

# SOCIAL INEQUALITY AND THE LAW

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## Introduction

When I was to speak on inequality in Britain and how the law should respond to it, I had two immediate reactions. The first was ...in 50 minutes!! The second was ...you want someone to speak on inequality in Britain and you have asked a white male married middle class middle aged partly privately educated law professor from Oxford University... you are having a laugh... and if the e-mail had come from anyone other than Julie and Michael I would have been writing an e-mail politely refusing as quickly as you could watch the trailer to Riot Club.

But, unworthy though I am, it was a real honour to be asked to speak at this event. The creation of the White Rose Law and Social Justice Network could not come at more opportune time. Austerity has made the inequalities in Britain all the more stark and tackling them all the more important. Julie, Michael and the team bring a wealth of experience and skills to this important task and I am sure we all wish the network every success and look forward to participating in and seeing the fruits of many projects in the future.

## The inequalities

I will start by setting out some of the key markers of inequality in Britain, but in doing so I owe some apologies. I have focussed on inequalities in Britain. I am all too aware that inequalities at a world-wide level are profound and overwhelming. But having to address those inequalities are no excuse for ignoring those close to home.

Also, in mentioning some inequalities I must inevitably be selective. So apologies if your favourite inequality is missing from this list!

More seriously there is a problem in listing these in the way I will because that can overlook the way these inequalities can intersect and interact. Many of the most disadvantaged in society suffer with multiple inequalities which magnify and intersect with other in complex ways. This presentation is, therefore, a gross simplification.

And finally an apology because this is not cheerful listening.

## Wealth

Inequalities of wealth are so well known they tend to be taken for granted. The UK is the world's sixth largest economy, yet 1 in 5 of the UK population lives below the official poverty line. As current economic problems cause enormous hardship for many, the wealth of Britain's one hundred richest people increased by £40.1 billion last year. That increase in wealth for just one hundred people alone could have created 2.76 million living wage jobs for a year. It could have lifted the families of 2.4 million children out of problem debt. Instead it remains in the hands of the already fabulously wealthy. In Britain just one hundred people now have as much wealth as the poorest 30% of households. The richest 1% of households in the UK now hold more wealth than over half of the population. Current figures suggest 3.5 million children live in poverty in the UK. That is one in four children. This is not spread evenly across the UK. It has been estimated that 100 wards have between 50 and 70% of children growing up in poverty. All projections are that rates of child poverty will increase to some 4.7million by 2020.

Among those fortunate to have jobs in the UK 1,386,000 are on minimum wage jobs. And as the living wage campaign has done so much to highlight the minimum wage is inadequate to meet the basic needs for a family. KMPG estimate that five million workers are paid less than the living wage. Had the national minimum wage had kept pace with FTSE 100 CEO salaries since 1999, it would now be £18.89 per hour instead of £6.50. Across the UK the

poorest 10% of the employed are paid less than £6,824 per annum, while the richest 10% start from £50,000 and go ever upwards.

It is estimated that in 2013 there were over a million people on zero hours contracts - some 3% of the employed category. While it is true that a range of employees use zero hours contracts and they can offer benefits, it is important to appreciate their precarious nature. They provide insecurity of income and low pay, while being highly profitable for employers. They deprive workers of significant protections from unfair dismissal. In a detailed review Zoe Adams and Simon Deakin conclude that there is “considerable evidence” that these contracts are being used abusively. While enormously convenient for employers, they provide inadequate legal or economic protection.

To top it all we have the current war on welfare claimants. In the 12 months to September 2013 874,850 sanctions, meaning denials of payments, were applied to claimants for benefits. This is an increase in 580% on the previous years. One breach of the rules means four weeks’ payments of benefits; two mean three months without your most basic needs being met. And when you read that sanctions have been applied to people going for a job interview rather than an appointment at the job centre; or a person who failed to complete an assessment as they had a heart attack during it, well....

Tax can and does do something to redistribute the wealth, but we should not assume tax policies are progressive. The bottom band of tax payers pay 43% of their income in tax while the household in top ten per cent pays 35%.

The injustice felt by the material inequality in part reflects the message that is sent. The idea, at the heart of capitalism, that reward should match the effort and skill put into the job or at least bear some relation to it, seems lost in a culture of excessive rewards and the bonus culture, where the pay seems more about a macho “mine is bigger than yours” than a genuine attempt to assess the value of an employee’s contribution. That society is willing to leave so many of its members in poverty and blame them for their situation is shameful.

## Food

Last year 900,000 people used food banks from the Trussell Trust, a 163 per cent rise on numbers helped in the previous financial year. Many more used food banks organised by religious and other groups. Oxfam and Church Action on Poverty have calculated that over 20 million meals were given to people in food poverty in 2013/14 by the three main food aid providers. This is shocking.

What is shocking too is the response of the department of work and pensions. It denies the figures are horrifying, saying “.....the OECD say there are fewer people struggling with their food bills compared with a few years ago....” But that is based on figures 3-years old. The United Reformed Church, not normally a body given for hyperbolic claims, states that the DWP response is a “master class in obfuscation, manipulation and deceit ....”

If the policies of a government are sending people to charity to feed themselves, at least the government should acknowledge what is happening.

## Education

There is a growing gap in the educational attainment for children from different socio economic background. Pupils eligible for free school meals on average score 1.7 grades lower at GCSEs than other children. In 2010 only 31% gained five GCSEs, a passport into a broad range of jobs.

Currently one in seven of those aged 17-24 are NEETS: not in education, employment or Training. That is over 1 million young people starting their life with source of employment income and little prospect of it. Their engagement is stunted before it has begun.

## Health

There are huge inequalities in health outcomes. Where you live and your socio economic circumstances will have a profound effect on your life expectancy. Men living in Kensington and Chelsea, London, have a life expectancy of 85.1, their neighbours in Islington only 76 years. In Scotland there is seventeen years difference in life expectancy between the wealthiest and the poorest. Even more striking is that looking at disability free life expectancy there is a seventeen year difference between those in the richest neighbourhoods and those in the poorest. And this is not just a matter of extremes. If the highest and lowest five per cent are excluded there is still a six year difference in life expectancy and 13 years disability free years between the richest and poorest in the UK. The evidence is clear: “Social and economic differences in health status reflect, and are caused by, social and economic inequalities in society.”

## Unemployment

We now have deep set structural unemployment and inactivity. Full employment has been abandoned as a policy objective. Just over 2.2 million people in Britain are unemployed, up from 1.6 million at the beginning of 2008. One in five employees is in low-paid work, which is more prevalent among women and part-time workers

Years of fruitless job seeking with the holy grail of a minimum wage job which will not pay for the basics. Low self-esteem; lack of hope; despised by the political elite.

The risk of worklessness is not equally shared – it has a structural element which means that certain people are much more likely to be without a job than others. Just over a third of disabled people (35 per cent) are in work, and even fewer people with a mental health problem have a job.

Turning to the markers of disadvantage

## Class

The recent report of the Social Mobility and Child Poverty Commission concluded that Britain is “deeply elitist”.

7% of the UK population as a whole is educated at a private school, but they are vastly overrated in positions of power. The statistics for those privately educated is as follows:

- 71% of senior judges
- 62% of senior armed forces officers
- 55% of top civil servants
- 50% of the House of Lords
- 44% of the Sunday Times Rich List
- 43% of newspaper columnists
- 33% of MPs

There are similar figures for those who attended Oxbridge. The report describes the figures as "elitism so stark that it could be called social engineering". Achievement, success and power appears to track where and to whom you were born, rather than your innate abilities. Compounded disadvantage mean those born to the most disadvantage struggle to move away from the well-trodden path of their parents.

## Gender

Women make up only 23% of MPs and 23% of cabinet member and 24% of House of Lords; 15% of elected police and crime commission and 39% of appointments to public bodies; 20% of professorial posts at universities; 5% editors of national or Sunday newspapers and 0% of bishops in the Church of England.

According to the firm’s latest Women in Work Index, out of 27 OECD countries the UK is ranked in 18th position out of a sample of 27 OECD countries in terms of female empowerment. Unfair pay still plagues Britain comparing equivalent work, women are paid 19.7% less than men.

Thirty per cent of women have experienced domestic abuse since the age of 16. Every year 7% of women do. A recent European wide study found 44% of women experience sexual or physical violence

## Racism

Nearly seven times more people of Afro-Caribbean and African descent are imprisoned than their share of the population. While the racial dimension of American penal policy is often discussed, the UK's receives less attention, even though it is worse.

Less than ten per cent of black students are at the top Russell Group universities, compared with a quarter of white students. Around a third of black students get a first or upper-second class degree, compared with two-thirds of white students. Black students face a 24 per cent less pay than their white counterparts.

In June 2012, 7.3 per cent of White people, 15.5 per cent of Black (African or Caribbean) people and 17.3 per cent of people with mixed ethnicity, of working age (16-64), were unemployed.

## 3 stories

Too many statistics. They become overwhelming. Often it is stories that hit home the hardest and provide a human face to the numbers. I will refer to three. I will tell the story, without comment. They don't need comment.

1. Max Wood was 44 and had when he was rule fit for work following a 30 minute assessment by ATOS. His GP had made it clear that he was utterly unfit for work due to complex mental health issues. Sickness and housing benefits were stopped and he was left £40 per week for all his costs including housing. Mr Woods, desperately short of money and highly anxious, stopped eating. He died four months later. He

weighed 5 st 8 lbs at his death. At his inquest the medical expert reported "his body mass index was not compatible with life". An Atos spokeswoman said: "Our thoughts are with the family of Mr Wood at this difficult time."

2. Anne Leitrim died in her flat in Bournemouth. She was 58 and a former nurse. Six years later her body was found there when the bailiffs turned up to repossess the house. Six Christmases and six birthdays had gone by. No neighbours or friends or family notice her not being there. The only people who eventually visited her were interested in recouping money.
  
3. David Clapson was living on benefits. He had worked for 29 years and lost his job after taking on care of his elderly mother. He missed one meeting at a job centre. His job seekers allowance of £71.71 per week was stopped. He was not able to put credit on his electricity card and as a result his fridge stopped working. He was a diabetic and needed the fridge to keep his insulin effective. Three weeks after the cuts he died from diabetic ketoacidosis caused by severe lack of insulin. His stomach had no food in it the coroner found. A pile of CVs were by his body. In his flat's kitchen was found just £3.44, six tea bags, a tin of soup and a tin of out of date sardines.

What can be done?

Given the extent and complexity of the problem no single response can be found. It requires action on economic, political, and social fronts; at national and local levels. Government, Corporations, private charities, national bodies, individuals, must all be involved. I will focus on legal responses and I will seek to go back to the basics. I draw on three values which I suggest should underpin our legal, and indeed social responses. I will then look at three cases and discuss some of the problems they highlight with our current legal response.

### **3 topics**

## Vulnerability

Everyone is vulnerable. Vulnerability is an inherent part of being human. Admittedly, this is not how generally people understand themselves. We emphasise our capacity; independence; and autonomy. But we puff ourselves up with such talk.

We are all vulnerable because we are all profoundly dependant on others for our physical and psychological well-being. From our very beginnings we rely on others to meet our essential needs for food, warmth, comfort, nurture and cuddles. Our society has built up a wide range of structures and forms of assistance which disguise our vulnerability. Indeed we are forced by a wide range of societal pressures to disguise or mitigate our vulnerability so that we can behave in an acceptable way in the public realm. Great emphasis that is paid to the “accommodations” for disabled people so as to minimise the impact of their disability, with the lack of appreciation of the accommodations for the able bodied. We proudly put in ramps to meet the needs of disabled people, overlooking the facts the steps we put up that meet the needs of the able bodies to climb heights. Whether it is transport or food; housing or warmth; community centre or pub we are dependent on others to meet our needs.

The significance of the failure to acknowledge our common vulnerability is that, as Martha Fineman argues, we lose sight of the power and privilege that is used by some to disguise theirs:

When we only study the poor, the rich remain hidden and their advantages remain relatively unexamined, nestled in secure and private spaces, where there is no need for them or the state to justify or explain why they deserve the privilege of state protection. We need to excavate these privileged lives.

If we are all vulnerable and all dependant on others to exist what supports and accommodations are the richest receiving to get where they are.

Self-reliance has become a dominant theme in social policy. Be it older people, lone parents or care in the community, autonomy and independence have become key policy goals. But this ignores the fact that as humans we are *interdependent*. No one can be truly independent. In a recent document on older, the Government's aspiration is utterly misguided: 'Our vision is one that promotes people's independence and wellbeing by enabling them to prevent or postpone the need for care and support.' How wrong. How very wrong.

Our starting point for our legal response must not be to emphasis our independence and capacity, but to acknowledge our profound vulnerability and need for those around and need for social structures. We may need them in different ways and perhaps to different extents at different points in our lives. Legal responses emphasise self-sufficiency, independence, capacity, autonomy are based on fictions.

## Care

Moving on to care, I could spend a long time on defining care and I won't now, read my book, but just to be clear I am not talking about caring about something, I am talking about active doing of care. We are very good about caring about things, and less good at caring for others. I am more guilty than anyone of that I am sure.

There is a new royal baby on the way. Should we have a bank holiday. A day off economic productivity, at least for many. It's feasible. Nothing too disastrous would happen. But what if we were to announce a day off care? That would have catastrophic results. Care is about meeting the basic needs of others. We need to recognise it as essential to our society.

Because we are all vulnerable and we all need care. Care is the essential activity in our society. Care we really do need to survive. Yet policies seeking to promote care, reward it, acknowledge its importance are thin on the ground. Paid carers are among the most poorly paid in our society. Unpaid carers face a host of disadvantages, material, in terms of health and finance. They receive pitifully little support from the state.

Being in a caring relationship should be seen as a valuable and indeed essential part of lives. At different times in our lives our roles in caring relationships may vary. Dependency should not be something to be afraid of or ashamed of. Something has gone very wrong with our care of vulnerable older people when 'not being a burden' is reported as the main goal of their lives by patients living in nursing homes. We all are and all should be in caring relationships. Contrast the view of the male imagination that care is 'waste', because it deals with the mess of human bodies, and failing to be economically productive. Rather care, with all its messiness, is at the heart of well-being. It is about people.

## The Private

In *Trade Securities v Alexandre Mouradian* the Court of Appeal heard an appeal over pay from an industrial tribunal. Mr Mouradian earned £300,000 per annum but was entitled to an extra bonus in addition each year. He had not been paid the bonus he thought he should be. I won't go into the details of the case. But the case is powerfully symbolic. The Industrial Tribunal system set up to protect workers who were discriminated against, illegally sacked or treated improperly was a major step forward in the protection of workers from employers. For many years it has worked well to ensure fair pay and lawful employment practices for vulnerable workers. Now it seems primarily for use for banker seeking extra bonus. There has been a huge increase in fees, now typically £1,200 to bring an employment tribunal, alongside the restrictions on legal aid. From January to March 2014 there has been a staggering 81% decline in applications to the employment tribunals. Although there is scheme to reduce or waive fees for those on low incomes recent research found very low take up due to the complexity of the scheme and the stringent qualifying conditions. Those facing discrimination, unfair pay, unjust dismissal can seek mediation, but there is little legal protection.

Family Law too has faced savage cut backs. If you are denied contact with your children; are not receiving a fair share of the assets on breakdown; are the victim of domestic violence but do not have the right paperwork, you will receive no legal aid. Mediation is offered up as the alternative.

Why has this happened? Of course its austerity... but it's also because the Government has described these disputes as essentially private matters. The couple divorcing should sort out their problems themselves and not seek to involve the courts. The dispute is private and personal and therefore "their choice." Employees and the workers can sit around the table. This ignores the power imbalances in play and there is so much more to say about that. But for now I emphasise that it ignores the broader social impact of these kinds of decisions.

The fact an employee is discriminated against; the fact a mother is left at the end of a relationship with a tiny share of the family assets because the husband "earned it"; the fact the domestic violence goes unaddressed is NOT simply a private matter. These may not be matters which directly affect the GDP. They may not be measurable in cash and subject to simple calculations...they are more important than that. They are about the way our society values people.

The fact that the resources of family courts and industrial tribunals are now focussed primarily on cases involving the fabulously rich is, in the logic of the government, because "they are worth it". What happens to the rich matters. What happens to the poor is a "private matter".

### 3 cases

#### **R (McDonald) v Royal Borough of Kensington & Chelsea [2011] UKSC 33**

Ms Macdonald was the prima ballerina of Scottish Ballet. In 1999, aged 56 she suffered a serious stroke severely limiting her mobility. She needed to use the toilet several times a night and a commode was provided she could use in her bedroom. The Royal Borough of Kensington and Chelsea funded a package of care which provided her with carers so that she could be helped at night out of the bed and to the commode. This was expensive. The Royal Borough decided it would be more appropriate for her to use incontinence nappies

and special sheeting and dispense with the carers. This they explained was not just about money, some £22,000 per year, but would provide her greater safety and privacy. She did not agree and regarded that as an intolerable affront to her dignity. She sought legal challenge to the borough determination.

The case went to the Supreme Court. You won't be surprised to learn she lost. You won't be surprised that Baroness Hale gave a dissenting judgement. I won't go into all the legal niceties of the arguments. But highlight these points.

### Language

Interesting for Lord Brown in the majority the woman at the heart of the case was the "appellant"; for Lord Walker "Miss McDonald"; for Baroness Hale she was "Ms McDonald". I suspect Baroness Hale was the one who referred to her in the manner she wished. But that reflected a more profound point than one about terminology. For the majority the case was looked at from the perspective of the London borough. Their proposals were reasonable. They were acting as many other boroughs did. They faced multiple pressures and had to make difficult decisions. They could not be said to be irrational. For Baroness Hale it all started with Ms Macdonald. She listened to her carefully and tried to see the case from her perspective. It was her right to be cared for. She was being reasonable and rational in seeking to avoid the indignity of incontinence pads, when she was not incontinent. Empathy, looking at the case from the life of the person involved, is key to a law seeking to address inequality.

### Rights

The case shows the paucity of rights reasoning. The majority emphasised that the authority had a broad discretion in how to deliver her care services. What they offered, the incontinence pad, were commonly used and could not be said to breach human rights. They compared an earlier case where there was a breach of rights.

*R (Bernard) v Enfield London Borough Council* [2002] EWHC 2282 (Admin); The claimants there were husband and wife. They had six children. The wife was severely

disabled and confined to a wheelchair. In breach of their duty under section 21(1)(a) of NAA 1948, the respondent council failed for some 20 months to provide the family with accommodation suited to her disability. The consequences were appalling. The wife was doubly incontinent and, because there was no wheelchair access to the lavatory, was forced to defecate and urinate on the living-room floor. And she was unable to play any part in looking after her six children. Small wonder that Sullivan J, at para 31, described the article 8 case as "not finely balanced" and awarded £10,000 damages.

Much work has been done on seeking to promote social rights. This is no doubt a theme which the network will wish to explore great detail in the future. We have begun to see an increasing use in human rights to require the state to provide positive services to improve socio-economic inequalities, rather than human rights simply being negative and keeping services at bay. There is a natural wariness in imposing positive obligations on local authorities. However, it is notable in this case that the approach of the majority focussed on whether the authority's proposal was reasonable in the abstract and hence the argument that many people found the use of incontinence pad reasonable; rather than whether the rights of the particular person involved were infringed and if so there was a justification for it.

### The reality

Lord Walker in this case famously stated:

I find it rather regrettable that Lady Hale's judgment makes so many references to defecation.

Interesting the majority willing to go into the detail on the financial and statutory details. But the messy reality of life could not be looked at in the face. The majority seemed to unwilling to look in the face what the consequences of what they were suggesting were. Well at least that suggests they had a sense of shame.

## Sandra Mujuru

The first reported conviction for familial homicide concerned Sandra Mujuru, aged 21, who allowed her partner, Jerry Stephens, to murder their four year old baby, Ayesha. The CPS in their press release described her wrong: “Mujuru, knowing Stephens’ history of violence against his ex-girlfriend and her son - as well as Ayesha - still left the child with him while she was at work.” The CPS, justifying the decision to prosecute, noted that Ms Mujuru, was aware of Mr Stephens’ potential for violence because she had visited him while he was serving time in prison for a vicious attack on his previous girlfriend. She was sentenced to a two year community order, while Stephens received a life sentence for murder. In sentencing Ms Mujuru the judge commented that she was a “decent young woman in a vulnerable position”. The judge noticed that Stevens was twice her age and was “a man with a dangerously short fuse whose anger manifests itself in physical violence towards whoever happens to be in way”. Ms Mujuru was an asylum seeker escaping violence in Zimbabwe. As a young asylum-seeker she should, of course, have known from which authorities to seek advice and help from and been readily able to access and call on a wide range of services and support. She could have done this without endangering her child and herself by igniting her partner’s “dangerously short fuse”.

- Privatization of the problem: the legal response to this situation focuses on Ms Mujuru and has not focus on the societal response. Where were the state bodies who were responsible for protecting children from abuse? Why are these well trained professionals not being held to account while a terrified asylum seeker fleeing violence in Zimbabwe be expected to intervene.
- The lack of empathy. How can you expect a woman living in an abusive relationship to seek support and help? How can asylum seeker be expected to know what numbers to ring? How can she when she lives with a man with a history of violence be expected to so endanger herself by seeking assistance?

## X and Y v Hounslow [2009] EWCA Civ 286

The respondents, anonymised as X and Y were over the weekend of 17 to 19 November 2000 subject to long series of sexual and physical assaults by four local youths, they let into their house. The legal case arose over whether Hounslow could be held liable in damages. Maddison J had awarded the £97,000 damages, the Court of Appeal allowed the appeal. Z and Y lived in a Council flat in Towell Court with the respondents children. X and Y had low IQs and X on the autistic spectrum

The youths had taken to using X and Ys flat for a range of illegal activities including taking drugs and storing stolen good. There had been violence against X and Y before. Ove the weekend in the presence of the two children X and Y were effectively imprisoned, assaulted and abused. The details are as utterly horrible as you might fear. I will spare you. The local council had been engaged with the family for some considerable time before the weekend both the with the Community Team for People with Learning Difficulties ('CTPLD') and the Children and Families Section ('C&F'), . Their social worker was aware of the exploitation by the youths and the assaults. She passed on the details to the police who took no action as Z and Y did not report the assault themselves. The claim against the council was that they should have foreseen of the imminent danger and arrange for alternative accommodation or protection and it was a breach of duty of care. They had not sought help. The authority had o undertaken responsibility towards them.

If rights of protection from violence are to mean anything they cannot be restricted to those who see help. The nature of child abuse and domestic abuse, indeed part of the evils of those, is that so often the victim blames themselves for what has happened. The emphasis on autonomy: they had not chosen to communicated with the police. The assumption of capacity and non-vulnerability: they had not sought help which underpins these decisions. We can leave X and Y to the unspeakable horrors which occurred....We can leave X and Ys children to the unspeakable horrors which offered because its their choice.

The CA said it would not be fair to expect a local authority to owe a duty of care to the respondents. So who does have a duty to care for them? Where are the vulnerable to find

the support and care we need? Care in the community is great, but the community must care and has an obligation to care. Autonomy and choice must be seen as an excuse to protect those who have neither agency nor choice.

### Way ahead

The students of English Law Schools are well trained in the “core subjects”. They have read plenty of cases about stevedores (I still don’t think I understand what they do); commercial leases; and the powers of the Lord Chancellor. But will they have read cases involving the mentally ill; disability benefit; or rights to local authority accommodation. They are well positioned to advise the be-suited businessman. They are not well placed to advise the welfare recipient.

In one well known university I attended a session by a new law and finance group. An impressive array of projects and courses are lined up. After the presentation of all they do I rather cheekily suggested the course be titled, “law, finance and rich people” because this was the law of banking; share options; commercial take overs... no one mentioned welfare , poverty, food banks...

Perhaps...maybe... this is understandable the courts are becoming a rich boys playground. As we have seen increasingly the family courts are for multimillionaire couples deciding who gets to keep which holiday home; the industrial tribunals are for disputes over bonus size. The cases for others are better suited to mediation and out of courts settlement. They are...well...not quite important enough.

We need to rediscover some of the reasons why we have and need law. Law should be to protect the most vulnerable, those who cannot care for themselves. It should be there to strengthen the bonds that hold us together. To reflect and reinforce our collective aspirations and obligations. To overcome unjust hierarchies of power not to bolster them. To redistribute power, not to reinforce it. To bring us together, not to keep us separate.

So I say to the White Rose Law and Social Justice:

Well done on highlighting inequality, rather than ignoring it

Bring out to the open the cases too often invisible in law school

Work with your hearts as well as your minds

Listen to the voices and stories of those who are marginalised and oppressed ...

listen to them rather than the mumblings of some Oxford Professor.

Jonathan Herring

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