

Women And the World's Judiciaries: Identifying Key Challenges and Opportunities

A synopsis of findings from colloquia in
Arusha, Tunis and Geneva, 2013

Discussion Paper
April 2014

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Paintings by Roger Pfund

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"When I was first appointed it was to a Court in a small rural town. For many my presence as woman and judge was not believable. One day a man entered my court and asked me where the judge was."¹

"At the beginning many male colleagues did not want us there. They were defending their castles and territories. Many colleagues refused to implement the orders we gave and we had to issue disciplinary orders."

"Women themselves were opposed to women judges. Many women said - I don't want to be judged by a woman."

"When I reported for duty I found that there were no toilet facilities for women Judges. I had to personally deal with the Registrar to make the facilities available. This was a humiliating experience."

"When I first became pregnant the President of the Tribunal said I should quit."

"When I was appointed a Judge ... I was viewed with suspicion; I was viewed as a rube rouser who had come to disturb the status quo."

"I became a specialist 'moaner.' As I later discovered the establishment unilaterally changed my name to 'moaner.'"

"In many ways the authorities treated both male and female judges in the same way. They oppressed one and they oppressed the other. Persecuted one and persecuted the other. But when they wanted to subjugate and intimidate judges they would start with women. They moved women judges away from capitals and away from their families and children. Women judges maintained their resolve but they paid a price."

¹ Quotes from testimonies of participants in ICJ Colloquia in 2013 on Women in the Judiciary. The proceedings were subject to chatham house rules and as a result the quotes are not attributed.

INTRODUCTION

In 2013 the ICJ convened three roundtable discussions on women in the judiciary. At these colloquia over 65 women judges, other legal professionals and human rights defenders from over 40 countries came together to share their personal and professional accounts of the challenges they have faced as women judges or as women lawyers and human rights defenders in jurisdictions in which women's representation in the judiciary is negligible or contested.

Discussions centred on storytelling and, through discussion of participants' own experiences, enabled the consideration and exploration of critical obstacles and other concerns related to women's equal representation within judiciaries.

These events mark the initial phase of a multi-year ICJ initiative to support women judges, lawyers and human rights as agents of change.

THE PARTICIPANTS: TRAILBLAZERS, MENTORS AND ACTIVISTS

A number of the women judges participating in the colloquia were among the first women appointed to the judiciary in their jurisdictions. Others were the first appointed to a senior level or to a particular court. These women represented different generations and levels of professional seniority. Some reflected on lessons learned and difficulties overcome during the trajectory of a long career. Others told of the ways in which they are still grappling with the challenges of being at the forefront of significant systemic change.

Other participants, although not the first among female judicial appointees, were pioneers in their jurisdictions in other ways: in their careers prior to entering the judiciary; in their approach to their judicial responsibilities and their commitment to the principles of independence of the judiciary; in their innovative or landmark decisions concerning human rights principles and gender equality.

THE DISCUSSION PAPER: SYNTHESIZING THE FINDINGS

At each of the colloquia a series of focus issues and concerns emerged as critical considerations in any exploration of the challenges women face in entry to, and within, the judicial profession. This paper presents a brief synopsis of participants' reflections on some of these issues. Section I captures participants' views as to why women's full participation in the judiciary is vital. Section II addresses a range of challenges, obstacles and opportunities identified.

I. THE IMPORTANCE OF WOMEN JUDGES

1. The importance of a proper and effectively functioning judicial system in a country cannot be overstated. The judiciary is vital to the rule of law, the fair administration of justice and the protection of human rights. Not only are the separation of powers and the independence of the judiciary bedrock components of the rule of law and democracy, but courts play a central role in ensuring that victims of human rights violations and abuses obtain effective remedies and reparation, that perpetrators of violations and abuses are brought to justice and that anyone accused of a criminal offence receives a fair trial.²
2. In this context, and because judicial decisions and the administration of justice have vast and varied effects on everyday lives, the competence, legitimacy and integrity of a country's judiciary is key and the composition of the judicial profession a matter of major significance. Judicial officers must be individuals of integrity and ability with appropriate expertise and procedures for judicial appointments must ensure the independence and impartiality of the profession. In addition, judiciaries must be representative of the societies they serve and there must be no discrimination in appointments on any grounds, including sex.³
3. Yet women's full participation in the world's judiciaries generally remains unfulfilled, and their underrepresentation in a great number of jurisdictions remains marked. Global figures indicate that on average women comprise just over 25 percent of the world's judicial officers, and although in some jurisdictions these percentages are higher, in many other countries and regions the numbers fall to far below 10 percent.⁴
4. Moreover, national percentages can alter dramatically when considering the number of women at senior levels of the profession and in leadership roles. In some jurisdictions there

² See also for general discussion: International Principles on the Independence of Judges, Lawyers and Prosecutors, ICJ Practitioners Guide No.1; ICJ Legal Commentary to the Geneva Declaration, Upholding the Rule of Law and the Role of Judges and Lawyers in Times of Crisis. And see also The Judiciary: Why Diversity and Merit Matter, Shami Chakrabarti. See also the International Commission of Jurists, 1959 Declaration of Delhi.

³ See in general: UN Basic Principles on the Independence of the Judiciary, Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985 (hereinafter UN Basic Principles), Principles 10 (and see also 13); See also, Human Rights Committee, General Comment No. 32, Right to Equality before Courts and Tribunals and to a Fair Trial, UN Doc. CCPR/C/GC/32, 23 August 2007, Paras. 18-22.

⁴ In Pursuit of Justice, Progress of the World's Women 2011-2012, UN Women, pgs. 60-61.

are high numbers of female magistrates, but extremely few *senior* women judges; in others women's presence at appellate levels is significantly low.⁵ In some jurisdictions statistics vary as per the competence of a specific court: women judges may be highly concentrated in family or children's courts, or may be excluded from handling criminal matters or from religious or customary courts.⁶

5. International law and standards require States to take concrete measures to address these imbalances and deficits, both through the identification and removal of legal and practical barriers to women's equal participation, and through proactive steps to actively encourage and advance women's equal representation and redress long-standing deficits. These obligations derive from general international standards concerning the independence of the judiciary, and from international legal requirements to ensure women's enjoyment of their human rights on the basis of equality and non-discrimination.⁷ Indeed, certain international gender equality standards specifically and expressly address women's right to equal participation in public life and equal access to, and representation within, the judicial profession.⁸
6. Article 7 of the Convention on the Elimination of All Forms of Discrimination against Women specifies that States Parties must "take all appropriate measures to eliminate discrimination against women in the political and public life of the country", and to this end they must ensure women's right "to participate in the formulation of government policy and the implementation thereof and to hold public office and perform all public functions at all levels of government".⁹ Political and public life refers to: "the exercise of political power, in particular the exercise of legislative, judicial, executive and administrative powers".¹⁰
7. Article 7 of the Convention not only requires the removal of legal and other barriers to women's participation in the

⁵ Ibid. And see CEDAW General Recommendation 23, Para. 30; Judicial Diversity in the United Kingdom and Other Jurisdictions, A Review of Research, Policies and Practices, The Commission for Judicial Appointments, Cheryl Thomas, 2005

⁶ CEDAW General Recommendation 23, Para. 31.

⁷ See for example: Articles 2 and 3, International Covenant on Civil and Political Rights (hereinafter ICCPR); Articles 1 and 2 (and in general), Convention on the Elimination of All Forms of Discrimination against Women (hereinafter CEDAW); Articles 2 and 3, International Covenant on Economic, Social and Cultural Rights (hereinafter ICESCR).

⁸ Article 7 CEDAW; Article 25, ICCPR; Human Rights Committee, General Comment No. 25: The right to participate in public affairs, voting rights and the right of equal access to public service (Art. 25), UN Doc. CCPR/C/21/Rev.1/Add.7, December 1996. See also Articles 6 and 7, ICESCR. And see Principle 13, Beijing Declaration and Paras. 232 (m) and 190(a) Platform for Action, 4th World Conference on Women, 15 September 1995 (hereinafter Beijing Declaration and Platform for Action).

⁹ Article 7(b), CEDAW

¹⁰ CEDAW General Recommendation 23, Participation in Political and Public Life, UN Doc. A/52/3, 1997 (hereinafter CEDAW General Recommendation 23), Paras. 5, 15 and 46(b)

judiciary. It also requires a range of practical and structural measures, including temporary special measures, to ensure women's equal enjoyment in practice of the right to hold judicial office.¹¹ As the Committee on the Elimination of Discrimination against Women has underscored, although the removal of legal barriers to women's equal representation within the judiciary is crucial, it is not sufficient: "the critical issue... is the gap between the de jure and de facto, or the right as against the reality of women's participation."¹²

8. The Beijing Declaration and Programme of Action, adopted in 1995 at the Fourth World Conference on Women, also addresses the matter. It outlines that States must "ensure that women have the same right as men to be judges, advocates or other officers of the court"¹³ and "commit themselves to establishing the goal of gender balance... in the judiciary, including, inter alia, setting specific targets and implementing measures to substantially increase the number of women with a view to achieving equal representation of women and men, if necessary through positive action".¹⁴
9. Women's rights to equality and non-discrimination are crucial to defining the importance of ensuring women's full and equal participation in the judiciary. Yet the necessity of women's full participation goes beyond this too, as it, "is essential not only for their empowerment but also for the advancement of society as a whole".¹⁵
10. Indeed, the integrity and effectiveness of an independent judiciary as an arm of democratic government is critical and the need for judicial diversity must be viewed in that context. It is inherent in the nature of equal justice in a diverse society that those administering justice reflect and embody that diversity: "women who are bound by the justice system should be participants in it at all levels".¹⁶ The Committee on the Elimination of Discrimination against Women has underlined the gravity of situations in which a lack of diversity takes its severest form, noting that: "societies in which women are excluded from public life and decision-making cannot be described as democratic".¹⁷

¹¹ CEDAW General Recommendation 23, Para. 15

¹² CEDAW General Recommendation 23, Para. 16

¹³ Beijing Declaration and Platform for Action, Para. 232 (m)

¹⁴ Beijing Declaration and Platform for Action 190(a)

¹⁵ CEDAW General Recommendation 23, Para. 17

¹⁶ Touchstones for Change, Equality, Diversity and Accountability, Report of the Canadian Bar Association Task Force on Gender Equality in the Legal Profession (Chair, Justice Bertha Wilson) 1993, pg. 185

¹⁷ CEDAW General Recommendation 23, Para. 14

11. In addition increased judicial diversity enriches and strengthens the ability of judicial reasoning to encompass and respond to varied social contexts and experiences. This can improve justice sector responses to the needs of women and marginalized groups.
12. Advancing women's full participation in the judiciary also plays a role in promoting gender equality in broader ways:
 - Female judicial appointments, particularly at senior levels, can shift gender stereotypes, thereby changing attitudes and perceptions as to appropriate roles of men and women.¹⁸
 - Women's visibility as judicial officers can pave the way for women's greater representation in other decision-making positions, such as in legislative and executive branches of government.
 - Higher numbers, and greater visibility, of women judges can increase the willingness of women to seek justice and enforce their rights through the courts.
 - In some contexts, female judicial officers may demonstrate a strong commitment to the recognition and protection of women's equality and rights which is then reflected in judicial reasoning and court decisions, particularly in cases concerning gender-based violence, divorce and family law and labour rights matters. However, this impact has not been thoroughly researched and requires dedicated and comprehensive multi-regional and country-specific analysis.¹⁹

II. THE CHALLENGES: APPOINTMENT, PROMOTION, INTEGRATION & ACCEPTANCE

13. Deficits in women's full and equal participation in the judiciary may take different forms in different legal systems. In some cases gender diversity among judges is significantly low across the board. In others female representation drops significantly when considering appellate courts and leadership roles. In some contexts, the presence of women judges may be highly concentrated in courts with limited or specialized jurisdiction, or may be excluded from handling certain matters, such as criminal cases or from sitting on religious or customary courts. The causes of these deficits are also many

¹⁸ CEDAW General Recommendation 23; Touchstones for Change, Equality, Diversity and Accountability, Report of the Canadian Bar Association Task Force on Gender Equality in the Legal Profession (Chair, Justice Bertha Wilson) 1993, pg. 185

¹⁹ For some discussion of these issues and references to relevant studies see: In Pursuit of Justice, Progress of the World's Women 2011-2012, UN Women, pgs. 60-61; Will Women Judges Really Make a Difference, Justice Bertha Wilson, 28 Osgoode Hall L.J. 507 1990; Sustainable Development, Rule of Law and the Impact of Women Judges, Sandra Day O'Connor and Kim Azzarelli, Cornell International Law Journal, Vol, 44, 2011; Equality and the judiciary: why should we want more women judges, Brenda Hale, Public Law 2001;

and varied. They range from ideological opposition and restrictive views on gender roles and norms, to failures of political will and the lack of prioritization and concerted efforts towards change.

14. Improving the situation requires action in a range of spheres. Judicial structures, roles and functions, appointment procedures, and terminology vary from country to country and within regions. Context is therefore vital and women's participation within any particular judicial system cannot be viewed in the abstract. As the obstacles and challenges faced by women vary, at least in nuance and contour, so too must opportunities and strategies for change be tailored to the specific jurisdiction.

OVERCOMING RELIGIOUS AND IDEOLOGICAL OPPOSITION

15. In certain jurisdictions concerted and prevalent opposition to the appointment of female judicial officers persists. This is particularly true in a number of Middle Eastern and North African (MENA) jurisdictions where there are no women within the judiciary, or where there are exceptionally few women or where women's roles are limited to judicial administration, as opposed to serving as judges in court. Even in those MENA jurisdictions where there are relatively high numbers of women in the judiciary and serving in courts, their roles are often subject to considerable limitations. For example, they are often not allowed to serve on religious courts, or criminal courts or to hand down verdicts.
16. This opposition is often explained or justified with reference to religious and ideological beliefs and edicts as to the role of women in the judiciary and more generally in society. In some instances the extent of women's participation in the judiciary is subject to explicit religious pronouncements and regulation that are upheld by the authorities. In others, religious interpretations have simply given rise overtime to widely held social assumptions and beliefs as to whether women can, or should, be judges. Meanwhile, in some of these situations, religion and ideology serves as a predicate for failures to appoint women judges in situations where opposition to their appointment is in reality grounded less in religion but more in reluctance among key constituencies to change the status quo. For example, this may be the case in situations where there is considerable opposition from male power bases within the judiciary to the appointment of female judges.
17. Religious and ideological barriers to women's full participation in the judiciary pose particularly exigent challenges. Not only

are they used to justify serious limits and strictures on women's appointments, but in many contexts, even once women are appointed to the judiciary, the effect of the religious and ideological discourse lingers, making it difficult for women to discharge their judicial functions effectively. For example, individuals may refuse to appear before women judges or officials may refuse to implement orders issued by female judicial officers. In some jurisdictions the appointment of women judges has been the subject of direct judicial challenge. In some situations female judicial officers are at risk of threat and violence.

18. Religion and ideology do not provide a legitimate basis on which to restrict women's full participation in the judiciary. International law and standards do not permit discrimination against women on grounds of religion. Laws, policies and practices that limit women's full and equal participation in the judiciary contravene international obligations and must be revised. The obligation to ensure full participation of women in the judiciary equally applies where a State's legal system includes religious tribunals and judicial bodies so that restrictions on women's full and equal participation as judges in these tribunals must be removed. Moreover, eliminating such barriers to women's participation, while important, is not alone sufficient. Authorities in jurisdictions where religious ideology has played a role in restricting women's full and equal participation in the judiciary must take specific targeted educational and outreach measures to address public perceptions as to the role of women in society and in the judiciary. Women judges must be afforded protection where necessary and enforcement measures may be necessary to ensure compliance with their decisions.

THE IMPERATIVE OF DELIBERATE CHANGE

19. Even where direct legal, policy or ideological barriers or restrictions on women's full and equal participation in the judiciary no longer exist, serious deficits of gender diversity persist. Experience indicates that simply removing such barriers and increasing the number of women who study and practice law will not in and of itself bring about meaningful improvements in numbers of women judges.
20. Although the study of law and membership of the legal profession was historically predominantly a male career path, this has now changed in a large number of jurisdictions and in many contexts women now comprise more than half of law school graduates. In some legal systems this number increases to almost two-thirds. However, assumptions that

greater numbers of women studying law will steadily of its own accord give rise to greater numbers of women in the judiciary do not always prove true. Similarly, greater numbers of women in the judiciary overall does not correlate to increased levels of women in senior and leadership positions.

21. Changing the composition of a country's judiciary and ensuring the full and equal participation of women in practice require dedicated commitment and action. Such transformation will not happen on its own. A range of practical and structural measures, including temporary special measures, are required to ensure women's equal enjoyment in practice of the right to hold judicial office.²⁰

ENSURING POLITICAL WILL: THE NECESSITY OF FIRM POLICY AND LEGISLATIVE COMMITMENTS

22. Women's full and equal representation within the judiciary must be accorded priority by Governments, the legal profession and civil society alike. Sustainable efforts to advance women's representation within the judiciary require express and lasting support and commitment from a range of actors. Of particular importance is engagement and action by relevant members of the executive and legislature, Chief Justices and Presiding Officers and members of judicial appointment bodies and professional organizations.
23. States must ensure comprehensive analysis of gender diversity at all levels of a country's judiciary and the factors contributing to deficits must be clearly identified. An effective and responsive action plan must be put in place and clear commitments and targets outlined. These must be accompanied by monitoring and oversight mechanisms. Responsibility for delivery must be clearly designated.
24. These commitments and targets may take different forms depending on the context, legal system and nature of the problem. In some instances, explicit political commitments and policy goals may be sufficient to make real and lasting change. In other contexts, the enactment of legal provisions may be necessary. It may not be possible to effectively overcome considerable deficits in women's representation and participation without the establishment of quota systems.²¹

ENSURING SELECTION AND PROMOTION PROCESSES AND CRITERIA ARE FIT FOR PURPOSE

²⁰ CEDAW General Recommendation 23, Paras. 15, 43, ; Beijing Declaration and Platform for Action 190(a)

²¹ See in general CEDAW General Recommendation 23, and in particular, Para. 15.

25. Laws, procedures and administrative practices governing judicial selection and appointment need not be uniform, but whatever means are adopted must ensure the independence and impartiality of the judiciary and must vigorously safeguard against appointment for improper motive. Similarly they must be designed to ensure judicial diversity, equality of opportunity and to overcome deficits in women's full and equal participation.²²
26. The ways in which judges are selected, appointed and promoted vary considerably across jurisdictions. As a result, the kind of reform measures that will be necessary to improve the ability of selection mechanisms to increase the extent of women's full and equal representation may differ depending on the specifics of the legal system in question.
27. In civil law jurisdictions, where career judiciaries are the norm, improving the representation of women in the judiciary generally necessitates particular measures designed to improve women's entry into judicial training institutions and programmes. Meanwhile, improving women's representation at senior levels and across different courts and areas of law involves particular scrutiny and oversight of internal systems of judicial assignment and promotion. In many civil law systems, women's representation in judiciaries is generally high, yet markedly concentrated at lower levels. In systems in which women now enter the profession in similar, or sometimes greater, numbers to men, it is notable that the equality of representation dwindles considerably at senior levels.²³
28. In common law systems, in which judges are largely appointed from among senior echelons of the legal profession, and in which selection processes often traditionally involved internal consultation processes, a range of distinct or additional reforms or action steps may be necessary. The establishment of impartial and transparent recruitment processes is crucial. In this regard the establishment of independent nominating bodies with clear mandates and sufficient powers may be an important step, as may be the public announcement of vacancies. Moreover the elaboration in legislation or directives of clear, transparent and holistic selection criteria is critical. Criteria should define merit in a

²² UN Basic Principles, Principle 10; Latimer House Guidelines for the Commonwealth on Parliamentary Supremacy and Judicial Independence, Para. IV; Draft Universal Declaration on the Independence of Justice (Singhvi Declaration), Para. 11;

²³ See for examples, Judicial Diversity in the United Kingdom and Other Jurisdictions, A Review of Research, Policies and Practices, The Commission for Judicial Appointments, Cheryl Thomas, 2005

sophisticated manner, should explicitly include the goals of judicial diversity and gender equality and should enable appointment from a diversity of legal backgrounds.

29. Ensuring women's full and equal participation within the judiciary necessitates the same level of diversity and equal participation of women in the composition of judicial nominating or selection bodies and professional structures, such as higher judicial councils. Where a specific body or entity is charged with the nomination, appointment, assignment and promotion of judges and/or where judicial appointments involve the legislative or executive arm of government, a paucity of diversity and female representation in those spheres will necessarily negatively impact on women's full and equal participation in the judiciary. Sustainable and effective programmes to improve women's full and equal participation cannot succeed over time unless women have an equal role and voice in key decision-making fora.

ENDING HARASSMENT AND DISCRIMINATION

30. Ensuring women's equality within the judiciary on a statistical or quantitative basis is critical, but not sufficient on its own. The qualitative experience of women judges within the profession must be assessed and effective measures taken to end the various forms of harassment and discrimination that female judicial officers report facing on a day-to-day basis.
31. Pregnancy-related discrimination must be eradicated. In some extreme cases, women judges reported being asked to resign when they became pregnant or being told they could not sit in court or issue decisions due to concerns as to their capacity for rational thought. Others noted that authorities had simply failed to put in place procedures for female judicial officers to obtain appropriate maternity leave and pay.
32. Harassment of female judicial officers by male peers must also be prevented and redressed. Women judges, particularly young women, regularly report facing sexual harassment by colleagues, especially superiors. Others speak of other forms of harassment, for example overt scrutiny and public commentary concerning their reactions to explicit sexual or medical material. Others report refusal by junior officers or court staff to comply with their orders.
33. Discrimination and harassment that manifests in the nature of judicial assignments given to women judges must also be addressed. For example, in some jurisdictions women are

typically appointed to low-status courts or to rural locations that are very difficult to access. In others, in the name of personal security and protection concerns, they may systematically be excluded from all criminal cases.

34. Women judicial officers must be protected from threats and violence. Security concerns regarding risks of violence involving non-State actors may be particularly acute in jurisdictions in which religious and ideological opposition to the participation of women within the judiciary is pervasive.

THE TOXICITY OF DEFICITS IN JUDICIAL INDEPENDENCE & IMPARTIALITY

35. An independent and impartial judiciary and respect for the rule of law constitute a vital backdrop to any sustainable progress towards women's full and equal participation in the judiciary. When measures are put in place to improve women's representation in the judiciary outside democratic contexts or in circumstances in which the judiciary is not independent and other rule of law safeguards are weak, the judicial advancement of women risks becoming identified with authoritarian government or with judiciaries that are subject to improper political influence and with corruption.
36. This may have toxic effects both for women's full and equal participation in the judiciary and in society more broadly, and can significantly undermine longer-term progress towards gender equality. Goals of women's advancement can become tainted or usurped by authoritarian governments and used to deflect criticism, to advance the pretence of progress or to distract attention from other systemic rule of law deficits. In such contexts women judges have sometimes been described, even from within their own circles, as fulfilling a window-dressing or tokenistic role. It can also contribute to the emergence of dangerous social and political pushback against gender equality generally, and the role of women within judiciaries more specifically, when government changes. Recent transitions in North African States provide stark examples of this.

THE IMPORTANCE OF MENTORS, ALLIES AND SOLIDARITY

37. The full and equal participation of women necessarily requires women's exercise of the will to act and seek judicial appointment. To that end, the importance of role models, mentors and solidarity and support networks cannot be underestimated.

38. Senior women judges and lawyers play a particularly significant role in encouraging their peers and younger women to seek, accept and embrace judicial appointment. This support can and should take a number of forms. Informal mentoring networks can provide a vital basis of support. Similarly, regular meetings of women judges and lawyers provide invaluable opportunities for exchange, regeneration, reflection on challenges faced and the identification of key support needs.
39. Enhancing the capacity and infrastructure of associations of women judges and women lawyers is also critical in efforts to advance the role of women within the judiciary. These associations can fulfil a solidarity and support function for individual women judges, and can be a source of training and education. They are often also instrumental actors in advancing women's full institutional representation.
40. Women judges associations are often well placed to advocate within judicial circles for the full and equal participation of women within the judiciary. They also often have the opportunity to place key concerns and demands before decision makers. Women judges and lawyers associations may also be able to raise awareness of judicial vacancies among their members, to encourage applications from female candidates, and to collectively call for or support the nomination of certain candidates.

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