Meaningful Participation in Law-making Process of Health Law in Indonesia

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***Abstract*— The formal review of Law Number 17 of 2023 concerning Health to the Constitutional Court was submitted. One of the reasons was because the Petitioner considered that this Law did not meet the requirements of meaningful participation. This issue was determined as the object of this research. The normative legal research method was employed, supported by a conceptual approach. The research aims to find out the application of public participation in the formation of health laws. The theory of public participation and the theory of judicial review were utilized to analyze how the formulators of the Health Act have fulfilled the formal requirements in the formation of laws and regulations.**

***Keywords*— public participation, law-making process, judicial review, health care law**

I. INTRODUCTION

Professional organizations of medical and health workers filed a formal review of Law No. 17 of 2023 on Health (Health Law). They include the *Pengurus Besar Ikatan Dokter Indonesia, Pengurus Besar Persatuan Dokter Gigi Indonesia, Dewan Pengurus Pusat Persatuan Perawat Nasional Indonesia, Pengurus Pusat Ikatan Bidan Indonesia,* and *Pengurus Pusat Ikatan Apoteker Indonesia*, who feel directly affected and have an interest in the content material and formal procedures in the formation of Law No. 17/2023. The Petitioners consider that they have a professional existence in providing health services, so they have the legal standing to submit a formal review of the Health Law to the Constitutional Court. The Petitioner filed a formal judicial review of the Health Law because the lawmakers did not fulfill their legal obligations on formal procedures in the formation of the Law by fulfilling the principles of meaningful involvement and meaningful participation. The absence of meaningful participation is one of the reasons why the applicable law can be canceled on the grounds that it does not meet the formal requirements for the formation of laws and regulations. If the formal judicial review is granted by The Court, then the law can be canceled. This application was registered as Number 130/PUU-XXI/2023 and was examined by the Constitutional Court through several hearings involving the legislators, related interested parties, and also experts and witnesses presented by the parties.

Since its establishment, the Constitutional Court has decided 89 applications for formal judicial review of applicable laws. A total of 38 petitions were ruled inadmissible, 36 petitions were rejected, only 1 petition granted by the Constitutional Court, while 14 other cases were withdrawn.

Verdict	Number of Verdict
Not Accepted (Niet Ontvankelijke Verklaard)	38
Rejected	36
Granted	1
Withdrawn	14
Total	89

From the data mentioned above, it appears that the Court has only once revoked a law due to the non-compliance with the formation requirements. This indicates that it is not easy for the community to cancel a law that has been in effect on the ground of

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formal defect. This could be because the law's formation was in accordance with the proper procedure, or the Constitutional Court did not dare to take a significant step of annulling a law whose formation was not in accordance with the procedure.

In the principles of democracy, there should be no constitutional system that cannot be monitored, including the process of law formation. Formal testing is a way for the public, through the Constitutional Court, to supervise the law-making process. According to Jimly Asshidiqie, the effectiveness of law formal review in the Constitutional Court should be sharper than judicial review. This is because formal testing can balance the power of majoritarian democracy which prioritizes the highest number of votes without regard for the quality of those votes.[1]

As a state of law, the constitutionality of the applicable laws should be able to be reviewed not only in terms of the material substance of the rules, but also in terms of the formal process of the law formation. Hans. A. Linde emphasized in his writing on Due Process of Law-making in 1975 that the government should not make rules that deprive people of their freedom or regulate people's property with laws made by an illegal law-making process. Therefore, according to Linde, the most important aspect of the lawmaking process is how the law is made and which legal processes are legitimate and which are not. [2] The point is that the lawmakers must be ensured that due process of law-making fulfills the formal requirements. Thus, the constitutionality of law should be considered not only in terms of its material content but also in the formal process of its formation.

The first formal review of a law submitted to the Constitutional Court was by the Indonesian Notary Association against Law Number 30/2004 concerning the Position of Notary in Case Number 009-014/PUU-III/2005. The application was rejected because it was considered insufficiently reasoned. Meanwhile, the Constitutional Court granted an application for formal review for the first time in Case Number 91/PUU-XVIII/2020 regarding the formal review of Law Number 11 of 2020 concerning Job Creation. In its decision, the Constitutional Court stated that it revoked the enactment of the law in question on the grounds that it did not meet the requirements for meaningful participation. The Constitutional Court in the decision emphasized that more meaningful public participation must at least fulfill three conditions, i.e.: public has the right to express their opinions and be heard; Public opinion is considered by legislators; and If the opinion is not accepted then the public has the right to get an explanation.

Following the Constitutional Court's Decision Number 91/PUU-XVIII/2020, which set restrictions on the conditions for meaningful participation, it is expected that lawmakers can comply with it as a procedure that cannot be ignored. For this reason, the author examined the lawmaking process of the Health Law issued after the Decision Number 91/2020, particularly through the lens of formal review of the Health Law in Case Number 130//2023.

II. LITERATURE REVIEW

A. Judicial Review

The world's first judicial review was conducted in the United States in the case of Marbury versus Madison in 1803. The case began when President John Adams of the Republican Party in the transition of his administration appointed John Marshall as Chief Justice of the Supreme Court, and William Marbury as Justice of the Peace. However, the handover of office did not occur until President Jefferson was sworn in as President. James Madison who served as Secretary of State withheld the appointment letters. Marbury then filed a lawsuit against Madison's actions to the Supreme Court and requested that the appointment letter be handed over by President Jefferson's administration. In the Supreme Court decision, although it was stated that President John Adams' actions in appointing officials during the transition period were justified, Marbury's lawsuit was still rejected. The Supreme Court under the leadership of Supreme Court Justice John Marshall decided the Marbury Vs Madison case by using constitutional interpretation as its legal basis. This marked the forerunner of judicial review in the world. The Supreme Court responsible for ensuring that the basic norms contained in the constitution are adhered to and implemented.

The concept of judicial review was later developed by Hans Kelsen who stated that the constitution is the highest law in a legal system as well as the source of validity of the legal norms below it. Therefore, to enforce it, it is necessary to establish a judicial institution tasked with reviewing the constitutionality of legal products. This is why Austria, where Hans Kelsen lived, adopted Kelsen's ideas and established The Austrian Constitutional Court (verfassunggerichtshof) in 1920, functions as an institution that ensures that laws enacted in Austria are in line with the Austrian constitution.

However, not all countries in the world follow Austria in establishing specialized courts for judicial review. Likewise, Indonesia, despite being a country with a Civil Law legal system like Austria and other European countries, did not establish a constitutional court at its inception. In 1970, Law No. 14/1970 on Judicial Power was issued, which authorized the Supreme Court to conduct limited judicial review of laws and regulations. Indonesia began the establishment of a constitutional court in 2001 as one of the demands of the 1998 Reformation, emphasizing that the government should be based on law. Thus, the 1945 Constitution also affirmed the supremacy of the constitution, which then led to the establishment of the Constitutional Court.

In the 1945 Constitution, the Constitutional Court has the authority to, among other things, review laws against the Constitution. However, it is not mentioned in the 1945 Constitution that the Constitutional Court has the authority to formally review laws. The authority of the Constitutional Court to formally review laws is regulated in Article 50 of Law No. 24/2003 on the Constitutional Court, which states that the Petitioner in a judicial review of a law must outline in his/her petition that the formation of the law does not fulfill the provisions under the 1945 Constitution; and/or the content material in paragraphs, articles, and/or parts of the law is considered contrary to the 1945 Constitution, so it can be interpreted that judicial review of laws in the Constitutional Court can be

both material and formal. Some peoples consider because there are no clear regulation about the authority of formal judicial review, then formal judicial review is actually not an authority of the Court, but most other peoples, including Constitutional Judges who have decided cases of formal review in the Constitutional Court so far, consider that formal review is the basis for the operation of judicial testing. Meanwhile, in the practice of constitutional justice, research conducted by I Dewa Gede Palguna, a former Constitutional Judge, states that violations of citizens' constitutional rights prove that countries that have institutionalized constitutional courts often provide formal and material guarantees of protection of citizens' rights. Formally, they assess the acts or omissions of public officials in the political process. Materially, they assess the content of laws produced by parliament.[3]

The right to carry out formal judicial review is the authority to assess a legislation product, in this case a law, in the process of its formation through procedures that have been determined or regulated in the applicable laws and regulations [4]. Laws are legal products formed by the House of Representatives (Article 20 of the 1945 Constitution). The President has the right to submit a draft bill to the House of Representatives and each of which is discussed by both the House of Representatives and the President for mutual approval (Article 5 and Article 20 paragraph (2) of the 1945 Constitutional Amendment). Thus, legal products called Laws must also be formed with or based on the procedures mentioned above.

Some of the reasons for conducting formal review include: the incompatibility of the form, format, and composition of the law as determined by the 1945 Constitution; the incompatibility of the authority of decision-making institutions in the law-making process; the incompatibility of the procedure implementation or procedures for law-making both in the discussion and decision-making stages of turning the draft bill into law; as well as public participation in the law-making process.

B. Public Participation Theory

Joan Nelson divides participation into two: 1) horizontal participation, which occurs among fellow citizens or community members. In this type of participation, the community can initiate an activity and complete development activities together with other community members; and 2) vertical participation, which refers to the type of engagement where the community collaborates with the government. In this relationship, the community is in a position as a follower. [6] In the context of democracy where the people are sovereign, vertical participation will be an important aspect of the democratization process and serves as a key aspect that can illustrate how democratic a country is.

Participation can be defined as an effort to take part or play a role in political activities and political affairs in a country. Public participation to influence the lawmaking process of political participation. The term political participation has been used in a variety of meanings that describe behavioral involvement, attitudes and perceptions. [7]

Some experts then divide community participation into several levels, which are then described as ladders of participation. Sherry Arnstein, who pioneered the ladder of participation known as The Arnstein Ladder Participation, divides participation into eight levels. The lowest level starts with manipulation, therapy, informing, consultation, placation, partnership, and delegated power, while citizen control represents the highest level. Arnstein divides the rungs into 3 typologies. The three highest levels are referred to as citizen power or active participation, which is considered to increase the level of decision-making. The three rungs in the middle are informing, consultation, placation as tokenism or responsive participation. Meanwhile, the two lowest levels, manipulation and therapy, are classified as non-participation or passive participation and are considered to be powerless. The levels of participation according to Sherry Arnstein are as follows:[8]

a. **Manipulation**, in this stage names from the community are used by the authorities, as if the activity is supported by the community, the public is promised better conditions but its never realized.
b. **Therapy**, At this level, the government pretends to involve the community, so that it appears that the community is truly involved. Then the community thinks that they are involved, even though the government does not receive input from the community.
c. **Informing**, At this level the government only informs the community about the activity, but the community is not involved and the community cannot negotiate. Even if the community wants to give input, it is not given enough time to do so.
d. **Consultation**, At this level, the community is informed about the government's plans and asked to provide input and suggestions through hearings. However, the government does not guarantee that the input will be taken into consideration.
e. **Placation**, At this level, the government appoints a number of people to be part of an authorized institution, so that these people are involved in decision-making. Although in practice the government remains dominant in making decisions.
f. **Partnership**, At this level, the community is given the right to discuss and make decisions with the government. There is a division of authority between the community and the government in planning, controlling decisions, formulating policies and solving problems faced by the community.
g. **Delegated power**, At this level, the community has the authority to participate in decision-making since the planning stage. So when the problem happens there is always a negotiation that involves the community.
h. **Citizen control**, At this highest level, community participation is very dominant, because it can be included in the decision-making process. The community can organize activities according to community needs. It even has the authority to deal with external parties..

Public participation in influencing public policies or decisions can be done individually or collectively. Efforts to influence government decision-making can be made by persuading or pressuring officials to act in a certain way. According to Saifudin in

his book, the actors of community participation in question are community forces included in the political infrastructure such as community leaders, the press, pressure groups, interest groups, universities and political parties. These political infrastructure forces can exert their influence and control in the process of forming legislation. Public participation in the formation of laws contains two meanings, namely process and substance. Transparency is the first step to realizing public participation in lawmaking. Substantively, it means that the laws made are democratic and responsive in character in responding to the needs and interests of the community. Saifudin argues that participation, transparency and democracy in lawmaking are inseparable. The reasons are [9]:

a. The demand for participation is carried out so that the people affected by each policy can contribute ideas in the form of materials to be regulated. Thus, a bottom-up process will occur so that it is expected to make an ideal law product.;
b. Transparency in the law-making process is a must because the public must know what the government stipulates in the regulations. This is also related to the legal fiction that when a law has been promulgated, then at that time every community is considered to know about the law. This is also the level of public acceptance of a newly formed law. If the formation of the law is not done transparently, it will lead to public apathy towards the law..
c. Democratization in the lawmaking process is in line with the will of democracy itself. Democracy aims to accommodate the interests of the people in general, so it is appropriate to accommodate the aspirations of the people's interests. Although the legislative body as a representative of the community has been elected through an election mechanism which then forms various laws, the interests of the people are often not accommodated by the interests of the parties that control the DPR. Therefore, public participation in the law-making processes still needs to be done

In a country with a representative system, there is an assumption that there is no need for public participation of any kind, because the people's representatives are already acting on behalf of the people. However, when the representatives of the people are unable to feel, think and act in accordance with the will of the people, then in order to realize participatory democracy (not mere elite democracy), the participation of people outside the parliament and government in the process of forming laws and regulations becomes very important and decisive. For this reason, the importance of involving parties outside parliament and government in the process of forming laws and regulations is: first, to capture the knowledge, expertise, or experience of the community so that the regulation really meets the requirements of good legislation; second, to ensure that the regulation is in accordance with the realities living in society (political, economic, social and others); third, to foster a sense of ownership, a sense of responsibility for the regulation. The various factors above will facilitate public acceptance, and also facilitate implementation or enforcement.[10] With the participation of external parties, it is expected that laws and regulations will have advantages in terms of the effectiveness of their enforcement in society. In addition, participation also provides legitimacy or support from the community for the formation of laws and regulations.[11]

For this reason, as a country that upholds democracy, public involvement in the lawmaking process is important and crucial. This is because the people have the right to exercise control over the authorities. Therefore, in essence, the formulation of laws and policies must involve the community as the party that will receive the impact of the enactment of these laws and policies. However, in reality, as one of the law-making actors as well as representatives of the community, the DPR and the President often make policies and form laws that are not in accordance with the interests of constituents.

III. METHOD

Basically, this research is a normative legal research supported by a conceptual approach by referring to various views and doctrines of legal science that have a correlation with the topics raised in this research.13 In addition, this research is also conducted with a legislative approach by examining the meaning of the content contained in a law. In answering the issues raised in this research, the author will maximize various data sources and legal materials. The legal materials are laws and regulations, including Law Number 12/2011, Constitutional Court Decision Number 91/2020 and Decision Number 130/2023, as well as other laws and constitutional court decisions related to the issues and topics of this research.

IV. RESULT AND DISCUSSION

In September 2023, the Constitutional Court formally commenced the examination of the Health Law, which had come into force on August 8, 2023. The petition was filed by various professional organizations of medical and health workers, many of which have been in existence for decades. *Pengurus Besar Ikatan Dokter Indonesia, Pengurus Besar Persatuan Dokter Gigi Indonesia, Dewan Pengurus Pusat Persatuan Perawat Nasional Indonesia, Pengurus Pusat Ikatan Bidan Indonesia,* and *Pengurus Pusat Ikatan Apoteker Indonesia*. The petitioners posited that they are the primary stakeholders in the constitutional fulfillment of health services to all individuals. Consequently, they asserted that they are not merely directly affected and interested parties, but rather constitutional institutional elements in the fulfillment of the constitutional right to health services. The petitioners posited that they are affected and/or have an interest in the lawmaking process of Healt Law. These obligations include the principles of meaningful involvement and participation. Consequently, the petitioners contended that they have legal standing, interests, and at the same time have suffered constitutional losses due to formal defects in the formation of the laws under review. Furthermore, they argued that the due process requirements for lawmaking have not been met.

In their petition, the petitioners contended that the health law was formally defective in several respects, namely:

1. Act 17/2023 is formally flawed because the law-making process of the Health Care Law does not involve the Regional Representative Council (DPD) as mandated by Article 22D paragraph (2) of the 1945 Constitution. Whereas according to the Petitioners, the Health Care Law has the scope of regulation and content material related to regional autonomy and related to education which must involve the DPD;
2. Act 17/2023 is formally flawed because its planning, discussion, and formation are not in accordance with one of the formal procedures for law formation, namely the requirement for meaningful community involvement and participation, In addition, there were also actions to inhibit participation in the discussion of the Health Bill, which undermined constitutional democracy and democratic rule of law.;
3. Act 17/2023 is formally flawed because the juridical basis does not consider the decisions of the Constitutional Court in both the Academic Paper and the Manuscript of the Health Bill, so it does not fulfill the provisions for the Formation of Laws according to the 1945 Constitution;
4. Act 17/2023 is formally flawed because the form and format of the Health Care Law does not meet the requirement of law-making procedures.

With regard to the four reasons presented in the Petitioners' request, the author will focus on the second reason, which pertains to the importance of meaningful community involvement and participation. This is in line with the emphasis placed on this topic in Decision 91/2020.

The Government, through the Minister of Health, submitted testimony at the trial in a Court, which stated that the making of Law 17/2023 was in referring to the principles of meaningful involvement and participation. This is because the formation of Law 17/2023 involved the opinion of various experts and the public, which were taken into consideration in the formation of Law 17/2013. Furthermore, according to the government, the legislators have provided access to the Academic Paper and the Health Bill, which means that the public was given the widest possible opportunity to provide responses and feedback to the bill. In its statement, the government underscored that, in the context of the right to participate in the formation of laws, the public is expected to actively express their opinions on the Health Bill. To facilitate this, the Ministry of Health has provided a platform for submitting opinions and feedback through online forms available on their official website at https://partisipasisehat.kemkes.go.id/.

The DPR provided testimony in the Court trial that the formulation of Law 17/2023 had accommodated meaningful participation in its formation by demonstrating the existence of a chronology of community involvement through meeting session and hearings involving organizations of medical personnel and health workers, including other parties related to the Health Bill. The legislators have endeavored to ascertain the aspirations of the broader community in the preparation and discussion of the Health Bill and to incorporate existing feedback in the lawmaking process of the Health Law. The DPR said, the aforementioned mandate of Article 96, paragraph (8) of the Law on the Establishment of Legislation has been fulfilled, and the right to be explained has been granted by the compilation of the Organ Leaders' Report in decision-making at the Plenary Session. Consequently, there is no necessity to provide a detailed explanation to those who have expressed an interest.

In addition to the petitioners and the drafters of the law, the court also heard the related parties, namely the parties who consider their constitutional rights related to the law petitioned for formal testing. These parties included the Association of Indonesian Doctors, Observers of Medical Education and Health Services, the Central Board of the Indonesian Psychiatric Association, the Indonesian Doctors Collegium, the Indonesian General Practitioners Association, and the Association of Indonesian Radiology Specialists. In essence, the Related Parties asserted that they were involved in the formation of the Health Law, yet not all of their feedback was included in the Health Bill. Similarly, the witnesses presented by the parties at the trial all stated that they had attended hearings or meetings with legislators, yet not all of their opinions were incorporated into the Health Bill.

In its legal considerations, the Decision Number 91/2020, the Court found that the public do not get enough opportunities to participate in the lawmaking process. Consequently, the Court emphasized that the formation of laws must involve meaningful public participation, which must at least fulfill three requirements The Constitutional Court in the decision emphasized that more meaningful public participation must at least fulfill three conditions, i.e.: public has the right to express their opinions and be heard; Public opinion is considered by legislators; and If the opinion is not accepted then the public has the right to get an explanation. (Paragraph [3.17.8] page 393, Decision 91/2020). Furthermore, the Constitutional Court referred to Decision 54/2023 regarding the formal testing of the Omnibus Law. The Court recommended that legislators encourage the development of an electronic-based information system for the formation of laws and regulations in order to fulfill the principle of meaningful participation.

Furthermore, the Constitutional Court had taken into account the legal facts revealed in the examination, including:

1. The applicants were invited to and attended public consultations or public hearings organized by the legislature;
2. The legislature had conducted public hearings, focus group discussions, and socialization activities in order to fulfill the right to express their opinions and be heard; public opinion is considered by legislators; and If the opinion is not accepted then the public has the right to get an explanation. to the information or opinions of experts and the public in the formation of laws, as well as written evidence submitted by the government to support its statement;
3. Witnesses presented by the petitioners, the government, and related parties representing various organizations, in their testimony, admitted to being invited to public consultation activities conducted by the legislator and could provide feedbacks and suggestions on the content of the Health Bill;

4. The government has provided the public with open access to the draft bill and academic papers, as well as provided a channel to convey public opinion through the Ministry of Health's official website, https://partisipasisehat.kemkes.go.id/, in the form of filling in online opinion and feedbacks forms;

In light of these legal considerations, the Court has determined that the legislators have made concerted efforts to facilitate community involvement. This is evidenced by their active invitation through various forums to create a website that can be accessed by the entire community, particularly stakeholders who wish to participate, not only from the medical profession or health workers. In its decision, the Constitutional Court ruled that legislators may sort and select all suggestions and feedbacks from the community to be utilized as material in decision-making and the formulation of norms in the formation of laws. In conclusion, the Court ruled that the Petitioners' argument regarding the lack of public participation in the formation of health laws is unreasonable according to law.

However, if we consider the Sherry Arnstein Theory, it can be argued that, based on the evidence presented in the trial, public participation in the lawmaking process of the Health Law is still at the consultation level. At this level, the community is informed about the government's plans and asked to provide input and suggestions through hearings. However, the government does not guarantee that the input will be taken into consideration. The consultation stage represents an intermediate level on the ladder of participation. During this stage, community involvement is limited to providing feedback, and there are no rights in decision-making. Furthermore, there are no deeper discussions with lawmakers. It is not sufficient to merely hear and consider public opinions; they must also be discussed and developed into ideas that will influence decision-making.

In the trial of the Health Law Review, it appears that medical and health worker organizations are divided into two distinct groups. The first group considers the health bill to have fulfilled their wishes and therefore supports the government. The second group feels that their opinions are only listened to but not discussed further or brought together with other opinions, and that the best decision is not obtained for all parties. It is imperative that lawmakers address the diversity of opinions and feedback from the public by further deepening the issues that, at the level of implementation, cause differences of opinion. It is inevitable that differences of opinion will arise in the formation of laws. However, these differences should be resolved by comprehensively considering various angles and the potential effects of such differences. Moreover, these differences originate from professionals who possess the requisite expertise in the field of health, which is of paramount importance given its capacity to impact public health and safety.

Nevertheless, the DPR recognizes that the existing opinions and feedback will be accommodated in consideration but adjusted to the objectives to be achieved that have been determined beforehand.. Thus, in order to achieve a specific goal, opinions and feedback are only taken into consideration in accordance with the objectives determined by the legislators.

Furthermore, the Constitutional Court’s decision indicates that the legislature has the authority to address the feedback obtained. This implies that the legislature is not obliged to incorporate public feedback and opinions into the draft law. This further underscores that Indonesia is still in the consultation stage of public participation. If lawmakers’ intentions are not benevolent, then the public will be misled into believing that they have participated in the lawmaking process when, in fact, they have not. This is a situation that can be exploited by those who wish to manipulate public participation.

V. CONCLUSION

The participation of the general public in the legislative process is a formal requirement that must be met. Should a legislator curtail the public's right to participate, a formal judicial review of the law may be initiated. The Decision Number 91/2020, serves as a cautionary tale for lawmakers, underscoring the importance of greater public involvement in lawmaking. In the wake of Decision 91/2020, the government implemented improvements to the process of soliciting public participation. In the lawmaking process of the Health Law, the Ministry of Health employed information technology to facilitate public feedback through its website at https://partisipasisehat.kemkes.go.id. The legislators actively invited parties related to the health bill to hearings and forums, including the petitioners, who considered that the health law did not sufficiently fulfill the requirements of meaningful participation. However, the legislator, in this case the DPR, recognizes opinions and inputs that will be considered but adjusted to the objectives to be achieved that have been determined beforehand. In order to achieve a specific goal, opinions and feedback must be taken into account in accordance with the objectives determined by the legislators. Consequently, public participation in the lawmaking process of the Health Act is still in the consultation stage. This implies that the community is informed of the government's plans and asked to provide input and suggestions through hearings. but, there is no guarantee that the input will be taken into consideration. The author posits that if public participation in the formation of laws is maintained at the consultation level, the level will tend to continue to decline, potentially even reaching the manipulation level. As a result, legislators must persist in enhancing the extent of community participation through more substantial community involvement, not merely soliciting feedback but also assuming responsibility for decision-making.

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