

### III. International Law



# Latin American prisons throughout history

From a region without penitentiaries to a mass imprisonment area<sup>1</sup>

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## Abstract

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The aim of this article is to present, in a general way, more than two centuries of Latin America's prisons history. This enormous regional generalization has a high cost in the loss of national particularities. However, it is important to approach it in this general way, in order to be able to appreciate lines of development in the long term. In the first section we will detail the prevalence of the colonial legal culture in the period prior to the regional integration into the global market. In the second section, we will analyse the construction of the first radial penitentiaries in various capital cities and the places of incarceration used in more regional areas. The processes of establishing criminal codes as a tool for change in penitentiary discourses and practices are also presented. In terms of architecture, the shift from the radial architectural design to the parallel one during the first years of the 20<sup>th</sup> century and the creation of the first centralised penitentiary administrations are briefly presented. In the third section the penitentiary politics of the military dictatorships with their widespread use of political imprisonments and State terrorism are addressed. Even after the establishment of democratic governments in many Latin American States, the ascent of a neo-punitivism which led Latin America to develop the greatest growth in incarceration rate in the world in the 21<sup>st</sup> century is also examined. Over the decades and through the various above-mentioned changes, each element and aspect has been consistently worsened by circumstances that historically characterised Latin American prisons: overpopulation, lack of distinction between convicted and accused individuals, violence, large numbers of imprisoned people without a firm sentence, poor sanitation and diet, lack of gender politics and human

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rights violation. It is important to point out that, unlike the Anglo-Saxon sphere, in Latin America, the terms 'prison' and 'penitentiary' are used as synonyms.

### I. Introduction

- 2 More than one and a half million people inhabit the prisons of the twenty countries that form what we call Latin America<sup>2</sup>. For three centuries, most of these would-be States were subject to the same political unit, namely the Spanish monarchy, from which they inherited a judicial culture with strong Catholic roots that has persisted to the modern day. The Brazilian judicial matrix culture, which has Portuguese monarchical origins, is also closely linked to those of its Spanish-speaking neighbours, at least in part because the two monarchies formed a compound monarchy, an *aeque principaliter*, between 1580 and 1640.
- 3 Despite this commonality of origin, Brazil is different from its Spanish-speaker peers in some ways, primarily because it retained a monarchic government and slavery for most of the 19<sup>th</sup> century. In contrast, the independence processes that swept through the rest of Hispano-America in the early 19<sup>th</sup> century were characterised by debates over how the new States would be established. All over Latin America, conservatives and liberals, centralists and federalists, confronted each other, bringing about the fragmentation of the first independent political units in many cases.
- 4 Before proceeding further, it is crucial to point out how complex it is to examine many topics in Latin America as a whole owing to the great variety of social and cultural patterns in the region's political and economic development. This certainly holds true in this essay as it succinctly considers specific aspects of different experiments carried out in criminal and penitentiary matters throughout the region<sup>3</sup>. This enormous regional generalization has a high cost in the loss of national particularities. However, it is important to approach it in this general way, in order to be able to appreciate lines of development in the long term.

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2 Leaving aside the debate over the inclusion of Haiti in Latin America, this article does not include it, nor Puerto Rico, Guyana, French Guyana and Surinam, within its analysis so as to focus particularly on those countries that inherited the Iberian legal culture.

3 C Aguirre, 'Prisons and prisoners in modernising Latin America (1800–1940)', in F Dikötter and I Brown, eds, *Cultures of Confinement. A History of the Prison in Africa, Asia, and Latin America* (Ithaca: Cornell University Press 2007)

Towards 1870, after several decades of independence, most Latin American countries had neither penitentiaries nor enacted any criminal codes. Instead, they continued to administer criminal justice under the forms inherited from Iberian legal culture. Although certain liberal leaders pointed out the importance of penitentiaries early on, as was the case with Bernardino Rivadavia<sup>4</sup> in Argentina, building new legal systems would prove to be a slow and troublesome process, particularly concerning criminal law.

The creation of new penal codes and the building of penitentiaries was a part of a set of liberal principles regarding criminal justice and were endeavours that had been on the political horizon of the new States since their early years of independence. Even though these endeavours would not bear fruit for a long time, the desire to do so set the tone for the discussion in intellectual environments and prompted Latin American emissaries to visit the United States to study their penitentiary system, as did a number of Europeans, such as Alexis de Tocqueville and Gustave de Beaumont from France. Some notable Latin American emissaries that went to the United States were: the Mexican writer Manuel Payno who, upon return, published three articles for the *Revista científica y literaria de Méjico* (*Scientific and Literary Journal of Mexico*) in 1845, the Mexican priest Mucio Valdovinos (*Ensayo sobre los diversos sistemas de cárceles conocidos bajo el nombre de penitenciarias y algunas reflexiones respecto al que debe adoptarse en la República Mexicana*<sup>5</sup>, 1852), the Chilean lawyer Francisco Astaburuaga (*Memoria que el señor D.F.S. Astaburuaga presenta al supremo gobierno como resultado de sus visitas a las cárceles de los E.U. de N.A*<sup>6</sup> in 1852), the Peruvian lawyer Mariano Paz Soldán (*Examen de las penitenciarias de los Estados Unidos: informe que presenta al supremo gobierno del Perú*<sup>7</sup>, 1853). After his trip, Paz Soldán achieved the construction of a penitentiary in Lima, inspired by the one in Philadelphia, devised its regulations and became its first director.

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4 Rivadavia was the first President of Argentina. A García Basalo, 'A panoptic in Buenos Aires? The First projected penitentiary in South America' (2013) 8 (1) *Épocas*. USAL < <https://p3.usal.edu.ar/index.php/epocas/article/view/2089> > accessed 27 July 2021

5 *Essay on the diverse prison systems known as penitentiaries and some reflections upon the one which should be adopted in the Mexican Republic* (the translation is ours).

6 *Report presented by D.F.S. Astaburuaga to the supreme government as a result of his visits to the North American prisons* (the translation is ours).

7 *Examination of the penitentiaries of the United States: report presented to the supreme government of Peru* (the translation is ours).

- 7 However, the Penitentiary Movement (*reforma penitenciaria* in Spanish) in Latin America would only gain momentum with the strengthening of the States and their inclusion in the international market in the last third of the 19<sup>th</sup> century. With the rise of economic and social transformations, Latin American governments had to face the ‘penitentiary question’ together with the ‘social question’. The advances in criminal coding movement served to consolidate the deprivation of liberty as the main form of repression; nevertheless, putting it into practice was made harder due to the lack, in most of the cities, of places where a prison sentence could be properly served.
- 8 In the big capitals, such as Rio de Janeiro, México, Buenos Aires or Santiago de Chile, important radial (miscalled “panoptic”)<sup>8</sup> penitentiary premises were built while in regional centres and more rural parts of the States, the need for places of incarceration was not considered a priority. Indeed, even in federal States at the time, some provinces and states could not afford the high costs of operating such facilities. With that in mind, a distancing process began between the norm and its practical application, this led to a gulf that would deepen and worsen over time and whose tangible consequences can be seen today.
- 9 This essay will present, in a general way, the process that led Latin American countries from having no penitentiaries to their being the most prolific users of such facilities for mass incarceration (in terrible conditions) in the world in a little over a century.
- 10 In the first section we will detail the prevalence of the colonial legal culture in the period prior to the regional integration into the global market.

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8 The radial design was created by William Blackburn (1750–1790), a disciple of John Howard (1726–1790). His designs were continued by the London Society for the Improvement of Prison Discipline. John Haviland (1792–1852), with his design for the Eastern Penitentiary (1829), made it much more famous and widespread. “The radial design called for a central building for the correctional officers and individual cellblocks situating an array that created the shape of a fan or spokes of a wheel”. C. Waid and C. Clements, ‘Correctional Facility Design: Past, Present and Future’, in *Journal Corrections Compendium*, v.26, i.11, november 2001. Towards the end of the 19<sup>th</sup> century, management needs (classification, workshops, schools) led to the creation of the parallel design, also known as “telephone pole typology”. These kind of penitentiary are divided into many parallel buildings, each connected by a central corridor that bisected each building into two wings. “By compartmentalizing parts of the prison, this design facilitated increased control over the movement of residents and the spaces in which they gather as well as designated areas for classification groups that are given different privileges” (“Reimagining Prison. Design strategies to increase public safety and improve societal well-being”, Vera Institute of Justice, 2018).

Economic growth based on having an export-oriented economy was a key determining factor in the consolidation of Latin American States, a process in which the building of penitentiaries was an important part. In the penitentiary projects, the influence of the Global North became evident in two predominant trends: *an Atlantic trend* to European projects and *a Pacific trend* linked to North American ones. At the same time, the importance of regional influences and exchanges within the Global South will be highlighted, as a path for the development of *local* models. With each passing decade since independence, abundant exchanges between neighbouring Latin American countries have been registered: ideas, discourses, models and patterns were exchanged at a scope and scale that were often tied to their levels of geographical and cultural proximity.

In the second section, we will analyse the construction of the first radial penitentiaries in various capital cities and the places of incarceration used in more regional areas. The concerns arising from the unbalanced development of such facilities along this capital-regional divide between 1850–1920 will be addressed. The processes of establishing criminal codes as a tool for change in penitentiary discourses and practices are also presented. In terms of architecture, the shift from the radial architectural design to the parallel one during the first years of the 20<sup>th</sup> century and the creation of the first centralised penitentiary administrations are briefly examined. 11

In the third section the ‘penitentiary politics’ of the military dictatorships with their widespread use of political imprisonments and State terrorism are addressed. Even after the establishment of democratic governments in many Latin American States, the ascent of a new punitive movement (neo-punitivism) which led Latin America to develop the greatest growth in incarceration rate in the world in the 21<sup>st</sup> century is also examined. Over the decades and through the various above-mentioned changes, each element and aspect has been consistently worsened by circumstances that historically characterised Latin American prisons: overpopulation, lack of distinction between convicted and accused individuals, violence, large numbers of imprisoned people without a firm sentence, poor sanitation and diet, lack of gender politics and human rights violation. It is important to point out that, unlike the Anglo-Saxon sphere, in Latin America, the term ‘prison’ and ‘penitentiary’ are used as synonyms. 12

## II. Latin America's incorporation into the international market, economic growth and the strengthening of State-building

- 13 The political, social and economic organisation of the newly independent States in Latin America was the result of many years of internal power struggles and opposing views. Even though the independence wars ended in the 1820s, political confrontations regarding the formative details of the new States went on for several decades. Some States, such as Mexico and Gran Colombia, rapidly dissolved. Out of the Mexican Empire, the United Provinces of Central America separated and, throughout the 1830s, five sovereign republics emerged, Honduras, Nicaragua, Costa Rica, Guatemala and El Salvador while the dissolution of Gran Colombia gave rise to the States of Ecuador and Venezuela<sup>9</sup>. This fragmentation process was not homogeneous nor were the States that resulted from it and it did not take long for wars to start between them, e.g. the Argentinian-Brazilian War (1825–1828), the Triple Alliance War (1864–1870) and the War of the Pacific (1879–1884). However, one commonality among all these new States was that they all went through many decades of internal struggles in their State-building processes.
- 14 In this context, the survival of colonial legal culture throughout the 19<sup>th</sup> century was notable. The permanence of slavery and other coercive means of labour control (forced labour, forced draft, indigenous taxes and *conchabo laws*<sup>10</sup>) characterised the punitive systems in these formative decades and were included in the region's first criminal codes. It was not until the last third of the 19<sup>th</sup> century, when efforts to build capitalist economies were imposed on Latin American States because of their being integrated into international markets as raw material providers, that the old colonial legal culture truly began to fade.
- 15 The success of this international integration ushered in amendments to the previously enacted penal codes across the region and led, among other things, to the abolition of coercive labour and military laws. Economic growth was fundamental for the realisation of Penitentiary Movement as

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9 The Republic of Panama broke away from Colombia at the beginning of the 20<sup>th</sup> century.

10 The *conchabo laws* derived from the colonial laws that persecuted “vagrancy”. *Conchabo laws* established the obligation of those who had no income or property to carry a ballot that accredited the provision of services to an employer. Those who did not have that ballot could be sent to prison.

it not only allowed the consolidation of the States but it also provided the necessary resources to pay for the costly constructions.

An exclusively materialistic view of the birth of the use of penitentiaries in Latin America would ignore the great importance of the cultural, political and intellectual transformations that took place and ultimately drove the process of change in the region's punitive culture. Among the most progressive Latin American leaders, the desire to avoid physical punishment (whipping, public vexation and immobilising techniques) and to abolish the death penalty, considered to be the most savage of all punishments, prevailed as such individuals sought to elevate justice to the standards of 'civilised countries'. Such objectives, according to the political protagonists of the time, would only be possible by means of the creation of well-functioning penitentiaries. 16

In the same way, with the beginning of mass immigration and internal migration from rural to urban environs, Latin American societies got used to the developing market economies' rules and the dynamics of an increasingly urbanised society within a few decades. As the years went by, the oligarchic-conservative States which had driven integration into the international market were, to a large extent, toppled by the unstoppable forces now at work within their respective populations. The Mexican revolution constitutes an extraordinary example of the power of the mobilized masses. 17

The advent of the "social question" and, together with it, the Penitentiary Movement, gave the political actors, which worried about the deeply rooted colonial punitive culture, cause for concern. As previously noted, almost all Latin American countries had no penitentiaries toward the end of the 19<sup>th</sup> century. Eager to manifest 'modernity' through architecture, Latin American governments threw themselves into the construction of the first penitentiaries, which they saw as symbolising the modern transformation while simultaneously demonstrating the power of a consolidated State (Table 1). 18

In this context, and in relation to their close geographical and cultural proximity, the most plentiful exchanges of ideas, discourses, models and patterns occurred between the Global North and South as well as between neighbouring countries of the Global South. In the North-South exchanges, two dominant trends can be observed: one which flowed via the Pacific Ocean where the influence of The United States is clearly seen in Mexico, Chile and Peru while the other trend came across the Atlantic where Europe strongly influenced projects in Brazil, Argentina and Uruguay. In the South-South exchanges, numerous common traits can be seen among the first penitentiaries built and in the subsequent related legislation in 19

three broad zones, namely the Southern Cone, North-Western South America and Central America.

*Table 1: First Latin American penitentiaries and criminal codes (19th and 20th centuries)*

State	Independence	First criminal Code	First Penitentiary Enablement	Name	City
Chile	1818	1874	1847	Cárcel Penitenciaria (Penitentiary Jail)	Santiago
Brazil	1822	1830	1850	Casa de Correção (Reformatory House)	Rio de Janeiro
Venezuela	1830	1863	1854	Cárcel Pública (Public Prison)	Caracas
Peru	1821	1863	1862	Panóptico de Lima (Panoptic of Lima)	Lima
Argentina	1816	1886	1865 <sup>1</sup>	Cárcel Penitenciaria <sup>2</sup> (Penitentiary Prison)	Mendoza
Mexico	1821	Federal System <sup>3</sup>	1870	Penitenciaría Estatal (State Penitentiary)	Guadalajara
Ecuador	1830	1837	1875	Penitenciaría Nacional (National Penitentiary)	Quito
Colombia	1819	1837	1878	Penitenciaría de Cundinamarca (Penitentiary of Cundinamarca)	Bogotá
Honduras	1838	1866 <sup>4</sup>	1888	Penitenciaría Central (Central Penitentiary)	Tegucigalpa
Uruguay	1825	1889	1888	Cárcel Penitenciaria (Penitentiary Prison)	Montevideo
Nicaragua	1838	1879 <sup>5</sup>	1889	Penitenciaría Nacional (Penitentiary Prison)	Managua
Guatemala	1839	1877 <sup>6</sup>	1891	Penitenciaría Central (Central Penitentiary)	Guatemala
El Salvador	1841	1859 <sup>7</sup>	1897	Penitenciaría Central (Central Penitentiary)	San Salvador
Bolivia	1825	1831	1897	Penitenciaría (Penitentiary)	La Paz

Paraguay	1811	1880	1900	Penitenciaría de Emboscada (Penitentiary of Emboscada)	Em-boscada
Costa Rica	1838	1880 <sup>8</sup>	1910	Penitenciaría Central (Central Penitentiary)	San José
Panama	1903	1916	1925	Cárcel Modelo (Model Prison)	Panamá
Cuba	1902	1938 <sup>9</sup>	1931	Presidio Modelo (Model Prison)	Isla de los Pinos
Dominican Republic	1844	1884	1952	Penal de la Victoria (Prison of La Victoria)	Santo Domingo

<sup>1</sup> The Penitentiary of Buenos Aires, opened in 1877 was, chronologically, the second one built, although it was the most famous in Argentina

<sup>2</sup> In Mexico, every federal state legislated in criminal matters. In 1835, the state of Veracruz passed the first Mexican criminal code, however, the most important code of the 19th century was the one from the Federal District and Low California territory (1871).

<sup>4</sup> According to Iñesta Pastor: “Levene, Ricardo y Zaffaroni, Eugenio Raúl, Códigos penales latinoamericanos, ob. cit., p. 15 consideran que el primer Código penal de Honduras fue el de 1898”. (Levene, Ricardo and Zaffaroni, Eugenio Raúl, Latin American criminal Codes, Op. cit., p15. they consider that the first criminal law of Honduras was the one in 1898)

<sup>5</sup> When Nicaragua constituted an autonomous province of the Federal Republic of Central America, it adopted a criminal code inspired by the codification of the State of Louisiana (USA) in 1837.

<sup>6</sup> When Guatemala constituted an autonomous province within the Federal Republic of Central America, it adopted a criminal code inspired by the codification of the State of Louisiana (USA) in 1834. According to Iñesta Pastor, the first code was the one in 1889. (RPyP, t, VI, 1941, p.185 – 188)

<sup>7</sup> When El Salvador constituted an autonomous province within the Federal Republic of Central America, it adopted a criminal code in 1826 that was inspired by the Spanish Code of 1822.

<sup>8</sup> Costa Rica passed a General Code in 1841 that was divided into three parts: Civil, Criminal and Procedural. The criminal part followed the Spanish code of 1822.

<sup>9</sup> Cuba used the Spanish criminal code of 1870 during most of its time as an independent State, namely until the Social Defence Code was passed in 1938, which remained in force until the approval of the Criminal Code in 1979.

### *III. The 'birth of the penitentiary' in Latin America. The great prisons of the capitals and the situation in regional areas (1850–1950)*

- 20 As can be seen in Table 1, only five Latin American countries built their first penitentiaries before the region began integrating into international markets: Chile (1847), Brazil (1850), Venezuela (1854), Peru (1862) and Argentina (1865). Argentina's first penitentiary (built in Mendoza) was little appreciated by the historians which has focused their attention in the capital city, Buenos Aires.
- 21 As seen in the above table, the remaining Latin American countries did not have premises purpose-built to function as penitentiaries until late into the 19<sup>th</sup> century: Mexico 1870, Ecuador 1875, Colombia 1878, Honduras 1888, Uruguay 1888, Nicaragua 1889, Guatemala 1891, El Salvador 1897, Bolivia 1897 and Paraguay 1900. As a result, much of the region remained without penitentiaries for most of the 19<sup>th</sup> century. The countries of the Caribbean, such as the Dominican Republic and Cuba, postponed the construction of the first male penitentiary premises until the 1930s and 1950s. This resulted in further maintenance of the colonial punitive tradition in those areas.
- 22 Those first radial penitentiary facilities built at the end of the 19<sup>th</sup> century were originally designed to function primarily as male confinement facilities employing a work system in a central role. This entailed inmates performing various tasks in different types of workshops, such as printing, leather, carpentry and broom-making workshops or in a bakery and the like). Latin American penitentiaries are somewhat unique in that they combine aspects originally designed for the application of the Pennsylvania

system with regulations inspired by the Auburn system.<sup>11</sup> The majority of these first penitentiaries were opened unfinished, without trained staff and were poorly constructed, which made them the target of immediate criticism. Concerning women's prisons, there were very few constructed during the first half of the 20<sup>th</sup> century and, in most of the region, the management of female prisons was the responsibility of religious institutions (primarily the Good Shepherd) until the end of the 20<sup>th</sup> century when the first purpose-built women's prisons began to be constructed.

As previously stated, most of the large radial penitentiaries built in Latin America were located in various capital cities. In regional areas of both centralist and federalist States, penitentiaries began to appear much later, if they appeared at all. It is worth stressing that in federal States, such as Brazil, Argentina and Mexico, penitentiary movements depended on each federal state or provincial administration. Consequently, the local administrations that had sufficient resources to build large penitentiaries (Sao Paulo in Brazil, Guadalajara in Mexico, Cordoba in Argentina, among others) did so while poorer administrations took many decades to build adequate buildings in line with the penitentiary movement principles. 23

Hence, the process of the cultural and legal transformations that is referred to as Penitentiary Movement took much longer to settle in regional areas than in the capital cities. This does not mean these regional areas were without development in this regard, on the contrary, considerable changes did occur but at different paces and, in many cases, without appropriate premises, the lack of resources and training of the penitentiary personnel. 24

The construction of the radial penitentiaries in the capitals corresponded to the first stage of the Penitentiary Movement of Latin America which took place between 1870 and 1920. This stage was characterised by the placement of what were, at the time, modern penitentiaries with their various workshops in close proximity to the key urban areas as they were seen as embodying the material and civilised advance of the young Latin American States that were now fully engaged in economic development and 25

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11 The *Pennsylvania system* was a method of prison administration based on the permanent solitary confinement of prisoners. In the *Auburn system*, the prisoners were forced to do collective work in silence during the day and kept in solitary confinement at night. It was mandatory the use of striped uniforms, lockstep, and silence. At the end of the 19<sup>th</sup> century, the *Crofton* or *Irish system* introduced the idea of progress through stages of imprisonment and conditional release. Consisted of three phases: solitary confinement, congregate work and, finally, a period with minimal supervision and conditional release.

State-building. It is the most studied stage in the history of Latin American prisons and a period that represents aspects associated with the discourses of positivist criminology. At the time, Latin America began to take part in international meetings regarding penitentiaries and the first criminology institutes were founded.

- 26 It was also a period that saw penal colonies being established in isolated territories under two principles: segregation and colonisation (Table 2). Segregation colonies were designed to isolate those individuals considered to be unreformable by the penitentiary system, whose main virtue was held up as their ability to rehabilitate. These segregation colonies were bitterly criticised, especially in the above-mentioned international meetings, for distancing themselves from the fundamental penitentiary principle: the reform of the criminals. On the other hand, colonisation prisons, which also served the purpose of segregation, allowed the advance of the States in less inhabited territories or those in dispute with other States. Well into the 20<sup>th</sup> century, these prisons served almost exclusively for segregation and for political prisoners. The use as political prisons intensified under the various dictatorial governments that became relatively commonplace in the region through much of the 20<sup>th</sup> century.

*Table 2: Latin American Penal colonies (19th and 20th centuries)*

Opened	Country	Location	Main function
1847	Chile	Punta Arenas	Colonisation
1852	French Guyana	Devil's Island	Segregation
1873	Costa Rica	San Lucas Island	Segregation
1897	Argentina	Ushuaia	Colonisation
c1900	México	National Valley	Segregation
1903	Brazil	Ilha Grande	Segregation
1905	México	Marías Islands	Segregation
1908	Brazil	Anchietta Island	Segregation
c1910	Venezuela	El Burro Island	Segregation
1917	Peru	El Frontón Island	Segregation
1919	Panama	Coiba Island	Segregation
1938	Colombia	Araracuara Penal Colony	Colonisation
1944	Chile	Santa María Island	Segregation
1944	Nicaragua	Corn Island	Segregation

1947	Ecuador	Penal Colony of Isabela Island (Galápagos)	Segregation
1951	Peru	Sepa Farming Penal Colony	Colonisation
1960	Colombia	Gorgona Penitentiary	Segregation
Source: A García Basalo (unpublished)			

It is important to at least mention other characteristics fundamental features of this first stage. On one hand, the association between buildings and systems, that is to say, the belief that a well-built penitentiary was enough to guarantee the application of the penitentiary system. This was pointed out for the English case by Robin Evans (1982). As a result of that belief, there was administrative decentralization and no coordinate politics between different institutions (in Latin America, this stage can be called as decentralized stage of penal institutions). Each penitentiary was autonomous in terms of regulations (regarding education, work, food, physical punishment, etc.) which provided local administrators with too much discretion and resulted in considerable regional differences. 27

On another note, the passing of penal codes was not followed by sanctioning general regulatory frameworks detailing the serving of prisons sentences. This is why each penitentiary's regulations acted as localised administration of sentences laws with broad limits of discretion. A fact noted by Raúl Zaffaroni<sup>12</sup> should be added: in practice, criminal codes were replaced by criminal procedural codes, exhibiting a notable historical continuity trait in Latin America. This has become increasingly evident as tasking individuals into custody became so widespread that the serving of deprivation of liberty for a large number of those imprisoned is done following procedural codes. 28

Thus, prosecution becomes sentence and formal court sentence is an extraordinary revision resource. In general terms, the procedural codes in Latin America that are so prone to handing out custodial penalties are derived from the Napoleonic procedural model that came to the region through the Spanish procedural codification model. Throughout post-colonial history, as Zaffaroni holds, legislative creation in Latin America has been very limited in moving from Napoleon's code to Rocco's. The inquisitorial tradition of the procedural systems is evidenced in practice where the police perform investigative and even judicial functions (determining 29

12 Born in Buenos Aires in 1940, Zaffaroni served as a member of the Supreme Court of Argentina from 2003 until 2015.

the type of offence, its dangerousness and then deciding upon detention). In Latin American historical codes, investigative magistrates have broad investigative powers that are usually delegated to the police, which the latter dreaded and the accused's defence is very limited in the examining stage.

- 30 A historical continuity in many Latin American penitentiaries, from an administrative perspective, are recurrent problems involving the management of the scant resources provided by either the State or produced by the penitentiaries themselves (the workshops make considerable profits). From an effective internal control point of view, these facilities frequently suffer from prison breaks, riots, strikes and an endless list of different forms of everyday resistance (boycotts and sabotage of the workshops, pilfering, graffiti and carvings or gambling). During this first stage, women's confinement conditions went through a less State-controlled path because they were administered by religious institutions.
- 31 A second stage of Latin American Penitentiary Movement spans the years between 1920 and 1950. It has been less studied than the first one but it is of prime importance since, during this period, the number of prisons significantly increased, many national penitentiary meetings were organised and the first centralisation and penitentiary administrative audit institutions were created. Some of the institutions created over this period were: *Consejo Nacional de Prisiones* of Costa Rica, *Conselho Penitenciário* of Brazil (1924), *Dirección General de Prisiones* of Perú (1929), *Dirección General de Prisiones* of Chile (1930), *Dirección General de Institutos Penales* of Argentina (1933), *Dirección General de Institutos Penales* of Uruguay (1933)<sup>13</sup>.
- 32 In these decades, Latin American countries opened many new penitentiaries, however, with different amounts of investment. Many of the new prisons were established in premises built for other purposes, such as old fortifications as well as disused nunneries and warehouses. The proliferation and increasing complexity of judicial administration, affected by demographic growth and the creation of new judicial constituencies, led governments to build new custodial facilities in regional parts of their respective countries.
- 33 The penitentiaries built between 1920 and 1950, followed the parallel or telephone pole topology, which came to replace the radial one, considered

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13 Previously, committees and councils existed in many Latin American countries to supervise the prisons, nevertheless, the functions and actions of such bodies were limited.

outdated since the early years of the 20<sup>th</sup> century. The new preference for the parallel model was due to the greater optimisation of space usage it allowed and the fact it turned out to be more hygienic thanks to a better intake of sunlight and air circulation. More adaptable to penology than their predecessors, greater flexibility in their usage and more readily refurbished than radial penitentiaries, the parallel pattern came to dominate Latin American penitentiary construction during the 20<sup>th</sup> century. When it comes to the penitentiary system, the Auburn system was gradually replaced by the Crofton system or, as it is also known, the progressive or Irish system.

This period also saw the first efforts of institutions to ‘measure’ penitentiary populations and carry out national penitentiary censuses in a methodical to produce meaningful statistical data. Argentina founded the *Registro Nacional de Reincidencia y Estadística Criminal y Carcelaria* (National Register of Reoffenders and Criminal Statistics) in 1933 and Brazil opened the *Cadastro Penitenciário e Estatística Criminal* (Penitentiary and Criminal Statistics Cadastry) in 1937. The production of statistical data by the State was a key step towards the definition of new penal guidelines.

The introduction of the above mentioned new facilities and the progressive ideals that came with them resulted in numerous changes to the criminal codes of the States where they were built, particularly regarding sentencing and release on parole. Many of the States analysed in this paper reformed their criminal codes during this period. Argentina (1921), Panama (1922), Peru (1924), Venezuela (1926), Uruguay (1934), Colombia (1936), Guatemala (1936), Ecuador (1938), Brazil (1940), Costa Rica (1941). Nevertheless, despite the said legislative reforms, remanding to custody remained a widely used practice and no laws that provided a clear framework for sentencing were passed. This led to the continuity of the large degree of discretion each facility had and, in many cases, this was exercised without judicial audit. While this was generally viewed as an undesirable situation, the difficulties in overcoming it are evidenced by several failed attempts to pass ‘penitentiary codes’ in Brazil that occurred during this period.

A third stage, which will be examined in the next section, took place between 1950 and 1990 and was characterised by a dichotomy of developments. On the one hand, the Standard Minimum Rules for the Treatment of Inmates<sup>14</sup> were established, on the other hand, both dictatorial and democratic governments in the region essentially militarised the administration of penitentiaries, a situation that has persisted to the present. This period

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14 These rules were adopted by the UN in 1955.

also saw the creation of the International Penal and Penitentiary Foundation (IPPF), essential for the diffusion of the principles of progressive penitentiaryism, even in a Latin America largely dominated by military dictatorships with little interest in (rather enemies of) the fulfillment of human rights.

*IV. The administration of prison sentences in Latin America. From progressive penitentiary movements to neo-punitivism (1950–2000)*

- 37 In Latin America, during a large part of the 19<sup>th</sup> and 20<sup>th</sup> centuries there were no prison sentences acts (in Spanish, *leyes de ejecución penal*). Each prison had its own internal regulations. Studying those regulations provides insight into how penitentiary systems were run and perceived when the Auburn and then Crofton systems dominated thinking on this matter. Prison regulations represent a valuable source of research, often underestimated by historiography, even though their true value becomes evident in the fact that countries such as Chile, Guatemala and Bolivia did not pass laws on prison sentences administration at any point in the 20<sup>th</sup> century.
- 38 Said administrative internal regulations did not guarantee the exercise of Latin American constitutional principles (legality, harmfulness, proportionality, due process) in penitentiaries and their administrators had too much room for discretion regarding their facilities' day-to-day operations, which is also indicative of the entrenched nature of problems involving such prisons in Latin America.
- 39 In general terms, parliamentary sanction of prison sentences acts did not occur until the end of the 20<sup>th</sup> century and the creation of execution courts (*juzgados de ejecución penal*) began in the 21<sup>st</sup> century. In the case of Argentina, the first steps in this direction were relatively early, although in fairly general terms, by the 1933 Prison Organisation Act and, more specifically, by the 1958 Penitentiary Act.<sup>15</sup> As regards the rest of Latin America, the general penitentiary tone during the 1920s to 1950s involved the expansion of the rights of people deprived of their liberty and prison workers, however, prison sentences acts were not passed at a national level.

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15 Prison Organisation Act (n°11,833) was characterized by the principles of individualization of the treatment and the application of the progressive regime. Penitentiary Act (act-decree n°412–1958) complemented the Prison Organisation Act in terms of the progressiveness of the penitentiary system and incorporated the Minimum Rules for the Treatment of Prisoners of the UN.

In Brazil there were some attempts to approve 'penitentiary codes' but these efforts ended in failure.

In this period, Roberto Pettinato and J. Carlos García Basalo, both from Argentina's prison administration, played crucial roles in the approval of the Standard Minimum Rules (1955) and the forming of networks of intellectuals focused on penitentiaries in Latin America and around the world. García Basalo was also a member of the IPPF and a prolific author who noted in numerous articles the changes that the Latin American penitentiary system went through during the 20<sup>th</sup> century. Among other important figures of the time, Marco A. González Berendique (Chile), Julio Altmann Smythe (Perú), Victorio Canepa y Armida Bergamini Miotto (Brazil), Alfonso Quiroz Cuarón (Mexico), Héctor Beeche (Costa Rica); Roberto Matho (Uruguay), Elio Gómez Grillo (Venezuela) should also be mentioned. All of them were very important actors in the creation of intellectual networks and in the application of changes in prison policies in Latin America.

Over the years, the Inter-American Commission on Human Rights (henceforth IACoMHR), which was created in 1959 and played a central role in the Organization of American States (OAS), would become an audit and counselling mechanism as important as the IPPF. A significant part of the activities of the IACoMHR has been focused on monitoring the living conditions of prison inmates in the Americas. The Commission's reports have also always been particularly relevant, from the very first ones (related to Cuba and the Dominican Republic) through to the most recent ones concerning Jamaica and Colombia.

Since the 1950s, despite the spread of a number of humanising policies for prisons, the proliferation of military-style staff and processes in Latin American penitentiaries can also be seen, a development that would deeply impact the later evolution of penitentiary administration. A decrease in the work performed inside the prisons was also recorded, an outcome that went hand-in-hand with their restructuring as 'warehouses' instead of 'factories' (Caimari, 2004). Humanisation policies in prisons were a part of the processes that sought to strengthen social welfare in Latin American States to mitigate the huge socio-economic gaps and inequalities that characterise the region.

In the 1960s, one can observe that a process of reducing prisons to militarised detention centres began to occur and this accelerated and became more widespread with the advent of the military dictatorships that devastated Latin America between 1970 and 1980. The dictatorships that took

power during these decades made extensive use of political persecution and State-based terrorism. Thus, many police stations, prisons and jails became clandestine detention and torture centres and that resulted in the systematic disappearance of anybody who opposed or expressed disconformity with the ruling dictatorship. This problem became so endemic in a large part of Latin America that tens of thousands of victims of State-based terrorism remain missing and their fates unknown.

44 With the democratic restoration of the mid1980s and early 1990s, the rights of penitentiary inmates gained renewed momentum and penitentiary laws were passed aimed at reversing the dramatic decline in prison conditions from previous years, however, the results were mixed. In the Argentine case, the *Ley de Ejecución Penal* (Act of Prison Sentences) passed in 1996 redefined the basic principles of the sentence of deprivation of liberty in the following terms: “Succeed in having the condemned individual to acquire the capacity of respecting and understanding the law, as well as the seriousness of their action and the punishment imposed, providing adequate social reinsertion, promoting social understanding and support, which would be part of the rehabilitation by means of direct or indirect control (author’s translation).” (Act N° 24.660).<sup>16</sup>

45 The first prison sentences act passed by the Brazilian Congress was passed in 1984, an occurrence that was repeated in the same year in the Dominican Republic. In 1991 and 1993 respectively, the Congresses of Peru and Colombia did the same. In the early 21<sup>st</sup> century, the Bolivian Congress passed its prison sentences act (2001), as did Guatemala (2006) and Mexico (2016).

46 The general tone of these texts reflected the principles, standards and aims of prison sentences accepted by international consensus and as typified in the Standard Minimum Rules. The various terms used to explain the overarching purpose of imposing a prison sentence are, for example, social reinsertion (Argentina); amend and social readaptation (Bolivia); re-education, rehabilitation and reincorporation (Peru); re-education and social readaptation (Guatemala) and, finally, social protection and readaptation of the convict (Dominican Republic). Numerous bills were drafted that allowed the use of alternative sentences to imprisonment (fines, weekend

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16 In original Spanish: “Lograr que el condenado adquiera la capacidad de respetar y comprender la ley, así como también la gravedad de sus actos y de la sanción impuesta, procurando su adecuada reinserción social, promoviendo la comprensión y el apoyo de la sociedad, que será parte de la rehabilitación mediante el control directo e indirecto”.

detention, house arrest, community service, restrictions on residence or movement, etc.). Even if these laws did not have a significant impact on the day-to-day realities within penitentiaries, they did address a number of concerns of human rights organisations and a large part of the most progressively-minded members of academia.

### V. The current situation

At the beginning of the 21<sup>st</sup> century, a creation process of execution courts (*juzgados de ejecución penal*) gained importance. They were designed to exercise judicial control over the effective fulfilment of penitentiary laws and penal substitutes. Despite these changes and the passing of several laws, there was very low use of alternative sentences to imprisonment. 47

The last three decades (1990–2020) have seen a worsening of living conditions inside prisons. Since the start of the 21<sup>st</sup> century, Latin America has experienced an abnormal growth in violent crimes, with a regional homicide rate four times the global average<sup>17</sup>. This rise in violent crime has been accompanied by a worsening of the punitive response to crime and higher rates of imprisonment. Between 2000 and 2018 the total number of incarcerated individuals rose from 644,000 to 1,572,000. The States that have experienced the greatest percentage increase in their prison populations are El Salvador (411 %), Ecuador (398 %), Paraguay (323 %), Venezuela (302 %), Guatemala (248 %), Peru (228 %), Brazil (221 %) y Nicaragua (219 %). 48

Consequently, most of these countries now have the highest rates of overpopulation (El Salvador, Peru, Guatemala and Bolivia exceed a 200 % of overpopulation) in the region. This supports the view that the abusive use of custody remains a serious and widespread problem in Latin America and constitutes clear proof of judicial administrative failure (i.e. ‘justice’ is not being served) that is resulting in an unacceptable situation for democratic societies, especially given that the presumption of innocence right is not being observed. The latter is evident from the fact that currently, prison 49

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17 Inter-American Development Bank. (2017). The costs of crime and violence: New evidence and insights in Latin America and the Caribbean. Washington, DC. Retrieved from <https://publications.iadb.org/bitstream/handle/11319/8133/The-Costs-of-Crime-and-Violence-New-Evidence-and-Insights-in-Latin-America-andthe-Caribbean.pdf>

inmates who have not yet been convicted make up 71 % of Paraguay's prison population with this figure being 62 % in Venezuela and 52 % in Honduras (WPB 2018).<sup>18</sup>

50 Recurrent political and economic crises, coupled with the ascent of neo-punitivism, have led most Latin American States to have some of the highest rates of imprisonment among democratic governments around the world. This situation is being aggravated by various crises in welfare systems throughout Latin America and the continuity of certain elements that have historically characterised this region's prisons: deficient infrastructure, class-based criminal selectivity, overpopulation, large numbers of unconvicted prisoners, no separation of convicted and unconvicted individuals, poor sanitation and diet, lack of gender-specific policies as well as ongoing human rights violations. Regarding class-based criminal selectivity, criminologists such as Alessandro Baratta have devoted much effort to drawing people's attention to the selectivity characteristic of the criminal system, suggesting its minimal application in conventional criminal law against vulnerable social actors is increasing its use against socially powerful ones.

51 Internal violence and irregular 'inmates self-government' also become significant aggravating circumstances in the living conditions. Although they are historical aspects of Latin American prisons, these features have been exacerbated lately with the advance of neo-punitivist discourse, punitivist populism and processes of criminal decodification (*proceso de descodificación penal*, in Spanish)<sup>19</sup>. Following Sozzo, punitivist populism overthrew the traditional way of thinking about punishment, which was traditionally linked to rehabilitation, to promote other justifications for judicial punishment and where reintegration into society does not come into play as 'what people want' or 'what people reclaim' hold sway.

52 As to the decodification processes, their analysis became relevant towards the end of the 1970s since the civilist work of the Italian Natalino Irti. In Argentina, Levaggi warns that the 1921 code (currently valid) was not only altered throughout its existence but also, and separately, numerous criminal laws were passed which have positioned Argentinian criminal law

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18 [https://www.prisonstudies.org/highest-to-lowest/pre-trial-detainees?field\\_region\\_taxonomy\\_tid=All](https://www.prisonstudies.org/highest-to-lowest/pre-trial-detainees?field_region_taxonomy_tid=All)

19 In Spanish, the concept of *descodificación penal* consists in the subtraction of the Penal Code from its central place through special legislation. It abandons the unity of the legal system and imposes a plurality of microsystems, with their own principles and logics.

in a state of regulatory disintegration and at odds with the very concept of codification.<sup>20</sup> Criminal decodification is a characteristic process in Latin America, particularly linked to laws dealing with drug trafficking and drug dealing. The proliferation of laws outside the codes has contributed to an irrational expansion of criminal law.

To put it succinctly, the period between 1990 and 2020 could be defined 53 as the time of ‘disabling-prisons’ (in Spanish, *prisiones incapacitadoras*) or massive ‘warehouse-penitentiaries’ (in Spanish, *prisiones depósito*) resulting in facilities where the State is less and less present.<sup>21</sup> Today’s prisons are militarised facilities which only serve to incapacitate ‘criminals’ while being unsustainably overcrowded and a constant source of human rights violations, arguably worse than they have ever been. Currently, the Latin American countries with the highest numbers of overpopulation are Guatemala (367 %), Bolivia (269 %) y Peru (212 %) (WPB 2018).<sup>22</sup>

Table 3. Rates of Imprisonment in Latin America (2018)

State	Imprisonment rate per 100,000	Prison Population	Total population (in millions)
El Salvador	604	38,714	6.41
Cuba	510	57,337	11.25
Panama	390	16,183	4.15
Costa Rica	374	19,226	5.14
Brazil	324	690,722	213.27
Uruguay	321	11,078	3.45
Nicaragua	276	17,196	6.23
Peru	270	87,995	32.55
Colombia	240	118,708	49.53
Dom. Rep.	238	26,286	11.03
Chile	233	42,683	18.30
Ecuador	222	37,497	16.89
Honduras	216	18,950	8.77

20 A Levaggi, *Historia del derecho penal argentino* (Buenos Aires: Perrot 1978).

21 *Incapacitación* supposes the impossibility of a person to be the holder of some rights or to make decisions while *depósitos*, means that the building only serves to ‘store’ people, without any type of productive activity.

22 [https://www.prisonstudies.org/highest-to-lowest/occupancy-level?field\\_region\\_taxonomy\\_tid=All](https://www.prisonstudies.org/highest-to-lowest/occupancy-level?field_region_taxonomy_tid=All)

Paraguay	199	13,607	6.84
Argentina	186	81,975	44.06
Venezuela	178	57,096	32.16
Mexico	164	204,422	124.43
Bolivia	156	17,946	11.53
Guatemala	141	24,386	17.33
Total	275	1,582,007	623.00
Source: World Prison Population List (twelfth edition, 2018)			

*VI. Conclusions: the ‘rebirth of the prison’ or birth of Latin America as a mass prison?*

- 54 The last 30 years of the history of prisons have been christened by Paul Hathazy and Markus-Michael Müller as the ‘rebirth of the prison’. With all of the foregoing in mind though, one cannot help but wonder if it was actually a period that heralded the birth of Latin America as a mass prison. The road taken by governments in the region regarding prisons to this point has seen Latin American States go from being without penitentiaries to States with many (infamous) penitentiaries that are not able to cope with the highest growth rate of imprisonment in the world, all in little over a century.
- 55 While there are considerable differences in various parts of Latin America, the region’s embrace of the use of penitentiaries has led it to have an average of 275 prison inmates for every 100,000 inhabitants. In 2018, the mean imprisonment rate in the Central America and Caribbean States analysed in this paper was 343 people per 100,000 while the corresponding rate in South American States was 232. The highest imprisonment rates in Latin America are those in El Salvador (604), Cuba (510) and Panama (390), while the lowest are those in Bolivia (157), Guatemala (136) and Venezuela (113). In absolute terms, the two countries with the largest prison population are Brazil (690,722) and Mexico (204,422).<sup>23</sup>
- 56 As detailed in the introductory section, the first penitentiaries were built in the period from 1870–1920. This occurred parallel to the development of legal codes dealing with prison sentences and, more specifically, with the first Latin American criminal codes that focused on punitive systems for

23 Data from WPB 2018 < [https://www.prisonstudies.org/sites/default/files/resources/downloads/wppl\\_12.pdf](https://www.prisonstudies.org/sites/default/files/resources/downloads/wppl_12.pdf)

the deprivation of liberty. Over the decades that followed, the penitentiary system was associated with certain prison premises that were concentrated almost exclusively in the vicinity of the capital cities. The dissemination of the penitentiary system to regional areas only became observable in the 1920 to 1950 period as new facilities were built in various provinces and federal states, a phenomenon that occurred just as the building pattern was changed, the various facilities' staff were professionalised and centralised administrative penitentiaries were built.

The second half of the 20<sup>th</sup> century saw the IPPF become a relevant actor in its role as the counselling organ of the UN and which gave rise to the Standard Minimum Rules that have played a central role in many prison-related matters since the 1950s. Over time, the IACoMHR positioned itself in (an arguably) equally relevant role given its extensive reach in terms of its auditing and counselling powers in penitentiary matters. Sadly, the second half of the century was also marked by the rise to power of numerous military dictatorships which deepened the political use of prisons and criminal selectivity and, in the 1970s the years that followed, some prisons became clandestine detention centres, torture and played a pivotal part in the disappearance of innumerable citizens.

The return of democracies in the 1980s and 1990s held the promise of change, however, in the years since, the general situation in prisons has worsened. The huge economic and social crises these young democracies had to face overwhelmed their welfare systems and resulted in a worsening of inequalities in what was already one of the most socio-economically challenged regions in the world. This inevitably led to explosive growth in violent crime, adding fuel to an already burning crisis.

This explosive cocktail, together with the ascent of neo-punitivism and punitive populism, gave rise to previously unseen growth in imprisonment rates in most of the region which, within a few decades, has come to resemble a mass imprisonment area that was already struggling with detention infrastructure that had been deficient for the 'normal' demands placed on it for decades. In this last period, the penitentiary population of Latin America tripled, increasing from a little over half a million towards the end of the 20<sup>th</sup> century to around 1.5 million in 2018, with States such as El Salvador and Ecuador quadrupling their penitentiary populations.<sup>24</sup> All this has been aggravated by the persistent historical characteristics of Latin

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24 Data from WPB 2018 < [https://www.prisonstudies.org/sites/default/files/resources/downloads/wppl\\_12.pdf](https://www.prisonstudies.org/sites/default/files/resources/downloads/wppl_12.pdf)

American prisons: overpopulation, lack of distinction between and separation of convicted and the large numbers of unconvicted prisoners, poor sanitation and diet, lack of gender-specific policies and ongoing human rights violations. As regards neo-punitivism, decodification is undoubtedly one of its clearest and most harmful aspects. The hardening of criminal law in Latin America can be observed through the growth in both the number of offences and the subsequent sanctions, while the proliferation of legislation linked to drug trafficking is evidence of this Latin American trend toward criminal expansion and punitive populism.

60 This brief essay cannot be closed without a reference to the Covid-19 pandemic which has imposed enormous hardship and caused immense disruption in prison systems worldwide since 2020. Undoubtedly, the pandemic should be seen as a historic event, but it has also induced a breaking point in almost all public policies with its tragic and painful effects, many of which are yet to be fully understood. The pandemic had great repercussions in prisons, as seen by the large number of critiques regarding the ways (and the number of times) prison administrations reacted to the challenges of lockdown and social distancing in their facilities. One of the most highly criticised aspects was the long-lasting suspension of visits, crucial for the mental health of incarcerated individuals, as well as the under-planned use of pardon and sentence switching. This led to something of a perfect storm of woes for prison inmates as inefficient responses to the challenges of the pandemic added to the lack of administrative resources and bad results of inadequate prison policies, it is, therefore, unsurprising this was followed by a large number of riots and judicial claims. Indeed, not even the most pessimistic prison analyst could have foreseen at the end of 2019 that the already grim scenario of Latin American prisons could be made so dramatically worse in such a short time and in such a serious manner.

61 The work required to undo these effects will take many years and much resource, adding to already existing State debt and deficiency in their penitentiary systems. Doubtlessly, transforming Latin American prisons into more humane institutions, assuming that is even possible, is one of the greatest challenges of the region's democracies, however, it should be seen as an inherent part of their core function – building fairer and less unequal societies.

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