

Judicial Reasoning on Unlawfulness in Onslag Decisions in Corruption Cases

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Abstract

This study analyzes judicial law finding (rechtvinding) in High Court Decision Number 25/PID.SUS/2021/PT/BDG, focusing on the interpretation of the element of unlawfulness in an onslag van alle rechtsvervolgving ruling within corruption cases involving budget switching policies in the education sector. The research addresses the tension between legal certainty and substantive justice, particularly the tendency to criminalize administrative discretion without adequate assessment of material unlawfulness and mens rea. This study employs a normative legal method with statutory and case approaches, supported by qualitative interpretative and argumentative analysis of legal materials. The findings demonstrate that the panel of judges applied a contextual and substantive approach by integrating formal and material unlawfulness, emphasizing intent, consequences, and proportionality. Although procedural irregularities were identified, the absence of malicious intent and state financial loss justified the application of onslag as a manifestation of the principles of ultimum remedium, proportionality, and subsidiarity. The novelty of this research lies in the formulation of the Theory of Decriminalization of Functional Discretion, which offers a conceptual framework to distinguish administrative deviations from criminal conduct based on intent, impact, and accountability. This study contributes to the development of a progressive paradigm in corruption law enforcement and recommends a risk-based legal assessment model to prevent overcriminalization while safeguarding good-faith public officials.

Keywords: Corruption; Justice; Law; Progressive

1. INTRODUCTION

Law enforcement against corruption is a key prerequisite for clean, accountable, and ethical governance. Corruption, as an extraordinary crime, not only causes financial losses to the state but also undermines the legitimacy of public institutions and public trust in the law.¹ In practice, the enforcement of corruption laws often places judges in a dilemma between maintaining formal legal certainty and achieving substantive justice.² This dilemma becomes even more apparent when positive norms do not provide explicit answers to concrete events, thus opening up space for judges to make legal findings as a form of legal discovery that is responsive to social dynamics.³

Problems arise when procedural irregularities in the management of public budgets—particularly in the education sector—are classified as criminal acts of corruption without adequate analysis of the material elements of unlawfulness and the existence of mens rea.

¹ St. Hadijah Wahid, Wandu Pratama Putra, and Friska Amelia Arale, “Tantangan Dan Strategi Implementasi Kebijakan Anti-Korupsi Di Lembaga Pemerintahan,” *Legal Standing: Jurnal Ilmu Hukum* 9, no. 3 (2025): 576–87, <https://doi.org/10.24269/ls.v9i3.9989>.

² Viony Laurel Valentine, “Penafsiran Keadaan Tertentu Dalam Tindak Pidana Korupsi : Perspektif Teori Kepastian Hukum,” *Jurnal Anti Korupsi* 13, no. 1 (2023): 14–27, <https://doi.org/10.19184/jak>.

³ M Dani Fariz Amrullah D, Yuli Kasmarani, and Dora Mustika, “Analisis Sifat Melawan Hukum Formil Terhadap Pelaku Tindak Pidana Korupsi Berdasarkan Pasal 2 Dan Pasal 3 Undang-Undang Nomor 20 Tahun 2001,” *Ta'zir: Jurnal Hukum Pidana* 8, no. 1 (2024): 57–68, <https://doi.org/10.19109/tazir.v8i1.22909>.

The Bandung High Court's decision No. 25/PID.SUS/2021/PT/BDG, which acquitted the managers of BOS, PMMS, and BPMU funds of all legal charges (*onslag van alle rechtsvervolging*), sparked debate about the conceptual boundary between administrative violations and criminal acts of corruption. The urgency of this research lies in the need to reaffirm the parameters for applying the element of 'unlawfulness' in the context of administrative discretion and budget switching, so as not to criminalise administrative policies that are carried out without the intention of personal enrichment and without actual loss to the state. The solution offered in this study is the formulation of an argumentative construction regarding the application of the judge's legal findings in assessing the element of unlawfulness materially, based on an analysis of motive, consequence, and proportionality of sanctions from the perspective of *ultimum remedium*.

Previous research by Valentine (2023) highlights the dilemma between legal certainty and substantive justice in corruption cases.⁴ The strength of this research lies in its theoretical mapping of the conflict between formalistic and progressive approaches in interpreting unlawful elements. However, the research has not yet examined in depth how this dilemma is applied in concrete cases of education budget management. The analysis is still conceptual and does not touch on the aspect of budget switching as a problem in public administration practice.

Furthermore, Wahid's research (2025) discussed strengthening the role of the judiciary in establishing precedents for combating corruption.⁵ This research has the advantage of providing a normative analysis of the law-making function of judges in corruption cases. However, its weakness lies in the lack of specific discussion on the boundary between administrative violations and criminal acts, as well as the lack of examination of acquittals as a concrete form of legal finding application. Analytically, Putra's research still places judges within the general framework of judicial activism without elaborating on the context of public sector budgetary discretion.

Meanwhile, research by Amrullah (2024) examines the interpretation of the element of 'unlawfulness' in Articles 2 and 3 of the Corruption Eradication Law.⁶ The strength of this research lies in its distinction between formal and material unlawfulness. However, its shortcoming is the lack of analysis of the relevance of *mens rea* and policy objectives in determining the existence of corruption, particularly in the context of education fund management. The study also does not explicitly link the application of the *ultimum remedium* principle in judicial practice.

Unlike previous studies, this study specifically analyzes the application of legal findings in acquittal verdicts in corruption cases related to the switching of education funds.

⁴ Valentine, "Penafsiran Keadaan Tertentu Dalam Tindak Pidana Korupsi : Perspektif Teori Kepastian Hukum."

⁵ Wahid, Putra, and Arale, "Tantangan Dan Strategi Implementasi Kebijakan Anti-Korupsi Di Lembaga Pemerintahan."

⁶ D, Kasmarani, and Mustika, "Analisis Sifat Melawan Hukum Formil Terhadap Pelaku Tindak Pidana Korupsi Berdasarkan Pasal 2 Dan Pasal 3 Undang-Undang Nomor 20 Tahun 2001."

This study not only examines the normative aspects of unlawful elements, but also integrates analysis of motives, consequences, administrative discretion, and the principle of *ultimum remedium* as a single argumentative unit. Thus, this study attempts to fill the research gap in the form of the absence of a comprehensive study that places *onslaag* decisions as a corrective instrument against the tendency to criminalise administrative policies that are not accompanied by malicious intent and actual state losses.

Based on the above description, the objectives of this study are: (1) to analyse the application of legal findings by judges in Decision Number 25/PID. SUS/2021/PT/BDG; (2) to examine the panel's considerations in qualifying budget switching as the basis for the dismissal decision; and (3) to formulate an interpretation of the element of 'unlawfulness' in public fund management to be in line with the principles of substantive justice and *ultimum remedium* in criminal law on corruption.

2. METHOD

This research is normative legal research oriented towards the systematic study of legal materials to discover principles, norms, and legal argumentation constructs relevant to the issues under investigation.⁷ Normative legal research treats law as a norm, so that the analysis focuses on the consistency, synchronisation, and coherence between the provisions of legislation and their application in judicial practice.⁸ The approaches used include the statutory approach and the case approach. The statutory approach is used to examine the provisions regarding the element of 'unlawfulness' in the Corruption Eradication Law and relevant principles, while the case approach is used to analyse the *ratio decidendi* and legal considerations of the judges in High Court Decision Number 25/PID. SUS/2021/PT/BDG, particularly in relation to the application of legal findings and acquittal (*onslag van alle rechtsvervolging*).

The legal materials used consist of primary, secondary, and tertiary legal materials. Primary legal materials include the 1945 Constitution of the Republic of Indonesia, Law No. 31 of 1999 in conjunction with Law No. 20 of 2001 on the Eradication of Corruption, as well as court decisions relevant to the subject matter. Secondary legal materials include literature, scientific journals, and academic documents discussing criminal law, state administrative law, and legal discovery theory, while tertiary legal materials include legal dictionaries and legal encyclopaedias as conceptual support. The technique for collecting legal materials was conducted through library research, while the analysis was carried out qualitatively using interpretative and argumentative methods, employing deductive

⁷ Hari Sutra Disemadi, "Lensa Penelitian Hukum: Esai Deskriptif Tentang Metodologi Penelitian Hukum," *Journal of Judicial Review*, 24, no. 2 (2022): 289–304, https://www.researchgate.net/publication/367395687_Lenses_of_Legal_Research_A_Descriptive_Essay_on_Legal_Research_Methodologies.

⁸ Oleksandr Kunets, "The Relationship Between Judicial Interpretation and Clarification of Legal Norms: Theoretical Approaches," *Legal Horizons* 27, no. 4 (2025): 32–42, <https://legalhorizons.com.ua/lh/article/view/222>.

reasoning that draws general rules into their application in concrete cases to obtain prescriptive conclusions.

3. RESULTS AND DISCUSSION

3.1 Judicial Discovery by Judges in the Onslaag Decision of the High Court Number 25/PID.SUS/2021/PT/BDG

Dismissal of all legal proceedings is a type of decision in criminal procedure law that releases the defendant from all legal charges, even though the alleged acts have been proven to have been committed.⁹ This concept originates from the Dutch legal system as codified in the *Wetboek van Strafvordering* (WvS) and has been adopted into Indonesian criminal procedure law through Article 191 paragraph (2) of the Criminal Procedure Code. The difference between this and an acquittal (*vrijspraak*) lies in the basis for the decision. An acquittal is handed down if the alleged act is not proven, while dismissal is handed down if the elements of a criminal offence are not fulfilled, even though the defendant's actions have been proven to have occurred.¹⁰

The principle of legality (*nullum delictum, nulla poena sine praevia lege poenali*)¹¹ is the main basis for the existence of onslaag.¹² This principle guarantees that an act can only be punished if there is a clear legal provision governing it before the act is committed. Hazewinkel-Suringa emphasises that onslaag is a legal instrument that protects citizens from criminal sanctions for acts that have no valid normative basis.¹³ This principle serves as a bulwark against the arbitrary use of criminal law.

The principle of ultimum remedium is the second foundation that places criminal law as a last resort in law enforcement.¹⁴ Sudarto explains that onslaag is a manifestation of this

⁹ Selamat Lumban Gaol, "Titik Singgung Hukum Pidana Dan Perdata Dalam Penjatuhan Putusan Lepas Dari Segala Tuntutan Hukum Dalam Tindak Pidana Penggelapan (Studi Putusan Nomor 1073/Pid.B/2020/PN.Jkt.Tim)," *UNES Law Review* 6, no. 1 (2023): 4056–67, <https://review-unes.com/law/article/view/2173>; Ade Arga Wahyudi, "Analisis Pertimbangan Hakim Dalam Memutuskan Ontslag Van Alle Rechtsvervolgving Pada Putusan Nomor: 2/Pid.C/2021/PN.Slk.," *Majalah Ilmiah Warta Dharmawangsa* 17, no. 2 (2023): 621–31, <https://jurnal.dharmawangsa.ac.id/index.php/juwarta/article/view/3176>.

¹⁰ Flora Dianti, *Hukum Pembuktian Pidana Di Indonesia: Perbandingan HIR Dan KUHP*, Revisi (Jakarta: Sinar Grafika, 2023), 5.

¹¹ Hari Nataleo Sembiring et al., "Jurnal Asas Legalitas Dalam Perspektif Filsafat Hukum Studi Kasus Penerapan Asas Legalitas Dalam Kasus Tindak Pidana Korupsi Di Medan," *Causa: Jurnal Hukum Dan Kewarganegaraan* 14, no. 10 (2025): 1–4, <https://cibangsa.com/index.php/causa/article/view/3686>.

¹² Arizal Anwar, *Pemaafan Hakim (Rechterlijk Pardon) Dalam KUHP Nasional: Konstruksi, Norma, Dan Implikasi Bagi Sistem Pemidanaan* (Bandung: Indonesia Emas Group, 2025), 73–74.

¹³ Sumiaty Adelina Hutabarat et al., *Pengantar Hukum Pidana (Teori Dan Implementasi Pada Era Revolusi Industri 4.0 Menuju Era Society 5.0)* (Jambi: PT. Sonpedia Publishing Indonesia, 2024), 3.

¹⁴ Brian Kukuh Mediarto, "Dinamika Asas Ultimum Remedium Dalam Pemberantasan Tindak Pidana Korupsi Di Indonesia Dan Relevansinya Dengan Prinsip Restorative Justice," *JISPENDIORA: Jurnal Ilmu Sosial, Pendidikan Dan Humaniora* 3, no. 3 (2024): 184–94, <https://jurnal.stiepari.ac.id/jispendiora/article/view/3101>; Yuni Priskila Ginting, "Settlement of Criminal Cases Outside of Court Based on the Principle of Ultimum Remedium," *The Prosecutor Law Review* 02, no. 1 (2024): 73–94, <https://doi.org/10.64843/prolev.v2i1.32>; Pande Komang Surya Mahesa and Ayu Putu Laksmi Danyathi, "Penerapan Prinsip Ultimum Remedium Dalam Kebijakan Kriminalisasi Di Indonesia: Tinjauan

principle because the decision reflects that a case can be resolved through other legal mechanisms outside of criminal law if the elements of a criminal offence are not fulfilled.¹⁵ Van Bemmelen reinforces this view by stating that criminal punishment is only valid if there is a real need to protect legal interests that have been seriously violated.¹⁶

The principle of proportionality requires a balance between the culpability of the offender and the severity of the sanction imposed.¹⁷ Pompe emphasizes that onslag is the logical choice when applying criminal sanctions to administrative violations or acts without a significant harmful impact would be contrary to justice. This principle also prevents overcriminalization, which may undermine the role of criminal law as a protector of essential legal interests.¹⁸

The principle of subsidiarity complements proportionality by requiring the use of the least severe legal instrument before resorting to criminal prosecution. This principle ensures that criminal law is used only if administrative or civil sanctions are inadequate to achieve legal objectives.¹⁹ In this framework, onslag becomes the concrete embodiment of the

Teoritis Dan Praktis,” *Jurnal Media Akademik (JMA)* 3, no. 9 (2025): 1–17, <https://jurnal.mediaakademik.com/index.php/jma/article/view/2858>.

¹⁵ Anwar Sadat and FX. Hastowo Broto Laksito, *Hukum Pidana Dalam Praktek Peradilan Pidana Di Indonesia* (Kabupaten Gresik: CV. Global Kreatif Media, 2025); Muhammad Abdul Hakim and Pudji Astuti, “Putusan Lepas (Onslag) Terhadap Terdakwa Tindak Pidana Korupsi (Studi Putusan Mahkamah Agung No. 1555 K/PID.SUS/2019),” *Novum : Jurnal Hukum* 6, no. 1 (2019): 13–22, <https://ejournal.unesa.ac.id/index.php/novum/article/view/48480>.

¹⁶ Elly Udarti et al., “The Death Penalty for Bribery-Related Corruption in Social Assistance During Non-Natural Disasters : A Legal Certainty Perspective The Death Penalty for Bribery-Related Corruption in Social Assistance During Non-Natural Disasters : A Legal Certainty Persp,” *PADJADJARAN Jurnal Ilmu Hukum (Journal of Law)* 12, no. 3 (2025): 368–90, <https://journal.unpad.ac.id/pjih/vol12/iss3/5/>; Muhamad Naufal Hibatullah et al., “Law Enforcement Regarding Witness Protection in the Investigation of Corruption Crimes in Indonesia,” *Krtha Bhayangkara* 19, no. 3 (2025): 772–84, <https://doi.org/10.31599/krtha.v19i3.4654>; Raditya Nugraha and Absori, “The Politics Of Death Penalty Against Serious Criminal Cases In The Perspective Of The New Justice-Based Criminal Code,” in *Proceeding International Conference Restructuring and Transforming Law*, vol. 4 (Surakarta: Department of Law, Universitas Muhammadiyah Surakarta, 2025), 328–56, <https://proceedings.ums.ac.id/icrtlaw/article/view/5712>.

¹⁷ Aretha Aurora, “Penerapan Asas Proporsionalitas Dalam Penjatuhan Sanksi Pidana Terhadap Pelaku Tindak Pidana Korupsi (Putusan No. 29/Pid.Sus-TPK/2021/PN.JKT.PST),” *ALADALAH : Jurnal Politik, Sosial, Hukum Dan Humaniora* 4, no. 2 (2026): 185–96, <https://ejournalqarnain.stisnq.ac.id/index.php/ALADALAH/article/view/1746>.

¹⁸ Alexander F. Tingga, Hartiwiningsih, and Rudepel Petrus Leo, “Non-Litigation Paradigm and the Principle of Criminal Proportionality in Corruption Cases with Mild Error Levels,” *Journal of Posthumanism* 5, no. 3 (2025): 1296–1309, <https://doi.org/10.63332/joph.v5i3.910>; Helen Brown Coverdale, “Putting Proportional Punishment into Perspective,” *Criminal Law and Philosophy* 19, no. 2 (2025): 181–201, <https://doi.org/10.1007/s11572-024-09736-5>; D. Husak, “The Criminal Law as Last Resort,” *Oxford Journal of Legal Studies* 24, no. 2 (2004): 207–35, <https://doi.org/10.1093/ojls/24.2.207>.

¹⁹ Muhammad Irwan, Ali Rahman, and Amaliyah, “Judicial Law-Finding in the Criminal Justice System: Harmonizing Legal Certainty and Substantive Justice,” *SIGn Jurnal Hukum* 7, no. 2 (2025): 647–63, <https://doi.org/10.37276/sjh.v7i2.502>; Clara Citra Piternalis and Diah Ratna Sari Hariyanto, “Koherensi Implementasi Pendekatan Normatif Terhadap Peradilan Pidana Di Indonesia,” *Ethics and Law Journal: Business and Notary* 2, no. 3 (2024): 149–55, <https://doi.org/10.61292/eljbn.226>; Murshal Senjaya and Rusli Subrata, “Critical Review of Criminalization Policies in Law Number 1 of 2023 Concerning the KUHP,” *East*

subsidiarity principle, as it rejects the use of criminal law for cases that can be resolved through non-criminal means.

Indonesian criminal law scholars provide valuable perspectives on this concept. Andi Hamzah explains that onslag is applied when the element of fault or unlawfulness cannot be proven legally, even if the factual act is established. Moeljatno asserts that onslag serves to prevent the criminal law from punishing acts that are not reprehensible in the eyes of the law. Satjipto Rahardjo, through the theory of progressive law, argues that judges should examine the substantive justice underlying each case, making onslag a tool to avoid rigid and formalistic applications of criminal law.²⁰

Insights from foreign scholars reinforce these understandings. Hazewinkel-Suringa regards onslag as a safeguard for the principles of legality and material justice. Pompe positions it as a form of negative criminalization, reducing the scope of punishable acts to maintain proportionality and rationality in the law. Remmelink sees onslag as an essential means of distinguishing purely administrative violations from criminal offenses, ensuring that criminal law does not become an excessive instrument of retribution.²¹

The application of onslag requires judges to engage in *rechtvindning* (judicial law finding), which takes into account normative, moral, and social aspects. The element of unlawfulness—both in its formal and material senses—becomes the central point of evaluation. If this element is not materially fulfilled, even though there is a formal violation, onslag becomes the logical consequence to uphold substantive justice. This principle aligns with the German doctrine of *materielle Rechtswidrigkeit*, which evaluates the substantive wrongfulness of a violation before designating it as a criminal offense.²²

Asian Journal of Multidisciplinary Research 2, no. 6 (2023): 2541–50, <https://doi.org/10.55927/eajmr.v2i6.4497>.

²⁰ Yazrul Anuar and Raju Moh Hazmi, “Hukum Progresif Dan Penegakan Hukum Pidana : Antara Teks Dan Konteks,” *Malaka Law Review* 1, no. 1 (2023): 22–28, <https://www.ejournal.ybpindo.or.id/index.php/malaka/article/view/27>; Fey Nisa Br Sibarani and I Dewa Gede Dana Sugama, “Putusan Lepas Dari Segala Tuntutan Hukum (Onslag Van Vervolging) Dalam Tindak Pidana Korupsi (Studi Putusan No 1169 K/Pid. Sus/2019),” *Jurnal Kertha Wicara* 13, no. 3 (2024): 118–27, <https://ojs.unud.ac.id/index.php/kerthawicara/article/view/108279>; Kurdi, Adery Ardhan, and Teuku Ahmad Dadek, “The Relevance of The Principle of No Criminal Punishment Without Fault (Geen Straf Zonder Schuld) in Corporate Criminal Liability in Indonesia,” *Jurnal Mercatoria* 18, no. 2 (2025): 91–98, <https://doi.org/10.31289/mercatoria.v18i2.16610>; Nova Yolanda Sitanggang, La Syarifudin, and Nur Aripkah, “Tinjauan Yuridis Asas Pemaafan Hakim Dalam Undang-Undang Nomor 1 Tahun 2023 Tentang Kitab Undang-Undang Hukum Pidana,” *Demokrasi: Jurnal Riset Ilmu Hukum, Sosial Dan Politik* 3, no. 1 (2026): 85–99, <https://doi.org/10.62383/demokrasi.v3i1.1525>.

²¹ Sitta Saraya Nurhadi et al., “Synergy of Administrative Law and Criminal Law in Combating Corruption in Indonesia,” *Mendapo: Journal of Administrative Law* 6, no. 2 (2025): 106–20, <https://doi.org/10.22437/mendapo.v6i2.43016>.

²² Puspitasari Gustami and Devi Siti Hamzah Marpaung, “Rewang Rencang : Jurnal Hukum Lex Generalis. Vol.1. No.4 (Juli 2020) Tema/Edisi: Hukum Pidana (Bulan Ketujuh) <https://jhlg.rewangrencang.com/>,” *Rewang Rencang : Jurnal Hukum Lex Generalis* 1, no. 4 (2020): 1–12; Reza Noor Ihsan, “Telaah Terhadap Putusan Lepas Dari Segala Tuntutan Hukum (Onslaag Van Recht Vervolging) Pada Perkara Tindak Pidana Korupsi,” *Belom Bahadat : Jurnal Hukum Agama Hindu* 12, no. 1 (2022): 66–79, <https://ejournal.iahntp.ac.id/index.php/belom-bahadat>; Sulistiani Sulistiani, Hafrida Hafrida, and Yulia Monita, “Dasar Pertimbangan Hakim Dalam Memberikan Putusan Lepas (Onslag) Terhadap Pelaku

The discovery of law by judges is an integral part of the justice system, especially when the available legal norms do not explicitly answer concrete problems.²³ Interpretation space is important to ensure substantive justice, especially in corruption cases that bring together procedural and substantive aspects of public policy. The Decision of the Bandung High Court Number 25/PID.SUS/2021/PT/BDG can be used as a concrete illustration of how judges use their authority in finding the law.

The court rendered a decision dismissing all charges against *against* H. L. S., a principal who was accused of misusing BOS, PMMS, and BPMU funds. The panel of appellate judges stated that the actions taken did not fulfill the elements of a corruption crime, especially the element of “against the law” as referred to in Article 3 of the Corruption Eradication Law. Rather than using a mechanistic approach to norms, the judges examined the intent, context of budget use, and its impact on educational goals.

Theory of legal discovery or legal *finding* in this case, it is clear when the panel uses a sociological and teleological approach. This approach assesses not only the formal act, but also the motivation and purpose behind it. The use of funds that are not in accordance with the RKAS was carried out by H.L.S. to cover the operational needs of the school, without the intention of enriching himself. This shows that administrative deviations that do not contain elements of *mens rea* cannot immediately be qualified as a criminal act.

This view is in line with Satjipto Rahardjo's theory of substantive justice, which emphasizes that the law must side with humanitarian values and propriety.²⁴ The function of law is not only as a tool for social order, but also a means of protecting the integrity of individuals who act in the public interest.²⁵ In this case, the judge placed this principle above mere legalistic logic.

The a quo decision also showed that the accountability report had been prepared by H. L. S., even though there was a blank note in the purchase document. The judge considered that the use of the blank note was not an attempt to deceive the state, but rather a form of administrative completeness in an emergency. There was no evidence that the action caused state losses or enriched certain parties.

Tindak Pidana Korupsi,” *PAMPAS: Journal of Criminal Law* 4, no. 1 (2023): 62–73, <https://doi.org/10.22437/pampas.v4i1.25352>; Fianka Bella Sari, Elis Rusmiati, and Tri Handayani, “Analisis Yuridis Terkait Perkara Tindak Pidana Korupsi Yang Dikategorikan Sebagai Perbuatan Melawan Hukum Perdana Sehingga Mengakibatkan Putusan Lepas,” *Syntax Literate: Jurnal Ilmiah Indonesia* 8, no. 4 (2023): 2694–2706, <https://jurnal.syntaxliterate.co.id/index.php/syntax-literate/article/view/11639>.

²³ Agi Attaubah Hidayat et al., “Penemuan Hukum Oleh Hakim Di Indonesia: Dasar, Metode, Serta Implikasinya Terhadap Kepastian Dan Keadilan Hukum,” *Legalite: Jurnal Perundang Undangan Dan Hukum Pidana Islam* 10, no. 1 (2025): 123–40, <https://journal.iainlangsa.ac.id/index.php/legalite/article/view/9770>.

²⁴ Yohanes Suhardin and Glenn Rival Simanjuntak, “Quo Vadis Keadilan Sebagai Kebajikan Utama Dalam Penegakan Hukum Di Indonesia,” *Jurnal Hukum Justice* 2, no. 1 (2024): 58–65, <https://ejournal.ust.ac.id/index.php/JHJ/article/view/4111>.

²⁵ Miswardi, Nasfi, and Antoni, “Etika, Moralitas Dan Penegak Hukum,” *Menara Ilmu* XV, no. 2 (2021): 150–62, <https://jurnal.umsb.ac.id/index.php/menarailmu/article/view/2425>.

The interpretation of the element of “against the law” becomes an important point in the legal argument of the panel. This element cannot only be seen from the perspective of formal violation of the rules, but must also consider the consequences and objectives of the act. In various jurisprudences, the material element is often a more relevant measure of justice, especially when the perpetrator did not intend to violate the law in a substantial sense.

This analysis is strengthened by the theory of differentiation between criminal law and administrative law. When public officials use budget discretion for institutional interests without violating the principle of propriety, then the administrative approach should be preferred.²⁶ Criminal law is *ultimum remedium*, only used if there is no other effective way to resolve the problem.²⁷

The principle of subsidiarity in criminal law enforcement is also an important consideration.²⁸ The imposition of criminal sanctions is only valid if other legal instruments have failed to prevent or correct the detrimental act. In this case, H.L.S. has demonstrated administrative accountability efforts, and there was no state loss or personal gain. Therefore, criminal sanctions are considered disproportionate.

The judge's considerations also reflect the application of the principle of proportionality.²⁹ Law enforcement must not sacrifice the principles of justice and common sense. Imposing criminal penalties on school principals who seek to maintain the continuity of education is contrary to the mission of law as a tool for achieving justice. The discovery of law by judges presents restorative justice amidst the dominance of repressive approaches.

This decision also contributed to the formation of a jurisprudential precedent in Indonesia. Although the Indonesian legal system does not strictly adhere to the doctrine *you have decided to stand*, relevant court decisions remain the reference in judicial practice.³⁰ The judge's courage in using legal findings to free the accused from the clutches of criminal

²⁶ Debyra Restu Mauludi, “Bentuk Penanggulangan Tindak Pidana Korupsi Dana BOS Oleh Tenaga Kependidikan Di Lingkungan Sekolah Berdasarkan Perspektif Kriminologi,” *Al Daulah : Jurnal Hukum Pidana Dan Ketatanegaraan* 12, no. 1 (2023): 119–43, <https://doi.org/10.24252/ad.vi.38157>.

²⁷ Diky Anandya Kharystya Putra and Vidya Prahassacitta, “Tinjauan Atas Kriminalisasi Illicit Enrichment Dalam Tindak Pidana Korupsi Di Indonesia: Studi Perbandingan Dengan Australia,” *Indonesia Criminal Law Review* 1, no. 1 (2021): 43–59, <https://scholarhub.ui.ac.id/iclr/vol1/iss1/4/>.

²⁸ Mohammad Buchori Muslim and Achmad Hariri, “Peran Pemerintah Dalam Mereduksi Tindak Pidana Korupsi Di Daerah,” *Mendapo: Journal of Administrative Law* 4, no. 1 (2023): 63–74, <http://publications.lib.chalmers.se/records/fulltext/245180/245180.pdf%0Ahttps://hdl.handle.net/20.500.123.80/245180%0Ahttp://dx.doi.org/10.1016/j.jsames.2011.03.003%0Ahttps://doi.org/10.1016/j.gr.2017.08.001%0Ahttp://dx.doi.org/10.1016/j.precamres.2014.12>.

²⁹ Helda Okta Havifah, Somawijaya, and Rully Herdita Ramadhani, “Analisis Pertimbangan Hakim Mengenai Keadaan Meringankan Hukuman Pada Putusan MA Nomor 813k/Pid/2023 Berdasarkan Asas Proporsionalitas Pemidanaan,” *Jurnal Hukum Dan Sosial Politik* 2, no. 3 (2024): 392–403, <https://doi.org/10.59581/jhsp-widyakarya.v2i3.3657>.

³⁰ Himlich Hasibuan, “Kepastian Hukum Dalam Putusan Hakim: Studi Terhadap Inkonsistensi Yurisprudensi Mahkamah Agung,” *YUDHISTIRA: Jurnal Yurisprudensi, Hukum Dan Peradilan* 2, no. 3 (2024): 76–84, <https://doi.org/10.59966/yudhistira.v2i3.1670>.

law opens up a new discourse regarding the limits of criminalization in cases of administrative deviation.

From a normative perspective, this decision shows that the law is not absolute. Wise and contextual interpretation is needed so that the law is not only a tool for enforcement, but also a means of protection. The judge in this case plays a role as an active subject in the legal reform process, not just a passive mouthpiece for the law.³¹

The decision dismissing all charges against H. L. S. as well as being a reflection of the importance of reformulating criminal law enforcement policies in the public sector. Official discretion in limited situations must be assessed objectively, not solely based on procedures. This signals that administrative violations that do not cause state losses and are not carried out with evil motives can be resolved without criminalization.

Taking all these considerations into account, it can be concluded that the legal discovery made by the judge in this decision represents a new paradigm in handling corruption cases. The judge is able to balance between normative and substantial justice and provide space for rationality and public interest in every decision. This is the strategic role of the judge in ensuring that the law does not become an instrument of power alone, but also a tool for achieving social justice.

3.1 Judges' Considerations in Assessing Policy Switching Budget as the Basis for Onslaught Decisions in Corruption Cases

Budget switching policy in public financial management practices often arise as a consequence of real needs that cannot be anticipated in detail in budget planning.³² In the education sector, the reality of implementing operational activities often involves situations of limited funds or delays in disbursement that force schools to reallocate funds to ensure the teaching and learning process runs smoothly. In the case of H. L. S., switching the budget is carried out by diverting part of the allocation of educational assistance funds, which were originally intended for certain needs, to cover other, more pressing operational needs.

The Bandung High Court Decision Number 25/PID.SUS/2021/PT/BDG shows that the panel of judges understands the practical discretion exercised by H. L. S. in implementing the budget. The judges' considerations are based on a comprehensive understanding of the factual situation in the field, including the urgency of using funds and the limitations of administrative regulations in responding to real needs. These considerations demonstrate the judges' bias towards substantive justice by rejecting a criminal law approach that is merely repressive and formalistic.

The budget switching policy implemented by H.L.S. was not intended to enrich itself, but rather as a form of response to educational needs that were not listed in the School

³¹ M. Abas et al., *Sosiologi Hukum: Pengantar Teori-Teori Hukum Dalam Ruang Sosial* (Jambi: PT. Sonpedia Publishing Indonesia, 2023).

³² Turiman, Ratna Meisa Dai, and Deasy Silvyia Sari, "Implementasi Kebijakan Penerapan Pola Pengelolaan Keuangan Badan Layanan Umum Daerah (PPK-BLUD) Puskesmas Di Kabupaten Bandung," *Responsive* 4, no. 2 (2021): 87–103, <https://doi.org/10.24198/responsive.v4i2.31923>.

Activity and Budget Plan (RKAS). Although administratively, there were violations of procedures, there was no evidence of state losses or misuse of funds for personal interests. The decision to use a flexible budget, although not entirely in line with regulations, was understood as an effort to ensure the sustainability of educational services.

The principle of criminal law as *ultimum remedium* is used as the basis for the judge's consideration in this case. The application of criminal sanctions should be the last option if administrative or civil approaches are inadequate to address violations.³³ The panel of judges considered that administrative sanctions for violations of budget procedures were sufficient to enforce accountability without having to plunge the perpetrators into the criminal system. Thus, administrative acts should not be immediately qualified as criminal acts without proof of malicious intent and state losses.

The theory of differentiation between administrative and criminal law violations developed by Van Hamel and Pompe is relevant in explaining the logic of this decision. Administrative violations are aimed at improving governance, while criminal acts contain elements of moral blame and serious consequences. In the context of budget switching by H.L.S., the act is more appropriately categorized as an administrative violation because it was carried out without evil motives and in an effort to ensure the efficiency of the implementation of public duties.

The panel of judges' analysis in this decision reflects the application of the principle of proportionality, namely assessing the appropriateness between the severity of the act and the sanction to be imposed.³⁴ The imposition of criminal sanctions for administrative violations that do not have a systemic impact or cause state losses will violate the principle of proportionality. Judges are aware that the misuse of criminal sanctions in every violation of procedures has the potential to cause fear in decision-making by public officials, which can ultimately hinder the effectiveness of public services.

The panel of judges also considered the material unlawful element. Not all violations of administrative rules can be immediately considered unlawful in the criminal sense. This doctrine is in line with previous Supreme Court decisions, which emphasized that violations of formal law are not enough if they are not accompanied by state losses or actions that are contrary to the principles of justice. The use of funds by H. L. S. is accounted for through reports and continues to be used for the benefit of the school, not for personal gain.

³³ Mas Putra Zenno Januarsyah et al., "Penerapan Doktrin Business Judgment Rule Dalam Perkara Tindak Pidana Korupsi Karen Agustiawan," *Jurnal Ius Constituendum* 7, no. 1 (2022): 143–58, <https://doi.org/10.26623/jic.v7i1.4922>.

³⁴ Deni Setiawan et al., "Prinsip Proporsionalitas Dalam Penerapan Hukuman Pidana Di Indonesia," *JIMMI: Jurnal Ilmiah Mahasiswa Multidisiplin* 1, no. 3 (2024): 266–78, <https://doi.org/10.71153/jimmi.v1i3.144>.

The judge's assessment in this case prioritizes the principle of appropriateness, namely, taking into account whether the action taken is in accordance to grant authority.³⁵ H.L.S., as the principal, has a moral and administrative responsibility to ensure the running of school activities. When the budget system is not flexible enough to accommodate urgent needs, the use of budget discretion becomes a rational solution. The judge's considerations show an understanding of institutional functions and do not only focus on procedural violations.

The connection between *switching* budget and accountability principles is also an important analysis material in this decision. The judge considered that accountability is not only formal, but also includes substantive accountability that is oriented towards achieving program objectives. As long as the use of the budget can be substantively accounted for and does not cause losses, then the relevant form of accountability is administrative, not criminal.

This decision also emphasizes the importance of reconstructing the boundaries of criminalization in administrative criminal law. The use of criminal law to resolve all forms of bureaucratic violations has the potential to damage the rationality of law enforcement and create uncertainty for public officials. The judge in this case recognized this risk and chose a more proportional path through the acquittal of all criminal charges.

The judge's framework of thought in this decision is in line with a relevant new theory, namely the Functional Discretion Decriminalization Theory. This theory positions the discretion of public officials carried out for the sake of effective service and public interest as an administrative act, not a criminal act, as long as there is no element of self-enrichment and real state loss. This theory emphasizes the importance of a clear separation between technical procedural deviations and substantive criminal acts. The basic principle of this theory is that criminal law should not be used to punish officials who make decisions based on public service needs, as long as the decision is made accountably, rationally, and does not harm the state.

This theory is a conceptual answer to the many criminalizations of administrative actions that are not accompanied by evil motives. In the context of the H.L.S. case, this theory can be a normative foundation for judges to state that the act of switching budgets is a form of functional discretion that actually supports the continuity of the education system. With this theory, the court not only provides individual justice but also forms a new direction in the practice of law enforcement that is wiser and more humane.

By taking into account all of these considerations, the judge in the H. L. S. case succeeded in placing budget switching within the proper legal framework. This decision opens up a wider discourse space regarding the need to redefine the limits of criminal responsibility in public administration and strengthen the role of the courts as guardians of the balance between rules and justice.

³⁵ Ade Mahmud et al., "Keadilan Substantif Dalam Proses Asset Recovery Hasil Tindak Pidana Korupsi," *Jurnal Suara Hukum* 3, no. 2 (2021): 227–50, <https://journal.unesa.ac.id/index.php/suarahukum/article/view/12245>.

3.2 Position of the Unlawful Element in the Onslaag Decision Regarding the Management of BOS, PMMS, and BPMU Funds by the Principal

The unlawful element is a constitutive element in the crime of corruption as regulated in Article 2 and Article 3 of Law Number 31 of 1999 in conjunction with Law Number 20 of 2001.³⁶ This element has a dual character because it can be interpreted formally or materially. In the formal approach, this element is interpreted as a violation of written norms, while in the material approach, this element is interpreted as an act that is contrary to propriety, a sense of justice, or general principles of good governance, even though it is not explicitly prohibited by written regulations.³⁷

The High Court Decision Number 25/PID.SUS/2021/PT/BDG places the unlawful element in a very strategic position, especially when the panel of judges considered that the actions of the defendant H. L. S. did not substantially fulfill the element. The panel rejected the normative interpretation that only highlighted procedural violations and instead evaluated the substance of the act based on its intention, consequences, and social benefits. This position shows that the existence of the unlawful element should not be interpreted narrowly and rigidly, especially if it is used to justify the criminalization of discretionary policy actions.

The defendant's actions in the form of using BOS, PMMS, and BPMU funds not in accordance with the School Activity Plan and Budget are indeed administratively contradictory. However, the panel of judges found that the use was directed to cover the shortfall in school activity costs that were urgent, and there was no intention to enrich oneself. The funds were also accounted for through reports, even though there were missing documents, such as blank notes. The unlawful element in this case was not fulfilled because there was no state loss, and there was no violation of moral values or propriety that are the principles in the legal system.

The judge's reasoning that emphasizes the material approach to the unlawful element shows a progressive understanding of substantive justice. Material interpretation allows the judge's discretion to consider the factual context and objective conditions of the defendant's actions. When administrative actions are carried out to ensure public services and do not cause personal loss or gain, then the unlawful element in the criminal sense cannot be imposed.

The unlawful element is not sufficient to be proven only through violations of ministerial regulations or technical instructions. Proof must refer to the real impact of the

³⁶ Angga Pratama, Elwi Danil, and Azmi Fendri, "Analisis Pertimbangan Hakim Mengenai Unsur Melawan Hukum Dalam Pasal 2 Ayat (1) Undang-Undang Nomor 31 Tahun 1999 jo. Undang-Undang Nomor 20 Tahun 2001 tentang Pemberantasan Tindak Pidana Korupsi," *Unes Law Review* 6, no. 1 (2023): 1659–68, <https://www.review-unes.com/law/article/view/964>.

³⁷ Andi Bau Mallarangeng et al., "Pembuktian Unsur Niat Dikaitkan Dengan Unsur Mens Rea Dalam Tindak Pidana Korupsi Andi," *LEGAL: Journal of Law* 2, no. 2 (2023): 11–24, <https://jurnal.lamaddukelleng.ac.id/index.php/legal/article/view/69>.

act, including whether the act violates the principles of integrity, transparency, and accountability in the management of state finances.³⁸ In the case of H. L. S., all funds were used for school needs, and there was no deviation that benefited a particular individual or group. Therefore, this element cannot be justified as a basis for criminalization.

The Supreme Court, in various decisions, has stated that the material interpretation of the unlawful element better reflects the values of justice.³⁹ When regulations are administrative and open to interpretation, criminal sanctions cannot be used unless there is malicious intent or substantial violations of state finances. The a quo decision is in line with the precedent and confirms that the function of judges is to bridge the rigidity of norms with substantive justice through fair and contextual interpretation.

This decision also shows the real application of the in dubio pro reo principle.⁴⁰ The doubts about whether H. L. S.'s actions actually fulfill the elements of being against the law must be interpreted to the advantage of the defendant. When there is no state loss, and the act is carried out openly with the intention of fulfilling institutional responsibility, then there should be no room for punishment. This principle is a manifestation of the presumption of innocence, which is upheld in the modern criminal law system.

The judge also considered that the unlawful element cannot be separated from the assessment of the legality of the act and the legitimacy of administrative actions. Discretion carried out by public officials, even though it is contrary to the technical instructions, can be considered legally valid if it is carried out in good faith and with the aim of increasing the effectiveness of service. There is no single standard in assessing discretion, the judge must consider whether the action is rational and proportionate.

The Theory of Decriminalization of Functional Discretion can be used as an analytical tool to explain why the element of unlawfulness is not fulfilled in this case. This theory emphasizes that the discretion of public officials that is carried out honestly, accountably, and without deviant motives must be placed outside the criminal category. If the element of unlawfulness is interpreted too broadly and used for every administrative deviation, then this will encourage over-criminalization of the implementation of public policy.

This theory proposes that the interpretation of the unlawful element must consider the function of the action, not just the procedure. In the case of H. L. S., the function of the use of funds was to ensure the continuity of the education process, and the procedural violation did not cause any loss or negative impact on the state. Therefore, criminalization does not

³⁸ Ahmad Sahala Fuad, Syawal Abdulajid, and Nam Rumkel, "Pengaruh Sistem Hukum Terhadap Kerugian Keuangan Negara Dalam Perjalanan Dinas Fiktif Pada Sekretariat Daerah Kabupaten Pulau Morotai," *Jatiswara* 40, no. 1 (2025): 37–55, <https://doi.org/10.29303/jtsw.v40i1.1193>.

³⁹ Markus Suryoutomo, Siti Mariyam, and Adhi Putra Satria, "Koherensi Putusan Hakim Dalam Pembuktian Ganti Rugi Imateriel Perbuatan Melawan Hukum," *Jurnal Pembangunan Hukum Indonesia* 4, no. 1 (2022): 133–49, <https://doi.org/10.14710/jphi.v4i1.139-144>.

⁴⁰ Rahmat Aripin et al., "Perlindungan Hak Terdakwa Dalam Proses Hukum Ditinjau Dari Prinsip Hukum 'In Dubio Pro Reo'," *Jurnal Kajian Hukum Dan Kebijakan Publik* 2, no. 1 (2024): 51–55, <https://jurnal.kopusindo.com/index.php/jkhkp%0A>ISSN.

have a strong ethical or legal basis.

This decision plays an important role in building a new direction for the interpretation of the unlawful element in criminal law on corruption. This element is not sufficient to be proven only through the formality of violations of technical rules, but must be proven through substantive criteria such as malicious intent, state losses, and inconsistency with the values of justice and propriety. The judge uses his authority to reinterpret this element so that it is not used carelessly and without proportionality.

The position of the unlawful element in this decision is not only a technical consideration, but also a reflection of the legal philosophy that favors utility. The law does not aim to punish blindly, but rather to protect the public interest and correct administrative errors without causing new losses. With this approach, the unlawful element does not lose its meaning, but instead becomes more selective and accurate in its application.

Progressive interpretation of the unlawful element also provides protection for the professionalism of public officials working in basic service sectors such as education. The legal system needs to clearly distinguish between administrative negligence and criminal intent. Through the acquittal of H. L. S., the judge showed that the unlawful element cannot be applied carelessly, especially to actions based on good faith and moral responsibility towards the institution.

The conclusion of this discussion confirms that the position of the unlawful element must be placed within the framework of a comprehensive evaluation of the motive, consequences, and substance of the action. Criminalization should not be carried out only based on administrative violations. This decision is an important milestone in judicial practice, as well as forming a new direction for the meaning of the elements of corruption crimes that are fairer, more humane, and more functional.

Several jurisdictions outside Indonesia apply approaches equivalent to *onslag van alle rechtsvervolging* or case dismissal mechanisms when the material element of unlawfulness is not fulfilled. These practices demonstrate a shared understanding that criminal law should be applied selectively, proportionally, and only where the elements of the offense are satisfied in both formal and material terms.

The Netherlands, as the origin country of the *onslag* concept, incorporates this mechanism in its criminal procedure framework through Article 352 of the *Wetboek van Strafvordering*. This provision provides a legal basis for judges to issue an *onslag* judgment where the defendant's act is proven factually, yet cannot be qualified as a criminal offense. Dutch legal doctrine views *onslag* as an embodiment of the principles of legality and *ultimum remedium*, as well as a tool to differentiate between administrative or civil breaches and acts that are inherently criminal. The jurisprudence of the Hoge Raad (Supreme Court of the Netherlands) has repeatedly emphasized that the application of *onslag* must take into account the protected legal interests and substantive justice values, ensuring that criminal law is not used excessively.

Germany recognizes an analogous concept through the doctrine of *materielle*

Rechtswidrigkeit. This principle holds that an act which formally violates a legal rule is not necessarily unlawful in the material sense. German courts have the discretion to assess whether a breach genuinely harms the protected legal interest or contradicts the sense of justice in society. If the violation is technical or administrative in nature and does not result in significant negative consequences, criminal liability can be excluded. In practice, this doctrine functions as a safeguard against over-criminalization and offers protection for public policy actors who act in good faith.

Japan applies a similar approach through prosecutorial discretion under Article 248 of the *Code of Criminal Procedure*. This provision allows prosecutors to suspend or terminate prosecution even where sufficient evidence exists, if the offender's motives are not blameworthy, the act carries low social impact, or its consequences do not cause substantial harm. In practice, this discretion is often exercised in cases involving administrative infractions or technical errors, thereby avoiding the imposition of criminal prosecution. This approach prioritizes a balance between legal certainty and legal utility.

France has a comparable mechanism through *classement sans suite*, a prosecutorial decision to drop a case before trial. The grounds for dismissal may be legal or policy-based, including situations where the offense's material element is absent, or the violation is deemed insufficiently serious to warrant criminal proceedings. This mechanism allows law enforcement authorities the flexibility to evaluate the necessity and proportionality of criminal enforcement.

The United States, although operating under a common law system, recognizes the broad principle of prosecutorial discretion. Prosecutors may terminate a case (*dismissal of charges*) or decline to proceed (*nolle prosequi*) where prosecution is deemed contrary to the public interest or when the material element of an offense is not met. In certain cases, both federal and state courts can dismiss proceedings via a *motion to dismiss* if the proven conduct does not legally qualify as a criminal offense.

A common thread among these jurisdictions is the emphasis on clearly distinguishing between formal or administrative violations and conduct that is genuinely criminal in nature. This principle is implemented through the assessment of the material unlawfulness element, ensuring that criminal law is used as a last resort rather than the primary instrument for addressing all forms of breaches. Mechanisms such as *onslag*, *materielle Rechtswidrigkeit*, *classement sans suite*, and prosecutorial discretion serve as safeguards against the misuse of criminal law in ways that could undermine the principle of justice and threaten individual freedoms.

These international approaches also reinforce core principles such as legality, *ultimum remedium*, proportionality, and subsidiarity. The principle of legality ensures that punishment is imposed only for conduct that has been clearly defined as an offense beforehand. The *ultimum remedium* principle places criminal law as a last resort, used only when other legal measures are ineffective. Proportionality demands a balance between the gravity of the offense and the severity of the sanction imposed, while subsidiarity requires

the use of non-criminal measures where these are sufficient to achieve the objectives of the law.

Understanding these foreign practices strengthens the conceptual basis for the application of *onslag* in Indonesia. The existence of similar mechanisms in diverse legal systems affirms that releasing a defendant from all legal prosecution when the material element of an offense is absent is not an anomaly but part of a modern criminal law practice oriented toward substantive justice. The use of *onslag* not only protects individuals from excessive criminalization but also ensures that criminal law remains true to its primary purpose, protecting legal interests that are genuinely vital to society.

Thus, these comparative practices serve as compelling evidence that the Indonesian application of *onslag* is aligned with broader international standards that uphold proportionality, prevent over-criminalization, and ensure that criminal law remains the ultimate remedy in law enforcement, particularly in addressing administrative deviations in public administration.

4. CONCLUSION

This study concludes that judicial law finding (*rechtvinding*) in Decision Number 25/PID.SUS/2021/PT/BDG reflects a substantive and contextual interpretation of unlawfulness by integrating formal and material elements, where the absence of mens rea and state financial loss justifies the application of *onslag van alle rechtsvervolging* as a mechanism to uphold substantive justice over rigid legal formalism. The findings affirm that administrative deviations in public fund management should not be automatically criminalized without a proportional and purposive assessment grounded in the principles of *ultimum remedium*, proportionality, and subsidiarity. The novelty of this research lies in the formulation of the Theory of Decriminalization of Functional Discretion, which provides a new analytical framework to distinguish between administrative misconduct and criminal liability based on intent, impact, and accountability, thereby addressing the gap in prior studies that largely overlook the functional dimension of public policy discretion. This study contributes theoretically by advancing a progressive paradigm in corruption law enforcement and practically by recommending the development of risk-based legal assessment guidelines to prevent overcriminalization, ensuring that criminal law remains a measured instrument for protecting essential legal interests while safeguarding good-faith public officials.

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