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Restorative responses to sexual violence: an introduction

by Estelle Zinsstag and Marie Keenan

Dr Marie Keenan

School of Social Policy, Social Work and Social Justice University College Dublin
Ireland

Phone: +353(1) 7168319

email: marie.keenan@ucd.ie

<http://www.ucd.ie/research/people/socialpolicysocialworksocialjustice/drmariekeenan/>

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Estelle Zinsstag and Marie Keenan¹

1. The origins - a gathering

In November 2014, the Daphne Research Project's² final event was a gathering held at the University of Leuven (KU Leuven) in Leuven (Belgium). The purpose of the gathering was to bring together a small number of world experts on restorative justice (RJ) and sexual violence from academic, practice and policy backgrounds as well as some stakeholders, not only to disseminate the preliminary results of the Research Project but more importantly to discuss and exchange cutting edge ideas on the possible further development of RJ in the field of sexual violence. Some of these discussions form the genesis of this volume. We, as the senior researchers for the Daphne Research Project (which findings will also be published shortly), saw in this gathering the potential for an additional volume on the legal, social and therapeutic dimensions of restorative responses to sexual violence. We commissioned the papers that are subsequently presented here.

2. Some explanatory notes on concepts

In this book we use a number of concepts which might be the subject of debate in some circles and therefore we would like to start by clarifying our position on those. We use sexual violence as an umbrella term to mean any type of violence of a sexual nature as will be explained below. However some of our authors use sexual crimes, sex crimes, sexual offences, sexually harmful behaviours etc. in the same way as we understand sexual violence.

The terms victim, survivor, victim survivor are used interchangeably throughout the book as different authors make use of different terms. However, all are used to refer to the people who have been harmed by the sexual violence. The terms offender and perpetrator are

¹ We would like to thank Ivo Aertsen for his insightful comments on an earlier draft.

² European Commission Daphne Grant JUST/2011/DAP/AG/3350. For more information please see <https://www.law.kuleuven.be/linc/english/research/researchdaphnesexualviolence.html>.

also used interchangeably in the text to refer to the person who has perpetrated the sexual violence.

Before considering the applicability of RJ to cases involving sexual violence, it is important to first examine what is meant by the concepts sexual violence and then restorative justice and how they are understood in this book.

2.1 What is sexual violence?

To begin with, the World Health Organisation promotes a broad definition of ‘violence’, describing it as ‘the intentional use of physical force or power, threatened or actual, against oneself, another person, or against a group or community that either results in or has a high likelihood of resulting in injury, death, psychological harm, maldevelopment or deprivation’ (WHO, 1996: 5). When it comes to sexual violence, which often involves covert as well as overt violence, the effects of which can also be psychological in nature, finding an adequate definition that covers for all eventualities is even more complex. Questions such as what is ‘consent’, in what circumstances is ‘sex’ harmful and ‘what is the appropriate age for non-invasive sexual contact’ arise in this context. Queries are also often raised about the ‘intentionality’ of the perpetrator (or *mens rea* regarding the act) and the ‘hidden’ aspect of the resulting injury, such as where is the ‘violence’ in sexual abuse that has not been overtly violent at all. Despite these conceptual difficulties and the ones that arise in marrying the normative aspects of what is sexual violence with culturally specific conditions and interpretations, social, political and public forces in many jurisdictions have coalesced to define certain sexual and other acts as aberrant to have them codified in penal law. Terms such as sexual assault, sexual abuse and rape emerge from these codifications which are also subject to penal sanction.

For our purposes, sexual violence is a broad term that is legally and culturally defined and encompasses many types of sexual act including contact and non-contact child sexual abuse, sexual assault, rape and wartime sexual violence. The chapters presented in this volume address these phenomena and many of the aspects mentioned here. While sex trafficking and sexual violence perpetrated through the use of communication technology are not focused upon specifically in any of the chapters, the content of the volume can be applied in these contexts too. However, both sex trafficking and sexual violence perpetrated through the use of communication technology warrant further in-depth analysis in their own right. We acknowledge the absence of such as a possible limitation of the collection.

2.2. What is restorative justice?

Since the 1970s RJ has developed into a justice mechanism (Daly, 2016) dealing with the aftermath of crime, focusing particularly on repairing the harm done to people and relationships (Braithwaite, 1999, 1989; McCold & Wachtel, 2002). Rather than focussing on who is guilty and what punishment is deserved, RJ focuses on a number of questions that distinguishes it from conventional criminal justice such as: what harm has been done? What needs have arisen and whose obligation is it to meet those needs (Zehr, 1990)? Described as a ground-breaking social theory of justice (Gavrielides, 2007) with tradition-based principles at its core RJ can also be viewed as a new social movement (Daly & Immarigeon, 1998). RJ is becoming increasingly established and accepted as a mechanism for responding to many different types of crime (ie low level up to very severe crimes for example) at nearly every stage of the criminal justice process.

However, RJ is also a term that is dogged with conceptual ambiguity. For example, there is much debate regarding the meaning of ‘restorative’ and ‘justice’, with large literatures existing on both. When restorative and justice are combined in the same concept, the problems of interpretation and expectations become even more intensified. It is reasonable to ask if justice can ever be restored in the aftermath of a crime and in particular one that involves sexual violence. It is also reasonable to ask what is restored during a ‘restorative’ process and if it is possible or even desirable – certainly in cases involving sexual violence (for more on these debates, see e.g. Keenan & Zinsstag, 2014). While the term RJ has gained in currency in the criminological and social science literature over recent decades it is clear that it is a concept that will be subject to and in need of much refinement and elaboration as the theoretical and applied fields of RJ continue to develop and advance –this volume hopes to contribute to these.

One of the most frequently cited working definitions of RJ is offered by Tony Marshall (1996: 37) who defines RJ as a ‘process whereby parties with a stake in a specific offence come together to resolve collectively how to deal with the aftermath of the offence and its implications for the future’. With its emphasis on ‘process’ this definition is often regarded as a ‘purist’ conception of RJ (McCold, 2000: 358) and is criticised for being too narrow on the one hand because of its emphasis on face-to-face meetings and too broad on the other because of a lack of interest in RJ outcome (Walgrave, 2000: 419). Walgrave (2000: 418) proposed an alternate ‘maximalist’ interpretation of RJ which is defined as a form of justice delivery that is primarily focused on repairing the harm that has been caused by the crime.

The following definition of RJ, provided by the United Nations (2006: 6-7), incorporates elements of both purist and maximalist definitions, and is the one most closely underpinning the work in the chapters of this book, with an emphasis on process, outcome and also on the precise role of the stakeholders involved:

Restorative justice is a way of responding to criminal behavior by balancing the needs of the community, the victims, and the offenders (p. 6).

Restorative justice programmes are any programme that uses restorative processes and seeks to achieve restorative outcomes (p. 7).

Restorative process means any process in which the victim and the offender and, where appropriate, any other individuals or community members, affected by a crime, participate together actively in the resolution of matters arising from the crime, generally with the help of a facilitator (p. 7).

Restorative outcome means an agreement reached as a result of a restorative process. The agreement may include referrals to programmes such as reparation, restitution and community services, aimed at meeting the individual and collective needs and responsibilities of the parties, and achieving the reintegration of the victims and the offender (p. 7).

Despite the conceptual complexities involved in definitions of RJ it is clear that RJ has become a framework for thinking about ways of humanising justice, of bringing victims and offenders together. This framework enables the victim/survivor to receive an acknowledgement of and explanation for the violence that was done to them, for offenders to be accountable and for community members to be meaningfully involved in responding to the needs that have arisen (see Dignan, 2000; McCold, 2000).

Over the past three decades, many programmes and practices now fall under the RJ rubric (Daly & Immarigeon 1998) and despite the existence of a variety of methodologies and programmes involving national and even regional variations, what unites RJ approaches is the commitment to a number of core principles: RJ is a victim-led approach to justice (Pali & Sten Madsen, 2011); participation is voluntary (Koss, 2014); the offender must take responsibility for the offence in order to be eligible for participation; safety of all is of paramount importance and preparation for the 'meeting' or conference or circle is essential. The legal and procedural relationship between RJ, criminal justice and the rule of law are also guided by Council of Europe (1999) and UN (2002) guidelines which have underpinned various national approaches

(see Keenan, this volume). More recently at the European Union level, Directive 2012/29/EU recognised the ‘great benefit to the victim’ that RJ can entail, but also prescribed a set of safeguards and conditions.

It is also important to note that while RJ can be considered as a philosophy or a paradigm, comprising guiding principles and values, there are several different models used in RJ and no one model is seen to be applicable in all cases. The most popular approaches include victim-offender mediation/dialogue, restorative conferences and restorative circles. Victim-offender mediation/dialogue (VOM/VOD) generally limits the participants in the meeting to the victim survivor, the perpetrator, a support person for each if they desire and one or two facilitators. Restorative conferences bring together victims, offenders and members of their communities of care as well as relevant professionals for a prepared meeting regarding the offence that has occurred. Restorative circles bring together a broader range of participants including victim survivors, perpetrators their communities of care and wider community members and the methodology differs from conferences e.g. The suitability of the model applied often relates to the nature of the case and the aim and purpose of the gathering. For example, conferences are very often used in youth crime, such as in Northern Ireland, whereas victim-offender mediation is often chosen in very sensitive cases, such as those involving sexual violence. While the evidence based literature on outcomes for RJ when controlled for model by offence type is thin (Shapland, Robinson & Sorsby 2011: 190) this volume contributes to the empirical literature in cases of sexual violence (see Beck, Bolívar & Vanseveren; Daly; Daly & Wade; Jülich & Landon; McGlynn, Downes & Westmarland, this volume).

3. Restorative justice for sexual violence

Theories on the suitability of RJ for cases involving sexual violence can be traced back to the 1990s when scholars such as Hudson (1998) first began to consider its use for sexual offences. By 2002, the applicability of RJ to sexual violence had become the subject of vigorous debate (Cossins, 2008; Daly 2006; Hudson 2002). In this volume Keenan outlines the case for RJ in sexual violence cases and rests the argument on the following four concerns regarding the limitations of conventional criminal justice: the limited role that victim survivors play in criminal justice and their dissatisfaction at being mere witnesses in the state’s case; insufficient offender accountability by conventional criminal justice mechanisms; the lack of attention given to the reintegration of sex offenders by conventional criminal justice and the limited role

that communities of care and citizens are afforded in criminal justice despite being both secondary victims and the network responsible for repair of the social bonds. She argues that RJ can complement criminal justice in these aforementioned regards.

Despite the apparent benefits of RJ as demonstrated by the research in this volume (see e.g. Beck et al.; Daly; Daly & Wade; Jülich & Landon; McGlynn et al.; Zinsstag & Busck-Nielsen) commentators are also concerned that the needs and interests of victims could be subjected to the needs of the perpetrators by the RJ process itself (see Keenan this volume) and that the power imbalance that sexual violence creates could provide opportunity for offenders to re-victimise the victim in the most subtle of ways, if the facilitators are not trained to re-balance the dynamics (see Godden-Rasul and Pali, this volume). However as Jülich & Landon demonstrate in their chapter on the work of Project Restore in New Zealand, this concern can be met by a number of procedural safeguards that aim to ensure the physical and emotional safety of all participants and to avoid any potential re-victimisation. Facilitation of RJ in sexual violence cases must also be done by RJ trained facilitators who have additional training in in the dynamics of sexual violence and in the impact of sexual trauma (see Mercer, Sten Madsen, Keenan & Zinsstag, 2015). Ward in this volume also addresses the dual relationship problem for RJ facilitators while Woessner considers the relationship between RJ and therapy in cases of sexual violence.

It is easy to understand why some victim advocates may have reservations about the application of RJ in cases of sexual violence. Yet practice experience indicates that the very same reasons which prompt victims and offenders to engage more generally in RJ in non-sexual cases also apply in cases of sexual violence – perhaps even more so. These are to enable their voice to be heard, for the impact and aftermath of the harm to be more profoundly and widely considered, to ask questions and hear answers and create a more meaningful level of accountability to those affected and harmed. Victims of sexual violence want to be heard and like victims of other crimes they also seek an acknowledgement of the harm caused to them. ‘How could you do this to me?’ is the question asked by most victims who have been raped, the ‘you’ referring of course to the person who committed the assault and hence the only one who can provide the answer. ‘Why did you do this to me?’ is also a question that many who have been sexually harmed in childhood want to ask of the person who abused them.

But it is not an easy question to ask and it is not an easy question to pursue. Some years ago in the Centre for Victims of Sexual Assault in Copenhagen (Denmark) the staff were taken by surprise when a young woman who had experienced rape told them that what would help her most was to talk to the man who had raped her (see Mercer, Sten Madsen, Keenan &

Zinsstag, 2015). She wanted to know why he had done this to her and she requested the staff to help her meet this man. The staff at the Centre had never imagined that anyone would want to sit down face to face with the man who had raped them and ask that question directly. They had no idea how to help her but they soon had to learn. At the time the RJ services 'didn't do sexual violence' and the sexual assault unit for victim/survivors 'didn't do offenders'. In the end the Centre staff learned about RJ and found a way to offer the young woman and other victims the opportunity to enter into dialogue with their offenders. The Centre cautiously adopted Mary Koss's mantra: 'No crime victim should be forced to confront her perpetrator, but neither should she/he be denied the opportunity if she/he desires it' (see generally Koss, 2000).

There is now a growing body of research evidence which supports the application of RJ in cases of severe harm, such as sexual violence and much of it is presented in this volume. Conventional criminal justice processes can be especially difficult for victims of sexual violence and many victims report dissatisfaction with criminal justice processes. RJ offers an additional approach which can be moulded to the needs of the individual victims. In addition to the benefits of RJ experience by victims of crime in general, there are additional benefits that can accrue to victims of sexual violence. Sexual violence is different from other offending behaviours in the degree to which it occurs in a relational context. In most cases there will be some form of past and perhaps present and even future relationship between the victim and the offender. The difficulty of reimagining a safer and positive future relationship is often one of primary concerns to victims and others indirectly affected by the sexual harm. Very often the perceived 'safe' approach to 'manage' this tension is to separate the parties and remove the potential for ongoing contact. However, frequently this is not sustainable, or even desirable, especially to the victim. RJ offers a methodology to bring together the parties in such circumstances to address such relational dilemmas.

Another specific benefit of RJ for sexual violence victims is the chance to reclaim their voice – not as a victim but as a survivor. Victims often speak of their need to re-narrate their life stories as 'survivors' of sexual violence rather than as 'rape victims'. Victims report that this allows them to challenge the perception that their lives have been ruined and that the change in the self-narrative of the effects of the rape event in their lives is one of the primary benefits she identified in the post-meeting evaluation.

While there is a growing body of literature on the benefits of RJ for victims of sexual crime (see many of the chapters in this volume) to date there is little research on the benefits of RJ for sex offenders. However, there is growing interest in how RJ in cases of sexual

violence can contribute to offender rehabilitation through supporting desistance from further offending and in enhancing offender accountability (see Woessner, this volume).

Despite this, reservations are often also expressed regarding the suitability of RJ for perpetrators of sexual violence for reasons to do with the potential for the erosion of the due process rights of offenders (see Keenan this volume). In practice, concerns about due process rights of offenders are largely unfounded and legal and procedural safeguards are outlined by the Council of Europe (1999) and UN (2002) documents on the use of RJ in penal matters, and several jurisdictions, such as Belgium and New Zealand have developed legislation and procedural guides based on these recommendations to ensure that no person is compromised by their participation in RJ.

One of the factors that may have inhibited RJ practice in the field of sexual violence is the perception that it is inherently a more risky practice in sexual violence cases than other types of crime. The nature and intimacy of the harm, the power imbalances often associated with sexual violence, which are also commonly linked to relational connections between victims and offenders, the perceived menacing characteristics of offenders and the particular vulnerabilities of victims, in some cases the young age and immaturity of victims, the inadequacy of support services for participants, and the anxieties and responses of communities are some of the reasons why this is believed to be the case.

For these and other reasons it makes sense for practitioners to proceed with caution in sexual violence cases, to gradually build up their case load involving complex cases and to develop the confidence and skills required to answer the question ‘How do we deliver safe practice in a risky operational environment?’ rather than simply complying with the view that ‘RJ doesn’t do sexual violence...’. Restorative justice practitioners in sexual violence cases must acquire an evidence-based knowledge of the phenomenon of sexual violence and the criminogenic factors that are linked to sex offending as essential practice knowledge. They should be able to understand the distinctions between restorative and criminogenic risk and interrogate the wider concept of ‘risk’ to have a much more precise understanding of what it means and how it is to influence any potential restorative process.

4. The structure and outline of the book

This book is divided in two parts, with an introduction and conclusion. Part 1 focuses on theoretical and conceptual frameworks (including legal, social and feminist), and comprises six chapters. Part 2 considers justice and therapeutic perspectives and is made up of a further

seven chapters.

Chapter 1, 'Repairing the harms of rape of women through restorative justice', by Nikki Godden-Rasul focuses on ways of conceptualising the harms of rape of women and how these conceptualisations can be utilised in RJ. Godden-Rasul argues that the harm of rape is shaped, mediated and altered by social structures and that individual justice cannot be properly done without some level of social justice, which includes not just the symbolic recognition of the wrong of rape and of women's value and freedom, but also the provision of essential state-provided or funded services. Godden-Rasul concludes that if RJ is to contribute to repairing the harm of rape, the key practical and strategic question as to what extent it can contribute to both individual and social justice must be considered.

Chapter 2, 'Towards integrative frameworks for addressing sexual violence: feminist, abolitionist, social harm and restorative perspectives' by Brunilda Pali explores the potential of addressing the phenomenon of 'sexual violence' from a restorative framework, drawing on three additional perspectives within critical criminology which are highlighted in relation to this phenomenon. The feminist perspective, the abolitionist perspective, the social harm perspective and their major tenets are compared with the restorative perspective and an integration of frameworks is developed for addressing sexual violence. The paper argues that the restorative framework has many lessons to learn from the other perspectives within critical criminology in its attempt to provide answers to sexual violence.

Chapter 3, 'Sexual violence and victims' justice interests' by Kathleen Daly, considers how we build a body of evidence that can assess and compare justice mechanisms in responding to sexual violence. In order to assess and compare the strengths and limits of different justice mechanisms in a systematic manner Daly developed the Victimisation and Justice Model, which has three components: contexts of victimisation, justice mechanisms and victims' justice interests. The focus of this chapter is on victims' justice interests.

Chapter 4, 'Restorative justice and the dual role problem confronting practitioners' by Tony Ward argues that restorative justice is just as vulnerable as traditional responses to crime and rehabilitation to what had been labelled the dual role problem. The dilemma of how practitioners can adequately meet their ethical responsibilities to victims of crime and the community, while also assisting individuals who have committed offences to engage in a meaningful process of self-reformation and social restoration is at the heart of the matter. Ward proposes that normative individualism in conjunction with a decision-making procedure derived from a moral acquaintance framework, is well positioned to address any ethical conflicts created by dual roles for RJ practitioners.

Chapter 5, 'Criminal justice, restorative justice, sexual violence and the rule of law' by Marie Keenan develops the arguments for and against RJ in sexual violence cases and presents the legal challenges that common and civil law jurisdictions encounter in attempting to reconcile criminal and restorative justice responses to sexual violence. In doing so the chapter acknowledges the differences that distinguish common law from civil law jurisdictions and the legal and philosophical traditions that underpin them, as these distinctions, argues Keenan, have influence on what will or not be easily countenanced in terms of legal and procedural innovations with regard to justice delivery.

Chapter 6, 'Wartime sexual violence and conventional and restorative justice responses: the potential of a 'blended approach' within transitional justice' by Estelle Zinsstag and Virginie Busck-Nielsen, focuses on wartime sexual violence against women and girls and existing transitional justice responses to this particular crime. The chapter offers ways to expand practical justice options for women victims of wartime sexual violence through a combination, or 'blending', of conventional justice and restorative approaches, which encourages personal, familial and community responses to harm.

Chapter 7, 'Sibling sexual violence and victims' justice interests: a comparison of youth conferencing and judicial sentencing' by Kathleen Daly and Danielle Wade introduces and applies a new method to assess and compare RJ conferences with other justice mechanisms, from a victim's perspective in cases of sibling sexual violence. The chapter offers a systematic empirical assessment of multiple cases of sexual victimisation. Daly and Wade suggest that all outcome research should aim to identify what some justice mechanisms can do better than others for victims and from this, to re-think and transform a range of activities, both in legal settings and civil society, for 'doing justice' more effectively. Daly's comparative work in this chapter reveals how justice mechanisms can be improved from a victim's perspective.

Chapter 8, 'Achieving justice outcomes: participants of Project Restore's restorative processes' by Shirley Jülich and Fiona Landon uses Daly's (2014) Victimisation and Justice Model (discussed in Chapters 5 and 7) to retrospectively analyse 12 sexual violence cases referred to Project Restore in New Zealand from the perspective of the victim survivors. Project Restore is a restorative justice provider specialising in addressing sexual violence within the criminal justice system. The analysis suggests that the desired outcomes for the most part had been achieved and the victims' justice interests met. The review found the only outcomes not achieved depended on the offender's ability to understand the impacts of his harmful sexual behaviour.

Chapter 9, 'Seeking justice for survivors of sexual violence: recognition, voice and consequences' by Clare McGlynn, Nicole Westmarland and Julia Downes, also focuses on victims' justice interests. This chapter examines the insights of sexual violence survivors on their understandings of 'justice', particularly the concepts of recognition, voice and consequences. In considering the extent to which restorative approaches may or may not meet these justice interests, McGlynn et al. suggest that some restorative approaches may provide an opportunity to satisfy certain of the survivors' justice interests. They argue further that survivors' concepts of justice extend well beyond both conventional criminal justice and restorative approaches, and thus they advocate that a far broader, kaleidoscopic, understanding of justice needs to be considered.

Chapter 10, 'The RESTORE Program for sex crimes: differentiating therapeutic jurisprudence from restorative justice with therapeutic components' by Elise Lopez and Mary Koss, offers an analysis of the differences between therapeutic jurisprudence and restorative justice with therapeutic components and argues why such conceptual refinement is necessary. The chapter is influenced by work undertaken by the RESTORE Program in the United States of America. Among the recommendations from the analysis is the suggestion that RJ conferencing programmes should differentiate between the justice and therapeutic outcomes for victims in any evaluations and outcome studies.

Chapter 11, 'On the relationship between restorative justice and therapy in cases of sexual violence' by Gunda Woessner, considers the relationship between RJ and therapy, by addressing a number of questions: What is the relationship between therapy and RJ? Do they interfere with or complement each other? What are the challenges for RJ practitioners and therapists when the victim or the offender is undergoing both RJ and therapy? Can RJ and therapy be pursued at the same time and are they mutually dependent on each other? Does RJ correspond to the aims of therapeutic work? With these questions in mind, this chapter compares the therapeutic and criminogenic as well as protective needs of both victims of sexual assault and of sex offenders to best navigate the possible achievements and hazards of RJ in cases of sexual violence.

Chapter 12, 'Responsibility, care and harm: the involvement of the community in cases of child sexual abuse: a reflection from the practice experience of the Belgian mediation service Alba' by Miriam Beck, Daniela Bolívar and Bie Vanseveren provides a reflection on the ways that victims' and offenders' closest social relationships (the 'community of care') can participate in RJ interventions. Drawing on the work of RJ at the Alba Victim-Offender

Mediation Centre in Belgium two cases are described and analysed in this regard. The chapter concludes by considering a three-fold position of involvement for communities of care in RJ.

Chapter 13, 'Circles of Support and Accountability: survivors as volunteers and the restorative potential' by Nadia Wager and Chris Wilson considers the restorative potential for victim survivors of sexual violence in working with sex offenders as volunteers in Circles of Support and Accountability (COSA). Findings from their recent study suggest that survivor-volunteers do not enter into their volunteering role seeking self-healing or in order to undergo a process of meaning-making. Rather they come to COSAs once they have transitioned from victim to survivor or they have found a renewed sense of strength or purpose that has arisen in the context of undergoing a new life transition or set back. There is suggestion that they work proactively to maintain their resilience and thus self-manage potential risks to their psychological well-being by being volunteers with these programmes. Wager and Wilson suggest that these findings give rise to new conceptualisations of survivorship which can resonate with images of strong, resilient, compassionate and self-managing individuals who are fully functioning members of their communities.

This edited collection aimed to gather a number of experts around the topic of sexual violence and restorative justice, a topic still widely under-researched. The authors included here have delivered very varied and rich chapters covering a wide range of themes which re-surface regularly throughout the chapters. We chose to discuss a number of them in some more depth in the conclusion to this volume.

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