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Application Of Fatwa In Islamic Banking Cases In Indonesian Court

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Abstract

Consumers of Islamic banking services generally expect that the operation of Islamic banking is in accordance with Islamic sharia, including matters involving the trials of banking cases in court. Therefore, this study is conducted to examine the extent of application of the DSN-MUI fatwa contained in OJK regulations in judges' decisions with regards to Islamic banking cases, as well as to examine the basis of judgment in decisions involving Islamic banking cases. In addition, this study also examines the implications of the judge's decision of not applying the fatwa on the development of Islamic banking in Indonesia. This study uses a qualitative approach involving court case documents as well as in-depth interviews with 12 respondents consisting of legal, banking, and Sharia experts. The findings of this study show that the basis used by Supreme Court judges in making decisions related to Islamic banking cases is guided by the achievement of legal purpose, i.e., by looking at the basis of justice, the basis of legal certainty, and the basis of legal usefulness. However, in the case of Islamic banking, there are two reasons for judges not applying the fatwa as contained in the OJK Regulation in court. The first reason is the substance of the law and the second reason is the legal structure in Indonesia. In order to strengthen Islamic Sharia law in the Indonesian legal system, the establishment of a Sharia economic institution and court system is necessary for ease of application and use of fatwas in addition to optimizing the opportunity to integrate the roles of OJK and DSN-MUI in the institution and court system.

Keywords: Fatwa, Islamic Banking Cases, Court

Introduction

This study is carried out to examine the application and use of fatwas in court decisions related to Islamic banking in Indonesia. In addition, it also examines the impact of court decisions on the development of Islamic banking institutions in Indonesia, especially from a legal perspective. The following paragraphs describe the background of the study.

Economic development in most countries where the majority of the population is Muslim with abundant natural resources is currently seen to be lagging in economic development. For example, economic growth in Islamic countries that are members of the Organization of Islamic Cooperation (OIC) is still low compared to developed countries as 27.2 per cent of the total population still lives with a per capita income below 1.25 USD per day. According to Irfan Syauqi Beik and Laily Dwi (2016), this happens due to the concept of economic development that is not based on Islamic principles. Abdullah A. Husain at-Tariqi, (2004) asserted that economic development that is not based on Islamic principles (capitalism and socialism) has failed to demonstrate justice in the economy. This is also supported by Haliza Abdul Rahman (2018) who states that one of the causes of economic development failure in developing countries is due to elements of development that are not aligned with the values of religion, culture and local wisdom. Therefore, improvements need to be continued by paying attention to development that is in line with local religious and cultural values and in line with the Qur'an and Sunnah in various sectors of the economy.

One of the most important sectors that needs to be given attention in the development of the Islamic economy is Islamic banking. This is because financial institutions and banking activities play a significant role in driving the development of a country (Khotibul Umam, 2017). In fact, banking is also one of the agents of development. At present, the development of Islamic banking in developing countries is seen to continue to grow rapidly in parallel with the increase of investors from Middle Eastern countries and they are indeed committed to practising Islamic values in economic activities (Iyan Faniyah, 2017).

Economic growth and Islamic banking are expected to form synergies in strengthening the economic structure and financial markets of the world in the present and in the future (Dody Budi Waluyo, 2018). Now, approximately 75 countries in the world have applied Islamic economic and financial systems, across Asia, Europe, the U.S. and Australia (Nur Kholis, 2008). In the

Middle East and Asia, there are more proactive efforts to develop Islamic banking and finance. in addition, Islamic banking institutions are also trying to work with corporate companies in Western and European countries in an effort to promote Islamic banking and finance in the region (Farrukh Shahzad, 2014).

In Indonesia, the development of Islamic banking can be seen from the increase in the number of assets from year to year. Data quoted from OJK (2015) show that the total Islamic banking assets are as much as Rp. 213.42 billion and increased to Rp. 316.69 billion in December 2018.

Table 1 Development of Total Assets, Office Network and Islamic Banking Workforce

Indicator	2015	2016	2017	2018
Sharia Commercial Banks				
Total banking assets	213,423	254,184	288,027	316,691
Number of banking companies	19	13	13	14
Number of banking company offices	1,990	1,869	1,825	1,875
Total banking workforce	51,413	51,110	51,068	49,516
Sharia Business Unit				
Total banking assets	82,839	102,320	138,154	160,636
Number of banking companies	22	21	21	20
Number of banking company offices	311	332	344	354
Total banking workforce	4,403	4,487	4,678	4,955
Total assets of BUS and UUS	296,262	356,504	424,181	477,327
Number of banking companies	41	34	34	34
Number of offices	2,301	2,201	2,169	2,229
Total workforce	55,816	55,597	55,746	54,471

Source: Sharia Banking Statistics (2018)

The growth of Bank Islam has seen an annual increase in the number of customers. At the same time, this has also resulted in an increase in the number of cases related to Islamic banking in court. The types of Islamic banking cases that arise usually involve cases such as Musyarakah financing and Murabahah financing cases. According to the report of Badilag MARI (Supreme Court's Religious Judiciary) in December 2015, Islamic banking cases registered in the courts at the national level were as many as 6 cases which later rose to 12 cases in January 2016 (Amran Suadi, 2017:12).

This study is of the view that in the legal system in Indonesia, the settlement of Islamic banking cases should be based on Islamic principles in accordance with the MUI fatwa. However, fatwas in Indonesia are not binding on any party to implement them, including OJK. This further leads to a number of MUI fatwas not taken by the OJK in establishing regulations related to Islamic banking in Indonesia. This is because MUI is not a government agency with the required authority. In addition, OJK regulations (which is the banking government body in Indonesia) can also be waived by judges in Islamic banking cases. This happens because of the principle of judicial independence where judges are free to make choices in case decisions (Firman Floranta Adonara, 2015). However, there is no denying that there are situations where judges still refer to the OJK regulations based on the MUI fatwa in the trials of Islamic banking cases, especially for cases that are clearly stated in the OJK regulations.

However, if the court does not refer to the fatwa consistently in discussing Islamic banking cases, it is feared that this may have an impact on the development and development of Islamic banking institutions. This is because the Islamic financial system is different from the conventional financial system. The inconsistent use of Sharia law as well as the use of civil law will have negative implications on the image and credibility of Islamic banking (Rihab Grassa & Kaouthar Gazdar, 2014).

In short, the fatwa contained in the OJK regulations should be one of the references used by judges in making decisions related to Islamic economic cases in Indonesia. OJK Regulation feared that it will have implications for the development and development of Islamic banking institutions in Indonesia. This is also supported by Law No. 21 (2008) related to Islamic banking in the general provisions of Article 1 (Number 12) which states that "Islamic principles are principles of Islamic law for all banking activities that are based on the fatwa of an institution that has the authority to gazette fatwas in the Islamic field related to the settlement of cases Islamic economy that must use Islamic principles". In fact, the development of banking institutions is highly dependent on customer trust in the service products offered (Nazori Majid, 2011). Thus, the mechanism for resolving Islamic banking cases in court and the consideration of court decisions that do not fully apply Islamic fatwas is seen as one of the unfavourable factors for Islamic banking institutions in Indonesia in increasing customer trust in the service products offered (Andi Wahyudin Jalil & Yani, 2021).

Methods

The research methodology used is qualitative in nature which includes the following stages: data collection, information analysis, and finally achieving the purpose of the study. Data are sourced from the results of secondary and primary data collection. The collection of secondary data in this study aims to achieve the first and second objectives of this study, i.e., to examine the basis used by judges in making decisions in Islamic banking cases in the Court as well as to analyze the judge's reasoning in considering the decisions of Islamic banking cases. The collection of primary data is done through semi-structured interviews, which are interviews that are conducted using a formal approach but at the same time provide space for freedom in conversation. In a semi-structured interview, the main topic or theme of the conversation, the agenda or schedule, and the rules of communication are determined before the interview is conducted. Qualitative data of this study is analysed using content analysis, data validation and validity processes, and research findings to ensure that the data collected and analysed are accurate, consistent, and reliable.

Results and Discussion

The Basis of Court Judges in the Consideration of Islamic Banking Case Decisions

Court decisions cannot ignore basic rights and justice because this will lower the public's trust in law enforcement actions (Syarif Mappiasse, 2015: 20). In this study, court decisions are understood as all decisions that have been read in front of the court and have the force of law by the Supreme Court or the Religious Court.

The resolution of Sharia economic disputes has been issued by the Supreme Court Law (Perma) Number 14 of 2016 on Procedures for the Resolution of Shariah Economic Matters. Based on the Perma, matters in the field of Sharia economics include Sharia banks, Sharia microfinance institutions, Sharia reinsurance, Sharia obligations, Sharia futures, Sharia securities, Sharia financing, Sharia pawning, Sharia financial institution retirement funds, Sharia businesses, including waqf, zakat, infak, alms, which are commercial in nature, both contentious and voluntary. Judges in religious courts as enforcers in deciding Sharia economic matters based on the Religious Court Law and Constitutional Court Decision Number 93/PUUX/2012. Included in this, is the case of Islamic banking.

Overall, it is found that the decisions of Islamic banking cases that have been reviewed in this study generally follow the legal basis according to the power of the Supreme Court which includes three bases as detailed in Section 4.2, namely the basis of justice, the basis of legal certainty and the basis legal benefits.

In order to analyse the basis used by judges in their decisions, this study has also used Gustav Radburch's theory on the purpose of the law (Satjipto, 2012:20). He stated that the purpose of the law must be orientated on three values that should be the main concern to achieve the purpose of the law. The three purposes are: 1) justice; 2) legal certainty; 3) legal benefits.

According to Radbruch, legal certainty is the main demand in a law. This is important for the law to be positive or in other words to apply with certainty. A positive law must be obeyed. Therefore, the law needs to have certainty or in other words the law cannot change. A law that has been enacted will bind everyone and its nature is permanent until the law is withdrawn.

These three legal purposes will be the framework of analysis in examining the basis used by judges in examining and adjudicating matters, namely the basis of justice, the basis of legal certainty and the basis of expediency. In this study, seven cases are analysed. All of these cases are Islamic banking cases in the Supreme Court involving agreements in the form of Mudharabah, Murabahah, Musyarakah and Ijarah from 2009 to 2017:

1. Case No. 48 PK/Ag/2009 (Tuan H. Effendi bin Rajab; Dra Psi. Fitri Effendi binti Munir Against PT. Bank Bukopin Pusat i.e., a Murabahah case)
2. Case No. 410 /K/Ag/2014 (Mr. Budi Legowo, SP; Akhadina Nurhayati Agustien Against PT. Bank Tabungan Negara and Pusat Koperasi Sharia BMT Amratani i.e., a Mudharabah case)
3. Case No. 569 K/Ag/2015 (Muchammad Wachyono, S.H. and PT. BPRS (Bank Perkreditan Rakyat Sharia) i.e., an Ijarah case).
4. Case No. 213 K/Ag/2016 (Mr. Hariyanto Against PT. Bank BNI Sharia KCP Mikro Kota Jambi i.e., a Murabahah case)
5. Case No. 684 K/Ag/2016 (Mr. Sudiro Atmaja Against PT. Bank BNI Sharia i.e., a Murabahah case).

6. Case No. 179 K/Ag/2017 (Hajjah Andi Syamsiar and PT. Bank BNI Islam i.e., a Murabahah case)
7. Case No. 624 K/Ag/2017 (Yusliana Dalimunte against PT. Bank Sumut Sharia i.e., a Musyarakah case) - contract Number 120/KCSY02-APP/MSY/2011

This study generally aims to identify the basis used by supreme court judges in making judge decisions related to Islamic banking. After reviewing the cases, it is evident that the main principle used by judges is guided by the achievement of legal goals. This is based on research findings that one of the main principles used by judges is the principle of justice. Justice involves the application of the law fairly and objectively to achieve the desired legal goals. Judges consider the facts and evidence in a case and apply the law by considering justice and fairness in their decisions.

In addition, the judge also refers to the principle of legal certainty. This principle demands that the law should be applied consistently and predictably so that the public can rely on the law and know the consequences of their actions. Judges must make decisions that are consistent with the applicable legal principles to achieve the goal of legal certainty.

Furthermore, the judge is also guided by the principle of expediency. This principle requires judges to consider the balance between individual rights and the general interest or social goals that are to be achieved through the law. The judge must ensure that the sanction or order given is proportionate to the violation committed or the need to protect the public interest. Therefore, the main basis used by judges in judgment is the basis of justice, the basis of certainty and the basis of expediency.

Reasons for Judges Not Applying Fatwa in Islamic Banking Cases in Court

In general, this study found that judges, when deciding a dispute, have used the principle of judicial independence. The same applies in Islamic banking cases, where the principle of independence of judgment was applied, that is, the judge is free to make a choice in the decision of the case (Firman Floranta Adonara, 2015). In the context of this study, the principle of the judge's independence in deciding a case has been analyzed to identify the reasons for judges not applying fatwas in Islamic banking cases.

A court decision is a decision pronounced by a judge in a conference that is open to the public in his position to complete or decide the trial of a case (Ridwan Syahrani, 2000: 83). According to Article 25 of Law No. 4 of 2004 regarding the power of the court, all court decisions must be based on the judge's reasoning, the principles in the legislation of certain articles (articles) from the rules related to the examined case and use the unwritten law as a basis for considering the decision in each trial in court.

Every court decision should lead to the implementation of a fair law that guarantees the protection of fundamental rights and fair justice. Court decisions cannot ignore basic rights and justice because this will reduce the public's trust in law enforcement actions (Syarif Mappiasse, 2015: 20).

Overall, this study concludes that, with reference to the perspective of law enforcement, judges do not use the fatwa that has been set by the National Sharia Council as outlined in the OJK regulations in Islamic banking cases in Court. Arguments regarding the application and use of this fatwa can be analysed based on the law enforcement theory by Lawrence Friedmann which is the legal substance approach and the legal structure approach.

Thus, there are two reasons for judges not applying fatwas in Islamic banking decisions, namely: the first reason is the substance of the law. This means that the judge does not apply a fatwa because the examined case does not require a fatwa, or the required fatwa does not exist yet. This is related to the procedure in the settlement of disputes that cannot be found in any source of fatwa because there is no fatwa so in the procedural case settlement using the general rules in the Civil Law Code, not using fatwa.

When the case was brought to the judge who then examined it further, the judge found that the reason and cause of the dispute were due to the OJK regulations that have not yet been outlined in that regard. This is because the OJK regulations only discuss the substance but do not explain the procedures for the implementation of the regulations. This sometimes causes the occurrence of obstacles in deciding the matter and finally, the judge does not apply the fatwa as contained in the OJK regulations but uses the procedural law that applies and is regulated in civil relations (Civil Code) which is general or in accordance with the prevalence only.

The second reason the judge did not apply the fatwa in Islamic banking decisions was based on the legal structure. Judges as enforcers of the law have the freedom to judge either by adopting fatwas or simply listening to the views of officials who are members of the court hearing. In the case studied, there is a judge's discretion in presenting an expert in the field of jurisprudence related to the procedural settlement of Islamic banking cases. The absence of a fatwa on procedural matters can be compensated with the opinion of the experts involved in court hearings. Based on the legal doctrine, in short, discretion is the freedom of action or the freedom to take decisions by institutions or government administrative officials based on their own opinion, which is also complementary to the basis of legitimacy. Such a law usually applies when the existing law is not capable (non-existent or unclear) of solving problems that appear suddenly.

In the context of law enforcement, progressive legal thinking can provide a wide space for law enforcers; in this case, refers to the police and prosecutors to exercise discretion. As explained above, the discretion is done with deep consideration with three conditions that are in the interest of the public who are involved in important and urgent issues, still within the jurisdiction of the judge, and do not violate the general principles of good government. The main goal is to get substantive justice.

The judge's freedom of action in deciding a matter is also seen in the case of Islamic banking. The findings of this study show that there are differences in the decisions of judges. This is in line with the principle of the judge's independence in giving decisions on the matters he judges. The findings of this study and the fatwa related to the procedural settlement of Islamic banking cases are important so that they can be a guide for courts and judges.

Islamic Banking Cases that are not based on Fatwas and Implications for the Development of Islamic Banking in Indonesia

The findings of this study have three implications for the development of Islamic banking in Indonesia as a result of the settlement of Islamic banking cases that are not based on fatwa, namely, i) affecting the public's trust in Islamic banking; ii) affecting the ability of Islamic banking to attract more investors and iii) affecting the role of Islamic banking in supporting the country's economic development.

Islamic banking cases in court that are settled conventionally will cause the public to think that conventional banking is more reliable than Islamic banking. This is because errors or mistakes in the Islamic banking system cannot be separated from the failure of the judge to give a decision that is in accordance with the principles of Islamic Sharia which prioritizes the principles of Sharia, which is the principle of Islamic law in banking activities based on fatwas issued by institutions that have the authority to determine fatwas in Sharia field.

Public confidence in the Islamic system is very important to ensure the development of Islamic banks in Indonesia (Muhammad Hikmah, 2017). The increase in Islamic banking cases gives a negative perception to the community and this certainly has implications for the growth of Islamic banking institutions. It is undeniable that the development of the banking system today depends on the confidence of investors and consumers.

The increase in Islamic banking cases in the long term also has implications for the growth of Islamic banking in Indonesia. This is because banking growth depends on the efficiency of the system in all forms of business, especially in the era of development and transformation of digital technology (Oktaria Ardika Putri & Sri Haryanti, 2022), where consumer knowledge is key in product choice (Nur Famiza et al., 2017).

The Sharia bank is a bank that operates based on the Quran and hadith. This means that Islamic banks are a form of ethical and moral financial services based on principles and sources of Sharia (Islamic teachings). An important element of Sharia is the prohibition of any element of riba'. Other elements include an emphasis on fair contracts, the existence of a link between productivity and finance, a ban on profits from gambling activities and various other elements of uncertainty. Although the products offered by Islamic banking are adapted from the products offered by conventional banking, they are differentiated in the aspects of implementation and the contracts used. Likewise, when there is a dispute that cannot be resolved through mediation by the disputing parties, it needs to be brought to court. Consumers, as one of the parties involved, certainly expect that Islamic principles and laws are in the trial process.

However, the reality is that in all the cases analysed in this study, the trial process still uses the principles of conventional banking solutions. The law applied is not specifically based on Islamic banking dispute resolution. There is no different treatment by the judge when adjudicating the trial in court. This inevitably causes the public's perception as users of Islamic banking to be sceptical about the resolution of cases that still use conventional law. This is likely to cause the community's interest in using Islamic banking in their banking activities to decrease.

The increase in cases of disputes in Islamic banking in Indonesia as well as disputes that are not resolved through Sharia principles may give a bad impression to investors who are interested in investing in Indonesia, especially among Muslim investors. In addition, the slow growth of banks can be attributed to a decrease in the amount of capital, and an increase in problematic financing that causes a decrease in profits (Ida Syafrida, 2015). From the economic perspective of investment, there are several factors that affect investment in Islamic banking institutions, namely the application of Islamic principles, the stability of the profit level, the level of profit sharing, the difference between the level of profit sharing and the level of revenue, the number of branches and the number of users who make transactions.

Sharia principles in Islamic banking are relevant to be applied starting from the manufacture of Islamic banking products, the service process and the application of Islamic principles in the event of a dispute because this is what distinguishes it from conventional banking. This study found that customer confidence affects investor confidence. Investor confidence has an impact not only on the development of banking but also on the economic development of a country. Another thing that is of concern to those who see that Islamic banking cannot support the development of the country's economy if Islamic banking cannot grow as well as conventional banks. According to Amran Suadi (2017), this stems from reduced consumer interest because the pattern of dispute resolution in Islamic banking cases is considered not based on Sharia principles.

A bank is a service institution that collects funds in the form of savings from the community and then channels them to the community in the form of financing to improve the community's standard of living. Therefore, banks have a very important and strategic role in supporting the growth and development of the country's economy. Therefore, the growth of banks that depend on the confidence of the public and investors is crucial.

Based on the case studies and analysis obtained from the research findings, in summary, there are two reasons for judges not using fatwas in considering the decision of Islamic banking cases, i.e., the reasons of legal substance and legal structure. These reasons are evident in the results of consideration in the judge's decision in several Islamic banking matters. This study found that the Islamic banking cases that do not use fatwas in the consideration of judges' decisions are considered not based on Sharia, thus negatively impacting the confidence of consumers and investors. Consequently, this will inhibit the growth of Islamic banking in Indonesia. The failure of Islamic banking in getting wide attention and support from consumers can be the cause of the lack of interest of investors in making investments. This in turn has an overall impact on the role of Islamic banking in moving the wheels of the country's economy.

Conclusion and Perspective

The growth and development of Islamic banking in Indonesia has a great potential to develop to a higher level compared to Islamic banking in other countries, especially in the Southeast Asian region. With a large Muslim population in Southeast Asia, Indonesia has high potential to strengthen the Islamic banking sector in the region. However, this needs to be supported by the Islamic legal system in Indonesia. This study shows that the legal system involving Islamic banking in Indonesia still has gaps that need to be improved, particularly the judge's consideration in making decisions related to Islamic banking.

The resolution of Sharia economic disputes is as stipulated in the Supreme Court Law (Perma) on Procedures for the Resolution of Shariah Economic Matters. Based on Perma, matters related to the Sharia economy involve Sharia banks; Sharia micro-financial institutions, Sharia future securities; as well as insurance, securities, financing, Sharia pawning, retirement funds and Sharia-based businesses; including endowments, almsgiving, waqf, and zakat that are commercial in nature, whether contentious or voluntary matters can be implemented in the Religious Court. A judge at the level of the Religious Court, he is the enforcer in deciding Sharia economic matters based on the Religious Court Law and the Constitutional Court Decision Number 93/PUUX/2012. Included in this, is the case of Islamic banking whereby the judge's basis in making decisions related to Islamic banking is based on the legal basis which is according to the power of the Supreme Court judge i.e., three principles namely the principle of justice, the principle of legal certainty and the principle of legal expediency.

From the cases that have been reviewed, it is evident that the matter that is disputed in the case of Islamic banking is not about whether financing has met the principles of Sharia or otherwise. The concern lies within the implementation of Sharia financing at the time of payment failure or breach of the agreement. When the case was brought to the judge with further examination, it was found that the reason and cause of the dispute was due to the fatwa of the Majelis Ulama Indonesia which was included in the OJK regulations but not yet outlined. This is because the OJK regulations only discuss the substance but do not explain the procedures for the implementation of the regulations. This sometimes causes the occurrence of obstacles in deciding the matter and finally, the judge does not use the fatwa in the OJK regulations but uses the procedural law that applies and is regulated in civil relations (Civil Code) which is general or in accordance with the prevalence.

Sharia banking cases in court which are resolved through a conventional approach will cause the public's perception of Islamic banking to be the same as conventional banking. In addition, mistakes or errors in the Islamic banking system are also related to the failure of judges to give decisions that are in accordance with Islamic Sharia principles in banking activities. OJK needs to make regulations that contain fatwas regarding procedures in settling Sharia banking cases.

Theoretically, the basis used by Supreme Court judges in making decisions related to Islamic banking cases is based on the achievement of legal goals, which is by looking at the basis of justice, the basis of legal certainty and the basis of legal usefulness. The basis of judges in making decisions based on the principles of justice applied is seen in parallel with the concept of economic justice in Islam. Economic justice in Islam demands a balance between two parties, namely oneself and others. In other words, every economic activity, such as banking activity, should be fair so that no party loses and no one is oppressed (Indra Sholeh Husni, 2020). This can also be guaranteed through the application of the principle of legal certainty and the principle of legal usefulness.

However, the use of fatwas in the settlement of Islamic banking cases cannot be implemented comprehensively. Although this does not completely negate the principle of justice as defined in the Islamic economy, but from another point of view, this matter is capable of causing doubts, doubts, and public confidence about the justice that has been achieved. This is because the community sees the basis of Islamic banking as synonymous with Islamic fatwa and Sharia guidelines.

Although from the aspect of the basis of judgment and the freedom of judgment, the three foundations are 1) the basis of justice; 2) the basis of legal certainty; and 3) the basis of legal expediency, and these are used by Supreme Court judges. This proves that the judges of the Supreme Court have acted within the limits of their authority, but in the case of Islamic banking, the judges were inclined to use the Civil Code as the substance of the law instead of fatwas, except in the sixth case. Therefore, this study is of the view that the emphasis that is more inclined to the basis of justice is to implement the law that lives in the community (i.e., a fatwa in the case of Islamic banking) which has become common even though it is not in the legislation.

In the context of law enforcement theory, judges in giving decisions on Sharia banking cases look at the legal substance, legal structure, and legal culture. In Indonesia, judges only look at the legal substance and legal structure.

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