

Land Rights in the Basement Benny Djaja^{1*} Faris Fasya Ramadhan²

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Abstract

Utilization and use of space above the ground has almost exceeded the limit because of the continued increase in population, especially in large cities and land above the ground will not increase, the use of basements becomes an alternative in meeting the needs of land for various types of activities, especially for strategic locations in urban areas, in practice this has happened in the city of Jakarta for the purposes of parking areas, shops, even used for subway lines or MRT. Policies are therefore required that regulate the right to use the basement properly, to prevent future conflicts and where there is legal certainty on the use of basements.

Keywords: Rights to use basements, land needs, legal certainty, deeds

1. PREFACE

The need for land from year to year is increasing this is in line with the increasing population and increasing other needs related to land. While the available land is fixed and cannot increase, the increasing need for land for development purposes has increased pressure on land resources in Indonesia. In addition, the development of land resources also faces the problem of misalignment between various interests and this situation is exacerbated by a regulatory system that is felt to be very complex and often irrelevant to the socio-economic conditions of the community. This situation, can lead to an unsustainable land resource management system.

Especially in urban areas the demand and need for land for various interests is increasing, making it increasingly difficult to obtain land. In addition to the utilization of above ground space, efforts to use underground space is an alternative to meeting the needs of various public interests such as the construction of underground transportation lines such as MRT, shops, warehousing, parking areas and others. Therefore, the impact of change appears more real in urban areas than in the countryside. In cities where population density levels are already increasingly dense and the ability to provide land is increasingly limited.

As is known the control and use of land by anyone and for any purpose, must be based on the basis of land rights regulated in national land law in accordance with the legal status of the master and the allocation of land use. The rights of the land are, among others, property rights, building rights, and right of use which are primary land rights that are given directly by the State. In addition, there are also secondary land rights that can be granted by parties who own land to other parties such as building rights, right of use, and rental rights for buildings. All of the above rights are supplemented by a certificate as a means of proof of ownership of a plot of land.

The use of space in the underground will certainly have an influence on the arrangement of existing land rights institutions that if not immediately held deep thoughts will be able to result in the emergence of legal and social problems that will be obstacles in the smooth development. Likewise, there will also be juridical claims about what land rights can be granted and to the extent of the authority of the holder of the right to the use of his land with the existence of other facilities that exist under his land rights and legal protections that can be obtained if there is a dispute in the future.

Based on the above description the author is interested in raising unanswered issues regarding underground land rights with the following formulation of the problem:

1. What is the status of ownership of basement rights based on normative provisions in Indonesia?

2. What is the legal effect of underground land rights on Peraturan Kepala Badan Pertanahan Nasional Republik Indonesia Nomor 8 Tahun 2012 Tentang Perubahan Atas Peraturan Menteri Negara Agraria/Kepala Badan Pertanahan Nasional Nomor 3 Tahun 1997 Tentang Ketentuan Pelaksanaan Peraturan Pemerintah Nomor 24 Tahun 1997 Tentang Pendaftaran Tanah?

2. RESEARCH METHODS

The research method used in this research is a normative juridical research method that is focused on assessing the status of ownership of basement rights based on normative provisions in Indonesia, namely Undang-Undang Republik Indonesia Nomor 11 Tahun 2020 tentang Cipta Kerja, Peraturan Pemerintah Republik Indonesia Nomor 18 Tahun 2021 tentang Hak Pengelolaan, Hak Atas Tanah, Satuan Rumah Susun dan Pendaftaran Tanah, Peraturan Gubernur Provinsi DKI Jakarta Nomor 167 Tahun 2012 tentang Ruang Bawah Tanah and the legal consequences of underground land rights against Peraturan Kepala Badan Pertanahan Nasional Republik Indonesia Nomor 8 Tahun 2012 Tentang Perubahan Atas Peraturan Menteri Negara Agraria/Kepala Badan Pertanahan Nasional Nomor 3 Tahun 1997 Tentang Ketentuan Pelaksanaan Peraturan Pemerintah Nomor 24 Tahun 1997 Tentang Pendaftaran Tanah.

The type of data used is secondary data consisting of primary legal materials, secondary legal materials, tertiary legal materials. Primary legal material, which is a legal material that has binding power that includes Undang-Undang Republik Indonesia Nomor 11 Tahun 2020 tentang Cipta Kerja, Peraturan Pemerintah Republik Indonesia Nomor 18 Tahun 2021 tentang Hak Pengelolaan, Hak Atas Tanah, Satuan Rumah Susun dan Pendaftaran Tanah, Peraturan Gubernur Provinsi DKI Jakarta Nomor 167 Tahun 2012 tentang Ruang Bawah Tanah dan Peraturan Kepala Badan Pertanahan Nasional Republik Indonesia Nomor 8 Tahun 2012 Tentang Perubahan Atas Peraturan Menteri Negara Agraria/Kepala Badan Pertanahan Nasional Nomor 3 Tahun 1997 Tentang Ketentuan Pelaksanaan Peraturan Pemerintah Nomor 24 Tahun 1997 Tentang Pendaftaran Tanah dan Putusan Mahkamah Konstitusi Nomor 91/PUU-XVIII/2020 mengenai Pengujian Formil Undang-Undang Nomor 11 Tahun 2020 tentang Cipta Kerja terhadap Undang-Undang Dasar Negara Republik Indonesia Tahun 1945.

Secondary legal materials include textbooks written by jurists and the opinions of jurists. The data collection technique used is a literature study in the form of tracing data and information through books, judge rulings, laws and regulations, and reports of previous research results. The approach used is a statutory approach that is an approach that is carried out by studying various laws and regulations related to legal issues that are being handled and the case approach carried out by studying cases related to legal issues examined. The data analysis method used in this study is to use qualitative analysis. Research with qualitative analysis techniques manages the entire data collected well and analyzed by systematically compiling data, classified in patterns and themes, categorized and classified, linked to each other, interpreted to understand the meaning of data, and interpreted from the perspective and knowledge of researchers after understanding the overall quality of the data.

3. RESULTS AND DISCUSSIONS

Property Status of Basement Rights Under Normative Provisions in Indonesia

In the period before 1960, Indonesia recognized the existence of legal dualism in the field of Agrarian Law by jointly applying Western Law and Customary Law. The enactment of these laws is based on the division of population groups stipulated in Article 131 and Article 163

Indische StaatsRegeling. This immediately changed when Undang-Undang Republik Indonesia Nomor 5 Tahun 1960 tentang Peraturan Dasar Pokok-pokok Agraria Enacted. Undang-Undang Republik Indonesia Nomor 5 Tahun 1960 It has a function in addition to regulating human activities related to the land as an embodiment of the function of legal regulators, also directing the activity to the achievement of the desired objective as the embodiment of the "social engineering" function of the law. This is clear from the arrangement Pasal 2, Pasal 6, Pasal 7 dan Pasal 11 in Undang-Undang Republik Indonesia Nomor 5 Tahun 1960 tentang Peraturan Dasar Pokok-pokok Agraria which stipulates that the arrangement of land by the state must be directed to achieve the greatest prosperity of the people. Likewise, the legal relations between man and the land and the legal relations between men from various fields related to the land, are not justified only for the prosperity of certain parties, but must run fairly and balanced. Aspects of justice and balance are certainly indispensable for each individual in using, defending, and fighting for his legal rights in controlling, enjoying, and profiting from a piece of land that is legally his (owner's) right.

The use of underground space is a fairly interesting phenomenon. The use of underground space has been quite a lot lately, especially in urban areas, such as the construction of mrt in Jakarta where the population is increasingly densely accompanied by more needs and economic activity while the strategic location to support it is all the more limited. On the other hand, the government's efforts to make a regulation on this matter do not seem to exist yet, while Undang-Undang Republik Indonesia Nomor 5 Tahun 1960 tentang Peraturan Dasar Pokok-pokok Agraria What is in effect now does not set explicitly. Ironically even in the Draft Law on Land which in fact is said to be a "refinement" Undang Undang Republik Indonesia Nomor 5 Tahun 1960 tentang Peraturan Dasar Pokok-pokok Agraria neither has set about it. Though this problem concerns various aspects that are quite complex that if not made an arrangement will cause difficulties in the future. These aspects include legal aspects regarding ownership, status of rights, authority, enforcement, legal protection and technical aspects such as the feasibility of buildings that ensure the safety, health, safety and comfort of residents and people in it. Ibid [4] Some rules inside UndangUndang Republik Indonesia Nomor 5 Tahun 1960 tentang Peraturan Dasar Pokok-pokok Agraria Indeed, some legal experts say that it is no longer in the current context, where the issues to be regulated by the law are increasingly complex so that it requires a more progressive range of written law.

Related to licensing in the use of basements, Harris Sibuea argued that any business entity that would utilize the basement must first obtain a basement utilization permit. Basement utilization permits are granted to be able to utilize basements with certain limits and areas as a control of basement utilization. The local government in question is the governor and regional devices as elements of local government organizers. Until now, that can be used as the basis of licensing the mastery of the land and the space below it.

Land law is an independent field as an independent branch of legal science that has its own place in the national legal system, whose substance is the entire legal provisions both written and unwritten about the rights of land tenure as a legal institution and as concrete relations, public and civil relations, which can be arranged and studied systematically, so that the whole becomes a unit. The aspect of land ownership as part of the social contract theory of determining the right to a piece of land, who is the first occupant, becomes a decisive factor. The use of upper-ground space becomes a trend when population density levels are getting higher, the need for land is high and prices become expensive. The phenomenon of development in large cities that utilizes land and basements is widely found, including the construction of the Blok M Mall shopping complex where in the lower room for economic activities and upper space is used for public transportation, the construction of pondok indah pedestrian bridge that has shops above the crossing, the construction of a traditional road, and so on.

According to Sapto Hermawan and Supid Arso Hananto, in his writing entitled "Pengaturan Ruang Bawah Tanah berdasarkan Prinsip Agraria Nasional", One of the legal issues related to the use of basements is the ownership of basements. Land ownership arrangements in Indonesia are generally regulated in Pasal 33 ayat (3) Undang-Undang Dasar Negara Republik Indonesia 1945 jo. Pasal 2 jo. Pasal 4 ayat (2) Undang-Undang Republik Indonesia Nomor 5 Tahun 1960 tentang Peraturan Dasar Pokok-pokok Agraria, where declaring the State controls the earth and the water and the natural wealth contained therein and the State determines the various rights to the earth's surface (land), then the State grants rights to the land to persons, both alone and together with other persons and legal entities, in which the parties have to use the land in question, as well as the body of the earth and water and space that are on it only it is necessary for interests directly related to the use of land. Pasal 33 ayat (3) Undang-Undang Dasar Negara Republik Indonesia 1945, Pasal 2 Undang-Undang Republik Indonesia Nomor 5 Tahun 1960 tentang Peraturan Dasar Pokok-pokok Agraria and Pasal 4 it expressly only regulates the basis of land rights on the earth's surface only.

At the end of 2019, the development of Indonesian law was enlivened by the term omnibus law as a solution to break through the civil law system embraced by the Indonesian legal system which is considered to be an obstacle to investment in Indonesia. Legal experts who are not familiar with omnibus law, except jurists who study in countries that adhere to the common law system. In the development of world law, there is actually no definite limit for a country whether it adheres to a purely civil law or common law system. Because basically both are applied, which can distinguish only paradigms that cause the dominance of the civil law or common law system that a state chooses as the main source of law. Bukan negates each other, but prioritizes or overrides one of the systems. In the comparative study of the legal system, until now there has been no agreement on classification criteria to identify a number of legal systems that are growing and developing and applied to communities in various parts of the world. Some are classified based on the conceptual structure of law (law as conceptual structure) or on the theory of sources of the law. Other views emphasize the social goals to be achieved with the help of the legal system (the social objectives to be achieved with the help of the legal system) or on the place of law itself within the social order. The word omnibus comes from the Latin meaning "for all". Black's Law Dictionary Ninth Edition Bryan A. Garner mentions omnibus: relating to or dealing with numerous objects or items at once; including many things or having various purposes. Basically, the definition of omnibus law deals with or deals with a variety of objects, including many things or having various purposes.

The purpose of the Copyright Law in addressing current problems is directed at: 1) Fast, effective, and efficient in resolving conflicts of laws and regulations; 2) Supporting the investment climate by standardizing government policies, both at the central and regional levels; 3) Licensing management is more integrated, efficient, and effective; 4) Able to break the lingering bureaucracy; 5) Increasing relations and coordination between related authorities because it has been regulated in a unified omnibus regulation policy; and 6) The existence of guarantees of legal certainty and legal protection for policy makers. Based on the Copyright Law compiled by the government, it appears that little by little, there is a paradigm shift to the legal system used so far. The choice that will be done by the government is to speed up the licensing process, a legal approach that prioritizes the value of benefits. In relation to the purpose of law, Mochtar Kusumaatmadja still agrees that the main purpose of law in general is order and justice. The purpose of justice is associated with the purpose of law within a country of law and justice in Indonesia refers to the fifth precept of Pancasila, namely social justice.

Therefore, regarding the utilization and ownership of the basement, Undang-Undang Cipta Kerja also specifically regulated in Paragraph 4 regarding the Granting of Land Rights / Management Rights in Land and Basement Space, especially in articles 146 and 147. The arrangements

regarding the basement are in more detail on Peraturan Pemerintah Republik Indonesia Nomor 18 Tahun 2021 tentang Hak Pengelolaan, Hak Atas Tanah, Satuan Rumah Susun dan Pendaftaran Tanah. Article 1 paragraph (6) provides its definition that the Basement is a space that is below the surface of the Land used for certain activities whose ownership, ownership, use and utilization is separate from the mastery, ownership, use, and utilization of the land.

Actually, regarding the utilization of basements for the DKI Jakarta area has been regulated since 2012 with the issuance of legal products in the form of Peraturan Gubernur Provinsi DKI Jakarta Nomor 167 Tahun 2012 tentang Ruang Bawah Tanah.

Pasal 74 Peraturan Pemerintah Republik Indonesia Nomor 18 Tahun 2021 tentang Hak Pengelolaan, Hak Atas Tanah, Satuan Rumah Susun dan Pendaftaran Tanah Divide the basement into 2 (two) namely shallow basement and inner basement. Dangkal Basement is a tanah owned by the holder of Land Rights with a depth limit as stipulated by the spatial plan or up to a depth of 30 (thirty) meters from the tanah surface in case it has not been regulated in the spatial plan. Dalam Basement is a tanah that is structurally and / or a function separate from the holder of Land Rights as a structure and / or function separate from the holder of Land Rights as referred to in paragraph (1) is an Upper Chamber or Basement controlled directly by the state. However, article 75 provides limits on Hak Atas Tanah on Ruang Bawah Tanah that in the event that there is utilization of oil and gas resources and mineral and coal, Land Rights in the Basement cannot be granted.

Regarding the status of ownership of the basement, the arrangement is in the second part of Peraturan Pemerintah Republik Indonesia Nomor 18 Tahun 2021 tentang Hak Pengelolaan, Hak Atas Tanah, Satuan Rumah Susun dan Pendaftaran Tanah. Article 76 provides an explanation that for the utilization of both the upper ground and basement must get the conformity of space utilization activities issued by the Minister and in accordance with the provisions of the laws and regulations.

Paragraph 4 Undang-undang Cipta Kerja provides certainty for the granting of Land Rights / Management Rights in land and basements. Article 146 states that (1) Land or space formed in the upper and/or underground space and used for certain activities may be granted the right to build, right of use, or management rights and (3) Land ownership limits in basements by land rights holders are given in accordance with the limits of the depth of utilization regulated in accordance with the provisions of the laws and regulations. Pasal 77 Peraturan Pemerintah Republik Indonesia Nomor 18 Tahun 2021 it also determines that for Ruang Atas Tanah or Ruang Bawah Tanah can be given Hak Pengelolaan, Hak Guna Bangunan or Hak Pakai after Ruang Atas Tanah or Ruang Bawah Tanah Utilized. The rights to land and basement space are granted by decree granting rights by the Minister based on the approval of the rights holder.

Article 79 provides provisions if the use and utilization in terms of use and utilization in shallow basements as referred to in paragraph (1) letter a interferes with the public interest and / or the interests of land rights holders on the surface of the land, it requires the approval of land rights holders. (3) The consent of the holder of the Land Rights as referred to in paragraph (2) is made in the form of an authentic deed in accordance with the provisions of the laws and regulations. (4) All disturbances received by land rights holders are awarded compensation that can be assessed in the form of money or other forms in accordance with the agreement with the party who will use and utilize the Basement. (5) The calculation of the value of compensation as referred to in paragraph (4) is carried out by the land assessor.

The provision of Hak Pengelolaan, Hak Guna Bangunan or Hak Pakai in the upper room or basement must be registered with the land office and given a certificate as a sign of proof of ownership. However, although management rights have been granted over the basement, it can be abolished because it was canceled by the minister due to administrative defects or because of a court ruling that has obtained permanent legal force. Its collateral/units of space and/or land

are destroyed and cannot be used or utilized anymore, voluntarily released by their rights holders, released in the public interest; and/or revoked under the Act. Hak Guna Bangunan and Hak Pakai in the upper chamber of the land or basement may be abolished if a. the expiration of the period as stipulated in the decision of granting, extension, or renewal of his rights, b. canceled his rights by the Minister before the term expires because: 1) does not fulfill the obligation and / or violates the prohibition; 2) non-fulfillment of the conditions or obligations contained in the agreement on the utilization of Land Or Basement Management Rights; 3) administrative defects; or 4) the judgment of a court that has obtained permanent legal force; c. change its rights to other Land Rights; d. be voluntarily released by the rights holder before the expiration period; e. released in the public interest; f. repealed under the Act; g. the building/unit of its space and/or its land is destroyed and cannot be used or utilized anymore; h. the termination of the agreement to grant the right or use of land for the right to build or the right to use on property rights or management rights; and/or i. the rights holder is no longer eligible as a subject of rights.

The Consequences of The Law of Land Rights Underground Against Peraturan Kepala Badan Pertanahan Nasional Republik Indonesia Nomor 8 Tahun 2012 Tentang Perubahan Atas Peraturan Menteri Negara Agraria/Kepala Badan Pertanahan Nasional Nomor 3 Tahun 1997 Tentang Ketentuan Pelaksanaan Peraturan Pemerintah Nomor 24 Tahun 1997 Tentang Pendaftaran Tanah

The principle of national land law that currently applies one of them is the principle of *horizontal separation (horizontale scheidings)*." In the use of the term for the right to the basement Boedi Harsono uses the term Right to Basement (HGRBT) which at a later time allowed the ownership of the buildings together. Even the parts can be owned individually separately from each other with certain parts as common property such as units of flats. The parts that can be owned individually for example can be called: basement units with property rights over basement units that are registered and have certificates of rights, such as property rights to flat units. That right can be transferred and transferred to other parties and can be used as collateral debt by being burdened with dependent rights. The requirements for the subject are the same as HGRBT, as well as the time period.

During this Pejabat Pembuat Akta Tanah only transacted the land at ground level only and with the concept of horizontal separation into separate with different rules.

Hak Ruang Atas Tanah dan Ruang Bawah tanah post Undang-Undang Cipta Kerja in the article 125-135 Undang-Undang Cipta Kerja There is something called a Bank Tanah is a body formed specifically by the central government to carry out activities, planning, acquisition, procurement, management, utilization and distribution of land.

Inside Peraturan Pemerintah Nomor 18 Tahun 2021 tentang Hak Pengelolaan, Hak Atas Tanah, Satuan Rumah Susun dan Pendaftaran Tanah Article 1 paragraph 4 states that "Land Rights are rights derived from the legal relationship between the rights holder and ground, including the space above the ground, and/or the space under the ground to master, possess, use, and utilize, and maintain the ground, the space above the ground, and/or the space under the ground."

Understanding Land Rights / management in The Upper Room and Basement according to Peraturan Pemerintah No 18/2021:

1. Land is the surface of the earth both covered with water, including space above and in the body of the earth, to some extent whose use and utilization is directly or indirectly related to the use and utilization of the earth's surface. (Chapter 1 verse 1)

2. Land Upper Space is a space that is above the surface of the Land used for certain activities whose ownership, ownership, use and utilization is separate from the mastery, ownership, use, and utilization of the land field. (Chapter 1 verse 5)
3. Basement is a space that is below the surface of the land that is used for certain activities, mastery, ownership, use and utilization apart from the mastery, ownership, use, and utilization in the field of Land. (Chapter 1 verse 6)

Upper Land Space or Basement can be granted Hak Pengelolaan, Hak Guna Bangunan or Hak Pakai after The Land Or Basement Is utilized (Article 77 paragraph 1 Peraturan Pemerintah No.18/2021).

So the new Basement can be given the right if the Basement has been utilized, as long as there is no utilization of space then the land cannot be granted any rights.

Hak Pengelolaan, Hak Guna Bangunan, and Hak Pakai in The Upper Room or Basement are granted by decree granting rights by the Minister (Article 77 paragraph 2). PP No.18/2021).

After the agreement is made notarially, then submitted to the ministry after which the right is granted by the decision of granting rights by the minister based on the approval of the land management rights holder.

So what about the granting of his rights and who is authorized to make his deed, in PP No.18/2021 article 79 paragraph 3 which reads "The consent of the holder of land rights as referred to in paragraph (2) is made in the form of an authentic deed in accordance with the provisions of the laws and regulations." Therefore, what will make the deed is a notary.

According to Irma Devita, SH., Mk.n. in a webinar entitled "Hak Guna Ruang Atas Tanah dan Ruang Bawah Tanah pasca putusan MK No 91/PUU-XIII/2020." because we are talking about granting rights over rights, such as Hak Guna Bangunan on Hak Milik or granting Hak Pakai on Hak Guna Bangunan it uses the PPAT deed because it is about the space on the land that is directly attached to the land, but against the upper room and basement will be made by the same agreement as when giving Hak Guna Bangunan deed above Hak Milik with utilization agreement or agreement granting Hak Guna Bangunan on Hak Milik with notary deed, later the form will be a space utilization agreement and later will be registered and will be issued certificate.

As we know the creation of deeds by Pejabat Pembuat Akta Tanah is arranged in Peraturan Kepala Badan Pertanahan Nasional Republik Indonesia Nomor 8 Tahun 2012. In the Deed of Granting Hak Guna Bangunan on Hak Milik or Hak Pakai on Hak Milik, the terminology of the title of the deed indicates that the granting of Hak Guna Bangunan/Hak Pakai on Hak Milik that means being on it, while Peraturan Pemerintah Nomor 18 Tahun 2021 as for regulating the right to land in the basement which means to be under it, the author sees that the deed as stipulated in Peraturan Kepala Badan Pertanahan Nasional 8/2012 no longer adequate to follow the development of existing regulations, the author proposed that the terminology be expanded to the Deed of Hak Guna Bangunan/Hak Pakai attached to Hak Milik. The word attached indicates that the Hak Guna Bangunan/Hak Pakai can be attached both below and above the ground.

4. CONCLUSIONS AND RECOMMENDATIONS

CONCLUSION

Basement is a space that is below the surface of the land used for certain activities whose mastery, ownership, use and utilization is separate from the mastery, ownership, use, and utilization of the land field.

The status of ownership of basement rights based on normative provisions in Indonesia, in accordance with article 146 of the UU CIPTA KERJA that land or space formed in the upper and or underground space and used for certain activities can be given the Hak Guna Bangunan, Hak Pakai, or Hak Pengelolaan. The use and utilization of land in upper and/or underground spaces by different rights holders may be granted to Hak Guna Bangunan, Hak Pakai, or Hak Pengelolaan. In line with PP 18/2021 in article 77 which states that The Upper Room or Basement can be granted Hak Pengelolaan, Hak Guna Bangunan, or Hak Pakai after the Upper Room or Basement is utilized, given by decision granting rights by the minister, as well as for the Hak Guna Bangunan and Hak Pakai in basements granted above Hak Milik, granted by decision granting rights by minister based on the approval of the rights holder.

RECOMMENDATIONS

The status of ownership of basement rights is still less clear, it is expected that in the future the government will review this more so that the status of basement space ownership is clearer and stronger. The role of notaries on the utilization of basements is not further explained in Peraturan Pemerintah NO 18/2021, it is limited to mentioning an authentic deed to make approval from the land rights holder. Although the authority to grant rights is to the Minister, the necessary mechanisms and documents have no further arrangements because the role of notaries and PPAT in it is very possible in the flow of granting the rights of the basement.

That the deed as stipulated in the Regulation of the Peraturan Kepala Badan Pertanahan Nasional 8/2012 is no longer adequate to follow the development of existing regulations, the author proposes that the terminology be expanded to the Deed of Granting HGB/Hak Pakai attached to Hak Milik, the word attached shows that HGB/Right of Use can be attached both below and above the ground.

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