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## The Future Concept of Work

Nicola Countouris  
*University College London*

Valerio De Stefano  
*Osgoode Hall Law School of York University, vdestefano@osgoode.yorku.ca*

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# Chapter 6

## The future concept of work

Nicola Countouris and Valerio De Stefano

### Introduction

For the past decade or so, both scholarly and policy work has explored extensively the broad topic of ‘the future of work’ from a number of perspectives and analytical standpoints. This exploration has been both descriptive and anticipatory in nature and intimately connected with technological change, and the development, in particular, of digital capitalism and the so-called gig economy.

This chapter engages with this rich and developing debate by focusing not so much on the ‘future of work’ angle but on its future ‘concept of work’ dimension. It does so in two ways. First, by exploring the legacy of the concept of subordination for the notion of work and the regulation of work relations. Second, by exploring an alternative idea (and legal definition) of ‘work’, based on the notion of ‘personal work relationship’ and its potential contribution to labour law in terms of ensuring that its standards apply to all socially relevant forms of work, and correspond to a number of twenty-first century societal necessities.

### 1. The legal concept of ‘work’

Unlike tigers, elephants or whales, concepts such as ‘work’ or ‘employment’ do not exist in an ontological sense.<sup>1</sup> Humans (and animals for that matter) perform plenty of activities that no society and no legal system seem to classify as work or employment. And, from looking after one’s offspring to caring for ageing relatives or finding a birthday present for your significant other, everyone would agree that some of these activities are not insignificant or trivial. Other human activities, however, are understood, conceptualised and defined as work or employment, in a way that, if not arbitrary, is typically contingent on specific societal preferences and functional in terms of particular structures of a certain period or place, even though the passage of time, and sometimes habit, can lead us to believe that these constructs are universal. For labour lawyers, such as the authors of this chapter, these constructs are also – and importantly – legal constructs. They are created by laws, statutes, regulations and judicial decisions, even where it could be claimed that these legal superstructures effectively encapsulate deeper societal, economic or political preferences and conventions. These laws ultimately dictate which activities amount to work or employment and which ones

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1. And even here there could be a debate, at least according to Jacques Derrida’s (2006) *L’Animal que donc je suis* (The animal that therefore I am), éditions Galilée.

‘deserve’ to be protected by employment protection legislation, collective agreements, social insurance and social security.

In a rather broad-brush way, it is possible to set out and contrast two alternative conceptual approaches that have been deployed to capture the concept of work that falls (or ought to fall) under the protective umbrella of contemporary labour and employment protection legislation. The first is linked to an idea of work linked to the concept of subordination. This approach, which remains the dominant one, and the concept of subordination underpin many of the existing legal institutions that shape labour law as we have known it for decades, institutions such as the contract of employment, the standard employment relationship and the notion of dependence (both legal and economic).

A second approach emerged, broadly speaking, in the latter decades of the twentieth century that advocates an extension of labour rights *au-delà de l'emploi*, beyond employment (to use the expression coined in 1999 by Alain Supiot and his colleagues),<sup>2</sup> which really meant ‘beyond subordinate employment’. We should warn our readers, at this stage, that we use the idea of ‘beyond employment’ as an umbrella term to describe a number of approaches that seek to extend labour protections to work relations that do not, strictly speaking, fall under the legal definition of the subordinate contract of employment. There are two main manifestations of this second approach. Again in very broad-brush terms, one effectively suggests that a *tertium genus* and intermediate category of semi-dependent work exists between employment and self-employment to which ‘some’ labour rights should apply. And another in effect seeks to reconfigure the binary divide between employment and self-employment in order to extend ‘all’ labour rights (and new social rights) to a new, and broader, family of ‘personal work relations’ (Freedland and Kountouris 2011; Countouris and De Stefano 2019).

## 2. Work, subordination and unfreedom

The idea of subordination in employment and work arrangements may well be rooted in the past but it has such significant implications for the contemporary world of work, and any ideas on how to reshape it, that it is also projected into the future. Subordination, of course, is central to the notion of the employment relationship as it emerged in the twentieth century, and is considered a requirement for recognition of a contract of employment in most countries around the world. In turn, the existence of a contract of employment is still the fundamental condition for applying the most important employment and labour regulations and protective standards worldwide. In a nutshell, the subordination of a worker to an employer acts as the *quid pro quo* to justify the application of certain labour rights and protections that have two important, but contradictory, purposes: rebalancing what is clearly an unbalanced relationship of power and resources, and compensating workers for what, ultimately, remains an unbalanced relationship of power and resources (Supiot 1994; Dukes and Streeck 2022). Let us note that the notion of subordination and control crystallised by the

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2. See Supiot et al. (1999).

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employment contract is also more significant and pervasive than any coordination power afforded under any other contract, and contracts for the performance of work in particular, in modern legal systems.

Subordination has been an ongoing topic of investigation by labour lawyers since the discipline's inception. Despite this, investigating the foundation and justification of subordination in modern democratic societies remains relevant and pressing. For example, Elizabeth Anderson, an American philosopher, has shown that at the dawn of industrialisation and the rise of modern factories, liberal thinkers such as John Locke, Adam Smith and Thomas Paine did not envision a society in which the majority of the population would be subjected to contracts of employment based on subordination. Anderson attributes this emergence of 'mass subordination' to the need of business organisations to take advantage of economies of scale, which required growth and the development of large bureaucratic structures underpinned by subordination. As Ronald Coase's Theory of the Firm highlights, she recalls, vertical integration necessitates hierarchy in the coordination of labour and capital for a productive organisation to function (Anderson 2017).

Nonetheless, the theory of the firm does not explain the extent to which the subordination of employees and business managerial prerogatives extends beyond what is necessary to coordinate individual work performances and integrate them into a business organisation. First, even today, employees are expected to show deference to their employers and supervisors and face discipline if they criticise their managers openly, regardless of the fairness of the criticism, other than with regard to managerial conduct that falls under whistleblower protection legislation. Second, employers have long had access to far-reaching disciplinary powers that are ostensibly asymmetrical. They can impose sanctions on employees for actions outside of work performance, such as social media posts or conduct outside the workplace. Employers' actions (think of some CEO's inopportune 'tweet' that causes the company's shares to tumble) that do not affect employees' working conditions directly, however, cannot generally be sanctioned by employees, either individually or collectively, and most legal systems do not acknowledge the power of 'private sanctions' in the hands of employees for these actions.

Coase's theories regarding the organisational foundations of employer power and managerial prerogatives fail to account for the extent to which these powers and prerogatives go beyond their necessary role in coordinating work performance. The exercise of managerial authority and the subjection of employees to the commands and directives of their supervisors and employers is widely accepted as a default component of employment relationships. This is evident in how lawmakers and courts treat it as such, with any limitations to these powers considered exceptions to the norm rather than the other way around. Despite nearly two centuries of employment and labour legislation, legal restrictions on management powers remain islands in an ocean of subordination.

In fact, it could be argued that the concept of subordination has reinforced this problem by giving sufficient legal contractual structure to the legitimate exercise of managerial

powers. In this sense, it could be argued that Coase's account of hierarchy in firms also overlooks that managerial prerogatives and employees' subordination are not simply products of economic development but are rooted in legal norms. The subordination that we still experience today, and the duty of obedience to employers and loyalty to them related to it, is a by-product and legacy of legislation such as the Master and Servants Acts (Deakin and Wilkinson 2005) and loyalty-based feudal legal concepts such as *Treupflicht* in Germany.

Beyond offering a somewhat sanitised picture of the economic roots of subordination, the theory of the firm essentially neglects the legal and public origins of hierarchy and authority at work, something which also risks being overlooked when rooting and justifying the subordination inherent in employment relationships in the notion that workers freely consent to this subordination when entering into employment contracts. This is of course a mere legal fiction that warrants a critical re-examination of free will in contractual work relations. This is not only because, as is evident, in the absence of alternative economic resources, most workers, both before and since the Industrial Revolution, have not been truly free to enter into employment contracts or other work arrangements, being at best 'free' to choose between which employer to submit to or starvation. But it is also because, in parallel with the adoption of laws fostering the emergence of the modern contract of employment, societies have sought to restrict substantially people's ability to obtain a living without 'earning' one, with social security (let alone social insurance) systems shaped accordingly and intertwining with, and mutually reinforcing, a rather tight 'work line', most visibly through the more recent degeneration of the welfare state into the workfare state. Laws against begging and vagrancy were adopted throughout Europe at the beginning of the modern era and the United Kingdom, as well as the southern states of the United States after the abolition of slavery often provided for confinement in workhouses and prisons (matched by *Arbeitshäuser* and *dépôts de mendicité* on the continent of Europe), and imposed forced labour on those who were capable of working but unable to support themselves through their own means and did not accept work under a master or serve as apprentices (and in some cases also when they could not find opportunities to work). Similarly, social security systems all over the world (at least that part of the world that is familiar with the idea of social security systems) have been increasingly tied to notions of conditionality, welfare to work or activation in ways that have further reduced people's 'freedom', systematically corralling them into a realm of work in which choice becomes an ephemeral concept.

Importantly, these assumptions were also fundamentally shaped by notions pertaining to broader movements and ideals of governance that ultimately aimed at exerting control and discipline over fundamental aspects of people's lives, particularly the bodies and minds of the working classes. The work of Michel Foucault has thoroughly detailed how the transition to modernity was characterised by a pervasive governmental attitude towards discipline, aimed at transforming individuals into obedient bodies subject to regulation, supervision and monitoring as if they were mere components of a productive machine. Institutions such as schools, prisons, hospitals, workhouses, barracks and factories were integral components of this 'disciplined society' (Foucault 1961 and 1975).

Employers' control and sovereignty over the bodies of workers, their time and places of work does not appear to have generally diminished that much since the onset of industrialisation. In fact, a non-negligible part of the business community openly asserts the right to exercise increasingly detailed surveillance over these aspects through new technological control tools that, in different guises, apply both to blue-collar workers in factories, warehouses and more peripatetic set-ups, and white-collar workers in offices and, increasingly, at home. An exponential increase in surveillance has more than compensated, at least *in fieri*, for the loss of control deriving from remote work practices such as telework, remote working and platform work. Some of these surveillance tools have also allowed businesses to refuse or claim back payment of wages to workers for the time that the software deemed them 'idle'. A court in British Columbia went so far as to label a worker's submission of timesheets for periods that, thanks to surveillance software, they were considered not to have been working as 'time theft'.<sup>3</sup> The idea that employers have so much control over periods of work that they can be deemed to 'own' the time that can thus be 'stolen' by a worker – something that recalls Blackstone's proto-industrial understanding of contracts of service – is ironically being kept alive and well by modern technologies and business practices.

All this signals not only that the current mainstream managerial culture will not tolerate any reduction in the intensity of surveillance, underpinned by subordination, of workers but also that the 'natural' reduction in physical and bureaucratic control over workspaces inherent in technologically mediated forms of work, such as homework, telework, peripatetic work and other forms of remote work, is not acceptable under a culture premised on subordination. So much so that any reduction in these pre-modern forms of control has had to be accompanied by an intensification of other forms of control through remote technologies. As a result of this culture, workers who, at least on paper, may be subject to less control over the times and places of their performance, such as certain platform workers or, really, any other professionals asked to perform task-based work, are perceived as entirely exorbitant as regards the notion of employment relationship. Employment relationships and their 'protective status' are imaginable only in the presence of constant and meticulous supervision and subordination. What a paradox for a discipline, labour law, that was – and in many ways remains – premised on the idea of enfranchising the disenfranchised, liberating the subordinate and freeing the unfree.

### 3. The idea of personal work

In contrast to this particular, and in our view rather narrow, vision of work in capitalist societies as associated with and shaped by the idea of 'subordination', in earlier co-authored work and in work co-authored with other colleagues, in particular Mark R. Freedland (Freedland and Kountouris 2011; Kountouris and De Stefano 2019), the authors of this chapter have sought to develop and define a different and broader idea of work as linked to the notion of personal work or personal labour. The idea is that work should be understood as any human activity (or product of that activity, including

3. British Columbia, Civil Resolution Tribunal, *Besse v Reach CPA Inc.*, 2023 BCCRT 27.

the provision of goods and services) that is predominantly the result of a person's own labour as opposed to being the result of the use of somebody else's labour or the result of an intensive use of capital (Freedland and Kountouris 2012). This concept is much broader than the concept of subordinate employment in that it transcends the traditional divide between, for instance, subordination and autonomy, in the sense that it acknowledges that personal work can be performed both under contracts (or relations) characterised by a nexus of subordination with an employer/business, but also under relations in which such a nexus does not exist, either in the canonical sense of an employer controlling and directing the performance of work or in the more nuanced sense of an employer/principal simply organising that performance by various means linked to their own organisation of capital (Countouris and De Stefano 2021).

In marked contrast to the notion of 'tertium genus', namely, work 'of a third category' somewhere between employment and self-employment and shaped by concepts of quasi-subordination or economic dependence, the idea of 'personal work' was conceived to break the binary mould and expand the personal scope of application of the entire universe of labour law protections, broadly understood as including both individual employment law, collective labour rights and equality law, to all those earning a living mainly from their personal labour, as opposed to living mainly off other people's labour and from capital assets. The only activities that this concept sought to exclude from its scope were therefore those that, in previous writings, we have described as amounting to genuine business activities performed by people operating a business on their own account, typically by employing others (in a way that would negate the 'predominantly personal' nature of the work that may be provided) or by being the result of an intensive use of capital (in a way that may amount to value extraction from capital rather than 'labour').

This second, broader idea of 'personal work' is slowly emerging and establishing itself in some 'niche' areas of regulation characterised by the growing societal perception of the need to extend labour rights beyond the traditional strictures of subordinate employment. The most recent deployment of this concept for this purpose can be found in a judgment issued by the Court of Justice of the EU in January 2023, in Case C-356/21, *JK v TP SA*.<sup>4</sup> The Court, to a large extent following the Opinion of the Advocate General in the case, decided that because 'the activity pursued by the applicant constitutes a genuine and effective occupational activity, pursued on a personal and regular basis for the same recipient, enabling the applicant to earn his livelihood, in whole or in part' it was worthy of protection under EU anti-discrimination legislation. Similarly, the EU Commission's 'Guidelines on the application of Union competition law to collective agreements regarding the working conditions of solo self-employed persons' of 2022 (EU Commission 2022), also relied on the concept of personal work to expand the immunity of collective bargaining from competition law when collective agreements govern the working conditions of people 'who work on their own and primarily rely on their own personal labour to make a living'.

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4. Judgment of the Court of Justice of the European Union of 12 January 2023, *TP (Monteur audiovisuel pour la télévision publique)*, C-356/21, ECLI:EU:C:2023:9.

We posit with a certain degree of confidence that, in the future, there will be no shortage of new examples of deployment of the concept of personal work to expand the scope of labour legislation, at the EU and at the national level. Most obviously the concept will permeate all EU anti-discrimination instruments that are phrased along the lines of Directive 2000/78, the directive whose scope was applied and expanded in the *JK v TP* case. We venture to suggest that it will then be deployed to reshape, possibly at the hands of the European judiciary, all other EU instruments that are characterised by a certain degree of universality and can be understood as applying to ‘all workers’, instruments that protect fundamental labour rights such as freedom of association, collective bargaining, but also health and safety at work. Along with this process of jurisprudential extension we expect some refinement, clarification and perhaps the elimination of some unnecessary add-ons devised by the Court in *JK v TP*, such as the requirement that the activity be ‘genuine and effective’, ‘occupational’, or pursued on a ‘regular basis’ and for ‘the same recipient’. These are all unnecessary add-ons that both restrict the potential of the concept of personal work and are not in tune with the developments affecting the world of work in the twenty-first century, including the technological developments associated with a greater use of platform-based labour and AI-optimisation of labour.

But it is also important to point out that the idea of personal work was not conceived in terms of incrementalism, it was conceived in terms of transformation. A use of the concept that merely extended ‘some’ protections to ‘some’ workers would be a clear ‘underuse’ of its transformative potential. Not only would it, in effect, create another blurred intermediate ‘third category’, but it would deprive the world of work of the liberating potential resulting from the demise of the idea of ‘subordination’, a demise that is inherent in the broader concept of personal work.

The concept of personal work, of course, does not imply the complete dismantling of all third-party coordination powers over the labour performed by humans. However, by separating the application and scope of protective regimes from the necessity of the existence of subordination in a work arrangement for it to fall into those regimes, personal work would greatly facilitate the reduction of those coordination powers to elements that are strictly necessary and proportionate to organising labour, as opposed to organising (and, in reality, imposing submission upon) labourers. This would in turn liberate work arrangements from the idea that management may advance claims for control and discipline over workers’ off-duty activities. Moreover, by abandoning control and subordination as the chief criteria for access to labour and employment protections, the concept of personal work can put up more substantial barriers against demands for supervision and micromanagement of workers, even related to technological developments, which can be considered arbitrary and excessive. For instance, this may make it possible to call into question the idea that management has a unilateral power to permit or revoke remote work for working activities that can actually be performed remotely because it would dispel the claim that remote work can be ‘granted’ only if accompanied by stringent algorithmic monitoring (Countouris and De Stefano 2023). No less importantly, it would empower workers vis-à-vis technology (at least the technology owned by the ‘firm’), ensuring that the ‘human monitoring’ and ‘human review’ of automated, AI-dictated decisions can be performed by workers who



are not subordinate to the owners of the very same means of production that they are supposed to monitor and, if necessary, overrule.

This would of course necessitate a transformative revision of labour law statutes in their entirety, including those chapters that deal with reasonable managerial instructions, discipline (a term that would have to be removed) and termination of work relations. But this transformative revision would be greatly facilitated by the use of the transformative idea of personal work.

#### **4. Some future challenges for the ideas of labour law and personal work**

In these concluding paragraphs we would like to tease out the potential for the idea and legal category of personal work to address a number of ulterior challenges shaping (and at times reshaping) productive arrangements/processes in capitalist societies, including automation/heteromation; unpaid gendered labour; and attempts to address climate change via a ‘just transition’ strategy. This is just a preliminary exploration of this potential, to be developed further in future work.

##### 4.1 Automation, heteromation and personal work

The concept of ‘heteromation’ was coined by Ekbia and Nardi (2017) and, in separate but contemporaneous work, by Standing (2011). In a nutshell it serves the purpose of describing a number of seeming automation processes as amounting to ‘faux-automation’ in that these processes still rely extensively on, and even require, human labour, except that the human labour is rendered invisible by the processes themselves (that perhaps disguise them as activities of consumption, or activities of leisure, or other activities of a voluntary and unremunerated character). Think about activities such as checking in online instead of the airline staff doing it for passengers at the counter in the airport – it is ultimately through the contribution of one’s human input (which, however, is not regarded as amounting to work, even where it substitutes prior forms of human input that clearly amounted to work) that the automated process performs its function. Or of activities such as performing a search through an internet-based search engine in a way that contributes to refining and increasing the value of the engine’s algorithm, generating wealth for the business that owns it and profits for its shareholders. This is another activity that the social structures and conventions that tend to define and conceive labour in a narrow way (including the concept of ‘contract of employment’) would not see as labour, work or employment in any way.

Can the idea of personal work encapsulate these types of activities that, while not amounting to ‘employment’ in the narrow sense, still perform a functionally equivalent role to that of labour when it meets capital, that is, the production of value, wealth and profit? We believe and argue that it is possible for the concept of personal work to do so, albeit under certain conditions and, in particular, through a more focused insistence precisely on the ‘function’ that personal work performs in a capitalist society, shifting

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the emphasis from the individual performance of work to the collective and cumulative contribution to value chains. This re-elaboration of the concept would require engaging with a number of new dimensions of this problem, from the role of human labour in the ‘metaverse’ to human–machine interaction in what Ekbia defines as ‘unimation’ (a dialectical synthesis of ‘automation’ and ‘heteromation’). But it is clear to us, and it would be clear to many, that the concept of ‘personal work’ has far more potential than any concept linked to the idea of subordination or dependence.

## 4.2 Unpaid gendered labour

The idea of ‘personal work’ has already been deconstructed with regard to some dimensions of unremunerated/unpaid work and in particular with regard to the issue of unremunerated gendered labour. The work of Fredman and Fudge persuasively elaborate on the potential of the concept for this particular domain (2013; see also 2016). In their analysis, Fredman and Fudge explore and further develop the ‘worker focus’ dimension of personal work, and the fact that the ‘PWR approach allows us to find other sources of costbearing and risk-sharing, such as the State, mutual funds such as national insurance etc.’. This in effect transforms the traditional bilateral notion of work that regards subordinate employment as necessarily tied to a single employer, accepting instead that employer-like liabilities – from remuneration to maternity rights – can accrue elsewhere, even in the absence of a formal employer in the traditional sense. In their words, the PWR model is helpful in showing informal and unpaid gendered labour as ‘just one manifestation of what is usual but hidden in labor law, namely, a cluster of numerous personal work relations’ (Fredman and Fudge 2013: 122), also noting that ‘because the personal work nexus can involve several participants, there is nothing against multiple sources of liability’ (Fredman and Fudge 2013: 120).

This expansive use of the idea of personal work is particularly relevant to the new realities and challenges of unpaid gendered labour, especially those that emerged during the pandemic and with the progressive shift to various patterns of remote work often blurring and further confounding the lines between the productive, reproductive, paid and unpaid labour of women in particular. Full deployment of the idea of personal work to cover these forms of work would require a more marked shift of focus from the individual and personal dimension of work to the aggregate effect that human and, in particular, female labour has on the system of production, consumption and accumulation in modern societies.

## 4.3 Climate change and just transition

It is increasingly clear that the transformations necessary to attune our patterns and systems of production and consumption to the climate change mitigation targets and imperatives will have a disruptive effect on economic and labour relations as we have known them hitherto. The impact on the employment relationship is not to be underestimated. Jobs will be created but also destroyed for the sake of achieving

climate objectives. We predict that in the course of this transition, restructuring processes will further fragment the continuity and bilaterality dimensions of the standard employment relationship, including for the sake of carbon emissions reduction with spells of unemployment, underemployment and retraining/reskilling being interspersed with periods of work, employment and activity. The organisation and performance of work will also be redesigned with carbon reduction targets in mind. This could involve more remote work, shorter working weeks and new jobs in sectors or activities that are actively designed (including through job-creation and job-guarantee policies) to reduce carbon emissions and facilitate or accelerate the transition.

The cost of these restructuring and reskilling processes will have to be spread, or ‘mutualised’ to use an expression deployed in the context of personal work analysis, in hitherto unexplored ways, because the more these costs are dispersed from workers alone, and shouldered by employers, businesses and society at large, the faster and fairer these transitions will be. This will require a different way of thinking about the interaction and relationship between social security systems, social insurance mechanisms and work, and of course about different financing structures for each of these three dimensions. The debate will most likely not be about whether some form of guaranteed basic income should exist, whether social security systems should become more generous and more universalistic, whether social insurance should become less prominent, whether the welfare state should be used to incentivise green jobs, or whether a broader concept of work should be embraced and protected by labour law. The debate will be about how basic income schemes can interact with a broader concept of waged labour and the role that social insurance and labour market policies should play in fostering green and just transitions and inequality reduction. The move towards universalism in order to compensate for the uncertainties that the transitions will inevitably generate will accelerate once it becomes clear that reaching climate goals requires an unprecedented commitment to carbon reduction.

## **5. Conclusions – personal work and human progress**

This chapter has sought to push further the conceptual boundaries of the idea of ‘personal work relationship’ in order to explore its transformative potential in respect of some, increasingly evident, shortcomings of the more traditional notion of labour law, but also to explore its possible contributions to resolving three fundamental challenges that confront twenty-first century societies: automation, unpaid gendered labour, and a just and green transition. Throughout the chapter we have argued that the universalistic potential of the idea of ‘personal work’ lends itself much better than any other concept of work based on subordination or dependence to the establishment of a new social contract based on an idea of sustainability. Personal work is an idea with a clear transformative potential. Whether it will fully deliver on its potential, however, is a matter that will ultimately be decided by the very uneven struggle that the concept of personal work seeks, ultimately, to redress, the struggle between Capital and Labour, ensuring for the latter a fair share of the fruits of progress and greater agency in shaping its very idea.

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