

# Penal Mediation as a Solution Alternative Case Crime of Sand Mining (Case Study in East Java)

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## Abstract

"Environmental damage due to criminal acts of sand mining has become a critical issue to be addressed for human life. As for the law enforcement process in the criminal justice system are often very complicated, take a long time and high costs, also to bring justice formal / procedural to the justice seekers. So that needs alternative ideas criminal case settlement through mediation penal sand mining in the effort or for the purpose of mutual win-win solution or a mutually acceptable solution. "

**Keywords:** Penal mediation, sand mining, environmental damage.

## I. Introduction

The development of environmental law can not be separated from the worldwide movement to give greater attention to the environment, the fact that the environment has become a problem that needs to be tackled together for survival in this world<sup>1</sup>. Formal environmental issues new world concern after the implementation of the Conference of the United Nations (UN) on the environment, which was held between June 5 and June 16, 1972 in Stockholm Sweden (United Nations Conference on the Human Environment).

Conference successfully gave birth to an international agreement in tackling environmental issues, and develop environmental law at national, regional, and international levels.

The basic rules underlying the development and protection of Indonesian environment contained in the Preamble of the Constitution of the Republic of Indonesia Year 1945 in paragraph 4, which reads:

"Later than it was to form a Government of the State of Indonesia that protect the entire Indonesian nation and the entire homeland of Indonesia and to promote the general welfare, educating the nation and participate in implementing world order based on freedom, lasting peace and social justice, then drafted Independence National Indonesia which formed in an arrangement of the Republic of Indonesia the sovereignty of the people based on: Almighty God, just and civilized humanity, the unity of Indonesia, democracy led by the wisdom of policies in social deliberation for all Indonesian people ".

National development is ideal and factual has placed the environment as an integral and fundamental part in the Development forward movement. However, according to David Silalahi, underdevelopment Indonesia have caused the low quality of the environment. Utilization of natural resources in the construction must be used rationally, so as to benefit as much as possible and not detrimental to the interests of future generations. This means, the development is a principle of conservation of natural resources and further exploit the natural resources without damaging the human living environment system.<sup>2</sup>

M.Hamdan reveals that in order to utilize natural resources to promote the general welfare and to achieve happiness in life based on Pancasila, is necessary to develop environmentally sustainable national policy based on an integrated and comprehensive taking into account the needs of present and future generations.<sup>3</sup>

To adapt to the times and the needs of environmental law is so rapid, it has enacted Law No. 4 of 1982 on Principles of Management of the Environment (hereinafter abbreviated UULH) after apply more or less for 15 years, later became Act No. 23 of 1997 on environmental management (hereinafter abbreviated UUPLH) concerning sustainable environmental management and sustainable. Furthermore, this UUPLH on October 3, 2009 has been changed to Law No. 32 of 2009 on the Protection and Management of the Environment (hereinafter abbreviated UUPPLH).

<sup>1</sup> Koesnadi Hardjosoemantri, *Environmental Law*, (Yogyakarta: Gadjah Mada University Press, 1999), page 6

<sup>2</sup> David Silalahi, *Environmental Law (Enforcement of Environmental Law in Indonesia)* (Bandung: Alumni, 1996), page 16

<sup>3</sup> M Hamdan, *Environmental Pollution Crime*, (Bandung: Mandar Maju, 2000), page 1

National development activities on the one hand will contribute to improving the quality of life of his people's welfare, but on the other hand also raised concerns about the decline of the environment permanently in the long term.

Remarkable degradation which in cross section Brantas river bottom over the past decade, gradually has sparked fears of environmental damage from upstream to downstream. The decline in the riverbed is directed to the existing mechanical sand miners along the Brantas river from Blitar, Tulungagung, Kediri, Jombang, Mojokerto up. Massive exploitation of sand material causes environmental balance along the river disturbed. The condition is getting worse, especially since the mechanical mining equipment operations that use a large capacity engine. In addition, sand mining in Watu halibut located in the village Selok Awar-Awar districts Pasirian Lumajang cause environmental problems, namely an excavated hole is dangerous, and caused sea water to residents and damage on paddy rice.

Because of environmental damage due to sand mining has been a criminal offense needs to be addressed for the sake of human life and other creatures.

Sony Keraf revealed that:

"It is undeniable that a variety of environmental cases that occurred today, both at the global and national scope scope, largely sourced from human behavior. Cases of pollution and damage, such as the sea, forests, the atmosphere, water, soil, and so rooted in human behavior irresponsible, uncaring and selfish. Humans are the main cause of the destruction and pollution of the environment".<sup>1</sup>

To control and reduce environmental damage due to sand mining operations above, East Java Provincial Government has issued the East Java Provincial Regulation No. 1 of 2005 on Control of Mining Minerals Group C.

Although the issuance of regulations on environmental protection and management, mineral and coal mining, mineral mining enterprises control group C, in the fact that a crime is still sand mining. So also the cooperation of local government and law enforcement in conducting fishing operations sand miners and the seizure of the machines vacuum sand, but still a lot of sand miners criminal acts committed citizens.

The law enforcement process against the perpetrators of the crime of sand mining is not much different from the process of law enforcement against other crimes, which refers padaHukum Criminal Procedure (Criminal Procedure Code). With reference to the Criminal Code, the stages of the process of settlement of criminal assault mining of sand through the process of inquiry and investigation, prosecution, due process in the courts, as well as the legal remedy.

Law enforcement in the criminal justice system is not solely for the purpose of legal certainty only, but also to meet the local justice. Law enforcement in the criminal justice system are often very complicated, take a long time and high costs, also to bring justice formal / procedural to the justice seekers. So do not wonder if justice is obtained modern society is nothing but bureaucratic justice, while the legal purpose accomplished prefer the certainty of law, being offset by two other legal ideals of justice and legal expediency. This is contrary to the wishes of the people who crave restorative<sup>2</sup> justice in any settlement of criminal cases, especially criminal assault sand mining should be resolved peacefully.

The fact that the judicial process is cumbersome, time consuming lengthy and expensive and the results are also less sense of fairness brings the disappointment of those seeking justice. So that people do not trust the judiciary.

The judicial system at this time, still put retributive justice (retributive justice)<sup>3</sup> reconstructed in the administration of criminal justice as a rationalization or of objectification revenge against criminal<sup>4</sup> offenders, causing suffering and negative stigma permanently to the perpetrators of criminal acts.

Additionally misperceptions law enforcement mainly lies in the functioning of the criminal law as the main weapon (primum remedium) in any settlement of the case or a criminal case into the realm or to the

<sup>1</sup> Sonny Keraf, *Environmental Ethics* (Jakarta: Kompas, 2002), page xiii

<sup>2</sup> Restorative justice is justice obtained through criminal perdilan system as a system which is a means of conflict resolution in which the victim, the community, the state and the offender mediation to resolve the conflict because of their violation of the criminal law (crimes). The state is no longer positioned as a single and dominant role in organizing criminal justice, because the state is not the real victims of the victims and its role is restricted as a mediator and facilitator. The relationship between the offender and the victim in the process perdilan built berdasarkan dialogical relationship, then known as the relationships between people who need each other (humanization). See Kuswandi, "The idea of the balance of the Criminal Justice System Indonesia (response to treatment Act No. 8 of 1981 (Criminal Code) for the Victims of Crime)", article in the *Journal Pulpit Justitia*, Volume V, No. 1, page 62.

<sup>3</sup> Retributive view of punishment as a reward to rely on negative towards deviant behavior committed by citizens of the community so that this view see the punishment only in retaliation for the mistakes made on the basis of the moral responsibility of each. Herbert L. Packer, *The Limits of the criminal*, (California: Stanford University Press, 1968) page.10

<sup>4</sup> Mudzakir, *Crime Victim Legal Position In The Criminal Justice System*, Dissertation, (Jakarta: Indonesia Univeritas, 2001), page. 208

authority of law enforcement officers<sup>1</sup> from the authority of investigation by the police, prosecution by the prosecutor, and the authority to examine and decide the case by the judge. Whereas the function of criminal law is a weapon of last resort (*ultimum remedium*), meaning that if other ways to resolve problems or criminal cases deadlock or fail, then the solution can be done through criminal means. Romli Atmasasmita argues, that:

"In a practical context we have often witnessed that the role of criminal law is not always successful and is seen as the only legal instrument that can maintain security and public order. Even the use of criminal law instruments often also give rise to new problems or protracted social conflict, and not the end of legal solutions.<sup>2</sup> "

Even Ruslan Saleh revealed that "the use of the sword of criminal law too often will make it a blunt sword"<sup>3</sup>. Therefore, in resolving a criminal case should not completely or permanently grounded in the application of the criminal (penal), but can be done through non penal approach that emphasizes the human side.

Conditions deficiencies in law enforcement to ensure justice for litigants and the judicial process is complicated, long and expensive aforementioned spawned a variety of ideas, including ideas to find alternatives for settling disputes out of court a criminal offense.

Bambang Sutiyo said that,

"Alternatives for settling disputes out of court can be understood as an alternative to settling disputes through non-litigation, namely the settlement that is consensus or cooperative for win-win solution or mutually acceptable solution. Settling disputes through consensus or kooperarif mechanism is different from the settlement through the courts (litigation) is using a legal approach through officers or law enforcement authorities and the end result is a win-lose solution. "<sup>4</sup>

So the concept of thought need for an alternative solution to sand mining criminal case through mediation or mutual penal an attempt to win-win solution or a mutually acceptable solution.

Completion of criminal assault sand mining through the judicial process as described above were found is: First, the problematic of philosophy, (a) a criminal offense if allowed to sand mining will reap bad impact on the environment. (B). lengthy enforcement process, allowing environmental destruction continue and become worse.; (c) mechanical sand mining can lead to a variety of environmental degradation and disasters such as erosion and damage to public facilities, such as bridges, dams, and so forth. Second, the theoretical problematic, that (a). the completion of the criminal case of sand mining through the criminal justice process to focus more on the formal justice and retributive justice, and therefore not in line with the theory of restorative justice. (B). completion of the criminal case for sand mining has not provided a full guarantee on justice and expediency for victims and perpetrators. Third, sociological problematic, namely: (a) sanctions to perpetrators cause suffering and negative stigma permanently on the perpetrator, (b) the victim received less attention in respect of damage suffered. Fourth, problematic juridical existence of a legal vacuum because the Penal Code, Criminal Procedure Code, and the regulations have not set any other criminal settlement mechanism through penal mediation in criminal sand mining. The research problem is formulated as follows: why an alternative penal mediation in the settlement of criminal assault sand mining?

This research is empirical legal research, the approach using socio legal approach. Type of data, sources of data in this study the primary data and secondary data. Data collection techniques as empirical legal study materials using observation and interviews. Mechanical analysis is to collect complete data, then processed and analyzed with descriptive qualitative technical. Data and findings that have been collected are described in narrative form relating to the legal theory that is used as an analysis so as to obtain a conclusion and a clear picture in the discussion.

## II. Discussion

### 2.1. Urgency Penal Mediation as an Alternative Settlement Sand Mining Case Crime.Criminal Justice System

#### 2.1.1 To be effective and efficient in Solving Crime Sand Mining.

The criminal justice system or "criminal justice system" is a term that indicates the existence of the mechanism of action in the prevention of crime, by using the basic approach of the system as quoted by Romli Atmasasmita in Remington and Ohlin, argued that:

"Criminal justice system can be defined as the use of a systems approach to the mechanism of the administration of criminal justice and criminal justice as a system is the result of interaction between legislation, administrative practices and attitudes on social behavior. Understanding the system itself

<sup>1</sup> Prijo Jatmiko, Penal Mediation for Prita case, Articles Faculty of Law, University of Brawijaya published June 8, 2009 by Online Media Legal idea, see <http://idea.hukum.wordpress.com/tag/prijo-djatkiko/>. Accessed February 8, 2015.

<sup>2</sup> Romli Atmasasmita, Introduction to Business Crime Law, second edition, (Jakarta: Prenada Media, 2003), p 46

<sup>3</sup> Ruslan Saleh, in Eva Achjani Zulfa, Paradigm Shift Punishment, (Bandung: Lubuk Court, 2011), page. 29

<sup>4</sup> Bambang Sutiyo Law, Arbitration and Alternative Dispute Resolution, (Yogyakarta: Gama Media, 2008), hlm.10.

implies a process of interaction that is prepared in a rational and efficient manner to provide a certain result with all its limitations. <sup>1</sup>.

Furthermore Muladi, revealed that the components of the criminal justice system is a sub system of criminal justice that police agencies, prosecutors, courts and prisons, and even can be added here institute legal advisers and the public.<sup>2</sup>

According Muladi, as a system, criminal justice have structures device or subsystem that is supposed to work in a coherent, coordinated and integrated in order to achieve maximum efficiency and effectiveness.<sup>3</sup>

Although the criminal law enforcement has been through the system, but the outcome is still far from expectations. Contributing factor among others still found weaknesses in the coordination and integration of each sub-system of criminal justice, still courts which led to the large number of piles of unresolved criminal cases, and the over capacity number of prisoners and detainees in prisons and detention centers of the country. In addition, factors of performance reputation of law enforcement officers who are less good, in terms of ethics or morals and in terms of the integrity of the work.

Complicating the process is the completion of the crime of sand mining is essentially inseparable from the administration and management system contained in the judiciary. Satjipto Rahardja revealed that:

"The administration of justice in the agencies involved quite a lot (police, prosecution, courts, prisons), which require careful management. The most difficult problem is how to organize these agencies into a single unit of work, while each has the authority and duties vary. Such differences do not mean anything, but if the mind all the bodies dealing with the same person, that the suspect, defendant or inmate, then the situation could be another. If, for example, each agency was to uphold its bureaucracy, then the efficiency of the administration of criminal justice may be severely disrupted. "<sup>4</sup>

In the process of settlement of criminal assault sand mining through the criminal justice process that starts from the stage of the investigation until the court decision is permanent legal power (inkracht van gewijsde) requires a relatively long time. So it is not efficient in terms of time and cost.

**TABLE 2 Completion Time Range Sand Mining Case Crime**

no	Start the process of investigation	Date Decision	Long Process	Punishmen Fine
1	May 2010	No.322/Pid.B/2010/PN.Kdr 14 February 2011	9 weeks	8 weeks/ 1million/2weeks
2	May 2011	No 241/Pid.B/ 2011/PN.Kdr 13 October 2011	6 weeks	8 weeks
3	April 2011	No.511/Pid.sus/2011/PN.Kdi 11 August 2011	5 week	3 week 15days 500 thousands/1 week
4	December 2011	No.40/Pid.Sus/2012/PN.Kdi 12 april 2012	5 weeks	10 weeks 500 thaousands/1 week
5	April 2012	N0.26/Pid.Sus/2013/Kdi 25 march2013	12 weeks	4 weeks 500 thousands1 week
6	December 2012	No.81/Pid.Sus/2013/PN.Kdi June 2013	7 weeks	5 weeks 500 thousands/1 week
7	June 2013	325/Pid.Sus/2013/PN.JMB November 2013	7 weeks	2 weeks
8	May 2003	121/Pid.B/2003/PN/Mkt. Agustus 2003 333/PID/2003/PT.SBY Januari 2004 2148 K/Pid/2004-7 Agustus 2005	27 weeks	6 weeks
9	August 2014	487/Pid.B/2014/PN.Mjk January 2015.	6 weeks	1 year, 6 weeks. 50 millions

Secondary data is processed.

Based on the above table it is seen that the process of resolving criminal assault sand mining through the criminal justice process that starts from the stage of the investigation until the court decision is permanent legal power (inkracht van gewijsde) requires a relatively long time. So it is not efficient in terms of time and cost.

<sup>1</sup> Romli Atmasasmita, the Criminal Justice System, Perspectives Eksistensialisme and abolitionism, (Bandung: Bina Cipta, 1996), page. 14

<sup>2</sup> Muladi, Capita Selecta Criminal Justice System, (Semarang: Diponegoro University Board Publishers, 1995), page. 16

<sup>3</sup> Ibid, page21

<sup>4</sup> Satjipto Rahardjo, Legal Studies, (Bandung: Citra Aditya Bakti, 1996), p. 185.

This is because in reality often have constraints in solving criminal case through the courts. These constraints are generally regarding evidentiary difficulties, difficulty finding an expert and another sebagainya, so that the process of resolving criminal case through the courts lasts longer and requires a huge cost, while the end result did not give satisfaction to the victim, the offender and society.

The end result is less effective and satisfying because of a court decision focuses only on the imposition of punishment on the defendant form of imprisonment, while the victim did not get restitution for material damage suffered. This means that the offender has been sentenced to prison, but the obligation to provide restitution (compensation) to victims no. That victims do not receive protection for any suffering or material losses as a result of the act defendant.

The workings of the criminal justice system in performing criminal enforcement process in reality is still complicated, time consuming and high costs. As a result, the principle of justice that is fast, simple and inexpensive contained in the provisions of Article 2 (4) of Law No. 48 of 2009 was not achieved.

Police, prosecutors and the courts in taking action or decisions sometimes just give justice bureaucratic form of application of law, not justice substantial, so the end result is often no sense of fairness to all parties (victim / community and actors) that have an impact on disappointment seekers justice. Disappointment is what makes distrust against the judiciary. So that the law enforcement process effectively and efficiently to create order, security and peace in the society is not reached its full potential.

Although the criminal justice system is as a formal means of modern legal developments in the framework of criminal law enforcement, but outside the criminal justice system there are other means more satisfying. In addition through the judicial process for justice, there are many ways and places that can be reached. Marc Galanter revealed "Justice in many room, (justice can be found anywhere, anywhere in the room)".<sup>1</sup> When the criminal justice system can not provide justice to be expected and can not solve the problem optimally (effectively and efficiently), then those problems can seek other alternatives that could provide it.

In the process of settlement of criminal assault sand mining should not just put entirely on the criminal justice process, but can also be solved by using other alternatives namely through penal mediation, in order to the solution becomes faster, simpler and lighter, thereby reducing the cost of the buildup of cases in the judiciary.

#### **2.1.2. Empowerment Environmental Rights For Victims of Crime Sand Mining**

The position of victims of crime in general is very weak in every stage of the criminal justice process, victims are not directly involved in fighting for their rights

Understanding of the victim Crime Sand Mining can be started from the fundamental right of each person (HAM) on healthy living environment (the right to a healthy environment) It can be seen in Article 65 paragraph (1) UUPPLH, everyone is entitled to a good living environment and healthy as part of human rights. The pollution and / or damage to the environment is a violation of human rights that are classified as environmental crime, the culprit may be individual or collective. This environmental impact can cause loss of both the environment itself, individuals, and groups.

Seeing the wide scope of casualties arising from criminal acts of sand mining, the protection of victims is a necessity as part of the fulfillment of human rights and of the future of humanity

Victim protection issues including one issue which has also received international attention. In Congress United Nations V11 / 1985 in Milan (about Prevention Crime and the Treatment of Offenders) suggested that victims' rights should be seen as an integral part of the overall criminal justice system (victim's rights should be perceived an integral aspect of the total criminal justice system) , From this congress also proposed a draft resolution on the protection of victims to the UN General Assembly, which later became the MU-UN Resolution No. 40/34 dated 29 November 1985 of the "Declaration of Basic Principles of Justice for Victim of Crime and Abuse of Power".

The impact of sand mining that triggers a decrease in the riverbed to exceed the limits of reasonableness as causing tens or even hundreds of bridge construction, plengseng, dikes, and some offices observations in danger due to erosion of the riverbed. Between the observation, almost all the bridges (long) crossing the river flow conditions are barely hanging. The foundations of the bridge that was supposed to be in the water and partially embedded in the bottom of the river began to appear on the surface. Continued impact of ecological damage due to sand mining activities were not only found along stream / main line of the Brantas River, but it was creeping up to regional watershed into sub-streams (tributaries).<sup>2</sup> Additionally threat water shortages haunt Surabaya and surrounding areas such as Sidoarjo and Gresik in the next five years. This condition is due to the decreased capacity of the majority of existing dams in the upper reaches of the Brantas River due to precipitates

<sup>1</sup> Marc Galanter, Justice in Many Room: Court, Private Ordering, and Indigenous Law, article in the Journal Of Legal Pluralism No. 19, 1981, page 1-47.

<sup>2</sup> Destyan S, Domino Effect Decrease in Brantas River Elementary, <http://seputartulungagung.blogspot.com/2011/04/efek-domino-penurunan-dasar-sungai>. Accessed on 7 April 2012.

or sedimentation.<sup>1</sup> If the sand mining still be allowed to proceed in the Brantas river, then in the next five years, the area through which the river flows will reap the adverse effects, which flooded a large scale. From the results of research conducted NGO Friends of the Environment, during the past five years, water levels along the Brantas decreased 70 cm. As a result, citizens have the rice fields in the basin sugai (DAS) Brantas, will experience drought when the dry season the water level decreases and can not flow through the paddy fields around it, reminding the river Brantas sustain two thirds of the population of East Java.<sup>2</sup>

The above example, at least give you an idea that, basically humanity future are likely to suffer due to decreasing environmental functions that are victims of crime sand mining. In the context of the fulfillment of the rights of man's most basic (HAM) to obtain the environment, good and healthy, it should be victims of crime sand mining is a party that should have a strong position in the resolution of criminal assault sand mining.

In the context of encouraging the involvement of victims in the fight for their rights in the process of resolving criminal assault sand mining, then the application of penal mediation to be very urgent and relevant. This is in line with one of the working principle of penal mediation, namely an emphasis on active participation of the parties to a conflict between the perpetrator to the victim. Barda Nawawi said that "one of the working principle of penal mediation is their active participation and autonomy of the parties."<sup>3</sup>

Justive restorative approach is a paradigm that can be used as a frame of the completion strategy of the crime of sand mining through penal mediation involving the parties to actively and autonomously, including the victim. Restorative Justice is a concept that responds development thinking of the criminal justice system by focusing on the needs of victim participation (people) who feel marginalized by a mechanism that works in the criminal justice system that applies today.

From the foregoing it can be understood that, in the settlement. criminal assault sand mining through penal mediation process, the victim acts as the subject of an active role and autonomous. Penal mediation process that promotes negotiations between perpetrators and victims to resolve their own conflicts between them have a positive impact. The positive impact for victims is primarily due to the penal mediation process, the victim had ample opportunity to explain the loss and the suffering they experienced as a result of criminal offenses committed by sand mining offender. In addition, victims can communicate directly with the perpetrator, the victim can express any concerns resulting from a criminal act for sand mining and the victim can understand the condition of the perpetrator so that it can receive for settling disputes in a peaceful and helpful.

In the resolution of the criminal act of sand mining through penal mediation process puts the interests of the victim as a primary consideration and substantial in the final results. The final result of the settlement process. The criminal act of sand mining through penal mediation reflects the interests of the victims, in particular with regard to the type, form and manner compensation or replacement of damages agreed.

Completion criminal case through mediation penal sand mining prioritizing oriented dialogue process with an emphasis on the needs of the victim and the offender's circumstances held accountability for, produce agreement compensation to victims' expectations. But what is important is the dialogue process can meet the emotional and informational needs of the victim and the perpetrator development of empathy for the victim. It can help prevent the crime of sand mining in the future.

### III. Cover

#### 3.1. Conclusion.

Mediation can be used as an alternative penal settlement of criminal assault on the justice system for sand mining in Indonesia, because:

1. Penal mediation is an effort to improve the criminal justice system. So with penal mediation, then make the criminal justice system more effective and efficient in solving the crime of sand mining.
2. The mediation process penal put the victim as a subject directly involved in determining the procedures for settling criminal assault sand mining. This is in contrast with the completion of criminal assault sand mining through the criminal justice process that put the victim as an object of the process for settling disputes,

#### 3.2. Recommendations

1. In the context of national law reform, pursued executive and legislative institutions in developing and discussing the draft Criminal Code and Criminal Procedure Code bill can include mediation as an alternative penal settlement of criminal assault sand mining.

<sup>1</sup> STY 5tahun again, Surabaya Threatened Air  
<http://www.surabayapost.co.id/?mnu=berita&act=view&id=7e3b57e3fae1ff18eea904da65f74a37&jenis=d41d8cd98f00b204e9800998ecf8427e> difficulties. Accessed on 7 April 2012.

<sup>2</sup> <http://www.harianbhirawa.co.id/konflik/28091-penambangan-pasir-ancam-tenggelamkan-das-brantas>. Accessed on 14 April 2012.

<sup>3</sup> Barda Nawawi Arief, Penal Mediation, Settlement Case .... Loc Cit.

2. Before mediation penal institutionalized and given a legal workframe to the Codes, in the hope that the police, prosecutors and the courts as the law enforcement agencies can create policies to implement penal mediation as an alternative the completion of the crime of sand mining so that the process of completion can be effective and efficient, equitable and beneficial to all parties.

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