The Constitutional Politics: The Regulatory Dynamics of Presidential Threshold After the Decision of Law No. 49/PUU-XVI/2018 by The Constitutional Courts

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Abstract: Theoretically, there are regulatory dynamics that can be identified, namely: first, the urgency of applying the 20% presidential threshold to the 2019 presidential and vice presidential election; and second, is the implication of regulations on political parties in proposing candidates for president and vice president who do not get 20% of seats in the DPR based on the results of the 2014 general election. The constitutional dynamics that developed in setting the threshold of 20% in the 2019 presidential and vice presidential elections were first, the determination of the 20% threshold in the 2019 presidential and vice presidential election was the mandate of the legislation and the Constitutional Court's ruling. In addition, to strengthen the presidential system. Second, the 20% threshold requirement in the 2019 presidential and vice presidential nomination is contrary to the 1945 Constitution and is considered threatening to electoral democracy and the existence of political parties.

Keywords: *Constitutional politics, presidential election, and Law*

Introduction

A. The Contemporary Issue of Presidential Threshold

The dynamics of the emergence of a struggle of thought towards the material test related to the presidential threshold (presidential threshold) 20 percent in Law No. 17 of 2017 concerning the Election was sued again by the group who refused the presidential threshold of 20 percent namely Busyro Muqoddas, Muhammad Chatib Basri, Bambang Wijayanto, Hadar Nafis Gumay, et al. with both have legal standing. Some of the reasons presented by them are first, Law No. 7 of 2018 concerning General Elections is contrary to the 1945 Constitution which is clearly stipulated in Article 22e paragraphs 1, 2 and 3 of the 1945 Constitution. The articles in the 1945 Law and UUD are contradictory so that they need to be materialized. Second, the constitutional rights of political parties to nominate themselves as presidential candidates from each party or a combination of political parties will be disrupted due to the existence of Law No. 7 of 2018 concerning General Elections[1].

The provisions of the presidential threshold in the electoral system leave a polemic in the governance system in Indonesia. Based on the decision of the Constitutional Court Number 14 / PUU-XI / 2013 which was decided on January 23, 2014 concerning the testing of Article 3 paragraph (5), Article 9, Article 12 paragraph (1) and paragraph (2), Article 14 paragraph (1) and Article 112 Law Number 42 of 2008 concerning the Election of the President and Vice President proposed by Effendi Ghazali stipulated that the implementation of the DPR, DPD and DPRD elections and the election of the president and vice president must be held simultaneously in the 2019 elections. The Constitutional Court granted several articles tested by the applicant, one of which was the simultaneous election. The Posita submitted by the Petitioner in his petition explained that the applicant considered the existence of a Presidential Election held after the implementation of legislative elections (pileg) was not in accordance with the mandate of Article 22E paragraph (1) of the 1945 Constitution of the Republic of Indonesia.[2]

Described, in accordance with Article 6a paragraph 2 of the Presidential Election Law, political parties must nominate vice presidential candidate pairs before the election, where the intended election is in accordance with the provisions of Article 22e paragraph 1.2, and 3 of the 1945 Constitution, namely the election of members of the DPR, DPRD and DPD . In the 1945 Constitution it is stated that Indonesia adheres to the presidential system. In the presidential system, presidential

elections should be held first before parliamentary elections. But in practice, in the Presidential Election Law the election of DPR members was held before the presidential election. Article 22e of the 1945 Constitution clearly states that elections are held to elect members of the DPR-DPD, President-Vice President and DPRD. He also stressed that the election constitution was held once in five years.

The applicant assesses that with two elections, the budget for holding elections will be more wasteful. In addition, with elections that are not simultaneous, the ease of citizens to exercise their right to vote efficiently is threatened. So that if the Pilpres and Pileg are held simultaneously, the voters will exercise their right to vote intelligently and efficiently. The application for the petition rejected by the Constitutional Court is about constitutionality Article 9 of the Presidential Election Law. The Constitutional Court Judge stated that the provisions of the presidential threshold are the norms of a congress regarding open legal policy delegated by Article 6A paragraph (5) of the 1945 Constitution of the Republic of Indonesia. The legislative election with the presidential election in 2019, of course the implementation of the threshold must refer to the results of the previous legislative elections, namely the results of the 2014 legislative elections.

B. The Origin of Presidential Threshold Concept

The Presidential threshold is the threshold for political parties or a combination of political parties for the submission of a president or vice president. The Presidential threshold of 20-25% requires political parties or a combination of political parties that want to nominate president and vice president must have at least 20% of seats in the DPR or 25% of nationally valid votes in the previous election. In the 2014 election, there were 12 parties participating in the election. Presidential Threshold is the threshold for political parties or a combination of political parties to submit presidential or vice presidential candidates.[3] As mandated in Article 222 of Law Number 7 of 2017 concerning General Elections which reads:

> Candidate pairs are proposed by political parties or a combination of political parties participating in the election that meet the requirements for obtaining seats at least 20% (twenty percent) of the number of seats in the DPR or obtain 25% (twenty five percent) of legitimate votes nationally in previous DPR member elections.

General Election is a means of people's sovereignty to elect members of the House of Representatives, members of the Regional Representative Council, members of the Regional People's Legislative Assembly and to elect the President and Vice President, which are carried out directly, publicly, honestly and fairly in the Republic Indonesia based on Pancasila and the 1945 Constitution of the Republic of Indonesia. General Election is a means of people's sovereignty to elect members of the House of Representatives, members of the Regional Representative Council, members of the Regional People's Legislative Assembly and to elect the President and Vice President, which are carried out directly, publicly, honestly and fairly in the Republic Indonesia based on Pancasila and the 1945 Constitution of the Republic of Indonesia.[4]

One consequence of a democratic legal state is that every filling of government positions at every level must be carried out democratically through general elections, hereinafter referred to as elections. General elections as a consequence of a democratic state are regulated in Article 1 paragraph 2 of the 1945 Constitution (1945 Constitution). Elections as a means for the people to channel their political rights to vote and be elected must be carried out properly and must be in accordance with the principles of the state of law in accordance with the constitutional foundation as stipulated in Article 22E of the 1945 Constitution of NRI, namely: General elections are held to elect members of the People's Legislative Assembly, Regional Representative Council, President and Deputy President and Regional Representatives. It also includes general elections to elect the President and Vice President as stipulated in

Article 6A paragraph (1) and (2) stating: "The President and Vice President are elected in one pair directly by the people" and "The pairs of candidates for President and Vice President are proposed

by political parties or a combination of political parties participating in the general election before the general election."

a. Presidential Threshold Base on UUD NRI 1945

As explained above, the state constitution has been amended several times based on the spirit of Indonesian reformation. The first period of the amendment to the 1945 Constitution of the Republic of Indonesia began in 1999 and the second period in 2000, but the two provisions have not been amended in terms of filling in the position of head of state. Then in the third change there are several provisions related to the conditions for becoming president and vice president and the mechanism of direct election by the people. The provisions referred to are stated in Article 6A of the 1945 Constitution of the Republic of Indonesia. Please note that the initial debate in amending the 1945 Constitution of the Republic of Indonesia was inseparable from the direct or indirect discussion of the electoral system. become president and vice president. [5]

Article 6A of the 1945 Constitution of the Republic of Indonesia does not mention the provisions for the threshold for nominating the president and vice president / presidential threshold, but based on the provisions of Article 6A paragraph (5) of the 1945 Constitution of the Republic of Indonesia which states that; "The procedure for the election of the President and Vice President is further regulated in the Law." Our State Constitution provides constitutional authority to the Government together with the House of Representatives to make more comprehensive rules regarding the procedures for the implementation of presidential and vice presidential elections because in the Constitution NRI 1945 does not contain detailed and concrete material related to the contents. Then a law was drafted on the presidential and vice presidential elections which contained the provisions of the Presidential Threshold. This is a political agreement between several factions in the House of Representatives with the consideration that in order to create a strong and effective presidential system the requirements for submitting president and vice president based on the number of legitimate national votes are needed by political parties or a combination of political parties as proof of the legitimacy of the people. [6]

b. Presidential Threshold After Decision of Mahkamah Konstitusi

Law Number 7 of 2017 concerning General Elections is the latest regulation related to electoral ratification in the plenary session of the House of Representatives (DPR) of the Republic of Indonesia in the early hours of July 21, 2017. Legal instruments that have reaped polemic regarding the presidential threshold (threshold for parties politics or a combination of political parties to submit candidates for president or vice president) contains 573 articles, explanations, 4 attachments, and are listed in several books; The first book is about General Provisions, the second book about Election Organizers, the third book on Election Implementation, the fourth book on Election Violations, Election Process Disputes, and Election Result Disputes, and the fifth book on Election Crime, and the Sixth Closing Book. This law was promulgated by the Minister of Law and Human Rights, Yosanna H. Laoly on 16 August 2017.

Regarding the threshold for political parties or a combination of political parties to submit a presidential or vice-presidential candidate, this law confirms that candidates for President and Vice President are proposed in 1 (one) pair by political parties or a combination of political parties that meet the minimum requirements 20% (twenty percent) of the total number of seats in the DPR RI or obtaining 25% (twenty five percent) of legitimate votes nationally in the previous election of DPR members. Political parties or a combination of political parties as intended can only nominate 1 (one) candidate pair in accordance with the internal mechanism of political parties and/or joint deliberations of political parties carried out democratically and openly. This is clearly stated in Article 221 - Article 223 of Law No.7 of 2017 which reads:

***Pasal 221** : Calon Presiden dan Wakil Presiden diusulkan dalam 1 (satu) pasangan oleh Partai Politik atau Gabungan Partai Politik.*

***Pasal 222** : Pasangan Calon diusulkan oleh Partai Politik atau Gabungan Partai Politik Peserta Pemilu yang memenuhi persyaratan perolehan kursi paling sedikit 2O% (dua puluh persen)*

dari jumlah kursi DPR atau emperoleh 25% (Dua puluh lima persen) dari suara sah secara nasional pada Pemilu anggota DPR sebelumnya.

***Pasal 223** : (1) Penentuan calon Presiden dan/atau calon Wakil Presiden dilakukan secara demokratis dan terbuka sesuai dengan mekanisme internal Partai Politik bersangkutan, (2) Partai Politik dapat melakukan kesepakatan dengan Partai Politik lain untuk melalokan penggabungan dalam mengusulkan Pasangan Calon.(3) Partai Politik atau Gabungan Partai Politik sebagaimana dimaksud pada ayat (2) hanya dapat mencalonkan 1 (satu) Pasangan Calon sesuai dengan mekanisme internal Partai Politik dan/atau musyawarah Gabungan Partai Politik yang dilakukan secara demokratis dan terbuka. (4) Calon Presiden dan/atau calon Wakil Presiden yang telah diusulkan dalam satu pasangan oleh Partai Politik atau Gabungan Partai Politik sebagaimana dimaksud pada ayat (3) tidak boleh dicalonkan lagi oleh Partai Politik atau Gabungan Partai Politik lainnya.*

Regarding this question, the Court was of the opinion that there was no fundamental reason that caused the Court to change its position. Because: [7] First, the Constitutional Court Decision Number 53/PUU-XV/2017 was pronounced on 11 January 2018. Meanwhile, the Court's ruling regarding the constitutionality of Article 222 of the a quo Election Law was based on comprehensive considerations which departed from the nature of presidential government systems according to the design of the 1945 Constitution, not on the basis of casuistic considerations that depart from concrete events. In the span of only a few months there was no change in the constitutional system according to the 1945 Constitution as evidenced by the absence of changes to the law as a further regulation of the constitutional system. Thus there is no fundamental reason for the Court to change its position; [8]

Second, because the establishment of the Court is based on comprehensive considerations that depart from the nature of the presidential government system according to the design of the 1945 Constitution, basically all Petitioners' arguments, even if argued using different testing grounds, have themselves been considered in the Decision of the Constitutional Court Number 53/PUU- The XV/2017[9]:

1. The Petitioners' arguments that the terms of the candidate pair are not open legal policy but that close legal policy has been rejected by the Court as stated in the consideration of the Decision of the Constitutional Court Number 51-52-59 / PUU-VI / 2008, which is later reaffirmed in the Court's decisions next, including in the Decision of the Constitutional Court Number 53 / PUU-XV / 2017;
2. The Petitioners' argument that Article 222 of the Election Law is not constitutional engineering but constitutional breaching, the Court has stated that it is constitutional engineering, as explained in the consideration of the Constitutional Court Decision Number 53 / PUU-XV / 2017, especially in Paragraph [3.14] number 4, therefore the Court disagrees with the Petitioners;
3. The Petitioners' argument that the calculation of the presidential threshold based on the previous DPR Election results has eliminated the essence of the election, this matter has also been considered by the Court since the Constitutional Court Decision Number 51-52-59 / PUU-VI / 2008 and further elaborated in the Court Decision Constitution Number 53 / PUU-XV / 2017, especially in Paragraph [3.14] number 5;
4. The Petitioners' arguments that Article 222 of the Election Law should not regulate the "conditions" of the Presidential Candidates because Article 6A paragraph (5) of the 1945 Constitution only delegates "procedures", this argument has also been refuted by the Court Decision 51-52-59 / PUU -VI / 2008;
5. The Petitioners' arguments that the delegation's arrangement of "conditions" of the Presidential Candidates to Law is in Article 6 paragraph (2) of the 1945 Constitution and not related to the proposal of Political Parties, this also by itself has been refuted by legal considerations 59 / PUU-VI / 2008. Moreover, it is difficult to establish a constitutionally coherent argument when on the one hand the Constitution explicitly gives a large role to political parties to propose candidates for president and vice president, while on the other hand the requirements of the presidential candidate are said not to be related to proposals by political parties. This matter has also been considered in the Decision of the Constitutional Court Number 53 / PUU-XV / 2017, specifically Paragraph [3.14] number 5;

6. The Petitioners' arguments that the presidential threshold removes the essence of the presidential election because it has the potential to present a single presidential candidate, even though at first glance it seems logical but ignores the fact that the 1945 Constitution does not restrict citizens to establish political parties as long as the requirements are fulfilled as stipulated in the law . So, even though the parliamentary threshold conditions are applied, the possibility for the birth of new political parties will remain open, as evidenced by the empirical facts that have existed since the guarantee of freedom of association and assembly, especially after the amendment to the 1945 Constitution. presidential and vice-presidential candidates, a political party must first be registered with the Ministry of Law and Human Rights. For political parties that meet the requirements of being registered with the Ministry of Law and Human Rights, to be a participant in the general election must also be registered as a general election participant in the KPU by fulfilling the more stringent requirements compared to the conditions listed in the Ministry of Law and Human Rights. Not only formal requirements, to be a participant in a political party election must pass verification starting from the central level to the sub-district level;
7. The Petitioners' arguments that Article 222 of the Election Law has the potential to produce legal uncertainty that must be anticipated by the Court, this is not at all reasonable because the formulation of Article 222 of the Election Law a quo does not give room to be interpreted differently because it is very clear;
8. The Petitioners 'argument that the nomination of the President should not be based on the results of the previous DPR members' election, this is actually no different from the arguments of the Petitioners in number 4 above, so that the Court's consideration as mentioned in number 4 above applies to this argument;

C. Presidential Threshold: The Evidence of Democratic Dilemma

The concept of democracy as a political system cannot be separated from Greek philosophers. But in the mid-20th century, the meaning of democracy experienced a paradigm shift: First, democracy was defined as a form of government; second, democracy is understood based on the source of authority for the government; and third, democracy is one of the procedures for forming a government. The main procedure of democracy is the election of political leaders competitively by the people through direct elections. Here, Joseph A. Schumpeter defines democracy with the terms "the will of the people" (source) and "the common good" (goal). Therefore, according to Schumpeter democracy is called a democratic method. The democratic method according to Schumpeter is institutional arrangements to arrive at political decisions that are aware of the general good by making people decide their own problems through the selection of individuals to gather in order to carry out their will. With this description, it shows that democracy can be seen from two dimensions, namely; contest dimensions and participation. Democracy also implies the existence of civil and political freedom, namely the freedom to speak, publish, assemble and organize which is needed for political debate and the implementation of election campaigns. [10]

In addition to these two dimensions, in the history of democratic theory there is a very sharp difference in whether democracy must mean a type of power or a form of representation of power. Of these differences, three main types or models of democracy have emerged. First, direct democracy or participatory democracy, a system of decision making on public issues where citizens are directly involved. Second, there are liberal democracies or representative democracies, a system of government that includes elected "officials" who carry out the task of "representing" the interests or views of citizens in limited areas while upholding the "rule of law" . Third, democracy is based on a one-party model. [11]

On the other hand, Anthony Giddens calls it direct democracy or participation democracy with the term deliberative democracy. Deliberative democracy is contrary to liberal democracy or representative democracy. According to Giddens, deliberative democracy is a way to reach agreement on policies or decisions in the political area desired by society. [12]

D. The Regulatory Implications of Presidential Threshold

Based on this ruling it becomes clear that the norm formulation contained in Article 222 of Law No.7 of 2017 as stated in the a quo ruling still remains constitutional or in line with the 1945 Constitution of the Republic of Indonesia. The verdict explicitly suggests that Threshold Presidential regulation is the authority of legislators In this case, the House of Representatives together with the President to regulate the requirements for the vote for Political Parties as a condition to submit candidates for President and Vice President in the simultaneous election.

Jimly Ashidiqie argues that our government adheres to a Presidential system, so that when a multi-party system is implemented the results are not a single Political Party in a dominant position. In such circumstances, a coalition system that is commonly known in the system of parliamentary governance is definitely needed, so that many scholars lack the development of practices in the world who think that the coalition system exists only in parliamentary systems. Coalitions in presidential systems such as experience in Indonesia include the Joint Secretariat Coalition in the era of President SBY's Government and the existence of the Great Indonesian Coalition and the Red and White Coalition in the Jokowi Government era and in some Latin American countries that are unavoidable. Therefore it is necessary to think about the ideal construction and posture of a presidential system coalition like in this country in order to function properly. So in order to realize the quality of the simultaneous elections in 2019 in the future, according to Jimly Asshiddiqie, the 2014-2019 period needs to be utilized to strengthen the institutionalization of political parties in the long run. With plurality that is "segmented" and even "fragmented" (segmented and fragmenteed pluralism) so that any "threshold" policy that is applied for the purpose of simplifying the number of political parties naturally in the long run the number of political parties in Indonesia will never be reduced to 2 (two) dominant political parties like in the United States. Therefore, we must be prepared to accept the fact that there are many and no dominant political parties as reflected in the results of the current 2014 legislative elections.

Candidate pairs are proposed by political parties or a combination of political parties participating in the marriages that meet the requirements for obtaining seats at least 20% (two percent) of the DPR seats or obtain 25% (twenty five percent) of legitimate votes nationally in previous DPR member elections . Article 222 of Law 7/2017 adds nomination threshold conditions that have the potential to eliminate the potential birth of alternative presidential and vice presidential candidates, which actually have been fully anticipated even through the second round of presidential election system, so the phrase article 222 a quo contradicts article 6a paragraph (3) and paragraph (4) of UUD 1945.

Whereas the phrase threshold requirements for nominating presidential and vice presidential candidates are stipulated in Article 222, namely: "those who meet the requirements for obtaining seats at least 20% (twenty percent) of the DPR seats or obtain 25% (twenty five percent) of valid votes nationally in previous DPR member elections "has clearly limited the potential for a more varied presence of presidential and vice presidential candidates. Although mathematically, the a quo article opens up the opportunity for the presence of several pairs of candidates, but in reality, the article which stipulates the tougher and tougher conditions has led to the presence of fewer presidential and vice-presidential candidates. '

That the phrase a 222 quo Article which encourages the presence of fewer presidential and vice-presidential couples who have the potential to be only two pairs as happened in 2014 and may repeat in 2019, or even create only one pair of candidates, has clearly contradicted the electoral system very anticipatory and complete, which regulates the second round of the presidential election and the conditions for determining the winner of the presidential election in Article 6A paragraph (3) and paragraph (4) of the 1945 Constitution. Even though for example, it is argued that the presidential and vice presidential threshold requirements in Article 222 Law 7/2017 a quo does not eliminate the norms of Article 6A paragraph (3) and paragraph (4), but the fact that the threshold system built is encouraging the presence of fewer candidates, and therefore eliminates the opportunity to use Article 6A paragraph (3) and paragraph (4) This is still a constitutional violation, or at least a potential violation of the constitution.

The requirements for nominating a presidential candidate by political parties are very well regulated in the 1945 Constitution so it should be closed legal policy not open legal policy, so the phrase article 222 a quo contradicts article 6 paragraph (1), article 6 paragraph (2), article 6a paragraph (1), Article 6a paragraph (2), Article 6a paragraph (3), Article 6a paragraph (4), Article 6a paragraph (5), Article 22e paragraph (1), Article 22e paragraph (2), Article 22e paragraph (6), and Article 28d paragraph (1) of UUD 1945.

Base on the arguments of the Petitioners who argued that Article 222 of the Election Law added that the nomination threshold conditions that have the potential to eliminate alternative presidential and vice presidential candidates had been considered even since the Constitutional Court Decision Number 51-52- 59 / PUU-VI / 2008 which was later reaffirmed in the decision - next decision. These considerations are strengthened by consideration in the Decision of the Constitutional Court Number 53/PUU-XV/2017 as can be read in particular in paragraph [3.14] of number 5 of the decision;

Theoretically, there are two further legal consequences that can be identified. First, the legal consequences of the pre-election of the President and Vice-President are lawsuit against the KPU's decisions, including: determining the stages of the presidential election, determining the candidate pairs and procuring goods and services; second, the legal consequences after the presidential election are a lawsuit against the validity of the elected President and Vice President. All claims will be addressed to the State Administration Procurement in Jakarta, because the locus is in Jakarta. As a solution, legally it can be done with the President issuing Perppu to revoke Article 9 of Law No. 42 of 2008, in which the article contains provisions for a presidential candidate pair and a vice presidential candidate pair proposed by a political party or a combination of Election participant political parties that meet the minimum voting requirements 20% of the total seats in the DPR or get 25% of the national valid votes. If article 9 is deleted or revoked, then the separation of the Pileg and Pilpres is valid, because it is in accordance with the norms and article 6A paragraph (2) of the 1945 Constitution First, this Constitutional Court decision will have implications for the birth of the national movement rejecting the results of the 2014 Election from the political elite of political parties participating in the 2014 Election who failed in this election competition, because they feel that Law No. 42/2008 has been declared contradictory to the 1945 Constitution and not legally binding, but the reality is still used as the basis for the upcoming 2014 presidential election. Moreover, the 2014 Election was not carried out simultaneously. In fact, the amendment to the Constitutional Court's decision stated that the elections demanded by the 1945 Constitution post-amendment were simultaneous elections not separate elections. If the 2014 election is separated between the legislative and presidential elections, it automatically loses its juridical backrest. Therefore, it is not impossible that in the future many parties will consider the results of the 2014 Election products to be unconstitutional. This movement will endanger political stability and will even lead to people's distrust of democratic institutions.

Secondly, the Constitutional Court's decision will have implications for the need for the DPR and the government to immediately prepare various products of the draft law on simultaneous elections for the 2019 Election because the simultaneous election requires the regulation of legislative elections and codified presidential elections. While today the two laws are separate, the Presidential Election Law uses Law No. 42/2008, while the Pileg uses Law No. 12/2012 on the Election of Members of DPR, DPD and DPRD. The modification of the two laws is not enough to just synchronize between articles, but also harmonize the substance of the value of the implementation process and the implementation system. More than synchronization, harmonization and correspondence between these two laws and other organic laws that regulate the political field, namely the Political Party Law, Election Organizing Law, MPR Law, DPR, DPD and DPRD and the Law on Regional Government. Thus, the Constitutional Court's ruling will result in the widening of various revisions to other laws. Described, argument that the presidential threshold in Article 222 of the Election Law based on the results of the previous DPR Election was irrational, has also been answered with the consideration of the Court in number 4 and number 9 above.

Third, the implications of this Constitutional Court ruling will also encourage the improvement of the performance of judges of the Constitutional Court (MK) because the elections are held simultaneously, both nationally and locally. As a result, disputes over election results submitted

to the Constitutional Court must have increased by 100%. At this point it can be ascertained that 9 constitutional judges will be overwhelmed in handling disputes over election results. In fact, as stipulated in the Election Law and procedural law in the Constitutional Court, the dispute over election results is limited in time. Therefore, it is an obligation to review Law No. 23/2004 concerning the Constitutional Court as amended by Law No. 8/2011 concerning the third amendment to the Constitutional Court Law. This review is aimed at the possibility of increasing the number of constitutional judges or establishing election special courts which are under the umbrella of the Supreme Court (MA) or the Constitutional Court (MK) and can make their representation in a number of provinces as well as criminal acts of corruption.

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