



The Essence of Social Function of Property Right of the Land in Perspective Justice and Utility

Muhammad Rustan¹, Aminuddin Salle², Abrar Saleng²
A.Suriyaman M.Pide²

¹ Graduate Student PhD, Study Program : Science Of Law. Hasanuddin University, Makassar. Indonesia

² Faculty Of Law. Hasanuddin University, Makassar. Indonesia

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ABSTRACT: Based on the findings that the social function of property rights to land is a very important thing (urgent) for the community, therefore it cannot be removed because it is the implementation of the principle of development in the public interest. The legal status of the social function of property rights over land, always changing due to the rules governing the construction of the public interest is always changing. The power of the social function of property rights into force on the ground is always changing due to changing the rules anyway.

KEYWORDS: social functions, rights to land, justice and utility.

I. INTRODUCTION

In Article 33 clauses (3) of Act 1945 the results of fourth amendment Number 5 of 1960 on Basic Agrarian Principles (UUPA) as a national agrarian law. According to Article 2 clause (2) UUPA, the right to state's governance is only authorizes the state :

- a) To regulate and organize allocation, use, supply, and preservation of earth, water and air space;
- b) To determine and regulate legal relations between people and the earth, water and air space;
- c) To determine and regulate legal relations between people and legal acts of the earth, water and air space (UUPA 2008:6)

The existence of a legal relationship between peoples and legal entities with the earth, water and air space cannot be separated from the social aspects of human beings because it is a social creature, hence the bear of social dimension that is limiting land property rights to the extent that bear social function of land property rights. The existence of social function of land property rights indicate the social aspects by limiting individuals in govern the object owned. In other words, the use of term *social function* in relation to the ownership of land has the authority typically has in arranging the various laws in force in a state.

For the essence of social function of land property rights have the interpretation for each of applicable law as customary law, national agrarian law (UUPA), and Islamic law. With various laws that govern the essence of social function of land property rights, causing different interpretations from one another. With the interpretation of each law on the essence of social function of land property rights will be described in this article.

II. LITERATURE STUDY

A. Definition of Social Function

The social function is prioritizing the public interest than personally or individually. Therefore, when associated with social function, the land property rights means the public interest more prioritizing public interest than individually with indemnity. The concept of social function in West law can be seen from the history of its development, is based on the rights of individuals who are individualistic in absolute right. But it turns out later not to bring happiness to people, then reduced its absolute due to abuse of the right (*misbruik van eigendoms recht*) or against the law.

The social function in West law is essentially the form of reduction or limitation of individual rights for the public interest. As an example of the social function in West law, namely in Bonn Constitution in West

Germany stated that “property shall involve obligations, its use shall simultaneously serve the general welfare” (Parlindungan A.P., 1994:61-42)[1].

Contrary to the theory of social function from West is the theory of Karl Marx (<http://id.hicow.com/karl-marx>)[2], that capitalism discuss inequalities that exist in capitalist society. Society in the form of capitalist society has two groups of people, those who own the tools of production and labor. According him the capitalist society is characterized by inequality which the bourgeoisie are the people with wealth and that workers work for the owners of wealth to create wealth. The majority of people in society are poor because of the form of capitalist society in which only a few people hold wealth while others do not have and that is a gap in the community. Therefore, there is a gap in the society, the capitalist of society and the only way to get rid of this gap is through the adoption of communist society.

While the concept of social function of land property rights under customary law, by Holleman (Buzhar Muhammad 1997:46)[3] stating that the communal (*commune tracks*) is individual interest which always UUPAanced with the public interest, individual rights under customary law always UUPAance with the public interest. They very appreciate the collective nature of customary law people than individualistic nature, therefore mentaliteit any judgment, decision-making and pressure in the customary law lies in the power of village head, and custom peoples.

Therefore, the thinking is done by custom people is an aspect or a style that is typical of a society that still live very isolated or in their daily lives is still very dependent on the land or nature in general, the custom people are always concerned with the whole that prioritize the public interest rather than individual interest.

In the view of Islam about the social function of land property rights can be seen the argument of H.Abdul Malik Karim Amrullah (1953:53)[4], that the social function of land property rights in Islam can be traced in the history of Prophet Muhammad SAW after the age of about 50 years which is around June 28, 622 AD, they migrated from Mecca to Medina. In Medina they live in the house of Abu Ayub al-Ansari. After a few months of Prophet lived at his home then there is a desire to build a mosque. Surely it was the first time in search of how their land to build mosques and sought both orphans Sahal and Suhail the Jewish nationality and accidentally they have land, then the Prophet offered to buy it, but the landowner would not sell just want to give it to the Prophet as the mosque's land, but the Prophet refused. The Prophet then still buy it at an agreed price of both orphan with 10 dinars, which is paid at the time was Abu Bakar, the first mosque stands established by the Prophet is Taqwa Mosque.

B. Definition of Land Property Rights

a. Land Property Rights according to the Liberalism

In the land property rights is patterned individualist usually called *eigendom* rights. The source of word *eigen* has meaning self or personal, while *dom* is derived from the word *domaniaal*, which is defined as property, and the term of *domein* is defined as area or territory or state. Therefore, the word *eigendom* can be interpreted as private property. Eigendom rights according to the liberalism is the highest right, the highest since the eigendom rights said that based on an assumption that each individual as a person freely own and do whatever he wants. The peak of individual's freedom is reflected in eigendom rights that later became known as human rights (Rahmadi Usman 2011:184)[5]. Salle Aminuddin (2011:2010)[6], therefore, the source of rights in land by liberalism essentially on human rights. The human rights is the source of all individual rights to land.

In a metaphysical theory proposed by Immanuel Kant (Ridwan 2011:90)[7], he legitimate abstract concept about private property law. The personality of individual cannot be disturbed. An object such a land is valid to him, when he relates closely with the land, so that other people who use it without permission is a disservice. Compromising one's property is essentially an attack on the personality. Therefore, the land which is used as the property rights contained an objective element juridical practical.

In the view of liberalism, all land property rights which owned by person is an absolute right for him on the basis of the views of individual freedom as the implementation of human rights concept. The spirit of individual freedom encourages people trying to create a method or modern production technology to achieve the goal of profit and revenue maximization. The concept of absolute freedom of individuals to the land creates problems of the loss of orientation in relation to the significance of human life as individuals and as a society.

Thus, the concept of land property rights in liberalism is put individual has complete freedom of land property rights, therefore land attached personally to the owner so it applies absolutely. Therefore, the land property rights absolutely creates the notion of violation on the land property rights which contrary to human rights.

b. Land Property Rights According to Islam

In Islamic jurisprudence means that *al-milkiah* or *al-milku* is a relationship between man and property is recognized by the Shari'a, and made special for him or be specific to humans. *Milku* can be means ownership and it is more common than the word *al-maal* (property) as stated by Abu Hanifa Thought. *Al-milku* are private

rights against the goods and services that prevent others from within, and allow owners to use goods or services except in the presence of Shari'a obstacle. Someone has proprietary rights to the property in accordance with the Shari'a it was hers, and allow it to be used (Wahab Dzhila, 2004:93)[8].

In essence, the land property right is only temporary to be owned by people, the absolute of land ownership is comes from Allah in His word in the Qur'an

"Unto Him is everything in the heavens, all that is in the earth, all between them, and to Allah return all things" (Qur'an Surah Ali-Imran : 109).

While all of that is in the heavens, on earth and in the earth is belong to Allah SWT absolutely but in Islamic teaching is human must to trying to have it for a while only, as the Prophet SAW said that was narrated by Imam Bayhaqi : "It is not any one among you, eating a better meal than eat the sweat themselves". Therefore, the Prophet praises the people who like to work for a property to be private property.

Islamic teachings do not know the absolute property rights so that the scholars have argued about the land property rights ownership of land as Heider Nawab Syed Naqvi, Abu A'la al-Mawdudi, Yusuf Kamal, Kamil Musa and Afzalur Rahman (Ridwan 2011:61) [7] and they agreed that the concept of land property rights is a middle way between the concepts of individualism and socialism. The ownership rights of individual is not absolute and collective rights is not absolute. It should be added that although individualism and socialism there is a difference of opinion in interpreting the land property rights, but the Islamic teachings take the middle way, does not mean that combine both views teaching (individualism and socialist), but the concept is the UUPAance between private property rights with collective property rights, the basis of Tawhid (Oneness) as a vertical principle in Islamic teachings (*hablum minallah*) and the principle of horizontal (*hablum minannas*).

c. Land Property Rights According to UUPA.

In UUPA regulate the relationship of law between land and state which cause governing rights for land. Because humans have a relationship with land, then the right to have it. The land property rights are regulated in Article 20 clause (1) of UUPA, is a hereditary right, the strongest and fullest to possess the land of the provision in Article 6.

As specified in Article 21 and Article 49 clause (1) of UUPA, in principle, only Indonesian citizens who can have ownership rights over land, either alone or jointly with others. Besides, certain legal entities established and appointed by the government engaged in both social and religious field as a legal entity that can have rights to land along the land was used directly in the social and religious field.(Rahmadi Usman 2011:222)[7]. For foreigners and foreign legal entities are prohibited from having rights to land in Indonesia.

III. DISCUSSION

1. Social Function essence of Ownership Rights to Land.

a. Urgency Social Function of Ownership Rights to Land.

Social function of property rights to land is very important in the community, state and nation, therefore the land ownership does not apply absolutely to the owner as opposed to the principle adopted in the national land law. Principles adopted in the national land law is all right to land has a social function, all land rights are not justified to meet the individual needs of the sheer, but it should be enabled for the necessities of life together, and that a UUPAance between the interests of individuals with common interests. A UUPAance between the interests of individuals with common interests on the ground, among others, manifested in the form of payment of compensation to owners of land rights. When pressed by the individual interests of the public interest, then after payment of land compensation is changing its status to the land for the public interest to have a social function.

Hence the importance of the social function incorporated into the draft national law in Indonesia (positive law), which has been experiencing growth that gives rise to a view of society that states that the presence of the UUPA with the policies undertaken by the government to make regulations varying thus no longer able to fulfill the rights of local communities. Instead they increasingly provide opportunities or facilities for those who have access to capital with all its effects.

As a very important thing, the social function of property rights to land should be filled in accordance with the plans that have been set by the government, the public interest should take precedence over the interests of the individual, but taking into account the UUPAance between the interests of individuals with common interests. With the concept of the social function of how the UUPAance between individual interests with the public interest, if the interests of individuals driven by public interest due to a need that is very important or urgent needs, such as for street purposes, purposes of the dam, the purposes of the airport, hospital use, general market purposes, general cemetery purposes and so on, then the interests of the individual should be released

with the proper compensation to the payment of money, or other land owners that do not harm the land, so that it can be the land of the social function of property.

In essence, the social function of property rights to land in the national system of land law still contains elements of togetherness that comes from traditional law religious communal nature, which serve as the basis of national agrarian law. Together elements of land ownership are governed under customary law and the applicable law. Togetherness of property rights to land are directly or indirectly derived from the right of the people who are together for achieving development rights in the public interest.

2. Legal status of the Social Function of Ownership Rights to Land.

a. The legal status of the social function of property rights to land after independence .

In the period after independence, dualistic agrarian law, because all land rights in the West has been registered under the Land Registration Office or Ordinance Overshviingordonantie Behind the Name (1834 Staablad 27) and the Indonesian land rights have not been registered almost everything except eigendom agricultural land at that time (Stablaad 837 38).

Interpretation of the social function of property rights to land carried out since 1919, the Hoge Raad after Arrest dated January 31, 1919, that although property rights are not absolute but contrary to propriety applicable. In the era after independence, West agrarian laws remain in force in Indonesia until 1960.

The social function of property rights to land for the construction of a common interest with the revocation of land rights, which remain applicable rules of the Dutch Onteigeningsordonnantie Staablad 1920 Number 574. According Oloan Sitorus (Limbong Bernhard, 2011,:82) [9] This Ordinance amended and supplemented several times, the last with Staablad 1920 Number 574 compiled with a view lands based essentially individualistic in which the absolute right to land ownership continues to be recognized and can not be contested.

This Ordinance to conduct land revocation shall come a long way and takes a long time because of having to go through the various judiciary, executive and legislative. The new constitution, Article 27 paragraph (1) Provisional Constitution of 1950 confirmed that the dispossession of land (ontegening) the public interest requires, along with provision of compensation and is based on the provisions of the laws that govern them. Therefore this dispossession changed after entering the year 1947 so that the legal status of property rights to be revoked on the ground is changing.

Therefore rule dispossession of land still individualistic which essentially still liberal. Because individualistic means individual rights legal protection is higher than in the public interest, so as to realize the social function of property rights to land difficult to realize, because the social function that is needed is a UUPAance between the interests of individuals with common interests.

The legal status of development in the public interest for a public housing ontogening, landowners are given the widest opportunity to object to the plan. Onteigeningsordonantie is valid until 1960 after the enactment of Law Number 5 In 1960 the government made Onteigeningsordonantie of the Dutch East Indies had been revoked.

For the implementation of the social function of property rights to land in the form of development for the urgent public interest, issued Law Number 20 of 1961 Revocation of Land and Existing Bodies On it. (State Gazette 1961 Number 288) and Explanatory Notes (Supplement Number 2324).

b. The legal status of the social function of property rights to land after the New Order (ORBA).

New Order was born after the implementation of the regulations of Law Number. 20 of 1961 Revocation of Land Rights and the Goods and Presidential Instruction Number Thereon 9 Year 1973 on Guidelines for Revocation of Rights to Land and the Goods above It. In the Presidential general interest translated umbrella of the interests of the nation that can be interpreted as the public interest or the interests of the people and /or construction of public interest. Consequently formulation forms of development activities that have the nature of public interest is abstract.

In Inpres. 9 In 1973, using two approaches namely general guideline approach (Article 1, paragraph 1), and the approach of the list of activities (Article 1, paragraph 2). Article 1 (1) contains the classification of public interest, namely a) the interests of the nation and the state, b) the public interest, c) The interests of the people much / joint d) The interests of development. Specified in paragraph 2 forms of development activities that have the nature of public interest, namely : Land, Public Works, General Services, Religious, Scientific and Cultural Arts, Health, Sports, Public Safety to Natural Disasters, social welfare, tomb, tourism and recreation and economic efforts that benefit the General Welfare. All these are the scope of their legal status in the public interest that has a social function in it.

It should be recognized that the time that the New Order government orientation is to strengthen the capitalist order of society. It is characterized by policies that put the land as one of the strategic commodities in development. Therefore, since half of the 1970 and 1990 appear to deregulation of the rules if only hamper the

acquisition of land for development in the public interest. Ease of acquisition of land placed as a comparative advantage in investment, because it's land policy aimed at creating a conducive environment for investment.

According to the Parlindungan A.P, 1994 :52)[1] that regulatory interior minister Number. 15 The year 1975 was analyzed that there are restrictions on the authority of state agencies to make laws in the sense of material, with the assumption that the construction of the public interest is to be implemented by the disenfranchisement regulatory interior minister is void because :

- 1). Minister of the country does not have the authority to make binding regulations generally in the absence of delegation of authority.
- 2). Regarding the revocation of rights, the Act Number 20 of 1961 has been appointed as the President of the competent authority to decide.
- 3). regulatory interior minister regulate a problem that has been regulated by Law Number 20 of 1961 and the contents of the minister of the Interior regulations contrary to the contents of the said law.

After the birth of the Presidential Decree 55 Year 1993 on Land Procurement for Development Implementation for Public Interest. Rules on the construction of the public interest are made with the intention of accommodating the aspirations of various groups in society as a reaction to the excesses of land acquisition that occurred during this time.

It can not be denied that time , because the basic concept of national development direction through a Five-Year Development Plan (Five-Year Plan), which starts from Repelita I through V Five-Year Plan, the foundation of the agricultural sector, leading to the industrial sector, even in the Five-Year Plan VI development towards to stage off, all of the necessary land property rights for social dysfunction.

Thus, development is in the public interest, the interests of many individuals to transform the land titles ranging pressed so that the meaning of social functions ranging misinterpreted and misused. Private interests granted facilities owned land use rights by way of the issuance of the Minister of Home Affairs Regulation Number 2, 1985 on Land Procurement Procedures Required for Development Projects in Sub Region. The latter regulation provides an opportunity to urge the interests of the individual.

b. Legal status of the Social Function of Ownership Rights to Land after Reform Order.

On how to apply the ` period of reform land management system that efficiently, effectively and carry out enforcement of property rights to land by applying the principles of justice, expediency and democracy. Born during the period of Presidential Regulation Number reform. 35 In 2005, Presidential Regulation Number 65 of 2006 Perpres 36 in conjunction with Presidential Decree Number 2005 65 The year 2006 is the instructions on the procedures to be followed in order to obtain official development activities in the public interest , the direct impact is felt by the public.

In Article 1, paragraph (5) Presidential Regulation. 36 of 2005 defined the interests of the majority of society . Implementation of development for public use by the government or local authorities carried out by way of a) the release or transfer of rights over land or b) revocation of land rights. Moreover, it can do a sale or exchange of atu otherwise voluntarily agreed upon by the parties concerned.

Perpres 36 in conjunction with Presidential Decree Number 65 2005 The year 2006 seems to provide options for the development of public interest that is done by the release and delivery of land rights or land revocation, when referred to in the regulation is in accordance with Article 18 of the UUPA.

In regard to the nature of the law in this regulation that presidential decree 36 in conjunction with Presidential Decree Number 2005, 65 of 2006 contains the things that are repressive, it can be said that the regulation includes provisions that can be classified as repressive laws.

Similarly, in care compensation in Article 18 paragraph (4) of Presidential Decree Number 35 in conjunction with Presidential Decree Number 2005 65 of 2006 regarding the placement location of the construction project for the public interest contains elements of coercion against the owner of the land because the element of voluntary disregard of the rights of land owners.

Basis of consultation is very short 120 calendar days (Article 10 paragraph 1 of Presidential Decree Number 65 of 2006) which led to give the impression to the public that is more concerned with the regulation in terms of procedural formalities or legal status to obtain the public's land property rights are made the object of public interest, from the essence of deliberation. Though the essence of consultation is the value adopted by the people of Indonesia since the first until now.

3. Applicability of the power of Social Function of Ownership Rights to Land.

a. Enactment of the social function of the strength of land titles before the birth of the UUPA.

Enactment of the social function of the strength of land titles are always changing the rules made any ownership rights over land led to enactment of the power of change as well . If we contrast the regulations before the birth of UUPA in 1960 the rule was still wearing the Dutch East Indies government regulations.

In the entry into force of the power of social function of property rights to land, before UUPA governed by *Onteigeningsordonnantie Statblad* 1920 Number 574 were made and treated with the same level legislation. The ordinance changes and additions to the Gazette in 1947 96.

In anticipation of the above so that land ownership is not an absolute force in Indonesia, as in *Bijblad* Number 11372 12746 jo *Bijblad* based on Article 27 paragraph (1) 1950 Provisional Constitution or Article 26 of the Provisional Constitution of 1950 asserted dispossession (ontogening) for the benefit general or something, or rights is prohibited except by giving compensation to the owner and are based on the laws that govern them. Hence the presence of the article in the Provisional Constitution of 1950, title to the land is gone absoluteness (absolute property rights do not apply), has turned into a social function, although it contains elements of the terms in it with a decent compensation.

b. Applicability of the power of Social Function of Ownership Rights to Land after Applicability UUPA.

Upon entering the UUPA was born in 1960, the interpretation of the rights to land that serves social change force strength. This is due to the basic force of the UUPA based on customary law (Article 5 UUPA).

In the Presidential Instruction 9 Year 1973 on Implementation of Repeal Land Rights and the Goods above It. In Article 1 (1) states there are four categories of activities that have the nature of public interest, namely:

- 1). Interests of the nation, and / or
- 2). Public interest, and / or
- 3). Interests of the people / joint, and / or
- 4). Development interests

As set out above under Presidential Instruction. 9 of 1973 does not provide the kind of detail that goes interests of the state, the nation, the public and many people only take the amount of lines. This gives a broader understanding of the public interest, as a result of activities of public interest are overlapping with each other such interests may overlap construction (over- lapping). Interpretation of other interests cause haziness understanding the interests of the state , the nation , the people and the wider community is difficult to determine in detail the type of activities , because the types of interests are not described in detail.

Inpres.9 In 1973 the power of the weak force is considered as contrary to the Legislative Act Number XX/MPRS/1966 about the Source Code DPRGR Memorandum of Law in Indonesia, which is reinforced by the Legislative Act Number V/MPR/1973 that the hierarchy of laws in Indonesia are :

- 1). Act of 1945
- 2). MPR Decree
- 3). Law/ Regulation in Lieu of Law
- 4). Government regulation
- 5). Presidential Decree
- 6). Implementing Regulations such as Regulation of the Minister, and the Minister of Instruction

Observing Inpres 9 In 1973 associated with Stufen Theory of Hans Kalsen that there is a requirement for the smooth conduct of the legal effect of a rule of law that is tiered according to the pyramid stairs. In each household there are norms (norm) is called the basic rules (grundnorm). Under the basic rules is called the Constitution, under the constitution are the rules, under the regulations are provisions. Basic validity and legality of a rule lies in the rules that exist on it.

Therefore Inpres 9 In 1973, when linked to the Legislative Act Number V/MPR/1973 deemed not to follow the hierarchy of laws in Indonesia , meaning contrary to legal principle of *lex `superiory derogat inferiory lex* (law higher law overturned lower). With the Presidential Directive Number 9 In 1973, contrary to the theory of law and legal principles applicable enactment Presidential power is considered weak.

Furthermore, after the birth of the Presidential Decree 55 In 1993 the scope of public interest changes. In Article 5 paragraph (1) asserts that the development activities undertaken and subsequently owned by the government and is not used for profit.

Issued Decree on the scope of increasing the number of public interest, this means about 14 scope and some who never entered the scope of public interest in the Presidential Instruction Number 9 In 1973 the power of force is no longer valid only between the other public services, general supplies, public works, tourism and recreation, public welfar, social welfare, science and art.

Presidential Decree 55 In 1993 undergone many improvements so that the power of force is :

1. Provisions about general interest only intended for government owned and is not used for profit. With the use of land for non-profit making social function can be used by the public.
2. Development activities in the public interest are clearly specified in the scope of the decree to be 14, although they can be extended with a presidential decree, the decree will provide a stronger force strength.

3. In no uncertain terms that the implementation decree for the public consultation carried out directly with the land owners. The consensus principle embodies the values espoused by the Indonesian nation since the beginning until now and set out in the fourth principle of Pancasila.

After the enactment of Law Number 2 In 2012, the construction of the public interest sphere into 18 parts, so many facilities for the benefit of society, the government and the state to obtain legal status in the public interest, so that the power of force of change as well as government hospitals /area, public safety facilities, public cemeteries government/local government, government agencies/local government/rural, social facilities, public facilities and public green spaces, structuring the urban slums, infrastructure, education / schools, sports facilities government / local government, public market and public parking. All this changed power enactment of general interest, so the more social functions.

This article is no gap, because it gives private companies the opportunity to participate in development efforts in the public interest , so that the orientation of this article will lead party meaningful business venture aims to make a profit. If private companies are involved in it, there will be the price of land can be speculated by certain parties, so that land ownership is made the object of public interest will omit social functions into business functions.

Thus Article 12 paragraph (1) above is contrary to Article 6 UUPA which asserts all rights over land has a social function. Similarly, in Article 41 paragraph (2) and (3) confirms that the parties are entitled to submit proof of procurement or possession is the only evidence that an unlawful and can not be contested in the future. Because it can not be contested again in the future means that the power of enactment of Article 41 paragraph (2) and paragraph (3) shall be absolute, meaning land property rights are transferred to the public interest should not be done through the District Court lawsuit, although there is evidence that possessed very strong, whereas in Article 19 paragraph (2c) UUPA, adheres to the principle of a strong force, this means that if in the future there is the evidence that was found to be robust, can be done through the District Court lawsuit to cancel the legal status of the land.

IV. CLOSING

A. Conclusions

Social function of property rights to land is critical for sustainable development for the benefit of the community, state, and nation. Development of the government's need community support in the form of release of title to land with compensation payments that have not been adequately reimburse and provide maximum replacement value corresponding market prices. The state as an institution has the power and authority to regulate tenure rights to land in the realization of the social function of property rights to land. The legal status of the social function of property rights over land that accommodated more powerful in various forms supported by regulation and legal culture of society. Setting social function of property rights to land is always changing cause blurring the meaning of public interest for the implementation of the development.

B. Suggestions

Unification required for coordination of development activities in the public interest. Clear arrangements in a statute will bear the legal status of social function of land which is effective and childbirth sense of justice and provide benefits to all parties. In addition, the necessary rules in favor of the communities that provide justice and benefit for all parties realized in restitution payments to replace the profits to improve the welfare of society.

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