

DOCTRINE OF PLEA BARGAINING: AN ADJUNCT OF CRIMINAL JUSTICE SYSTEM

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Abstract

Punishment is the corollary of Criminal law. It is essential to the laws effectiveness. Without its application the law would be an empty letter. The protection of society and security of person's life, liberty and property is an essential function of the state. This could be achieved through instrumentality of criminal law by imposing appropriate sentence and stamping out criminal tendency. Law as a cornerstone of the edifice of 'order' should meet the challenges confronting the society¹. Therefore the aim of protecting society is sought to be achieved by application of the principle of Deterrence, prevention, retribution and reformation. These normative theories have in common the belief that punishment has or can be shown to have a "General Justifying Aim" as respectively; - reformation of character, the righting of moral wrong, the deterrence of pain producing actions on part of promoting general welfare.

It is in consonance with the above reality that this paper analyses plea bargain practice to see whether it

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comforts with these aim. The thing that triggers the carrying out of punitive sanctions is the violation of the law of the land: Such coercive measures have been provided for in dully enacted laws as specified responses to such judgements, but what plea-bargain does on the other hand is a total deviation of the written and specified sanctions to a bargained option. The question is whether the practice of plea bargaining, generally, does indeed advert to the attainment of the basic assumptions of the Criminal Law: or whether the practice of plea bargain adduces to the philosophical basis of punishment. The discussion here is focused on the three normative standard theories of punishment. The aim is to test whether plea bargaining practice generally address the question of adequacy of punishment, crime prevention and control.

1. Introduction

Delay in administering Criminal Justice makes the system weak and meek. It tends to dilute the purpose of Criminal Law, the prevention of crimes. A punishment imposed after a long time may not have the same impact upon the victim or the perpetrator or the public at large. There are persons who easily deceive the Criminal Justice System by evading punishment by flexing their muscle power because they have influence in the society while in contrast there are persons accused of offences who are not able to secure bail for one reason or another, and languish in jail as under- trial prisoners for years. If reports are to be believed approximately three lakh under trials are overstaying in the dingy and overcrowded Indian jails facing trials. The CBI Stated in its report published in April 2010 that at present there were 9,000 cases pending in the country. Certainly, this poorly reflects on the Indian criminal justice system apart from running counter to

the democratic principles of the respectable republic. The Undertrials accused in criminal charges under various sections of the Indian Penal Code are facing twin dilemma of denial of basic human rights and are forced to squander away their productive years of life under imprisonment without any immediate light at the end of the tunnel. Incarceration of the Undertrials for such a long time- in some cases even beyond the prescribed penalty- defies all theories of punishment². The problem of backlog of cases has been haunting the Indian Courts for a long time. It is rightly said "If there is one sector which has kept away from the reforms process it is the administration of justice"³. To reduce delay in disposing off criminal cases the Law Commission recommended introduction of "plea-bargaining" as an alternative method to deal with huge arrears of criminal cases. Plea Bargaining is widely resorted in United States of America so much so that ninety to ninety five percent of criminal cases end with the negotiated agreements rather than court room trails. By virtue of the Criminal Law (Amendment) Act, 2005, plea bargaining has been introduced into the Criminal Procedure Code of 1973, which has come into effect from July 5, 2006. The Cr.p.c has been accordingly amended by adding Chapter XXI-A consisting of 12 Sections. The bill attracted enormous public debate. Critics of the plea bargaining system, allege that it is not recognized and is against public policy and impairs public interest in effective punishment of crime.

Plea bargaining, in its most traditional and general sense, refers to pre-trial negotiations between the defendant, usually conducted by the counsel and prosecution, during which the defendant agrees to plead guilty in exchange for certain concession by the prosecutor⁴. A "plea bargaining" is a practice whereby the accused foregoes his right to plead not guilty and demand a full trial and instead uses a right to bargain for a benefit. This benefit is usually related to the charge or sentence. In other words, plea bargaining means the accuser's plea of guilty has been bargained for and some consideration has been received for it⁵. A plea bargain is in derogation from the concept that a Judge can only decide a sentence after hearing in an open Court. The term 'plea-bargaining' is used to cover different things. It is sometimes used to describe discussions between prosecution and an accuser's legal advisers concerning the charges upon which an accused will be presented for trial and including indications that the accused is prepared to plead guilty to certain offences. This may be described as prosecutorial plea bargaining. The term also covers discussion in which the trial judge takes part. In such an

arrangement counsel for the accused and the prosecution attend the Judge in his private Chamber and discuss upon the Judge indicating the probable sentence of the accused, through this counsel, indicates that he will plead guilty. This may be described as Judicial Plea-bargaining⁶. Plea-bargaining is a pre-trial procedure. It can be defined as process whereby a bargain or deal is struck between the accused of an offence (through council) and the prosecution with the active participation of the trial Judge⁷. Consideration is given to an accused person, who, being guilty of a crime, enters a plea of guilty and accused is assured of some material benefit in exchange. Plea bargaining occurs when the prosecutor induces a criminal accused to confess guilt and to waive his right to trial in exchange for a more lenient criminal sanction than would be imposed if the accused were adjudicated guilty following trial. The prosecutor offers leniency either directly, in the form of a charge reduction, or indirectly, through the connivance of the judge, in the form of a recommendation for reduced sentence that the judge will follow. In exchange for procuring this leniency for the accused, the prosecutor is relieved of the need to prove the accused's guilt, and the court is spared having to adjudicate it. The court condemns the accused on the basis of his confession, without independent adjudication. Plea bargaining is, therefore, a nontrial procedure for convicting and condemning people accused of serious crime⁸. A plea bargain is a contract with the state. The defendant agrees to plead guilty to a lesser crime and receive a lesser sentence, rather than go to trial on a more severe charge where he faces the possibility of a harsher sentence⁹. The shortest possible meaning of Plea Bargaining is “*Plead guilty and ensure lesser Sentence*”¹⁰.

Plea Bargaining can be of three types: **-Each type involves implied sentence reductions, but differs in the ways of achieving those reductions.**

Charge Bargaining¹¹: refers to withdrawal of one or more charges against an accused in return for a plea of guilty. Here the accused has the option of pleading guilty to a lesser charge or to only some of the charges filed against him. For example, a defendant may face the charges of burglary, rape and sodomy. The defendant may agree to the charges of burglary and rape in exchange of the state's agreement to drop the sodomy charge¹².

Sentence Bargaining¹³: refers to reduction (where possible) of a charge from a more serious charge to a lesser charge in return for a plea of guilty, e.g., murder to manslaughter, etc. It is a promise by the prosecutor, after acceptance of guilty, to recommend the court specific sentence or bargained sentence or it can be done directly with the trial judge. It saves the prosecution the necessity of going through trial and proving its case. It provides the defendant with an opportunity for a lighter sentence. The accused has an option of admitting guilt and settling for a lesser punishment. In United States, it can only be granted if they are approved by the trial judge. It sometimes occurs in high profile cases, where the prosecutor does not want to reduce the charges against the defendant, usually for fear of how the newspapers will react. A sentence bargain may allow the prosecutor to obtain a conviction to the most serious charge, while assuring the defendant of an acceptable sentence¹⁴.

Fact bargaining: This is the least used negotiation which involves an admission to certain facts in return of a promise for not introducing other known facts as evidence before court. In fact bargaining, a prosecutor agrees not to contest an accused's version of the facts or agrees not to reveal aggravating factual circumstances to the court. This form of bargaining is likely to occur when proof of an aggravating circumstance would lead to a mandatory minimum sentence or to a more severe sentence under sentencing guidelines. A prosecutor also may agree to provide leniency to an accused's accomplices, withhold damaging information from the court, influence the date of the accused's sentencing, arrange for the accused to be sent to a particular correctional institution, request that an accused receive credit on the sentence for time served in jail awaiting trial, agree to support the accused's application for parole, attempt to have charges in other jurisdictions dismissed, arrange for sentencing in a particular court by a particular judge, provide immunity for crimes not yet charged, or simply remain silent when a recommendation otherwise might be unfavourable¹⁵.

2.The Indian concept of Plea Bargaining

The Indian concept of Plea Bargaining is inspired from the "*Doctrina of Nolo Contendere*"¹⁶".The doctrine has been under consideration by India for introduction and employment in the Criminal Justice System. The concept of plea-bargaining is itself an alternative remedy to the long and tortuous process of trial in courts. It has been introduced to

ensure speedy disposal of cases and to reduce congestion of prisons. As per the crpc the initiative to move the machinery for negotiated pleas is left to the accused person accused of an offence for which the maximum punishment does not exceed seven years may file an application for plea-bargaining in the court in which such offence is pending for trial.. The court may also *suo-motu* make an offer for plea-bargaining which if the accused accepts; he has to make an application. On receiving the application the court, will conduct a preliminary examination in camera that the accused has filed the application voluntarily. It will also examine the prosecutor and the aggrieved party and if it is convinced that the accused was forced to plea-bargain, it will reject the application. The court will then issue a notice to the Public Prosecutor to the complainant to work out a mutually satisfactory disposition of the case. The negotiation of such a mutually acceptable settlement is left to the free will of the prosecution and the accused. If a settlement is reached, the court can award the compensation based on it to the victim and then hear the parties on the issue of punishment. The court may release the accused on probation if the law allows for it. If a minimum sentence is provided for the offence committed, the accused may be sentenced to half of such punishment. If the offence committed does not fall within the scope of the above, then the accused may be sentenced to one-fourth of the punishment provided or extendable for such offence. The accused may also avail of the benefit of section 428 of Cr.P.C, 1973 for setting off the period of detention undergone by the accused against the sentence of imprisonment in plea-bargained settlements. The court must deliver the judgment in open court according to the terms of the mutually agreed disposition and the formula prescribed for sentencing including victim compensation The judgment delivered in plea-bargain cases is final and no appeal lies on such judgment. However, a writ petition to the State High Court under Articles 226 and 227 of the Constitution or a Special leave petition to the Supreme Court under Article 136 of the Constitution can be filed by the accused. This acts as a check n illegal and unethical bargains. There are certain exceptions laid down to plea bargaining. It has been proposed that there will be no plea bargaining in three cases namely, offences against women, children below the age of 14 years and socio-economic offences (like offences under Food Adulteration Act etc). There can be plea bargaining for offences where punishment prescribed is 7 years or less. The benefit of plea –bargaining would, however, not be admissible to habitual offenders. The scheme described above and incorporated into the Cr.P.C. is, nonetheless, at divergence with that suggested by the Law Commission of India in its Reports, which it called

"concessional treatment for those who on their own choose to plead guilty without any bargaining".

The judge is not envisaged to be a silent spectator, but has a significant role to play in the process. The court is responsible for ensuring that the whole process is carried out with the full and voluntary consent of the accused¹⁷. Where a satisfactory disposition of the case has been worked out, the court is bound to dispose of the case after awarding compensation to the victim as per the settlement arrived at, and after hearing the concerned parties on the issue of the quantum of punishment. It then has to award sentence and this may range from one fourth to one half of the prescribed punishment for that offence¹⁸.

The scheme envisaged the constitution of a "competent authority"- a Metropolitan Magistrate or a Magistrate of the First Class specially designated as a "Plea-Judge" by the High Court in case of offences punishable with imprisonment for less than seven years, and in case of other offences, two retired judges of the High Court appointed in consultation with the Chief Justice of the High Court and his two senior most colleagues- to decide on whether or not to accord concessional treatment to an accused who makes an application for the same¹⁹. Thus, theoretically, there is no room for bargaining or underhand dealings with the prosecution or the judge trying the case. The victim and the prosecutor have a role to play only insofar as they have a right to be heard and place their points of view before the competent authority. Quite apparently, the scheme recommended was, thus, only a formalisation of the practice of showing some leniency in punishment to those who plead guilty, rather than plea bargaining in its conventional sense²⁰.

Plea-bargaining is a necessary element of the United States criminal justice system. Properly negotiated and structured, plea agreements in general benefit defendants, the Government, and the judiciary. In addition, the public benefits from plea-bargaining because plea agreements result in the conservation of public resources as well as the quick disposition of criminal cases. Plea-bargaining is also particularly useful to prosecutors of organized crime cases, as plea-bargaining may lead to invaluable cooperation of defendants in the investigation

and prosecution of other members of a criminal organization. Both private defence counsel and public defenders look upon plea negotiation as a necessary part of the criminal justice system²¹.

3. Theories Of Punishment And Plea Bargaining

Punishment is the sanction imposed on an accused for the infringement of the established rules and norms of society. The object of punishment is to protect society from mischievous and undesirable elements by deterring potential offenders, by preventing the actual offenders from committing further offences and by reforming and turning them into law-abiding citizens. It is also asserted that respect for law grows largely out of opposition to those who violate the law. The public dislikes a criminal and this dislike is expressed in the form of punishment. The protection of society and security of person's life, liberty and property is an essential function of the state. This could be achieved through instrumentality of criminal law by imposing appropriate sentence and stamping out criminal proclivity (tendency). Law as a cornerstone of the edifice of 'order' should meet the challenges confronting the society²². Therefore the aim of protecting society is sought to be achieved by application of the principle of Deterrence, prevention, retribution and reformation. These normative theories have in common the belief that punishment has or can be shown to have a "General Justifying Aim" as respectively; - reformation of character, the righting of moral wrong, the deterrence of pain producing actions on part of promoting general welfare. To this aim, Martins²³ submitted thus

"...in each case, the practice of punishment, in one society or another, is to be brought directly under the preferred aim and inspected to see whether punishment there comports with that aim and hence, whether or not that practice can be justified."

It is in consonance with the above reality to analyse plea bargain practice to see whether it comports with these aim. The thing that triggers the carrying out of punitive sanctions is the violation of the law of the land: Such coercive measures have been provided for in duly enacted laws as specified responses to such judgments, but what plea-bargain does on the other hand is a total deviation of the written and specified sanctions to a bargained option.

The discussion here is focused on the three normative standard theories of punishment.

Deterrent theory.—According to this theory, the object of punishment is not only to prevent the

wrong-doer from doing a wrong a second time, but also to make him an example to others who have criminal tendencies. Salmond considers deterrent aspects of criminal justice to be the most important for control of crime²⁴. To quote a judge: "I do not punish you for stealing the ship, but so that the ship may not be stolen." That is to say, the chief aim of the law of crime is to make the evil-doer an example and a warning to all that are like-minded. The commission of every offence should be made a bad bargain. Bentham treats the committed offences as an act of past, that should be used as opportunity of punishing the offenders in such a way that the future offences could be prevented²⁵. Glanville Williams says deterrence is the only ultimate object of punishment. "Punishment (sanction) is before all things deterrent, and the chief end of the law of crime is to make the evildoer an example and warning to all that are like minded with him²⁶." This kind of threat is commonly described as 'specific' or 'individual' deterrence. Specific deterrence works in two ways. First, an offender would be put in prison to prevent him from committing another crime for specific period. Second, this incapacitation is designed to be so unpleasant that it will discourage the other offender from repeating his criminal behavior. When individual deterrence is used as means to send message across society is called 'general' or 'community' deterrence. The higher percentage of criminal being caught and punished would enhance the credibility of sanctions. Crime does not pay and honesty is the best policy. That is the message deterrent theory tries to communicate to society. Once deterrent as painful sanction is accepted, it would oppose better facilities in prison as suggested by the reformist²⁷. The admission of guilt is a sign of less culpability and thus has an impact on the need for specific deterrence. This holds true if the confession is made because the offender regrets his act. The repentant offender will not tend to commit further crimes. But a bargained for guilty plea cannot always be attributed to remorse. On the other hand, individual deterrence may be weakened by the practice of plea bargaining. The offender may feel that he can commit crimes without great risk, because somehow he can always bargain for a lenient sentence in case he gets caught. He might get the impression that it is not the seriousness of the criminal act but someone's abilities in negotiating that determines the severity of the sentence. Moreover, his plea to a lesser charge will not reflect the gravity of his conduct and he thus might get off so easily that he only loses for the system. For that reason, a result of the practice of the lesser plea might be an undermining of the deterrent effect of the punishment.

Retributive theory

An eye for an eye would turn the whole world Blind²⁸.

Retributive theory.—In primitive society punishment was mainly retributive. The person wronged was allowed to have revenge against the wrong doer. The principle 'an eye for an eye', 'a tooth for a tooth', 'a nail for a nail', 'limb for limb' was the basis of" criminal administration.' According to Justice Holmes: 'It is commonly known that the early forms of legal procedure were grounded in vengeance. The advocates of this theory plead that the criminal deserves to suffer. The suffering imposed by the State in its corporate capacity is considered the political counterpart of individual revenge. It is urged that unless the criminal receives the punishment he deserves, one or both of the following effects will result, namely, the victim will seek individual revenge, which may mean lynching (killing or punishing violently), or the victim will refuse to make a complaint or offer testimony and the State will therefore be handicapped in dealing with criminals.

Retributive punishment gratifies the instinct for revenge or retaliation, which exist not merely in the individual wronged, but also in society at large. In modern times the idea of private revenge has been forsaken and the State has come forward to effects revenge in place of the private individual. But critics of the retributive theory point out that punishment per se is not a remedy for the mischief committed by the offender, it merely aggravates the mischief. Punishment in itself is an evil and can be justified only on the ground that it yields better results. Revenge is justice gone wild²⁹.Retribution as a justification has a foot hold in morality. It is ideal therefore that we subject plea bargain to a test so as to determine not just its legality, but also its propriety in a social context. On this basis, punishment is justifiable only by reference to the probable consequences of maintaining it as one of the devices of the social order³⁰.The reasoning is that, if punishment can be shown to promote effectively the interest of the society, it is justifiable, otherwise, it is not.

The question to be bothered with here is whether plea bargain could serve the society's expectations on the reasons for punishment in vindicating its order, undermined by offenders. Retribution is said to be significant in two ways³¹. The first is that it influences the public's mind by shaping reactions to the sanctions imposed by the legal system. Plea bargaining procedures

more often than not are shrouded in secrecy; hence, the public hardly get acquainted with the intricacies. The proceedings are hardly captured or contained in the law reports, the best the public often get are from the Mass Media. The second point is that the concept of just desert produces a check on the power of the state in determining the amount of punishment necessary to pay the price of crime and no more. Ideally, this check will meet the Biblical injunction¹⁴⁵ that the father shall not pay for the sin of the Children. An advantage of retribution is that it punishes only the guilty. This implies that it must set in place an effective means of determining the guilt of an offender rather than adopting a bargaining strategy which is founded in presumptuous pressure. A version of retributive pursuit is the revenge theory. The philosophy is that punishment is a collective expression of the private desire to revenge, and the suffering of the criminal is a source of psychological satisfaction to the persons of interest³². This in turn will prevent a primitive means of self help justice and the survival of the fittest. Hence, retribution emphasize that punishment depends upon the guilt, and the severity of the appropriate punishment depends upon the depravity of the act³³ and not the offender or circumstances outside the act. Retribution kicks against the concept of leniency in the imposition of punishment; for which plea bargain furthers. The ideal is that more serious crime should receive stronger disapproval than less serious ones; “the seriousness of the crime determined by the amount of harm it generally causes and the degree to which people are disposed to commit it. It is submitted therefore, that the idea of leniency furthered by the American model of plea bargain does not accord with the ideals of the Retributive philosophy. Moreover, charge bargain, whether in the US or in India is a derogation of retributive ideals. This is because a person after a charge bargain is punished not on the basis of the offence committed, but on a lesser charge- other than his actual offence or guilt. The point is that if strict enforcement of punishment is relaxed, then the laws will be honoured mainly in the breach and they will ultimately lose their character as law. The way forward is that they should be vindicated, and clearly, the way to do this is to punish those who violate it. The evidence of plea bargaining in India thus far does not accord with the concept of adequacy of punishment from the retributive point of view.

Reformative theory.—According to the reformative theory, the object of punishment is the reformation of criminals. It is maintained that punishment tends to reform criminals and that it accomplishes this by instilling in them a fear of repetition of the punishment and a conviction

that crime does not pay, or by breaking habits that the criminals have formed, especially if the penalty is a long period of imprisonment which gives the prisoner no opportunity for improvement. Even if an offender commits a crime under certain circumstances, he does not cease to be a human being. The circumstances under which he committed the crime may not occur again. The object of the punishment should be to reform of the offender. The criminal must be educated and taught some art or craft or industry during his term of imprisonment, so that he may be able to lead a good life and become a responsible and respectable citizen after release from jail. While awarding punishment, the judge should study the character and age of the offender, his early breeding, family background, his education and environment, the circumstances under which he or she committed the crime, the motive which prompted him or her to indulge in criminal activities, etc. The object of doing so to acquaint the judge with the circumstances under which the offence was committed so that he could award punishment that could serve the ends of justice.

Critics of this theory state that if criminals are sent to prison to be transformed into good citizens, a prison will no longer be a 'prison' but a dwelling house. The deterrent motive should not be abandoned altogether in favour of the reformatory approach since the permanent influence of criminal law contributes largely to the maintenance of ethical, and social habits that prevent any but the abnormal and subnormal persons' from committing crime.

Explaining the purpose and object of criminal law/ Perkin says that:

'Its purpose is to define socially intolerable conduct, and to hold conduct within limits, which are reasonably acceptable from the social point of view. If the criminal law were hundred per cent effective and integrate it so that best of all could be achieved there would be no punishment,— because there would be no conduct which overstepped the boundaries it had established³⁴.

A long prison term, on the other hand, usually has quite the opposite effect on people. In the prison environment they meet an atmosphere of despair, of disillusion with the justice system. Often prisoners are under great pressure to ascertain their status among the co-habitants. Many of them get mentally or physically abused. Prisoners learn new techniques and get new ideas about how to commit crimes, and when they have left the penitentiary they have often

improved their criminal skills rather than their skills to deal with life. Furthermore, the longer the incarceration term, the less links to family and friends can be maintained. The person leaves prison often without money and a job, and has little chance to find employment due to his/her criminal record. All he/she can do and what he/she knows best is to re-offend. Even a fine can lead to an increased tendency to re-offend. If the person has broken the law in the first place because he/she needed money, a fine will not solve his/her problems. The person may feel an even greater financial difficulties forcing him/her to commit more criminal acts. Finally, harsh punishments can make people their faith in the justice system. They might feel no obligation to act in accordance with rules which are unjust³⁵. If a penalty is very severe for a minor offence, potential offenders might go for a more serious crime. After all, they risk a severe sanction in any case. And the next time they offend, they are more careful and sophisticated about their actions.

Reform is supposed to work by changing the criminal's moral attitudes. Furthermore, the offender will learn how to lead a law-abiding life, and how to cope with problems without having to resort to criminal activity as a solution. Reformation, therefore, indicates a more lenient punishment. It should fit the individual offender and thus requires a great deal of information about the circumstances of the crime and the criminal. A milder punishment after a guilty plea has been justified on the grounds that the offender who admits guilt has taken a first step towards reform³⁶. Again this is only true if the guilty plea is connected to remorse. If the accused loses respect for the system and starts to believe that justice can be bought it may even be contrary to his reformatory interests. The major lesson he/she is not remorse but that the system can be manipulated by the knowing offender³⁷. Reform, on the other hand, indicates a sanction that meets the particularities of the specific offence and offender. One advantage of plea bargaining is said to be its capacity of finding individual solutions. The reasonableness of the plea agreements frequently lauded. Plea bargaining is an attempt to avoid too harsh a result for a particular accused. Some go so far as saying that bargaining permits conviction on a charge which may not fit the evidence but which permits a lesser sentence. This argument may be accurate in the United States where the judges have little discretion in imposing a sanction and are very much bound by guidelines that cannot always take into account the particularities of a single case.

4. Conclusion

Punishment is a tool for achieving a given societal target at any given time. The criminal law is the society's way of treating both the crime and the criminal. Thus, for any prosecutorial device that is adopted by the authority, it is anticipated that punishment will result for one or more of a reformatory, deterrent or retributive purpose. This is the reason for adjudication and trial. A complete theory of punishment will not only specify the conditions under which punishment should and should not be administered; it will also provide a general criterion for determining the amount or degree of punishment. It is not only unjust to be punished undeservedly: it is also a failure of the criminal law to be let off the hook. It is also unfair to be punished severely for a minor offence or lightly for a heinous one. The answer as to what the proper amount of punishment should be is hinged on what form of punishment will serve as an effective means of crime prevention and control in a given society at a given time. The fact that judges often justify the form of punishment imposed in any given case is because of the moral expectation of the society on the need to punish. Plea bargain has failed this moral test. But that is not the end. Plea bargaining can work through effective bargaining guidelines and the corroboration of the judges in exercising their discretion in accordance with the spirit of the given criminal legislation albeit, the criminal law.

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