

Principles of Circumstantial Evidence in Handling Criminal Cases

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Abstract

There are no provisions related to circumstantial evidence in the handling of criminal cases. However, there are several judges' decisions that use circumstantial evidence in criminal cases, so that the decision does not reach the highest degree of justice and legal certainty in a decision, because it is not based on the minimum requirement of two pieces of evidence that must be met in terms of proof to impose a criminal sentence. As for the formulation of the problem in this study are: (1) the philosophy of circumstantial evidence from the perspective of criminal procedural law. (2) ius constituendum application of circumstantial evidence in the process of proving criminal cases. This research is a normative research, which is a technique or procedure of review based on several legal principles, legal principles, and legal principles relating to the substance of legislation that is general and specific in nature in order to answer the legal issues raised.

I. Introduction

Indonesia is a country of law, as stated in the provisions of Article 1 paragraph (3) of the 1945 Constitution of the Republic of Indonesia (hereinafter referred to as the "1945 Constitution"). A state of law or a state based on law is a country whose government, society and people in their actions always prioritize and enforce the law with legality in the sense of law in all its forms.

Criminal law is public law, where the interests to be protected by criminal law are public interest. Criminal law is divided into two parts, namely the material criminal law which regulates the determination, perpetrators and sanctions of criminal acts regulated in Law Number 1 of 1946 concerning Criminal Law Regulations (hereinafter referred to as "Law No. 1 of 1946") which has been replaced by Law Number 1 of 2023 concerning the Criminal Code (hereinafter referred to as "Law No. 1 of 2023") on January 2, 2023, while the formal criminal law regulates the implementation of procedural procedures in court and as a guideline or basis for law enforcers to implement the provisions in the material criminal law which is regulated in Law Number 8 of 1981 concerning the Criminal Procedure Law (hereinafter referred to as "KUHP").

Indonesia is a country that adheres to a mixed legal system, with the main legal system being *Civil Law*, where all legal rules must be codified into a law, both written and unwritten. Regarding the Civil Law legal system applied in Indonesia, it will be narrowed down to the criminal law system and civil law.

The legal system of proof adopted in the Criminal Procedure Code is a theory of proof based on negative law (*negatief weetelijk*). This can be concluded from Article 183 of the Criminal Procedure Code which reads: "The judge shall not impose a criminal sentence on a person unless with at least two valid pieces of evidence he obtains confidence that a criminal act really occurred and that the defendant is guilty of committing it".

Evidence can be interpreted as anything that can be used to prove the truth of an event in court. Valid evidence in Article 184 paragraph (1) of the Criminal Procedure Code is: Witness Statements, Expert Statements, Letters, Instructions and Statements of the Defendant. Therefore, outside of the provisions that have been regulated in Article 184 paragraph 1 of the Criminal Procedure Code mentioned above, it cannot be used as valid evidence.

The five pieces of evidence on their journey are not enough to reach out to reveal the increasingly sophisticated and systematic mode of criminal acts. The development of science and technology has also been used to commit crimes so as to cause its own problems in the law of proof, namely the increasingly difficult and more complex efforts to collect concrete evidence. The difficulty of proving this is mainly because the parties who interact do not meet each other physically or the shrewdness of the perpetrators of criminal acts in engineering their evil acts.

In practice, there are several criminal decisions that are not in accordance with the law where the judge interprets the law or makes legal findings based on *circumstantial evidence*. So that the action carried out does not achieve the highest degree of justice and legal certainty in a decision, because it is not based on the minimum requirement of two pieces of evidence that must be met in terms of proof to impose a criminal sentence.

Some examples of judges' decisions that apply *circumstantial evidence* or indirect evidence in the process of resolving criminal cases, are as follows:

1. Decision Number: 1361/Pid.B/2005/PN.Jkt.Pst

In the case of premeditated murder on behalf of the defendant Pollycarpus Budihari Priyatno against the victim on behalf of Munir, in the process of examining the evidence, the public prosecutor presented 14 (fourteen) witnesses, 4 (four) oral verbal witnesses, 3 (three) experts, and 2 (two) witnesses whose BAP was read in front of the trial for proof, while the legal counsel appointed 2 (two) witnesses and 1 (one) expert. However, none of the witnesses testified that they had seen, heard and knew that the defendant had done or acted anything against Munir's victim. The panel of judges at the first level sentenced the defendant to imprisonment for 14 (fourteen) years and the panel of judges at the review level sentenced the convict to imprisonment for 20 (twenty) years.

2. Decision Number: 777/Pid.B/2016/Pn.Jkt.Pst

In the case of premeditated murder on behalf of the defendant Jessica Kumala Wongso against the victim or the name of Wayan Mirna Salihin, in the process of examining the evidence there was no witness who saw Jessica put cyanide poison in the coffee that Jessica ordered for Mirna's victim, and the CCTV footage did not record that the person who put the cyanide poison in the coffee was Jessica. However, the panel of judges has reached its verdict which sentenced Jessica Kumala Wongso to 20 (twenty) years in prison. In the trial, the Panel of Judges analyzed all the evidence presented by the Public Prosecutor and considered the expansion of evidence by using the theory of proof based on the law in a negative manner (*Negatief Wettelijke Bewijstheorie*) with a combination of the judge's conviction for logical reasons (*conviction rais onnee*).

The basis of the judge's decision is the doctrines of legal experts who state that in such a case or circumstance (the absence of eyewitnesses who saw when the poison was added to the victim's drink) then indirect evidence can be used. Based on this, the judge should not impose a criminal sentence on a person except with at least two valid pieces of evidence based on those listed in the Criminal Procedure Code, so the question is whether the legal force of *the circumstantial evidence* used in deciding a criminal case is.

Didik Endro Purwoleksono, explained that there is a difference in the theory of proof based on belief for logical reasons where the basis of rejection is the judge's belief and the basis is a conclusion that is not based on the law, but on the experience of the judge, while in the Theory of Proof based on the law negatively the basis of the rejection of the provisions of the law and is based on the provisions of the law that mention it in a limitative way.

Colin Evans divides evidence into two categories, namely direct *evidence* and *circumstantial evidence*. However, in the context of court trials, there is no difference between direct *evidence* and *circumstantial evidence*, but the strength of the proof is very significant. *Circumstantial evidence* is defined as a form of evidence that the judge may consider regarding facts that are not directly seen by the witness.

Current legal conditions:

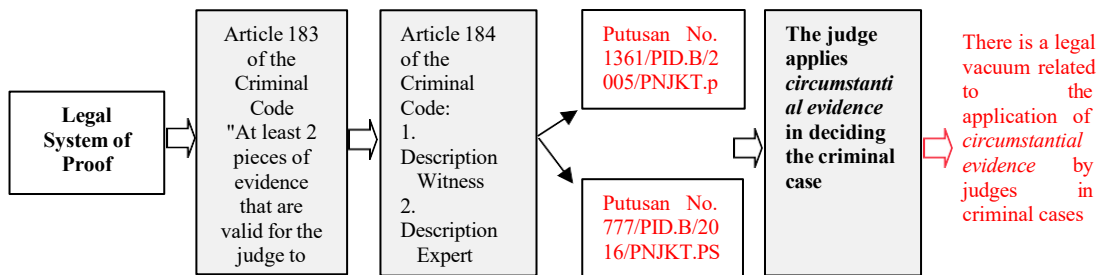


Figure 1: Current Legal Conditions in Criminal Proof

Based on the description above, there are legal issues that can be raised for research in this journal. The formulation of the problem of the legal issue raised is as follows:

1. The philosophy of circumstantial evidence in the perspective of criminal procedural law.

Ius constituendum the application of *circumstantial evidence* in the process of proving criminal cases.

2. Research Method

The type of research used in this writing is the type of normative juridical law research. The type of normative juridical law research is research on problems that have the purpose and purpose of examining the laws and/or regulations that apply in society in particular, as well as literature on theoretical concepts in law and then juxtaposed with the problems discussed in this study. This study analyzes and finds legal rules, legal principles, and legal doctrines to find solutions and answer legal issues in this research.

Problem Approach

According to Peter Mahmud Marzuki, there are several approaches in legal research, namely the statute *approach*, the *case approach*, the historical approach, the *comparative approach* and the *conceptual approach*.

Approaches that are relevant to this legal research are:

1. The statute *approach* is carried out by examining all laws and regulations related to the application of laws and other laws and regulations that contain the principle of proving *circumstantial evidence* in handling criminal cases.

2. A conceptual *approach* is carried out when the researcher does not depart from the existing legal rules. This is done because there are no legal rules for the problems at hand. In using a conceptual approach, researchers need to refer to legal principles. These principles can be found in the views of scholars or legal doctrines related to the principle of proving *circumstantial evidence* in the handling of criminal cases.
3. The case approach is carried out by conducting an analysis of cases related to the issues at hand that have become court decisions that have had permanent force, as follows:
 - 1) Decision Number: 1361/Pid.B/2005/PN.Jkt.Pst
 - 2) Decision Number: 777/Pid.B/2016/Pn.Jkt.Pst
4. This *comparative approach* is carried out by comparing the laws of a country with the laws of one or more other countries regarding the principle of proving *circumstantial evidence* in handling criminal cases.

Source of Legal Materials

This research uses legal materials, namely primary and secondary legal materials with explanations including:

Primary Legal Materials

Primary legal materials, namely primary legal materials consisting of legislation, official records, or minutes in making legislation and judges' decisions. In this case:

- a. the Constitution of the Republic of Indonesia in 1945 and its amendments;
- b. Law Number 1 of 1946 concerning Criminal Law Regulations;
- c. Law No. 8 of 1981 concerning the Criminal Procedure Law (Statute Book of the Republic of Indonesia No. 76 of 1981 and Supplement to Statute Book of the Republic of Indonesia No. 3209);
- d. Law of the Republic of Indonesia Number 5 of 1999 concerning the Prohibition of Monopoly Practices and Unfair Business Competition (Statute Book of the Republic of Indonesia Number 33 of 1999);
- e. Law No. 48 of 2009 concerning Judicial Power (Statute Book of the Republic of Indonesia of 2009, No. 157, Supplement to Statute Book of the Republic of Indonesia No. 5076);

- f. Law No. 3 of 2009 concerning the Second Amendment to Law No. 14 of 1985 concerning the Supreme Court (Statute Book of the Republic of Indonesia of 2009, No. 3).
- g. Law of the Republic of Indonesia Number 1 of 2023 concerning the Criminal Code (Statute Book of the Republic of Indonesia Number 1 of 2023).
- h. Regulation of the Business Competition Supervisory Commission Number 1 of 2019 concerning Procedures for Handling Cases of Monopoly Practices and Unfair Business Competition.

Secondary Legal Materials

Secondary legal materials are all legal publications that are not official documents.

Secondary sources of legal material in writing this journal include literature, opinions of scholars related to what is discussed, articles published in legal journals, print media, and the internet, and legal dictionaries

3. Results and Discussion

The Philosophy of *Circumstantial Evidence* in the Perspective of Criminal Procedural Law

The Facts of Proof of Criminal Cases

Proof comes from the word evidence which means something (events and so on) which is enough to show the truth of something (events and so on) anything that is a sign of an act (crime and so on). Proof = deeds (things and so on) prove; proving (showing) evidence. The word proof (*bewijs*) in Dutch is used in two senses, sometimes it is interpreted as an act by which a certainty is given, sometimes it is also as a result of the deed, namely the existence of a certainty.

According to Eddy O.S Hiariej, giving a conclusion (by quoting Ian Denis' opinion) that: The word *Evidence* is closer to the meaning of evidence according to Positive Law, while it can be interpreted as proof that leads to a process. *Evidence* or evidence (Max. M. Houck's opinion) as providing information in a valid investigation regarding facts that are more or less as they are.

According to R. Subekti, proving is convincing the Judge of the truth of the postulates or postulates presented in a dispute. In the context of criminal law, proof is the core of a criminal trial, because what is sought is the material truth. The evidence has started from the investigation stage to find out whether an investigation can be carried out in order to shed light on a criminal act and find the suspect.

Some of the evidentiary theories from various schools that according to his time are considered to be the right thing, are as follows:

- a. Pure objective proof theory
- b. Pure subjective proof theory
- c. Free proof theory
- d. Theory of proof that is negative according to law (*negatief wettelijke*)

Van Bemmelen states that the purpose of proof (*bewijzen*) is as follows: "*Proof is an attempt to obtain proper certainty by means of examination and reasoning from the judge: 1) Regarding the question of whether a certain event or act has really occurred; 2) Regarding the question of why this event has occurred;*"

M Yahya Harahap stated regarding the proof as follows: "The definition of proof reviewed from the perspective of criminal procedure law means a provision that limits court hearings in an effort to find and defend the truth. Whether the judge, the public prosecutor, the defendant or the legal advisor, each is related to the provisions of the procedures and the assessment of evidence prescribed by law. Judges, public prosecutors, defendants, or legal advisors may not be free to act in their own way in the assessment of evidence. In using evidence, it must not be contrary to the law. The defendant cannot freely defend something that is considered true outside the provisions that have been underlined by the law".

In every examination, whether it is an examination with an ordinary event, a short event, or a quick event, evidence is needed to help the judge make his decision. The valid evidence based on the provisions of Article 184 of the Criminal Procedure Code is: Witness Statements, Expert Statements, Letters, Instructions and Statements of the Defendant. These pieces of evidence are important, therefore the judge may not impose a criminal sentence on a person unless with at least two valid pieces of evidence and based on the judge's belief that a criminal act really occurred and the defendant is the one who committed the act. Therefore, the evidence is very important in finding the perpetrators of the crime and the acts committed by the perpetrators of the crime. Therefore, the following is an explanation for each of these evidences.

The Meaning of Proof in Criminal Cases

The meaning of proof is very diverse, each legal expert has their own definition of proof. Many legal experts define this proof through the meaning of the word prove. According to Sudikno Mertokusumo, proving is called in a juridical sense, namely providing sufficient grounds to the judge who examines the case in question to provide certainty about the truth of the event submitted.

According to Subekti, proving is convincing the judge about the truth of the postulates or postulates presented in a dispute. Based on the definition of these legal experts, proving can

be stated as a process of explaining the actual legal position of the parties and based on the postulates put forward by the parties, so that in the end the judge will draw conclusions about who is right and who is wrong.

The process of proving or proving contains the intention and effort to state the truth of an event, so that it can be accepted by reason for the truth of the event. Proof means that it is true that a criminal event has occurred and the defendant is guilty of committing it, so he must be held accountable. Proof is provisions that contain outlines and guidelines on the manner in which the law justifies proving the wrongdoing charged to the defendant. Proof is also a provision that regulates evidence that is allowed by law and can be used by the judge to prove the alleged offense.

Proof is provisions that contain outlines and guidelines on the ways in which the law justifies the wrongdoing charged to the defendant. Proof is also a provision that regulates evidence that is allowed by law and can be used by the judge to prove the alleged offense.

Conviction In Time or the System of Proof Based on the Judge's Conviction Alone This system adheres to the teaching that whether or not you are guilty of the act charged, depends solely on the judge's assessment of "belief". So whether the defendant is guilty or convicted or not depends entirely on the judge's conviction. Conviction In Raisone or a System of Proof Based on the Judge's Conviction on Rational Grounds.

The Conviction In Ralsone *evidentiary system* still prioritizes the judge's conviction assessment as the sole reason for punishing the defendant, but the judge's conviction here must be accompanied by real and logical judge's consideration, accepted by sound reason. The judge's conviction does not need to be supported by valid evidence because it is not hinted, even though the evidence has been stipulated by law, the judge can use evidence outside the provisions of the law. What needs to be explained is that the judge's conviction must be explained with logical reasons.

Positive Wettelijks theorie or the System of Proof Based on Positive Law is that this system is placed face to face with the system of proving conviction in time, because this system adheres to the teaching that the guilt of the defendant is based on the absence of legal evidence that can be used to prove the guilt of the defendant. The wettelijk positive system is very ignorant and does not take into account the judge's conviction at all.

Negative Wettelijk or the System of Proof Based on Negative Law is where a judge may not impose a criminal sentence on a person unless with at least two valid pieces of evidence he or she is convinced that a criminal act really occurred and that the defendant is guilty of committing it. If viewed from the context of Article 183 of the Criminal Code, it can be concluded that the Criminal Code in Indonesia has a *negative proof system*.

Purpose of Proof of Criminal Cases

According to Munir Fuady, the system of proof in the Criminal Procedure Law is almost uniform in any country that the burden of proof is placed on the shoulders of the Public Prosecutor.

The purpose of proof is to provide an overview of the truth of an event, so that from that event the truth that can be accepted by reason can be obtained. Proof means that it is true that a criminal event has occurred and the defendant is guilty of committing it, so he must be held accountable.

The purpose and purpose of proof for the parties involved in the trial examination process are as follows:

- a. For the Public Prosecutor, Proof is an attempt to convince the Judge, namely based on the available evidence, to declare a defendant guilty according to the letter or defect of the indictment.
- b. For the defendant or legal counsel, proof is the opposite attempt to convince the judge, namely based on the available evidence, to declare that the defendant is acquitted or released from the lawsuit or mitigate his sentence. For this reason, the defendant or legal adviser, if possible, must submit evidence that is favorable or mitigating to his party, Usually the evidence is called the opposite.
- c. For the Judge on the basis of this evidence, namely the existence of evidence in the trial, either from the public prosecutor or legal advisors/defendants, the basis is made to make a decision.

According to Djoko Sarwoko, the proof system aims to:

- a. to find out how to put a result of proof on the case being examined.

- b. The results and the strength of proof that can be considered proportionate enough to prove the guilt of the defendant.
- c. Whether the completeness of the evidence with evidence is still needed for the judge's confidence.

***Ius Constituendum* Application of Circumstantial Evidence in the Process of Proof of Criminal Cases**

Legal science recognizes two types of law, namely: *ius constitutum* which means the law that is currently in force or the law that has been established and *ius constituendum* which means the law that is aspired to or dreamed of. According to Sudikno Mertokusumo, based on the criteria of the time of enactment, the law is divided into 2 (two). First, *Ius Constitutum* is a law that applies today and/or a law that has been established. Second, *Ius constituendum* is a law that still needs to be established; a law that will come and/or a law that aspires (in the future). According to Soerjono Soekanto and Purnadi Purbacaraka, that *Ius Constituendum* changed to *ius constitutum* by:

1. Replace a law with a new law (the new law was originally a *draft ius constituendum*).
2. Amendments to existing laws by incorporating new elements (new elements were initially in the form of *ius constituendum*).
3. Interpretation of laws and regulations. The interpretation that exists today may not be the same as the interpretation of the past. The interpretation in the present day used to be *ius constituendum*.
4. The development of the doctrine or opinion of a leading legal scholar in the field of legal theory.

The difference between *ius consitutum* and *ius constituendum* is placed on the time factor,, namely the present and the future. In this case, law is interpreted as a legal system that is identified with the term positive law. The tendency of this understanding is very strong, because certain circles are of the opinion that "After promulgation, *ius consituendum* becomes *ius constitutum*".

Before describing *the ius constituendum* of the principle of *circumstantial evidence* in handling criminal cases, first describe the condition of *ius constitutum* related to the problem of the

application of circumstantial evidence in the consideration of several criminal verdicts.

Current Legal Conditions

The system of proof according to the law negatively (*negatief wettelijke bewujs theorie*) has elements in the form of at least two pieces of evidence, while the element of judge's conviction is only a complementary element, so in determining whether the accused person is guilty or not, his guilt must be proven by at least two types of evidence as stated in the Criminal Procedure Code "the judge may not impose a criminal sentence on a person except If with at least two valid evidences, he obtains confidence that a criminal act really occurred and the defendant is guilty of committing it.

Valid evidence based on the Criminal Procedure Code, which basically is:

1. Witness Statement
2. Expert Testimony
3. Letter
4. Instructions
5. The defendant's statement.



Figure 2 : Concept of Proof of the Criminal Code

The evidence of the examination based on the provisions of Article 42 of Law of the Republic of Indonesia Number 5 of 1999 concerning the Prohibition of Monopoly Practices and Unfair Business Competition (hereinafter referred to as "Law No. 5/1999"), is:

1. Witness statements;

2. Expert testimony;
3. Letters and/or documents;
4. Instructions;
5. Information of business actors.

The evidence of the examination is based on the Regulation of the Business Competition Supervisory Commission Number 1 of 2019 concerning Procedures for Handling Cases of Monopoly Practices and Unfair Business Competition (hereinafter referred to as "Perkom PPU No.1/2019"), which in essence is:

1. Witness statement
2. Expert testimony
3. Letters and/or documents
4. Instructions
5. Information of business actors.

In the process of examining the evidence of several criminal cases, such as the case of premeditated murder on behalf of the defendant Pollycarpus Budihari Priyatno against the victim on behalf of Munir and the premeditated murder on behalf of the defendant Jessica Kumala Wongso against the victim or Wayan Mirna Salihin, the judge in his consideration decided the case based on *circumstantial evidence*), where in the case there was no recording and/or witness who heard, saw and knew that the defendant committed premeditated murder against the victim.

Deciding or imposing a criminal sentence on the case, the judge's conviction should be supported by at least two valid pieces of evidence in accordance with Article 184 paragraph (1) of the Criminal Code. Considering this, it should be known that how to consider the judge's confidence in deciding a case without direct evidence with the infulfillment of two valid pieces of evidence but based on indirect evidence.

The judge must absolutely decide on the case or the reason for proving the confession. It is never possible to conclude completely, with what the Judge decides has fully fulfilled the purpose of certainty and also certainty of justice. Law also cannot be identified with justice, because law is a means while justice is an end.

The Law of Aspiration

The existence of a legal void (not regulated) of *circumstantial evidence* as a valid evidence in the Criminal Procedure Code provides legal inadequacy and invalidity to the victim, the defendant, the community and the judge to impose a criminal sentence. Where the judge is in an uncertain position when faced with a case where there is no strong evidence (the witness did not hear, see and know that the criminal act was committed and the defendant did not admit the act) to believe that the criminal act committed and/or was accused by the general prosecutor in the trial, so that with this position the judge uses *circumstantial evidence*) as a basis for consideration and conviction to impose a criminal sentence on the defendant, even though the criminal sentence is not in accordance with the existing legal certainty.

Thus, the legal advice in this dissertation research is to provide a legal input related to the concept of *circumstantial evidence* in handling criminal cases as additional valid evidence in accordance with the criminal procedure law. Where the judge uses indirect evidence when there is no direct evidence that indicates the criminal act, the judge must consider and assess from the aspects of conditions, history, position of the perpetrator and victim as well as the influence and/or consequences of the criminal act.

That from the consideration of these aspects, it must be mutually consistent, logical, definite, and related to the facts and evidence at trial. In addition, it is carried out with an objective, careful and careful analysis in accordance with the principles of criminal procedure law, so as to be able to explain the causal relationship of criminal acts and obtain conclusions that are irrefutable by the existing evidence.

This concept can later provide a legal solution to the void in the norm of proof by applying the principle of *circumstantial evidence* to be a reference for judges in criminal proceedings as an additional valid evidence.

4. Conclusion

The conclusions that can be drawn from this paper are:

1. The philosophy of proving *circumstantial evidence* in the perspective of criminal procedural law is a form of evidence that can be considered by the judge regarding the absence of facts that are not directly seen by witnesses, to provide an overview of the

truth of an event, so that from the event the truth that can be accepted by reason can be obtained. However, *circumstantial evidence* is not the same as Clues because clues must be obtained from the facts at trial in the form of witness statements, letters, and statements of the defendant.

2. *Ius constituendum* The application of *circumstantial evidence* in the process of proving a criminal case is to give the judge the authority to use *circumstantial evidence* in the criminal proof process as an additional valid evidence in the criminal sentencing. The concept of *circumstantial evidence* in the perspective of criminal procedure law is that the judge in using indirect evidence must consider and assess from the aspects of conditions, history, position of the perpetrator and victim as well as the influence and/or consequences of the criminal act, which must be mutually consistent, logical, definite, and related to the facts and evidence at trial in accordance with the principles of criminal procedure law so that they are able to explain the causal relationship criminal offenses and get a conclusion that is not disputed by the existing evidence. With these reforms, it is intended that there will be a criminal imposition that is appropriate, fair and rational with the existing facts.

Advice

From the explanation and discussion in the previous chapter, the author puts forward the following suggestions:

1. It is necessary to include the concept of *circumstantial evidence* in the Criminal Procedure Code (KUHAP) as additional valid evidence, so that it can be used as a legal basis by the judge in deciding a criminal case to prove the truth of an event in court.
 - a. It is necessary to include *circumstantial evidence* as additional examination evidence in the Law on Judicial Power and/or Law Implementation Regulations in order to be a guideline for the implementation of criminal punishment because *circumstantial evidence* is still not a valid evidence.

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