

Development and  
the implications  
for law, justice,  
and society

# Islam and Women in the Constitution of Bangladesh

The impact on family laws for  
Muslim women

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Policy Brief

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The Foundation for Law, Justice and Society

in association with **the Centre for Socio-Legal Studies**  
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# Executive Summary

- In analysing the evolution of Islamic family laws in relation to women's rights in Bangladesh, it is important to assess the role of Islam and the status of women in the document representing the country's ultimate legal authority: its Constitution.
- The Constitution of Bangladesh has been amended fifteen times, and its interpretations of secularism and the status of Islam as a guiding principle of the state remain unclear.
- Constitutional amendments with regard to religion have been largely symbolic gestures made in line with ruling party agendas, with religion being employed as a means of consolidating power.
- The Constitution has been used only rarely in family law cases and the primacy of secularism or Islam in the document depends on the choice of interpretation.
- In the end, the Constitution of Bangladesh remains an evolving document and its influence on family law for Muslims is dependent on the inclinations of the judges interpreting it.

# Islam and Women in the Constitution of Bangladesh

## The impact on family laws for Muslim women

Despite its geographically small size, the population of Bangladesh represents 9.3 per cent of the world's 1.57 billion Muslim population and, with over 145,312,000 self-identified Muslims, constitutes the world's fourth-largest Muslim population after Indonesia, India, and Pakistan.<sup>1</sup> The country also has a history since independence of pursuing gender equality through a range of development programmes and both government and non-government institutions. Compared to its historically closest and economically better-off South Asian counterparts, India and Pakistan,<sup>2</sup> Bangladesh has fared better on a range of indices measuring the status of women.<sup>3</sup>

This brief focuses on the legal aspect of gender in Bangladesh, examining specifically Muslim women and the impact that the shifting emphasis of secularism and Islam in the country's Constitution may have had in terms of their status in family laws. Created in 1972, the document has been amended fifteen times. It is considered the 'supreme law of the republic', as an 'expression of the people's will', and all other laws must be consistent with its terms.<sup>4</sup> This brief assesses its relevance in determining personal or family laws for Muslims by analysing its emphasis on secularism and the aspirations towards women's equality to which it refers.

### The Constitution and its amendments

The Constitution and its fifteen amendments have been highly challenging to navigate from a judicial perspective. The document is both supportive of secularism and equal political representation and opportunities for women while also upholding the application of *shari'a* as a guide to family laws for Muslims. The most recent version of the Constitution, as of 2011, contains some ambiguity regarding the declaration of Islam as an official state religion and principles of gender equality enshrined within it, which leaves the reconciliation

of the two principles in law open to a degree of judicial interpretation.

After the proclamation of independence and interim Constitution, declared on 10 April 1971, the first formal Constitution of independent Bangladesh was adopted on 4 November 1972. The 1972 document contains one preamble, 153 articles, and four schedules<sup>5</sup> and, according to its terms, can only be amended with a two-thirds parliamentary majority. The Constitution does not require the consensus of all parties as a prerequisite for such amendments. The 1972 Constitution also provides for a unicameral legislature under Article 65, a parliamentary system in which executive power is to lie in the hands of a cabinet of ministers headed by the prime minister.

To understand the evolving nature of the Constitution and explore its impact on the legal system, it is particularly important to take note of its many amendments regarding the role of Islam. Over the course of these amendments, Islamic principles have been introduced to a number of aspects of this highest of legal authorities.

Secularism, as one of the four fundamental principles stated in Article 8 of the Constitution, and which also includes nationalism, democracy, and socialism, has been under review among these amendments. The Fifth Amendment was particularly significant in this regard as it legitimized the introduction of martial law after 1975 and, with it, a number of changes to the Constitution, including those made under the military rule of General Ziaur Rahman, founder of the Bangladesh National Party. With regard to the role of Islam, it was during this martial law period that secularism was removed from the Constitution as a fundamental principle, and the words 'absolute trust and faith in almighty Allah' were included instead.<sup>6</sup> The words *Bismillahir Rahmani Rahim*, the traditional start of a blessing or prayer in Islam, meaning 'In the name of God, the Beneficent, the Merciful' was inserted in its preamble.

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The timing and nature of amendments which constrain or enhance the role of Islam in the Constitution is indicative of the tendencies of the two main parties, the Awami League (AL) and the Bangladesh National Party (BNP). They are generally perceived as taking opposing positions, with the AL having a more secular orientation than that of the BNP. In response to the historical background of the Liberation War and the perception that Pakistan stood for a stronger Muslim identity, the independence movement of Bangladesh was structured largely along secular lines and seen as a cornerstone of Bengali nationalism. Sheikh Mujibur Rahman, leader of the movement, headed up the AL at the country's independence and came to be seen as symbolic of all of the four fundamental principles. The party has since been associated more closely with secularism than has the BNP.

It should be noted, however, that 'Neither the Awami League nor the BNP has advocated ... for the radical transformation of Bangladeshi society along Islamic lines'. The original Constitution, created shortly after independence under AL rule, made secularism a fundamental principle of the new state. This principle, however, was removed from the Constitution when General Ziaur Rahman, who later formed the BNP, came into power.

*The Islamic card became all the more critical to Bangladeshi politics under the military regime that displaced Sheikh Mujibur Rahman within four years of the birth of the country. General Zia ... needed an ideological platform to justify military involvement in politics and build resistance to the Awami League. He chose to play the Islamic card and his party, the Bangladesh Nationalist Party, allied with Islamic forces in the country.<sup>8</sup>*

Moreover, as thousands of Bangladeshi workers headed to the Middle East and perhaps in an effort to downplay the failure to remain one with a country built on the promise of South Asian Muslim solidarity, Bangladesh attended its first Islamic summit meeting as an independent country in 1975.<sup>9</sup>

Meanwhile, Ziaur Rahman's administration allowed political parties running on religious platforms to run for elections again, removing a ban on such parties that was put in place immediately after Bangladesh

won its independence.<sup>10</sup> He also, however, enthusiastically took up the cause of the UN Decade for Women initiated in 1975, but this was largely seen as an intention to take advantage of associated foreign aid for development and to capitalize politically on its distribution.<sup>11</sup> Women's rights activists who argue that secularism is the key to women's equality tend to perpetuate the view that AL is more secular and thus more interested in enhancing women's rights by largely supporting the AL.<sup>12</sup> However, the reality is that both parties have allied with Islamist groups while in opposition in an effort to consolidate power against whichever party is ruling at any given time, and neither have demonstrated a strong commitment to women's rights in fear of such groups.

Nevertheless, it becomes evident from a chronological analysis of constitutional amendments that whatever efforts BNP has made to 'Islamize' the Constitution, AL has sought to undo. AL has done notably little to repeal amendments put in place by General Hussain Muhammad Ershad, who primarily followed Ziaur Rahman's lead by amending the Constitution to declare Islam as the state religion.<sup>13</sup> Despite this concession to the religious right, the largest Islamist party in Bangladesh, the Jamaat-e-Islami, supported the movement against Ershad because of his failure to go even further in the direction of declaring the country an Islamic state, possibly also hoping that a democratic system might prove to be a better bet in terms of setting up that type of state in the future.<sup>14</sup>

Over the years since Bangladesh's independence, the Constitution has become a playground in which the two main parties fight over a largely imaginary line in the sand between secularism and Islam. Recent amendments, furthermore, have brought the issue of secularism back to prominence. In 2005, the Fifth Amendment was annulled by the Bangladesh High Court, one of two divisions of the Supreme Court. The High Court ruling said: 'We are putting on record our total disapproval of martial law and suspension of the Constitution or any part thereof in any form'.<sup>15</sup> In 2010, the Appellate Division of the Supreme Court upheld this ruling after opposition parties BNP and Jamaat-e-Islami appealed the High Court decision to restore secularism to the Constitution's four fundamental principles. It also observed that



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parliament does not have the power to suspend constitutional law and proclaim martial law in its place and as such, cannot legitimize proclamations made under military rule, including amendments to the Constitution. None of these changes, however, clarifies to what extent Islam and its principles can or should be applied to the country's laws.

Meanwhile, although the Fifth Amendment had also lifted a ban on political parties campaigning on religious platforms, this ban was not renewed – until very recently on 1 August 2013 when, under the ruling AL, the Bangladesh High Court declared the election commission's registration of opposition party Jamaat-e-Islami illegal in advance of the next round of elections scheduled to be held later in the year.<sup>16</sup> Moreover, it was argued that, since the phrase '*Bismillahir Rahmani Rahim*' preceded the text and preamble of the Constitution, it was to remain in place without affecting the secular status of the Constitution.<sup>17</sup> However, through its standing committee member Moudud Ahmed, opposition party BNP pointed out that, if the Constitution was to begin with such a phrase, the Constitution could hardly be considered secular, pointing also to the fact that the Eighth Amendment's declaration of Islam as a state religion remained unaffected.<sup>18</sup>

Nevertheless, there remains a degree of enthusiasm amongst ruling party Awami League members for the implications of repealing this amendment. "In the light of the verdict, the secular Constitution of 1972 already stands to have been revived," [*sic*] Law Minister Shafique Ahmed said ... "Now we don't have any bar to return to the four state principles of democracy, nationalism, secularism and socialism as had been heralded in the 1972 statute of the state," he said.<sup>19</sup> Given the number of times the Constitution has fluctuated between prescribing a lesser or greater influence of Islam in law-making, and the generally vague references thereof, amendments appear to be largely symbolic gestures and a means of expressing party positions on the prominence of Islam in Bangladesh. Importantly, secularism itself, and its relationship to women's rights, have yet to be fully determined.

### What is secularism in Bangladesh?

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The influence of religion — and Islam in particular — does not necessarily preclude sexual equality, as there are jurisprudential avenues within *fiqh* or Islamic jurisprudence to offer women greater equality. However, the way that secularism (a term that has come to mean a variety of orientations towards the tolerance of religious practices by a state) has been defined in the Bangladeshi Constitution has implications for the extent to which *fiqh* is used as a reference in cases of personal law, as well as the extent to which state and non-state actors choose to engage with Islamic jurisprudence. Secularism in the Bangladeshi Constitution has been interpreted in part as a response to the explicit and violent 'Islamizing' aspect of the Pakistani military strategy during the 1971 war. Secularism as an aspect of Bengali nationalism, however, has a longer and more complex history than the events of 1971. The Constitution itself does not clarify its position on the meaning of secularism, but its intent is one of religious neutrality or *dharmo niropekkhota*. This neutrality, however, is not borne out in a document that begins in the name of Allah and continues to state that Islam is the 'state religion', while touting secularism as one of its fundamental principles.

There are three major issues of contention over the role of Islam in the constitution: (1) its preamble that invokes the name of Allah; (2) Islam as the state religion; and (3) secularism as one of its four fundamental principles. Prior to the repeal of the Fifth Amendment and to the passing of the Fifteenth Amendment, even when the word 'secularism' in Article 8(1) was replaced with the phrase, 'Absolute trust and faith in the Almighty Allah', followed by Article 8(1A), stating that 'Absolute trust and faith in the Almighty Allah shall be the basis of all actions', the second part of that Article stated that the four fundamental principles, while necessary for governance, the making of laws, and interpreting the Constitution, 'shall not be judicially enforceable'. Thus, even in the current version of the Constitution, with secularism restored as fundamental principle, these principles remain unenforceable from a judicial perspective.

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Additionally, despite Bangladesh declaring Islam as its state religion, it does not make explicit in its Constitution what that might actually mean in terms of the role of the religion in determining legal practices. Nevertheless, it holds great symbolic value for both (secular) women's rights activists and the religious right. A range of women's rights activists challenged the Eighth Amendment, which asserted Islam as the country's state religion, on the basis that it allowed for discrimination against women. Naripokkho, one of the most prominent such activist groups, argued that only a version of secularism that excludes Islam as a state religion can be conducive to protecting the rights of women. Their view is that the amendment allows the use of religion to constrain such rights.<sup>20</sup>

However, the Constitution also calls for the equality of women in Articles 27 through 29, with Article 29 stating the option of special provisions made for women or any other 'backward section of citizens' to ensure their 'adequate representation in the service of the Republic'. The wording of the Constitution does not clarify whether, in legal cases where classic principles of Islamic jurisprudence may clash with the concept of equality between men and women (as is often the case with current family laws for Muslim women in Bangladesh), Islamic principles should take precedence over that equality. Current Prime Minister Sheikh Hasina, meanwhile, has publicly stated that it is important to 'remain vigilant' on misinterpretations of the Koran and, in her speech addressing the National Conference of Trained Imams in 2011, pointed out that, "Secularism means that people belonging to different religion will perform their religious rituals independently which is the main message of Islam"<sup>21</sup>

It is important to note that, in Article 28(2), the Constitution only explicitly calls for women and men to be treated on equal terms in 'all spheres of the State and of public life'. Arguably, the lines between public and personal life are blurred in certain areas of personal law, most noticeably so in the context of citizenship and property rights. And the Constitution appears to provide ample provision to equalize rights where there is a perception of disparity, without specifying the public or private nature of such a disparity's context. The primary architect of the original Constitution, Kamal Hossain, has pointed

out that Part 2 of the Constitution; that is, Articles 8 through 25, were intended to 'ensure equality', while the document as a whole was 'conceived as a charter for a programme of extensive affirmative action.'<sup>22</sup> How then, does this supreme law find its way down to actual cases of family law?

### **The Constitution in interpretations of family law**

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Despite the two main parties' wrangling over the status of secularism in the Constitution, and their alliances with Jamaat-e-Islami and other Islamist parties which this wrangling intermittently requires, there is a particular nuance in the way that the religious (Islamic) right perceives the Constitution with regard to personal law and women's rights. Of the 'seven distinct camps of Islamist parties and organizations' noted by Ali Riaz, Jamaat-e-Islami has historically emerged as the largest and most influential in terms of having a parliamentary presence.<sup>23</sup> Their response to the 1972 Constitution emphasizing secularism and its subsequent reversal through the Fifteenth Amendment in the current Constitution has been largely dismissive. The document is seen as a tool of the Awami League, promoting its brand of secularism and even persecution of Islamists,<sup>24</sup> allied as such groups are with the main opposition party.

The implications of bringing back secularism with the Fifteenth Amendment remain unclear, as personal law has generally been treated as a matter of religious freedom. The Bangladeshi government's Law Commission's past statements support this view. In a response to a joint report by UNESCO and Women for Women (a women's rights NGO in Bangladesh) reviewing the proposal for a Uniform Family Code, which would apply the same personal laws across all religious groups in Bangladesh while also enhancing women's rights in those laws considerably, the Law Commission referred to then Article 8 of the Constitution on the faith in Allah as the fundamental principles of state policy, suggesting that personal law for Muslims can only be prescribed by the 'eternal law' that is 'Muslim personal law.'<sup>25</sup>

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Meanwhile, as a point of judicial reference in personal law cases, the Constitution has its limits in terms of positively influencing the rights of Muslim women. Its primary reference to women's equality lies largely in the public sphere, that is, in terms of enhancing women's presence in the labour force and in parliament. The Constitution contradicts itself, even in its most secular form, with regard to the role of Islam and the extent to which it is necessary to exert Islamic jurisprudence while supporting the equality clause of the Constitution for Muslim women, as opposed to stepping outside of a *shari'a*-driven framework altogether.

The Constitution has been referred to only in a limited fashion in cases involving the protection and enhancement of women's rights. For example, in response to a spate of violence directed at young rural women as part of their sentencing by fatwa, a type of edict issued by religious scholars in Islam, the Supreme Court declared such sentences unconstitutional in 2001.<sup>26</sup> When the ruling came up for appeal in 2011, appellant lawyers argued that, since Islam is the state religion, all fundamental rights must be interpreted in that light, and that giving or receiving fatwa is a fundamental right in this view. Ultimately, the fatwa ban was somewhat lifted in that it was specified that no fatwa can be issued in defiance of existing laws of the country and, even when issued, cannot be enforced.

Furthermore, the Constitution has rarely been used in the context of family law cases. However, according to Human Rights Watch:

*The practice of husbands bringing countersuits for restitution of conjugal rights continues even though the High Court Division of the Bangladesh Supreme Court has on several occasions held such orders unconstitutional (the court has also held otherwise). In three cases, Sharmin Hossain alias Rupa v. Mizanur Rahman, Nelly Zaman v. Giasuddin, and Sherin Akhter and another v. Md Ismail, the court held that ordering a husband and wife to live together would be unconstitutional. The High Court rulings suggested that the*

*Constitution guarantees 'women's equality before the state and in public life, and to life, personal liberty, and body.'<sup>27</sup>*

In *Nelly Zaman v Giasuddin Khan*, the equality clause of the Constitution's Article 28 was specifically cited. In one other case, *Khodeza Begum v Sadeq Sarkar*, the High Court suggested that, based on the equality clause, the law on restitution of conjugal rights was so unconstitutional as to be entirely void. This was subsequently overruled in *Md. Chan Mia v Rupanahar* and *Hosna Jahan (Munna) v Md. Shajahan (Shaju)*, when the High Court pointed out that conjugal rights are reciprocal and therefore not in violation of the clause.<sup>28</sup>

## Conclusion

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The overwhelming majority of women's rights activists in Bangladesh continue to promote secularism as a means of attaining women's equality in personal laws. Part of the reasoning behind this is that, as prominent activist and international relations analyst Meghna Guhathakurta has suggested, while women's rights in the economic and political sphere have tended to be 'most [*sic*] heavily determined by the flows of the political economy than by Islamist ideology ... Islamization has tended to influence restrictions on women's rights in the legal arena.'<sup>29</sup> The prevailing perception among such activists is that opening the door of religion leaves women's rights open to discriminatory interpretations of Islam.

As is the case in many other countries, incumbent parties in Bangladesh have frequently invoked religious unity as a means of consolidating power when opposition parties have campaigned on the basis of ethno-linguistic nationalism. This is evident in the constitutional amendments made by the BNP and the Jatiya Party, whereas the AL, which represents the larger independence movement founded on Bengali nationalism and enjoys a strong base of support outside of the Islamist right, takes greater risks in provoking the ire of the right in its secular amendments to the Constitution. As for the implications of such amendments on personal laws, due to the confusing and vague guidelines present in the Constitution, the



document has little bearing on the ways in which personal laws for Muslims have been modified. Just as Islamic jurisprudence itself can be interpreted as being discriminatory against or supportive of

women's rights, the Constitution can be interpreted as requiring such laws to be modified only within the context of Islamic jurisprudence or by ignoring the influence of Islam altogether.

## Notes

- 1 See *Mapping the Global Muslim Population: A Report on the Size and Distribution of the World's Muslim Population* (October 2009), Washington, D.C.: Pew Research Center.
- 2 According to the World Bank's 2011 World Development Indicators, in terms of 2010 GDP per capita (current US\$): India \$1,477; Pakistan \$1,008; and Bangladesh \$609.
- 3 See the United Nations Development Programme's 2011 Gender Inequality Index, the Organisation for Economic Co-operation and Development's 2009 Social Institutions and Gender Index, and the World Economic Forum's 2011 Global Gender Gap Index.
- 4 See Mahmudazzaman, M. (2012) *Role of Constitution in Nation Building* (November). Dhaka: Democracywatch.
- 5 By 2011, there were seven schedules, with the three additional ones containing speeches composed or delivered by Sheikh Mujibur Rahman, leader of the Bangladesh independence movement and first prime minister of the country.
- 6 See Gopal, K. (2010) 'A "secular" Bangladesh: Country's top court lifts 4-year stay on order banning religion in politics', *The Indian Express*, 7 January.
- 7 See Rozario, S. (2006) 'The new burqa in Bangladesh: Empowerment or violation of women's rights?' *Womens Studies International Forum* 29.4: 368-80.
- 8 Ibid.
- 9 Ibid.
- 10 See Bano, M. (2008) 'Allowing for Diversity: State-Madrasa Relations in Bangladesh, Working Paper 13', *Religions and Development Research Programme*. Birmingham: International Development Department, University of Birmingham.
- 11 See Kabeer, N. (1991) 'The Quest for National Identity: Women, Islam and the State in Bangladesh'. In: Deniz Kandiyoti (ed.), *Women, Islam and the state*. Basingstoke: Macmillan.
- 12 See Chowdhury, E. H. (2009) "'Transnationalism reversed': Engaging religion, development and women's organizing in Bangladesh', *Women's Studies International Forum* 32.6: 414-23.
- 13 Ershad also set up family courts in 1985 to expedite the resolution of family law cases, and put in place a number of ordinances raising the penalties for violent crimes against women.
- 14 See Shehabuddin, E. (2008) 'Jamaat-i-Islami in Bangladesh: Women, democracy and the transformation of Islamist politics', *Modern Asian Studies* 42.2-3: 577-603.
- 15 See 'Court restores "secularism" in Bangla constitution', *Zee News (Online)*, 29 July 2010.
- 16 See 'Bangladesh court declares Jamaat illegal', *Al Jazeera*, 1 August 2013.
- 17 See Liton, S. and K. S. Islam (2010) 'Interview with Suranjit Sengupta - Constitutional Reform: Where does the power lie?', *The Daily Star (Forum magazine)*, November.
- 18 See 'Don't amend Bangladesh constitution in haste', *Tajikistan News*, 25 July 2010.
- 19 See 'Bangladesh set to return constitution to secular roots', *Reuters*, 21 February, 2010.
- 20 Similarly, the largest women's rights organization in the country, the Bangladesh Mahila Parishad, 'strongly endorses the [current] fundamental principles of the Bangladesh Constitution, including secularism, and there have been various confrontations with religion-based parties over issues such as the National Women's Development Policy. More than other political and civil interest groups, women's organisations have been upfront in identifying threats to women's rights and empowerment from the political use of religion and have protested this'. See Nazneen, S., N. Hossain and M. Sultan (2011) 'National Discourses on Women's Empowerment in Bangladesh: Continuities and Change', IDS Working Paper 368. Brighton: Institute of Development Studies.
- 21 See 'PM urges imams to remain alert against misinterpretation of Islam', *TwoCircles.net*, 9 February 2011, available at: <http://twocircles.net/node/238591>
- 22 See Hossain, K. (1997) 'Interaction of Fundamental Principles of State Policy and Fundamental Rights'. In: S. Hossain, S. Malik and B. Musa (eds), *Public Interest Litigation in South Asia, Rights in Search of Remedies*. Dhaka: University Press Limited.
- 23 See Riaz, A. (2013) 'Unpacking the Islamist Agenda', *The Daily Star*, 4 May.
- 24 See Saidul Islam, M. (2011) "'Minority Islam" in Muslim Majority Bangladesh: The Violent Road to a New Brand of Secularism', *Journal of Muslim Minority Affairs* 31.1: 125-41.
- 25 It should be noted that, as with the government itself, the Law Commission changes hands depending on which party is in power, and more recent Commission publications indicate a stronger inclination towards reforms, although leaning primarily towards incremental changes rather than dramatic shifts such as a Uniform Family Code. It remains to be seen whether the replacement of this Article with secularism will have any impact on the movement for the Uniform Family Code, but the movement appears to have lost traction in recent years.
- 26 Ahmed, F. E. (2011) 'Jitihad and Lower-Middle-Class Women: Secularism in Rural Bangladesh', *Comparative Studies of South Asia, Africa and the Middle East* 31.1: 124-32.
- 27 'Will I Get My Dues ... Before I Die?' Harm to Women from Bangladesh's Discriminatory Laws on Marriage, Separation, and Divorce'. New York: Human Rights Watch.
- 28 See Hoque, R. and M. M. Khan (2007) 'Judicial Activism and Islamic Family Law: A Socio-Legal Evaluation of Recent Trends in Bangladesh', *Islamic Law and Society* 14.2: 204-39.
- 29 See Chowdhury, E. H. (2009) "'Transnationalism reversed': Engaging religion, development and women's organizing in Bangladesh', *Women's Studies International Forum* 32.6: 414-23, at 416.



### The Foundation

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