

Western Balkans and the Rule of Law: How to solve a catch-22?

By Jovana Marović



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"REFORM FATIGUE"

Western Balkan states are in different stages of the EU integration process, and each suffers from a myriad of ills. Implementing reforms is at a dissatisfying level, and their influence on democracy extremely limited.¹ All countries are semi-consolidated democracies and afflicted by serious democratic setbacks and illiberal patterns.² Although all states are facing specific problems, the worrisome state of the rule of law presents a common obstacle towards faster integration. Weak and heavily politicised institutions, lack of accountability and transparency at all levels, non-existence of widespread political support for serious cuts are just some of the issues which affect the dissatisfactory state of the rule of law.

A widely represented concept is that in an undeveloped democracy the ruling elites are using state apparatus to ensure achieving self-interest and to attain the support of voters. Close entwinement of party and administration resulting in governance through clientelism which not only violates the merit-based system but creates space for corruption at all levels,³ is a practice which has found fertile ground in Western Balkan states⁴ which have never experienced the high standards of democracy. As a result, the erosion of public trust in institutions is constant.⁵

¹ Nikola Burazer, et al, "Democracy in Progress Shadow Report on Political Copenhagen criteria in Western Balkans EU Candidate States", Centre for Contemporary Politics, Belgrade, December 2017, http://www.balkanfund.org/publib/thinkandlink/Democracy-in-Progress.pdf

 $^{^2}$ "Confronting Illiberalism, Nations in transit 2018", Freedom House 2018, $\underline{\text{https://freedomhouse.org/report/nations-transit/nations-transit-2018}}$

³ Citizens of the region see corruption as the third biggest reason to worry about, after unemployment and the alarming economic situation, Public Opinion Survey, Balkan Barometer 2017, Regional Cooperation Council, Sarajevo 2017, https://www.rcc.int/seeds/files/RCC_BalkanBarometer_PublicOpinion_2017.pdf

⁴ A credible enlargement perspective for and enhanced EU engagement with the Western Balkans, European Commission, Strasbourg, February 2018, https://ec.europa.eu/commission/sites/beta-political/files/communication-credible-enlargement-perspective-western-balkans_en.pdf

⁵ Balkan Barometer, for example, indicates that 67% of the region's citizens have no faith in the judiciary.

While all Western Balkan states are implementing certain activities to strengthen the rule of law, on the basis of the EU conditionality policy, the effects are extremely limited. A poor track record in reforms is caused by the modest efficiency of EU's tools for monitoring, measuring and reporting on the activities taken by the countries. On the other hand, ruling elites in the Western Balkans are reluctant to reforms, unwilling to reject illegal practices, which are the basis of their power.

The Berlin process, as an intergovernmental initiative bringing a new perspective and impetus to the enlargement policy, which enjoys the support of the region, EU member states and the European Commission, is another important mechanism for influencing the rule of law in the Western Balkans. As the initial four-year period of this process is coming to an end in July 2018, it is the right time to consider possible ways for its upgrading. Therefore, this paper aims to point out the necessity of redefining this initiative, as a complementary to the European integration process, and the inclusion of the rule of law as one of its goals, towards bolstering EU's efforts in this area.

UPS & DOWNS IN EU'S ROLE IN STRENGTHENING RULE OF LAW IN THE WESTERN BALKANS

The EU is balancing between the enlargement fatigue of many member states and the desire to maintain the process alive, thus trying to prevent the further downfall of democratic standards in Western Balkan states. The enlargement process goes through constant re-examination at supranational and member states level, affecting the commitment to reforms in the Western Balkans. Stalling of the enlargement process affects the support for reforms. Even though the European Commission (EC) has issued the strategy for Western Balkans' credible European perspective in February, apart from identifying some of the burning issues, this document offered no clear, developed mechanisms for their solution or a firmer dedication towards securing a framework for stronger democratisation of the Western Balkans. The same rule of law and good governance instruments were repeated in the Sofia Western Balkans-EU summit declaration a few months later from case-based peer-review missions to trial monitoring in the field of serious corruption and organized crime ⁶. However, there is still no significant progress in the concretization of these instruments.

The Strategy for a credible enlargement perspective for and enhanced EU engagement with the Western Balkans is different as it specified, for the first time, albeit indicative, dates for the accession of countries currently negotiating membership (Montenegro and Serbia). However, just a few months later, the (false) dilemma of strengthening the Union vs. acceptance of new members has again emerged.⁷ Taking into account previous

⁶ See: Appendix 1, Table 4, Sofia Declaration of the EU-Western Balkans summit, 17 May 2018, http://www.consilium.europa.eu/en/press/press-releases/2018/05/17/sofia-declaration-of-the-eu-western-balkans-summit/

⁷ Andrew Gray "Macron pours cold water on Balkan EU membership hopes", Politico, 17 May 2018, https://www.politico.eu/article/emmanuel-macron-pours-cold-water-balkans-eu-membership-enlargement/

(unsuccessful) attempts at reforming the Union, the indicative framework and dates for the WB states' transition phases have practically ceased to apply before they were even established. Still, most of EU's concern for the Western Balkans is linked with stability which is why a credible enlargement strategy has been published: to keep non-EU actors, at least shortly, at a decent distance. However, as noted by Freedom House, "the desire for a superficial "stability" in the Balkans must not overwhelm the need to use the EU's considerable leverage to improve the rule of law."

Stalemate ups and downs in EU's policy and commitment towards the WB do not encourage rule of law. Vague, imprecise, bureaucratized reports that do not address clearly undemocratic practices and abuses even less. And most importantly, by rewarding the so-called pro-European elites whose commitment is questionable and power almost unlimited, the EU even creates room for further decline of the rule of law. However, Western Balkan states most often do present a simulation of reforms through blurred statistics that do not reflect the real situation on the ground.

The EC's new approach, adopted at the beginning of Montenegro's negotiations in 2012, implies the opening of chapters related to the rule of law⁹ from the very beginning and the results within them are the only assurance for the completion of the entire process. However, the establishment of the early benchmarking system regarding the rule of law does not yield results, especially considering that Montenegro has been negotiating for six years now and sharing common problems with the region.¹⁰ The up-to-date success

 $^{^8}$ "Confronting Illiberalism, Nations in transit 2018", Freedom House 2018, $\underline{\text{https://freedomhouse.org/report/nations-transit/nations-transit-2018}}$

⁹ Chapter 23 (Judiciary and Fundamental Rights) and 24 (Justice, Home and Security)

¹⁰ A credible enlargement perspective for and enhanced EU engagement with the Western Balkans, European Commission, Strasbourg, February 2018, https://ec.europa.eu/commission/sites/beta-political/files/communication-credible-enlargement-perspective-western-balkans_en.pdf

of the EU to overcome the weaknesses in establishing rule of law in the WB is bounded by legislative and procedural developments, thus underestimating that the rule of law reform is complicated and requires a political change in mind-sets. Improving regulations does not mean its non-selective application, its increased quality or shifts in practice.¹¹

WHY SHOULD RULE OF LAW BE PLACED AT THE HEART OF THE (IMPROVED) BERLIN PROCESS?

The most evident motive for launching a German-led initiative entitled the Berlin process in 2014 was the need of several member states¹² to display EU's continued commitment and support for the Western Balkans right after EC's President Jean-Claude Juncker announced a five-year deadlock in enlargement. Political at its core, the Berlin process is designed and perceived as complementary to EU integration reforms with the aim of providing a framework for enhancing regional cooperation that would lead to resolution of bilateral disputes, achieve reconciliation, enhance regional cooperation and lay the foundations for sustainable growth. Each of the five summits¹³ within the process was incorporated within the general framework and these four goals defined in Berlin, but the topics ranged from summit to summit in accordance with the agenda prioritized by the host country.¹⁴ Rule of law has not found its place in the goals¹⁵ while the topic was occasionally discussed at summits.

Jovana Marović "EU's strategy towards the Western Balkans: The Stairway to Nowhere?", Center for European Neighbourhood Studies (CENS), Central European University, 2017, https://publications.ceu.edu/node/45782

¹² Germany, Austria, France, Italy, Slovenia and Croatia – participating states in the Berlin process. In addition, six Western Balkan states (Albania, Bosnia and Herzegovina, Kosovo, Macedonia, Montenegro, Serbia) and representatives of the European Commission participate in the process.

¹³ With the London event in July 2018 the initially envisaged format of five consecutive summits is coming to an end.

¹⁴ Germany, Austria, France, Italy and the United Kingdom

¹⁵ The goals of the Process were outlined in the Final Declaration by the German Chair in 2014, See: https://www.bundesregierung.de/Content/EN/Pressemitteilungen/BPA/2014/2014-08-28-balkan.html

Besides, although rule of law has found its place in all the closing documents of the summits, only the final declaration from Trieste and the accompanying declaration against corruption provide concrete measures and obligations for Western Balkan states.16 The same "interest" in the rule of law also appeared at high-level regional meetings between the summits. Only three meetings covered this topic. Such approach corresponds to the commitment of Western Balkan leaders to the Berlin process since the connectivity agenda is of utmost importance and interest for them due to the prolonged economic crises and high unemployment in the region.

Civil society from the region insisted that this topic should be an integral part of the process by offering sustainable proposals for enhancing rule of law.¹⁷ Part of the recommendations found its place in the messages from Trieste. However, as this topic did not find itself in the priorities of the following summit in London, there is not going to be continuity in the efforts to fulfil them or in the mechanism for their follow-up showing that the Berlin process has to be improved in terms of visibility, effectiveness, and efficiency.¹⁸

There are at least two reasons why rule of law is not one of the Berlin process' goals. When the enlargement fatigue threatened to endanger its image, Germany, some member states and the European Commission have, through a new initiative, wanted to preserve the EU's transformative power and further support reforms in the Western Balkans. In order to be able to do so, the goals and topics within the process had to be supported by the leaders of the participating and Western Balkan states, and rule of law was not one of those topics.

¹⁶ See: Appendix 1, Table 3

 $^{^{17}}$ See recommendations from the Civil Society Forum of the Western Balkans Summit Series in Skopje and Tirana, Appendix 1, Table 3

¹⁷ Zoran Nechev "Towards the more visible, efficient and effective: the Berlin Process 2.0", Institute for Democracy "Societas Civilis", Skopje, November 2017, http://idscs.org.mk/en/2017/12/01/towards-visible-efficient-effective-berlin-process-2-0/

Secondly, although rule of law is one of the burning issues across the region, improvement requires a specific approach for each country, i.e. on an individual level, which is not the case for the remaining four objectives of the Berlin process that should be addressed within the regional approach.

However, the logic of the countries, which initiated the Berlin Process, that economic reforms would lead to a strengthening of the rule of law has so far showcased as being wrong. This approach has neglected the fact that rule of law is key for the reform of all areas. Legal certainty and unbiased implementation of laws actually mean more favourable business climate, attracting more direct investments, efficient and transparent usage of funds. Since the Berlin Process "is not a substitute, not a competitor, but on the contrary a facilitator of our common work," it should address in the first place the reforms that are preconditions for all other. Dearing that in mind, rule of law shouldn't be put under the rug, instead, it should be listed as one of the Berlin Process' goals, regardless of the countries that will preside and be summit hosts in the future.

Rule of law is complex and to reinforce it means joint efforts and combined work of regional governments, parliaments, CSOs, business sectors, regional and international organisations, the EU and its member states. The Berlin Process is an already established mechanism that mobilises and consults a majority of the aforementioned actors; therefore it should be used, expanded and additionally improved for the purpose of initiating and addressing difficult issues, which the rule of law definitely is. However, the participation of

¹⁹ Mogherini: Berlin Process is not a substitute for the EU enlargement", European Western Balkans, 12 July 2017, https://europeanwesternbalkans.com/2017/07/12/ewb-interview-mogherini-berlin-process-not-substitute-eu-enlargement/

²⁰ Jovana Marović "Why should rule of law be placed at the heart of the (improved) Berlin Process," European Western Balkans", 15 February 2018, http://wb-csf.eu/op-eds/rule-law-placed-heart-improved-berlin-process/

other actors, including delegations of national parliaments, should be an integral part of the summits, not the side-events, as it has been so far.

The rule of law backslidings across the European Union was one of the main causes of the European economic and financial crisis,²¹ the consequences and challenges of which we are still struggling with. Frequent violations of the key EU values by its member states have often been understood as the Union's inability to effectively address rule of law challenges in its own backyard (e.g. Poland or Hungary). This again jeopardizes its transformative power, the "European project" in general and its ability to promote reforms consolidating the rule of law in the Western Balkans. Hence, the EU has to provide additional mechanisms in the pre-accession phase²² that would prepare the states for membership and prevent backslidings after joining the community.

Finally, even though the Sofia EU-Western Balkans Summit was organized this year in May with a clear prospect of their further up-holding,²³ a more practical and developed framework of the Berlin Process, as a political event at a high level, should be also used further as an important commitment and monitoring mechanism. Bearing in mind that the EU's approach so far had little influence on the rule of law, it is necessary to use the Berlin Process' intergovernmental framework for focusing efforts and responsibility.

²¹ Viviane Reding "The EU and the Rule of Law – What next?", Centre for European Policy Studies, Brussels, 4 September 2013, http://europa.eu/rapid/press-release_SPEECH-13-677_en.htm

²² But also post-accession control mechanisms.

²³ The first Western Balkans summit after fifteen years after the one in Thessaloniki in 2003

GUIDELINES FOR STRENGTHENING THE RULE OF LAW IN THE WESTERN BALKANS

Berlin Process & Rule of Law

- Rule of law should be one of the Berlin process' goals after its primary four-year mandate which ends with the London summit in July 2018;
- The Berlin Process Rule of Law Task Force should be established composed of representatives of the WB governments, civil society experts, representatives of the EU member states and the European Commission. Responsible for the coordination of the Berlin Process Rule of Law Task Force's work should be the country holding the presidency of the summit. The Berlin Process Rule of Law Task Force should develop specific roadmaps for all the Western Balkan states based on the annual benchmarks/priorities for the rule of law established by the European Commission, as well as a template by which the WB governments will report on the progress made in implementing reforms in areas related to the rule of law from summit to summit;
- Western Balkan states should be represented at the summits by delegations of their
 national parliaments respectively (with an equal distribution of ruling party and
 opposition MPs); Given that parliaments play an important role in overseeing the
 executive power, which is the ground for the rule of law, this would further affirm the
 model and have an impact on its underpinning;

- Improvements made in strengthening the rule of law should be discussed on joint
 meetings of interested parties at the summits. Between the summits, semi-annual
 meetings should be organized which the host country would also design.
- Participation of the civil society, national parliaments, business sector, etc., should be an integral part of the summits and not the side-events.

European Commission / European Union, following extensive consultations with all interested parties at national level, should:

 Determine a list of key, specific and concrete benchmarks/priorities annually for Western Balkan state; EC's previously introduced practice of highlighting priorities for certain chapters (including for the chapters 23 and 24 on the rule of law) in the country reports hasn't brought any progress within these areas. For this reason, benchmarks/ priorities need to be more concrete and rounded by the values to be achieved annually;

How should EU's rule of law instruments look like in practice: Example of expert missions

- ► Established at a high level;
- Composed of well-informed members on reforms and political systems in WB states, including the engagement of local non-partisan and independent experts;
- Specific based by the areas they monitor (conflict of interest, independence of the judiciary, the role of the parliament in the fight against corruption etc.) i.e. the key benchmarks/priorities established for Western Balkan states on an annual level.
- Reports of all individual missions have to be publicly and timely available to all interested parties;
- Key findings and recommendations should be incorporated in one general document which would represent a basis for strengthening rule of law in the countries;
- Findings of expert missions should influence the European Commission's conditioning
 policy at an annual level (indicator: criteria and priorities to be concrete and regularly
 improved annually);
- Western Balkan states should improve and update their action plans for chapters 23 and 24 annually, in accordance with the expert missions' reports, annual reports of the European Commission and special reports on the state of affairs in chapters 23 and 24;

²⁴ Specified Annually

Reports, which are delivered by states to the European Commission on the
implementation of action plans for chapters 23 and 24, should be simpler, more
concrete and more "measurable".²⁴ The reporting template developed under the Berlin
Process should serve as a model.

Civil society and the rule of law: an additional mechanism for monitoring reforms and progress in implementing reforms

• Establishing a regional portal for mapping cases of corruption at a high level (based on criminal charges, indictments, media reports etc.).

Table 1: Sample template for the WB states for reporting to the European Commission and in the framework of the Berlin Process

Priority & Core Activities	Performance Measure (Numerically Specified on Annual Basis)	Performance Target	Problems in Fulfilling Core Activity (Why the performance target was not reached?)	Source of information (With the goal to secure a better quality of reporting in the annual reports of institutions)
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 Table 2: (Possible) framework for reporting on the rule of law within the Berlin Process

Key benchmarks/ priorities within the framework of Chapters 23 and 24 for a one-year period (including the definition of indicators for each activity)	The level of fulfilment of key benchmarks/ priorities based on indicators (filled by governments of the Western Balkan states)	The level of fulfilment of key benchmarks/ priorities by indicators (filled by expert missions) The outlook of key achievements and/or reasons why the rule of law isn't functioning	The contribution of the parliament in strengthening the rule of law and fight against corruption in relation to the key obligations (activities have to be directly linked with the benchmarks/ priorities; for example, recommendations directed at prosecutor's offices after consideration of the annual report, hearings on corruption cases etc.) ²⁵	the key benchmarks/ priorities (the result of widespread consultations of the civil society)
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²⁵ Mandate for reporting to be given to a standing committee responsible for the fight against corruption.

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APPENDIX

Table 3: Rule of Law within the Berlin Process

Berlin Western			
Balkans			
Summit,			
28 August 2014			

"The German Government expressly underlines its support for the prospect of European integration for the countries of the Western Balkans. All of the countries of the Western Balkans will have an opportunity to join the European Union if they meet the conditions for accession. Germany is aware of its responsibility for a peaceful, stable and democratic future based on the rule of law, and will continue to support the region on its path to this future."—

Final Declaration by the Chair of the Conference on the Western Balkans

Vienna Western Balkans Summit, 27 August 2015

"Acknowledging the progress made, more efforts are needed to accelerate domestic reform processes, notably in the areas of rule of law, economic governance and public administration reform, as well as in the fight against corruption and against organized crime, thereby increasing stability and prosperity in the region. 9. With regard to the situation in Macedonia, the participants welcomed the agreements reached under the auspices of Commissioner Hahn. Now it is paramount that all sides strive to put the national interest ahead of party and personal ambitions in order to fully implement the agreements. Shortcomings in the areas of rule of law and media, as identified in the independent experts' report, must be addressed without delay. In the case of Bosnia and Herzegovina the participants welcomed the new EU approach, which allowed for the entry into force of the Stabilization and Association Agreement, and called for the swift implementation of the reform agenda." —

Final Declaration by the Chair of the Vienna Western Balkans Summit

Paris Western Balkans Summit, 4 July 2016

"More than ever, the rule of law lies at the heart of the enlargement process, including through judicial reforms, and by tackling organized crime and corruption, as well as ensuring full respect of fundamental rights." –

Final Declaration by the Chair of the Paris Western Balkans Summit

Civil Society Forum Skopje, 24-26 November 2016

"Where do we want to be?

In an ideal scenario CSOs would have the opportunity to work independently to build a deliberative democracy in which educated citizens reattach themselves to the democratic process. Democracy needs to be re-defined in such a way that the rule of law becomes its basic principle. It should be more about stable norms than contingent and arbitrary political decisions. The institutions of liberal democracy need to be strengthened in a collective enterprise of state and non-state actors. Human rights need to be a tenet. Progressive legislation needs to be thoroughly implemented, not just adopted as part of ticking-the-box administrative exercises." –

Civil Society Forum of the Western Balkans Summit Series' Recommendations

"EU should intensify communication with CSOs within the new reporting cycle and prior to preparation of the country reports and improve two-way communication and the simulation of reforms on the ground should be highlighted in the EC reports.

Civil Society should have more influence over content of the EC reports; better benchmarking system and increased participation in the monitoring and evaluation of the rule law.

Civil Society Forum in Tirana, 26-28 April 2017

Governments should present required information using accurate, reliable and accessible data. This will lead towards greater citizens' participation and transparency of the process;

An alternative regional benchmarking system on specific issues should be developed and conducted by the CSO in the WB6 including tracking of the specific corruption cases at the regional level; Upon this template countries should report to the next summit;

Regional cooperation on data exchange in specific segments of anticorruption such as assets disclosure and conflict of interest should be strengthened. Governments should adopt the regional instrument on data exchange, which will be prepared by the Regional Anticorruption Initiative (RAI) with the support of the ANAC and civil society."

Civil Society Forum of the Western Balkans Summit Series' Recommendations

Rule of Law – one of the priority topics Joint Declaration Against Corruption adopted

"The Summit recalled the need to provide appropriate responses to global challenges and confirmed the importance of strengthening reforms on the rule of law, fundamental rights, economic development and competitiveness in order to deliver results to citizens.

Trieste Western Balkans Summit, 12 July 2017

Improving governance and the rule of law is an essential requirement for EU accession and for building a sound economic fabric. Countries respectful of the rule of law can lessen the negative effects of corruption, avoiding that bad governance, poor management of public money, and less competitive markets undermine the trust of citizens in democratic institutions and processes. Corruption affects all. It is in the common interest of EU's Member States and the Western Balkans to ensure that efficient anti-corruption policies are in place and are working and have a strong political backing. In order to contribute to these developments and mainstream the anticorruption dimension, the Italian National Anticorruption Authority (ANAC) chaired in Trieste a workshop with partner institutions from the Western Balkans and the Regional Anticorruption Initiative (RAI), working on five issues: prevention of corruption; transparency; public procurement; whistleblowing and conflict of interest. Thematic seminars will follow, with the cooperation of the European Commission, so as to deepen know-how and to contribute to improving operational capacity. The initiative showed the substantial interest of partners to effectively address and cooperate on integrity issues. Participants welcomed the final declaration agreed at the workshop (in annex) which identifies a set of commitments to improve the capacity to respond to corruption." -

Final Declaration by the Chair of the Trieste Western Balkans Summit.

London Western Balkans Summit, 10 July 2018

Rule of law is not among the priority topics of the Summit.

Table 4: Rule of Law within the Sofia Declaration of the EU-Western Balkans summit

Strengthening support to the rule of law and good governance "Enhance support for judicial reform and efforts to fight corruption and organised crime, including capacity building for corruption prevention; Extend rule of law advisory missions with increased support from Member States and from the EU: **Sofia Priority** Enhance monitoring of reforms through more systematic, case-based peer-Agenda, review missions; 17 May 2018 Introduce trial monitoring in the field of serious corruption and organised crime: Work towards better measurement of results in justice reform; Roll out support for the Western Balkans through the European Endowment for Democracy in the area of independent and pluralistic media and civil society." -Sofia Declaration of the EU-Western Balkans Summit

INFORMATION ABOUT SEE THINK NET

The SEE Think Net Network was established in mid-march 2018 with the generous support of the European Fund for the Balkans as the first regional network composed of civil society organisations that aim to monitor the topics related to the Berlin Process. The Network encompasses think tanks, civil society organisations and individuals from the 6 Western Balkan countries plus Croatia and Slovenia. Besides the Institute for Democracy "Societas Civilis" (IDSCS) which will coordinate the Network, the SEE Think Net Network includes the Network of the European Movement in Serbia (NEMinS), Open Society Foundation for Albania and its affiliate, the EU Policy Hub, Adnan Ćerimagić, Politikon Network from Montenegro, Kosovar Centre for Security Studies, the Institute for Development and International Relations (IRMO) from Croatia and the Centre for European Perspective (CEP) from Slovenia. The goal of the SEE Think Net Network is to produce significant policy inputs and provide policy recommendations on topics that derive from the Berlin Process. As such, its activities are devised in order to closely monitor the Berlin process and the policy areas the process encompasses.

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INFORMATION ABOUT THE EUROPEAN FUND FOR THE BAI KANS

The European Fund for the Balkans is designed to create and support initiatives aimed at strengthening democracy and fostering European integration by enabling inclusive policy making, supporting capacity development and creating a platform for exchange and cooperation in the Western Balkans. The Fund was launched in 2007 by four European private foundations (King Baudouin Foundation, Erste Foundation, Robert Bosch Stiftung andf the Compagnia di san Paolo), within the framework of the Network of European Foundations.

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