

THE WEAKNESS OF THE LAW IN THE REPUBLIC OF INDONESIA NUMBER 18 YEAR 2003 ON THE ADVOCATE

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Abstract

This article intends to analyze the use of the jury system in the criminal justice system of Indonesia, jury is a form of lay participation or the participation of lay that community of professional non-law in the judiciary, to make decisions which provide a more fulfilling sense of justice in society, in order to avoid the role of judges is absolute in the criminal justice process, in the legal system of modern states today dichotomy between legal systems tradition of common law or civil law is fading and towards the tendency to mix both the legal system in order to find substantive justice in the judicial process. Indonesia never make changes conceptually to the criminal justice system, so that the judicial process drab dominated the role of judges is great where law and justice seems to be the monopoly of a judge, the role of judges becomes absolute in determining aspects of the facts (fact finding) and the legal aspect in judge, legal research using law approach, conceptual, and comparative law. The results of this study is that morality is the essence of a sense of justice in society, morality can not be separated from the law, because morality is is what is considered correct by the general public, so the public will view the law as something that has no authority and can not be trusted, when morality is left in any decision of the judge in criminal justice. Entering jury in the justice system is able to raise the level of public confidence in the legal and judicial institutions that exist, because the inclusion of jury in the criminal justice system to prosecute in the aspect of fact (fact finding) addition will ease the task of the judge also made aspects of morality local is the living law in automatically entered in every decision, every decision so it is possible to better meet the sense of justice in society.

Keyword: jury, society, the criminal justice system

CHAPTER I

INTRODUCTION

A. Background

The raising of law number 18 years 2003 on the Advocate where to make it require so long time because of the tug interests and should perform a comparative study of various countries such as United States, South Korea, and Japan, but after at the end, the law began to no longer able to accommodate the interest of the advocate and the law that always dynamic.

The advocate organization who formed as mandate Laws Advocate Number 18 Years 2003 is PERADI¹, who had agreed upon by the whole advocate organization that there are at that time except PERADIN², but in its development of the *single bar* system that given by advocate laws is not able to provide the development of the law and the wishes of advocate itself, started with the split of PERADI with the family of Adnan Buyung Nasution³ and formed the new advocate organization also claimed to as Organisasi Wadah Tunggal Advokat (Single Bar) that is Kongres Advokat Indonesia (KAI)⁴, Hasanudin Nasution⁵ said that before

¹ PERADI adalah organisasi *single bar* advokat yang diamanahkan pembentukannya oleh UU Advokat No. 18 Tahun 2003

² PERADIN adalah Organisasi Advokat tertua di Indonesia yang lahir di Kota Surakartadan tetap mengaku sebagai organisasi Advokat yang sah sebagaimana amanah UU Advokat No. 18 tahun 2003 sehingga PERADIN sejak awal tidak mau ikut membentuk PERADI lihat www.hukumonline.com/hol/14008/peradin-menggugat-keabsahan-peradi diakses pada rabu 02 desember 2015 04:00 PM

³ Tokoh Senior Advokat yang ikut mendorong disahkannya UU Advokat, dan beliau juga awalnya getol ingin membentuk PERADI, dan agar Advokat diwadahi dalam satu wadah tunggal (*Single Bar*)

⁴ KAI adalah Kongres Advokat Indonesia yang dibentuk oleh Adnan Buyung Nasution sebagai wujud kekecewaannya pada sistem pemilihan ketua Umum di Peradi yang dinilainya tidak Demokratis lihat www.detik.com/news/berita/1801931/wahai-pengacara-seluruh-indonesia-kapan-akur- accessed on Wednesday, December 02, 2015 at 04:10

⁵ Hasanudin Nasution adalah Mantan pengurus Dewan Pimpinan Nasional (DPN) Peradi yang sekarang menjadi pengurus Peradi yang di ketuai Juniver Girsang

the raising of law number 18 years 2003 we have incredibly diverse term about the term of advocate, such as lawyer, counselor, defender, law consultant and many others.⁶

In the development of the Constitutional Court even decided KAI as well as Advocate organization authorized by Law Number 18 in 2013, after the Supreme Court issued a KMA No. 073 2015 concerning an order to the entire head of the court throughout Indonesia in order to take the oath of Advocate regardless of the origin of the organization⁷, so of course KAI who initially did not have the right to be sworn as advocates eventually be have the right to be sworn into advocates, including other advocate organization other outside KAI and Peradi , but the decision of the Constitutional Court (MK) narrowed understanding of Advocate organization may file a sworn advocate is only the Advocate organization that is legally recognized, that is Peradi and KAI⁸.

B. The Objective of the Study

To fulfill the tasks of Pembaharuan Hukum Pidana Indonesia and also to find out the weaknesses of Law No. 18 Year 2003 concerning Advocates.

C. Design of the Study

The paper was put on a normative approach to review laws and other support regulations.

D. Problems Statement

1. What is the weakness of Law number 18 Year 2003 concerning Advocates?

⁶ Hasanudin Nasution, Mewujudkan Organisasi Advokat yang Mandiri dan Profesional, www.pustakalegal.wordpress.com/materi/organisasi-advokat/?e_pi=7%2CPAGE_ID10%2C8549366144 diakses pada 19 Nopember 2015 pukul 11.00 AM

⁷ Lihat KMA No. 073/KMA/HK.01/XI/2015

⁸ Lihat Putusan MK perkara No. 36/PUU-XIII/2015

CHAPTER II DISCUSSION

A. The History of the Law Formation Number 18 Year 2003 Concerning Advocate

Law Number 18 Year 2003 concerning Advocates passed on 6 March 2003 was formed by seven advocate organizations that originally formed the Working Committee of the Indonesian Advocates⁹ who formulated the first Advocate Code Ethic in 2002 to prepare for the ratification of the Bill of Advocates law in 2003 to the Advocate Law authorized by Parliament, Advocate bill's officially move to the Parliament of Republic Indonesia on 28 September 2000¹⁰.

There are some constitutional judges who had been actively involved in discussing the bill of Advocate in parliament, namely Akil Mochtar¹¹ and Hamdan Zoelva¹², and Mahfud MD who at that time was served as the defense minister and doubles as the Justice minister and Human Rights representing the government discussed the Bill of Advocates, and also Patrialis Akbar¹³ who still active in constitutional justice is a person who also discuss this bill of Advocate, regardless whether it is a personal attitude or policy of the party, interesting to note their opinion of the Advocate Law, starting from Akil Mochtar DPR RI former members of the Golkar faction and chairman of the Constitutional Court who ever been in the field of

⁹ Anggota KKAI ini awalnya terdiri atas 7 organisasi yaitu 1. IKADIN(Ikatan Advokat Indonesia), 2. AAI (Asosiasi Advokat Indonesia), 3. IPHI (Ikatan Penasehat Hukum Indonesia), 4. HAPI (Himpunan Advokat dan Pengacara Indonesia), 5. SPI (serikat Pengacara Indonesia), 6. AKHI (Asosiasi Konsultan Hukum Indonesia), 7. HKHPM (Himpunan Konsultan Hukum Pasar Modal), kemudian saat pengesahan UU Advokat satu organisasi advokat masuk bergabung untuk membentuk Peradi yaitu APSI (Asosiasi Pengacara Syariah Indonesia), dan 8 organisasi inilah yang menjadi pembentuk Peradi sesuai perintah Undang-undang Advokat

¹⁰ Agustin Teras Narang, *Proses Pembahasan Undang-undang Advokat di Parlemen*, Yayasan Pancur Siwah, Cet. 1, 2003

¹¹ Akil Mochtar saat itu anggota DPR-RI dari Fraksi Partai Golkar

¹² Hamdan Zoelva saat itu anggota DPR-RI dari Partai Bulan Bintang

¹³ Patrialis Akbar juga ikut membahas RUU Advokat sebagai anggota DPR-RI dari Partai PAN

advocate when the preparation of the advocate bill from the beginning has been very vocal confirms that the role advocate organization was very strategic, he believed that advocate organization has the authority to appoint an advocate. Second, he has a role to collect data and registration of the advocates. Thirdly he also has a role to supervise the lawyers¹⁴.

Akil Mochtar then proposed that the Bill Advocates also regulate how to form a single advocate organization to improve the quality of professional advocate, as well as maintaining the dignity of lawyers as it would be easier to conduct surveillance and enforcement¹⁵, Hamdan Zoelva, Mahfud MD and Patrialis Akbar almost all of them have same idea with Akil Mochtar' opinion and then was passed with the spirit of single bar namely Advocate Organization.

Law Number 18 year 2003 concerning Advocate is already mandated on *Self Governing* for the advocate organization so they should take care of himself as an independent organization free from government interference, as well as other state institutions¹⁶, the basic idea of the creation of advocate organization is *single bar association* to unite all into one advocate a solid and professional organization.

PAI (Persatuan Advokat Indonesia) in 1963 that the organization was later renamed PERADIN (Persatuan Advokat Indonesia) as a Single Bar Indonesia as a result of the first Congress Advocates Conference in Surakarta in 1964, government support for PERADIN as a single bar, the organization advocates at that time realized by issuing a statement alongside army chief minister as commander of the operation to restore security and orderliness (Pangkopkamtib) on May 03, 1966. Due to Peradin who have a strong commitment to the rule of law, democracy and the *Rule of Law*, establishing the relationships between Peradin and the government of Orde Baru (1977 -1998) becomes inharmonious, some members of Peradin material who had enjoyed the wealth since Orde Baru then resigned and formed the Association of Indonesian Legal Counsel (HPHI).

The reason why the government turns away from Peradin is reflected to a government licence for establishing LPPH (Institute of Legal Services and Counseling) led by Albert Hasibuan. LPPH is one *underbow* of the Golongan Karya (Golkar) party in power at that

¹⁴ Pendapat Akil Mochtar dalam Rapat Panja RUU Advokat pada 26 Februari 2002 www.hukumonline.com/berita/baca/t4dfbe4b5005bf/jejak-hakim-konstitusi-di-uu-advokat accessed on Wednesday, December 02, 2015

¹⁵ Pandangan Akhir Fraksi Golkar pada 06 Maret 2003 www.hukumonline.com accessed on Wednesday, December 02, 2015

¹⁶ www.peradi-jaksel.blogspot.com/2009/09/konflik-organisasi-advokat-runtuhnya.html accessed on Wednesday, December 02, 2015

time¹⁷ to make the position of Peradin increasingly weak, especially after the 10 November 1985 the Supreme Court Mudjono and general attorney Ismail Saleh intervened in the congress Peradin in Bandung where they propose for the establishment of IKADIN (Indonesian Advokat Association) as a new single bar of Advocate profession organization, which ultimately approved.

In 1987 the government allowed the establishment of Ikatan Penasehat Hukum Indonesia (IPHI) as a forum for practicing lawyers, because of the difference between the understanding of advocates and practicing lawyers, then in 1988 Asosiasi Konsultasi Hukum Indonesia (AKHI) was formed to reinforce the characteristic difference between a legal consultant with other legal profession. On April 4, 1989 appeared a new advocate organization that is Himpunan Konsultasi Hukum Pasar Modal (HKHPM) and AAI (Asosiasi Advokat Indonesia), which was born in 1990 instead exacerbate the schism the advocates¹⁸

The cooperation between advocate organization began to emerge a few years later, on 8 April 1996, where IKADIN, AAI and IPHI form a cooperation called Forum Komunikasi Advokat Indonesia (FKAI) that serves as a communication medium in order to develop professional advocate and preparation for the establishment of the Advocate bill, it is increasingly confirmed on 11 February 2002 in which seven advocate organizations those are advocates AAI, IPHI, HAPI, SPI, AKHI and HKHPM formed KKAI (Komite Kerja Advokat Indonesia) replaces FKAI in order to meet the establishment of a single bar and Advocates bill. APSI (Asosiasi Pengacara Syariah Indonesia) recently formed on February 18, 2003 finally also joined in KKAI and this eighth advocate organizations formed on 21 December 2004, to fulfill the orders of the Law Advocate which already passed a year earlier¹⁹.

From the brief history of the formation of Law No. 18 of 2003 which is so complex and full the interest of various groups and people who have a lot of different desire so it was formed the recent Law Advocate, which has many weaknesses that already 12 times in a

¹⁷ ¹⁷ LPPH dibentuk untuk menandingi LBH (Lembaga Bantuan Hukum) yang dibentuk Peradin sebelumnya keadaan tersebut berujung pada kondisi yang semakin melemahkan eksistensi peradin sebagai satu-satunya wadah organisasi advokat di Indonesia lihat www.peradi-jaksel.blogspot.com/2009/09/konflik-organisasi-advokat-runtuhnya.html accessed on Wednesday, December 02, 2015

¹⁸ Pada tanggal 27 Juli 1990 sekitar 200 advokat anggota IKADIN dari kubu Gani Djemat-Yan Apul, yang pada waktu itu mengikuti Munas IKADIN di Hotel Horison Ancol menyatakan keluar dari IKADIN dan mendeklarasikan organisasi advokat yang baru bernama Asosiasi Advokat Indonesia (AAI) lihat Undang-undang Advokat dan Sejarah Konflik www.peradi-jaksel.blogspot.com accessed on Wednesday, December 02, 2015

¹⁹ Alfin Sulaiman, *Runtuhnya Cita-cita Kewibawaan dan Kemandirian Profesi Advokat*, www.peradi-jaksel.blogspot.com accessed on Wednesday, December 02, 2015

judicial review in the Constitutional Court²⁰, there have been removed from the Law on Judicial Advocate result is Article 31 of the penal provisions deleted by the Constitutional Court Decision Number 006 / PUU-II / 2004²¹. So it needs to be studied more in depth about the weakness of the Law Advocate.

B. The Weakness of Materially Based on the Friedman's Theory

Law advocates have a lot of weaknesses in the material terms for example in article 3, paragraph (1) letter e in Article 2, paragraph (1) which states that a college graduate of Perguruan Tinggi Ilmu Kepolisian (PTIK) and military law graduate can be an advocate without having to go through education in regular law faculties²². Moreover, in article 16 and article 18 of Law Number 18 year 2003 has *Antinomy Normen*²³ by Law Number 8 year 1981 on the KUHAP, with article 7 of the foreclosure authority on KUHAP while in the case of Advocate Law is not allowed. And there are several other articles that need to be criticism, which include:

1. Article 1 and Article 28 paragraph (1), which contains the definition of advocate organizations, and Advocate Organizations as the sole forum for advocates, however it is not mentioned clearly whether the name of that organization, so Peradin refused to recognize Peradi even Peradin itself interpret this article as legitimacy for itself as an single bar organization, some advocate organizations in the end also admmitted as a legitimate advocate organization despite Constitutional Court had ruled that the Peradi was State Organ²⁴ as a mandate of Law Number 18 Year 2013 concerning Advocates
2. Article 2, paragraph 1, about the appointment of the Advocate, in verse 1 says that "people who can be appointed as Advocate is who have a high educational

²⁰ www.hukumonline.com/berita/baca/hol7581/banyak-mengandung-kelemahan-uu-advokat-diminta-direvisi accessed on Wednesday, December 02, 2015

²¹ Lihat putusan Mahkamah Konstitusi no. 006/PUU-II/2004 www.mahkamahkonstitusi.go.id accessed on Wednesday, December 02, 2015

²² www.hukumonline.com/berita/baca/hol7581/banyak-mengandung-kelemahan-uu-advokat-diminta-direvisi accessed on Wednesday, December 02, 2015

²³ Pertentangan Norma antara Undang-undang yang satu dengan yang lain yang mana kedua undang-undang memiliki kedudukan yang sama lihat Kajian Teoritis Tentang Antinomy Normen(konflik norma) antara Undang-undang Nomor 8 Tahun 1981 Tentang Hukum Acara Pidana Dengan Undang-undang Nomor 18 Tahun 2003 tentang Advokat Terkait Dengan Kewajiban Memegang Kerahasiaan Klien Bagi Advokat, sebuah Skripsi Faried Muhammad Yamin tahun 2012

²⁴ Lihat Putusan MK Nomor 014/PUU-IV/2006

background scholar of the law", this makes police science college graduates were also allowed in being an advocate, so the advocate profession grew wider and rather worthless²⁵ and become the favorite profession of the police when they are not serving or retired.

3. Article 2, paragraph 1, says that "The appointment of advocate carried out by the Advocate Organization" in fact, the appointment of advocate carried out by the advocate organization become unclear because although a lawyer had legitimately passed into advocates and obtain a certificate of graduation, and have served their apprenticeship.
4. Article 4 about the oath, says that "Before carrying out his profession an advocate must sworn by his religion or promise solemnly in an open session of the high court at the domicile of the legal region" This article makes the independence of lawyers' organization to be lost because practically every lawyer must first sworn by open session of high court that certainly be done by the chairman of the high court. Forms of independence and professionalism should those advocate organizations themselves who were swearing, indirectly by involving a high court to swear the advocate instead make the advocates still locked into the old rules²⁶.
5. Article 5, which states that lawyers are law enforcement of free and independent, but in fact the independence is not obvious, because advocates totally unable to practice in the court if they do not have evidence of swearing an official report of the high court, although they were Peradi advocate and have a card of Peradi, it is more important to have a news event of the oath as the letter of the Supreme Court²⁷, and

²⁵ Otto Hasibuan selama menjadi ketua peradi sampai demisioner di tahun 2015 selalu melakukan seleksi sangat ketat untuk kelulusan calon advokat karena ingin menjaga integritas dan wibawa advokat sebagai penegak hukum sebagai amanah dari pasal 5 UU Advokat, sehingga jarang sekali mantan penegak hukum yang bisa lulus ujian dalam sekali seleksi, bahkan didalam KEAI (Kode Etik Advokat Indonesia) dan Peraturan Peradi No 1 tahun 2013 disyaratkan syarat yang berat agar mantan penegak hukum yang pensiun untuk menunggu sampai 5 tahun masa pensiun baru boleh ikut mendaftar pendidikan dan ujian peradi lihat Peraturan Peradi No. 1 Tahun 2013 dan Kode Etik Advokat Indonesia KEAI yang disahkan tahun 2002.

²⁶ Didalam aturan lama sebelum keluarnya UU Advokat, para pengacara praktik, diseleksi dan diangkat oleh ketua pengadilan tinggi di wilayah domisili calon pengacara tersebut berada, dan diangkat sumpah untuk menandai pengangkatan para calon pengacara yang lulus ujian seleksi tersebut menjadi advokat

²⁷ Lihat surat ketua mahkamah agung Nomor 073/KMA/HK.01/XI/2015 yang pada intinya memerintahkan ketua pengadilan tinggi diseluruh indonesia untuk mengangkat sumpah bagi calon advokat tanpa memandang calon advokat itu dari peradi ataukah dari selain peradi

more severe in the new draft in 2013, this position would be removed by the compilers of the Advocate Law from the KAI²⁸

6. Article 16 of Law Advocate About immunity rights advocates when giving law services only in a court of Law²⁹, this contrary to the 1945 Constitution Article 28D (1)³⁰ and the rule of law as mandated in Article 1 (3) of the 1945 Constitution thus to avoid legal uncertainty, and also to embody the justice of the profession, it should be emphasized that the provisions of article 16 of Law Advocate must be interpreted, that it can not be prosecuted either civil or criminal actions in carrying out their profession in good faith in the interests of clients within and outside the court
7. Article 31 of Law Advocate of penal provisions against the 1945 Constitution in Article 1 (3), namely the right to legal assistance is a part of human rights³¹ and also contrary to article 1, paragraph (1) law advocate because those advocates are not only people who practice giving legal services in court but outside court could also known as an advocate
8. Articles on Supervision in Chapter III about supervision, why only advocate who supervised and why the other advocates are not supervised, if advocate organization is the institution that houses the law enforcement, advocate organizations should also be supervised by an independent institution established by the government as the Police with their Kompolnas or the Supreme Court and the judicial commission, but in fact advocate organizations grows as an organization that absolute without stabilizer and supervision, whereas the money goes into the advocate organization is so great every year, from the advocates candidates who follow PKPA³² education, UPA³³.

If the substance of the law itself is bad then surely these rules will not be useful, even became a joke that looks like now, when KAI (Kongres Advokat Indonesia) which contains only the outcasts of PERADI (Indonesian Advocates Association) even got the same rights as all of the advocates of Peradi, that is the right to sworn and news of the event in the court, so

²⁸ Lihat draft UU Advokat tahun 2013 yang tidak jadi disahkan sampai saat ini, draft itu disusun dengan dipelopori oleh sejumlah tokoh KAI termasuk Todung Mulya Lubis dan Adnan Buyung dengan beberapa tokoh KAI yang berhasil menjadi anggota dewan perwakilan rakyat yang duduk di komisi 3 seperti Ahmad Yani

²⁹ Pasal ini di uji materi dan dikabulkan dengan penambahan bahwa hak imunitas advokat saat memberi jasa hukum tidak hanya didalam pengadilan namun juga diluar pengadilan lihat putusan Mahkamah Konstitusi nomor 26/PUU-XI/2013

³⁰ Lihat Pasal 28D ayat (1) Undang-undang Dasar 1945

³¹ Pasal ini telah dihapus oleh Putusan Mahkamah Konstitusi Nomor 006/PUU-II/2004

³² Pendidikan Khusus Profesi Advokat Lihat Pasal 2 ayat (1) UU No. 18 Tahun 2003 tentang Advokat

³³ Ujian Profesi Advokat lihat Peraturan Peradi No. 3 Tahun 2006

that the soul of the law number 18 of 2003 on advocates that expressed the organization advocate is a *single bar organization* and the decision of the court which states Peradi who perform duties as *single bar organization* so Peradi is a state organ whose running the duty of Law number 18 year 2003 concerning the advocate has collapsed.

C. The Formal Weakness

Law Advocate is one of the many laws in Indonesia that has no PP / Government Regulation since 2003 until now, so it is normal that in the future this legislation is so much contested the judicial review to the Constitutional Court since the first Chairman of the Constitutional Court Jimly Asshiddiqie until the recent chairman of the Constitutional Court.

UU no. 18 Year 2003 concerning the advocates are not qualified because often challenged in the constitutional court and the conflict continue to occur within the organization, it means that the Law Advocate is not qualified, drafted in haste so full of conflict, so it needs to be revised³⁴. In fact, since 2006 Jimly Asshiddiqie already stated Act No. 18 year 2003 concerning Advocates that there are many problems and it is not qualified as a result of many political interests. This statement was revealed shortly by Jimly after deciding the court verdict Number 014 / PUU-IV / 2006 and case No. 015 / PUU-IV / 2006, which are both about judicial review of Law No. 18 Year 2003 concerning Advocates that rejected by the Constitutional Court when it was led by Jimly³⁵.

Until the year 2015 already 12 times the Law on lawyers in the judicial and of all that only one article is removed upon the granting of the application for Judicial Review, namely Article 31 of Law Advocates, which filed UMM, the rest is a patchwork, the addition of the word and the addition of Tafsir, so that the Law No. 18 of 2003 has been collapsed materially because if the analysis is no longer qualifies as a good law

³⁴ Irman Putra Sidin, "UU Advokat Dinilai Tidak berkualitas" online site from www.beritasatu.com/nasional/314914-uu-advokat-dinilai-tak-berkualitas.html accessed on Wednesday, November 19, 2015 at 23:04

³⁵ www.hukumonline.com/berita/baca/hol15828/lagi-permohonan-uji-materiil-uu-advokat-kandas-di-tangan-mk accessed on Wednesday, December 02, 2015

CHAPTER III

CONCLUSION AND SUGGESTION

The weakness of Law Advocate are not qualified and loaded interests and political *bargaining* between the legislators with the stakeholders so many articles have *normen antinomy*, unclear and multiple interpretations. The involvement of the Supreme Court in swearing the Advocate create havoc in the own advocate organization, then the lack of government regulation (PP) which makes too much sued the Judicial Review in the Constitutional Court. Nowadays, based on the decision letter of Supreme Court KMA Decree No. 073 / KMA / HK.01 / XI / 2015 and the Constitutional Court Decision No. 36 / PUU-XIII / 2015 makes article about advocate organization be widened and becomes unclear understanding as a whole so that the spirit of *Single Bar Association* as the soul of establishment of Law No. 18 of 2003 concerning Advocates have become lost replaced by the spirit of *Multi Bar Association*

SUGGESTION

1. Advocates should not need to be independent in the sense of standing alone as a super body institutions, but the advocate and advocate organizations should be included in the scope of the powers of the Supreme Court or the Constitutional Court as the ruler of the Judiciary in our democratic system, so that there is no overlap and obscurity of functions.

2. Law No. 18 of 2003 should be revised or revoked and created a new Advocate Law but still continue to promote the Advocate position as Law enforcement and Honorable Profession (*officium Nobile*) that should be strengthened those positions in the new Advocate Law, rather than removed or deleted.

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