

A legal perspective on the economic crisis of 2008

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Abstract. *The 2008 global financial meltdown was the symptom of an underlying crisis in law and institutions caused by the neoliberal utopia of Total Market – “scientific” depoliticization of the economy, full commodification of labour, land and money, and all-out competition, with even legal systems subject to “law shopping”. Financial markets were so successfully deregulated, they were the first to collapse: taxpayers are now paying the bills. But the markets for natural and “human resources” are also at risk. In the spirit of the 1944 Declaration of Philadelphia, Supiot argues, the rule of law must be reinstated to end human subordination to economic efficiency.*

The global financial meltdown in the autumn of 2008 was but a symptom of deeper underlying trouble, ultimately a crisis in law and institutions. In order to function properly, markets require a three-dimensional institutional framework within which relations between economic agents can be conducted under the auspices of a third party that guarantees the fairness of their transactions over the long term of human existence. By way of illustration, a medieval marketplace makes a useful metaphor, as does the *Marktplatz* in Brussels, for example: its architectural magnificence is imbued with institutional meaning. This ancient marketplace is bounded by the headquarters of the institutions which ensured the smooth operation of the market. The Town Hall housed the municipal authority that saw to the fairness of trade through inspection of weights and measures, while the buildings of various trades (e.g. butchers, bakers, brewers) housed the guilds that upheld the status and quality of labour, without which there would have been nothing valuable to trade. These various buildings also marked out the boundaries of the commercial sphere. If one left the marketplace, say, to go to the courthouse or to the royal palace, a different set of rules applied. Indeed, if the law of the market had extended to judges or

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political leaders, their decisions would have been up for sale, the city would have been corrupt, and honest traders would have been unable to carry on their business there freely. Yet such removal of the market's institutional framework is precisely the aim of the neoliberal project that has been pursued for the past three decades. Chasing the utopian fantasy of a marketplace without boundaries, it is bent on engineering a "flattened world" in which relations between people and even the law can be treated as goods (Friedman, 2005).¹ The unprecedented crisis that broke in 2008 was a foretaste of the disastrous consequences of that utopia – a wake-up call to stop promoting "law shopping" and reinstate the rule of law.

The institutional foundations of markets

Today's markets no longer feature the spatial and architectural unity of medieval marketplaces, yet their smooth operation still depends on the selfsame institutional framework. A contract only makes sense if the parties it binds have concluded it under the auspices of some higher authority that can guarantee they will keep their word (e.g. the gods, the king or the State). In the absence of such a guarantor, the contract will be no more than an expression of the will of the strongest party. Similarly, the right to own private property involves more than just a binary relationship between a person and the thing that he or she owns, because the effective exercise of that right depends on the existence of a third party that guarantees each person's property is respected by everyone else (Macfarlane, 1998). Where this precondition is not met – say, if the State is dysfunctional or corrupt – the fiction of a connection between a thing and a single individual owner becomes untenable. Relationships would then predominantly revert to dependency, with the weak having to do allegiance to the strong so as not to be dispossessed of what little they own.

Yet, the institutional foundations of markets have been under systematic neoliberal attack for three decades, through financial deregulation and the promotion of competition between different systems of labour and environmental law. From the legal standpoint, it was predictable that the financial markets would be the first to collapse because this is where deregulation has made its deepest inroads. But the meltdown was also predictable in economic terms. It had in fact long been foreseen by some economists. Such economists, however, do not get published in peer-review journals, nor are they ever nominated for the prize awarded each year "in memory of Alfred Nobel".²

The market economy long predates capitalism,³ whose main characteristic is to embrace the market as a general principle for regulating the economy. This, however, presupposes that land, labour and money should be treated *as if* they were commodities, which is clearly not the case (Polanyi, 1944, pp. 71–80). The

¹ This utopia was foreshadowed in Edwin A. Abbott's 1884 novel, *Flatland: A romance of many dimensions*, whose striking relevance today is aptly highlighted by Ota De Leonardis (2008).

² Examples from France include Jean-Luc Gréau (1998) and, more recently, François Morin (2006).

³ On the need to distinguish between the two, see Amato and Fantacci (2009, p. 329).

capitalist market economy is thus grounded in legal fiction. But legal fiction is not like literary fiction: it is sustainable only to the extent that it is humanly viable. For example, without a system of environmental law that effectively protects natural resources, nature cannot be treated as a commodity for very long. Similarly, without a system of labour law that effectively protects “human resources”, labour markets too are unsustainable. The 1944 Declaration of Philadelphia reaffirmed that “labour is not a commodity” and called for “the extension of social security measures to provide a basic income to all in need of such protection and comprehensive medical care”. The Declaration thus committed States to the adoption of a system of labour and social security law that would ensure the physical and economic security of workers and their families, i.e. the regulatory frameworks needed to sustain the long-term operation of labour markets over successive generations (see Supiot, 2000).

But the regulatory frameworks were constructed at national level, and they are now gradually being dismantled in the context of globalization. The same goes for financial markets, whose deregulation has been pursued systematically – and to devastating effect, as recent events have begun to show. Without such frameworks, the rules of free trade lose their connection to the diversity of people, territories and goods. For a while, it may still be possible to pretend that labour, land and money are unconnected to workers, the natural environment and the real economy, but such fiction is bound to break down eventually as reality closes in. Contrary to what Market worshippers naively believe, the dismantling of national regulatory frameworks will not procure the “spontaneous order of *the Market*”. It will simply undermine the institutional foundations of *markets*. There is indeed no such thing as *the Market Economy*, but rather a variety of legal systems framing different types of market, with variations depending not only on the nature of the goods and services traded but also on historical backgrounds and legal cultures.

The advent of Total Market

In order to understand the implications of the dismantling of markets’ institutional foundations, a distinction needs to be drawn between two types of process which, though clearly distinct, have become conflated into the catchy term “globalization”. The abolition of physical distance in the transmission of signs between people is a structural process which derives from the introduction of new information and communication technology. The free movement of capital and goods, by contrast, is a conjunctural process which derives from reversible political decisions (on liberalization of trade and capital markets) and the temporary over-exploitation of non-renewable physical resources (i.e. artificially low transport costs). The conjunction of these two distinct processes has led to the utopia of “Total Market”, in which people, signs and things can all be rendered commensurable and be mobilized in the cause of globalized competition – i.e. they can all be “liquidated” in the legal sense of this term.⁴

⁴ Liquidation consists in making something fungible by converting it into cash. For example, a debt is said to be liquid when it can be converted into a specified amount of money.

The Market then becomes *total* in the sense that Ernst Jünger gave to that adjective in the aftermath of the First World War when he used it to describe a form of organization based on the total mobilization of human, technological and natural resources to produce armies that were “sent to the battlefield both day and night, where an equally mechanical bloody maw took over the role of consumer” (Jünger, 1930, as translated in Wolin, 1993, p. 129).⁵ The First World War marked the founding moment of this conversion of people into fuel with which to drive the monotonous functioning of a war machine that worked like “a turbine fueled with blood” (*ibid.*, p. 129). Post-war forms of work organization conformed to this model and were aimed at converting everyone and every thing into usable energy. This approach evolved into the management vision that is still prevalent today. As early as 1932, Jünger described it in the following terms:

Our situation is peculiar in that our every movement is governed by pressure to set a record, while the minimum standard of performance we are required to meet is constantly broadening the scope of its expectations. This completely precludes the possibility that any sphere of life might ever stabilize on the basis of some secure and undisputed order. The resulting way of life is more like a deadly race in which all of one’s energy is stretched to the limit lest one should fall by the wayside (Jünger, 1932).

That economic competitiveness has become the ultimate purpose of the legal order boils down to acceptance of a dogma that sees the growth of output and trade as an end in itself – an end that can only be pursued through all-out competition, by pitting all people in all countries against one another. This dogma is actually spelt out in the first preambular paragraph of the Marrakech Agreement which established the World Trade Organization: international “relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services” (WTO, 1994). This statement stands in stark contrast to the Declaration of Philadelphia. Quantifiable economic outcomes – employment and a large and steadily growing volume of real income and effective demand – and “expanding the production of and trade in goods and services” are considered as ends in themselves. Human beings have been dropped from the list of objectives that the economy and trade are supposed to serve, as have all references to human freedom and dignity, economic security and emotional well-being.

Just as King Midas changed all he touched into gold, Total Market converts everything into economic resources. People are thus considered merely as means to an end, and no longer as the ultimate beneficiaries of economic activity. They are subsumed into the indistinct pool of “resources” that Market needs in order to function.⁶ Such commodification of human beings was long confined to workers, but it has now been extended to all types of creditor or debtor by

⁵ It was from this seminal article that Carl Schmitt later derived the concept of the “total State”.

⁶ On this process of “resourcification”, see Doria (2010).

means of innovative financial instruments. Not only can these new instruments convert an interpersonal relationship into a tradeable product, but they also do away with any connection to the people engaged in the relationship. Influenced by their economic perspective on law, business lawyers have spent the past two decades actively pleading for such dissolution of people into the category of “things”. In particular, they have argued that relationships between creditors and debtors should be considered “in objective terms”,

as if they were just commodities, i.e. relationships between one balance sheet and another rather than between one person and another. The rules governing trade in debt thus derive from those governing the sale of goods with guaranty construed as an accessory of the object of the sale. Such commodification of obligations effectively makes it possible to organize their tradeability as if they were goods, which, in turn, allows for optimization of their value; and all of this takes place within a regulatory framework that is secure because it owes more to the laws of mechanics than to uncertain considerations of psychology (Aynès and Stoffel-Munck, 2005, p. 99).

Such brilliant analyses sowed the seeds of the disasters wrought by financial derivatives like collateralized debt bonds or credit-default swaps. Capitalism would obviously be better off in a world inhabited solely by electronic calculators, but wishful thinking and the pretence that people do not exist can only lead to dead ends – all the more dead because a commodified world is a world in which no one has to answer for anything. Indeed, one of the most devastating effects of those new financial “products” has been to spare lenders the need to answer for the financial risk inherent in any credit transaction. As a matter of fact, even the term *credit* is a misnomer here because lending can now proceed regardless of whether the borrower’s solvency is *credible* or not. The process might be better described in terms of issuing counterfeit currency. But this is not entirely accurate either because a counterfeiter is at least liable to prosecution under criminal law. And responsibility for such counterfeiting on a massive scale has now actually been taken over by States themselves.

“Law shopping” versus the rule of law

The notions of “person” and accountability are not the only ones that Total Market has deprived of meaningful content. The law itself – along with religion, ideas and art⁷ – has come to be seen as just another product competing on the global market. Legal systems better suited to the pursuit of financial profitability outcompete the rest. So instead of competition being subject to the law, the trend is towards making the law subject to competition. Friedrich Hayek was among the first to have theorized such regulatory Darwinism. Having no faith in the “rational agent” of economics, he believed in natural selection among normative systems as a result of international competition between legal systems and cultures. In his view, the proponents of social Darwinism were wrong to

⁷ See Coase (1974, pp. 384–391). On the extension of the concept of “the market for ideas” to religions by the Supreme Court of the United States, see Legendre and Mayali (2002).

look no further than the selection of individuals who were congenitally the fittest – a process too slow to be internalized – “and at the same time neglecting the decisively important selective evolution of rules and practices” (Hayek, 1979a, p. 154).

In the economic sphere, the freedoms associated with free trade – i.e. freedom of establishment, freedom to provide services, and the free movement of capital and goods – are invoked as grounds for allowing investors and firms to evade the laws of the countries where they operate and to opt for some other jurisdiction more congenial to their business interests. Flags of convenience used to be confined to the law of the sea, but this practice is now spreading on dry land as a result of “law shopping”, whereby national legal systems are treated as products competing on an international market for standards.⁸ In Europe, this trend is actively promoted by the European Court of Justice which has upheld the right of firms to circumvent the law of the State where they carry on their business by registering in another State whose law is less constraining.⁹ In one of its most recent judgements along these lines, the Court held that “the objectives of protecting the purchasing power of workers and good labour relations” did not in themselves constitute sufficient public policy grounds to justify impairment of “freedom to provide services”.¹⁰ One would be hard pressed to find a more vivid expression of the current reversal of the spirit of the Declaration of Philadelphia which, as recalled by the International Labour Conference in 2008, stressed the ILO’s responsibility “to examine and consider all international economic and financial policies in the light of the fundamental objective of social justice”.¹¹ Recent developments, by contrast, reflect a legal view of the world centred on a “market for legislative products” open to the discretionary choice of individuals who are free to avail themselves of whichever legal system is the most profitable.

In order to help “law shoppers” choose the best products on the “market for standards”, the World Bank has since 2004 published an annual report that assesses the economic efficiency of national legal systems within the framework of its “Doing Business” programme.¹² The accompanying database provides “objective measures” of the law of 178 countries (referred to as “economies”). In particular, it contains numerical indicators of the “rigidity” of labour law in each country. *Doing Business in 2005*, for example, includes a chapter on “hiring and

⁸ For a richly referenced overview, see Muir Watt (2005).

⁹ See Case C-212/97, 9 March 1999, *Centros Ltd v. Erhvervs-og Selskabsstyrelsen*, ECR 1999, p.I-1459; Case C-438/05, 6 December 2007, *International Transport Workers’ Federation and Finnish Seamen’s Union v. Viking Line ABP and OÜ Viking Line Eesti*, ECR 2007, p.I-10779 (legitimizing flags of convenience for the sake of freedom of establishment); and Case C-341/05, 18 December 2007, *Laval un Partneri Ltd v. Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet*, ECR 2007, p.I-11767.

¹⁰ Case C-319/06, 19 June 2008, *Commission of the European Communities v. Grand Duchy of Luxembourg*, para. 53.

¹¹ Quoted from the preamble to the *ILO Declaration on Social Justice for a Fair Globalization* (ILO, 2008, p. 6).

¹² See <http://www.doingbusiness.org>, which includes a map showing the world as an arena for legislative competition (*Business planet: Mapping the business environment*).

firing workers” that assesses the degree to which labour law acts as a constraint on investment across countries (World Bank, 2005, pp. 25–32). A table also compares labour law systems worldwide on the basis of indices that are designed to measure: difficulty of hiring, rigidity of hours, difficulty of firing, rigidity of employment, and hiring and firing costs.¹³ From this perspective, of course, “difficulty” or “rigidity” refers to regulation, while “cost” refers to rights designed to protect workers. The “rigidity of employment” index thus assigns negative scores to States that give workers too many rights, such as social protection for part-time workers, minimum wages the Bank deems too high (US\$20 per month being considered too much for African countries), a working-time limit below 66 hours per week, prior notice of dismissal, or programmes to combat discrimination based on race or sex.¹⁴ The formalization of this “market for legislative products” is designed gradually to eliminate those regulatory systems that fail to meet investors’ financial expectations. In other words, inter-firm competition for the favours of the financial markets is unlikely to remain confined to the economic sphere; it is set to become the organizing principle of the legal sphere as well.

Such “law shopping”, however, is ultimately incompatible with the rule of law. Indeed, freedom to choose the most convenient legal system goes against the notion that everyone should be equally subject to the rule of law. It also goes against democracy itself because the scope of democracy automatically shrinks in countries whose labour, tax and environmental legislation is subject to global competition. Hayek argued that this restriction of democracy was necessary to allow for “the spontaneous order of the market”. A fierce critic of the standard-setting initiatives taken in the aftermath of the Second World War,¹⁵ Hayek’s main complaint was that those endeavours had established “unlimited democracy”, whose rule extended to economic matters: “once we give licence to the politicians to interfere in the spontaneous order of the market [...] They thus initiate that cumulative process which by inner necessity leads [...] to an ever-growing domination over the economic process by politics” (Hayek, 1979a, p. 151). This argument eventually morphed into the primary objective of the neo-liberal revolution, namely, to protect the “spontaneous order” of the market against the power of democratically elected government. What this meant was that the distribution of work and wealth, together with control over money, should be entirely excluded from the political sphere. Democracy had to be restricted in this way in order to prevent the ignorant masses from interfering

¹³ The World Bank’s methodology is based on the work of economists from Harvard and Yale (see Botero et al., 2004).

¹⁴ In response to criticism by the International Confederation of Free Trade Unions and the ILO (ILO, 2007; Berg and Cazes, 2007), a joint working group was set up by the ILO and the Bank in 2009 to review these indicators (see http://doingbusiness.org/Documents/Press_Releases_10/EWI_Advisory.doc).

¹⁵ Referring to the Universal Declaration of Human Rights of 1948, he wrote: “The whole document is indeed couched in that jargon of organization thinking which one has learnt to expect in the pronouncement of trade union officials or the International Labour Organization [...], but which is altogether inconsistent with the principles on which the order of a Great Society rests” (Hayek, 1979b, p. 105).

with the laws of economics, which were beyond their understanding. “To them the market economy is largely incomprehensible; they have never practised the rules on which it rests, and its results seem to them irrational and immoral. [...] Their demand for a just distribution in which organized power is to be used to allocate to each what he deserves, is thus strictly an *atavism*, based on primordial emotions” (Hayek, 1979a, p. 165).

This drive for depoliticization led most economists to abandon the learned tradition of “political economy” in favour of “economic science”. By aping the natural sciences, this discipline even succeeded in awarding itself its own prizes for excellence in the name of Alfred Nobel.¹⁶ This quest for scientific legitimacy was contemporaneous with the neoliberal revolution, of which it was a key component. Indeed, since science and religion are the only domains not open to political debate in a democratic society, the point was to believe and make believe that the economy fell within the domain of science, in order to depoliticize it. In the process, however, the neoliberal revolution unwittingly linked up with the other major scientific ideologies, particularly “scientific socialism”, through its faith in the existence of immanent laws of economics that political leadership has a duty to implement, rather than question.

Concluding remarks

The most fundamental tenet of neoliberal doctrine is that the Market is the supreme regulatory authority for worldly affairs and that it must ultimately be allowed to dictate the conduct of firms and the economic policy of States around the globe. Since this doctrine continues to hold sway among the business and political leadership of the western world, it is hardly surprising that the economic recovery packages designed to cope with the recent collapse of financial markets consisted in throwing staggering amounts of public money at them without so much as wondering about the structural reasons for their collapse. It is as though arsonist firefighters had sprayed petrol onto an engine which they had set alight in the hope of restarting it.

Unlike the dogmatic of law, which is inherently possessed of conscience and open to the resources of interpretation, the dogmatic of scientism does not recognize itself for what it is and is thus perfectly hermetic to any challenge from without. This is what makes scientism so powerful, but it is also a weakness when the principle of reality intrudes upon the system, as it has done with neoliberal doctrine today. The system’s political and economic proponents are then incapable of comprehending why their world falls apart. A couple of decades ago, this is what happened to socialists and communists: lacking the capacity to think through the breakdown or collapse of “scientific socialism”, they converted within a few years from unconditional defence of the latter to equally uncondi-

¹⁶ A successful forgery of the genuine Nobel prizes, the “Bank of Sweden Prize in Economic Sciences in Memory of Alfred Nobel” was established in 1968 and first awarded in 1969 (see Moynot, 2008).

tional support for the neoliberal faith. Something similar is now happening to those (often the same characters) who embraced that faith and owe it the authority they enjoy.

The latest report from the OECD, *Economic policy reforms 2010: Going for growth*, is a good example of such introversion, mired in dogmatic certainties that no amount of counterfactual evidence will ever shake. Published some 18 months after the crisis broke, the report argues in its editorial (entitled “Shifting gears”) that the collapse of the financial markets does not call into question the Organization’s “longstanding policy prescriptions” (OECD, 2010, p. 5). On the contrary, it recommends intensifying policies aimed at flexibilizing labour markets and “reaping efficiency gains on spending, especially in the areas of education and health, and avoiding large increases in harmful labour and capital taxes” (ibid., p. 4). From atop its towering expertise, the OECD hands down good grades to Brazil, China, India, Indonesia and South Africa for “major improvements in human capital”. Subject to “some differences” across these countries, however, it urges them to rise to the challenges of “moving towards more competition-friendly product market regulation, strengthening property rights and contract enforcement, deepening financial markets” (ibid., p. 5). This last recommendation is a particularly shocking example of inability to reconnect with the principle of reality: it was indeed precisely because they refrained from submitting to the rule of the financial markets that the major emerging markets were so little affected by their collapse.

At best, there has been reluctant admission that better financial market *regulation* might help, but without any hint that rules which ought to be binding should no longer be treated like competing products on some international market for standards. Hence again the circularity of the self-referential logic which stubbornly sustains the belief that the market can be regulated by the Market. Besides, unlike other European languages, English – the language of globalization – lacks specific terminology to distinguish between “regulation” and the enforcement of genuinely binding rules in the same way as it distinguishes between, say, “governance” and “government” (see Supiot, 2003).¹⁷ The notions of regulation and governance derive from physics and biology where they refer to rules inherent in some technological device or living organism. Their usage was extended to human affairs through cybernetics as this science endeavoured to erase the boundaries between people, animals and things. Erasure of those boundaries, however, leads to obliteration of the characteristically human distinction between biological or technical standards, on the one hand, and legal rules, on the other – and therefore between the domains of being and having to be. Indeed, a biological organism embodies a state of being in which its existence and the rule by which it lives are undifferentiated. The order of human affairs does not fit this model, however, because in this case the rule is not immanent but

¹⁷ French, for example, makes a clear distinction between *réglementation*, which is about imposing rules, and *régulation*, which is about getting people to respect rules. German and Italian also make this distinction (Supiot, 2003, pp. 1–2).

necessarily external to the “social corpus”. This is why medicine looks upon evil (i.e. sickness) rather than good (i.e. health) as a problem, whereas for society the challenge lies in determining exactly what the right order is (see Canguilhem, 1955). Indeed, in this case, the rule cannot be found embedded in society itself; it obviously has to come from elsewhere, somewhere beyond the reach of both scientific research and individual whim, albeit in the guise of “ethics”.

The issue is thus not about “regulating markets” as one might casually adjust the settings of the central heating. It is about bringing them under effective control with hard-and-fast rules to serve the interests of society. This, in turn, means going back to the political and legal drawing board in order to restore the order of ends and means as between human needs and economic and financial organization. In other words, it means reconnecting with the spirit of the Declaration of Philadelphia which, towards the end of the Second World War, aimed to harness the economy and finance in furtherance of the principles of human dignity and social justice. What this implies for the International Labour Organization today is not to give up on its “core business”, but to promote labour standards suited to the state of the world today (for some suggestions, see Supiot, 2006). Francis Maupain, one of the ILO’s sharpest legal minds, once disingenuously pointed out that the question to be pondered would then not be about the social dimension of globalization but about the economic and financial dimension of social justice. This was not meant as a plea for restoring the institutional arrangements of the three decades of prosperity that followed the Second World War. Admittedly, in the industrialized countries at least, those years certainly did produce much better social and economic outcomes than the three decades of neoliberalism that followed, but those arrangements belong to a world that is no longer. The fact remains, however, that the definition of social justice adopted at Philadelphia in 1944 has lost nothing of its cogency. The *ILO Declaration on Social Justice for a Fair Globalization*, adopted in 2008, stresses that the Declaration of Philadelphia “continues to be fully relevant in the twenty-first century and should inspire the policies of [the ILO’s] Members” (ILO, 2008, p. 6). Keeping faith with the spirit of Philadelphia means charting courses for the future in the light of the present. This presupposes escape from the flattened, boundless world of neoliberal dogmatics and recovering the use of five senses that have been brutally blunted by some three decades of policy designed to harness people to the interests of finance. They are the senses of limits, moderation, action, responsibility and solidarity (for further elaboration, see Supiot, 2010).

Lasting peace can be established only if it is based upon social justice: this statement, reiterated in the Declaration of Philadelphia, was first made at the time of the ILO’s post-war establishment in 1919. Yet it is more relevant than ever in today’s world. Indeed, to present the middle and working classes with the bill for the bankruptcy of neoliberal policy will only exacerbate the sense of social injustice that is felt so acutely already across the world of work. The temptation will then be to generalize the approach currently followed in regard to immigration, which consists in organizing global competition among workers, on the one hand, while holding “aliens” responsible for social insecurity, on the

other. Xenophobia has historically served as a convenient safety valve for regimes that have plunged entire populations into insecurity and destitution. The risk of a resurgence of identity-driven extremism has been heightened by the wholesale conversion of a bottomless abyss of private debt into a towering mountain of public debt.

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