

LICS 2026

Topic: *Strengthening Legal Frameworks for Combating Human Trafficking and Enhancing Protection of Women and Children*

Reconstruction of Restitution Rights for Women and Children as Vulnerable Groups in Restorative Justice and Maqashid Shariah

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Abstract. *Women and children sociologically occupy the most vulnerable positions against exploitation and violent crimes, suffering multidimensional losses encompassing physical devastation, long-term psychological trauma, and economic deprivation that demand comprehensive recovery interventions. Although Indonesia's criminal justice system recognizes restitution as a form of financial recovery for victims, its implementation frequently fails due to the dominance of a rigid retributive paradigm and a legal loophole in the form of substitute imprisonment (subsider), which indirectly legitimizes financial impunity for offenders. This study aims to dissect this systemic failure and formulate a legal reconstruction for restitution by integrating the Restorative Justice paradigm and the philosophy of Maqashid Syariah. Employing a normative legal method with statutory, conceptual, and philosophical approaches, this study finds that restitution must no longer be a mere additional penalty bartered with jail time; through the principles of Hifz al-Nafs (protection of life and honor) and Hifz al-Mal (protection of wealth), it must be reconstructed as an absolute human right of the victim. The proposed reconstruction includes abolishing substitute imprisonment, institutionalizing mandatory asset tracing, and applying state subrogation through a Victim Trust Fund modeled on Baitul Mal, ensuring substantive justice that dismantles perpetrators' financial shields and restores victims' dignity.*

Keywords: *Justice; Restitution; Restorative; Vulnerable.*

1. Introduction

The Constitution of the Unitary State of the Republic of Indonesia provides a highly noble philosophical and juridical mandate to the state to protect the entire Indonesian nation and all of its territory. This mandate, enshrined in the Fourth Paragraph of the Preamble to the 1945 Constitution of the Republic of Indonesia, affirms that the state's presence is not merely as an administrative instrument but as an absolute protective entity for each of its citizens. Within the

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landscape of human rights enforcement, this obligation of protection must be manifested more concretely and with greater intensity when confronted with segments of society that are structurally and sociologically positioned in a subordinate status. Therefore, ensuring the realization of justice and recovery for marginalized groups constitutes the most fundamental indicator of the success of a democratic and dignified legal civilization.

Within the anatomy of modern social structures, women and children have historically occupied the position of the most vulnerable groups. This vulnerability does not arise in a vacuum but is the accumulation of entrenched patriarchal culture, unequal power relations, structural poverty, and limited access to education and economic resources. It is precisely this condition of socio-economic desperation that is systematically exploited by criminal predators. Women and children frequently become the primary targets of various heinous crimes, ranging from Human Trafficking (TPPO), sexual violence, domestic violence (KDRT), to labor exploitation and forced prostitution, all of which reduce the value of a human being to a mere commodity for generating financial profit.

The destructive impact caused by crimes of exploitation against women and children extends far beyond the losses typically associated with ordinary crimes. When a woman or child becomes a victim of an extraordinary crime, they not only suffer visible physical injuries but also endure permanent psychological devastation. Their dignity is stripped away, their future is destroyed, and they often have to bear cruel social stigma from their surrounding community. Moreover, the economic losses they suffer are immense, ranging from the loss of income potential, expensive medical and psychiatric treatment costs, to fictitious debts imposed by criminal syndicates. This chain of suffering creates a vicious cycle of poverty and trauma that can never be overcome without intervention from the strong hand of state authority.

In responding to this humanitarian tragedy, legal instruments have in fact evolved by introducing the concept of restitution. Doctrinally, restitution is compensation imposed directly on the perpetrator of a crime, or on a third party that benefits from the crime, to be given to the victim. The existence of the right to restitution marks a shift in criminal policy from an overly offender-oriented approach toward a justice system that pays greater attention to the fate of victims. For women and children who have lost everything, restitution money is not merely a nominal amount of compensation but rather existential capital to finance medical treatment, recover from trauma, and rebuild the fragments of their lives that have been destroyed by criminal perpetrators.

Unfortunately, this noble design of restitution is often reduced to empty rhetoric when confronted with the reality of criminal justice practice in Indonesia. The current positive law

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remains heavily influenced by the outdated paradigm of retributive justice. This paradigm measures the success of law enforcement solely by the severity of imprisonment imposed on perpetrators in correctional institutions. Law enforcement officials, from investigators to judges, frequently assume that once perpetrators are incarcerated, justice has automatically been served. They ignore the deeply painful sociological reality that while perpetrators sleep behind bars, victims outside continue to cry, suffer hunger, and lack the means to heal their psychological wounds.

This failure to enforce substantive justice is exacerbated by a highly fatal legal loophole in various special criminal law instruments in Indonesia, namely the allowance of substitute imprisonment (*subsidiary punishment*) for restitution. The law provides perpetrators with the option of replacing their obligation to pay restitution worth billions of rupiah to victims with an additional prison sentence of very short duration, often measured only in months. This colonial-era legal loophole is openly exploited by financiers of crime and organized criminal syndicates to preserve their wealth. From the perspective of criminal economic rationality, they naturally prefer serving a short additional prison term rather than surrendering assets acquired through exploitation to the women and children who have become their victims.

The judiciary's failure to compel perpetrators to pay restitution essentially constitutes a form of human rights neglect legalized by statute. A situation in which victims win their legal battle in court but receive not a single cent in financial compensation is known as an "illusory victory." The state's failure to execute these economic rights triggers revictimization or secondary victimization. Women and children who should be protected by the state instead feel betrayed by the legal system itself. They leave magnificent courthouse buildings empty-handed, returning to their villages to once again confront poverty, loan sharks, and despair, which ultimately place them back in a position of vulnerability to future exploitation.

Recognizing the dogmatic deadlock of the conventional criminal justice system, a radical philosophical and normative reconstruction is required. This transformation must be driven by adopting a Restorative Justice approach integrated with the noble values of *Maqashid Sharia* (the objectives of Islamic law). Restorative Justice demands that the law focus on repairing harm and restoring relationships rather than merely exacting retribution. Meanwhile, *Maqashid Sharia* provides a robust theological and moral foundation that the highest purpose of law is to preserve human welfare, including the protection of life, intellect, lineage, and property. The combination of these two paradigms offers a comprehensive solution to the deadlock of positive law in Indonesia.

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From the perspective of Maqashid Sharia, every form of crime that deprives women and children of their freedom, inflicts suffering on their bodies, and seizes their property constitutes a form of fasad corruption or destruction that undermines the pillars of Hifz al-Nafs protection of life and Hifz al-Mal protection of property. Therefore, Islamic law never separates corporal punishment for perpetrators from the absolute obligation to compensate victims for their material losses Dhaman. Islamic law views the restoration of the financial rights of wronged victims as an absolute obligation fardhu that is non-negotiable and certainly cannot be replaced merely by imprisonment. If perpetrators fail to fulfill this obligation, the Islamic paradigm requires intervention by the Baitul Mal state treasury to assume responsibility in order to safeguard the dignity of vulnerable groups from the abyss of harm.

Based on these systemic problems and the proposed philosophical solutions, this article is prepared with the primary objective of critically examining the anatomy of the failure to fulfill restitution rights for women and children as vulnerable groups. Furthermore, this article will formulate a legal reconstruction model that integrates the postulates of Restorative Justice with the principles of Maqashid Sharia. Through this comprehensive study, it is hoped that the state can discover a strong juridical foundation to sever the lifeline of financial impunity enjoyed by criminal perpetrators, while simultaneously restoring law to its true function: as an instrument for safeguarding and restoring human dignity based on substantive justice and mercy for all creation.

2. Research Methods

This research is a normative legal study doctrinal legal research, namely research that positions law as an autonomous, coherent, and logical system of norms. The focus of the study is directed toward an in-depth analysis of legal principles, theories of justice, Islamic sharia doctrines, and the synchronization of written norms operating within the positive legal system. Through this type of research, the researcher seeks to discover the coherence between existing norms and the philosophical principles of victim protection. To examine the research problems comprehensively and rigorously, this study applies two main approaches, namely: Statutory Approach: This approach is applied to examine, analyze, and critique regulatory instruments related to the protection of vulnerable groups and the enforcement of restitution. The hierarchy of regulations analyzed comprehensively includes: The 1945 Constitution of the Republic of Indonesia; Law Number 21 of 2007 concerning the Eradication of the Crime of Human Trafficking (TPPO); Law Number 35 of 2014 concerning Amendments to Law Number 23 of 2002 on Child Protection; Law Number 31 of 2014 concerning Amendments to Law Number 13 of 2006 on the Protection of Witnesses and Victims; and Supreme Court Regulation Number 1 of 2022

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concerning Procedures for the Settlement of Applications and the Provision of Restitution and Compensation to Victims of Criminal Offenses. Conceptual Approach: This approach is used to synthesize doctrines and expert views in the fields of law and theology. Specifically, it integrates Restorative Justice with the theory of Maqashid Sharia, particularly the concepts of Hifz al-Naf and Hifz al-Mal, in order to construct a new paradigm for the fulfillment of restitution.

3. Results And Discussion

3.1. The Vulnerability of Women and Children and the Failure to Fulfill Restitution in the Criminal Justice System

The vulnerability of women and children within the structure of society is not a natural phenomenon destined to occur, but rather a sociological construct born from systemic inequality. In a social system still strongly gripped by patriarchal culture and global capitalism, women and children are often positioned as second-class entities who do not possess full authority over their bodies, decisions, and economic resources. In rural areas or pockets of poverty, limited access to quality education and the scarcity of decent employment opportunities force these groups to the forefront of desperation in their struggle to survive. This condition acts like a powerful magnet, attracting predators and organized crime syndicates to exploit their innocence and helplessness without mercy.

The modus operandi of crimes targeting these vulnerable groups is highly systematic and relies on manipulative social engineering. Human trafficking syndicates, for example, visit the homes of poor families carrying promises of high-paying jobs abroad or in metropolitan cities. They provide advance allowances or departure-cost loans that are actually psychological and financial traps (debt bondage). Once these women and children are uprooted from their family and social networks and arrive at holding locations, their identities are confiscated, their freedom is stripped away, and they are forced to work under conditions of modern slavery. Children are exploited as cheap labor or in the pornography industry, while women are driven into commercial sexual exploitation or become unpaid forced laborers.

The losses caused by such exploitative crimes have dimensions of destruction that are highly complex and multiplied in effect. Unlike ordinary property crimes, where losses can be easily calculated, the harm inflicted on women and children extends to invaluable immaterial aspects. They suffer traumatic experiences that alter their psychological structure; they lose trust in others, experience social dysfunction, and endure physical suffering due to sexually transmitted diseases or disabilities resulting from abuse. Economically, their families back home often sink

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deeper into debt to loan sharks because their assets have been sold to bribe syndicates into releasing detained family members.

Theoretically, Indonesia's criminal justice system attempts to address this complexity through the restitution mechanism administered under the auspices of the Witness and Victim Protection Agency (LPSK). Restitution is designed as an antithesis to the indifference of traditional criminal law, which focused solely on the relationship between the offender and the state. Through restitution, the state orders offenders to compensate victims for actual losses, including replacement of confiscated property, reimbursement of medical and psychological treatment expenses, and compensation for immaterial suffering. This concept offers a glimmer of hope that justice is not merely about punishing wrongdoing but also about repairing the damage to life and property suffered by society's weakest members.

However, this theoretical promise collapses when confronted with the reality of a criminal justice system that remains highly positivistic and bureaucratic. The primary failure in fulfilling restitution stems from a fatal legislative error in formulating sentencing provisions. In many special laws (*lex specialis*), victims' restitution rights are classified as additional punishment for offenders, which is ironically accompanied by the option of substitute imprisonment (subsidiary punishment). This means that if an offender is unable—or more accurately, unwilling—to pay restitution, the obligation is immediately extinguished and replaced with only a few additional months of imprisonment. This clause openly nullifies victims' constitutional rights through a simple exchange for time served in prison.

The economic calculations of offenders, especially intellectual actors or illegal labor recruitment corporations, are highly rational in exploiting this legal loophole. When judges impose imprisonment along with restitution obligations amounting to billions of rupiah for dozens of exploited women and children, offenders employ asset-concealment strategies. They hide criminal proceeds in third-party accounts, launder them into crypto assets, or establish shell companies. In court, presenting themselves convincingly, they claim bankruptcy and choose to serve six months of substitute imprisonment. The state allows this legal manipulation to continue, tolerating syndicates that prefer brief incarceration while retaining their illicit wealth.

Beyond the issue of subsidiary imprisonment, the current criminal procedural system imposes an excessively harsh burden of proving losses upon vulnerable groups. During trial, victims and the LPSK are required to provide formal administrative evidence such as unpaid salary slips, hospital receipts, and employment contracts. Yet a fundamental characteristic of exploitative crimes is that perpetrators deliberately destroy physical documents to eliminate traces of wrongdoing, while victims are confined and never possess any receipts. Requiring traumatized

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women and exploited children to compile administrative evidence according to civil-law standards is an empathy-deficient form of law enforcement that ignores the reality and anatomy of the crime itself.

This entire chain of structural, substantive, and cultural failures leads to one absolute conclusion: Indonesia's criminal justice system is currently in a state of moral bankruptcy when it comes to protecting the economic rights of vulnerable groups. The dominance of a retributive paradigm that celebrates imprisonment as institutional success has blinded the state to the cries of victims whose lives have been shattered. A system that allows victims to return home empty-handed, receiving not a single cent of compensation and becoming trapped once again in debt, is a system that legalizes structural victimization. Law without the ability to restore is merely an instrument of power that has lost its humanitarian legitimacy.

3.2. The Convergence of Restorative Justice and Maqashid Sharia in Protecting Vulnerable Groups

In response to the paralysis of the retributive criminal justice system in restoring victims' rights, modern legal discourse has produced a new paradigm known as Restorative Justice. In stark contrast to the retributive approach, which exclusively asks, "What law was violated and what punishment is appropriate for the offender", restorative justice poses a far more fundamental question: "Who has been harmed, what do they need to recover, and who bears the responsibility to repair the damage?" This paradigm shifts the balance of justice away from the state as an entity seeking retribution and back toward victims as the primary subjects whose humanity must be restored and returned to its original condition.

The essence of restorative justice lies in repairing harm, ensuring offender accountability through direct restoration, and facilitating social reintegration for all parties. In the context of crimes against women and children, restorative justice firmly rejects the notion that imprisonment alone is sufficient to settle an offender's debt to society. Prison may satisfy public demands for punishment, but it does not heal the psychological wounds of an exploited child, nor does it repay the debts of a woman's family deceived by trafficking syndicates. Therefore, from a restorative perspective, restitution is not an optional or supplementary element of a court judgment but rather its primary element and an absolute prerequisite for achieving holistic justice.

This restorative paradigm, which emerged from Western sociological wisdom, actually finds a profound and precise point of convergence with the philosophy of Islamic law, particularly through the concept of Maqashid Sharia. Maqashid Sharia is a universal doctrine affirming that

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all laws revealed by God ultimately serve one noble purpose: realizing public welfare *maslahah* and preventing all forms of harm on earth. Integrating restorative justice with *Maqashid Sharia* does not mean transforming positive law into rigid religious law; rather, it means injecting the national legal system with transcendental moral values oriented toward human dignity *Takrim al-Insan*.

Within the spectrum of *Maqashid Sharia*, protecting women and children from exploitation directly intersects with the principle of *Hifz al-Nafs* protection of life. Islamic law regards human life as sacred; physical abuse, deprivation of liberty, and severe psychological trauma are viewed as destruction of human life as a whole. Therefore, restoring damaged lives through medical and psychiatric treatment is a religious obligation. Restitution, in this context, becomes the material instrument for realizing *Hifz al-Nafs*. Allowing trafficking victims to remain without recovery funds means the state contributes to the destruction of its citizens' lives and mental well-being, something explicitly prohibited in Islamic doctrine.

This convergence becomes even more evident through the principle of *Hifz al-Mal* (protection of property). Islamic law stipulates that wealth obtained through oppression, fraud, or exploitation of others is unlawful wealth and must be returned to its rightful owner. For women enslaved without wages, their labor represents the honor of their property rights. In *Fiqh Jinayah* (Islamic criminal law), violations of these rights are addressed through the mechanism of *Dhaman* (financial compensation), which is highly binding. *Dhaman* cannot be extinguished simply by forgiving physical wrongdoing or punishing offenders with imprisonment or corporal punishment. Until victims' money is returned, the property-related offense remains unsettled in the eyes of both the law and God.

Furthermore, Islamic law places special emphasis on protecting the *Mustadhafin* the oppressed, vulnerable, and marginalized. Poor women and orphaned children who fall victim to trafficking syndicates are clear examples of the *Mustadhafin* in the modern era. A legal maxim states: *Tasharruf al-Imam 'ala al-Ra'iyah manutun bil maslahah* (the policies of a ruler toward the people must be based on public welfare). Combining restorative principles with this maxim means that the state carries a moral mandate to prioritize the economic rights of vulnerable groups above procedural and administrative interests. The state must not create rules that make it more difficult for the weak to claim their rights to compensation and restitution.

The harmony between Restorative Justice and *Maqashid Sharia* fundamentally exposes the flaw in the concept of substitute imprisonment. In both Islamic and restorative logic, civil obligations (*Dhaman*) can never be erased by bodily punishment (*Uqubah Badaniyah*). If offenders are imprisoned, that serves as atonement for violating public order and the state. However,

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imprisonment does not eliminate a single cent of their material debt to the women and children they exploited. This separation between bodily punishment and financial compensation underscores that physical suffering in prison is not a legitimate currency for depriving victims of their rights.

In conclusion, the philosophical convergence of Restorative Justice and Maqashid Sharia gives rise to a new categorical imperative: restitution is an absolute right that cannot be substituted, negotiated, or abolished by any legal instrument. The fulfillment of restitution for vulnerable groups constitutes a fundamental pillar of a legal civilization that upholds human dignity. By embedding the values of Hifz al-Nafs, Hifz al-Mal, and restorative recovery into the positive legal system, Indonesia possesses a strong and authoritative theoretical framework for rejecting outdated retributive paradigms and moving toward a justice system that radiates substantive, human-centered justice.

3.3. Legal Reconstruction of Restitution Fulfillment Based on Restorative Justice and Maqashid Sharia

Referring to the empirical deadlock within the justice system and the philosophical strength arising from the convergence of Restorative Justice and Maqashid Sharia, radical and comprehensive legal reconstruction becomes an absolute requirement. This reconstruction must not merely amend one or two supplementary provisions but must redesign the entire anatomy of restitution fulfillment from beginning to end. The first and most urgent strategic step is to amend relevant legislation such as the Human Trafficking Law and the Child Protection Law to permanently abolish substitute imprisonment provisions for perpetrators of exploitation crimes, particularly intellectual actors, corporations, and trafficking brokers. This abolition reflects the state's firm stance that criminal debts owed to victims cannot be repaid by simply sitting behind bars.

Simultaneously, procedural law must be reconstructed to position restitution not as an "additional punishment" left to judicial discretion, but as a victim's "absolute primary right." Judges should be required to order mandatory confiscation of offenders' assets without offering alternatives. If offenders claim they lack cash, prosecutors acting as executors should be granted broad authority to seize homes, vehicles, corporate shares, and freeze family members' accounts when those assets are proven to derive from money laundering. This represents the realization of a doctrine aimed at impoverishing perpetrators of crimes against humanity in order to restore the Hifz al-Mal of vulnerable groups whose resources they have drained.

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To ensure the availability of assets for seizure, reconstruction at the investigation stage must implement mechanisms for early asset tracing and freezing. Conventional investigations focused solely on proving criminal acts must be transformed into a “follow the money” approach. From the moment an exploitation syndicate is designated as a suspect, law enforcement, assisted by the Financial Transaction Reports and Analysis Center (PPATK), should immediately block all financial access. Integrating criminal prosecution and asset tracing from the outset prevents syndicates from hiding or transferring illicit wealth during lengthy court proceedings.

To address the complexity of proving losses in court, the classical civil-law principle the burden of proof lies with the claimant, which heavily burdens victims, must be reconstructed. Guided by the Islamic principle of Taisir (facilitation for the oppressed), judges should accept material and immaterial loss calculations prepared by the LPSK and psychologists as valid presumptive evidence. The burden of proof should instead be shifted to offenders or corporate syndicates. They should be required to prove, through authentic documents, that they did not detain, withhold wages from, or exploit victims. If they fail to do so, the loss estimates submitted by the LPSK should be fully granted by the court.

What, then, if the offender is genuinely a low-level participant who is impoverished and possesses no assets whatsoever? Here, the concept of **Baitul Mal** in Islamic law and state responsibility converge to produce the doctrine of State Subrogation. When a court has determined the amount of restitution and the offender is truly insolvent, the state must not evade responsibility. Through public funds, the state should advance and pay compensation or restitution directly to women and child victims. Once the victims’ rights have been satisfied, the right of recovery is transferred to the state. It should be the state, not impoverished rural women, that pursues repayment from criminal syndicates.

As an instrument for implementing this subrogation doctrine, Indonesia should institutionalize the establishment of a Victim Trust Fund under the supervision of the LPSK and the Ministry of Finance. Budget limitations should not be used as an excuse to delay justice. This humanitarian endowment fund could be financed through confiscated criminal assets, auctions of evidence from major criminal cases, administrative fines imposed on corporations, and a designated portion of Non-Tax State Revenue (PNBP) generated from law enforcement sectors. The Victim Trust Fund would ensure the availability of liquid resources ready for immediate disbursement once a judge issues a decision in favor of victims requiring medical treatment or recovery capital.

Even more progressively, inspired by Islamic philanthropy, the Victim Trust Fund could be integrated with the national management system for Zakat, Infaq, Sadaqah, and Waqf (ZISWAF). Victims of human trafficking exploitation clearly qualify as **Asnaf** (eligible recipients of zakat),

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specifically as Gharimin (those burdened by debt), *Ibn Sabil* (stranded persons), and Riqab (modern slaves who must be liberated). The involvement of state-managed Islamic philanthropy would not only address funding constraints but also foster collective awareness that liberating vulnerable groups from economic exploitation constitutes an inseparable part of religious practice and social piety.

In conclusion, this series of legal reconstructions from abolishing substitute imprisonment and implementing early asset confiscation to reversing the burden of proof and introducing state subrogation through a Trust Fund would definitively restore the spirit of justice to Indonesia's criminal justice system. Law would no longer function as an executioner indifferent to victims' suffering but would instead become a healer of social wounds. Integrating the noble principles of Restorative Justice and Maqashid Sharia means placing the protection of women and children at the highest altar of state responsibility, creating a legal system that embodies both divine and human values and serves as a mercy to all creation (rahmatan lil 'alamin).

4. Conclusion

Indonesia's criminal justice system has experienced a paradigm paralysis when confronted with the obligation to restore the economic rights of vulnerable groups who become victims of exploitative crimes. The failure to execute restitution for women and children stemming from the loophole of substitute imprisonment and the complexity of proving losses demonstrates that the dominance of retributive justice merely celebrates the punishment of offenders while legitimizing victims' impoverishment. Therefore, comprehensive legal reconstruction is imperative through the integration of the philosophy of Restorative Justice and the noble values of Maqashid Sharia. The doctrines of Hifz al-Nafs (protection of life) and Hifz al-Mal (protection of property) affirm that restitution is an absolute right that cannot be exchanged for time spent in prison. Through the abolition of substitute imprisonment, implementation of early asset tracing, reversal of the burden of proof, and state intervention through subrogation mechanisms and the establishment of a Victim Trust Fund similar to Baitul Mal), the legal deadlock can be resolved. This comprehensive reconstruction ensures that positive law does not merely function as a rigid instrument of retribution but transforms into a shield of substantive justice that restores dignity, humanizes humanity, and fully elevates women and children from the abyss of exploitation.

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