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The Idea of Civil Disobedience: A Few Words after the Judgment of the Voivodeship Administrative Court in Opole (II SA/Op 219/20) and the Judgment of the Supreme Administrative Court (II GSK 292/21)

Idea obywatelskiego nieposłuszeństwa. Kilka słów po wyroku Wojewódzkiego Sądu Administracyjnego w Opolu (II SA/Op 219/20) oraz wyroku Naczelnego Sądu Administracyjnego (II GSK 292/21)

ABSTRACT

The global SARS-CoV-2 coronavirus pandemic carried a number of restrictions and prohibitions, the manifestation of which in Poland was, i.a., cyclical closing and opening of selected branches of the economy, which for the vast majority of entrepreneurs meant – at best – an uncertain future. The lack of clear and consistent actions when introducing restrictions and bans by the Polish Council of Ministers, as well as the failure to provide real financial aid, resulted in the growing opposition of many entrepreneurs, which in turn translated into breaking or circumventing the applicable regulations regarding restrictions and prohibitions in the field of economic freedom. Can such an action be considered a manifestation of civil disobedience? The author's attempt to obtain an answer to this question is the result of the judgment of the Voivodeship Administrative Court in Opole of 27 October

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2020 (II SA/Op 219/20), which for many Polish entrepreneurs was an excuse to express their civic objection and open a business against applicable restrictions and limitations, as well as the judgment of the Supreme Administrative Court of 28 August 2022 (II GSK 292/21).

Keywords: SARS-CoV-2 coronavirus pandemic; civil disobedience; economic freedom; entrepreneurs

INTRODUCTION

Recent years have been marked by the SARS-CoV-2 coronavirus pandemic and the resulting, at least controversial, legislative actions, which were intended to contribute to preventing the spread of the acute respiratory disease caused by it – COVID-19. In the territory of the Republic of Poland, we experienced the cyclical introduction of a number of restrictions on personal freedoms and rights of varying intensity and frequency. The freedom of economic activity was also subject to limitations and restrictions. A significant part of entrepreneurs was left without adequate help, and the inability to run a gainful activity resulted in growing frustration, a sense of injustice and an increasingly difficult economic situation for many of them. This, in turn, was naturally conducive to the growing opposition of entrepreneurs to the introduced restrictions and restrictions of law, which very often resulted in breaking or circumventing – in their opinion unjust.

This article presents philosophical, theoretical and legal considerations on the subject of the individual's opposition to unjust law and the idea of civil disobedience, which were referred to the facts and the content of the justification of the judgment of the Voivodeship Administrative Court in Opole of 27 October 2020 (II SA/Op 219/20) and the judgment of the Supreme Administrative Court of 28 August 2022 (II GSK 292/21). The author aims to try to find an answer to whether the aforementioned judgment of the Voivodeship Administrative Court in Opole may constitute in other, factually similar cases, an incentive for an individual to oppose an unconstitutional law and whether such an attitude may be considered a manifestation of civil disobedience.

RESEARCH AND RESULTS

1. From an individual's opposition to an unjust right to the idea of civil disobedience

Considering the above-mentioned issue, first one should refer to the philosophy of the state created by Aristotle. Justice was undoubtedly a fundamental principle of the Stagirite's thinking because a reasonable organization of the system should

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always aim to guarantee it in relations between people, subjects and the authorities. Aristotle distinguished essentially two forms of justice: general (formal) and specific (material). In his opinion, general justice satisfies the sense and criteria of justice created in the ideology of the factor constituting the law as provided for and guaranteed by legal norms. Specific justice corresponds to the citizen's sense of a clear division of rights and obligations for everyone.[1] Aristotle based his reasoning on the interdependence of statutory law and natural law. When the solutions of statutory law fail, in his opinion common sense should enter, based on the sense of equity (*epikeia*), i.e. resolving matters on the basis of a reasonable approach in assessing the conduct of an individual.[2] *Epikeia* was therefore, according to the Stagirite, a virtue of the correct application of the law to specific cases, which are part of a reality that is always richer and much more varied than the law, often even against its letter, but always in accordance with its spirit.[3]

For centuries, Roman law has reliably helped us in our search for the right attitude of an individual towards the law. Digest of Justinian (*Digesta Iustiniani*), which is the most extensive of the three parts of the great compilation[4] of Roman law (*Corpus Iuris Civilis*) undertaken in the years 528–534 CE by Emperor Justinian I the Great, contain perhaps the most concise, but also the most beautiful definition of law by Celsus (but commonly ascribed to Ulpian), who stated that it is the art of (applying) what is good and right[5] (*ius est ars boni et aequi*, Ulpianus, D. 1.1.1). As W. Wołodkiewicz points out, in ancient Rome such an attitude to law undoubtedly had a long tradition: "The understanding of law resulting from this definition was present in Roman thought for a long time. A similar thought was expressed by Cicero (…), who defines law (…) as established justice (…). Even earlier, the connections between *ius* and *bonum et aequum* can be found in the Roman writers Ennius, Plautus and Terentius (…). Also Paulus (D. 1.1.11) derives the concept of law from equity and goodness".[6] In turn, in the Justinian Code (*Codex Iustinianus*) we find a sentence indicating that in all matters the principle of justice and equity should prevail over the principle of strict law (*placit in omnibus rebus praecipuam esse iustitiae aequitatisque quam stricti iuris rationem*, C. 3.1.8). Without undertaking a deeper analysis, it should be noted that *Corpus Iuris Civilis*, and especially *Digest* as its essential part, became the foundation of continental legal dogmatics. Thus, as T. Giaro points

[1] A. Sylwestrzak, *Historia doktryn politycznych i prawnych*, Warszawa 2007, p. 63.

[2] *Ibidem*, p. 66.

[3] Arystoteles, *Etyka nikomachejska*, Book V, 10, 1137b, Warszawa 2008, p. 189.

[4] W. Dajczak, T. Giaro, F. Longchamps de Bérrier, *Prawo rzymskie. U podstaw prawa prywatnego*, Warszawa 2009, p. 86.

[5] See J. Zajadło (ed.), *Łacińska terminologia prawnicza*, Warszawa 2009, p. 36.

[6] W. Wołodkiewicz (ed.), *Regulae iuris. Łacińskie inskrypcje na kolumnach Sądu Najwyższego Rzeczypospolitej Polskiej*, Warszawa 2006, p. 74.

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out, this dogmatics constituted itself as a hermeneutic of the text of the law, which distinguished it from the Roman jurisprudence.[7]

Aristotle wrote about *epikeia* in *Nicomachean Ethics* and *Rhetoric*, which in the Middle Ages as commented on by, i.a., St. Thomas Aquinas. In the *Summa Theologica*, Aquinas taught that human action consists of specific acts that can vary in an infinite number of ways, and therefore it is impossible to make a law of human activity applicable to every case. St. Thomas Aquinas gives in *Summa Theologica* an example of a law that requires items to be deposited for safekeeping, which is of course right in the vast majority of cases. However, he emphasizes that this law can sometimes be harmful. Aquinas points out that it may happen that someone has given his sword for safekeeping and wants to take it back, being in a state of strong affect. Another person, in turn, may want to take back something that he will use to the detriment of his country. In the mentioned and similar cases, evil, according to St. Thomas Aquinas, would be to fulfill this law, and good, to fulfill, against the letter of the law, what is required by the reason of justice and public benefit.[8] *Epikeia*, according to Aquinas, is therefore a virtue which makes a person inclined to choose what is just even when what is just contradicts the letter of the law, which cannot take into account all circumstances.[9] It should be noted that St. Thomas Aquinas took over from Augustine Aurelius and also developed one of the most famous Roman legal formulas, according to which an unjust law is not a law (*lex iniusta non est lex*),[10] which raises the fundamental question whether a law can have any, even extremely immoral content. As J. Zajadło points out, this formula is widely discussed in the contemporary philosophy of law in connection with the issue of accounting for the crimes of totalitarian regimes, but at the same time it is given a much more radical form, according to which a grossly unfair statute is not a statute (*lex iniustissima non est lex*).[11]

The thesis, already well-established in the literature on the subject, is the linking of the concept of civil disobedience with the 19th-century American writer, poet and philosopher transcendentalist, even called – though not quite rightly – an anarchist, H.D. Thoreau,[12] who in 1849 published the essay *On the Duty of Civil Disobedience*, in which he posed the fundamental question: "Unfair laws exist: should we be content with obeying them, or should we make an effort to change

[7] See W. Dajczak, T. Giaro, F. Longchamps de Bérrier, *op. cit*., pp. 88–89.

[8] Saint Thomas Aquinas, *Suma teologiczna*, http://www.katedra.uksw.edu.pl/suma/suma_indeks.htm (accesss: 11.12.2023), II-II q. 120 a. 1 co.

[9] S.-T. Bonino, *Saint Thomas Aquinas in the Apostolic Exhortation Amoris Laetitia*, "The Thomist. A Speculative Quarterly Review" 2016, vol. 80(4), p. 515.

[10] J. Zajadło (ed.), *op. cit.*, p. 42.

[11] *Ibidem*.

[12] B. Stoczewska, *Jeszcze raz o obywatelskim nieposłuszeństwie – interpretacje, spory wokół pojęcia*, "Krakowskie Studia Międzynarodowe" 2017, vol. 14(3), p. 85.

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them, obeying them until we achieve the goal, or maybe we should break them?".[13] Thoreau was a declared opponent of slavery and the American War with Mexico, who in protest refused to pay taxes, for which he was also arrested for a short time. He described the incident this way: "The current US government, or its representative: the state government, I meet face to face, no more than once a year. He comes to me in the person of a tax collector – this is the only opportunity for a man with a situation like me to meet the government. Then the government says clearly: – Grant me. The simplest, most effective and, as things stand, the most indispensable way to express your dissatisfaction and dislike of the government is then to refuse. It just so happens that this tax collector is my neighbor, and I have to deal with him – because if he wasn't, I argue with people, not with parchment. (…) Under the rule of unfairly condemning people to prison, the only right place for a human being righteous is also a prison. The prison is the right place today, the only place Massachusetts provides for its independent and tenacious people. The state by one legal act closes them off and excludes them from life, just as they cut themselves off from the state by observing their own rules. This is where they will find their escaped slave, Mexican parole or Indian, eager to plead for justice to their own peoples; right there, in this place of seclusion, but also of freedom and honor, where the state keeps people who do not support it, but oppose it – in the only place in this slave state where a free man can retain honor. If anyone thinks that while there he loses his influence and that his voice will not reach the ears of the state, that he will no longer be an enemy within the prison walls, he does not understand that the truth is much stronger than a lie, or that a man who he experienced injustice himself, he is able to fight for it much more eloquently and effectively (…)".[14] The aforementioned essay has undoubtedly inspired the development of contemporary reflection on the essence of civil disobedience. It should be emphasized that Thoreau, while analyzing the idea of civil disobedience in the conditions of a democratic state, pointed to its two fundamental features. First, as noted by B. Stoczewska, in the understanding of Thoreau, the attitude of civic opposition was individual, which means that the decision to apply it was based solely on the conscience of each person.[15] The author of the essay *On the Duty of Civil Disobedience* states: "Does a citizen have to submit his conscience to the legislator even for a moment or even the slightest degree? So why do we have a conscience? I believe that we should be human first and then citizens. We should not cultivate respect for the law, but rather for justice. The only obligation I have the right to assume is the obligation to always do what I consider to be just (…). The law has never made people any bit fairer – but respecting the law every day

[13] H.D. Thoreau, *O obywatelskim nieposłuszeństwie*, Kraków 2020, p. 17.
[14] *Ibidem*, pp. 19–21.
[15] B. Stoczewska, *op. cit.*, pp. 85–86.

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turns the kindest among us into agents of injustice. A common and natural effect of blindly respecting the law is the sight of ranks of soldiers – colonel, captain, corporal, privates, boys delivering gunpowder and others – marching to war in equal formation through the hills and valleys, marching against their own will, indeed against conscience and common sense (…). They have no doubts whatsoever that the whole quarrel is damnable, because they are all peaceful by nature. So what are they now? Still humans? Or maybe small mobile forts and warehouses in the service of an unscrupulous man in power?".[16] Secondly, Thoreau understood civil disobedience as the duty of every citizen resulting from his functioning in society, being closely correlated with the sense of responsibility for the fate of the state.[17] He assigned the citizen the role of a kind of brake capable of stopping a speeding machine,[18] stating: "If injustice is part of the necessary friction of a government machine, let this friction continue: perhaps it will wear smoothly, and the machine will eventually break down. If injustice had a spring, block, rope, or crane at its sole disposal, then one might wonder if the cure would be worse than the disease; but since the law is of such a nature that it requires us to be an instrument of injustice towards one another, then I say: let's break the law. Let our life be the counter--friction that will stop the machine. My primary task is to make sure that I do not become an instrument of the same injustice that I condemn".[19]

The concept of civic opposition was developed in the 20th century by the German political theorist and philosopher H. Arendt, giving it – unlike Thoreau – a much broader than individual, social character. For such an approach as the remark of Stoczewska, the arguments were primarily for pragmatic reasons, the rejection of group objection, according to Arendt, has a chance of success, the law of the entire society.[20] She derived the aforementioned thesis from the understanding of civil disobedience as one of the forms of a voluntary association whose main goal is to change the questioned law. However, in a manner similar to Thoreau, Arendt argued that the image of civil disobedience is one of the ways of legitimizing power, while passivity may be perceived as a silent consent to inappropriate action.

In the 1970s, the Americans: J. Rawls and R. Dworkin, in turn, reflected on civil disobedience. The first of the aforementioned two, in his work *A Theory of Justice*, published in 1971, defined civil disobedience as "a public, nonviolent, conscientious yet political act contrary to law, usually done with the aim of bringing about a change in the law or policies of the government".[21] He described the

[16] H.D. Thoreau, *op. cit.*, pp. 7–8.
[17] B. Stoczewska, *op. cit.*, p. 86.
[18] *Ibidem*.
[19] H.D. Thoreau, *op. cit.*, pp. 17–18.
[20] B. Stoczewska, *op. cit.*, p. 86.
[21] J. Rawls, *Teoria sprawiedliwości*, Warszawa 1994, p. 499.

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idea of civil disobedience in conditions of a society that is "close to just", i.e. one that functions on the basis of two principles: individual freedom that is compatible with the freedom of others, and accepts social inequalities, assuming that they will be arranged in a way that benefits everyone.[22] Thus, when committing an act of disobedience to the law, citizens will appeal to the sense of justice of the majority of members of the community, while excluding criteria derived from the principles of morality or religion.[23] Dworkin, in turn, argued that acts of civil objection play the role of a test of the correctness and effectiveness of the law, thus improving its quality. In his opinion, respect for the law is a legal obligation, but it cannot be treated in an absolute way. After all, there may be a defective law, or even an unfair law, and there is no reason to respect it without any reservations. Dworkin claimed: "There is an inalienable, moral dimension of legal actions, hence the constant risk of causing injustice in the public sphere".[24] He also drew attention to the rational nature of man, noting that every citizen should be guided by his own discernment, without disregarding the decisions or arguments of the court.[25] Importantly, Dworkin considered the readiness of an individual to submit to punishment for disobedience to the law as a necessary condition of that institution.[26]

By far the broadest and the least restrictive definition of civil disobedience was presented in the work published in 1979 titled *The Authority of Law: Essays on Law and Morality*, by Israeli philosopher and legal theorist J. Raz. In his view, civil disobedience is "politically motivated breaking the law, which is intended to directly change the law or social policy, or to express someone's protest and disregard for the law or social policy".[27] For Raz, civil disobedience is simply one type of political action that differs from other such activities in that it uses violations of the law as a means.[28] The exceptional nature of civil disobedience in a liberal state, in his opinion, is that it is the only type of political action against which no one has the right.[29] It is also worth paying attention to the work of M. Cooke, in which he explains that civil disobedience (the disobedience of citizens broadly understood) is an act of protest against legally binding, and hence constraining, political power.[30] It seeks to transform the existing political system of power as opposed to destroying it.[31]

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[22] *Ibidem*, p. 500.

[23] B. Stoczewska, *op. cit.*, p. 86.

[24] R. Dworkin, *Imperium prawa*, Warszawa 2006, p. 1.

[25] B. Stoczewska, *op. cit*., p. 87.

[26] R. Dworkin, *Biorąc prawa poważnie*, Warszawa 1998, p. 385.

[27] J. Raz, *Autorytet prawa. Eseje o prawie i moralności*, Warszawa 2000, p. 264.

[28] B. Stoczewska, *op. cit.*, p. 87.

[29] J. Raz, *op. cit.*, p. 276.

[30] M. Cooke, *Civil Obedience and Disobedience*, "Philosophy and Social Criticism" 2016, vol. 42(1).

[31] *Ibidem*.

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It is worth noting that within the existing literature, a distinction is made between two types of civil disobedience, namely direct and indirect civil disobedience. C. Cohen, in his scholarly work, highlights that all acts of civil disobedience can be classified into one of these two categories.[32] Direct civil disobedience occurs when individuals deliberately violate the specific law against which their protest is directed.[33] In essence, direct civil disobedience entails a direct transgression of the law being protested. Rawls argues that direct civil disobedience involves a deliberate breach of the law that is openly criticized.[34] Similarly, W. Smith and K. Brownlee explain that acts of civil disobedience are considered direct when they involve a straightforward refusal to conform to the law that is the immediate target of the protest.[35]

On the other hand, indirect civil disobedience can be understood as a refusal to comply with non-controversial laws as a means of indirectly expressing opposition to the underlying objective of the protest.[36] Cohen interprets indirect civil disobedience as disobedience towards a law other than the one directly related to the object of the protest, although it may have some degree of proximity.[37] Rawls perceives indirect civil disobedience as a violation of another law.[38] To illustrate this, the author provides an example where the state authority enacts an imprecise and excessively stringent law against treason, and engaging in treason would not be an appropriate method of opposing that particular law.[39]

The Polish contribution to the analysis of the aforementioned issue – although referring only to the American legal doctrine – was the first to be made by W. Lang and J. Wróblewski in the 1984 monograph *Social Justice and Civil Disobedience in the US Political Doctrine*.[40] In their opinion, a civil disobedience should be considered an unlawful act that violates the law in force at a given time and place and is an expression of an intended protest not only against this law, but also the official policy of the state, custom or social practice unequivocally supported by that state. Lang and Wróblewski emphasized that the most important feature of civil disobedience is the moral and political motivation of an act that violates the law.[41]

In the next decade, E. Łętowska and A. Rzepliński took part in the discussion on the idea of civil disobedience. Łętowska emphasized the necessity to eliminate

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[32] C. Cohen, *Civil Disobedience and the Law*, "Rutgers Law Review" 1966, vol. 21(1), p. 4.
[33] *Ibidem*.
[34] J. Rawls, *op. cit.*, p. 500.
[35] W. Smith, K. Brownlee, *Civil Disobedience and Conscientious Objection*, 24.5.2017.
[36] *Ibidem*.
[37] C. Cohen, *op. cit.*, p. 4.
[38] J. Rawls, *op. cit.*, p. 500.
[39] *Ibidem*, p. 501.
[40] W. Lang, J. Wróblewski, *Sprawiedliwość społeczna i nieposłuszeństwo obywatelskie w doktrynie politycznej USA*, Warszawa 1984.
[41] *Ibidem*, p. 125.

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violence within the framework of the above-mentioned idea: "(…) it is precisely this requirement that often causes civil disobedience to be referred to as a synonym of permitted civil disobedience".[42] What is extremely important from the point of this article, she also claimed that the main motive for actions that bear the hallmarks of civil disobedience should be to demonstrate the unconstitutional nature of a given practice or law of a lower rank than the constitution,[43] which means *de facto* acting in its defense.[44] At the same time, it should be noted that such action must be treated as a last resort and preceded by the exhaustion of funds available under the applicable legal order.[45] Łętowska also points attention to the potential threats to the described idea, including its susceptibility to abuses by anarchist or terrorist ideas or movements.[46] The observations of Rzepliński on the idea of civil disobedience are also extremely interesting. In his opinion, the right to express civil objection to the behavior of the authorities as well as customs or practices supported by the state, which should be considered unconstitutional, but also those that violate fundamental moral norms, is fully legitimate.[47] The use of civic objection should be related to a personal, sincere, deep and rationally justified moral position or philosophical view of an individual.[48] At the same time, Rzepliński recommended far-reaching caution when applying it and making sure that there was a fully justified, objective doubt as to the constitutionality of the infringed right. In his opinion, these doubts should be resolved on the basis of the positions and opinions of experts from legal circles, as well as be reflected in the general public.[49]

As Stoczewska points out, it is only in recent years that a significant increase in interest in the discussed issues can be felt, as evidenced by, i.a., monographs by M. Kaczmarczyk *Civic Disobedience and the Concept of Law* (2010) or M. Rutkowski *Disobedience to the Law* (2011).[50] It seems that the issue of civil opposition in the conditions and realities of contemporary Polish democracy will gradually grow, and the judgment of the Voivodeship Administrative Court in Opole (II SA/Op 219/20) and the judgment of the Supreme Administrative Court (II GSK 292/21) are just the examples.[51]

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[42] E. Łętowska, *Po co ludziom konstytucja*, Warszawa 1994, p. 138.

[43] *Ibidem*.

[44] B. Stoczewska, *op. cit.*, p. 88.

[45] *Ibidem*.

[46] *Ibidem*.

[47] A. Rzepliński, *Obowiązki obywatelskie. Cywilne nieposłuszeństwo*, [in:] *Prawa człowieka a policja. Problemy teorii i praktyki*, ed. A. Rzepliński, Legionowo 1994, p. 176.

[48] *Ibidem*.

[49] *Ibidem*.

[50] B. Stoczewska, *op. cit.*, p. 85.

[51] Judgment of the Voivodeship Administrative Court in Opole of 27 October 2020, II SA/Op 219/20, LEX no. 3093916; judgment of the Supreme Administrative Court of 28 June 2022, II GSK 292/21, LEX no. 3400883.

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2. The case of a hairdresser from Prudnik – judgment of the Voivodeship Administrative Court in Opole (II SA/Op 219/20)

Prudnik entrepreneur H.L., who was the owner of the local hairdressing salon, on 22 April 2020 – in the opinion of the Police officer who intervened – did not comply with the obligation to temporarily limit the business activities related to hairdressing by entrepreneurs consisting in a complete ban on this type of activity, introduced pursuant to § 8 (1) (1) (g) in conjunction with § 9 (1) (1) of the Regulation of the Council of Ministers of 19 April 2020 on establishing certain restrictions, orders and prohibitions due to the occurrence of an epidemic state.[52] According to the content of the official memo of a Police officer, H.L. performed a haircut at hairdressing salon on that day, without also complying with the obligation to cover his mouth and nose. After the intervention H.L. ceased his activity and closed the salon. The next day, the State District Sanitary Inspector in Prudnik (which is the first instance authority in this case) received an official note from the locally competent Police Station. On its basis, the State District Sanitary Inspector in Prudnik initiated on 28 April 2020 administrative proceedings to impose a fine against H.L. for failure to comply with the aforementioned regulation of a total ban on entrepreneurs from conducting activities related to hairdressing. As the legal basis for initiating the procedure, the State District Sanitary Inspector in Prudnik also appointed Article 61 § 4 of the Administrative Procedure Code,[53] Article 48a (1) (1) and Article 48a (3) (1) of the Act of 5 December 2008 on preventing and combating infections and infectious diseases in humans,[54] imposing on the same day, by way of an administrative decision, a fine in the amount of PLN 10,000 towards the owner of a hairdressing salon. On 22 April 2020, which he considered to be "credible, reliable and constituting a significant, key source for establishing the facts", he determined that – on that day – H.L. had a haircut in his hairdressing salon. The Sanitary Inspector also noted that the case was not delayed, therefore the requirement of Article 10 § 1 of the Civil Procedure Code (the principle of active participation of the parties in the proceedings), which was recorded in the files pursuant to Article 10 § 3 of the Civil Procedure Code. Based on the Police findings from the memo, the authority concluded that on that day H.L. had performed haircut in his hairdressing salon. The authority found the Police note to be "credible, reliable and constituting an important, key source of establishing the facts". The Sanitary Inspector also noted that there was no need for a delay in settling the matter, hence the requirement of Article 10 § 1 APC (principle of active

[52] Journal of Laws 2020, item 697.

[53] Act of 14 June 1960 – Administrative Procedure Code (consolidated text, Journal of Laws 2023, item 775), hereinafter: APC.

[54] Consolidated text, Journal of Laws 2019, item 1239, as amended.

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participation of the parties in the proceedings) was waived, which was recorded in the case files in accordance with Article 10 § 3 APC.

H.L. disagreed with the aforementioned decision and, represented by the attorney in the appeal against the said decision, accused it of violating it: 1) Article 10 § 1 APC in conjunction with Article 77 § 1 and Article 81 APC by depriving a party of an opinion on the findings on which the decision was based, the party argued that those findings were not supported by evidence and could not constitute the basis of the decision; 2) issuing a decision in violation of Article 10 § 1 in conjunction with Article 77 § 4 and Article 81 APC by basing it on an official note that was not disclosed to the party, therefore could not comment on its content; 3) Article 7 § 1 APC in conjunction with Article 77 § 1, Article 78 §§ 1 and 2 and Article 80 APC, due to the fact that the party was not admitted to participate in the proceedings, and the evidence was not exhaustively examined, which led to arbitrary and unauthorized factual findings in the decision; 4) failure to apply Article 189f APC, which obliges the authority to refrain from imposing a penalty, after meeting any of the conditions, in a situation where from 22 April 2020 H.L. did not stay in the premises and did not perform hairdressing activities. In the justification, the owner of the hairdressing salon emphasized that on 22 April 2020, he came to his facility to prepare documentation for the Social Insurance Institution, during which he was visited by a friend who had his hair cut during a chat and during this activity he was found by intervening police officers. He further emphasized that he had not been in a hairdressing salon since then, he had no opportunity to comment on the collected evidence, and the body of first instance notified him about the proceedings and served the decision at the same time. He also noted that he performed the haircut free of charge as part of the so-called "Peer Service". In the opinion of H.L., the incident had negligible harmfulness, and the punishment imposed was disproportionate to the offense and the authority could apply Article 189f § 1 APC. The owner of the hairdressing salon also requested that the execution of the decision be suspended.

By order of 19 May 2020 of the Opole State Provincial Sanitary Inspector (appellate agency), acting pursuant to Article 135 and Article 123 § 1 APC, suspended the immediate execution of the decision. Then, with the notification of 27 May 2020, he informed H.L. that the evidence collected in the case concerning the above-mentioned appeal is sufficient to make an appeal decision. By the decision of 23 June 2020, Opole State Provincial Sanitary Inspector upheld the challenged decision and repealed its own decision on the immediate suspension of the execution of the challenged State District Sanitary Inspector in Prudnik decision. In the justification, the appeal body, among others, emphasized that the introduction by the legislator of restrictions on Polish society during the epidemic caused by the SARS-CoV-2 coronavirus was aimed at protecting the highest good, which is human health and life, and the enforcement of these restrictions by authorized services was

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necessary and aimed at preventing the emergence of an epidemic situation on the scale that was observed, e.g., in the Italian Republic. Then the authority quoted the content of Article 46b of the Act of 5 December 2008 on preventing and combating infections and infectious diseases in humans, and indicated that in the event of an epidemic, the Council of Ministers may establish a temporary limitation of certain areas of business activity. On this basis, the Regulation of the Council of Ministers of 19 April 2020 has defined a restriction consisting in a complete ban on business activities related to hairdressing. It expired with the entry into force of another Regulation of the Council of Ministers of 2 May 2020 on establishing certain restrictions, orders and prohibitions due to the occurrence of an epidemic state.[55] He further emphasized that on the day of issuing the decision and its delivery, there was a ban on economic activity related to hairdressing.

The owner of the hairdressing salon disagreed with the above, and in a complaint to the Voivodeship Administrative Court in Opole accused the Opole State Provincial Sanitary Inspector decision violation of the substantive law (including Article 46b of the Act of 5 December 2008 on preventing and combating infections and infectious diseases in humans, and indicated by its application in a situation where the regulation issued on its basis did not provide for restrictions in the conduct of business activities of hairdressing on the date of the decision and § 7 (1) (g) of the Regulation of the Council of Ministers of 2 May 2020 on establishing certain restrictions, orders and prohibitions due to the occurrence of an epidemic state, through its application in a situation where it was in force until 15 May 2020) and procedural (e.g. Article 15 APC, i.e. the principle of two-instance proceedings, due to the lack of examination by the second instance authority of all evidence and issuing the decision in the current legal status).

The Voivodeship Administrative Court in Opole after diagnosis in a simplified procedure on 27 October 2020, cases from the complaint of H.L. against the decision of the Opole State Provincial Sanitary Inspector of 23 June 2020 on the subject of a fine for failure to comply with the temporary restriction of business activities by entrepreneurs established in the state of an epidemic: (1) repealed the challenged decision and the preceding decision of the State District Sanitary Inspector in Prudnik of 28 April 2020, (2) discontinues the administrative proceedings in their entirety, and (3) adjudged the amount of PLN 697 from the Opole State Provincial Sanitary Inspector for the benefit of H.L. for reimbursement of the costs of court proceedings. What is extremely important, in the justification of judgment in case II SA/Op 219/20, the Voivodeship Administrative Court in Opole found the complaint justified, although the Court emphasized reasons other than those indicated by the complainant.

[55] Journal of Laws 2020, item 792.

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Pursuant to § 1 of the Regulation of the Minister of Health of 20 March 2020 on declaring an epidemic state in the territory of the Republic of Poland,[56] from that date until further notice, an epidemic was announced in the territory of the Republic of Poland in connection with SARS-CoV-2 virus infections. This state has replaced the previously introduced state of epidemic threat.[57] In connection with the risk of SARS-CoV-2 coronavirus infections, the legislator took legislative measures to amend the Act of 5 December 2008 on preventing and combating infections and infectious diseases in humans, introduced by special regulations, starting with the Act of 2 March 2020 on special solutions related to preventing, countering and combating COVID-19, other infectious diseases and crisis situations caused by them.[58] The Voivodeship Administrative Court in Opole indicated in the content of the justification that the Constitution of the Republic of Poland[59] also provides for a different mechanism of operation of the executive and legislative authorities. Based on Article 232 of the Polish Constitution, in order to prevent the effects of natural disasters bearing the hallmarks of a natural disaster and to remove them, the Council of Ministers may introduce, for a specified period of time no longer than 30 days, a state of natural disaster in part or throughout the territory of the state, which may then be extended with the consent of the Sejm. Pursuant to Article 233 (3) of the Polish Constitution, the act defining the scope of limitations of human and civil freedoms and rights in a state of natural disaster may, i.a., limit the freedoms and rights specified in Article 22 of the Polish Constitution (freedom of economic activity). Pursuant to Article 2 of the Act of 18 April 2002 on the state of natural disaster,[60] the state of natural disaster may be introduced in order to prevent the effects of natural disasters and to remove them. A natural catastrophe is understood as an event related to the actions of the forces of nature, including mass occurrence of human infectious diseases (see Article 3 (1) (2) of the Act on the state of natural disaster).

As noted by the Voivodeship Administrative Court in Opole, the Council of Ministers, however, resigned from the formal and provided for in Article 232 of the Polish Constitution of introducing a state of natural disaster, thus recognizing that the ordinary constitutional measures granted to it within the meaning of Article 228 (1) of the Polish Constitution are sufficient to control the epidemic. Therefore – according to the justification of the judgment in case SA/Op 219/20 – all

[56] Journal of Laws 2020, item 491, as amended.

[57] See Regulation of the Minister of Health of 13 March 2020 on declaring an epidemic threat state in the territory of the Republic of Poland (Journal of Laws 2020, item 433).

[58] Journal of Laws 2020, item 374.

[59] Constitution of the Republic of Poland of 2 April 1997 (Journal of Laws 1997, no. 78, item 483, as amended), hereinafter: the Polish Constitution. English translation is available at https://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm (access: 10.12.2023).

[60] Consolidated text, Journal of Laws 2017, item 1897.

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constitutional and legislative rules apply to legal regulations concerning limitations of human and citizen's rights and freedoms, except for regulations applicable to states of emergency from Chapter XI of the Polish Constitution. Therefore, in order to introduce limitations on human freedoms and rights, it is not possible to invoke extraordinary circumstances justifying specific legal solutions and such circumstances cannot justify far-reaching restrictions on civil liberties introduced in the form of regulations. The Voivodeship Administrative Court in Opole also stressed that, pursuant to Article 31 (3) of the Polish Constitution, restrictions on the exercise of constitutional freedoms and rights may be established only by statute and only if they are necessary in a democratic state for its safety or public order, or for the protection of the environment, public health and morality, or the freedoms and rights of other people. Moreover, these limitations may not violate the essence of freedoms and rights. Only regulations which do not constitute the basic elements limiting constitutional rights and freedoms may be the content of the regulation. The regulation should only include provisions of a technical nature that are not essential from the point of view of the rights or freedoms of an individual. In the justification of the judgment, the Voivodeship Administrative Court in Opole rightly noted that by introducing the provisions related to the prevention, counteraction and combating the epidemic caused by the SARS-CoV-2 coronavirus, the above rules were broken, and all restrictions on freedoms and rights were transferred from the act to the regulation. It should be emphasized that the Voivodeship Administrative Court in Opole raised that the restrictions referred to in Article 46b of the Act of 5 December 2008 on preventing and combating infections and infectious diseases in humans are a repetition of the restrictions referred to in Article 21 (1) of the Act on the state of natural disaster. Therefore, the legislative actions taken created such a legal state in the field of limiting human freedoms and rights, which in fact corresponds to the regulations applicable in the event of a natural disaster, although this state has not been introduced. However, this has the consequence that the relaxed constitutional conditions for the restriction of human freedoms and rights, specific to states of emergency, cannot be applied in this case. The Voivodeship Administrative Court in Opole also emphasized that the introduction of such restrictions may only take place by means of an act, in compliance with the principle of proportionality referred to in Article 31 (3) of the Polish Constitution. In the justification of the judgment, the Voivodeship Administrative Court in Opole indicated that Article 46 of the Act of 5 December 2008 does not contain guidelines concerning the content of legal norms to be included in the ordinance issued on its basis. Thus, in the opinion of the Voivodeship Administrative Court in Opole, the above infringed Article 92 of the Polish Constitution, and additionally was inconsistent with Article 22 of the Polish Constitution, which unequivocally states that restriction of the freedom of economic activity is permitted only by statute and only for the sake of important public interest. It should be noted that the Voivodeship Administrative Court in

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Opole also pointed to the failure of the sanitary authorities to allow the party to take a position in the case and collect evidence (basing the determination of the facts solely on the Police note), as well as the failure to consider whether there were grounds for withdrawing from imposing a financial penalty.

Judgment in the case II SA/Op 219/20 of the Voivodeship Administrative Court in Opole is extremely important from the point of view of many entrepreneurs affected by restrictions on business activity during the pandemic. It should be noted that the Council of Ministers did not abandon the form of a regulation issued on the basis of Articles 46a and 46b of the Act of 5 December 2008 on preventing and combating infections and infectious diseases in humans,[61] continuing to introduce (especially in 2020–2021) cyclical restrictions regarding, e.g., functioning of swimming pools, fitness clubs, hotels, gastronomy or shopping malls. In view of the above, the legal arguments presented by the Voivodeship Administrative Court in Opole still applied to the ongoing restrictions. Nevertheless, the non-final nature of the judgment meant that the case of the hairdresser from Prudnik was continued.

3. Completion of the case of the hairdresser in Prudnik – judgment of the Supreme Administrative Court (II GSK 292/21)

On 15 February 2021, the Supreme Administrative Court received a cassation complaint of Opole State Voivodeship Sanitary Inspector against the judgment in case II SA/Op 219/20 of the Voivodeship Administrative Court in Opole of 27 October 2020. Regarding H.L.'s complaint against the Opole State Voivodeship Sanitary Inspector decision of 23 June 2020, the appeal body appealed against the judgment in its entirety pursuant to Article 174 (1) and (2) of the Law on proceedings before administrative courts,[62] alleging: 1) violation of substantive law, i.e. Article 145 § 1 (1) (a) of the Law on proceedings before administrative courts by a misinterpretation of Article 46 (4) and Article 46b of the Act of 5 December 2008 on preventing and combating infections and infectious diseases in humans and § 9 (1) (1) of the Regulation of the Council of Ministers of 19 April 2020 and Articles 22 and 92 of the Polish Constitution, in which he stated that the limitation of economic activity contained in the Regulation of the Council of Ministers of 19 April 2020 on establishing certain restrictions, orders and prohibitions due to the occurrence of an epidemic state goes beyond the statutory authorization and thus constitutes a basic restriction of business activity; 2) violation of substantive

[61] See Regulation of the Council of Ministers of 21 December 2020 on establishing certain restrictions, orders and prohibitions due to the occurrence of an epidemic state (Journal of Laws 2020, item 2316).

[62] Act of 30 August 2002 – Law on proceedings before administrative courts (Journal of Laws 2002, no. 153, item 1270, as amended).

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law, i.e. Article 145 § 3 of the Law on proceedings before administrative courts and Article 105 § 1 APC by stating that the decision was issued in violation of the law and discontinuation of administrative proceedings, in view of the application of the provisions of the Regulation of the Council of Ministers of 19 April 2020; 3) violation of the provisions of the procedure that may have a significant impact on the outcome of the case, i.e. Article 145 § 1 (1) (c) of the Law on proceedings before administrative courts in conjunction with Article 10 APC, Article 7, Article 77 § 1 and Article 81 APC by erroneously assuming that it was necessary to ensure the participation of the party in the proceedings and assuming that the Police note is not sufficient evidence in the case, the authority relied only on the police note and that the party did not participate in the proceedings, while the justification of the decision of the second instance authority and the documents attached to it clearly show that the party's attorney actively participated in the administrative proceedings; 4) violation of the provisions of the procedure that may have a significant impact on the outcome of the case, i.e. Article 145 § 1 (1) (c) of the Law on proceedings before administrative courts in conjunction with Article 189d (including point 7 of this provision) APC by erroneously assuming that when determining the amount of the penalty, the public administration authorities omitted the obligation to measure it. Considering the above, pursuant to Article 176 § 1 (3) in conjunction with Articles 185 and 188 of the Law on proceedings before administrative courts it was requested to: a) set aside the appealed judgment in its entirety and remit the case for re-examination by the Voivodeship Administrative Court in Opole; b) order the administration body to reimburse the costs of the cassation proceedings in accordance with the prescribed norms. In response to the cassation appeal, acting on behalf of the legal successors (as a result of H.L.'s death, his legal successors were included in the proceedings), the attorney applied for the cassation appeal to be dismissed and the costs of the proceedings, including the costs of legal representation in accordance with the prescribed standards.

The Supreme Administrative Court, after examining the case at a closed session on 28 June 2022, dismissed the cassation appeal as unfounded and awarded Opole State Voivodeship Sanitary Inspector the amount of PLN 900 as reimbursement of the costs of the cassation proceedings jointly and severally for K.L. and Z.L.

In the justification of the judgment in case II GSK 292/21, the Supreme Administrative Court argued that the allegations of the cassation appeal, which – in accordance with the principle of availability – determine the limits of the review of the legality of the appealed judgment, do not justify the claim that the result of this review should be expressed in a critical assessment of the judgment of the Voivodeship Administrative Court in Opole (II SA/Op 219/20). This means that, according to the Supreme Administrative Court, the cassation appeal does not undermine the position of the court of first instance, which shows that the decision controlled by the Voivodeship Administrative Court in Opole and the decision of

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the first instance body preceding it are unlawful. Emphasizing that the essence of the disputed issue is related to the need to answer the question about the possibility and admissibility of interfering with the constitutional freedom to conduct business activity, the Supreme Administrative Court pointed out that the state of epidemic is not an emergency within the meaning of the Polish Constitution, which implies the conclusion that the controlled decision and first instance court decisions were issued without a legal basis.

CONCLUSIONS

As a result of the prolonged lockdown, a significant number of entrepreneurs struggled with an increasingly difficult financial situation. Their situation was not improved by unambiguous messages regarding, even partially, the deadline for lifting – still changing – restrictions and definitely insufficient state aid for the affected industries. As a consequence, many of them due to the lack of prospects for a better tomorrow, left to itself, they were forced to make dramatic choices related to reducing employment or even closing its businesses. An increasing number of entrepreneurs also decided – contrary to the applicable regulations – to open their service premises against the applicable law.

As could be predicted, after dismissing the cassation appeal by the Supreme Administrative Court, judgment in case II SA/Op 219/20 of the Voivodeship Administrative Court in Opole became legally valid. At the same time, it needs to be emphasized that the judgment of the Voivodeship Administrative Court in Opole is part of a broader jurisprudence trend: only the Voivodeship Administrative Court in Warsaw on 12 January 2021, it annulled six sanctions decisions imposed in connection with breaking the restrictions, and a day later, subsequent judges annulled nine decisions, and on 14 January 2021, another six decisions (21 decisions of the Sanitary-Epidemiological Station were annulled within three days[63]). It should be noted that the judgment in case II SA/Op 219/20 can hypothetically open the way for Polish entrepreneurs to seek compensation claims, e.g. on the basis of general provisions resulting from Article 417 ff. of the Civil Code.[64]

Regardless of the above, the justification of the judgment of the Voivodeship Administrative Court in Opole of 27 October 2020 issued in the case II SA/Op 219/20 was a sufficient argument for some Polish entrepreneurs to act in violation of the restrictions or restrictions introduced by the Council of Ministers, restricting or prohibiting economic activity, introduced by the Council of Ministers. Many

[63] M. Manista, *Wyrok WSA w Opolu, sygn. akt II SA/Op 219/20*, 20.1.2021, http://lange.pl/news/index.php/2021/01/20/wyrok-wsa-w-opolu-sygn-akt-ii-sa-op-219-20 (access: 10.2.2021).

[64] Act of 23 April 1964 – Civil Code (Journal of Laws 1964, no. 16, item 93, as amended).

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of them, seeing the unconstitutionality of bans and limitations on fundamental freedoms and rights implemented by legal acts of a lower rank than statute, in view of the failure to implement the provisions specified in Article 232 of the Polish Constitution in the state of a natural disaster, saw sufficient justification for oppose the law, breaking it or trying to circumvent it, justifying his actions with civic disobedience. There are many examples of activities motivated in one way or another in the Polish public space.[65]

Analyzing the above-described ways of understanding and defining civil disobedience, it seems that the attitudes related to breaking or circumventing the legal provisions introduced by ordinances – in the described actual state and legal – can be classified as a manifestation of civil disobedience. It should be noted, however, that the presented case can be classified as an example of an indirect civil disobedience. It appears that the hairdresser in Prudnik consciously transgressed legal statutes, thereby exposing himself to potential legal ramifications. Such a breach of the law can be discerned as not being an ultimate objective in and of itself. Instead, it can be inferred that the hairdresser in Prudnik sought to voice his dissent against regulatory measures impeding his entrepreneurial pursuits and subsequently hindering his ability to sustain a livelihood. On the other hand, it is also worth asking whether if the restrictions discussed in this article were introduced in accordance with the applicable provisions of the Polish Constitution (e.g. by introducing the state of natural disaster specified in Article 232 of the Polish Constitution, and then introducing the restrictions and prohibitions referred to in Article 21 (1) of the Act on a state of natural disaster), could we consider cases of breaking or circumventing them, e.g. by opening fitness clubs, hotels, restaurants, as a manifestation of civil disobedience? This scenario engenders a conflict wherein the preservation of economic freedom is juxtaposed with the societal interest aimed at safeguarding the paramount good, namely human health and life. Attaining a conclusive response to such an inquiry necessitates a comprehensive deliberation.

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[65] Cf. Libertea.pl, *Akcja #otwieraMY. Obywatelskie nieposłuszeństwo wobec władzy*, 20.12.2020, http://libertea.pl/2020/12/20/akcja-otwieramy-obywatelskie-nieposluszenstwo-wobec-wladzy (access: 10.02.2021); Najwyższy Czas, *Polacy mają dość i zapowiadają akcję #otwieraMY. Obywatelskie nieposłuszeństwo wobec władzy?*, 20.12.2020, https://nczas.com/2020/12/20/polacy-maja-dosc-i-zapowiadaja-akcje-otwieramy-obywatelskie-nieposluszenstwo-wobec-wladzy (access: 10.2.2021); Ł. Warzecha, *Już czas na obywatelskie nieposłuszeństwo?*, 8.1.2021, https://wiadomosci.onet.pl/opinie/koronawirus-w-polsce-obywatelskie-nieposluszenstwo-komentarz-lukasza-warzechy/0yt4lt5 (access: 10.12.2023); M. Wierzbicki, *Bunt w Legionowie. Restauracje będą otwarte*, 13.1.2021, https://warszawawpigulce.pl/bunt-w-legionowie-restauracje-beda-otwarte (access: 10.12.2023); Wprost.pl, *Mentzen wzywa do obywatelskiego nieposłuszeństwa i masowego otwierania firm. „Prosty wybór"*, 14.1.2021, https://biznes.wprost.pl/koronawirus/10408282/mentzen-wzywa-do-obywatelskiego-nieposluszenstwa-i-masowego-otwierania-firm-prosty-wybor.html (access: 10.12.2023); F. Szymczak, *Nowe obostrzenia – co to oznacza dla przedsiębiorców?*, 25.3.2021, https://natemat.pl/blogi/filip-szymczak/345451,nowe-obostrzenia-co-to-oznacza-dla-przedsiebiorcow (access: 10.2.2021).

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Judgment of the Voivodeship Administrative Court in Opole of 27 October 2020, II SA/Op 219/20, LEX no. 3093916.

ABSTRAKT

Globalna pandemia koronawirusa SARS-CoV-2 przyniosła szereg ograniczeń i zakazów, których przejawem w Polsce było m.in. cykliczne zamykanie i otwieranie wybranych gałęzi gospodarki, co dla zdecydowanej większości przedsiębiorców oznaczało – w najlepszym wypadku – niepewną przyszłość. Brak jasnych i konsekwentnych działań przy wprowadzaniu przez polską Radę Ministrów

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ograniczeń i zakazów, a także niezapewnienie realnej pomocy finansowej skutkowało narastającym sprzeciwem wielu przedsiębiorców, co z kolei przekładało się na łamanie bądź obchodzenie obowiązujących przepisów, które dotyczyły ograniczeń i zakazów w sferze wolności gospodarczej. Czy takie działanie można uznać za przejaw obywatelskiego nieposłuszeństwa? Próba uzyskania przez autorkę odpowiedzi na to pytanie jest efektem wyroku Wojewódzkiego Sądu Administracyjnego w Opolu z dnia 27 października 2020 r. (SA/Op 219/20), który dla wielu polskich przedsiębiorców stanowił usprawiedliwienie do wyrażenia swojego obywatelskiego sprzeciwu oraz otwierania działalności gospodarczej wbrew obowiązującym restrykcjom i ograniczeniom, a także wyroku Naczelnego Sądu Administracyjnego z dnia 26 sierpnia 2022 r. (II GSK 292/21).

Słowa kluczowe: pandemia koronawirusa SARS-CoV-2; obywatelski sprzeciw; wolność gospodarcza; przedsiębiorcy

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