

## **ETHICAL DILEMMA OF THE PRACTICE OF RENTING A WOMB FROM THE PERSPECTIVE OF FEMINIST LEGAL SCHOOL (FEMINIST JURISPRUDENCE)**

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### **Abstract**

*The practice of surrogacy has become a controversial issue in the legal, ethical, and social fields, particularly from the perspective of feminist jurisprudence. This is particularly true in Indonesia, where religious and cultural norms strongly influence societal views and perceptions. The background of this research is the increasing need for infertile couples to have children, which often drives them to seek solutions beyond natural means. The focus of this research is to analyze the ethical and legal dilemmas related to the practice of surrogacy from the perspective of feminist jurisprudence. The method used is a literature review by examining various relevant legal sources, ethics, and feminist views. The results of the study indicate that the practice of surrogacy not only has the potential to exploit women but also contradicts human rights and religious norms in Indonesia. These findings emphasize the need for clear regulations to protect the rights of women and children, as well as the importance of awareness of the ethical implications of this practice in society.*

*Praktik sewa rahim atau surrogate mother telah menjadi isu yang kontroversial dalam bidang hukum, etika, dan sosial, terutama dalam perspektif aliran hukum feminis, terutama di Indonesia, di mana norma agama dan budaya sangat memengaruhi pandangan dan persepsi masyarakat. Latar belakang penelitian ini adalah meningkatnya kebutuhan pasangan suami istri yang mengalami infertilitas untuk memiliki anak, yang sering kali mendorong mereka mencari solusi di luar cara alami. Fokus penelitian ini adalah menganalisis dilema etis dan hukum terkait praktik sewa rahim dari perspektif aliran hukum feminis (Feminist Jurisprudence). Metode yang digunakan adalah kajian literatur dengan mengkaji berbagai sumber hukum, etika, dan pandangan feminis yang relevan. Hasil penelitian menunjukkan bahwa praktik sewa rahim tidak hanya berpotensi menimbulkan eksplorasi terhadap perempuan, tetapi juga bertentangan dengan hak asasi manusia dan norma agama di Indonesia. Temuan ini menekankan perlunya regulasi yang jelas untuk melindungi hak-hak perempuan dan anak, serta pentingnya kesadaran akan implikasi etis dari praktik ini dalam masyarakat.*

**Keywords:** Ethical Dilemmas, Womb Rent, and Phenomenal Law



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## A. INTRODUCTION

Having a child in a marriage is a dream in itself. However, not all long-married couples are blessed with children. The strong desire to have a child sometimes leads to unnatural and unscientific methods. All of these methods are undertaken solely to realize their dream of having a child. Some resort to adoption, in vitro fertilization, and even uterine surrogacy.

Surrogacy is a non-scientific pregnancy method, typically performed when a woman is unable or unwilling to conceive and give birth. The embryo is developed and carried to term by another woman (not the wife) and then transferred to the couple according to a pre-agreed agreement.

One example of a surrogate mother practice in Indonesia occurred in 2009, specifically in Mimika, Papua. A married couple was unable to have children for medical reasons. Doctors diagnosed a serious infection in the wife's uterus, making pregnancy impossible. According to the customs of the Key Tribe, if a married couple is unable to conceive, the husband is required to divorce the wife. Following this custom, the couple in Mimika, Papua, decided to go to a hospital in Surabaya to undergo IVF.<sup>1</sup>.

The practice of surrogacy has become a hot topic in various legal, social, and ethical discussions. This phenomenon allows couples who are unable to have children to use the services of a surrogate mother. However, this practice also raises complex ethical dilemmas, particularly when it comes to women as the objects of this practice.

Surrogacy cases have become increasingly common in recent decades, following the discovery of an extrauterine fertilization method known as in-vitro fertilization. This is a process in which an egg is fertilized by sperm in a petri dish by medical personnel. This type of fertilization was first successfully performed in 1970 and became known as test tube babies, after the discovery of a method for preserving sperm. Initially, this method was intended to help couples, especially when the wife experienced problems with her fallopian tubes, preventing the egg from reaching the uterus.<sup>2</sup>.

The application of artificial reproductive technology is accompanied by complex issues, including social, ethical, legal, and religious considerations. The increasing attention to these emerging issues, coupled with the increasing number and diversity of emerging issues, has made surrogacy attractive and potentially beneficial from a social, ethical, and legal perspective.

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<sup>1</sup> Adinda Akhsanal Viqria, "Analysis of Surrogate Mother According to Civil Law and Islamic Law Adinda," Journal of the Master of Law Program, Faculty of Law, University of Indonesia 1, no. 4 (2022): 1693–1706, <https://scholarhub.ui.ac.id/dharmasiswa> Available at: <https://scholarhub.ui.ac.id/dharmasiswa/vol1/iss4/3>.

<sup>2</sup> Desriza Ratman, Surrogate Mother in Ethical and Legal Perspective (Jakarta: PT. Alex Media Komputindo, 2012), 37.

Although the law explicitly regulates methods of conception, many people still practice this practice, driven by a strong desire to have children. This article will attempt to analyze and examine this practice from the perspective of feminist jurisprudence.

## B. METHODS

The research method used in this study is library research or literature review with a descriptive interpretive approach, which involves collecting and analyzing information from various written sources, including books, journal articles, and legal documents related to the practice of surrogacy. The researcher searched for relevant literature to understand the legal, ethical, and social perspectives on this issue, as well as feminist perspectives related to the exploitation of women in this practice. Data obtained from these various sources was critically analyzed to identify ethical and legal dilemmas and to explore the implications of the practice of surrogacy in Indonesia. With this approach, the study seeks to provide a comprehensive understanding of this complex issue and generate evidence-based recommendations.

## C. THEORY

### 1. Definition of Surrogate Mother(Rent the Womb).

*Surrogate Mother* etymologically it is interpreted as "Surrogate Mother" or "Guardian Mother."<sup>3</sup> In a broader sense, a Surrogate Mother is a woman who is bound by an agreement with another party, usually a married couple, who are willing to become pregnant after the fertilization process between sperm and ovum is carried out outside the uterus (In Vitro Fertilization). After fertilization, the embryo is inserted into the woman's uterus until birth, according to the agreement in the agreement. In the end, the baby will be handed over to the relevant party in return for the agreed material. In Arabic, Surrogate Mother is called *isti'jarul arham*, which means renting the womb, namely a woman who is willing to rent her womb to carry and give birth to a child, with fertilization carried out outside the uterus based on an agreed agreement and compensation.

According to Desriza Ratman, womb rental is a process in which sperm and egg fertilization is carried out in a petri dish. After fertilization, the embryo is implanted into the uterus of another woman unrelated to the embryo source, and this process is carried out based on a rental agreement known as surrogacy. Meanwhile, Fred Amelen argues that a woman binds herself through an agreement with a married couple to become a surrogate mother. After fertilization of the sperm and egg cells occurs outside the uterus until the birth process according to

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<sup>3</sup> Ameln Fred, Selected Chapters on Medical Law, I (Jakarta: Grafikatama Jaya, 1991), 117.

the agreement, the baby is then handed over to the married couple in exchange for the agreed material.<sup>4</sup>.

*Surrogate mother* In vitro fertilization (IVF) is a technique in which the sperm and ovum from a married couple are processed in a test tube and then inserted into the uterus of another woman, not the wife. The woman who is willing to receive and carry the embryo is called a surrogate mother, while the couple who use this service are known as the intended parents. The surrogate mother will receive fees for all needs during pregnancy, childbirth, and after delivery. After giving birth, she must hand over the baby to the intended parents. The process of uniting the sperm and ovum cells from the married couple is then implanted into the surrogate mother's uterus through an agreement made between the two parties, with a certain fee for the woman who rents her womb. After giving birth, the surrogate mother is required to hand over the baby she is carrying to the parents who have rented the womb according to the agreed agreement.<sup>5</sup>.

## 2. Surrogate Mother Technique

*In vitro fertilization* (IVF) is a method of fertilization outside the uterus, in which a woman's egg is taken and combined with a man's sperm in a test tube (Husni Thamrin, 2014). After the embryo and fetus are formed, the embryo is then placed back into the woman's uterus to begin the pregnancy process. In other fertilization methods, the process is similar to IVF. However, after the embryo develops into a fetus, the embryo is transferred into the uterus of another woman, often referred to as a surrogate mother. The involvement of this third woman in the process is often known as "renting a womb" or "surrogate mother."

In the practice of surrogacy, a woman carries a pregnancy for another couple. In this context, the woman's womb is rented to bear a child for the couple in need. This method is usually chosen when the surrogate mother has health problems that prevent a natural pregnancy. This process is known as surrogacy, and the woman who rents her womb is referred to as the surrogate mother. Surrogacy can also be considered the practice of borrowing a woman's womb in exchange for a fee.<sup>6</sup>.

## D.ANALYSIS AND DISCUSSION

### 1. Feminist Jurisprudence.

Feminist legal theory is a legal school based on gender emancipation (efforts for equality) in the political, economic, and social spheres. Feminist Legal Theory is based on the feminist movement's view that, historically, law has been an

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<sup>4</sup> Ali Imron, Islamic Marriage Law in Indonesia (Semarang: Abadi Jaya, 2015), 87.

<sup>5</sup> R. Febrina Andarina Zaharnika, "Legal Analysis of the Implementation of the Surrogate Mother Agreement Reviewed from a Positive Law Perspective," *Mimbar Justitia Law Journal* 7, no. 2 (2021): 105, <https://doi.org/10.35194/jhmj.v7i2.1873>.

<sup>6</sup> Vasanti Jadva et al., "Surrogacy: The Experiences of Surrogate Mothers," *Human Reproduction* 18, no. 10 (2003): 2196–2204, <https://doi.org/10.1093/humrep/deg397>.

instrument for perpetuating women's subordination to men. History written by men has created bias in the concept of human nature, gender potential and capabilities, and in the organization of society. By stating that masculinity is the norm, femininity is a deviation from the norm, and this constitutes hegemony in the concept and reinforcement of patriarchal law and power.<sup>7</sup>.

This patriarchal culture gives rise to what is known as gender discrimination, where women's position in law and society is considered one level—or even several levels—lower than men. This is despite the adage of equality before the law, which states that everyone is equal before the law regardless of gender, race, social status, and so on. Therefore, feminist jurisprudence or feminist legal theory emerged as a critical form of criticism of existing legal schools or understandings. The feminist legal school began under the umbrella of critical legal studies, but later this school emerged and developed precisely as a critical response to the critical legal studies school. Feminist jurists have been very critical in trying to view the law as fundamentally having a number of limitations in realizing social values. The law (both in the formation of rules and its substance) is very phallocentric, that is, it favors the interests of men, so that the law is applied in their favor.

Feminism in law also rejects how women's positions are consistently marginalized in contracts, employment, and various social spheres. Feminists see that even though women have tried to improve their futures, the law remains overshadowed by a more masculine ideology. Feminists challenge and dismantle the belief or motto that men and women are so different that certain behaviors can be distinguished based on gender differences. Gender, according to feminists, is socially constructed or created, not biologically. Gender determines physical appearance and reproductive capacity, but not psychological, moral, or social characteristics. In other words, feminist jurisprudence attempts to study law from a woman's perspective and is based on feminist theories.<sup>8</sup>.

## 2. Liberal Feminism

The figure of liberal feminism is Naomi Wolf, her solution is Power Feminism. Women have the power in terms of education and income, and women must continue to demand equal rights and now is the time for women to be free to have free will without being dependent on men.

Liberal feminism is a view that places full and individual freedom on women. Freedom and equality are rooted in rationality and the separation of private and public needs. Everyone has the capacity to think and act rationally, including women. The roots of oppression and underdevelopment in women are due to their own mistakes. Women must prepare themselves to compete with men in free competition and have equal status with men. They view the state as a ruler who

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<sup>7</sup> Sulistyowati, *Women and Law* (Jakarta: Obor Foundation, 2008), 53.

<sup>8</sup> Abintoro Prakoso, *Legal Theory*, ed. Mardiana, II (Yogyakarta: LaksBang Justita, 2022), 295.

does not side with women, the state is dominated by men who reflect masculine interests, but they also consider the state to be a reflection of the interest groups that control it. For liberal feminists, women tend to be in the state only as citizens, not as policymakers. This results in women's inequality in politics or the state.<sup>9</sup>

### **3. Radical Feminism.**

The radical feminist genre emerged in the 1970s, when radical feminist groups offered an ideology of women's separatist struggle, which emerged as a reaction to the culture of sexism or gender-based social domination in the West around 1960, particularly against sexual violence and the pornography industry. Understanding that men's oppression of women is a fact of society, and this movement lives up to its radical name. Radical feminism rests on the view that women's oppression occurs due to the patriarchal system. Women's bodies are the primary object of oppression by male power, thus questioning, among other things, the body and reproductive rights, sexuality (including lesbianism), sexism, power relations between women and men, and the private-public dichotomy. "The personal is political" became a fresh idea capable of reaching women's issues into the private sphere, an issue considered most taboo to be brought to the surface. Negative information or views (black propaganda) were often directed at radical feminists. Because of their experience in exposing private issues, Indonesia has a Law on the Elimination of Domestic Violence.<sup>10</sup>

### **4. Socialist Feminism.**

Socialist feminism refers to the school of thought that holds that: There is no socialism without women's liberation. There is no women's liberation without socialism. Socialist feminism fights to abolish the ownership system. The institution of marriage, which legalizes men's ownership of property and husbands' ownership of wives, is abolished, as Karl Marx envisioned for a classless society without gender distinctions. Socialist feminism emerged as a critique of Marxist feminism. This school of thought argues that patriarchy predates capitalism and remains unchanged if capitalism collapses. Criticism of capitalism must be accompanied by a critique of domination over women. Socialist feminism analyzes class and gender to understand women's oppression. Socialist feminism agrees with Marxist feminism that capitalism is the source of women's oppression, and also agrees with radical feminism that considers patriarchy to be the source of all oppression. Therefore, both support each other in all forms of oppression. Nancy Fraser exemplifies that in the United States, the nuclear family is headed by men and the economy is officially headed by the state. Because the roles of citizens and workers are masculine roles, while the roles of consumers and childcare are feminine roles. The agenda for combating this is to eradicate capitalism and the patriarchal system.

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<sup>9</sup> Muhammad Erwin, *Philosophy of Law: Critical Reflections on Law* (Jakarta: Raja Grafindo Persada, 2011), 130.

<sup>10</sup> Prakoso, *Legal Theory*, 298.

In the Indonesian context, this analysis is useful for examining the problems of poverty that burden women.

## 5. The Ethical Dilemma of Uterine Rental Practices

Couples facing infertility often desperately desire children. From an Islamic perspective, children are considered a gift and a trust from Allah SWT, and the desire for offspring is natural and normal. This encourages couples to seek various ways to have children, one of which is through surrogacy.

The dilemma between the desire to have children and the restrictions of Islamic law regarding surrogacy reflects the challenges faced by many Muslim couples. While there are various alternatives to address this, Islam still requires its followers to act in accordance with the legal and ethical framework established by Islamic law and the laws of the state.<sup>11</sup>.

## 6. Exploitation of women

One of the main arguments against surrogacy is the potential exploitation of women, especially in countries with poor economic conditions.<sup>12</sup> Surrogacy may be forced to accept these offers due to financial need, which raises questions of freedom and choice. In these situations, it can be classified as a relationship between the employee and the employer that involves economic dependence. For example, there is a relationship with the mother's sister-in-law, and in one case, the relationship involves her aunt. Various types of work, the most common being "in-house" work (such as domestic help), but also including independent work (such as manicurists and hairdressers) or dependent work (such as employees), all fall into this category.<sup>13</sup>.

Surrogacy, or womb rental, should not be carried out because it can damage the dignity and honor of a woman or the mother of the child. While society may rationally utilize technological advances through the practice of surrogacy, it is important to draft a clear and written surrogacy agreement. This agreement must regulate the rights and obligations of each party, so that the rights and obligations arising from the agreement can be guaranteed and protected, especially for the benefit of the child. The practice of womb rental should not be carried out if it conflicts with religious values, morals, decency, and public order, especially for the benefit of the child.<sup>14</sup>

The practice of surrogacy or womb rental cannot be implemented in Indonesia because it is considered to violate the human rights of women who

<sup>11</sup> Nashwa Rifda Agustina, Anita Zulfa, and Machda Putri Puspaningtyas, "The Dilemma of Uterus Rental in Islam: Between the Desire to Have Children and the Limitations of Sharia," *Jurnal Medika Nusantara* 2, no. 4 (2024): 1–6, <https://doi.org/DOI: https://doi.org/10.59680/medika.v2i4.1484>.

<sup>12</sup> Nova Arikhman, "Social Review of Surrogate Mothers in Indonesia," *Jurnal Kesehatan Medika Saintika* 7, no. 2 (2016): 140–50.

<sup>13</sup> Bioethica Surrogate Motherhood et al., "Πλαστική Μητρότητα Στην Ελλάδα : Στατιστικά Δεδομένα Από Διυλαστικές Αποφάσεις" 3, no. 2 (2017): 39–58, <https://doi.org/10.12681/bioeth.19723>.

<sup>14</sup> Zaharnika, "Legal Analysis of the Implementation of the Surrogate Mother Agreement Reviewed from a Positive Law Perspective."

undergo this practice to have children from a legal marriage. In addition, the agreement made is not officially recognized, because a woman's womb is not an object that can be agreed upon. As a result, the parties involved in the agreement do not receive legal protection. In addition to ignoring the human rights of surrogates, womb rental also has the potential to violate the human rights of children born from this agreement. According to Article 56 paragraph (1) of the Human Rights Law, "every child has the right to know who his parents are, to be raised and cared for by his own parents." This practice raises issues regarding the status of children, and there is the possibility of genetic inbreeding which can result in the risk of weakness or defects due to inbreeding.<sup>15</sup>.

## 7. The dilemma of legal ethics and religion

According to Article 1313 of the Civil Code, the statement that "An act in which a person or group of people bind themselves to another person" can be applied to the practice of surrogacy as a form of agreement. In this case, one party (the biological parent) commits to another party (the surrogate mother), or both parties mutually agree to perform an act (embryo transfer), thus forming a legal relationship known as a contract. Thus, this agreement reflects a form of contract between the two parties.<sup>16</sup>.

Article 1233 of the Civil Code stipulates that an obligation can arise from either an agreement or a law. The agreement as a source of an obligation can be a written or unwritten document and can originate from a law or individual action. In the context of surrogacy, an obligation is formed when the biological parents reach an agreement with a woman to carry and give birth to their child. In accordance with Articles 1313 and 1233 of the Civil Code, all provisions agreed upon in the agreement apply as law to the parties involved. This includes various elements of the agreement, such as the performance to be carried out, the rights and obligations of each party, the form and content of the agreement, the purpose and duration of the agreement, and certain conditions that are part of the agreement.

According to Indonesian law, the permitted method of fertilization is the sperm and ovum collection from a legally married couple, which are then implanted back into the uterus of the wife from whom the ovum originated. This method is known as IVF. However, methods or efforts to achieve pregnancy outside of natural means, other than those regulated in Article 127 of Law Number 36 of 2009 concerning Health, including the practice of surrogacy or womb rental, are not legally permitted in Indonesia.

One of the requirements for a valid contract is a lawful cause, meaning it does not conflict with law, morality, or public order. Surrogacy is not considered a

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<sup>15</sup> Alifia Qintarawati, "Protection of Surrogate Mothers from the Perspective of Human Rights Law in Indonesia," JOURNAL OF LAW AND STATE CONSTITUTIONAL SCIENCE 1, no. 4 (2023), <https://doi.org/DOI: https://doi.org/10.55606/bureaucracy.v1i3.655> Protection.

<sup>16</sup> Muhammad Akbar, Muhammad Ali, and Dwi Pratiwi Markus, "Legal Review of Uterine Rental Agreements from the Perspective of Civil Law" 05, no. 02 (2024): 109–19.

"permissible" pregnancy treatment under the Health Law. Therefore, this requirement for a lawful cause is not met.<sup>17</sup>.

Indonesia currently lacks clear regulations governing surrogacy practices. Furthermore, policies related to surrogacy are also influenced by cultural and religious factors. Pancasila, the foundation of the Indonesian state, provides a philosophy of life that places religion as the foundation for various activities. Furthermore, international law lacks standard provisions, such as conventions or other sources of international law, that can be used as a reference. The legality of surrogacy practices internationally currently depends on the national laws of each country.<sup>18</sup>.

Although some countries have legalized this practice, surrogacy must be carried out by considering and protecting the rights of children and women, including inheritance rights.<sup>19</sup> This practice also needs to be carried out using secure technology to ensure the safety of all parties involved. Many countries in Europe and the United States have legalized surrogacy under their constitutions and laws. In contrast, Indonesia and most Middle Eastern countries that adhere to Sunni Islam prohibit the practice of surrogacy based on law and the teachings of the Quran. Meanwhile, countries that adhere to Shia Islam, such as Iran, allow this practice with a number of strict regulations and through a court decision process. Furthermore, the practice of commercial surrogacy is also a particular concern.<sup>20</sup>.

Apart from legal dilemmas, the practice of renting a womb also raises dilemmas from a religious perspective<sup>21</sup>. Scholars forbid the practice of womb rental if it involves the womb of a woman other than one's own wife. They also prohibit mixing the husband's seed with another woman's, or mixing the wife's seed with another man's. Furthermore, inserting fertilized seed after one of the partners has died is also not permitted. In fact, according to Yusuf Qaradawi, this remains unjustified even if the woman renting the womb is another wife of the same husband. The reason is because this method creates uncertainty regarding who the biological mother of the unborn child is, and to whom the baby's lineage should be attributed—to the owner of the egg or to the owner of the womb.<sup>22</sup>.

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<sup>17</sup>Rachmadsyah, S. Surrogate Mother (IbuPengganti) on hukumonlinedotcom. [http://www.hukumonline.com/klinik/detail/1t4c562a3b4bba4/surrogate-mother-\(ibu-pengganti\)](http://www.hukumonline.com/klinik/detail/1t4c562a3b4bba4/surrogate-mother-(ibu-pengganti)). Accessed December 18, 2024

<sup>18</sup> Bayu Sujadmiko et al., "Surrogacy in Indonesia: The Comparative Legality and Islamic Perspective," *HTS Teologiese Studies / Theological Studies* 79, no. 1 (2023): 1–9, <https://doi.org/10.4102/HTS.V79I1.8108>.

<sup>19</sup> Syarifah Lisa Andriat Nur Ina Az Zahra, Charoline Christy Hutapea, "Inheritance Rights of Surrogate Mothers of Children from Uterine Rental Reviewed from a Civil Aspect Nur," *Jurnal Ilmiah Dunia Hukum* 7, no. 1 (2022): 35–47, <https://doi.org/10.33561/holrev.v1i2.3642>.

<sup>20</sup> Mega Dewi Ambarwati and Ghina Azmita Kamila, "The Evaluation of Surrogacy's System in Indonesia as Comparison to India's Legislation," *Lentera Hukum* 6, no. 2 (2019): 253–66, <https://doi.org/10.19184/ejlh.v6i2.10842>.

<sup>21</sup> Akhsanal Viqria, "ANALYSIS OF SURROGATE MOTHER RENTAL ACCORDING TO CIVIL LAW AND ISLAMIC LAW."

<sup>22</sup> Yusuf Qaradawi, *Contemporary Fatwas* (Jakarta: GEMA INSANI, 2022), 65.

## E. CONCLUSION

Uterus rental practiceFrom the perspective of feminist law, surrogacy completely fails to reflect the fundamental ideas espoused by this school. In practice, many women are subjected to injustice in social stratification. This practice also opens up the potential for exploitation of women, thus violating human rights. Ethical dilemmas are also one of the biggest challenges for those involved in this surrogacy practice. Legal and religious dilemmas are a significant obstacle. In Indonesia, the practice of surrogacy is completely illegal and contradicts both legal and religious norms. This practice is not explicitly regulated by law, and religiously, it is also in direct conflict with the basic principles of Islamic law.

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