



Embedding human rights in assessment for care and support

*All human beings are born free and equal in dignity and rights.
(Article 1, Universal Declaration of Human Rights 1948)*

Key learning points

- > Assessment for care and support is underpinned by human rights ethics, law and practice.
- > A human rights approach enables practitioners to undertake empowering assessments.
- > When adult social care is under increased pressure, a human rights approach becomes even more important.
- > Practitioners need support to manage the ethical and practice issues that arise.
- > Adult social care is constantly learning how to better uphold human rights from people with lived experience, from practice and from research.

Introduction

Adult social care is grounded in human rights, and its legislation and policy are governed by human rights law (Harms-Smith et al, 2019). At the time of writing, the Covid-19 pandemic has highlighted the impact of inequalities (Public Health England, 2020) and the importance of human rights (Human Rights Watch, 2020). The backdrop to this resource also includes the Black Lives Matter movement's renewed calls for freedom and justice for Black people following the murder of George Floyd in the United States of America (Black Lives Matter, 2020).

This resource focuses on the activity of assessing adults and carers who may have care or support needs. As with all adult social care activity, this is a human rights activity and a human rights approach is essential.

The aims of the resource are to enable practitioners in adult social care to:

- > Ground their assessments of adults and carers in human rights law, ethics and practice
- > Use evidence-informed approaches to uphold human rights in and through assessment
- > Use the case study of the impact of Covid-19 to reflect on the importance of a human rights approach
- > Consider how they will seek support and transfer learning into their practice.

The briefing aims to be relevant, practical and accessible for all practitioners in adult social care. It is also useful for supervisors of practitioners and others in supportive or leadership roles.

This briefing is organised into six sections:

- > A brief overview of the *Human Rights Act 1998*
- > How assessment is grounded in human rights
- > A human rights approach to assessment
- > Case study of Covid-19
- > Support for practitioners
- > A conclusion and reflective questions.

This briefing builds on other Research in Practice resources, in particular:

- > Braye S and Preston-Shoot M (2016) *Legal literacy: Practice Tool*
- > Elliott T (2017) *Embedding human rights in adult social care: Leaders' Briefing*
- > Guthrie L and Blood I (2019) *Embedding strengths-based practice: Frontline Briefing*
- > Johnstone L (2017) *Good recording: Practice Tool*
- > Nosowska G (2014) *Good assessment: Practitioners' Handbook.*

1. A brief overview of the *Human Rights Act 1998*

The *Human Rights Act 1998* (HRA) incorporates Articles of the European Convention on Human Rights (ECHR) into United Kingdom (UK) law (see below). The HRA states that:

‘So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights’ (3 (1)).

The *Human Rights Act 1998* includes the right to:

- > Life (Article 2)
 - > Freedom from torture and inhuman or degrading treatment (Article 3)
 - > Freedom from slavery and forced labour (Article 4)
 - > Liberty and security (Article 5)
 - > A fair trial (Article 6)
 - > Not be punished for something that is not against the law (Article 7)
 - > Respect for private and family life, home and correspondence (Article 8)
 - > Freedom of thought, conscience and religion (Article 9)
 - > Freedom of expression (Article 10)
 - > Freedom of assembly and association (Article 11)
 - > Marry and found a family (Article 12)
 - > Peaceful enjoyment of possessions (Article 1, Protocol 1)
 - > Education (Article 2, Protocol 1)
 - > Free elections (Article 3, Protocol 1)
- It also includes:
- > The prohibition of discrimination (Article 14) - the enjoyment of all rights and freedoms as set out in the ECHR are secured regardless of sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.
 - > The abolition of the death penalty (Article 1, Protocol 13).

Human rights are divided into three classes:

1. Absolute rights, such as Article 3, may not be restricted.
2. Limited rights, such as Article 5, may be restricted, but only on the explicit grounds listed in the article itself.
3. Qualified rights, such as Article 8, may be limited for various reasons, as long as the test in the article is met. This is that the limitation must be: grounded in law; necessary in a democratic society; and for reasons including the prevention of crime, the protection of health and the protection of the rights and freedoms of others.
(Harms-Smith et al, 2019)

Practitioners need to be familiar with the HRA and case law that arises from it, as they must carry out functions for the public in a way which is compatible with the ECHR rights (Elliott, 2017).

2. How assessment is grounded in human rights

Social care ethics, law and practice is grounded in upholding human rights (Braye and Preston-Shoot, 2016). Human rights underpin social care ethics. For example, the social work Code of Ethics states that: 'Social work grew out of humanitarian and democratic ideals, and its values are based on respect for the equality, worth, and dignity of all people...Human rights and social justice serve as the motivation and justification for social work action.' (BASW, 2014). The Royal College of Occupational Therapists' Code of Ethics and Professional Conduct states that occupational therapists must 'always recognise the human rights of service users and act in their best interests' (RCOT, 2017, p.16)

The HRA states that law and guidance must be read and applied in a way that is compatible with the ECHR rights.

The *Equality Act 2010*

The *Equality Act 2010* relates to Article 14 of the HRA. It protects people from discrimination on the basis of particular characteristics (see below). Practitioners carrying out public functions must avoid discrimination and take account of equality, diversity and inclusion in the way that they make policy, deliver services, buy goods and services and employ people (SCIE, 2011).

Age	Sex	Pregnancy and maternity	Race	Disability	Religion or belief
	Marital status	Sexual orientation	Gender reassignment		

The *Mental Capacity Act 2005 (MCA)*

The *Mental Capacity Act 2005* provides essential principles for upholding people's right to make decisions and their best interests if they lack capacity to make a particular decision. This upholds people's individual humanity and enables them to exercise their human rights. In **B Hillingdon v Steven Neary [2011] EWHC 1377 (COP)**, the judge found that the local authority deprived Steven Neary of his entitlement to take proceedings on the lawfulness of his detention (Article 5) because it had not used the MCA effectively.

The Care Act 2014

The *Care Act 2014* starts with key principles (see below) and states that the general duty of a local authority in exercising a function under the Act is to promote the individual's well-being (Part 1, Section 1 (1)). The principles, general duty and specific duties – including preventing needs for care and support, meeting needs, providing information and advice, safeguarding and advocacy - uphold human dignity and equality. *Care Act 2014* duties relate particularly to Articles 3 freedom from inhuman or degrading treatment, 5 liberty, and 8 respect for private and family life.

The Care Act 2014 sets out some principles that underpin work with individuals:

- > Beginning with the person's views, wishes, feelings and beliefs.
- > Thinking about prevention.
- > Not making assumptions.
- > Ensuring participation.
- > Balancing adult and carer needs.
- > Protection from abuse and neglect.
- > Minimising restrictions.

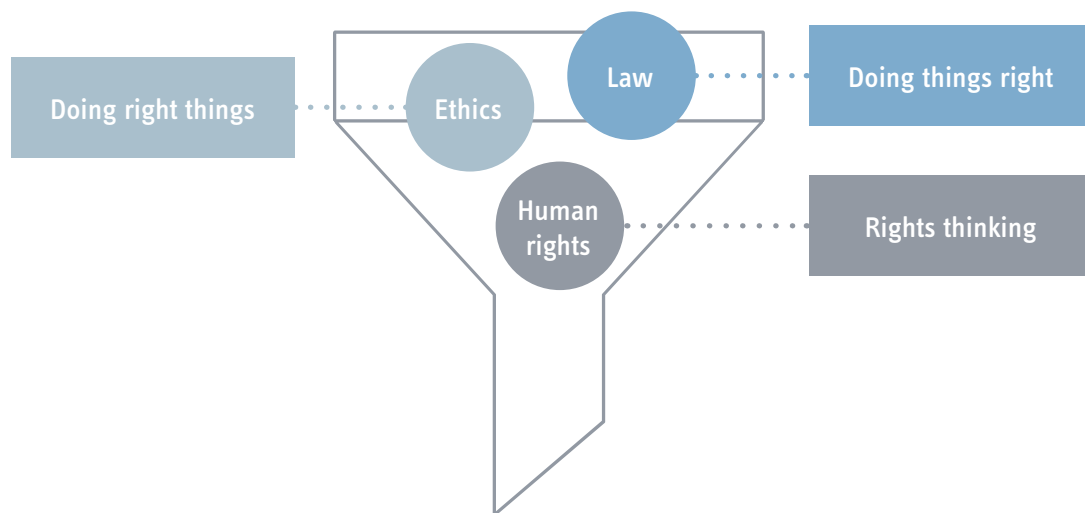
(Part 1, Section 1 (3))

Capabilities statements and frameworks for practitioners in adult social care emphasise human rights. For example, the Knowledge and Skills Statement for social workers in adults services says that they must:

'understand and work effectively within financial and legal frameworks, obligations, structures and culture, in particular Human Rights and Equalities legislation, the Care Act, Mental Capacity Act, Mental Health Act and accompanying guidance and codes of practice' (DHSC, 2015, page 5).

McDonald (2010) categorised three different approaches practitioners can take to decision making – legalistic, actuarial or rights-based. Legalistic practice is highly procedural. Actuarial practice has a focus on avoiding adverse outcomes. A rights-based approach includes advocating for and upholding people's rights and their choice, even if this seems unwise. This approach also involves awareness of the structural barriers to people being able to act.

Legal literacy offers a way of combining legal knowledge and procedural expertise with professional ethics and respect for principles of human rights, equality and social justice (Braye and Preston-Shoot, 2016). These three areas (shown below) provide a solid foundation for a human rights approach to practice.



Professional discretion exercised in real world circumstances

Social inequality and injustice create personal and structural barriers to people exercising their human rights (Hölscher, 2011). For example, someone living in poverty may not have the resource to visit or communicate with their family (Article 8). A human rights approach emphasises inclusion, recognises the impact of diversity and makes human rights explicit in decisions. It also balances the human rights of individuals, carers and people in the community (Greenhill and Whitehead, 2011).

Practitioners work with people whose ability to exercise their rights may be limited or who may face barriers. Therefore, practitioners need to proactively uphold rights. This fits with the ethos of strengths based practice, described as:

‘a more resourceful, open, helpful approach, conducive to promoting social justice and human rights as core social work activities (DHSC, 2019, page 6).

Strengths-based practice is based on an equal relationship, where the practitioner brings expertise including legal knowledge and the adult or carer brings expertise about their own situation. Strengths-based approaches promote rights to participation and self-determination (Guthrie and Blood, 2019).

3. A human rights approach to assessment for care and support

Assessment is an activity where professional judgement is applied in the situations of people whose independence and autonomy might be at risk. Therefore, its aims must align with human rights values (BIHR, 2016). The *Care Act 2014* statutory guidance states that assessment:

‘should not just be seen as a gateway to care and support, but should be a critical intervention in its own right’ (DHSC, 2020, 6.2).

Assessment can empower people to understand their situation, rights and options.

The essential elements of the assessment duty and their relation to human rights Articles are set out below:

- > Adults and carers must be assessed where it appears that they may have needs, regardless of the level of needs or their financial resources (Part 1, 9 (1-3)). This relates to Article 14.
- > Assessment involves looking at the adult’s or carer’s needs, the impact of these on areas on well-being, outcomes they want to achieve and what will help them to achieve that (Part 1, 9 (4)). This relates particularly to Articles 2, 5, and 8.
- > The adult and carer must be involved, along with any person whom the adult asks the authority to involve or, where the adult lacks capacity, any person who appears to the authority to be interested in the adult’s welfare (Part 1, 9 (5)). This principle of involvement echoes Article 1 of the Universal Declaration of Human Rights that *‘All human beings are born free and equal in dignity and rights’*.

Practitioners, managers and leaders in organisations must strive to ensure that assessments are accessible to all and inclusive (Article 14). There are many disparities in access to assessment related to information, knowledge, technology, systems, language, culture, suitability and stigma (for example Meyer, 2018; Moriarty et al, 2011). People from particular groups can face significant barriers, for example people who are homeless (Cornes et al, 2018) or autistic adults (SCIE, 2011b). Even when assessments are accessed, the quality may be variable (for example Carers UK, 2019). A particular group facing barriers to services is those who have No Recourse to Public Funds because of their immigration status. In these cases, the HRA still applies. Decisions about whether to provide social services assistance rest on a human rights assessment to identify if a decision to refuse support could potentially result in a breach of human rights (Harms-Smith et al, 2019).

The *Care Act 2014* statutory guidance states that an assessment should be: appropriate and proportionate; person-centred; flexible; holistic; strengths based and accountable. Also that it should look at the whole family, avoid duplication and include expert involvement if needed (DHSC, 2020). These principles fit with the ethos of a human rights approach. For example, over-assessment may be an invasion of privacy (Article 8) so proportionate assessment is needed. Holistic assessment, that includes exploring the person's life and involving the people who matter to the person, enables us to explore individual, shared, overlapping and competing rights in context (Banks, 2016).

The *Care Act 2014* statutory guidance (DHSC, 2020) identifies considerations around how assessment is carried out. These can be supportive of individual rights and uphold dignity and equality.

- > Supported self-assessment can enable an adult or carer to take more control of their assessment.
- > Joined-up assessment between agencies to avoid confusion or duplication can facilitate quicker access to support (Allen, 2014).
- > Specialist assessment for people with complex needs, for example autistic adults and people who are deafblind/Deafblind, can help to avoid discrimination (Wright, 2020).
- > Virtual assessment on the telephone or online can be empowering and may enable involvement of wider family or friends (BASW and SCIE, 2020).

Digital technology provides an opportunity to increase involvement, for example some autistic people prefer online interactions over face-to-face because of their sensory needs (Bertilsson et al, 2013). Practitioners need to understand the benefits and drawbacks of technology, such as communication tools and video-conferencing, through a human rights lens (Harms-Smith, et al 2019). These include, for example, implications for privacy (Article 8) or potential bias arising from using algorithms to make judgements (Article 14).

Assessment leads to a judgement about eligibility and meeting needs. A defensible judgement (see below) requires practitioners to follow the law, including the HRA, and proactively uphold rights.

Kemshall (2003) identifies the following criteria for defensible decision-making:

- > All reasonable steps are taken.
- > Reliable assessment methods are used.
- > Information is collected and thoroughly evaluated.
- > Decisions are recorded and carried through.
- > Agency processes and procedures are followed.
- > Practitioners and managers are investigative and proactive.

A human rights approach to assessment, following McDonald (2010), includes actions to:

- > Get to know the person, their preferences and choices
- > Understand how the person is able to exercise their rights
- > Identify barriers and enablers to the person's dignity and rights being upheld
- > Make judgements about how best to empower the person to live a life of dignity and equality.

The list of human rights Articles can be a helpful prompt in assessment.

The professional judgement that follows assessment is about eligibility and meeting needs. It is also an opportunity for practitioners to recommend what else might contribute to outcomes and promote wellbeing (Part 1, 9(6) (a)). BASW (2018) proposes that practitioners strive to identify what would promote wellbeing to the standard of Article 19 of the UN Convention on the Rights of Persons with Disabilities (see below). This would enable practitioners to promote full and equal inclusion and participation.

Article 19 - Living independently and being included in the community

This recognises the equal right of all persons with disabilities to live in the community, with choices equal to others, and to take measures to facilitate full enjoyment of this right and full inclusion and participation in the community, including:

- > Choice of where to live and with whom.
- > Access to services necessary to support living and inclusion in the community.
- > Equal access to community services and facilities for the general population.

Strengths-based principles of collaboration and self-determination, positive risk taking and building resilience are key to a human rights approach to assessment (Guthrie and Blood, 2018). Practitioners can empower people to understand their rights according to the law, and explain the rights and responsibilities they and their organisation have.

The 'three conversations' model

The 'three conversations' model for assessment highlights the importance of identity which is defined as the rights of all people to choose how they want to live (Partners4Change, no date). The conversations follow simple rules that include not making assumptions, and not using words that 'de-humanise' people. TLAP and SfC (2018) emphasise the importance in conversation of asking people about their lives, recognising their expertise and of equality (see next page).



It's about people's lives, not just their needs

It provides a platform for people to talk about their whole lives and not just the parts where they need support.



It recognises that people are experts in their own lives

It encourages people to use their expertise, skills and experience in their own care and support.



Its founded on trust, honesty and openness

It requires a relationship of two equals, recognising each person's contribution and understanding the concerns they might have.



It starts with a blank sheet

The conversation should be led by what's important to the person but care workers can prompt and shape the discussion.



It needs sufficient time and resources

The person may need time to feel confident and comfortable to participate. But getting it right means that people are offered the care and support they want.



It takes place within the context of the person's whole life and their community

It will cross organisational boundaries, and some things might be best supported by other services.

TLAP and SfC (2018)

Questions that support a human rights approach include questions that relate to:

Individual dignity and equality

- > What matters most to you?
- > What does a good life look like to you?

Article 2 freedom from inhuman and degrading treatment

- > What is stopping you from living your life the way you want?
- > What has happened to you? – this is a trauma-informed question that allows exploration and growth, and does not undermine someone’s dignity (Taggart 2017)

Article 5 liberty and Article 8 respect to private and family life

- > What makes home for you?
- > Who is important to you?

Article 14 prohibition of discrimination

- > Can you tell me a bit about your history?
- > What’s meaningful to you in your life?

Recording assessment is also an opportunity to uphold rights and dignity (Johnstone, 2017). Showing a human rights approach in recording an assessment might include:

- > A clear picture of the person’s story and preferences
- > Explicit discussion of their rights, and barriers and enablers to exercising these
- > Analysis including the balance of competing rights
- > The human rights implications of judgement and decisions.

4. Case study of Covid-19

This section provides a case study of human rights issues and responses during the Covid-19 pandemic, with a particular focus on assessment for care and support. It summarises the context for adult social care practice, legislative changes and guidance, as well as some examples of how human rights have been upheld.

There are disparities in risk and outcomes of Covid-19. These relate to Article 14 areas of potential discrimination, including:

- > Age - people who are 80 or older are seventy times more likely to die than those under 40.
- > Sex - risk of dying is higher in males than females.
- > Race and colour – risk of dying is higher in those in Black, Asian and Minority Ethnic groups than in White ethnic groups.
- > Other status – mortality rates in the most deprived areas are more than double the least deprived areas, and risk of dying is higher for people in particular occupations including transport and social care.
(Public Health England, 2020)

Practitioners individually and collectively campaign for equality of life chances (Articles 2 and 14), for example social workers that raised concerns through a survey helped to shape BASW's human rights statement (BASW, 2020c). Adult social care practitioners are under pressure to complete care and support assessments whilst following public health measures of social distancing, closing workplaces and wearing protective equipment. Human rights are at the heart of prioritising, risk assessment and response during Covid-19. This includes resisting pressure to shortcut engagement and to get things done through more coercive approaches (BASW, 2020b).

Ethical principles for responding to the pandemic were issued for adult social care (DHSC, 2020b). These principles reflect human rights principles, for example they include respect and inclusiveness. They also relate to Articles of the Convention, for example minimising harm relates to Articles 2 and 3.

In March 2020 the UK government passed the *Coronavirus Act 2020* which allows for various changes to legal rights, for example it increases the time frames for detention under the *Mental Health Act 1983* (Schedule 8). The *Coronavirus Act 2020* includes the potential for easements of the *Care Act 2014* (see below).

Easement: Local authorities do not have to

- > Carry out detailed assessments of people's care and support needs.
- > Carry out financial assessments.
- > Prepare or review care and support plans.
- > Meet eligible care and support needs, or the support needs of a carer.

However, where local authorities use easements, human rights responsibilities remain. Local authorities must respond within a timeframe that does not jeopardise people's human rights, must consider their needs and wishes and must take all reasonable steps to continue to meet needs. If plans are revised, the local authority must involve adults and carers. They:

'remain under a duty to meet needs where failure to do so would breach an individual's human rights...These include, for example, the right to life (Article 2), the right to freedom from inhuman and degrading treatment (Article 3) and the right to private and family life (Article 8)' (DHSC 2020c, Annex B).

Duties in the MCA relating to Deprivation of Liberty Safeguards remain in place during the pandemic.

The *Care Act 2014* easements potentially reduce access to hard won rights to care and support, for example they can temporarily reduce the number of people who receive an assessment (Healthwatch, 2020). However, requirements for transparent decision making and notification of changes (DHSC, 2020c) help to ensure procedural fairness and the opportunity for challenge. The guidance highlights the central role of professionals such as social workers, occupational therapists and nurses in decision making (DHSC, 2020c). This enables professional ethics to also be central. At the time of writing, only seven local authorities have notified that they had used easements.

Practice during Covid-19 shows creativity in upholding human rights, for example:

- > Recognising inequalities and barriers to support, for example isolation or lack of technology.
- > Identifying alternatives to face-to-face assessment, for example through third parties or through video assessment.
- > Creatively carrying out assessments, for example through windows or in gardens.
- > Proactively identifying potential need, for example for carers or people approaching end of life.
- > Working with community and grassroots groups to check in and see how people were, and to identify needs for care and support.

See www.researchinpractice.org.uk, www.scie.org.uk, www.basw.co.uk.

In Control (2020) produced a contingency planning tool that recognises that care and support could break down. It enables people to set out the essential areas of support they need and to say what they would like to happen if different situations arose, for example paid carers become sick or they become sick. The tool prompts for possible ways of meeting need so people can identify what might work for them. Contingency planning is a way of upholding rights in crisis or situations of sudden change.

www.be-human.org.uk/coronaheroes

Practice example:

'Our social workers are becoming familiar with the Government guidance on who is most vulnerable from Covid-19...They are making contact with them, ensuring they have accessible information about protecting themselves and their family...and arranging for weekly phone and video calls to check in. If they are extremely at risk..., they are making contact with the community hub to ensure that they have a regular supply of food, medicines, toiletries, household and personal hygiene goods.' (Articles 2 and 3)

'There are lots of modern technologies out there that can help maintain social and family networks... and we are encouraging families and Care Home providers to set up and use them.' (Articles 5 and 8)

'We have decided that during the Covid-19 crisis we will adopt the presumption of necessity and use Direct Payments very flexibly.' (Article 14)

'So, we're sticking to those principles of social justice, human rights, collective responsibility and respect for diversity.' (Mitchell and James, 2020)

5. Support for practitioners

This section highlights the support that practitioners need to manage the ethical and practice issues that arise in assessment.

Taking a rights-based approach (McDonald, 2010) involves relationship building, empathy and advocacy. Professional curiosity, which helps us to practise in a way that upholds people's individual dignity and human rights, involves stepping outside your comfort zone (Burton and Revell, 2017) and engaging with complexity (Shenaar-Golan and Gutman, 2013). This is tiring, particularly when work demands are high and resources are stretched (Burton and Revell, 2017).

Striving to act ethically requires both intention and attuned action (Featherstone and Gupta, 2020). Practitioners face moral dilemmas where the right answer is not clear. They also experience moral distress when a preferred ethical course of action is clear but is not possible, maybe due to lack of resources. And they can experience impact from situations where, no matter what is done, harm follows as well as good, perhaps because of competing rights (Weinburg, 2009).

Practitioners need good support to undertake assessments well. This includes learning and development, workload management, opportunities for critical reflection, supervision and peer support (Nosowska, 2014).

Critical reflection is central to good assessment. It requires practitioners to consider the impact of their own identity, power and beliefs, and how this affects their actions (Reynolds, 1998). Supervision, and trusted and structured peer discussions, are good forums for deep critical reflection.

Ruch (2000) identified four levels of reflection. The deepest involves exploration of conscious and unconscious influences on judgements. This enables practitioners to manage the ethical complexity of human rights work.

6. Conclusion

Human rights ethics, law and practice underpin assessment for care and support. Attending to the Articles of the European Convention on Human Rights within assessment can help to address inequality, promote strengths-based practice and empower people.

Practitioners are in a position to empower people to exercise their rights. They are also able to influence a human rights approach within organisations and wider society.

As this resource was written, Covid-19 was exposing the impact of inequalities on people's life chances, and Black Lives Matter was highlighting the bias and oppression that affect institutional, and individual, responses.

Even under pressure, practitioners can find ways to uphold human rights. Adult social care can continually learn about how to uphold human rights in practice and how to collectively push for greater dignity, rights and equality for all people.

Following a human rights approach can present moral dilemmas. Therefore practitioners need support, reflection and opportunities to learn from good practice.

The basis of human rights – upholding the dignity and worth of each individual – is a touchstone for good assessment practice.



Reflective questions

- > How does my assessment practice flow from the foundation that all humans are equal in dignity and rights?
- > How confident am I in the ethical, legal and practice basis for a human rights approach to assessment?
- > How do I explicitly consider individual, shared, overlapping and competing rights in my assessment?
- > What can I learn from how human rights have been affected and upheld in Covid-19?
- > What support do I need for human rights work?



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