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CRIMINAL LAW POLICY ABOUT MONETARY SANCTION IN THE BILL OF PENAL CODE OF INDONESIA.....	100
Huseinwan, Elwi Danil, Iwan Kumiawan.....	
TRANSPARANCY AND ACCOUNTABILITY POLITICAL PARTY FUND ASSISTANCE FROM THE CORRUPTION CRIMINAL PERFECTIVE.....	114
AGA ZURNETTI - NANI MULYATI - RIKI AFRIZAL	
Model Ganji Kerugian bagi Korban Penipuan Pasar Modal	122 ✓
Muh.Azzah, Prof Much. Zaidun , SH, M.S, Dr.Mas Rahmah, SH,MH, L.LM.	
MODEL PERLINDUNGAN OLEH PUSAT PELAYANAN TERPADU PEMBERDAYAAN PEREMPUAN DAN ANAK TERHADAP PEREMPUAN DAN ANAK KORBAN TINDAK KEKERASAN DI SUMATERA BARAT.....	138
Ellen Nova , Yandriza	
Legal Mediation and Confiscation of Asset; Efforts to Give Restitution for Victims of Trafficking in Persons.....	157
Rita Dewi Sartika Saimima, ¹ Fransiska Novita Eleanora, ² Widya Romasindah Aidy ³	
OPTIMALISASI PEMBERANTASAN TINDAK PIDANA NARKOTIKA MELALUI PENGUSUTAN TINDAK PIDANA PENCUCIAN UANG TERHADAP PENGEDAR NARKOTIKA	165
Riki Afrizal	
EFFECTIVENESS OF THE COORDINATION FUNCTION AND SUPERVISION OF THE CORRUPTION ERADICATION COMMISSION AS A TRIGGER MECHANISM INVESTIGATION OF CORRUPTION CRIMINAL ACTIONS IN THE REGION.....	173
Dr. Setyo Wahyudi, S.H.,M.H.....	
PROBLEMATIKA KEWAJIBAN NOTARIS DALAM MELAPORKAN TRANSAKSI KEUANGAN MENCLIRIGAKAN.....	182
Tian Terina, Rendy Renaldy	
PEMANFAATAN SARANA PERBANKAN OLEH PELAKU TINDAK PIDANA PENCUCIAN UANG (MONEY LAUNDRY) DALAM PERSPEKTIF HUKUM PIDANA	194
DR. JANURI, S.PD., S.H., M.H.....	
TINDAKAN TERHADAP UNDANGAN KLARIFIKASI OLEH POLRI PADA KASUS PIDANA BERDASARKAN HUKUM ACARA PIDANA INDONESIA.....	204
Ruli Purwanti, S.H., M.H, Fathur Rachman, S.H., MH	
Social Permissive Reasoning as Inherited Poverty (Critical view of a Political Dynasty Theme to Corruption)	213
Amalia Syauket, Nina Zainab.....	

PENAL MEDIATION AND CONFISCATION OF ASSET; EFFORTS TO GIVE RESTITUTION FOR VICTIMS OF TRAFFICKING IN PERSONS

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Abstract

Crimes undergo a very complex development. Initially conventional, now the crime develops in accordance with the conditions of the times and experiences a diverse mode of various. The development of criminal acts that occur currently has an economic motive that continues to develop when carrying out his crime. One of the crimes with economic motives is the crime of trafficking in persons. Conventionally, the crime of trafficking in persons is carried out by inviting someone with the lure of getting a job with great results. Currently, recruitment is done online with a very broad scope. The main problem with the crime of trafficking in persons is that the victim is not easy to get restitution for a crime that happened to him. Actors of trafficking in persons often avoid giving restitution, even acting as if they do not have the assets obtained from the trafficking business. To avoid rejection of restitution payments to victims of trafficking, it is necessary to mediate since the investigation process. Efforts to obtain compensation can be carried out through mediation of penalties. The peace efforts through mediation of the penalties will remove the demands for the criminal acts that occur, but only facilitate the confiscation of assets obtained from proceeds of trafficking in persons.

Keywords : *penal mediation, confiscation of property, trafficking in persons, restitution*

Introduction

The crime of trafficking in persons is an economic motivated crime. Trafficking in persons is a transnational crime that provides a large material benefit for perpetrators. Head of the Metropolitan Police Headquarters Information Bureau Brigadier General Dedi Prasetyo said that the profit of traffickers were around Rp.4 billion rupiah.¹ The most common form is trafficking in persons for the purpose of sexual exploitation, forced labor, or victims offered to become domestic workers abroad with a large salary offer.

Victims of criminal acts of trafficking in persons often experience trauma or illness that endangers them. Therefore, efforts to restore the condition of victims of trafficking in persons can be carried out by providing legal protection relating to the rights of victims. In the Declaration of Basic Principles of Justice for Victims of Crimes and Abuse of Power in 1985 stated that the rights of victims are the right to get compensation, restitution, rehabilitation, and reintegration for victims of trafficking in persons. Compensation must also be given by the State to victims of trafficking in persons if the perpetrators do not carry out the granting of restitution rights to victims. The State is obliged to seek financial compensation to victims of trafficking in persons because the perpetrators are unable to provide compensation to victims. However, restitution that should have been given to victims was easily given to its implementation.

Conflicts between legal norms in this study are contained in the provisions of Article 48 paragraph (1) with Article 50 of Law Number 21 Year 2007 concerning Eradication of Criminal Acts of Trafficking in Persons. Article 48 Paragraph (1) states the granting of restitution rights to victims of trafficking in persons, but this cannot be fulfilled because in Article 50 it is possible for the perpetrators not to pay restitution rights and be replaced with imprisonment for 1 (one) year. This condition will certainly not be beneficial for victims of trafficking. Perpetrators can avoid

¹ Theofilus Ifan Sucipto, <https://www.medcom.id/nasional/hukum/GbmLZZ3N-pelaku-perdagangan-untung-rp4-miliar> 09 April 2019

refuse to provide restitution for victims of trafficking. Based on the conflict, it is necessary to carry out a reconstruction of criminal restitution for traffickers so that victims can get compensation.

Research Methods

The type of research conducted there is normative juridical completed with empirical juridical research. The research data was conducted through library research completed with interviews with competent legal experts. While the approach method used in this research is Statute Approach (legal approach) and conceptual approach (case approach), and conceptual approach.

Analysis and Discussion

In a criminal case verdict, confiscation of assets is a type of deprivation of wealth of a person who comes from a crime. The confiscation of assets is an in personam action for the perpetrators of criminal acts, not an in rem act of assets related to a crime. In dropping a decision the Judge will impose sanctions on the convicted person to pay the costs of the case and or pay a fine and pay compensation, pay compensation or confiscate assets owned by the convicted person to pay compensation if the assets directly related to the crime have been transferred or not found. The thing to remember, assets that can be seized are assets that are used to finance, become tools, facilities or infrastructure in committing the crime of trafficking in persons. The public prosecutor can also seize the assets of the perpetrators if they can prove that the assets were actually obtained and have a close relationship between the assets and the criminal acts charged.

Asset of proceeds of crime are: all movable or immovable objects, both tangible and intangible, have economic value obtained or suspected to originate from criminal offenses or are intentionally used to commit crimes². Meanwhile, according to Romli Atmasasmita³, the assets of a criminal act are the subject and object of criminal law. Assets as subjects of criminal law are assets that are used as a means to commit a crime, have helped or supported the preparation and planning of a criminal act. Whereas what is meant by assets as objects of criminal law are assets of a criminal act.

Article 1 number 2 of the Draft Bill on Criminal Assets Deprivation (draft VII, September 2008) is:

- a. Assets obtained or thought to originate from criminal offenses
- b. Abnormal assets equated with assets of a criminal offense

Article 4, Criminal assets that can be confiscated are;

1. Assets obtained directly or indirectly derived from criminal offenses, including assets therein after being converted, amended or combined with assets generated or obtained directly from those criminal acts. This includes income, capital or other economic benefits derived from this wealth.
2. Assets that are reasonably assumed to be used or have been used as a means and infrastructure for committing criminal offenses.
3. Assets related to criminal offenses that the suspect/defendant dies, escapes, is permanently ill, their whereabouts or other reasons are unknown.
4. Assets in the form of findings
5. Other legal assets as a substitute for assets of a criminal offense.

The confiscation of assets is applied to a crime with a minimum sentence of 4 (four) years in prison. The limitation of the criminal threat is adjusted to the provisions of the UN

² Roberts.K, Pengembalian Aset Hasil Kejahatan dalam Perspektif Rezim Anti Pencucian Uang, PT. Rajagrafindo Persada, Depok, 2017, p. 37

³ Romli Atmasasmita, Kebijakan Perampasan Aset Pasca Ratifikasi Konvensi PBB Anti Korupsi-2003 dalam Sistem Hukum Pidana Indonesia

Convention against Organized Transnational Crime (2000) or the Palermo convention which has been ratified by Law Number 5 of 2009. In order to protect the rights of the community, the procedure to guarantee the seizure of these assets does not uphold the rights of third parties in good faith, then carried out ancillary proceedings and carried out by the court after the main case is decided.

In connection with the confiscation of assets in the crime of trafficking in persons, it is necessary to carry out a reconstruction of the Penal Code through Mediation Penal. Positively, Indonesia recognizes the principle that criminal cases cannot be resolved outside the court. However, in certain cases it is possible to resolve cases outside the court. In law enforcement practices in Indonesia, some criminal cases can be resolved outside the court through law enforcement discretion, peace mechanisms, tradition institutions and so on. In the development of criminal law, logical consequences will be found that in a criminal event that occurs in the community there will be found a private nature.

The essence of efforts to get restitution for victims of trafficking in persons can be carried out through preventive actions, repressive measures and restorative measures. Preventive actions have been taken by the government by issuing various laws and regulations to ensure that victims can receive compensation through restitution. The researcher offers the concept of compensation through mediation of penalties at the beginning of the investigation. In the beginning of the investigation, according to the researcher, restorative measures can also be carried out through the forced seizure of the assets of the perpetrators obtained from trafficking in persons.

Although it is not easy to make an effort to confiscate the assets, it must still be carried out from the beginning of the procedural steps to confiscate the assets. Starting with asset freezing of savings accounts, and confiscation of existing assets. These steps are efforts from the early stage of law enforcement that must be implemented so that victims can get restitution. The confiscation of these assets is a message that can be delivered by the government to the public. The efforts to eradicate trafficking in persons are the top priority for providing legal protection for the people of Indonesia.

If criminal fines are often ignored by the perpetrators, then the forced confiscation of assets will certainly make the deterrent and the public afraid to do so. Perpetrators of trafficking in persons will be afraid that if the proceeds of the wealth obtained will be confiscated by the government without having to go through criminal justice first. Efforts to force assets in the crime of trafficking in persons can be done through the confiscation of the assets of the perpetrators.

Assets found in the investigation process can be carried out appropriation, seizure, disappearance, destruction or manipulation of existing assets. Assets that can be confiscated are:

1. Movable property, both tangible and intangible and immovable property obtained from the proceeds of criminal acts of trafficking in persons.
2. The confiscation of these assets will be used as compensation for the victim. The amount is the same as the assets obtained from the crime of trafficking if he is found guilty.

Indonesian laws and regulations do not regulate mediation of penalties. However, the efforts through mediation of the penalties are partially regulated in the National Police Chief Regulation (Polem): Pol: B / 3022 / XII / 2009 / SDEOPS dated December 14, 2009 concerning Handling Cases through Mediation of Penalties, the Alternative Dispute Resolution (ADR) as well as the Republic of Indonesia's National Police Chief Regulation Number 7 Year 2008 on Basic Guidelines on Strategy and Implementation of Community Policing in the Implementation of police Duties. The Police Chief's rules were used as a basis for regulating the handling of criminal cases through ADR and agreed by the

Mediation is carried out through the principle of deliberation to reach consensus, respecting social / customary norms and meeting the principle of justice.

Penal mediation is known as mediation in criminal cases, mediation in criminal matters, victim offenders mediation, offender victim arrangement⁴ The implication of the settlement of the case outside the court is that there is no formal basis, so that normally a settlement is carried out peacefully through a customary law mechanism, but it is still resolved through the court process according to the positive law in force. One of the existence of mediation of penalties in the settlement of civil cases in the field of criminal law is the provision of restitution in the criminal justice process.

Penal mediation can be regarded as a new development in criminal law. This development is a renewal in the field of criminal law, where the dimension of the mediation of the penalties achieved is not formal justice through the criminal justice sub-system regulated in criminal laws that are formal legal. Philosophically, mediation of the penalty of seeking win-win solutions for the parties, suspects and victims. Penal mediation can provide the highest justice for the parties because an agreement is made between the suspect and the victim of the crime.

In the process of the Criminal Justice System mediating penalties according to the "Explanatory Memorandum" from the recommendation of the European Council No. R. (99) 19 concerning Mediation in Penal Matters can be done in the following steps:⁵

- a. The informal mediation model is carried out by inviting the parties to an informal settlement, seeking an agreement between the perpetrator and the victim so as not to continue the prosecution process. Criminal cases from prosecution or justice in community procedures that are more flexible and informal in negotiations.
- b. The victim offender mediation model is conducted in a way that all parties meet to discuss crime conflicts and involve a designated mediator. Mediators can come from formal officials, independent mediators or even a combination of the two. Mediation in this form can be carried out at the police policy stage, the prosecution stage or even after conviction.
- c. The Model Reparation negotiation program is carried out to assess, estimate the amount of compensation or the amount of reparation that must be paid by the offender to the victim. This program has become a reconciliation between the parties related to material improvement planning. This mediation model can be imposed on offenders through work programs so that perpetrators can save money to pay compensation to victims.
- d. Traditional village or tribal moots model, this model strives for all communities in their neighborhood to meet and solve conflicts of crimes among their citizens. The tribal moots model provides the advantage that the existing legal forms are adapted to the structure of modern society and individual rights that are recognized according to law.
- e. Model Community panels of courts, mediation is done flexibly and informally by way of mediation and negotiation. The purpose of this model is to avoid a case of prosecution or trial.
- f. The family and community group references model, this model was developed through community participation in the criminal justice system involving perpetrators, victims, families of perpetrators and victims, community members, law enforcement.

The Draft Law of the Criminal Law Act as a renewal of the national criminal law strives for the influence of criminal acts on the victim or his family as well as providing forgiveness from the victim and his family as a basis for consideration in criminal proceedings (Article 56 paragraph (1) letters I, j and k). The provision of appropriate compensation as a form of repairing the damage

⁴ Lilik Mulyadi, *Mediasi Penal dalam Sistem Peradilan Pidana Indonesia*, PT. Alumni, Jakarta, 2015, p.3.
⁵ Barda Nawawi Arief, *Mediasi Penal Penyelesaian Perkara di Luar Pengadilan*, Pustaka Magister, Semarang, 2008, p.7-12

done voluntarily on the consequences arising from the criminal act carried out becomes a criminal mitigation (Article 139). It is even possible for a judge to forgive / forgive ("pardon") without dropping any criminal offenses against the defendant, even though it is proven to be a criminal offense and an error.⁶

In the polarization and penal mediation mechanism, if it is truly desired by the perpetrators and victims as well as to achieve broader interests, the researcher believes that mediation is an effort that can be done in resolving cases for crimes experienced by victims of trafficking in persons. The mediation is carried out as a form of seriousness of the perpetrators of the crime experienced by the victim when the crime was committed and other conditions arising from the occurrence of the crime. Mediation is conducted so that victims get compensation as a form of compensation for their suffering first without waiting for the trial process.

In Article 82 of the Criminal Law Act the following is stated:

Paragraph (1) The right to sue for a violation that is threatened with the main penalty is not a fine, no longer valid if the maximum fine is paid of its own volition and the case fee is paid if the prosecution has been carried out, with the permission of a government employee designated in the law general, within the stipulated time period.

Paragraph 2

If the act is threatened, in addition to fines and booty, then the object that is worthy of compensation must be paid or paid for, which is estimated by the government employee mentioned in paragraph 1.

Based on Article 82 of the Criminal Code mentioned above, the settlement of a case by the court has not explicitly described the possibility of peaceful settlement of the case or the agreement of the perpetrators and victims. However, the problem of giving compensation or compensation in a criminal case is a "means of diversion" in order to stop the prosecution or conviction. The reason for the abolition of the prosecution in Article 82 of the Criminal Code is not only because there has been an attempt to compensate / compensate the victim, but because the compensation is the maximum fine payment that is threatened in trafficking in persons. Resolving criminal cases by giving compensation to victims of trafficking will not eliminate the prosecution and punishment.

Based on the description above, the researcher believes that the mediation and compensation process at the beginning of the investigation process is an effort that can be used to encourage the perpetrators to express their remorse and sympathize with the victims' suffering. In addition, the mediation process can be a consideration for judges in imposing criminal sanctions so that they do not become more severe because of the good will of the perpetrators since the beginning of the investigation process.

The penal mediation model that can be used in cases of trafficking in persons is a combination of the victim offender mediation model and the Model Reparation negotiation program. Since the beginning of the investigation, parties have tried to offer an alternative settlement of criminal cases by way of peace. Although this form of mediation will not eliminate the charges of the main criminal offense of trafficking in persons, the parties continue to negotiate the best for the perpetrators and victims of trafficking in persons. In the case of the settlement of criminal trafficking in persons, researchers assume that the mediation process can continue to be carried out simultaneously with the process in the criminal justice system. The process is

⁶ Naskah Akademik RUU KUHP 2017, p.120

out simultaneously as an effort that the settlement mechanism outside the court case can reach a settlement that has legal force. Concern that one of the parties avoids the agreement becoming the law, it is likely that the case will continue before the due date for its prosecution. The perpetrators and victims of trafficking in persons can carry out the negotiation process before proceeding with the examination process before the court hearing. During the investigation process, negotiations were carried out by emphasizing the payment of compensation from the perpetrators to the victims. The concept of reconciliation between the perpetrator and the victim seeks an agreement to pay compensation to the victim.

The mediation effort is carried out so that both the perpetrators and victims are aware of and appreciate the results obtained from the mediation process. Such mediation still adheres to the principles of legal certainty, usefulness and legal justice. The principle that mediation is carried out to acknowledge the wrongs committed by the perpetrators and apologize from the victim as a party harmed by the crime of trafficking in persons can be a win-win solution.

In connection with the confiscation of assets of traffickers, the President of the Republic of Indonesia in President Joko Widodo on November 10, 2017 issued legislation that ratified the Asean Convention Against Trafficking in Persons through Law Number 12 Year 2017 Regarding Ratification of the Asean Convention Against Trafficking in Persons Especially Women and Children. Through the convention, efforts to protect women and children and provide assistance to victims of trafficking in persons are expected to increase the effectiveness of prevention and eradication of trafficking in persons.

Article 1 of Law Number 12 of 2017 in Paragraph (f) states that trafficking in persons is a serious crime. Therefore, the crime of trafficking in persons is a crime that can be punished with a maximum loss of independence of at least four years or a more severe sanction. Therefore, according to the researchers, the form of severe sanctions including confiscating the assets of the perpetrators of trafficking in persons. Paragraph (j) states that "Wealth" is any form of asset, whether in form or form, movable or immovable, tangible or intangible, and legal documents or instruments that prove the right to, or interest in, the asset. While in item (k), wealth is stated from "Proceeds of a criminal offense" is any wealth derived from or obtained, directly or indirectly, through the implementation of a criminal offense.

In the understanding of researchers, the wealth resulting from trafficking in persons including tools, or facilities and infrastructure in carrying out criminal acts. Even assets used to finance the activities of trafficking in persons, including assets obtained from the proceeds of these criminal activities. The forced attempt to confiscate property is the most effective way for perpetrators to provide restitution rights for victims of trafficking in persons. Paragraph (l) of Law Number 12 of 2017 also states that assets derived from the crime of trafficking in persons may be subject to "freezing" or "confiscation", it temporary prohibition on the transfer, conversion, relinquishment or transfer of wealth, or receiving security or control of wealth. on a temporary basis based on an order issued by a court or other competent authority While item (m) states that the proceeds of assets of the crime of trafficking in persons can be carried out "deprivation", that is, deprivation includes permanent revocation of wealth by a court order or other competent authority

Article 17 of Law No. 12 of 2017 also states that confiscation and confiscation is carried out by the State on the proceeds of criminal offenses originating from the offenses covered by this convention or assets which are the same value as the proceeds of said offenses. Wealth, equipment or other equipment used or intended for use in criminal offenses covered by the convention. The state shall adopt measures deemed necessary to carry out the identification, tracking, freezing or confiscation of any goods referred to in paragraph 1 of this article for the purpose of seizure.

Article 3 states that if the proceeds of a criminal offense have been altered or transferred, in part or in whole, to other assets, such assets must be held liable for the actions referred to in this article instead of the proceeds of the criminal offense. Article 4 also states that if the proceeds of a criminal offense have been mixed with assets obtained from a legitimate source, such assets must, without prejudice to the authority of freezing or confiscation, be seized up to a number that has been calculated from the results of the criminal offenses mixed. Article 21 of this Convention, States are obliged to empower courts or other competent authorities to order that bank, financial or trade records can be opened or confiscated. In addition, States are prohibited from refusing to act based on the provisions of this article on the grounds of bank secrecy.

On the basis of the provisions of the convention, the researcher considers that confiscation of assets resulting from the crime of trafficking in persons constitutes the basis for ensuring that the rights to goods that become assets of the proceeds of a crime must be guaranteed not to be transferred, removed or even damaged so that it can be detrimental to the applicant confiscated. Confiscation is an attempt to guarantee that the victims' rights in litigation in court will still be fulfilled. Referring to Law Number 12 of 2017, the researchers are of the opinion that in an effort to obtain restitution for victims of trafficking in persons, forced efforts may be made to confiscate the assets owned by the suspect obtained from the trafficking in persons. In the initial stages of the investigation process, confiscations can be made of objects owned by the suspect which are allegedly obtained directly or the result of the criminal act carried out. Other items that can be confiscated are suspect bills in whole or in part. Confiscation can also be carried out on objects that are used directly to commit a crime or at the time the crime is prepared. Other objects that can be confiscated are objects that are used to prevent the investigation of criminal acts, other objects that have a direct relationship with the criminal acts committed, objects that are in confiscation due to civil or bankruptcy proceedings.

The policy of confiscation of assets belonging to the perpetrators of trafficking in persons must, of course, include adequate legal construction to facilitate the tracking of the assets themselves until the management of these assets during the investigation, trial or after the judge's decision is handed down. Legal construction in the confiscation of assets is a framework that can be used by law enforcers as an effort to implement criminal policy in the crime of trafficking in persons.

Based on the aforementioned description, in general confiscated assets in the crime of trafficking in persons consist of;

- 1) Money which is the profit gained from the activities of trafficking in persons in the form of cash or money deposited in the Bank
- 2) Movable or immovable assets, which are used in criminal activities of trafficking in persons and / or assets resulting from trafficking in persons.

The confiscation of course must have a strong legal force when the confiscation of assets carried out as a result of the crime of trafficking in persons. This of course also must pay attention to the principle of law that legal protection of material property rights can only be done if the property is obtained legally. This means that if it is proven in court that assets obtained illegally from trafficking in persons are not eligible for legal protection.

The policy of confiscation of assets confiscated from trafficking in persons must be taken into consideration as a form of imposing sanctions. The main step to be able to confiscate assets resulting from the crime of trafficking in persons will provide legal certainty for victims in an attempt to claim restitution rights. In addition, confiscation of these assets will protect the human rights of victims of trafficking and can provide benefits and welfare to victims and / or victims' families. Therefore, the Indonesian government is required to conduct supervision of:

- 1) The possibility of money laundering efforts resulting from the crime of trafficking in persons.
- 2) Providing legal certainty for victims of trafficking in persons in an effort to obtain compensation
- 3) Seek to provide compensation in the form of restitution to victims of acts of trafficking since the beginning of the investigation process
- 4) Improving the system of obtaining restitution for victims of trafficking in persons.

Conclusions

1. To facilitate the provision of restitution, restitution criminal reconstruction will be carried out through mediation of the penalties from the beginning of the investigation process of cases of trafficking in persons.
2. The criminal mediation model that can be used in cases of trafficking in persons is a combination of the victim offender mediation model and the Model Reparation negotiation program. The mediation of the penalties is an alternative peaceful settlement of criminal cases to the parties. This form of mediation will not eliminate the charges of the main criminal offense of trafficking in persons, but the parties continue to do their best for the perpetrators and victims of trafficking in persons.
3. In addition to mediating penalties, seizing restitution requires the confiscation of assets of perpetrators of trafficking in persons. The seizure of property is an effort to provide legal protection, provide justice and legal certainty for victims and or their families

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