procedures for the creation of new Local Government quoted above, its requires that because the number, names and headquarters of Local Government

Areas in the State are fixed in the Constitution, the creation of new Local Government Areas will affect other provisions in the Constitution. For this reason, the Constitution requires the National Assembly to pass an Act reconciling any such new development with the existing provisions that may be affected (Aguda, 2000).

Consequently, in order to enable the National Assembly to exercise the power conferred upon it to ensure the existence of the newly created Local Government Areas, the State is to make adequate returns to the National Assembly to enable the latter exercises its investigative power and thus pass the consequential provisions (Akande, 2004, S.88 of the 1999 CFRN). This Consequential Act is necessary merely for the purpose of amending Section 3 and the Second Column of Part I to the Constitution wherein the particulars of existing local government areas are contained (Leigh, 2009). The National Assembly can neither add nor detract from any of the Local Government Areas created by the State.

It is submitted that only the National Assembly can amend Section 3, Part I of the Constitution through Consequential Act. However, the failure of the National Assembly to exercise this power has held the Local Government Areas created by the valid law of a State as inoperative. This has been identified as one of the impediments to the creation of new Local Government Areas under the 1999 Constitution.

4.3.1 CONSEQUENTIAL PROVISIONS: THE LEGISLATIVE VETO

This section briefly examines the rationale for empowering the National Assembly to make consequential provisions updating the number, names and the headquarters of the Local Government Areas created by the law of a State.

It is contended that Local Government Areas being the constitutional creatures of State, the National Assembly's failure to pass the Consequential Act as required is unconstitutional. This is because the only requirement for the National Assembly to pass the Act is to list the particulars of the Local Government Areas created by the State; the Constitution can accord such Local Government Areas status needed without requiring the consequential provisions of the National Assembly.

In Attorney General of Lagos State v. Attorney General of the Federation (2004), the Lagos State Government complied with the Constitution by creating new Local Government Areas under the 1999 Constitution. The failure of the National Assembly to pass the Consequential Act as required by the Constitution to ensure the existence of the particulars of the newly created Local Government Areas as held the Local Government Areas inchoate. The implication of this is that the Local Governments are created inconclusively though the law creating them is a valid law.

It is contended that the creation of new Local Government Areas is the residual power of the State legislature the same way the creation of State is the exclusive power of the Federal legislature (see Para. 9 of the Exclusive List of the 1999 CFRN). Hence the requirement for an Act of National Assembly validating the law enacted by the State under the Residual List amounts to usurpation of the State power and too much oversight. Thus this encourages a legislative veto against another legislative body in a federally organised State.

The effect of too much oversight legislative power though against the executive has been observed by Hamilton and quoted by Braveman. It is reproduced here as follows when against another legislative body with italics added as saying; "[If] even no propensity had ever discovered itself in the legislative body to invade the rights of...another legislative body, the rules of just reasoning and theoretic propriety would of themselves teach us that the one (a legislative body) ought not to be left to the mercy of the other, but to possess a constitutional and effectual power of self-defence...." (Braveman et al, 1996).

It is submitted that the requirement for the National Assembly to pass a Consequential Act before the valid law of the State can become effective renders the State legislative power ineffectual. There can be no convincing reason why such oppressive legislative power should be reserved in the National Assembly. Hence there is need for the State House of Assembly to be given some elements of legislative powers to act alone or in defence (Fatula, 2006).

5. COMPARATIVE EVALUATION OF CONSTITUTIONAL POWER FOR THE ESTABLISHMENT (OR THE CREATION) OF LOCAL GOVERNMENTS

In recent time, the ideal way of evaluating the working of local government system is through comparative studies to find solutions to the problems facing a particular government and its inherent constitutional weaknesses. The main area of comparative studies of local government in the world has been the area of legal regulation of local government (Lidstrom, 1999). Despite this, there remain differences among federally organised States in terms of this (Sellers and Lidström).

This section therefore takes the comparative evaluation of constitutional power and procedures for the establishment of local government areas to Australia, and Canada. These countries are all federally organised States but differ in terms of constitutional powers and procedures for the establishment of Local Government Areas from Nigeria.

In Canada, the country's constitution recognises both the federal and provincial (i.e Federal and States) governments as independent entities with their powers and authoritative jurisdictions stated. A province has power to create local government areas. According to Makarenko (2007), he observes as follows;
"Local governments… are simply recognised as creatures of the provinces, and derive their powers from provincial law (usually in the form of a Municipal Act created by the provincial legislature). This means the provinces have the right to alter local governments in their jurisdiction at any time, be it to abolish or amalgamate municipalities, change their financial structures, alter their powers and responsibilities, or change the methods of electing their officials. Moreover, the province may do so without the consent of the local government(s) it is altering."(Makarenko, 2007).

Similar constitutional position exists in Australia in which the Commonwealth Constitution does not recognise local governments as the creatures of the Federal Government. The States in Australia have powers to create any local government by their State Parliaments. According to John Pyke a former Constitutional Law lecturer in Queensland University of Technology, States in Australia by establishing local government "have made provisions in their Local Government Acts for changing boundaries, merging councils areas, or possibly creating new ones, after some sort of public hearings by a special commission"(Pyke, 2018).

Examining the power of State for the creation of local government in Australia, Section 70 of the Queensland Constitution 1982 provides;

(1) There must be a system of local government in Queensland.
(2) The system consists of a number of local governments.

Section 8 of Local Government Act 2009 of Queensland provides for the whole of Queensland the local government areas created by the state parliament in line with section 70 and 71 of the State Constitution. Section 8(1) provides that "A local government is an elected body that is responsible for the good rule and local government of a part of Queensland" while Subsection 2 of Section 8 reaffirms that "a part of Queensland that is governed by a local government is called a local government area."

In South Australia which is another State in Australia, Part 1 of the Local Government Act 1999 of the State empowers the State Governor to act by proclamation to "Create, Structure and Restructure Local Councils" which is similar to the power vested in the Lagos State Governor by the State legislature under the 1979 Constitution in Nigeria which was declared unconstitutional.

It is remarkable to note however that in Australia and Canada, there is no constitutional relationship between the Federal and Local Governments, yet the Federal Government remains one of the sources of funds for the administration of local government despite the fact that local governments are created by each State's law. It is noted therefore that "Local Government relies on State and Commonwealth Government funding along with its own revenue to carry out many of its responsibilities (NSW website).

In recent time, referendum to recognise the status of local government in the Federal Constitution of Australia was cancelled after so many of such attempts that were failure. Nevertheless, campaign is ongoing in the country to recognise the status of local government in the Federal Constitution (ALGA and LG NSW, websites). This does not mean the Federal Government will take away the State power to conduct the affairs of the local government. This has become necessary after the High Court of Australia (the country's apex court) challenged the power of the Federal Government to fund local governments which the Constitution of the Federation does not contemplate (Pape v Commissioner of Taxation, 2009).

In 1988, the Federal Referendum that seeks to recognise the status of the local government provides for inclusion of clause as follows;

119A, "Each state shall provide for the establishment and continuance of a system of local government, with local government bodies elected in accordance with the laws of the state, and empowered to administer, and make by-laws for, their respective areas in accordance with the laws of the state"(Burgess).

The 2013 aborted referendum is slightly different from what is obtainable above. The proposed new provision seeks to amend the substantive Section 96 of the Australian Federal Constitution as shown below with the (new provision underlined);

During a period of ten years after the establishment of the Commonwealth and thereafter until the Parliament otherwise provides, the Parliament may grant financial assistance to any State, or

to any local government body formed by a law of a State, on such terms and conditions as the Parliament thinks fit (UNSW).

6. CONCLUDING REMARKS AND RECOMMENDATIONS

What is obtainable from the discourse in this work is that the obstacles to the creation of new local government areas under the various Nigerian Constitutions are the consequences of constitutional weaknesses as seen under the 1979 Constitution down to the current 1999 Constitution which vests the National Assembly with too much oversight legislative powers that has catapulted into legal controversy as equally deduced from the Attorney General of Lagos State v. Attorney General of the Federation (2004) via the requirement of consequential provisions.

In light of the identifiable impediments to the creation of new local government areas under the 1999 Constitution in Nigeria, this work has taken a brief walk to the federal arrangements in Australia and Canada and has come back home with a positive view to correct where the Nigerian federal arrangement has gotten it wrong.

The work identifies that the reason why the National Assembly is reluctant to pass the Consequential Act for the State which create new local governments by its own law is because the whole processes of creating the local government areas do not involve the federal legislature and yet it is called upon to exercise the final say, aggression is certain because both legislative bodies have no mutual legislative relationship to that effect.

Something common exists with the Nigerian constitutional power for the creation of new local government area with the comparative views in this work. That is; although the present 744 local governments (inclusive of the FCT area councils) are the creatures of military Edicts and ratified by the draftsmen of the constitution. The power to create new local government is now a matter of States similar to the situation in Australia and Canada. The area of controversy and inherent weakness is the requirement for the National Assembly to authorise the law of the State before becoming effective.

This work is not unaware of some of the financial implications for administering the new local government areas in the country due to absence of the practice of true federalism. Instead of toeing the feet of many writers in the materials consulted, the work instinctively leaves that to further research making the paper novel in character.

In light of the above, the work views that federal arrangement is some worth a metaphorical creature. That is, federalism is a polygamous family; the Federal Government is the husband, the States are the wives while the Local Governments are the children. The National Assembly is but a Committee-Of-In-Law representing the interests of the various wives. Hence any attempt to subject the request of a wife before the Committee will breed jealousy. It is on this note that the work concludes that the requirement for consequential provisions by the National Assembly for the validation of the law of a State creating new local governments will lead to legislative jealousy. Hence the following are the recommendations for constitutional reform:

1. That the requirement for consequential provisions for local government created by the valid law of state under the constitution as obtainable in Section 8(5) of the Constitution should be

deleted.Because the basis for the consequential provisions is to alter the particulars of the local government areas in Section 3 and the second column of Part I of the schedule to the Constitution, the following are recommended as alternative to consequential provisions;

i. Section 3(2) of the Constitution should be amended with addition of underlined clause to the substantive provision below:

"Each State of Nigeria named in the First Column of Part I of the First Schedule to this Constitution shall consist of the area shown opposite thereto in the Second Column of that Schedule and any other area as may be created by the State under the law empowering it to create new local government area in this Constitution."

ii. Constitutional amendment should be made in relation to the provision of Section 3(6) of the Constitution with the underlined clause to the substantive provision below: "There shall be seven hundred and sixty-eight local government areas as shown in the Second Column of Part I and six area councils as shown in Part II of that Schedule and such other number of local government areas as may be created by a valid law of a State under this Constitution."

2. The National Assembly should be mandated to update the particulars of the new local government areas created whenever constitutional amendment shall be possible and notwithstanding this amendment, the created local government areas shall be constitutionally recognised.

3. Finally, the Constitution should set guidelines for the creation of new local government areas as it may relate to the population requirement and economic viability of the area to be created as the new local government area.

If the recommendations for constitutional reform expressed above are taken, controversy over the creation of new local government areas under the 1999 Constitution will be brought to an end.

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