Development of Democratization on Indonesia Through Administrative Court

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DOI: https://doi.org/10.55292/0xkdaz62

Abstract

A Democratic Government System provides legal protection (*rechtsbescherming*) for its people. The government is responsible for every action and decision (*geen bevoegdheid zonder veraantwordelijkheid*). Government Actions in carrying out welfare state activities are not sufficient based on written rules (*gescreven rechts*). This is a logical consequence due to the increasingly rapid dynamics of national life. Therefore, it requires quick action in order to prevent government stagnation. The government often issues written discretion (*naar buiten gebracht scriftelijk beleid*) in the form of policy regulations (*beleidsregel*) with a ratio legis to accelerate the aims of the state in order to achieve public welfare. Policies that are made if not supervised will undoubtedly cause a problem. So, there needs to be a proposal related to legal protection facilities for policy rules. In Practice, Policy rules cannot be reviewed because they are not laws and regulations. The author will analyze these problems by observing them using normative research methods. In this study, it is concluded that to

implement the principle of democracy, it is necessary to have legal protection facilities for all government actions, whether based on bound authority or discretion through the State Administrative Court. This can be used as a tool to prevent abuse of authority by the Government so that the welfare of the Community is realized.

Keywords
Democracy, Legal Protection, Policy Rules, Discretionary, Administrative Court

I. Introduction

The concept of a modern rule of law, known as the welfare state *(welvaarstaats)*, was born at the end of the 19th century in Western Europe. The change in the concept of the *nachtwakerstaat* from being passive to being active in providing public welfare (*bestuurzorg*) is influenced by the practice of the legal state or classical rule of law, creating social inequality.

The welfare state is the antithesis of the classical rule of law concept, which is based on the idea of carrying out strict supervision over the implementation of state power, especially the executive, which during the time of absolute monarchy has been proven to have committed many abuses of power.[1] Thus, the government must protect its citizens not only in the political field but also in the socio-economic field in order to prevent arbitrariness from the rich.[2] The government has broad authority to intervene in all social life

[1] Riawan Tjandra. *Hukum Sarana Pemerintahan.* (Yogyakarta: Cahaya Atma Pustaka, 2014). p.1.
[2]S.F Marbun, dan M.D Mahfud, *Pokok-Pokok Hukum Administrasi Negara,* (Yogyakarta: Liberty, 2009). h.45.

with various patterns *(staatbemoienis)*, and the separation between the state and society *(staatsonthouding)* is no longer appropriate to current conditions.

The paradigm between the 2 (two) concepts of the rule of law, according to Utrecht in Riawan Tjandra[3]From a political perspective, the classical rule of law basically only carries out primary tasks, as a guarantor and protector of the economic position of those who control the tools of government in a *nachtwakerstaat*. In contrast to the modern rule of law, the government is tasked with maintaining security in the broadest sense, namely social security in all areas of society.

The problems faced by the Government in carrying out increasingly complex government functions *(bestuurfunction)* must be resolved quickly and not rigidly. In the situation and conditions of very rapid development of society, the realization of the ideals of the idea of a modern rule of law will be very difficult to achieve if we still maintain the principle of legality, which prioritizes legal certainty, which is rigid and binding. The principle of legal certainty, which is the basis of the principle of legality, must be complemented by other principles that can give power to government agencies so that they can respond quickly to new developments. Thus, in order to complete the principle of legality, there needs to be a legal breakthrough by giving discretionary authority to government agencies to act on their own initiative[4]. The following is a paradigm shift in the concept of the rule of law [5].

[3] Utrecth in Riawan Tjandra. (2014), *op. Cit.* h.4

[4] Hotma P Sibuea, *Asas Negara Hukum, Peraturan Kebijakan, dan Asas-asas Umum Pemerintahan yang Baik*. (Jakarta: Penerbit Erlangga, 2010). h.67.

[5] Riawan Tjandra, *Hukum Sarana Pemerintahan.* (Yogyakarta: Cahaya Atma Pustaka, 2014), h.8.

Table 1. Paradigm Shift of Rule of Law

Criteria	Rule of Law (classic)	Rule of Law (Modern)
Type of Country	*Nachtwakerstaat*	*Welvaarstat/Welfare State*
State Activities	Passive	Active
Consept	*Staatsonthouding*	*Staatsbemoienis*
Principle	*Wetmatgheid*	*Recht- of doelmatigheid*
Idea	*Normstelling, voorscrif, uitvoering/toepassing*	*Doelsteling, plan, beleid*
Terminology	*Formele rechtstaat*	*Materiele- of sociale rechtstaat*

Looking at the table, there is a paradigm shift in the concept of a legal state, which was originally aimed at realizing legal certainty *(rechtmatigheid)* in a formal rule of law to achieving legal benefits *(doelmatigheid)* for the welfare of society in a material state.

An administrative court is mandatory in the concept of a rule of law *(rechtstaat)* based on civil law traditions. F.J Stahl also confirmed this. In Stahl's thinking [6], a country can be said to be a state of law if it has the characteristics of *Wetmatigheid Van Bestuur* (Government based on law), *Grondrechten bescherming* (protection of human rights), *Macthsverdelling* (separation of powers), and *Rechterlijke Controle* (legal control) because a government administration's role is to control government actions and provide legal protection.

[6]Miriam Budiarjo. *Dasar-dasar Ilmu Politik,* Cetakan ke-12, (Jakarta: PT. Gramedia Pustaka Utama, 2015), h. 113.

Dicey's Introduction to the Law of the Constitution, published in 1885, acts almost as a substitute for a written constitution. His ideas lock up together to form the ideal type of a 'balanced' constitution, in which the executive, envisaged as capable of arbitrary encroachment on the rights of individual citizens, will be subject, on the one side, to political control by Parliament and, on the other, to legal control through the common law by the courts. As expressed by Dicey in terms of the twin doctrines of the rule of law and parliamentary sovereignty, the balance necessarily tips in favor of the representative government.[7] In this sense, the rule of law is contrasted with every system of government based on the exercise by persons in authority of wide, arbitrary, or discretionary powers of constraint. Stefen Brayer, the growth of the administrative state have sounded two conflicting themes, one of themes, the need for checks and controls.[8]

This paradigm shift in the concept of the rule of law has had an impact on the enforcement of administrative law norms in Indonesia. Regulations relating to enforcing administrative law norms in Indonesia are regulated through formal law Law 5 of 1986 jis. Law 9 of 2004 and Law 51 of 2009 concerning Administrative Court and material law in Law 30 of 2014 concerning Government Administration.

After enacting the Government Administration Law, which is the material law of the Administrative Court system, it provides expanded legal protection for the people so that they do not become victims of arbitrary

[7] Carol Harlow and Richard Rawlings, *Law and Administration*, (Cambridge University Press, Third Edition, 2021), h. 4

[8] Peter Cane, *Administrative Law,* (USA : Ashgate Publishing, 2002), h. 47.

actions or/abuse of power by government officials. Government bodies in carrying out actions/decisions are bound by the principle of legality towards legislative power and are subject to supervision by judicial power. However, in administration government, the Government is also given discretionary space as a complement to the principle of legality. Discretionary authority must not be separated from the basic legal framework, which could lead to abuse of authority or power. In Government Administrative Law, the requirement of discretion must not conflict with the provisions of laws and regulations, however, this requirement has been abolished by the Job Creation Law. This abolition is a doctrinal purification of discretion. [9] The legal implications of this abolition will impact the climate of government administration because of the potential for abuse of discretion. In addition, the Job Creation Law also provides space for the President to broadly use discretionary authority, and it does not specify who will exercise control over the use of this discretion, considering that there is no organ above the President. [10] Administrative agencies perform a wide variety of functions, including distributing benefits, licensing and regulating numerous businesses and industries, and permits for a wide variety of activities.[11]

[9] A. Muh Agil Mahasin, "Purifikasi Konsep Diskresi dalam Undang-Undang Cipta Kerja (Purification of The Concept of Discretion in The Job Creation Law)". *Jurnal Rechtsvinding,* Vol. 13, No. 1 (2024): h. 95, http://dx.doi.org/10.33331/rechtsvinding.v13i1.1606

[10]Agil Oktaryal, *UU Cipta Kerja mengubah konesp diskresi, berdampak buruk pada administrasi pemerintahan,* (2020), *https*://theconversation.com/uu-cipta-kerja-mengubah-konsep-diskresi-berdampak-buruk-pada-administrasi-pemerintahan-146583.

[11] Jack M. Beermann, *Administrative Law " What Matters and Why,* (New York: Aspen Publishers, 2011), h. 13.

There are several discretionary policies in the era of President Jokowi, which instruct 5 (five) essential things for law enforcement officials to be in tune with each other. These instructions are given to support the implementation of breakthroughs in the economic field and others that have been issued by the Government, including discretionary policies that cannot be criminalized, all government administrative actions that cannot be criminalized, state losses stated by the Audit Board are given a sixty-day opportunity to be resolved, data on state losses must be concrete, and the last is not to expose all cases to the media. The policy is stated in Presidential Instruction of the Republic of Indonesia Number 1 of 2016, dated January 9, 2016, Concerning the Acceleration of the Implementation of National Strategic Projects. [12]

Based on the case, it is necessary to have control over the discretionary authority exercised by the Government. The existence of administrative justice is one of the pillars of the rule of law. The issue of *rechterlijke controle* is one of the essences upheld by administrative justice, especially for countries that adhere to the civil law tradition. In this regard, Indonesia is one of the countries that organizes administrative courts in its legal and judicial systems. As for the institutional existence of the administrative court in Indonesia, it should follow the typical Dutch administrative court model regulated in *Wet Administratief Rechtspraak Overheids-beschikking (AROB)*, a special court with very limited authority. This typical

[12]M. Ikbar Andi Endang, Diskresi Dan Tanggung Jawab Pejabat Pemerintahan Menurut Undang-Undang Administrasi Pemerintahan (Discretion And Responsibility of Government Officials Based On Law Of State Administration)", *Jurnal Hukum Peratun,* Vol. 1, No. 2 (2018): h. 226. https://doi.org/10.25216/peratun.122018.223-244

Dutch administrative justice was adopted in Indonesia philosophically, juridically, and sociologically and began to be regulated in Law Number 14 of 1970 concerning Basic Provisions of Judicial Power, which was then implemented independently through Administrative Court Law. In practice, there are inconsistencies in testing policy rules. The following data relates to Policy Rules testing:

Table 2. Policy Rules Testing in Supreme Court

Policy Rules	Judicial Review	Explanation
Circular Letter of The Directorate General of Coal Minerals, Ministry of Energy and Mineral Resources of The Republic of Indonesia No. 03.E/31/DJB/2009	Supreme Court	Accepted (granted)
Circular Letter of Supreme Court of The Republic of Indonesia Number 7 of 2014	Supreme court	Not accepted *(Niet onvankelijke verklaard)*
Joint Decree of Minister of Education, Minister of Home Affairs, and Minister of Religion of The Republic of Indonesia Number 02/KB/2021, 025-199/2021 and 219/2021	Supreme Court	Accepted (granted)
Chief Justice of the Supreme Court of The Republic of Indonesia Letter Number 73/KMA/HK.01/IX/2015	Supreme Court	Not accepted *(Niet onvankelijke verklaard)*

Source: Direktori Putusan MA

The inconsistency of the Supreme Court raises problems if it needs to be followed up appropriately. In order to provide legal protection for the community against the Government's discretionary actions. Therefore, through this research, to implement the principle of democracy in the state, a legal protection control mechanism is needed for discretionary authority in the form of Policy Rules.

Research Question

Based on the data, there needs to be consistency in reviewing policy rules. This problem is the focus of research on how the legal protection of government discretionary authority in the form of Policy Rules is a manifestation of a democratic state.

II. Method

This Legal Research focuses on the legal protection of government discretionary authority in the form of Policy Rules as a manifestation of a democratic state. This writing uses doctrinal legal research or normative legal research.[13], which uses several statutory and conceptual approaches. [14]

[13] Wayne C Booth, et. Al, *The Craft of the Research*, Second Edition, (Chicago: University of Chicago Press, 2003). h. 76. Primary legal materials are legally binding instruments or materials that have an authoritative nature, and secondary legal materials are materials used to explain the primary legal materials.

[14] Peter Mahmud Marzuki, *Penelitian Hukum,* (Jakarta: Kencana Prenada Media Group, 2012) h. 93

III. DISCUSSION

Policy Rules based on administrative law perspective

Policy rules are generally binding regulations stipulated through an Administrative Decree, not laws and regulation related to the balancing of interests, determination of facts or interpretation of legal regulations in the use of the powers of Government Bodies. This is also stated in Awb "*Onder Beleidsregel wordt verstaan, een bij besluit vastgestelde algemene regel, niet zijnde een algemen verbindend voorscrift, omtrent de afweging van belangen, de vaststelling van feiten of de uitleg van wettelijke voorschriften bij het gebruik van een bevoegdheid van een bestuursorgaan*". There are 3 (three) components in policy rules, subjectum component: government bodies/officials, material/content component: contains separate general rules *(algemene regel)* which go beyond the scope of the rules (material sphere) of statutory regulations and authority components, government bodies/officials does not have the authority to make laws and regulations but from discretion.[15] According Philipus M. Hadjon, Policy rules related to *freies ermessen*[16], express a policy in writing *(naar buiten gebracht scriftelijke beleid)*.

1) Policy Rules are formed based on discretionary authority

[15] Philipus M Hadjon, *Hukum Administrasi dan Good Governance,* (Jakarta : Penerbit Universitas Trisakti, 2010) h. 58.

[16] Philipus M Hadjon,et al, *Pengantar Hukum Administrasi di Indonesia*, cet-11. (Yogyakarta: Gadjah Mada University Press, 2011) h. 152.

The concept of discretion, according to Philipus M. Hadjon [17], will be described in 3 (three) parts; **first,** the term discretion in some administrative law literature is called discretionary power or discretion. There are various discretionary terms, in various countries, including: Germany: *(ermessen* (no *freies ermessen)*, *discretionaire bevoegdheden*, Inggris: *discretionary power*, Netherland: *(vrijs bevoegdheid)*. **Second,** in essence, the term discretion, which is free authority, is different from limited authority *(gebonden bevoegdheid)*; the essence of discretion is due to choices regarding norms that are facultative and vague *(vague norm)* and factual conditions. **Third,** the parameters used to test discretion are Legislative Regulations and General Principles of Good Governance; for arbitrary prohibitions, the parameters are rationality, while the prohibition on abuse of authority is the aim of using the principle of specialization. According to Philipus M. Hadjon, free or discretionary power includes the authority to decide for oneself and interpret disguised norms *(vague norms)*. This indicates that free power remains subject to principle *rechtmatigheid* (*geschreven rechts* and *ongeschreven rechts*). According to Ten Berge *algemene beginselen van behoorlijk bestuur komt men tegen in twee variaten, namelijk als toetsingsgrond voor de rechter en als instructienorm voor en bestuurorgaan* (General Principles of Good Government consist of 2 (two) variants, namely as a basis for judges' assessments and as guiding norms for government organs).

Meanwhile, according to Prajudi Atmosudirjo [18], discretion is needed to complement the principle of legality, in which case State Administrative Officials are given the

[17] Philipus M Hadjon, et, al, *Hukum Administrasi dan Tindak Pidana Korupsi,* (Yogyakarta: Gadjah Mada University Press, 2012) h. 14-15.
[18] Prajudi Atmosudirjo, *Hukum Administrasi Negara*. (Jakarta :Ghalia Indonesia, 1994), h.82.

freedom to act or make decisions according to their own opinion. Discretion is divided into 2 (two): bound discretion and free discretion. Bounded discretion is the discretion granted to government bodies and/or officials, which is limited by law in terms of legal norms that are facultative in nature. Meanwhile, free discretion is the discretion given to government bodies and/or officials that is not specifically limited by law if legal norms are vague *(vague)*. The differentiating aspect between the two discretions lies in the freedom given by law to government officials and/or officials in taking action on their initiative to resolve a factual problem.

Discretionary authority is the basis for forming policy rules. This is in accordance with Kreveld which states that policy rules are general regulations that contain the implementation of discretionary government authority for citizens, which are regulations whose legal basis is not directly regulated in law, but indirectly through government authority based on the principles of good governance *(het gaat om algemene regels; omtrent de uitoefening van een vrije bestuursbevoegdheid jegens de burger van welke regels de grondslag niet uitdrukkelijk in de wet doch impliciet in de bestuursbevoegdheid ligt opgestolen, en welke regels beginselen bender zijn ingevolge de beginselen van behoorlijk bestuur).*[19] Discretionary in written form, according to Ridwan, creates not only policy rules but also law and regulation or *feeling handling* (factual government action).[20]

2) Policy Rules are not law and regulations.

Policy rules are not law and regulations because they are made based on freies ermessen and not by Government

[19] J. H. Van Kreveld, *Beleidsregels in het Recht,* (Denhaag: Kluwer's Gravenhage, 1983), h. 257.

[20] Ridwan HR. *Diskresi dan Tanggung Jawab Pemerintah*, (Yogyakarta:UII Press, 2014) h. 142

Agencies or Officials who have the authority to form law and regulations. Even though it is a general regulation (algemene regels), it is not promulgated. Following are the differences between law and regulations and policy rules:

Table 3. The difference between law and regulations and policy rules

No	Law and Regulation	Policy Rules
1	Not Based on Freies Ermessen/Discretionary of Power	Based On Freies Ermessen/Discretionary of Power
2	Contains No Knowledge Requirements from It's maker	Contains Knowledge Requirements from It's maker *(angeschreven Hardheidclausule)*
3	Formed By A Body/Official Who is Authorized to Make Law and Regulations	Formed By Agency/Officials Who Have No Authorization to Make Law and Regulation
4	Can be Reviewed by Cassation	It cannot be Reviewed by Cassastion
5	Legally Binding (direct)	Legally Binding (indirect)

Legal Protection for Discretionary Powers in the Form of Policy Rules in Administrative Court

1) Cancellation of the Use of Discretion through the Administrative Court based on Government Administration Law

Policy rules are not the absolute competence in the court, except if there are elements *"willekeur"* and *abuse of*

power/authority.[21] Discretionary of Authority based on Government Administration Law is divided into 3 (three), **first,** The definition of discretion is decisions and/or actions determined and/or carried out by government officials to overcome concrete problems faced in the administration of government in terms of laws and regulations that provide choices, do not regulate, are incomplete or unclear, and/or there is stagnation. government. Second, discretion can only be exercised by authorized officials, and it aims to streamline government administration, fill legal gaps, provide legal certainty, and overcome government stagnation in certain circumstances for the benefit and public interest. Discretion of Government Officials, including: Making decisions and/or actions based on the provisions of laws and regulations that provide a choice of decisions and/or actions; Making decisions and/or actions because laws and regulations do not regulate; Making decisions and/or actions because statutory regulations are incomplete or unclear; and Making decisions and/or actions due to government stagnation for broader interests. **Third,** The consequences of Discretion Law are described in the following table:

Table 4. Legal Consequences of Disrectionary of Authority

Category	Parameter	Legal Consequences	Procedure
Exceed Authority	1. *Onbevoeghdeid ratione temporis*	Null and Void *(van rechtswege niteig)*	*Ex tunc* (one of which is carried out by court decision)

[21] Philipus M Hadjon,et al, *Perlindungan Bagi Rakyat di Indonesia: sebuah studi tentang prinsip-prinsipnya, Penangannya oleh Pengadilan dalam lingkungan Peradilan Umum dan Pembentukan Peradilan Admnistrai Negara*. (Surabaya: PT. Bina Ilmu, 1987), h.. 124.

	2. *Onbevoegdheid ratione loci* 3. Not in accordance with the art 26, Pasal 27, dan Pasal 28		
Confusing Authority	1. Not by purpose authority 2. Not in accordance with the art 26-28 3. Contrary to the principles of good governance *(*AAUPB*)*	Void *(vernietigbaar)*	*Ex nunc* (one of which is carried out by court decision*)*
Arbitrariness	Have no authority	Null and Void *(van rechtswege niteig)*	*Ex tunc* (one of which is carried out by court decision*)*

Based on the law above, the debate is about the cancellation mechanism. Referring to the opinion of Philipus M. Hadjon, in the context of the separation of powers between the executive and judicial powers, it implies that they may not interfere with each other's powers. And testing at the PTUN is limited to testing the law, not policy. However, there is an exception that the PTUN can test discretion using toetsingrechts in the form of the principles of good governance *(algemene beginselen van*

behoorlijk bestuur), based on the principle of prohibiting abuse of power using the parameters of purpose/specialization. Thus, the norms contained in the article above should be based on abuse of power. [22]

2) Administrative Court can review Policy Rules.

In a modern state, the principle of rule of law cannot be separated from the principle of democracy. The paradigm shift from the classical state has implications for a harmonious relationship between the state and the people within the framework of a welfare state. The state regulates taxation, labor, pensions, education, insurance, etc. [23] In carrying out its functions, the government needs to provide a means of objection *(inspraak/adviesering)* and *rechtsbescherming*/legal protection. This aims to ensure the protection of the constitutional rights of the community.

Legal protection facilities can be preventive (before government action) or repressive (after government action). This is mandatory from the principle of the rule of law, especially for those that adhere to the continental European tradition, and judicial control *(Rechterlijke Controle)* is required.

In a simple frame of mind, the Administrative Court Law is always considered a formal law. This is indeed true, but

[22] Bibianus Hengky Widhi Antoro, Pengujian Penyalahgunaan Wewenang di PTUN, *Jurnal Yudisial, Vol. 13, No. 2* (2024) : h. 221, https://doi.org/10.29123/jy.v13i2.350.

[23] Miriam Budihardjo, *op. cit, h. 115*

M. Ikbar Andi Endang, Diskresi Dan Tanggung Jawab Pejabat Pemerintahan Menurut Undang-Undang Administrasi Pemerintahan (Discretion And Responsibility of Government Officials Based On Law Of State Administration)", *Jurnal Hukum Peratun,* Vol. 1, No. 2 (2018): h. 226. https://doi.org/10.25216/peratun.122018.223-244

some of the regulations contained in the Administrative Court Law apparently also contain several regulations that are material in nature. We can see an example of this regulation in the meaning of the *Administrative Decree (KTUN/Beschikking)*, including setting the definition of *KTUN*, what can be classified as *KTUN*, and fictitious *KTUN*. Following this, 2014 Law Number 30 of 2014 concerning Government Administration was enacted. The applicability of the Government Administration Law was determined as material law of the Administrative Law. The presence of the Government Administration Law actually shifted and expanded several paradigms of the Administrative Court Law, especially the object of dispute, which ultimately also shifted the absolute competence of the Administrative Court. One of the Administrative Court competencies that is expanded by the Government Administration Law is regarding policy rules.

Testing of Decisions and/or actions of Government Officials based on discretion is based on legal aspects *(rechtmatigheid)* and wisdom *(doelmatigheid)*. Testing of decisions (discretion) is carried out through the mechanism of administrative efforts *(administratief beroep)*, namely objections based on *contraries actus* and administrative appeals.[24]

The distinction in the test has implications for the limitation of the State Administrative Court's test only on *recthsmatigheidtoetsing*. If this is a guideline, then the test of the discretionary authority to the PTUN is a necessity because the legal actions carried out or issued by Government Officials are their exclusive rights as a consequence of the principle of a

[24] Indroharto, *Usaha Memahami Undang-Undang Peradilan Tata Usaha Negara Buku II Beracara di Pegadilan Tata Usaha Negara* (Jakarta: Pustaka Sinar Harapan, 2005), h. 165-166.

modern state in the context of realizing the welfare of the Community. Observing this, the author agrees with Hadjon, who stated that although the judiciary cannot sit in the executive chair, but in the case of legal actions based on such discretion containing elements of abuse of authority, the State Administrative Court has the authority to test it.

The testing of discretion carried out by the PTUN is based on the implementation of its discretionary policy, not based on discretionary policy, and uses *marginal toetsingrechts* (testing with limitations), including the prohibition of deviating from the objective (principle of specialization).

IV. Conclusion

Based on the above description, in order to implement the principle of democracy in Indonesia, there needs to be a means of legal protection for all government actions without exception, in accordance with the principle of no authority without accountability. This can be used as a tool to control abuse of authority and the government in exercising authority, based on recthmatigheid (gescreven rechts/ongescreven rechts), not only limited to bound authority, including discretionary authority (policy rules) so that the State Administrative Court can be a government control in realizing the community's welfare.

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DECLARATION OF CONFLICTING INTERESTS

The authors state that there is no conflict of nterest in the publication of this article.

FUNDING INFORMATION

Write if there is a source of funding

ACKNOWLEDGMENT

The authors thank to the anonymous reviewer of this article vor their valuable comment and highlights

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