

Shari'ah Court and the Role of *Muftīs* in the Nigerian Judiciary: Mission on Reviving the Lost Glory of Its Past

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ABSTRACT

Islamic institutions including courts and *fatwā* have been in existence in Nigeria since the advent of Islam in the country. While the courts were established in order to adjudicate between disputant parties, *muftīs* were also used as assessors (court officials) responsible for assisting the courts in dispensation of justice. When the colonial administrators came, they introduced their legal system to the colonies, which led to a gradual wipe away of some aspects of the Islamic legal system (including the courts and *fatwā* institutions). The doctrine of the tripartite tests (i.e., the repugnancy test, incompatibility test and public policy test) was introduced into the country's legal system to the extent that the full and hitherto application of Islamic law was modified and some were suspended. Muslims are left with only matters related to civil causes and personal matters. Islamic jurists such as *muftīs* become *functus officio* in the Shari'ah Courts. In view of this, the paper explores the possibility of finding an avenue on how to revive the past glory of *muftīs* in the Nigerian judicial system. Thus, it sets out some modalities on how *fatwā* can be streamlined to achieving this objective. One of such modalities is to institutionalise *fatwā* in the country.

Keywords: Shari'ah Court, role of a *muftī*, Nigeria, judiciary

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INTRODUCTION

The role of *muftīs* in the Shari'ah courts is paramount, especially in dealing with an effective dispensation of justice. In Nigeria, this role has been robbed by some structures laid out by the colonial rule. The

British colonial administrators colonised Nigeria between the period of the late 19th century (1861) and the middle of the 20th century (1960), within which, many Islamic structures recorded some setbacks including the *fatwā* institutions. In fact, the role of *fatwā* and the administration of Islamic law generally started to decline by the advent of the colonial administration. Indeed, this has to do with the influence of the English legal system, which for long has been interacting with the Islamic law side-by-side in the country. The interaction between the two laws has no doubt resulted to the setback in the administration of Islamic law in the Nigerian courts. Practically, the existence of the English legal system in Nigeria has created a vacuum for the application of Islamic law, particularly in its judicial and the administrative systems. It has affected the entire Islamic system in the country to the extent that the Shari'ah Courts and other Islamic institutions lost their past glory. Thus, judges who preside over Shari'ah matters, lack requisite knowledge of Islamic jurisprudence talk more of the vast knowledge of Islamic law. Some of them cannot read even a portion in the Glorious Qur'an and the *ahādith* of the Prophet (s.a.w), not to talk about understanding the knowledge of how to apply and make use of sciences of the Qur'an and hadith. The worst part of all is that there is no qualified person to guide these judicial personnel whenever they find themselves in a fix position. Hence, their reliance has been always on

the submissions of legal practitioners who do not have vast knowledge of Islamic law. As the role of *muftī* is paramount to the development of Islamic law and the administration of justice in the Nigerian courts, the paper reveals the necessity to revive the hitherto institution of *fatwā* and the role of *muftīs* in the Shari'ah Courts so that Islamic matters would be effectively determined.

NATURE AND ORIGIN OF *FATWĀ* IN NIGERIA

The nature and origin of *fatwā* in Nigeria is having a nexus with the development, nature and extent of the application of Islamic law within the country's legal history (Juwayriya *et al.*, 2011). Hence, in order to be well-informed about the concept of *fatwā* in Nigeria, it could better be traced from the historical antecedents of Islamic law in the country (Girbo: interview by Author, Nigeria, 2013). To begin with, the Nigerian legal system is a legal system that is hybrid in nature. It encompasses and deals with the entire laws, rules and all legal machineries obtained in the country (Asein, 2005). Just like some other Commonwealth countries, Nigeria is a diverse country that has been characterised with diversity of religions and legal pluralism (Tonwe *et al.*, 2000). It is a Sovereign Nation located on the Gulf of Guinea in the West African Sub-Region. It shares boundary with the Republic of Niger at about 1497 km from the North, the Republic of Cameroun from the east at about 1690 km, the Republic of Chad at about 87

km from the North-east, and the Republic of Benin from the West at about 773 km. It has a total area of about 923,678 square km including 13,000 square km of water boundaries. The country has been endowed with water ways such as river Benue and river Niger, Lake Chad and Atlantic Ocean. Its climate is arid in the Northern region, tropical at the centre and equatorial in the Southern Region. It has a population of more than 160 million and embraces multi religions (Islam, Christianity and traditional religions) and also comprises of a multi-ethnic society (over 250 ethnic groups), whereby major ethnics like Hausa-Fulani in the North, Igbo from the East and Yoruba in the West. Out of the total population, Muslims constitute more than 50%, Christians more than 30% and the traditionalists constitute the remaining percentage of more than 10%. The Country is a Federation consisting of 36 States and the Federal Capital Territory, within which the Presidential system of Government is practiced (Library of Congress, July 2008). Its legal system comprises the Received English law (Common law, Equity and the Statutes of General Application); Legislation; Case law; Islamic law (Ubah 1982); and the Customary laws (more than 250 ethnic groups and each with its own peculiar custom) spread all across the country (Tobi, 1996). In the case of *Laoye & ors V. Oyetunde* (1944) A.C. 170, the application of the native customs was also judicially recognised by the court; thus, the Privy Council in examining the basis of the establishment of Native Courts

said, "The policy of the British in this and in other respects is to use for purpose of administration of the country, the native laws and customs in so far as possible and in so far as they have not been varied or suspended by Statutes or Ordinances affecting Nigeria." For the purpose of this discussion, the study focuses on the Islamic legal system under which the authority of a *fatwā* can be issued and applied. In Nigeria, the Islamic law is applicable based on the Qur'an, Hadith and the principles of Maliki *Madhhab* (School of Islamic jurisprudence) (Tobi, 1996). Meanwhile, the English system comprises the Common law, Equity and the Statutes of General Application in force in England as at 1st January 1900 (Yakubu, 2006). To this end, Section 28 of the High Court Laws of Northern Nigeria provides that, "subject to the provisions of any written law... Common law, the Doctrine of Equity, and the Statute of General Application which were in force on the 1st Day of January 1900, shall be in force within the Jurisdiction of the High Court". The local enactments consist of the Constitution of the Federal Republic of Nigeria and other Nigerian legislation (primary and subsidiary). In addition, the case law is a decisions of the courts applicable based on the doctrine of judicial precedent (Asein, 2005). Custom, as a source of the Nigerian legal system, consists of usage or practices of a particular group of people, which by common adoption and acquiescence and by long and unvarying habit has become compulsory and acquired the force of law

with respect to the place or subject matter to which it relates (Kolajo, 2000). To this end, the law of the defunct Plateau State of Nigeria defines customary law as the rule of conduct which governs legal relationships as established by custom and usage (s. 2). Similarly, in the case of *Lewis v Bankole* (1908) 1 NLR 81 at 100), the Court defined customary law as unwritten law (*jus non scripta*) and a mirror of accepted usage recognised by the members of particular ethnic group.

Therefore, the above definition has designed a clear cut demarcation between customary law and Islamic law. The two laws are not same, even though most of the 20th century writers on the origin and nature of the Nigerian legal system have attempted to classify and incorporate the Islamic law to customary law with the belief that the Islamic law is a Muslim custom and therefore cannot be spared from being part of the customary law (Miles, 2006). However, the story became an issue of the past in 1998 when the Supreme Court of Nigeria (*Per Wali JSC*) made it categorically in *Alkamawa v Bello* (1998)6 SCNJ 27) that the Islamic law is not same as the customary law (Tobi, 1996) because it does not belong to a particular group of people (*Alkamawa supra*). According to the learned justice (*Wali JSC*), the Islamic law is a complete system of universal law and even more universal than the English Common law. Hence, the decision has settled that the Islamic law is not a customary law, but it is an independent source of Nigerian legal system (Abikan, 2002).

Today in Nigeria, the concept of *fatwā* and the role of *mufī*, being part and parcel of the Islamic matters, have become *functus officio* in the legal system, which is largely an English-based system. Thus, by virtue of the current Nigerian legal system, the decisions of *mufī*s are considered as personal and non-binding. This has been affirmed by a Shari'ah Court of Appeal Qadi, Alhaji Ibrahim Wakili Sudi (Qadi Sudi, interviewed by the Author, Nigeria, 2013), who reiterated the importance of *fatwā* in the country, especially in the dispensation of Shari'ah justice in the courts. To this end, he said:

“*Fatwā* plays a very important role in the dispensation of justice in the courts, even though it is considered simply as an opinion by a learned Islamic scholar aimed at assisting and guiding the courts, it is however, advisory and not binding.”

The learned Qadi has lamented that it is unfortunate that there is no institutionalised and bureaucratised *fatwā* issuing body which could be saddled with responsibilities of issuing a binding *fatwā* in Nigeria. In fact, according to him, it is only the periphery committees of *fatwā* within different Muslim organisations that exist in the country. This also goes in line with the opinion of a learned scholar Shaykh Adamu Girbo (2013), who confirmed that *fatwā* in Nigeria is not institutionalised and something needs to be done by the authority concerned in order to make it possible (Girbo, 2013). Similarly, in the words of Senator Abubakar Sodangi (interviewed

by the Author, Nigeria, 2013) “*fatwā* is not institutionalised in Nigeria and the lack of its institutionalisation has left so many gaps in the country’s legal and judicial systems.” He confirmed that currently in Nigeria, there is no institutionalised *fatwā*, except the *fatwā* committees that are lying in various Islamic organisations such as those in the Nigerian Supreme Council for Islamic Affairs (NSCIA), *Jamā’atu Nasrul Islam* (JNI), *Jamā’atu Izālatul- Bid’a wa Iqāmatil-Sunnah* (JIBWIS) *Fityānul Islam* and others.

It is based on the above lacuna that the politicians and some legal luminaries such as lawyers and academia (law teachers) in Nigeria have more or less taken over the *muftī*’s job of issuing *fatwā*. They have been perceived as modern *muftī*(s) by some people (Haji *et al.*, 2012) even though there are a lot of contentions on whether or not they could be regarded as such, especially looking at the tasks of becoming a *muftī* under the Islamic law, which indeed are not quite simple (Girbo, 2013). Such modern *muftī*(s) in Nigeria are those whose background in most cases is not fully Islamic; sometimes they possess a little combination of both Islamic and western knowledge. As a result of this, they may fall short of the requirements for being a *muftī*. Hence, they could not be considered as *muftī*(s) in the eyes of Shari’ah due to their lack of requisite requirements and sufficient expertise in the Islamic law (Muhammad, interviewed by the author, Nigeria, 2013). However, in order to tackle such problem,

Shaykh Adamu Girbo (2013) suggests, among other things, that *fatwā* should be institutionalised and bureaucratised in Nigeria so that private and unqualified individuals would stop parading themselves as *muftīs*.

At this juncture, it is worthy to mention that Islam generally came into Nigeria centuries ago through Kanem Borno Empire in the North- Eastern part of the country (Balogun, 1969). For the purpose of this discussion, however, the concept and history of *fatwā* in Nigeria are considered from the period of the Fulani jihad (in the 19th Century) due to the commitments of the then leaders of jihad towards restructuring the administration of the Shari’ah justice in the region. The emergence of the Fulani Empire, which is otherwise known as “the Sokoto Caliphate”, has given the Shari’ah a new outlook in Nigeria from its system of governance, economic policy, foreign policy, administration of justice, as well as the organisation of the society (Yadudu, 1992). Apart from that, the Caliphate was also famous for the conception of law and utilisation of its institutions in order to achieve maximum benefits for the Muslim *Ummah* (community) in the country (Ladan n.d.). For this reason, this paper traces the nature and origin of *fatwā* from the following periods: the period prior to the Fulani *jihād*; the period of the *jihād* but before the colonial era; the period of the colonial administration; and the post-colonial period.

Period Prior to the Fulani Jihād

Before the Fulani jihad in the 19th century (1804), Islam in itself had experienced a serious setback, where the whole system was adulterated with so many customs and conventions (Juwairiyya *et al.*, 2011). Islam was just a caricature of itself, thus corruption and all forms of injustice were well pronounced. Shari'ah was flagrantly abused and most of the people were ignorant of the religion. The practice of Islam was reduced to dry rituals, thus Islam was not in the social, political and economic spheres of the community (Kumo, 1997). In the aspect of administration of justice, the Islamic law was only applied in cases where the interests of the then tyrant Kings were to be served. In short, the development of the Islamic law and practice in the pre-*jihād* period can best be described as a to-and-fro movement on the negative axis of a graph. It should, however, be noted that despite the nature of the regime before the jihad and the flagrant abuse of the Shari'ah by the oppressive and ignorant Kings and some venal scholars, other honest and prominent scholars played positive roles to save the situation (Albasu, 1985). Shaikh Jibril Ibn Umar, who was a teacher to both Shehu Usmanu Dan-Fodio and Mal Abdllahi Dan-Fodio (popularly known as Abdullahin Gwandu, a brother to the latter), was indeed a role model. It should be added that in the aspect of law and its administration in Nigeria (present Northern Nigeria) before the jihad, local traditions and enactments by rulers were the two main sources of law. When Shehu Usmanu Dan-

Fodio started preaching Islam preparatory to the jihad, the King of Gobir Nafata (who was a pagan) did all he could to stop him through some of his arbitrary and anti-Islamic legislation, but to no avail. The wicked legislation was to the effect that it was illegal for Shehu Usmanu Dan-Fodio to preach to people; that converts must revert back to their religion and that no one should wear turban and women should not cover their groin in line with the teachings of Shari'ah (Kumo, 1997).

The above proclamation was made in the market place and it became the law with immediate effect. This shows that in the pre-jihad period, the Kings were the supreme leaders of their subjects and anything they said became a law. They were the masters and their people were slaves. In fact, the Kings made the laws and they remained immune from the law. This simply means that Shari'ah and proper administration of justice did not thrive in the pre-*jihād* period. Hence, the concept of *fatwā* was not even the supposing issue talk more about the role *mufti* supposes to play (Olorunfemi, 1985).

The Period of the Jihād (the Period before the Colonial Era)

The *jihād* of Shehu Usmanu Dan-Fodio has brought an end to the leadership of the then contemptuous and oppressive Nigerian Kings especially in the Northern part of the country (Shagari *et al.*, 1978). The Islamic law and practice were restored by the Shehu with vigour, leading to the replacement of old and infiltrated Islamic practices with the

new and pure Islamic system. Thus, *Qādis* were appointed to try cases in line with the Islamic injunctions and they were also assigned jurisdictions. During that period, Shehu Usmanu Dan-Fodio showed keen interest in matters related to administration of justice because of its importance. This was why he appointed certain officials in addition to *Qādis* to ensure a smooth administration of justice. The officials include *Na'ib* (Deputy Judge), *muftī* (jurist-consult), *Kātib* (court clerk), *Qāsim* (estate distributor), *'Awn* (messenger) and *Tarjumān* (interpreter) (Kumo, 1977). It should be noted that, among these officers, the office of the *muftī* is the most important one for the reason that *muftī* being a jurist can assist the court in arriving at a just decision. By implication, this means that the concept of *fatwā* in the pre-colonial Nigeria was tilted and inclined largely towards the administration of justice than any other sector.

The Period of Colonial Administration

The concept of *fatwā* under this period has experienced a serious retardation due to the restrictions placed by the colonial administrators against the complete application of the Islamic law in Nigeria. However, according to Suleiman Kumo, the Islamic law did not suffer any setback during that period; rather, it thrived under the colonialists contrary to the expectation of many (Kumo, 1980). The early period of *jihād* indicates a return to the Islamic system of government and by extension, the application of the Islamic law in the

administration of justice. This continued for about two decades before the demise of the original founders of the Caliphate (Shehu Usmanu Dan-Fodio and his allies). After their demise, the successors took over the mantle of leadership and since then, decadence in the system resurfaced. The learned scholar described the situation:

“By the middle of the century, when the founders of the Caliphate had passed away, their heirs and successors had become altogether something different. Their conduct and general comportment had become identical in practically every respect with those of the pre-*jihād* Hausa Rulers and by the time the British conquered the country, there was not one emirate throughout the Sokoto Caliphate, where the principles, the methods and the procedures of an Islamic government were applied. The rulers of that time had arrogated to themselves the powers of life and death over their subjects in total and contemptuous disregard for the Shari'ah, and the original principles upon which the *jihād* leadership was founded were totally discarded.”

This simply suggests that during the period of the British indirect rule, Emirs in Nigeria had free hand in the administration of justice subject to such limitations as may be imposed by the British. In this regard, the Emirs were allowed to appoint the judges and other court officials and also decide where to place a court. The Resident (who was usually sent by the British) only gave a warrant but the control was vested

in the hands of the Emirs. The provision of the first Proclamation called the “Native Courts Proclamation” of 1900 was clear on this. The only hurdle in the law was that it gave the Resident the power to establish the court and possess the power of supervision of the court. Another obstacle was that the law ousted the application of *Hadd* punishments for *Zina* and other *hudūd* (the prescribed punishments) offences. However, it has not tempered with the office of the *mufti* since the power to appoint the judge vested in hands of the Emir. This simply means that the Emirs had ample opportunity and responsibility of choosing the correct or ensuring that the correct person is appointed to deliver justice in the courts (Kumo, edited by Bobboy *et al.*, n.d.). However, other scholars, like Prof. A. A. Gwandu who relied so much on the thesis and other publications of Dr Suleiman Kumo (PhD Thesis, SOAS London), were of the view that the colonialists were responsible for the sorry state of affairs of Shari’ah in Northern Nigeria, particularly in relation to the office of *mufti*. He stated that:

“Gradually with the coming of the colonialists, the office of the *mufti* began to be neglected to the extent that while the title of *mufti* remained, the qualifications and status of the occupant of that office became no more than those of the court clerk”.

It is clear from the above that the learned scholar believes that the colonialists were responsible for the setback people were experiencing in the

application of Islamic law generally and that, they are responsible for the weakness and subsequent disappearance of the office of the *mufti* in the country.

The position remained almost the same under the 1906 Native Courts Proclamation, notwithstanding some changes introduced by the law in respect of re-establishing the status of the *Alkālī*,¹ the Emirs,² the Shari’ah/*Alkālī* courts and the Judicial Council. Their establishment was made by warrant under the hand of the Resident. The *Alkālī* presided over the *Alkālī* courts, with or without councillor helpers, while the Judicial Councils were to be presided over by the Emirs or Chiefs with other members to be determined by the Resident. Another change was on the appointment of the judges. It now shifted to the Resident but he was required by law to consult an Emir or a chief before exercising such power. Apart from these changes, the position remained as it was subject to no interference by the British Courts either through appeals or the like. In addition, the 1916 Native Courts Ordinance did not bring much change either (Kumo PhD Thesis SOAS London).

The Post-Colonial Era

When Nigeria became an independent state on the 1st October 1960, a lot of reforms were put in place, especially in

¹ This is a Hausa native term referring to “*Al-Qādi*” in Arabic language, which in anglicized form refers to a Shari’ah judge.

² This is referred to as “*Amir*” in Arabic language, a Muslim leader or a commander.

respect of the position of *muftī* and the application of Islamic law in general. Islamic law was applied partially, *fatāwa* were issued privately and personally in an informal way, *muftīs* were no longer called *muftīs* but with different description and nomenclatures. Sometimes, they were referred to as “assessors” of the courts (s. 5 (1) and (2) of the Area Court Law 1968). This provision has been maintained and applied by the Area courts of Northern Nigeria for quite some times. To this effect, a section of the Area court law provides the features of the Area courts, as follows:

- “(1) An Area Court may with or without assessors.
- (2) An assessors for each Area Court shall be approved by the Chief Justice or by such person as he may appoint for such purpose.
- (3) Assessors shall act in an advisory capacity and shall have no vote in the decision of the court.” (s. 5 (1) and (2) of the Area Court Law 1968).

Furthermore, effort was also made by the military administration in 1975 under the leadership of General Murtala Ramat Mohammed to revive the practice of issuing *fatwā* (*iftā*) within the Shari'ah courts in Nigeria but unfortunately it was not seen the light of the day. The then military head of state even announced the appointment of the Grant *Muftī* of Nigeria (Shaykh Abubakar Mahmud Gummi), whose appointment should have taken effect around April 1976. Due to the assassination of the then military leader

(General Murtala Ramat Mohammed) in a bloody *coup d'état* in February 1976, however, the appointment was thereafter set aside by his successor (General Olusegun Obasanjo) following a series of criticisms (Mustapha, interviewed by the author, Nigeria, 2013). The situation continued until 1999, when about 12 Northern states³ passed a Bill into law for the implementation of Shari'ah (complete Shari'ah in both civil and criminal cases) within their respective states. This also called for the revitalisation of the hitherto practice of *fatwā* and the position of *muftī* in the administration of justice and the Islamic administration generally in such states (Ostien, 2007). Thus, some states in northern Nigeria, through the legislative process, were able to establish some institutions such as the State Shari'ah Commission or its equivalent, and The Council of *Ulamā'* with important advisory and executive functions. In light of this, it is the opinion of Professor Mustapha that the concept of institutionalisation of *fatwā* will tackle the contemporary issues and challenges that may arise before the courts such as the concept of artificial insemination, polio vaccines, family planning and their effects. He further affirmed that the smooth implementation of Shari'ah would be considered ineffective and incomplete without *fatwā* being institutionalised (Mustapha, 2013).

³ Bauchi, Borno, Gombe, Jigawa, Kaduna, Kano, Katsina, Kebbi, Niger, Sokoto, Yobe, and Zamfara states

CONCLUSION

Generally, the concept of *fatwā* in Nigeria is as old as the history of the application of the Islamic law in the country. It has become *functus officio* since the beginning of the colonial administration. In fact, the whole Islamic system encountered some setbacks when the British colonial administrators trooped into the country. They rendered most parts of the Islamic system and structure not functional as they used to say, it is repugnant to natural justice, equity and good conscience; it is incompatible directly or indirectly to the law for the time being in force; and it is also contrary to the public policy. In the past, *fatwā* and *muftīs* played a significant role in Nigeria, ranging from rendering legal and consultancy services to the courts, as well as giving advisory services to the Islamic Rulers of the time. However, such roles and services rendered by *fatwā* committees or *muftīs* have nowadays remained a mirage due to the lack of well-structured Islamic institution, lack of a suitable legal framework and lack of qualified personnel. Several efforts were made thereafter by subsequent administrations in the country to revive the hitherto system and put things into the right direction, but to no avail. Consequently, the citizens (especially the Muslims) in the country who have the rights to freedom of religion, as enshrined in the Constitution, are left without any statutorily established Islamic institutions such as the *fatwā* institution that can assist in regulating their conduct of religious activities in the

country. Most of such activities in recent times are taken over by unqualified legal practitioners who have been perceived as modern *muftī*(s). At this moment, the opinions of *muftī* and the status of *fatwā* in Nigeria have been regarded as a “take it or leave it” issue. In fact, it has been considered as a mere advisory opinion. Thus, the courts in Nigeria require a distinct and well-structured *fatwā* framework and institutions in support to effectively function and compete with their conventional counterparts in the world. In view of this, it is indeed significant to have in the Nigerian judicial system, a workable relationship between *muftī* and the courts similar to the practice in some modern Muslim countries such as Malaysia. In Malaysia, there exists a formal relationship between *muftī* and the courts to the extent that the decision of *fatwā* committee, after being published in the Gazette, shall become binding on the Shari’ah courts (Section 34 (4) the Administration of Islamic Law (Federal Territories) Act 505, 1993). In fact, *fatwā* in Malaysia is regarded as a binding piece of legislation and judicial precedent, which every Muslim and Shari’ah courts should be bound by (Farid, 2012). To make this aspiration a reality, the paper suggests the following:

- i. The Nigerian Government (at both federal and state levels) should enact a *fatwā* legal framework in preparatory to its institutionalisation. This can be done by amending some

provisions in the constitution and/or relevant laws that are standing as stumbling blocks to actualization of this suggestion.

- ii. The Nigerian Government (at both federal and state levels) should establish the *fatwā* institutions or committees that will from time to time, or based on request, liaise with the judiciary with the view to assisting same in resolving some fix matters concerning Islamic law. This can be done after the first suggestion has been put in place
- iii. The Nigerian Government should establish a special induction training institute for training *muftis* and *fatwā* committee members, so that they will be well-equipped with not only the theoretical knowledge of the Shari'ah but also with the knowledge of present day reality.
- iv. The Nigerian Government should educate and enlighten the public about the significance of *fatwā*, the role of *mufti* and the necessity of having a *fatwā* institution in a diverse country like Nigeria, especially towards ensuring a stabilised and harmonised judicial system. This can be done through organising periodic seminars and workshops.

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