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The Dutch Supreme Court hears grievances against motivations of judicial decisions that are based on the ground that formulations in a motivation of a decision are obscure. It is, however, difficult to determine if such an appeal against the decision will be successful. From a pragma-dialectical perspective, the use of obscure or ambiguous language may be considered fallacious if it obstructs the resolution of a dispute. In this contribution I will discuss the way in which the Dutch Supreme Court decides on differences of opinion about the obscurity of the motivation of a legal decision. I will demonstrate how insights provided by argumentation theory may be used to clarify criteria that are used in Dutch legal practice to evaluate complaints about obscure and ambiguous language in motivations.

Keywords: legal argumentation, legal language, fallacy of unclarity

1 Introduction

Judges are expected to convey the justification underlying their decisions as clearly as possible. If a party to the proceedings is of the opinion that the argumentation of a (lower) judge is obscure, it can submit its complaints to the Dutch Supreme Court referring to justification requirements. It is, however, unclear what criteria are decisive when the Supreme Court evaluates justification complaints. When it comes to assessing justification complaints, literature refers to the Supreme Court employing 'considerable margins making it very hard for the lawyer lodging the appeal in cassation, to predict the outcome of the procedure.' The precise nature of defective justification is even called 'one of the best kept secrets of the chambers.'

In non-legal, everyday discussions too, language users may be expected to make an effort to express their argumentation as clearly as possible. Van Eemeren and Grootendorst (1992, 2004) state that parties in a discussion making use of unclear or ambiguous language are guilty of the fallacy of unclearness. By using unclear formulations, they violate one of the rules for critical discussion: the language use rule (2004, pp. 195-196).

This discussion rule, although never explicitly referred to in these terms, seems to play an important role in legal procedures as well. One of the legal parties may, for example, complain about the unclear formulation of the arguments, rendering an adequate reaction impossible.[1]

In my contribution I will discuss the way in which the Dutch Supreme Court decides on differences of opinion about the obscurity of the justification of legal decisions. By analysing (legal) discussions on the formulation of the justification, I will try to find evaluative criteria that reach beyond the specific case at hand. First I will indicate what type of complaints concerning the justification of judicial decisions may be submitted to the (Dutch) Supreme Court. Then I will discuss a number of exemplary cases of complaints concerning the formulation of the justification that have been dismissed or have been upheld. Finally I will discuss the way in which the Supreme Court may 'repair' the formulation that is subject of a complaint and is subsequently dismissed.

2 Requirements regarding clearness

Ambiguity and vagueness can lead to problems in communication. But when should these problems be considered as fallacies? This question is closely connected with the definition of the concept of a fallacy.[2] In the pragma-dialectial argumentation theory a fallacy is defined as a speech act which frustrates efforts to resolve a difference of opinion,

1 Veegens (2005, nr 121).

2 In handbooks on fallacies (e.g., Hamblin, 1970, Woods & Walton, 1982, and Walton, 1995) and in textbooks (e.g., Johnson & Blair, 1994), fallacies are divided into two groups: those dependent on language and those independent of language. When dealing with linguistic fallacies, or fallacies of language and meaning, most authors discuss at least the fallacy of equivocation and the fallacy of amphiboly.

and the term fallacy is thus systematically connected with the rules for critical discussions. By making use of unclear or ambiguous language, parties to a difference of opinion can make the resolution of a dispute difficult or even impossible. In doing so they violate the language use rule, which runs as follows:

> Discussants may not use any formulations that are insufficiently clear or confusingly ambiguous, and they may not deliberately misinterpret the other party's formulations.

It is a misunderstanding to assume that only deliberate violations of the language use rule result in a fallacy. This misunderstanding could be a result of van Eemeren and Grootendorst (1992, pp. 197, 202) stating that the language use rule is broken if unclearness or ambiguity is 'misused' 'to improve one's own position'. [3] However, in *Argumentation* (2002, p. 110) the authors emphasise that parties do not always violate the discussion rules on purpose.

Van Eemeren, Grootendorst and Snoeck Henkemans (1996, 2002) discuss linguistic fallacies in which unclarity may occur from: the structuring of the text, implicitness, indefiniteness, unfamiliarity, and vagueness. They also demonstrate how syntactic ambiguity may be caused by the structure of the sentence and how semantic and referential ambiguity may occur if words have more than one meaning.

Analysing unclarity in legal argumentation as a potential violation of the language use rule presupposes that a legal process can be regarded as a critical discussion. In a pragma-dialectical approach legal procedures are considered as specific, institutionalised forms of argumentative discussions (Feteris, 1999; Plug, 2000). Although several rules in legal procedures differ from the rules for critical discussions, this does not seem to be the case for the requirement of comprehensibility of the justification of legal decisions.

The Dutch constitution, under Section 121, prescribes that all judicial decisions shall contain their underlying grounds. If parties to the proceedings are of the opinion that the justification of a judicial

3 If this would indeed imply intention, there would be an extra difficulty for the party who accuses the other party of a fallacy. The accuser would not only have to make clear that the resolution of a disagreement is frustrated, but also that this was done deliberately. This would obviously render the burden of proof almost impossible.

decision is defective, they can appeal to the Supreme Court for the quashing of the decision. The Supreme Court will then decide whether the grievance against the motivation of the lower Court is sustainable. The Supreme Court distinguishes between three categories of defective justification: incomprehensible motivation, disregard of essential arguments put forward by the parties and manifest errors in establishing the facts.[4]

Among these defective justifications incomprehensible motivation takes a prime position. Within this category five subcategories are distinguished:[5]

1. The requirement of clarity has not been met:
- 'neither head nor tail' can be made from considerations
- ambiguous motivation
- internal inconsistency

2. The conclusion does not follow the judge's argument in any way.

3. The argument allows for only one conclusion and this conclusion is not drawn.

4. It is wrongly assumed that a certain argument excludes a certain conclusion.

5. A train of thought may be incomplete or fail to mention certain relevant facts or may lack logical coherence: 'the argument is incomprehensible without further motivation'.

These subcategories originate in a great number of judicial decisions. The way in which these justification defects have been formulated may vary considerably. It is hard to find a common denominator or to establish to what extent the requirement of clarity differs from other motivation requirements. By taking these five subcategories as a point of reference it is possible, however, to identify the character of the grievance regarding the comprehensibility of the motivation and to establish what precisely the criticism is aimed at.

In the first place the criticism may be aimed at the *correctness* of the contents of the argumentation. If someone claims that the argumentation is 'internally inconsistent', the criticism refers to the

4 HR (Supreme Court), 1 July, 1977, *NJ* 1978, 73.
5 Korthals Altes (1993, pp. 98-103).

correctness of the contents of the argumentation in relation to the contents of other arguments that have been put forward. It is true for both judicial as well for non-judicial argumentation that logical and pragmatical inconsistencies should be avoided.

A second form of criticism may be aimed at the *argumentative relationship* between the arguments and the (sub) standpoint. In cases like these the criticism is not aimed at the contents of the arguments, but rather at the argumentative or logical relationship between the argument(s) and the standpoint. This is the case when someone puts forward that 'the conclusion cannot be drawn from what the judge has said', that 'a certain argument allows for only one conclusion (which then has not been drawn)' or that 'it is wrongly assumed that a certain argument excludes a certain conclusion'.

In the third place the criticism may focus on whether or not the argumentation is *complete* or *sufficient*. If the Supreme Court is of the opinion that 'a certain train of thought is incomplete', that 'the Court fails to mention certain relevant facts', that 'it lacks logical coherence' or that 'the argument is incomprehensible without further motivation', nothing is said about the correctness of the argumentation itself. Since the argumentation is incomplete, it lacks sufficient argumentative strength to justify the standpoint.

Finally it may be the *unclarity* of the verbal presentation of the argumentation that is criticized. If it is said of the considerations that 'neither head nor tail' can be made from them or that 'the motivation is ambiguous', it is impossible to ascertain the correctness of the contents of the argumentation since it is not clear what the argumentation actually boils down to.

When a party to the proceedings submits to the Supreme Court a complaint about an incomprehensible justification, he may claim that, in pragma-dialectical terms, the lower judge violated the language use rule. Within the scope of this particular rule, only grievances as to unclarity of the formulation of the motivation of a lower judge are relevant. On the basis of a number of examples I will demonstrate the position of the Supreme Court in cases like these.[6]

6 Some of the examples that are discussed in this contribution were presented at the ISSA conference in 2002.

3 Successful complaints about unclearness

The first example concerns a dispute between Mr Finkenburgh, who manufactures safety belts and children's seats for cars, and Mr van Mansum, who designs these belts and seats.[7] The designer claims to have sustained damage because of non-performance on the part of the manufacturer since the latter failed to ensure that his products met the usual safety and quality standards. The designer requests rescission of their contract as well as damages. Following the Court's dismissal of the request, the designer decides to appeal. The Court of Appeal rules in the plaintiff's favour and sets aside the judgement of the Court. The contract is rescinded and the manufacturer is ordered to pay damages. The argumentation of the Court of Appeal runs as follows:

> *In view of the contents of the documents submitted by both parties, considered in mutual connection and conjunction* (italics by HJP), it has been proven conclusively that Finkenburgh has been in breach of contract in respect of van Mansum.
>
> Finkenburgh has not produced any evidence on the matter.
>
> Consequently it has been established that Finkenburgh has been in breach of contract in respect of van Mansum.

The manufacturer, Finkenburgh, appeals before the Supreme Court, claiming the Court of Appeal's justification of its decision is incomprehensible. He is of the opinion that the Court does not sufficiently provide an insight into which documents of the extensive case file it refers. Moreover, the Court, he says, gives insufficient insight into its line of thought because it does not become clear why the contents of 'the documents submitted by both parties' leads to judicial finding of the facts. The documents that have been submitted do not only support van Mansum's standpoint but contain elements that, according to Finkenburgh, support his standpoint as well:

> the Court of Appeal was not in a position to consider van Mansum's claims proven, solely referring to the documents that had been submitted, adding 'considered in mutual connection

7 HR (Supreme Court), 16 October 1998, *NJ* 1999, 3.

> and conjunction'. The Court should, however, have indicated precisely which grounds, originating in these documents, were found by the Court to have decisive evidential value.

The Supreme Court agrees with Finkenburgh and, in its judgement of this justification complaint, refers to the fundamental principle of proper judicial procedure:

> that every judicial decision should at least be justified in such a way that sufficient insight is given into the underlying line of thought to render the decision verifiable and acceptable for both parties to the proceedings and third parties alike. In this particular case the Court did not meet this justification requirement. Not even in view of the debate between parties does the Court's judgement make clear on the grounds of which of the many documents it was found proven that Finkenburgh has been in breach of contract in respect of van Mansum.

The Supreme Court is, in pragma-dialectical terms, of the opinion that the Court of Appeal has violated the language use rule and is guilty of the fallacy of unclearness. The unclearness, caused by referential indefiniteness, frustrates the effort to arrive at a solution of the dispute, or may at least make it more difficult. Since it is unclear which arguments support the decision, it is impossible to ascertain whether the decision of the judge is correct. The consequence is that parties cannot contest the argumentation and that the Supreme Court is prevented to verify whether the decision is the result of a proper application of the law.

In the following judgement a similar case of unclear reference was considered.[8] The Supreme Court is very plain in its rejection of this way of justifying judicial decisions:

> Even in view of the debate between parties, the Court's reference to a procedural document – without specifically indicating which passages therein are of relevance – which in its turn refers to yet another procedural document in which reference is made to statements made in an official report,

8 HR (Supreme Court) 29 June 2001, *NJ* 2001, 494.

> provides insufficient insight into the line of thought resulting in the decision of the Court.

In his conclusion of the same judgement the Advocate General provides a possible explanation for this type of justification, but goes on to point out its disadvantages.

> We may assume that it usually originates in a desire to work efficiently. In the dispensation of justice too, however, penny-wise is usually pound-foolish, in this case because it necessitates a detour by way of the Supreme Court to the same or a different judge. Is this efficiency?

In both judgements the Supreme Court uses the expression 'even in view of the debate between parties'. In this way the Supreme Court, in reference to the fundamental principle of proper judicial procedure, seems to indicate that the considerations underlying the decision should, in principle, find their way into the judgement. If, however, considerations are not made explicit in the motivation, this does not automatically lead to a breach of the language use rule. In such a case the arguments that have been exchanged by the parties to the proceedings in other stages of the legal procedure could still be taken into consideration. In doing so, the Supreme Court seems to adopt the same position as the pragma-dialectical theory: all pro- and contra-arguments that are relevant to the evaluation are taken into account.

In the examples presented so far it is virtually impossible to establish by which arguments the decision is actually supported. As a result of the great number of arguments which do, in principle, qualify and all possible combinations in which these arguments could operate, the number of possible interpretations is almost unlimited. In the following example about a grievance as to the obscurity of the justification the number of interpretative possibilities is much more limited.

The judgement of the Supreme Court of 17 May 1974 (*NJ* 1975, 307) deals with a request to review the amount of alimony a man has to pay his ex-wife. The ex-husband is of the opinion that the amount stipulated by the Court is too high. The Court of Appeal denies the man's request on the following ground:

> (…) that the ex-husband's arguments come down to his claim that the (…) total of the woman's living expenses was determined on too high a level, because the judgement was based on incorrect or incomplete data;
> that the ex-husband, however, failed to show the plausibility of *this* (italics by HJP).

The ex-husband lodges an appeal in cassation and, in his criticism on the Court's decision, brings forward that:

> [it is] not clear what it is the Court is referring to using the word 'this' when it considers 'that the ex-husband failed to show the plausibility of this'. It is not clear whether the petitioner, in the Court's line of thought, has (only) failed to show the plausibility of his view that the (earlier) decision was based on incorrect and incomplete data or failed to show the plausibility of his standpoint that the total (of his ex-wife's) living expenses was determined on too high a level (as well).

In its judgement of this justification complaint the Supreme Court states:

> that the justification of the Court does not meet the requirements as laid down by the law, as it is not clear what the word 'this' refers to; that the Court fails to make clear whether, in its opinion, no other data have come to the fore than those already known or that the data that have come to the fore have not been properly established, or that the data provided do not convince the Court that a revision of its original decision is called for.

The Supreme Court indicates that the demonstrative pronoun 'this' can refer to three different statements. First of all, it is possible that the Court could have meant that there are no new data. Secondly, it could have meant that there are new data but that these have not been established. In the third place the Court could have meant that these new data are available but that they do not lead to a revision of the original decision.

Unlike the first cases of referential indefiniteness, in this case no less than three possible interpretations are suggested as to the Court's intentions. The Supreme Court, nonetheless, decides that it is not possible to choose between these three possible interpretations. The central problem seems to be that the Supreme Court cannot ascertain if the Court of Appeal has taken the new data into account. If it failed to do so, the ex-husband could have contested the decision by arguing that the Court of Appeal disregarded essential arguments.

Unclearness in judicial decisions caused by referential indefiniteness seems to be a recurring phenomenon. In 2004 the Dutch judiciary started a large-scale project, *PROMIS*, as a response to criticism by both laymen and professionals on the transparency of criminal sentences.[9] The aim of the project was to come to a better and clearer formulation of judicial decisions. However, from the evaluation of the results of the project by van den Hoven and Plug (2008), it appears that even in the criminal sentences that were explicitly focussed on improving clarity in the formulation of the argumentation, referential indefiniteness occurs.

Several American authors on legal language, such as Mellikoff (1990), Solan (1993) and Tiersma (1999), offer explanations for this phenomenon. They found that one of the devices lawyers and judges have developed to make legal language more precise, is to use reference words like `such', `said' or `aforesaid'. The function of these words supposedly is to limit the class of possible referents to a noun phrase.[10] The first point of criticism of the authors is that words like `aforesaid' and `said' used in this way are archaic. Their second, more important, point of criticism is that they are useless in reducing ambiguity and may even cause unclarity. Mellinkoff (1990, pp. 306, 318) says:

> If there is only one possible reference for *aforesaid*, it is usually unnecessary – as when an answer refers to the only action there is, "the action aforesaid." If *aforesaid* can by any chance refer

9 Project Motiveringsverbetering Strafvonnissen (PROMIS).

10 Tiersma (1999, p. 89) provides the following example: 'Lessee promises to pay a cleaning deposit of 200$ and a damage deposit (...). *Said* deposit shall accrue interest at a rate of five percent per annum.' Tiersma observes that 'said deposit' can refer to the first mentioned deposit, the second, or perhaps even both.

> to more than one thing, or to nothing, its long history of uncertain reference marks it as dangerous. In either case, no aid to precision.

4 Unsuccessful complaints about unclearness

Apparently unclearness caused by referential indefiniteness or referential ambiguity may result in successful justification complaints. Sometimes, though, complaints about the obscurity of the justification are not recognised, as the following cases demonstrate.

In the first case there is a difference of opinion between van der Vlies, the purchaser of a stretch of land, and Spanish Water Resort, the original owner of the plot. One of the questions that need to be answered by the Court is whether or not there is an actual agreement between the two parties.[11] In order to be able to address this question, the Court assesses the six arguments (a through f) with which van der Vlies justifies his claim. The Court of Appeal concludes that there has never been an agreement between the parties. In his appeal to the Supreme Court van der Vlies argues that:

> [...] in answering the central question the Court of Appeal has, unjustly, limited itself to the assessment of the separate arguments, thereby ignoring their mutual correlation and connection, or so it seems judging by the Court's decision. Moreover, it is, in the absence of any justification whatsoever, unclear why arguments a, c and e do not play any part at all in the relationship between Spanish Water Resort and van der Vlies: even if one or more of these arguments did not play any part when judged on their own merits, it is unclear whether they may play such a part when considered in mutual correlation or connection.

In other words, van der Vlies is of the opinion that the Court of Appeal, in so far it interpreted the arguments as coordinate argumentation, failed to indicate this clearly in its judgement which, in the end,

11 On this case, HR (Supreme Court) 5 June 1992, NJ, 1992, 539, see also Plug (1999)

resulted in a negative assessment of the dispute. This complaint was rejected as follows:

> It has not become clear from the decision that the Court failed to judge the arguments of van der Vlies in conjunction. Apart from that, van der Vlies did not indicate in what way the total of his arguments exceeds the sum of the parts.

This rejection comes down to the opinion that van der Vlies is committing the fallacy of the straw man[12], or that, if he is not, he fails to present convincing proof that the solution of the dispute has been negatively influenced by unclearness on the part of the Court.

In the second case too, the obscurity in the phrasing was not found to have influenced the assessment of the dispute.[13] This dispute between a hospital and the works council of this hospital is about a difference of opinion on whether the travelling allowance scheme should be considered as a set of regulations or merely as information for those it concerns. The Court is of the opinion that the hospital intended this scheme to serve as information for the people concerned (about the purport of the results of collective bargaining). Two arguments are presented in support of this ruling. The interrelationship between these arguments, however, is obscure. It is not clear whether these arguments were intended to function as multiple or in as coordinative argumentation. The Advocate General summarises the problem thus:

> The Court supports its judgement on two grounds, introduced in the challenged judgement by the words 'on the one hand' and 'on the other hand'. These introductory words do not contribute to the lucidity of the ruling since they suggest that the successive elements may lead to different conclusions, whereas, on the contrary, these elements can only lead to one and the same conclusion.

12 A party who misrepresents the opponent's standpoint (or arguments) or attributes a fictitious standpoint to him or her, commits the fallacy of the *straw man* (See van Eemeren, Grootendorst and Snoeck Henkemans, 2002, p. 117). In this example, van der Vlies (would have) misrepresented the interpretation of the relation between the arguments as being multiple (independent arguments).

13 HR (Supreme Court) 22 May 1992, *NJ* 1992, 607.

> Also in view of the fact that both grounds operate completely separately, I assume that the Court did not intend to communicate that its judgement was founded on both grounds in conjunction but, more likely, that the Court intended to formulate two separate grounds which, each on its own, would be able to support the judgement. Both parties, apparently, were under the same impression. This becomes clear from the first ground of appeal in cassation (…) ('referring to on the one hand') and part 3 (referring to 'on the other hand'). Both will have to be valid in order to make cassation feasible.

One could imagine a different ruling if parties in cassation had not understood that the argumentation could be interpreted as multiple and would have limited their challenge to only one of the grounds. In this case the phrasing did not hinder the solution of the difference of opinion, since the parties anticipated the ambiguity. Obscurity, in other words, did not result in a violation of the language use rule.

5 The apparent intention

Veegens, Korthals Altes en Groen (2005, nr 167) observe that when assessing justification complaints, the Supreme Court presumes the correctness of the decision and that 'minor problems may be ironed out, considering that the judge had 'apparently' meant to rule in the vein of the Supreme Court.' Research by Bruinsma (1988, p. 18) portrays a member of the Supreme Court elucidating this approach as follows: 'when a decision is correct in itself, but its defective justification is brought to attention by means of a clever ground for appeal, it is the Supreme Court that 'dresses' this decision with the phrase that 'the Court of Appeal apparently had the intention of wanting to put forward that ...'.There is absolutely no point in quashing a perfectly good decision.'

More or less standard phrases such as 'The Court of Appeal apparently judged that …' indicate that the Supreme Court is 'ironing out minor problems'. A clear example of this approach is a case in which an appellant in cassation put forward that the Court of Appeal

had presented an incomprehensible clarification of its position. The Supreme Court, in its turn, puts forward the following:

> *The court has apparently judged that* (italics by HJP) Mr. Bakker assumed, and under the circumstances was correct in assuming, that Hartman employing Cuiper as construction supervisor entailed that Hartman had indeed been granted sufficient authority to conclude that arrangement (…)

Since the Supreme Court clarifies the intentions of the Court of Appeal, it appears that the Supreme Court employs a usage declarative, a speech act that explains or specifies unclear or ambiguous language use, to present an optimal interpretation of the considerations of the Court of Appeal.[14] This interpretation strategy has, however, met with some criticism. Barendrecht (1998, p. 113), for example, brought forward the following:

> Instead of completing defective justifications by means of veiled phrases such as 'the court has apparently judged that …' one could choose to state that the justification is indeed defective but that this nonetheless offers insufficient ground for cassation since the Supreme Court can complement the justification based on the records and in a way that does meet the required standards.

Phrases such as 'the judge has apparently argued that..', according to the author, should be considered as an indication of defective justification which nonetheless should not result in cassation since the Supreme Court could complement the defective justification in question. He is of the opinion that the Supreme Court should be entirely open as to why the lower judge's decision is maintained and that these considerations should not be hidden in the account of the lower judge's decision. These objections, in pragma-dialectical terms, boil down to the Supreme Court not just limiting itself to employing a usage declarative, clarifying the judge's apparent intentions. Employing a

14 Usage declaratives, such as specifications, amplifications and explanations are a sub-category of declaratives. The purpose of usage declaratives in a critical discussion is to make clear how a particular speech act is to be interpreted (see van Eemeren and Grootendorst 2004, p. 66).

usage declarative is, after all, unacceptable precisely in the case of a difference of opinion as to the interpretation of the judge's considerations. In view of the justification obligation, the Supreme Court may be expected to justify the interpretation of a defective justification on the grounds of arguments that are made explicit.

6 Conclusion

In judicial contexts the evaluation of justification complaints relies heavily on the circumstances of the case. This is also true of justification complaints that are motivated by the obscurity of the motivation. In my analyses of some decisions on complaints about unclear motivations from a pragma-dialectical perspective I set out to find criteria to evaluate these complaints. This perspective may provide an explanation as to why complaints about unclear, vague or ambiguous formulations are not always allowed.

The party that complains about obscurity of the motivation has the obligation to provide evidence in support of his standpoint. This burden of proof means that it has to be specified what it was exactly that was unclear and what caused this unclarity. In the case of referential indefiniteness, for example, it is specified how the use of certain referential words makes it impossible to decide which arguments justify the legal decision.

Moreover, the party laying down the justification complaint has the obligation to show that the unclarity, ambiguity or vagueness in the argumentation had its repercussions on the resolution of the dispute. The relationship between the arguments may be vague but that vagueness need not be of any influence on the position of the party laying down the complaint. Ambiguity too need not influence the resolution of a dispute in a negative way if the plaintiff anticipated both meanings. This means that complaints about the unclarity of the formulation of argumentation in a legal context may, just as accusations of linguistic fallacies in a non-legal context, only be successful if it has become clear what exactly makes the argumentation obscure and, moreover, how this frustrated the resolution of the dispute.

When unclear or ambiguous formulations do not frustrate the resolution of a difference of opinion, it can be said that, in pragma-

dialectical terms, the language use rule has not been violated. It is however undesirable that the Supreme Court, in these cases, limits itself by indicating 'what was apparently intended by the (lower) judge'. The Supreme Court should rather justify why the unclear or ambiguous formulation is of no influence on the settlement of the dispute.

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