


# Conditions for the Legitimacy of a Justified Risk in the Implementation of Law Enforcement and Crime-detection Operations

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**Keywords:** Justified risk, circumstances precluding the criminal nature of the action, conditions for the legitimacy, law enforcement and crime-detection operations (activities), responsibility of operational officers.

**Abstract:** The professional activity of law enforcement operational officers of the Russian state is associated with the performance of complex tasks in a crime and socially unfavorable environment. The performance of their duties is associated with a constant risk that can entail the onset of socially dangerous consequences that harm specific objects of criminal law protection. In the event that high-risk actions are committed by an officer involved in law enforcement and investigative activities, the conditions for the legitimacy stipulated by the criminal law of the Russian Federation must be observed. The aim of the study is the institution of the justified risk and the issues of responsibility for exceeding the conditions of legitimacy by operational officers who acted under conditions of such risk. The objective of the study is to determine the conditions for legitimacy of high-risk actions by operational officers and identify legislation gaps in the legal institution under consideration. The methodology of the research proceeded from the analysis, generalization and systematization of legal norms governing the issues of justified risk in the implementation of operational law enforcement and crime detection activities, real life examples, educational and research materials. The main conclusions of our research reflect the gaps in legislation on the topic under consideration and our own conceptual framework in this research area.

## 1 INTRODUCTION

The circumstances, that preclude criminal liability in connection with the exclusion of the criminal danger of the committed act are stipulated in the current criminal law of Russia. According to outward signs, such acts are similar to criminal ones and hence penal, but regarding the specific circumstances, they can be treated as a social benefit because of their final social value.


Justified risk is one of the circumstances precluding the criminal nature of the act, in accordance with the current Criminal Code of the Russian Federation. So, the actions of the individuals undertaking the risk are characteristic for many spheres of public service, including law enforcement. Law enforcement and investigative activities should

be singled out as a special area of reasonable risk, characterized not only by external similarity with a socially dangerous, illegal orientation, characteristic of many other circumstances, the implementation of which excludes criminal liability in view of their social and legal usefulness, but by the ultimate goal towards which the actions of the risking person are directed.

In general, the ultimate goal of an operational officer when performing a justified risk is to suppress criminal activity at the very moment a person commits a crime, as well as to prevent socially dangerous actions in the future.

From the legal standpoint, a justified risk while implementing law enforcement and investigative activities is the fulfillment by an operative officer of his legal (professional) duties and the exercise of his

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subjective right in alignment with the requirements of the position held. Professional risk can be defined as a line of duty, the fulfillment of which is an official and moral obligation of the law enforcement and investigations officers.

The issues of justified risk, its legal nature, principles of implementation, conditions for the legality of the application of such acts were actively researched by such scholars as A.N. Ignatov (2000), Yu. Krasikov (2000), L.L. Kruglikov (2005, 2012), S.S. Zakharova (2005), V. I. Samorokov (1993), V. S. Ishigeev (2020), V. L. Lapsha (2020), A. Y. Bondar (2020), M. A. Yaroslavsky (2020), A.I. Plotnikov (2016), A. Y. Grishko (2001), K.E. Witt (2012), A.S. Shumkov (2007). These works reflect the criminal and legal characteristics of justified risk from the standpoint of the current domestic criminal legislation.

The pivotal works of the applied nature on the conditions for the legitimacy of a justified risk in law enforcement and investigative activities were implemented by M.I. Katbambetov (2013), G.S. Shkabina (2017), A.S. Shumkova (2006), Dudulina N.V. (2017). They reflect the main conceptual approaches of the current legislation of the Russian Federation on law enforcement and investigative activities, activities of operational officers, professional service in the implementation of Federal legislation. Foreign German authors also cover the applied areas of activity of government officials - H.G. Sunderman (1984), representatives of the NIS countries pay significant attention to topical issues of law enforcement operational activities - E.A. Didorenko S.A. Kirichenko B.G. Rozovsky (2000).

## 2 MATERIALS AND METHODS

The research is based on the criminal law standards on justified risk and criminal liability for its violation, other Federal legislation of the Russian Federation, regulating relations during the performance of law enforcement and crime detection operations.

The core of our research are academic papers of domestic researches of the modern criminal cycle, textbooks from different periods of time, interpreting with a certain approach the current legislation on the issues of justified risk. Along with them, the empirical basis was the analysis and generalization of materials from judicial practice on the power abuse and subsequent responsibility of the risk-taker.

Our research is a comprehensive research of justified risk during implementation of operational-investigative activities by employees of state

authorities. It covers research, educational and applied aspects of the legitimacy of justified risk, which excludes criminal liability while performing high risk professional actions.

In the course of our research, we identified the following gaps in current legislation: 1) in terms of the concept of justified risk, the conditions for the legitimacy of professional risk in the criminal law of the Russian Federation; 2) in the concept as well as legal and procedural aspects of the operational environment in the Federal legislation governing the implementation of law enforcement and investigative operations in Russia.

## 3 RESULTS AND DISCUSSION

The performance of professional duties under justified risk is included, in the opinion of the legislator, in the concept of justified risk, and does not provide any legal responsibility for the officer undertaking the risk on conditions of its legitimacy. Thus, a justified risk while performing law enforcement operations is included in the number of lawful acts, treated by criminal law as circumstances excluding the criminal nature of the act.

The content of a justified risk to be recognized as such, reflects the absence of an illegal purpose, willful damage to law-protected interests and includes the exercise of professional and legal duty by an officer, subject to the conditions of lawfulness necessary from the standpoint of the Criminal Code of the Russian Federation. When an operative officer performs official activities, legal liability, including criminal liability, does not arise in the latter case.

We consider justified risk in the context of performing professional activities by an operative officer, whose authority is outlined by the necessity to perform law enforcement operations, acting at high risk, often with a narrow line of criminal legal protection of an object at the current operational environment.

Justified risk in law enforcement operations is a socially useful value carried out by officials of the relevant law enforcement agencies of the state, aimed at achieving the goals of crime prevention, identification of a number of persons involved in criminal activity. Subject to the conditions of legality stipulated in the criminal legislation, federal laws and departmental legal acts, legal liability for officers who acted in an operational environment, while performing law enforcement operations activities, is excluded.

### **3.1 The Essence of Justified Risk in the Performance of Operational Crime Detection Activities the Essence of Justified Risk in the Performance of Operational Crime Detection Activities**

Justified risk should be defined in terms of legislative position, as well as research, educational and applied points of views. In particular, the practical meaning reflects the substantive and legal characteristics of the justified risk in the implementation of operational investigative activities. The legislative definition (Art. 41 of the Criminal Code of the Russian Federation – herein after CC of the RF) includes the conditions of legality, the limits of criminal liability.

In accordance with Art. 41 of the CC of the RF the infliction of harm to the interests protected by criminal law, while at justified risk to achieve a socially beneficial goal is decriminalized. In the educational literature, the following concepts of justified risk based on current legislation are proposed. According to L.L. Kruglikov justified risk is a legitimate creation of danger of the ensuing of consequences provided for by the criminal law in order to achieve a socially useful result in any field of human activity that cannot be obtained by conventional means and methods (Kruglikov L.L., 2012). The author points out that the law outlines the conditions for the lawful behavior of a subject in a justified risk environment, and harm can be caused as a result of a poorly calculated experiment, ill-considered measures when releasing hostages, etc. (Kruglikov L.L., 2005).

The theoretically substantiated definition of justified risk, with the concept of which we agree, is the opinion of A.N. Ignatov and Y.A. Krasikova. The authors note that in the Criminal Code of the Russian Federation the term "justified risk" is indicated as relevant and correct from the point of criminal law. The 1991 Fundamentals of Criminal Legislation used the concept of "justified professional and economic risk", which decreased the scope of its application. Therefore, the application of this concept by the criminal law for an officer, performing such professional activities as a law enforcement, would not be covered by the provisions of the law and the issue of the legality of the actions of the one who takes the risk would not determine the limits and conditions of the legality of the service of operational officers.

In the textbooks, the authors indicate that the source that generates the danger of prejudicing law-

protected interests, when at a justified risk, is the actions of a person himself, deliberately deviating from the established safety requirements to achieve a socially useful goal (Ignatov A.N., Krasikov Y.A., 2000)

In his dissertation research A.S. Shumkov proposes the following concept of justified risk. This is an act that relates to the violation or non-observance of special rules, aimed at achieving a socially useful objective that cannot be achieved by other means (not associated with violation or non-observance of special rules), which, despite the sufficient precautions taken by the person, led to the infliction of damage to the interests protected by criminal law (Shumkov A.S., 2007). According to another scientific definition S.S. Zakharova in her works assumes that a justified risk should be understood as an objectively necessary, prepared, acceptable act by a person aimed at achieving a socially useful goal, implemented in a situation of uncertainty with the possibility of choosing an alternative option of behavior, which, despite the measures taken, caused harm to the interests protected by criminal law (Zakharova S.S., 2005).

In our opinion, it is relevant to cite M.I. Katbambetov's proposal, which indicates the necessity to amend Art. 41 of the Criminal Code of the Russian Federation by the provision: "It is not a crime to inflict harm to the interests protected by criminal law by a person exercising official powers" (Katmambetov M.I., 2013). The author points out the possibility of introducing a separate article 411 into the criminal law, dealing with harm infliction during the exercise of official authority. The legislative inclusion of the relevant rule of law is confirmed by the results of research by V.S. Ishigeev, V.L. Lapshi and A.Y. Bondar. In particular, it is indicated that in the daily activities of law enforcement officers, it is quite possible that they create a risk of inflicting harm to law-protected interests through the unjustified use of weapons (Ishigeeva V.S., Lapshi V.L., Bondar A. Y., 2020).

In consideration of the foregoing, we propose the following concept of the circumstances excluding criminal liability. Justified risk is the legitimate creation of a potential danger to the objects and the interests protected by law in order to achieve a socially useful result that could not be obtained by ordinary, risk-free measures.

When defining a justified risk from a practical point of view, its main features should be determined as: 1) the compulsion to perform risk-related actions 2) the legislative framework of risky measures 3) the objective of the justified risk should be socially and

publicly beneficial 4) the actions of the officer taking the risk should be officially regulated by service instructions according to the type of public service. The practical importance is reflected in the conditions of the legitimacy of a justified risk when a law enforcement officer performs operational tasks, while carrying out operational crime detection activities.

According to the current Federal Law of 12.08.1995 No. 144-FZ "On Law enforcement operations", law enforcement operations are defined as the type of activity carried out publicly and secretly by the operational units of state bodies authorized by the Federal legislation of the Russian Federation, within their powers through the conduct of operational crime detection measures to protect life, health, human and civil rights and freedoms, property, ensure the security of society and the state from criminal encroachments. These activities are also aimed at ensuring and protecting human rights in the private sphere, affecting personal secrets, family secrets, the private life of an individual, the inviolability of a citizen's home and privacy of correspondence. According to Art. 5 of the mentioned law, a person whose guilt in committing a crime has not been proven in accordance with the procedure established by law, i.e. with regard to whom the initiation of a criminal case was refused or the criminal case was terminated due to the absence of a crime event or due to the absence of corpus delicti in the act, and who has the proof of operational-search activities being conducted with respect to him and believes that his rights were violated, he has a right to demand from the body carrying out operational crime detection activities, his private information received by officials within the limits allowed by the requirements of conspiracy and excluding the possibility of disclosing state secrets. The goals of operational and investigative work in the context of the implementation of the rules of the criminal law of RF in the system of circumstances precluding criminality of acts reflect the constitutional provisions in the field of rights and freedoms of citizens. They belong to every person from birth in accordance with Art. 17 of the Constitution of the Russian Federation. These are such types of rights as life and health, personal dignity and inviolability of a person, physical freedom and freedom to realize thoughts, property and inviolability of the home, etc. (Chapter 2 of the Constitution of the Russian Federation).

For example, in the operational activities of the federal security services, there are situations when, in order to protect people's lives, they are forced to take actions, which can cause real harm, but still outside

the framework of the rules of law of necessary defense and extreme necessity. Infiltration and controlled delivery are examples of such risky operational measures. The source speaks about the activities of not only Russian special services. For example, in the American publications about a policeman who infiltrated the drug circulation circle as a small businessman, but as a result his activities contributed to the prosecution of several dozen large drug dealers. It is obvious that in his actions there are elements essential to the crime offence that do not fall under extreme necessity or necessary defense. Subsequently, under the criminal law of New York, his actions were recognized within the frame of the legitimate provocation. And so, in many spheres of human life, numerous similar cases can be found.

### **3.2 Conditions for the Legitimacy of a Justified Risk While Performing Law Enforcement Operations**

Justified risk in the system of circumstances that do not entail criminal liability due to their general social value is an independent type, for which, the conditions of legality should be determined in the theory of criminal law and the practical activities of operational units. They determine the legal framework for recognizing the actions of the one who takes the risk as socially beneficial or justifiable and, in this regard, determine the grounds for bringing to legal responsibility or exemption from it. The conditions for the legitimacy of a justified risk while performing law enforcement operations are based on the job regulations (instructions) of the operational officer, the legal framework of the relevant unit (service) in compliance with the Constitution of the Russian Federation.

We consider that while performing law enforcement operations activities, the following conditions for the legitimacy of a justified risk for operational units officers should be distinguished: 1) the actions of the officer who takes the risk should be caused by the appropriate operational situation, which acts as a pretext and a legal basis for actions in the conditions of justified risk. The concept of the operational situation is not stipulated in the legislation, therefore, from the standpoint of the law enforcement officer, it can be interpreted variably. This is a set of conditions that directly or indirectly characterizes the objective reality during performance of the law enforcement operations or a set of factors and conditions in a certain territory at a certain time, taken into account by operational units in the implementation of the operational or crime detecting



operations. Along with the fact that the Russian legislation does not provide the concept of the operational situation, the definition of the subjects of its implementation is also ambiguous. In the organizational essence, it is regarded as a type of management activity, delegated to the heads of various levels and structures in the operational services of state power. And, thus, not every operative officer has a managerial function according to the official regulations while performing current official duties, including dangerous professional activities, while on operational investigative work; his activities are considered a form of performing official duties or the functions of a power officials. Therefore, we note that at the legislative level it is necessary not only to define the concept of an operational environment, but also to indicate its limits, conditions and procedural forms, the scope of its main and other participants, and its legal consequences.

2) The performance of operational-search activities with a justified risk is characterized by risky actions or risky inactivity, directly provided in the service instructions and aimed at the goals provided by the operational crime detection and other federal legislation of Russia. These goals (or at least one of them) determine the advantage of such an act in achieving personal, public or certain state benefits. They are aimed at a socially useful result not only from the point of legal concepts, but also from other human and public-state interests and benefits. At the same time, social value does not come for an operational officer, but for the performance of professional duties, for the purpose of carrying out an operational crime detection activity. For example, in accordance with Art. 39 of the Criminal Code of the Republic of Azerbaijan it is not a crime to inflict harm on objects protected by law at a justified risk to achieve a socially valuable goal (39.1).

3) It is impossible for an operational employee to take a legitimate justified risk by ordinary, non-risk-related actions. This is due to such a professional and legal situation when an official could perform his professional duties in the usual way while performing an operational law enforcement activity, but he preferred to take the risk. Such risk thereby caused harm to certain objects and interests. The reason for the risky actions could be a negligent or dismissive attitude to the situation, an incomplete understanding of the nature and danger of the current situation, the sufficiency of professional skills or experience of the operational officer.

So, e.g. - an extract from a attorney's appeal on the first instance judgment by the Tagansky District Court of Moscow dated April 17, 2017. The court

referred to the testimony of O. and two officers of the internal affairs bodies about the circumstances of the controlled purchasing operation, as well as to the materials of the operational-search activities. "Meanwhile, the Plenum of the Supreme Court of the Russian Federation, in paragraph 14 of its Resolution of June 15, 2006 No. 14 on judicial practice in cases of crimes related to drugs, psychotropic, potent and poisonous substances, explained that the results of ORM (Law enforcement operations) can be accepted as a basis for the decision if they are received in accordance with the requirements of the law and indicate that the offender's intent to illicit trafficking of illegal drugs or psychotropic substances, formed regardless of the operational officers activities, and that the offender has taken all the preparatory actions necessary for the commission of the unlawful act."

In the papers of Ukrainian authors, we found the following scientific and practical research on this issue. The borderline between justified and unjustified risk is very flexible, since it is almost impossible to anticipate all the circumstances in the process of implementing a plan. If this were possible, then the risk itself, both justified and not justified, would be excluded. Nevertheless, the criminal legislation of the Azerbaijani state echoes the Russian one and defines in Art. 39 that the risk will be recognized as justified if its goal could not be achieved by non-risk actions (inactivity).

The characteristics of operational-search work that justify professional risk do not clarify the situation, when there is no freedom to choose more favorable circumstances, and the solution of a law enforcement task cannot be achieved by other, usual means without risk, or when there is no statutory regulation for the use of special forces, methods of work and an operational officer has to use the principles of professional ethics, morality, operational praxeology in extreme situations. Given the currently prevailing principle, according to which a person is automatically found guilty of not predicting in advance the onset of unforeseen adverse consequences ("did not foresee, but should have foreseen"), one cannot at all talk about the existence of any guarantees of legal protection of the operative worker, acting under conditions of risk (Didorenko E.A., Kirichenko S.A., Rozovsky B.G., 2000).

4) The actions of the individual who takes the risk should not be associated with deliberate (knowing) infliction of harm to the lawfully protected interests, benefits during the performance of the law enforcement operations. If any socially dangerous consequences that incur criminal liability, have occurred, then when considering this criminal case in

the course of the investigation, it is necessary to determine the direction of intent, accompanied by the appropriate actions of the operational officer, on the obvious (in his personal understanding) infliction of a certain type of harm to a specific object (subject). The object should be obvious to the officer, its social and legal or other characteristics should be clear. As well as a potentially possible type of harm, which must inevitably encroach on certain benefits, or be close to the imagined, but definitely capable of entailing dangerous consequences. The illustration of this is an excerpt from the cassation ruling of the Judicial Collegium for Criminal Cases of the Supreme Court of the Russian Federation, where an attorney indicates a violation of the requirements of the criminal procedure law with respect to carrying out an operational experiment and violation of the law requirements during the experiment, namely, at the moment of issuing resolution approving law enforcement and investigation operations the officer was not in possession of any data indicating that the client was preparing to commit a crime. This determines the form of deliberate guilt for knowingly causing harm while performing operational investigative activities.

It should be taken into consideration in relation to non-recognition of a justified risk as such from the standpoint of Part 3 of Art. 41 of the Criminal Code of the Russian Federation, that, *a priori* for the operational officer, his actions could entail a threat to lives of many people. Notwithstanding this fact, social values are indicated in the law, but their characteristics are not stated. In particular, we consider it relevant to present arguments in the works by A.I. Plotnikov, who points out that the concept of "many people" cannot be strictly defined. Some lawyers consider "many" in this context as - at least three. However, the number three does not correspond to the concept of "many", but to the concept of "several". In cases when legislation refers to several protected values, other expressions are used: "death of two or more persons" (e.g. part 3 of article 264 of the Criminal Code of the Russian Federation). In our opinion, "many" means several times more than "three", at least not less than 10. (Plotnikov A.I., 2016).

5) When performing official duties, an operational officer acting in high risk situation must take the necessary measures to prevent possible, potential or likely harm. In so doing, these measures should be recognized as sufficient to act under risk conditions, and the risking person's assessment of the actions taken to prevent harm. In other words, in the current operational situation, the officer must anticipate the

possible consequences, determine the danger they expose and correctly determine the *modus operandi* that will allow to minimize the consequences should they occur in the perception of the officer acting at risk.

At the very least, an officer on duty acting at risk should at most resort to such actions that minimize the consequences. It is obvious that in practice it is not easy to anticipate all possible and potential consequences and act accordingly in the criminal and potentially dangerous environment.

The specified condition of legality is associated with the previous one, that is, with premeditated infliction of harm in the course of operational crime detection activities.

6) The actions of the individual who takes the risk must be accompanied by his own skills, experience, physical and other capabilities, that will be instrumental in performing justified actions in the current situation and will comply with the requirements of the law and the interests of the service. This is determined by the legal sources of the relevant operational units of law enforcement (police, execution of punishments, customs authorities) and military (security services) state bodies.

As one of the domestic researchers notes: "The risk in operational law enforcement activities lies in the fact that it is necessary to take operational measures to prevent or investigate dangerous crimes," when there is a real possibility of adverse consequences, both for the operational officer himself and for other persons "(Shumkov A.S., 2006). In a more detailed manner, the concept of justified risk consists in the necessity to carry out operational law enforcement measures thus putting the operative officer in constant professional risk, because a successful outcome is not always guaranteed. As the author notes, "... the objects exposed to risk during the implementation of operational-search measures are very different." These are the legally protected society and state interests, individual interests, including the persons being checked, undercover officers, operative officers, prestige of the operational service as a whole.

### **3.3 Exceeding Justified Risk Limits by the Operational Officers**

Subject to the specified conditions of legality of a justified risk by the operative officer, responsibility does not arise during performance of the risky actions, regardless of the achievement of the useful goal. An exception is the onset of legal liability when the limits are exceeded, for example, during the

actions of the individual taking the risk, when the obvious goal is the onset of consequences protected by law.

In view of the above, we suggest the following definition for the legitimacy conditions of a justified risk in the implementation of operational law enforcement and crime detection activities. The legal limits of justified risk in operational activities from the standpoint of the Russian criminal law are the conditions of legality determined by the criminal law of the Russian Federation for performance of official duties by operational officers within the limits of their service instructions in order to achieve the goals of operational law enforcement and crime detection activities.

In case of exceeding the legitimacy conditions of justified risk while performing operational-search activities, officials may be subject to disciplinary or criminal liability. Criminal liability takes place in the event of a significant violation of citizen rights, their legitimate interests, significant harm to public objects, relations and other interests of state institutions. If less significant harm or damage than those stipulated by the criminal law has been caused and less serious consequences have occurred than those provided for in the relevant articles of the Special Part of the Criminal Code of the Russian Federation in respect to materially defined crime, though internal local acts of the law enforcement service were violated, the operative officer may be subject to disciplinary liability.

### **3.4 Justified Risk of an Operative Officer in the System of Circumstances Precluding Criminality of the Act**

One of the features of justified risk, associated with its official (professional) orientation (goal), is social admissibility. It includes such criminal law characteristics as public value and acceptance of perpetration. At the same time, public value is defined by the goal of operational law enforcement activities, which must strictly comply with the fundamental law of the Russian state and the Criminal Code in terms of the framework for implementation, as well as the goal of the risk-taking person's actions. This refers to compliance with the conditions of legality and the onset of criminal liability in case of exceeding the permissible lawful measures. According to the current legislation of the Russian Federation, the operative law enforcement and crime detection measures are aimed at protecting the interests of an individual, his main benefits, property and public

security in the state (Article 1 of the Federal Law of 12.08.1995 No. 144-FZ "On Law enforcement operations"). The acceptability of justified risk actions is justified by the official duty instructions of the operational officer of a law enforcement agency. The duty instructions are approved by the head of the federal executive body and regulate professional activities in the relevant position in the state service.

One of the key elements of justified risk as one of the circumstances excluding the criminality of an act is the subjects participating, and rather involved in it. The subject of such a risk, on the one hand, is a person (s) under investigation and one or a set of operational-search measures is being carried out in relation to them. And this participant of the justified risk has to be affected because it is assumed that he participated in the commission of a crime or was otherwise involved in it. For example, aiding criminal acts. On the other hand, a subject who voluntarily takes risks while performing his professional duties in view of the position held in the operational division of a law enforcement agency is an official performing operational law enforcement and search work. The actions of this subject of justified risk are aimed at the preventive function stipulated by the legislation and provided by the state authorities.

The preventive function is aimed both at preventing a specific criminal manifestation at the time of the risky actions, and at its general preventive effect, reflected in the criminal and penal legislation of the Russian Federation - the prevention of crimes (part 2 of Art. 43 of the Criminal Code of the RF and part 1 of Art. 1 of the Penal Code of the RF).

## **4 CONCLUSIONS**

Justified risk is a legitimate creation of a possible-potential danger to objects and interests protected by law in order to achieve a socially valuable result that could not be obtained by ordinary, risk-free means.

Justified risk during performance of operational law enforcement and crime detection activities is a legitimate risky action of an operational officer aimed at achieving the objectives of his activities provided there is no harm inflicted to important objects protected by law.

The legal limits of justified risk in operational activities are the conditions of legality determined by the criminal legislation for the performance of service duties (job instructions) by an operational officer of a state authority in order to achieve the goals of operational law enforcement and crime detection activities.

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