Antinomy of Judge's Free Evaluation of Evidence Principle Application in Civil Law Finding in Indonesia

Dedy Muchti Nugroho[*], Setiono[**] & Adi Sulistiyono [***]

Abstract

Law finding (rechtsvinding) and law creation (rechtsschepping) activities by judge is the part of duty, authority, and obligation the judge assumes as the state official accepting, examining, and deciding (Article 1 clause 9 of KUHAP) any criminal and civil case as the real manifestation of the judicial power implementation that is independent and free of extra judicial intervention as governed in Article 24 of 1945 Constitution jo Article 5 clause (1) jo Article 10 clause (1) of Law Number 49 of 2009 about Judicial Power basically mandating the judge to explore, to follow and to understand the legal values and the feeling of justice living within society. The application of judge's free evaluation of evidence principle is conducted in every stage of law finding and is manifested into the judge's free evaluation to determine the concrete actual event. In this principle application, there is antinomy with other civil law principle, but all of those principles could run simultaneously. The difference of positivism thought from legal historical thought in fact affected the judge in Indonesia so that progressive and conservative thoughts were known. This research was conducted based on the author's experience and daily work as the judge in District Court for 12 (twenty years) hearing and trialing many cases. This research focused on the attempt the judge took in undertaking his/her duty to solve the civil dispute in the case of imperfect law by means of finding the law (rechtsvinding).

Keywords: eating disorders, binge drinking, masculinity, alcohol

A. Introduction

In hearing and trialing the case, the judge faces a fact that written law cannot always solve the problem faced, recalling that the codification of law, although it seems to be complete, is never perfect because thousands unexpected problems will be posed to the judge[1]. The judge, in practice, should find the law *(rechtsvinding)* himself/herself to complete the existing law or to fill in the legal vacuum to sentence a case. The judge, on his/her own initiative, should explore and find the law within society[2].

Bagir Manan stated that obligation of finding the law is encouraged by some factors: *firstly*, nearly all concrete legal events are not depicted entirely and appropriately in the law; secondly, the provision of law is unclear or is in contradiction with other provisions requiring "option" in order to be applied appropriately, correctly and justly; thirdly, the result of community dynamics, a variety of new legal events is not depicted in the law; fourthly, the obligation of finding the law results because of the provision of legal principle prohibiting the judge to refuse sentencing a case with the reason of unclear provision or the law governing it inadequately[3]. The judge in law enforcement system has the main duty of hearing and trialing as well as solving the case filed to him/her.

[*] Dedy Muchti Nugroho, SH, M.Hum., Mahasiswa Program Doktor Ilmu Hukum, Universitas Sebelas Maret Surakarta, Indonesia, Research Fields : Civil Law / Hakim Pengadilan Negeri Kelas I-B Sumber, Kabupaten Cirebon.

[**] Setiono, Prof., Dr., SH., MS., Guru Besar Emiritus Fakultas Hukum Universitas Sebelas Maret Surakarta, Indonesia (Promotor), Research Fields : Civil Law and Business Law.

[***] Adi Sulistiyono, Prof., Dr., SH., MH., Guru Besar Fakultas Hukum Universitas Sebelas Maret Surakarta, Indonesia (Co Promotor), Research Fields : Corporate Law and Business Law.

[1] Sudikno Mertokusumo and A. Pitlo, *Bab-Bab Tentang Penemuan Hukum,* Edisi Keempat, Citra Aditya Bakti, Jakarta, 2009, p. 10.

[2] Soedjono Dirjosisworo, *Pengantar Ilmu Hukum,* Edisi Kedua, Rajawali, Jakarta, 1996, p. 14.

[3] Bagir Manan, *Menegakkan Hukum Suatu Pencarian,* Asosiasi Advokat Indonesia, Jakarta, 2009, p. 169.

For that reason, the judge plays an important role in enforcing the law and justice through not only legal justice but also moral justice and social justice verdicts. It means that in the presence of verdict principle, the judge is considered as true *(res judicata pro veritate habetur)*.[4]

Rule of law inadequacy or incompleteness should be completed by means of finding law in order to make its rule of law applicable to the event. Essentially, all of cases that should be solved by the judge in the court need thinking toward law finding method to make the rule of law applicable to the event thereby yielding an ideal verdict containing justice (philosophical), certainty (juridical), and usefulness (sociological) aspects.[5] The prominent elements in legal philosophical study are, among others, the meaning of law in relation to natural law such as ethical principle, the law in relation to individual human beings and society, the law development (including law finding) and the feeling of justice development in human rights[6].

The judge in sentencing the case casuistically always faces three principles: justice, law certainty and usefulness. Those three principles should be conducted in compromise by means of applying them equally or proportionally. According to doctrine in trialing practice in Indonesia, it may not be done by a judge in verdict dictum. It is like a line in which the judge hearing and sentencing the case is on 2 (two) bordering points on the line: justice and law certainty points. The usefulness principle is in between them.

In this research, the discussion on three layers of legal sciences about legal dogma, legal theory, and legal philosophy finally should be directed to legal practices: law development and application. The problem with law application aspect includes law interpretation (interpreting the meaning of unclear material law) and law vacuum *(leemten in het recht)* or often called *rechtsvacuum*, law vacuum *(wet vacuum)*, antinomy (legal norm conflict) and vague norm (*vage normen*). Although it is stated that the good law is the one almost not giving discretion opportunity to the judge *(optimam esse legem, quae minimum relinquit arbitrio judicis; id guod certitude ejus praestat)*, in practice many laws are found incomplete or unclear despite the sufficiently clear explanation of law[7].

A. Method

The research method used was juridical-normative (legal research) one.[8] As Mahmud Marzuki suggests, there are 5 (five) approaches used in legal studies: statute approach, case approach, historical approach, comparative approach and conceptual approach.[9]

This study employed an approached emphasizing more on case approach, statute approach and conceptual approach. Technique of collecting law material used was inventorying all of law materials including primary, secondary and tertiary ones. This research no longer suggested expert's opinion, but it was adjusted directly with the author's way of collecting the law material and the material collected was then grouped by the existing legislation order, in this case the primary law material included Republic of Indonesia's Constitution of 1945, legislation (rule of law) as the system in implementing civil procedural law, in both *Burgerlijk Wetboek* (BW) or called Civil Code, *Herziene Inlands Reglement* (HIR) or known reformed Indonesian Regulation (RIB), Justice Power Law (Laws Nos. 19 of 1964, 14 of 1970, 35 of 1999, 4 of 2004 and 48 of 2009), Public Judicature Law (Laws Nos. 2 of 1986, 8 of 2004 and 49 of 2009), Supreme Court Law (Law No. 3 of 2009).

B. Result And Discussion

1. Judge Ratio Decidendi in Finding the Civil Dispute Law

Indonesia is a constitutional country; it is mentioned firmly in the Article 1 clause (3) of Republic of Indonesia's Constitution of 1945 (thereafter called the 1945 Constitution). It means that Indonesian state administration system represents the recognition of the guarantee over the citizen's basic rights based on the rule of law.

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[4] Sudikno Mertokusumo, *Teori Hukum,* Universitas Atma Jaya, Yogyakarta, Cetakan 8, 2011, p. 55.

[5] Lily Rasjidi, *Dasar-Dasar Filsafat Hukum,* Penerbit Alumni, Bandung, 2002, hlm. p and compare with Theo Huijbers OSC, *Filsafat Hukum Dalam Lintasan Sejarah,* Yayasan Kanisius, Yogyakarta, 2015, p. 273.

[6] *Ibid.*

[7] Johny Ibrahim, *Teori dan Metodologi Penelitian Hukum Normatif,* Bayu Media Publishing, Malang, 2005, p. 215.

[8] Ronny Hanitijo Soemitro, *Metodologi Penelitian Hukum dan Jurimetri,* Cetakan Ketiga, Edisi Revisi, Ghalia Indonesia, Jakarta, 1998, p. 11.

[9] Peter Mahmud Marzuki, *Penelitian Hukum,* Prenada Media, Jakarta, 2005, p. 93.

For that reasons, one consequence of constitutional country is that the justice power should be implemented independent of the government's will.[10] Indonesian constitutional system in its historical development derived from Dutch legal system that has long dominated Indonesia, so that it is based on the concordance of Dutch legal system applied in Indonesia. It was France that developed Napoleon Code: Code Civil (*KUH Perdata*), *Code Penal* (KUH Pidana), and *Code du Commerce* (*KUH Dagang*) based on the concordance, the enactment of colonial law to the colonized countries, so that France that had ever colonized the Netherlands enacted Napoleon Code in Netherlands. For that reasons, the Dutch law is in continental European (civil law) scope. Thus, it can be understood that in Indonesian judicature, the judges hearing, trialing, and sentencing a case are affected by Continental European legal system (Civil Law). In Indonesia there are ± 400 (four hundreds) law sets inherited from the colonial.[11]

The judge's rationale in finding the law is firstly through Article 1 clause (1) of Law No.48 of 2009 about Justice Power explaining that justice power is the independent state's power (rule) to organize judicature in order to enforce law and justice based on Pancasila and the 1945 Constitution of Republic of Indonesia for the sake of Republic of Indonesia constitutional country.

Article 4 clause (1) of Law No. 48 of 2009 about Justice Power also confirms that "the court trials by law without discriminating people" meaning that the judge as the main organ of court should exist primarily in the legal system and cannot go out of the law, so that he/she should find the law without breaking its legal principle.

Article 50 clause (1) of Law No. 48 of 2008 about Justice Power confirms that "Every verdict of judge should contain legal rationale by mentioning the articles of law or non-written law as the basis and the reason of trialing". It is continued with Article 53 clause (1) of Law no.48 of 2009 about Justice Power confirming that "The judge is responsible for the law he/she has chosen appropriately". Such the provision is in line with the provision of Article 68 letter A of Law No. 49 of 2009 about Public Judicature confirming that "in hearing and sentencing the case, the judge should be responsible for the stipulation and verdict he/she has made".

Article 5 clause (1) of Law No.48 of 2009 about Justice Power also determines that "Judge and Constitutional Judge obligatorily explore, follow, and understand the legal values and the feeling of justice living within society". The provision of Article 5 clause (1) is defined that the application of law in concrete even through court trial, the judge not only applies the existing law or regulation, but also explores obligatorily the legal values living within the society.

Article 10 clause (1) of Law No.48 of 2009 about Justice Power also gives the judge the foundation of law finding mentioning that "(1) the court is prohibited to refuse hearing, trialing and sentencing the case filed to it with the excuse that there is no law or the law is unclear, but it should hear and trial it obligatorily.

The Laws No.48 of 2009 about Justice Power and No. 49 of 2009 about Public Judicature give the judge the rationale in finding the law. The judge should be independent in the sense of free, not free as much as possible but responsibly free (responsible independency). The judge's duty is basically to sentence every case filed as well as possible, so that the justice seekers *(justisiabelen)* feel the protection over their rights. When the legal event results, but the rule of law is unclear or less clear, even perhaps there is no law at al; it cannot be the judge's excuse to refuse solving the case.

In civil case, the judge's independency in finding the law will be bond to something suggested by the parties, the written norm of law in civil case, the judge cannot decide beyond what the corresponding party prosecutes as governed in *Herziene Inlandsche Reglement* (HIR) in Article 178 clause (3) stating that "he (the judge) is prohibited to sentence the case not prosecuted or will grant beyond the prosecution". In Indonesian judicature practice, the judge often breaks it in the excuse of justice within society. In civil case, the judge's verdict no longer prevails for the public *(erga omnes)* but prevails for the parties in the case only corresponding to the Article 1917 clause (2) of KUH Perdata (Civil Code) determining that "the judge's verdict only prevails for the matters sentenced in the verdict".

[10] A. Masyhur Effendi, *Dimensi dan Dinamika Hak Asasi Manusia,* Ghalia Indonesia, Jakarta, 1999, p. 94.
[11] Puslitbang Mahkamah Agung Republik Indonesia, *Rencana Kerja Bidang Hukum,* Jakarta, 1995, p. 22.

Furthermore, through observing some thoughts related to the judge's duty and legislation,[12] based on some policies included in the legislation related to judicature world or governing the justice power, the 1945 Constitution of Republic of Indonesia's, Law Nos. 48 of 2009 about Justice Power, 49 of 2009 about Justice Power, 49 of 2009 about the Second Amendment to Law No. 2 of 1986 about Public Judicature and Law No.5 of 2004 about Supreme Court. The judge in undertaking the Justice Power is free based on law and the feeling of justice within society. Thus, in Indonesia the implementation of judge's duty and obligation is the combination and or collaboration of some thoughts. In solving the civil case, the legal source that can be used is not only based on law or judicature practice, however, there is also the law growing and developing in society or qualified as the habit law. In the attempt of solving civil case filed to him, a judge passes through the stages of establishing the fact, and qualifying the event and legal event. Establishing the fact is to assess whether or not a concrete even is filed to the trial requiring the authentication stage. So, what should be authenticated is the fact or concrete event, while the stage of qualifying means grouping or categorizing the concrete event into legal event groups or category by applying the rule as a logical activity. In this case, the judge has not applied the regulation but should provide the name of legal event. The next is to constitute or provide the constitution, in which the judge determines the law from a legal relation between legal event and legal subject (between the parties in the case). In relation to the judge's duties of hearing and trialing and solving the problem filed to him, the next stage is to formulate the rule of law found in the complete verdict format.

2. Judge's Independency and it's Application Antinomy

a. Civil Judge's Independence in the Process of Finding Law

The judge's independence is basically the last objective in the implementation of justice power, but the means of achieving the impartial judicature. The impartial justice involves the case dealt with by the judge and judicature institution linked to the administrative relation with other state institution in government.

The finding of law is the series of complex processes or activities in judicature process. Originally, the civil judge conducts more activities of finding law compared with criminal judge. The civil judge's discretion of finding law compared with the criminal judge is the result of characteristics of governing civil law. Criminal law is the compulsive public law *(dwingend recht)* because it pertains to public interest, so that the judge is given less discretion of interpreting the law. The legality principle in Article 1 clause (1) of KUHP (Penal Code) limits the civil judge's moving room to interpret the law.[13] The presence of closed system concerning the border of delict and sanction norm disables the criminal judge to create new delict and new sanctions out of sanction delict specified in Penal Code (KUHP).

The process of trialing civil case in Indonesia starts from debriefing to sentencing verdict. The activity of finding law is the series of activities in inseparable judicature process, intact and having correlation with each other. The momentum of law finding, according to Sudikno Mertokusumo[14], starts with the authentication of or establishment of concrete event because at that time the concrete event is stated as proved or established as the actually occurring event for which the law should be found. The use of law finding is often debated between law implementation, law application, law development and law creation. The judge's free evaluation of evidence principle in civil procedural law is manifested in every stage of filing the case to the court and the judge is bond to what the parties suggested (*secundum allegata iudicare).* In civil case, the judge's free evaluation of evidence principle is defined as the freedom to assess the answer given by the parties and to assess the authentication filed by the parties. Through such the freedom, the judge with his/her free (independent) conviction (belief) can obtain the overview of concrete events disputed by the parties as specified in Article 155 clause (1) *Herziene Inlandsche Reglement* (HIR)/Article 165 clause (1) *Rechtsreglement Buitengewesten* (RBg), so that the judge assess independently the truth of prosecution or the truth of response (answer) to the prosecution.[15]

[12] Aliran-aliran dalam penemuan hukum yaitu Aliran *Begriffjurisprudenz,* Aliran *Interssenjurisprudenz (Freirechtsscule),* Aliran *Soziologische Rehtsshule,* dalam Sudikno Mertokusumo, *Op.Cit.,* pp. 42-46.

[13] Sudikno Mertokosumo and A. Pitlo, *Op.Cit.,* p. 5.

[14] Sudikno Mertokusumo, *Penemuan Hukum Sebuah Pengantar,* Edisi Kelima, Cetakan Kedua, Liberty, Yogyakarta, 2009, p. 78.

[15] Elisabeth Nurhaini Butarbutar, *Kebebasan Hakim Perdata Dalam Penemuan Hukum,* artikel dalam Jurnal Ilmu Hukum MIMBAR HUKUM, Fakultas Hukum - Universitas Sumatera Utara (USU), Volume 23, Number 1, February 2011, p. 62.

The judge's free evaluation of evidence principle is also applied when the judge qualifies the concrete to be legal event. Generally, the parties has qualified concrete event in every propositions they express in the trial, but the judge independently accepts or declines the qualification given by the parties.[16] The judge's free evaluation of evidence principle is also applied when he/she constitutes or imposes the verdict. In this case, the judge independently accepts or declines prosecution, either partially or entirely. This principle application can be confirmed with the presence of prosecution or petitum in subsidiary known as *ex aequo et bono* principle.

b. Antinomy of Judge's Free Evaluation of Evidence Principle Application

As an event or a series of complex activities in finding law and applying legal regulation up to the verdict, the application of procedural law principles in every stage of finding law is generally is inseparable from each other, event they are not chronological and antinomy often occurs within them. Antinomy, according to Fockema, is defined as the contradiction between two or more rules that should be solved by means of interpretation.[17] Basically, antinomy is two different but overlapping things. For that reasons, in dealing with antinomy, the judge is required to create the balance between the two provisions. Friedman stated that antinomy occurs due to theory, the law existing between the philosophy of law and political science. It is because basically the function of legal politics is to choose values and to apply them to the idealized law, meanwhile the philosophy of law is the reflection and the formulation of legal values. As a result of legal theory lying between the philosophy of law and legal politics, the new problem arises on the one hand related to the philosophy and on the other hand related to the contradictory politics.[18]

In the application of law, there is always inevitable conflict particularly between justice demand and law certainty. As Apeldorn suggests, when the law is implemented just like its sound, the justice is urged more (*summum ius summa iniuria)*. Otherwise, when the law is implemented in certain condition, it nullifies more uncertainty. Civil law also contains antinomy because it has freedom and orderliness values. On the other hand, there is the freedom of contracting, and on the other hand other party wants orderliness and bond. Antinomy occurs between law certainty and proportionality value. One party wants the certainty and another one wants something proportional or depending on time or place. There is antinomy between obedience and flexibility values, for example in interpreting the good will (intention based on the provision of Article 1338 clause (3) of Civil Code (*KUH Perdata*). In the activity of finding law, antinomy works collectively because justice equates by giving every one the equal proportion applied in the activity of establishing, while the proportional justice is applied to the activity of constituting, everyone get his right or share *(suum cuique tribuere)*. When related to the judge's free evaluation of evidence principle, there is antinomy between the principle of trialing by law and the judge's free evaluation of evidence principle.

The principle of trialing by law is contained in Article 4 clause (1) of Law Number 48 of 2009 about Justice Power, the court trialing corresponding to the law. Another provision is included in Article 20 AB *Algemene Bepalingen van Wetgeving voor Indonesie)* stating that the judge should trial by law. There is a conflict between Article 20 AB *(Algemene Bepalingen van Wetgeving voor Indonesie)* and Article 4 clause (1) of Law Number 48 of 2009 about Justice power because the definition of by law in Article 4 clause (1) of Law Number 48 of 2009 about Justice Power is broader than the definition by act. The definition of by law open more opportunity for the judge to implement his freedom (independency) in finding law, otherwise the definition of by act limits more the freedom of judge in trialing. Referring to the *lex posteriori derogat legi apriori* principle, Article 20 AB *(Algemene Bepalingen van Wetgeving voor Indonesie)* the content of which is in contradiction with Article 4 clause (1) of Law No.48 of 2009 about Justice Power should be paralyzed, but because the law is developed for the sake of human being's interest, it can be deviated through teleological or sociological interpretation, interpreted based on the objective of legislator adjusted with the community development. So these two principles can remain to prevail concomitantly and in overlapping way.

[16] Considering the research conducted in I-A Special District Court of Bandung, I-B Class District Court of Cirebon, I-B Class District Court of Sumber (Cirebon Sub District) and Madiun District Court in 2015, the parties have qualified themselves the event they proposed in the court. It is related to the parties in the court generally designating the Lawyer (Advocate) to represent them

[17] Fockema Andreae, *Kamus Istilah Hukum, Belanda-Indonesia,* Cetakan Pertama, Binacipta, Jakarta, 1983, p. 32.

[18] W. Friedmann, *Teori dan Filsafat Hukum, Telaah Kritis Atas Teori-Teori Hukum* (terjemahan), Muhammad Arifin, Cetakan Kedua, Raja Grafindo Persada, Jakarta, p. 2.

In civil case, the judge makes more interpretation. It is because civil law is generally governing. Through such the interpretation, the rule of law always change and develops, otherwise in the closed system, the rule of law give more law certainty because the legislator does not give the freedom of interpretation difference. Although the civil judge more likely makes interpretation, in interpreting the law, the judge is limited by the enacted legal system. There is antinomy as well between judge's passive principle and free evaluation of evidence principle. The judge in hearing the civil case is passive, meaning that the scope filed to the judge is determined by the parties rather than by the judge. It means that the judge is not allowed to add or to reduce the basic dispute filed by the parties. This principle is determined in Article 178 clause (2) and (3) *Herziene Inlandsche Reglement* (HIR)/Article 189 clause (2) *Rechtsreglement Buitengewesten* (RBg), that the judge obligatorily trials entire prosecution and is prohibited to grant beyond the prosecution. It means that the judge is bond to the event filed by the parties *(secundum allegata iudicare).*

The passiveness of civil judge can be defined as the judge intervening less actively to the case. It means that in civil procedural law, the judge should *tut wuri* (following behind) in which the judge only follows what the parties in the case want. The parties can freely end the dispute filed to the court and the judge cannot hinder it. It can be peace or withdrawal of prosecution as intended in the Article 130 of *Herziene Inlandsche Reglement* (HIR) or Article 154 *of Rechtsreglement Buitengewesten* (RBg).

On the one hand, the judge freely assesses what filed by the parties in the trial but the judge should follow the parties' want. In the activity of finding law, the application of the two principles can work concomitantly because the judge's free evaluation of evidence principle is applied in deciding to accept or to decline the event filed by the parties and the freedom of assessing (evaluating) the evidence. The application of passive judge principle is conducted when the judge undertakes his/her duty of trialing what is filed by the parties.

There is antinomy basically in definition of justice in civil case, because on the one hand, the equal recognition should be given but on the other hand the unequal recognition is given to one party but based on what it has given during the trial. In the activity of finding law, antinomy can work concomitantly because the justice, the characteristic of which is to give equal proportion to everyone, is applied in the activity of establishing, while proportional justice is applied to the activity of constituting, in which everyone get his right or share *(suum cuique tribuere).*

C. Conclusion and Recommendation

1. Conclusion

Considering the elaboration in introduction, result and analysis sections in this article, the problem existing can be understood and the following conclusions can be drawn:

1. The judge's ratio decidendi in finding the law is governed in positive (material) law in Indonesia (Justice Power Law, Public Judicature Law, Supreme Court Law) is that the judge should be free and independent, is not allowed to decline to trial and obligatorily makes legal deliberation over the verdict by mentioning the article of legislation or non-written law as the basis of trialing, by applying the meaning of trialing according to law without discriminating people so that a verdict of civil case consistent with the legal values and the feeling of justice living within the society is yielded.
2. The application of judge's free evaluation of evidence is conducted in every stage in the activity of finding the law manifested into the judge's freedom to determine the actually occurring concrete event. In this stage, the judge assesses independently the relevance of event suggested by the party in debriefing process to be the concrete event and freely assesses the evidence filed in the trial to determine the concrete event as the juridical fact. In the stage of qualifying the concrete event to be the legal event, the judge uses independently the law finding source and the finding law method becoming the basis to determine the legal event and applying its law. The judge also freely accepts or declines the qualification given by the parties in the propositions in the trial. In the stage of constituting, the judge freely decides punishment or gives right to the parties in dispute based on his/her assessment and conviction. In its application, there is often antinomy or conflict between the judge's free evaluation of evidence principle and other procedural law principle, but all of those principles can work concomitantly because the principle does not have hierarchy.

2. Recommendation

Considering the result and analysis, and the conclusion elaborated, the following recommendations can be given:

1. There should be political will in the government along with Legislative Assembly (DPR = *Dewan Perwakilan Rakyat*) as the legislative institution to discuss immediately the Draft National Civil Procedural Law in the Legislative Assembly's session to be the foundation for the civil judge in finding law *rechtsvinding)* and creating law *(rechtsschepping)* to complete the existing law in deciding a civil case as mandated in Article 5 jo Article 10 of Law Number 48 of 2009 about Justice Power.
2. The Republic of Indonesia's Supreme Court should issue Supreme Court's Regulation about technical guidelines of finding the law for the judge in Indonesia in order to remove the hesitancy in finding the law with the input of law finding pattern that can be responsible scientifically. The Republic of Indonesia's Supreme Court is expected to confirm the position of jurisprudence as the legal source for the judge in hearing and trialing the civil case.

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