

INFORME

**FEDERALIZATION OF A FAILED STATE - SHORT ANALYSIS
OF THE SOMALI EXPERIMENT**por **Krystian Spodaryk**

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ABSTRACT

This article is a contribution to the ongoing debate on the constitutional foundations under the Somali federalism. Its main objective is to provide information on current state of re-unification of the country as well as analysis of the political processes behind it. The adoption of the new constitution in August 2012 is rightly perceived as a milestone in the history of Somalia. Nonetheless, as any constitution of the federal state, it brings diverse ways of interpretation of basic principles referring to issues such as devolution and division of powers. It is also not clear on the crucial point: how the future federal state should be formed - through recognition of the existing self-governing autonomous states or rather the whole process needs to be centrally driven? As the AMISOM and Somali National Army manage to gain control over more and more regions in South Central Somalia by enforcing Al-Shabab's withdrawal the answer to this question become even more pivotal than ever before.

RESUMEN

Este artículo pretende ser una contribución al debate abierto sobre el Federalismo en Somalia. Su objetivo principal es aportar información sobre la actual situación de la reunificación, así como el proceso político detrás de la misma. La adopción de la nueva constitución en agosto de 2012 es percibida como un hito importante en la historia de Somalia. La misma trae la interpretación de principios básicos de organización del estado que hacen referencia a asuntos claves como la de devolución o la división de poderes. Todavía no está claro como se desarrollará el estado federal, centralizado o descentralizado. Cual será el resultado de la lucha de AMISOM y del ejército Somalí por ganar control en las regiones del sur es una de las cuestiones fundamentales ahora.

I. INTRODUCTION

Somalia for over 20 years has been a constant object of analysis conducted by very many researchers. Main reason for this is obviously a perpetual and protracted civil war that has cost hundred thousands of lives and millions of displaced. The majority of analysts focus their attention either on the military progresses that AMISOM makes on the ground or on the UN and NGOs work in the field of political reconciliation and democratization. However, little attention has been received by the sole process of the socio-political reunification of the country. The problem gained some more international attention when the process of re-establishment of Jubaland administration (the southernmost part of Somalia) was launched in 2012.

It is extremely interesting, however, to see how a new federal entity emerges from the ashes of the civil war, albeit with the significant help of the international community. This experiment has never been done before in Africa. Its innovatory status lies mainly in the attempt of establishing the federal state when vast areas of it are still not controlled by the federal government - a situation without a precedent in African history.

Despite the fact that breakthroughs and milestones have previously been solemnly announced many times in Somalia, it is true to say that the Somali peace process has finally entered into a new phase in 2012. New constitution laid solid foundation under the federal structure of the state. The election of a new president also symbolically marked the 'end of transition' and transformed what had been called the Transitional Federal Government (TFG) into the Somali Federal Government (SFG)¹. Devolution of powers in Somalia has been secured by the new constitution, but in practice the birth of a new structure is extremely painful. This is caused by various reasons. Firstly, the legal provisions are not clear and specific enough on how the new administration bodies in the so-called 'newly liberated areas' should be formed. Secondly, the AMISOM and SNA (Somali National Army) joint offensive, despite several successes, is slow and nearly half of the South Central Somalia is still under control of Al-Shabab militias. Thirdly, the ambitions of local warlords make it difficult to provide an effective administration over the SFG-controlled areas.

When discussing the current political situation one should also not forget about Puntland - the semi-autonomous state in Northern Somalia. Its leaders accept the federal composition of the future state, but are seeking a more privileged status of their administration by pointing out that effective control over the land have been executed there since 1998 and that it is Puntland's experience that should be used in first place when undertaking a task of reunifying the country. What remains unsurprising is the firm standpoint of Somaliland, the north-westernmost part of Somalia that unilaterally proclaimed itself an independent republic as early as in 1991. Since then Somaliland have successfully conducted an intricate inter-clan reconciliation process and until now it has remained the most peaceful part of Somalia. The Somaliland leaders did not participate in any way in the transitional process in Mogadishu and do not perceive themselves as a part of any future arrangement that would mean transfer of powers from its capital, Hargeisa, to Mogadishu.

Within this context, my article will focus on the legal framework that lies under the federal state of Somalia, the current efforts of its implementation and the possible scenarios for the Somali federalism.

II. THE WAY TO FEDERALISM - TFG FROM 2004 TO 2012

The idea of a federal state for Somalia emerged in the beginning of the 21st century, after eleven previous Somali peace processes have failed. The Eldoret peace process, inspired by Kenya and launched in 2002, from its inception was aiming at empowering the highest possible number of clan elders and local leaders. The final product of the 2-year-long debate was the Transitional Federal Charter (TFC) that foresaw the creation of the Transitional Federal Institutions (TFIs), such as parliament (TFP) and government (TFG)². The TFC was a clear breakthrough in the hitherto thinking about the possible political settlement aiming at terminating the civil war in Somalia. It consisted of specific arrangements as well as a relatively sophisticated system of checks and balances that were supposed to ensure equal representation on one hand and effective governance on the other. According to the TFC the TFP should have consisted of a single chamber with 275 representatives. At least 12% of seats were to be assigned to women. Given the security situation in the country the conduct of popular vote was impossible. Members of Parliament (MPs) were to be selected at a sub-clan level, with a significant involvement of clan elders. The specific arrangements on how this selection would have taken place were discussed after the adoption of the TFC and were the objects of an extremely heated debate. The TFP at first held its sessions in Nairobi and moved to Somalia only in February 2006 to establish itself in Baidoa³. First President of Somalia elected by the TFP in 2004 was Abdullahi Yusuf Ahmed, a former military and the first President of Puntland in the years of 1998-2004. The election of a figure that was considered a devoted patriot and that was widely respected for the establishment of effective government in Puntland in 1998, was received with much hope by the Somali public. Nevertheless, the TFG was not able to gain effective control over South Central Somalia and when the forces allied around the Islamic Courts Union (ICU) captured Mogadishu in June 2006, the TFG was practically dissolved. The US-backed and Ethiopian-led intervention in Somalia ousted ICU from power in January 2007 and TFG could establish itself in Mogadishu⁴. Nevertheless, TFG lacked the support of the Somali public as it was widely regarded as an entity inspired and sponsored by foreign forces. To this end the UN initiated the so-called Djibouti process and get together the TFG representatives and moderate Islamists that had previously formed part of the ICU, Alliance for the Re-Liberation of Somalia (ARS). In January 2009, following the creation of a TFG-ARS unity government, Ethiopian military forces withdrew from Somalia. The TFP was reinvigorated through the co-optation of 200 ARS and 75 civil society representatives. President A.Y. Ahmed resigned and the former ICU chairman, Sheikh Sharif Ahmed, was elected a new president in January 2009. Simultaneously, the TFP amended the TFC to extend TFG's mandate for two more years. In 2011 the transition period was eventually extended by August 2012.

By mid-2011 Somalia was a federal state only *de iure*. The TFG was not capable of getting effective control over most part of Mogadishu. Due to constant pressure of AMISOM forces and the development of the Somali National Army (SNA) in July 2011 Al-Shabab withdrew its troops from the capital. From this moment the AMISOM and SNA offensive moved on more rapidly. By the beginning of 2012 the outskirts of Mogadishu were cleared. Simultaneously, the Ethiopian offensive was launched from

2. <http://www.refworld.org/cgi-bin/texis/vtx/rwmain?page=country&category=&publisher=&type=LEGISLATION&coi=SOM&rid=456d621e2&docid=4795c2d22&skip=0>

3. <http://www.un.org/News/Press/docs/2006/sc8662.doc.htm>

4. T. Dagne, *Somalia: Current Conditions and Prospects for a Lasting Peace*, 2011, p. 11. Source: <http://www.fas.org/sgp/crs/row/RL33911.pdf>

the west and Beledweyne and Baidoa were captured by February 2012. In October 2011 Kenyan troops launched the operation *Linda Nchi* and entered Somalia from the south in a bid to support Ras Kamboni movement in its struggle against Al-Shabab. Kenyan diplomatic efforts allowed re-hating of their battalions into a part of AMISOM contingent and as such their offensive managed to capture Kismayo in September 2012⁵. The success of the offensive meant that new political arrangements needed to be sought in the newly controlled areas. According to the principle of federalization, new leaders would be selected through the bottom-up approach, being chosen at a sub-clan level. Yet, there were still no clear rules and procedures on how this process should proceed. This problem became most apparent in the case of Jubaland, where the political ambitions of local leaders and the TFG pressure clashed in 2012 creating an administrative vacuum and becoming a serious test for a future federal state. This case will be discussed in more detail later in this article.

III. A NEW CONSTITUTION - FEDERALISM IN THEORY VS. PRACTICE

The new situation on the ground speeded up the political processes at a national level. In August 2012 a new Provisional Constitution was adopted by the National Constitutional Assembly (NCA), a body that consisted of 825 members from virtually all Somali clans. The new constitution reinforced the idea of a federal structure of the state (article 3 /3/), but gave no guidance on the patterns of future devolution processes. What makes the Supreme Act peculiar is the fact that one of the Schedules (annexes) contains the list of amendments to the Constitution to be made in the future. The article 7 defines the territorial range of the country and states clearly that it shall consist of “*any land (...) that joins the Federal Republic of Somalia in accordance with a law that shall be passed by the Federal Parliament*”⁶. This underlines the theoretically voluntary character of joining the structure, but it is contradicted in the same article, where the future boundaries of the state are explicitly indicated, just like it was enumerated in the TFC. Thus, the boundaries of the Federal Republic of Somalia are:

(a) *To the north: The Gulf of Aden;*

(b) *To the north west: Djibouti;*

(c) *To the west: Ethiopia;*

(d) *To the south west: Kenya;*

(e) *To the east: the Indian Ocean.*

The Act does not determine the future capital of the state, leaving the issue to the Parliament’s future legislation. Mogadishu and its surroundings, known as a Banadir region, plays crucial role in the federalization process and form one of the member-regions of a federal state. Chapter 5 is more specific on the issue of devolution of powers in Somalia. It states that “*(...)no single region can stand alone. Until such time as a region merges with another region(s) to form a new Federal Member State, a region shall be directly administered by the Federal Government for a maximum period of two years.*” Practically speaking the article refers mainly to the so-called

5. <http://www.guardian.co.uk/world/2012/sep/28/kenyan-soldiers-capture-kismayo-somalia>

6. Full text of the Provisional Constitution: http://www.somaliweyn.com/pages/news/Aug_12/Somalia_Constitution_English_FOR_WEB.pdf

'newly accessible areas' in which the AMISOM and SNA forces took over full control in 2012-2013. The TFG appoints members of the provisional administration in this areas directly. A specific legislative path is foreseen for determining the boundaries of regions, called Federal Member States (FMS). Although the article 49 allows a certain level of flexibility in this regard, the main principle is that the creation of any FMS shall be based on the administrative divisions of 1991. However, "(...) *based on a voluntary decision, two or more regions may merge to form a Federal Member State(...)*". The rationale behind this provision is to provide a legal ground for the creation of possibly strong FMSs that would not be smaller than any of the 18 regions that existed during the Siad Barre era. Nevertheless, the article does not reflect the actual situation on the ground. Puntland, which most likely is to become the strongest FMS of Somalia, consists of 2 former regions (Nugal, Bari), over half of Mudug region and claims its rights over large parts of Sanag and Sol (which is the reason for a protracted conflict with Somaliland). Galmudug administration, which representatives have been a party of the constitutional process and signatory of the Somalia End of Transition Roadmap in September 2011, controls another half of Mudug and small parts Galgadud. The political situation is even more intricate with another TFG ally, Ahlu Sunna Wal'Jamaa (ASWJ). This sufi militia controls large parts of Central Somalia⁷. As of April 2013 ASWJ controls parts of southern Mudug, Gedo and southern Galgadud, as well as small parts of Hiran, Middle Shebelle, and Bakol. ASWJ leaders, also a party of the transition process in 2011-2012, claim control over these lands and aim at being introduced as a FMS within the federal structure of the state.

Small administration of Himan and Heeb, which controls part of Galgadud, would also see itself as one of the FMS in the future, although its neutrality in the TFG struggle against Al-Shabab could be an obstacle in this endeavor. On the other hand, the institutionally and administratively most stable part of Somalia - Somaliland does not want to take part in any process which objective would be the re-unification of the country within its pre-1991 boundaries.

This reality on the ground, together with a recent situation in Jubaland, makes the constitutional provisions hard, if not impossible, to implement. Most probably none of the FMSs *in spe* will fulfill the conditions of the article 49. More difficulties can possibly be found when it comes to the division and execution of powers between the FMS and federal government. As it was stated in the introductory note of this article, the devolution of powers is not at all precise and can become the biggest issue of contest once TFG and its allies win the war with Al-Shabab. Article 54 states that "(...) *the allocation of powers and resources shall be negotiated and agreed upon by the Federal Government and the Federal Member States (pending the formation of Federal Member States), except in matters concerning: (A) Foreign Affairs; (B) National Defense; (C) Citizenship and Immigration; (D) Monetary Policy, which shall be within the powers and responsibilities of the federal government (...)*". This provision is somehow softened by the article 53 which secures the representation of FMS in case of negotiations relating to foreign aid, treaties and trade. The objective of this article was to meet the ambitions of several future FMS, notably Puntland. In reality Puntland conducts its own foreign policy and signs unilaterally most of the treaties (especially referring to foreign aid and trade) without consulting the Somali Federal Government (SFG). This situation, given the ambitions of Puntland leaders, is very unlikely to change in the foreseeable future.

The Constitution also gives basis for future cooperation and establishes methods of consultation between the FMS and SFG. A special conference shall be held annually with the aim of discussing pivotal issues such as: strengthening national unity; security and peace of the country; national socio-economic development, and common market policies of the country; promotion of the wealth of the people; information sharing (article 51).

For the first time in history of Somalia its Parliament consists of two chambers: the House of the People and the Upper House. The Upper House received relatively large powers that consist of the participation in the process of the selection of key figures in the judiciary system. The number of the Upper House members shall not exceed 54 and the selection process is based on the principle of equality of all FMS - each of them should be allocated with exactly the same number of members (article 72). The Upper House cannot, under any circumstances, be dissolved before the end of its term.

The House of the People consists of 275 members. Although there is no specific quota stipulating the number of MPs that should represent each clan, it states that *the members of the House of the People of the Federal Parliament must represent all communities of the Federal Republic of Somalia in a balanced manner* (article 64). This opens a large space for interpretation and can possibly become a reason for inter-clan conflict. The Constitution does not explicitly mention the so-called 4.5 formula that was introduced in 2000 after the Arta Conference. According to this rule four main clans (Hawiye, Darod, Dir and Rahanweyn) were given equal number of seats while the minorities were given half of the seats of each clan's allocation. This rule was later extended to the TFG itself⁸. The principle that dominated Somali politics in the years of 2000-2012 was contested by large parts of the society as it did not properly reflect the clan divisions and, on the other hand, it was very often an obstacle in the creation of an effective government. Its symbolic end came together with the nomination of a new members of the SFG in November 2012. Only 10 ministers were nominated and the clan proportions were not obeyed to the extent foreseen by 4.5 formula⁹. Nonetheless, the necessity of maintaining the balance between the representations of each clan remains obvious for Somali legislators. The Technical Selection Committee (TSC) was still using 4.5 formula when approving the MPs of the House of the People as, for obvious reasons, the popular vote foreseen in the Constitution was not organized¹⁰.

Similarly, due to lack of progress in the formation of FMSs and uncertainty of their future boundaries, the members of the Upper House have still not been selected. The non-existence of this chamber can hamper the legislation process as any amendment to the Constitution requires the approval of 2/3 majority of the Upper House¹¹.

Despite its obvious shortfalls, the end of transition process is perceived by the international community as successful. The adoption of the Constitution was followed in September 2012 by the election of a new president - Hasan Sheikh Mohamud, a former academic and civil society activist. In October he appointed a new Prime Minister - Abdi Farah Shirdon who formed a Cabinet one month later. The transition from TFG into SFG became a fact. The government soon received wide international recognition, notably

8. http://wardheernews.com/Articles_12/Sept/Warsame/03_Why_Somalis_about_the_Clan_Power_Sharing_Formula.html

9. http://www.hiiraan.com/op4/2012/nov/26786/a_symbolical_break_with_the_somali_4_5_clan_power_sharing_formula.aspx

10. <http://somalilandpress.com/somalia-technical-selection-committee-approves-202-parliamentarians-33899>

11. M. Uluso, *Provisional Constitution Heightens Tensions in Somalia*, in: International Policy Digest Vol. 1 Issue XIV, 10.2012.

from the US and the EU. During first quarter of 2013 A. F. Shirdon undertook several decisions that improved the popularity of the SFG. One of them is the establishment of the long-expected Independent Task Force on Human Rights that will publish a report on its findings and recommended courses of action. The Task Force will eventually give way to a permanent parliamentary Human Rights Commission, which will have the capacity to investigate allegations on human rights violations and abuses over a longer period¹². Another popular move was to undertake a so-called Listening Tour during which he visited several cities across South Central Somalia in order to meet with the population, establish public service priorities and facilitate the creation of local administrations¹³.

IV. CLASH OF TOP-DOWN AND BOTTOM-UP APPROACHES. THE CASE OF JUBALAND

The issue of the future status of Lower Juba region became a first serious test for the Prime Minister Shirdon and the new SFG. The establishment of an effective and widely recognized administration there occurred to be an extremely difficult task. The success or failure in this field will most probably determine the fate of Shirdon's cabinet.

After the withdrawal of Ethiopian troops in the beginning of 2009 Al Shabab quickly filled up the void left by them and established its rule over Kismayo and beyond. Parts of the Ras Kamboni brigades that took active role in fighting against Ethiopian troops together with Hizbul Islam decided to create Ras Kamboni Movement (RKM) and allied themselves with the TFG forces. Under a leadership of Ahmed Madobe RKM received a solid logistic backing from Kenya which aimed at creating a special buffer zone in Lower Juba that would prevent the infiltration of Al-Shabab elements into Kenyan soil. In 2010, residents of Somalia's Juba region established a new secular regional administration called Jubaland Initiative in order to create an autonomous state patterned on Puntland and Somaliland. In April 2011 the new autonomous Jubaland administration was established. The region was later renamed to Azania with a newly elected president - Mohamed Abdi Mohamed (Gandhi), the former national Minister of Defense. This development was not well received by Ahmed Madobe and created a serious crisis among the allies as RKM could shift back its support to Al-Shabab. This did not happen and RKM supported the Kenyan *Linda Nchi* offensive that was launched in October 2011. Despite the initial reservations TFG fully supported Kenyan military operation indirectly supporting the Jubaland Initiative and the whole process of creation of the autonomous state¹⁴. The situation has changed with the election of the new president in 2012. Hasan Sheikh Mohamoud and his government has declared the formation of Jubaland and its process illegal and subsequently urged the process to be delayed until the parliament establishes laws and territorial boundaries of proposed regional states within Federal Somalia¹⁵. Despite this statement the process moved forward. In the end of February 2013, over 870 delegates from Lower Juba, Middle Juba and Gedo convened in Kismayo and after one month of debate they signed a Transitional State Charter for Jubaland, a new FMS that will consist of all of these three pre-1991 regions¹⁶. The delegates are expected

12. <http://allafrica.com/stories/201302061063.html>

13. <http://www.raxanreeb.com/2013/03/somalia-pm-boosts-local-government-as-first-stage-of-national-listening-tour-closes-in-galgadud/>

14. <http://www.standardmedia.co.ke/?id=2000045933&cid=4&articleID=2000045933>

15. http://www.garoweonline.com/artman2/publish/Editorial_29/Political_disconnect_breeding_discontent_in_Somalia_Editorial.shtml

16. <http://allafrica.com/stories/201304080283.html>

to soon elect state Members of Parliament, a new State President and Vice President what will be followed by a formal declaration of Jubaland as a federated state in the Federal Republic of Somalia. The conference brought together RKM representatives and some other key figures such as former TFG Prime Minister Omar Abdirashid Ali Sharmarke and former Minister of Defense Mohamed Abdi Mohamed (Gandhi).

During the conference, on the 26th March 2013, Somalia's Prime Minister Abdi Farah Shirdon arrived in Kismayo after federal participation was requested by the delegates. After five days of negotiations Shirdon returned to Mogadishu where shortly afterwards Somalia's federal government announced the collapse of talks and declared the conference unconstitutional¹⁷. Main reservation of the SFG is the leadership of the process, which should be vested to the federal institutions. The whole initiative was also allegedly not inclusive. Shirdon's standpoint remains firm in this regard and there is little chance that Jubaland would be recognized by this government.

SFG declaration resulted in mixed reactions across the Somali society. While centralists praised the decision by claiming that federal powers should be in charge of all administrative processes that are ongoing in the country, others underlined that such position can be a serious obstacle in the reconciliation and re-unification of Somalia¹⁸. The unwillingness to legitimize such bottom-up processes may result in serious delays in formation of the state. Jubaland aims at following the reconciliation patterns of Somaliland in 1993 and Puntland in 1998. Despite its several shortfalls Jubaland Initiative managed to gather an overwhelming majority of key stakeholders from the region. Nervous reaction of the SFG on any attempt of establishing local administrations in the so-called newly accessible areas in South Central Somalia may also provoke an unnecessary climate of uncertainty among authorities in Garowe (Puntland), South Galkayo (Galmudug) and Dhusamareb (ASWJ), whose legitimacy to become a new FMS may also be questioned in the future.

In its struggle with the regional administrations new federal government of Somalia attempts to gain possibly strongest position on the national scene in the first months of its existence. To this end it is aiming at getting the full support of the International Community (IC). In several cases, among which Jubaland and Puntland, the Somali neighbors' foreign policy does not remain in line with the SFG approach. Kenya and Ethiopia tend to support regional initiatives and maintain semi-official relations with Somaliland and Puntland. Kenya was the first host of the Jubaland Initiative in 2010 and has actually sponsored the whole process from its inception¹⁹. It was later effectively supported by IGAD and EU²⁰. The UN Political Office for Somalia (UNPOS) focused its efforts on reinforcing the institutional capacity of the SFG, but was receiving rather positively various regional initiatives aiming at restoring peace and order in the newly accessible areas, especially throughout the whole transition period of 2009-2012²¹.

Further obstruction by the SFG of the bottom-up processes that are focusing on the establishment of local administrations may lead to a popular discontent and could put in question the SFG's legitimacy to impose regional authorities in South Central part of the country.

17. http://www.garoweonline.com/artman2/publish/Somalia_27/Somalia_PM_returns_to_Mogadishu_rejects_Jubaland_convention.shtml

18. <http://salaanmedia.com/?p=3509>

19. <http://www.guardian.co.uk/world/2011/nov/08/somali-fears-in-kenya-conflicts>

20. <http://allafrica.com/stories/201210170050.html>

21. <http://unpos.unmissions.org/Default.aspx?tabid=11447&language=en-US>

V. CONCLUSION

The Provisional Constitution of the Federal Republic of Somalia is widely regarded as a great achievement of Somali people and the International Community. It provides a solid ground for further transformation of this war-torn country and gives hope for peace and stability in this state. However, due to some specific arrangements included there, many of the provisions of this act cannot be implemented. Since there is still no Upper House formed, the Constitution cannot be amended as it was foreseen in its annexes (called Schedules). Some of the articles referring to devolution of powers and the process of FMS creation occurred to be ambiguous as they do not provide clear guidance on how the inclusion of local administration would look in practice. As no flexibility in state formation is granted by federal powers, the whole endeavor will most probably be regarded as 'constitutional' only if it is guided from the very beginning to the end by the SFG. This approach can further damage the fragile balance of powers achieved in some parts of the country, especially in case of Jubaland.

Given its importance and size, there is little probability that Puntland authorities would at any point not get the recognition of the SFG. Nonetheless, the president of Puntland, A. Farole explicitly supported the efforts of the Jubaland Initiative and appealed to SFG to promote national reconciliation and state-building processes²². In response to this SFG launched in January 2013 in Baidoa what it called 'exemplary' reconciliation and administration-building process with the aim of approving an interim authority in accordance to the government's vision of a bottom-up approach. Main difference between the Baidoa and Kismayo processes lies only in permanent participation of the SFG representatives, which lacked in the case of the latter.

Nation-building exercise in case of Somalia have always been an extremely intricate challenge. As AMISOM and SNA troops move forward in their offensive and the majority of the population supports the federal government, there is an opportunity like no other during over 20 years of an armed conflict to finally put an end to the Somali instability. To this end SFG should support any bottom-up initiative that is focused on bringing back stability to the country and which is based on the principle of inclusiveness. In this way it can make sure that it will win the 'battle of hearts and minds' of Somali people – a most important step towards winning the whole war against Al-Shabab.



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