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Original article

Restitution of Polish cultural property – de lege lata remarks and basis for system evaluation Contribution to the discussion

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ABSTRACT

The article aims to present the legal and factual state of restitution of Polish cultural property and point out selected, interesting doubts, problems, and disputable issues related to applying the current law. The analysis is based on legal regulations, the latest literature, and statistics on the effectiveness of restitution of cultural property in Poland in 2011-2017.

The thesis was put forward that a coherent system of restitution of cultural property, before the adoption and against the background of application of the Act on Restitution of National Cultural Assets, has not yet been developed in Poland. The regulation can be treated as an essential way to stimulate change and increase the importance of the restitution of cultural assets.

Restitution of Polish cultural property in the years 2011-2017 is a complex process, encountering various problems. The adoption of the Act on the Restitution of National Cultural Assets, despite numerous critical voices, may constitute a critical developmental impulse due to numerous difficulties in the effective enforcement of the restitution idea in Poland recently.

KEYWORDS

protection of cultural heritage, cultural property, law, monument

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Introduction

In practice, the issue of restitution of cultural property is becoming increasingly important. It is more and more vital in scientific discourse (for example, Poland after 1989). That is evidenced notably by the evolution of national and EU legislation on the protection of cultural property or, more broadly, national heritage protection. The very concept of "restitution" derives etymologically from the Latin word *restituere*, which means "to restore". From the legal and historical point of view, the term is associated with a process and, at the same time, with a legal rule, which refers to the search for and return of illegally displaced goods, most

often cultural assets seized during ongoing conflicts and warfare [1, p. 37]. Theft of cultural property may occur in the effect of one state's actions against another or in consequence of illegal actions of individuals, such as foreigners. Restitution means a compilation of efforts undertaken by the competent state authorities to confirm the right to return the displaced monuments and bring the previously lost cultural assets back to the country [2, p. 34].

The restitution of Polish cultural property has been addressed in the current literature, but under conditions before the current legislative regulation on the restitution of national cultural property came in force. There have been raised issues such as the importance of restitution in terms of the philosophy of law alongside an indication of specific models of this process in the international environment [1, passim], constitutional justification for the process of restitution of cultural property [3], the relationship between the public interest resulting from the process of restitution of movable monuments and constitutional protection of property rights [4; 5, p. 77-140; 6], and the problem of restitution as a disputed matter in relations between Poland and Germany and the Russian Federation [7; 8, passim; 9]. The role and influence of international law on Polish solutions in the restitution of cultural assets are also comprehensively presented [10, passim; 11; 12]. The issues mentioned above will be omitted or only mentioned in the deliberations presented in the article.

The author tries to look at the selected issue from the perspective of the latest legal amendments in Poland, which have been in effect since May 2017 concerning the adoption of the Act of 25 May 2017 on the Restitution of National Cultural Property (hereinafter: u.r.n.d.k.) [13]. The presentation of the current legal and factual state and the reference to the main problems, challenges, and prospects for the future together with an attempt to assess them are significant in the paper. The considerations aim to characterize the legal and factual state of restitution of Polish cultural property and point out selected interesting doubts, problems, and disputable issues related to applying the law in force. It is worth emphasizing that the chosen aspects are part of a more complicated matter of national heritage protection in Poland, including the protection of cultural property. It has been assumed that a coherent system of restitution of cultural property has not been developed in Poland, before the adoption and against the background of applying the Act on Restitution of National Cultural Assets. However, the legislative regulation was a vital impulse to stimulate changes and a way to raise the importance of the issue of restitution of cultural property.

1. Restitution of Polish cultural property in terms of national law. Outline of the system

As the law currently stands, the u.r.n.d.k. remains the most important act in the system of Polish legislation related to the restitution of cultural property. The act defines competent authorities within the restitution framework of cultural assets, which is understood as a process conducted by the Polish state on its territory and abroad in connection to proceedings concerning cultural assets removed in violation of the law from the territory of the Republic of Poland. The content of the regulation also specifies the bodies competent to cooperate with foreign authorities and foreigners acting in the case of restitution of foreign cultural property located in Poland. What is more, the provisions of the u.r.n.d.k. regulate the proceedings taking account of the return of cultural goods removed in violation of the provisions of the applicable law on the territory of a European Union country other than

Poland (Article 1 of the u.r.n.d.k.). It should be noted the complementarity and consistency of the u.r.n.d.k. regulations with the provisions of the Act of 23 July 2003 on the protection and the care of monuments (hereinafter: u.o.z.i.o.n.z.) [14].

In Article 2 (2) of the u.r.n.d.k., the legislator provided a legal definition of the restitution of cultural property carried out by the Polish state. The term refers to "action undertaken by the state authorities or other public finance sector units focused on the recovery, including restitution, of a cultural asset lost by a Polish citizen, a legal person, or an organizational unit having its seat on the territory of the Republic of Poland, or an entity established under the law of a foreign country carrying out activities in the field of protection or dissemination of the Polish national heritage, or a cultural object which is located on the territory of the Republic of Poland at the time of loss or a later date, as well as the return of which Poland is entitled to claim under international law, the law of the European Union, or the national law of foreign countries, or a cultural object which has been removed from the territory of the Republic of Poland in violation of the law" [13]. It can be interpreted that the legal definition of restitution of cultural property is broad, while its most important point is to indicate the need to recover goods exported from the territory of the Republic of Poland illegally.

Article 3 of the u.r.n.d.k. indicates that the minister in charge of culture and national heritage is the competent authority to conduct a complex restitution process in Poland. He/She performs tasks domestically and abroad, thus acting as a coordinator of administrative cooperation within restitution of cultural property in the EU Internal Market Information System (IMI)[1]. Article 5 of the u.r.n.d.k. specifies the scope of cooperation between the minister and other public administration bodies. Further provisions unify the procedures for recovering cultural assets unlawfully taken from the Republic of Poland territory. First of all, the procedures before the Member State court in which the cultural object has been disclosed along with the permit for the state authority that claims the return of the object to the proceedings have been clarified. Besides, the provisions of the u.r.n.d.k. also formulate criminal provisions that penalize undermining the proceedings for the return of a foreign national cultural asset through providing the authority with false information or by concealing information about the place where the good is stored to hide it (Article 52 of the u.r.n.d.k.). Nevertheless, the legislator excluded the perpetrator's responsibility, who voluntarily returned the cultural object to the competent authorities, or provided information about the place of its storage or information about the person holding the object, if it contributed to finding the object (Article 53 of the u.r.n.d.k.). The literature estimates that the adopted legislation has led to expanding the catalog of legal and factual instruments, both judicial and extra-judicial, regarding the restitution of national cultural property in practical activities of the competent national authorities [15, p. 172].

[1] The IMI system is a web-based application with centralized mechanisms to facilitate the exchange of information and cooperation across borders between Member States' authorities to improve the functioning of the areas of the EU internal market defined in the system. See: Regulation (EU) No 1024/2012 of the European Parliament and of the Council of the European Union of 25 October 2012 on administrative cooperation through the Internal Market Information System (OJ L 316/1 of 14 November 2012), *Introduction*, point 2.

2. Restitution problems and prospects for changes in the legal and factual situation

The application of the u.r.n.d.k. encounters certain difficulties and challenges, and often also criticism. The u.r.n.d.k. regulations contributed to the introduction of far-reaching changes also on the grounds of the u.o.z.i.o.n.z., including in the field of defining legal concepts of a monument, a cultural asset, or a national cultural property and the relations between these concepts. According to K. Zalasińska, due to the introduced amendments in legal circulation, there are several partially overlapping definitions and separate regimes of the legal protection of monuments and national property. The author expressed an opinion that in the long run, the situation risks undermining the practical meaning of the regulation concerning the protection of monuments "by breaking the existing system and sanctioning the «new order», forcing changes in the systemic interpretation of the existing regulations" [16, p. 162]. At the same time, she criticizes entrusting additional duties to the authorities for the protection of monuments concerning cultural assets that are not monuments, i.e., assets that have not been entered in the relevant book of the register of monuments [16, p. 162].

The entry of the u.r.n.d.k. into force was to contribute to the systematization of the state's activities within restitution of national cultural property and strengthen the importance of protection and care of monuments, regulated by the provisions of the u.o.z.i.o.n.z. The literature stresses that one of the legislator's intentions was to increase the effectiveness of actions in recovering cultural assets lost by Poland as the result of the destruction caused by World War II. The adaptation of national solutions to the EU legislation was to contribute to the increased importance of cooperation at the governmental level and the functioning of the judiciary. One of the more effective ways, both in the promotion and in the struggle for the restoration of Polish collections of cultural property, was to make the Ministry of Culture and National Heritage maintain a central data set in the form of a database of war losses to facilitate the preparation of restitution applications [17, p. 166-7]. However, it is difficult to fully share the presented view while bearing in mind that the database of war losses does not have the character of a public register. Therefore, it does not constitute an official inventory of cultural property lost by Poland in consequence of events accompanying World War II. As R. Sasin noted, the information contained in the analyzed database is of informative and research character, while some of the data is of low quality, with no photographs of some of the lost cultural assets and incoherent structure of categorization of individual monuments [18, p. 97-8].

It should also be remembered that one of the legislator's intentions in the creation of the u.r.n.d.k. was the need to implement EU solutions related to the protection of cultural property against illegal export into the national legal order, including the Regulation of the EU Council of 18 December 2008 [19], as well as the Directive of the European Parliament and the EU Council of 15 May 2014 [20]. The literature points to the Polish legislator's efforts to establish a law that would more effectively fulfill the EU standards in the field of protection of the common European cultural heritage [21, p. 298]. Before the entry of the u.r.n.d.k. provisions into effect, the issue of restitution of monuments illegally exported from an EU country was regulated in Chapter VI of the u.o.z.i.o.n.z, namely in Articles 62-70. Chapter VI was deleted in the current legal order. Instead, it was decided that the problem would be comprehensively regulated in a separate act, i.e., the u.r.n.d.k. K. Zalasińska is convinced that the implementation of EU regulations did not require the adoption of a separate act,

but only the amendment of the u.o.z.i.o.n.z., and supplementing Chapter 6 with new legal concepts and procedures for counteracting and combating illegal export of cultural property from EU countries [16, p. 162].

However, referring to the presented view, it should be stated that the mentioned regulations of EU law provide far-reaching freedom for the Member States to apply legal instruments aimed at adequate restitution of cultural property and preventing illegal export of monuments from the EU area. Following the entry into force of the EU regulations, the national legal system has implemented the EU principle of cooperation of administrative bodies to increase the protection of national heritage in the Member States territory. The principle was undoubtedly a positive developmental impulse for strengthening the importance of the restitution process in Poland. An essential legal measure for the implementation of the principle of cooperation has become the legally sanctioned possibility that the Minister of Culture and National Heritage would cooperate with both the heads of other ministries in the country (particularly important it was with the Team for the Restitution of Cultural Property, operating within the Ministry of Foreign Affairs) and with governmental bodies from other EU countries [15, p. 172].

An additional justification for the need to introduce sweeping changes in connection with the enactment of the u.r.n.d.k. might be the low effectiveness of the state's activities in the sphere of the restitution of Polish cultural property in the years preceding the entry into force of this legal act. The report of the Supreme Chamber of Control on the recovery of lost works of art in Poland shows that in the years 2011-2016, the restitution process was ineffective in many areas. The criticism was based on the following main arguments [22, p. 9-11]:

- the lack of development of a systemic strategy of public administration activities that would be based on specific action plans, as well as the dispersion of tasks among various entities without a clear division of their competences,
- the lack of rules of cooperation and sufficient coordination of restitution activities on the part of the Ministry of Culture and National Heritage with the Ministry of Foreign Affairs, which resulted in duplication of some activities undertaken by the Minister of Culture and National Heritage with the tasks performed by the Plenipotentiary of the Ministry of Foreign Affairs for restitution of cultural property,
- no introduced formalized regulations relating to the mode and manner of conducting restitution proceedings in the Ministry of Culture and National Heritage, the Ministry of Foreign Affairs, and the National Institute of Museums and Collections Protection (Polish abbrev. NIMOZ),
- insufficient flow of information between the bodies as above mentioned about activities carried out within the framework the restitution process,
- ineffectiveness of the implementation of some provisions of the decision of 11 October 2013, which sanctioned the principles of exchange of information on cultural assets lost during World War II between the head of the Ministry of Culture and National Heritage and the Association of Polish Antiquaries,
- the lack of relevant staff, premises, and technical resources to conduct the restitution by the Ministry of Culture and National Heritage, which could adversely affect the number of recovered cultural assets,
- the lack of adoption of useful instruments for full cataloging of cultural assets lost by Poland during the Second World War.

In the context of considerations on the legitimacy of the changes introduced by the adoption of the u.r.n.d.k. provisions, the reference should also be made to statistics which present the number of domestic cases (conducted in Poland), and foreign cases (pending before courts abroad) carried out in the activities of the Minister of Culture and National Heritage due to the restitution of Polish cultural property in the years 2011-2017. The statistics include cultural assets lost due to warfare. Figure 1 displays the collected relevant data.

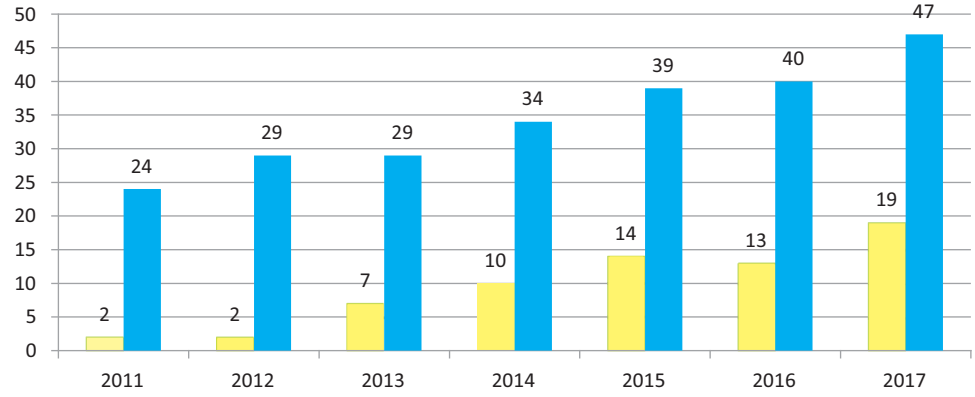

Fig. 1. The number of domestic and foreign cases conducted by the Minister of Culture and National Heritage in relation to the restitution of Polish cultural property in the years 2011-2017
Source: Own study based on: [23].

When analyzing the data collected in Figure 1, the number of restitution cases conducted by the Minister of Culture and National Heritage systematically increased in the years 2011-2017. The trend concerned both the restitution process conducted in Poland (more than a tenfold increase in the number of cases) and before courts in countries abroad (less than a twofold increase in the number of cases). In each of the analyzed years, restitution realized abroad included significantly more cases than restitution conducted concerning Poland's cultural property. While bearing in mind the data presented, it should be remembered that regarding a part of restituted cultural goods, cases were continued for more than 12 months. It is worth noting that in the analyzed years, a total of 67 cultural goods revealed in war losses incurred by Poland were found.

The minimum market value of recovered cultural assets amounted to about PLN 7 370 000 with the cost of restitution reaching about PLN 1 166 000. The costs of the conducted restitution process constituted less than 16% of the recovered historical value of the objects. The value of re-vindicated objects in the still ongoing restitution process totaled PLN 68 211 500 [23].

The data presented allow for the conclusion that the effects of the head of the Ministry of Culture and National Heritage's activities in the process of restitution of lost cultural assets took into consideration a relatively small part of the value of all lost works of art. The statistics supported the need to increase the effectiveness of the use of legal instruments for the restitution of national cultural property lost by Poland in connection with the events of World War II. That could have been one of the prerequisites for the development of the provisions of the u.r.n.d.k.

In the comments made against the background of the changes in the system of protection of cultural property with the emphasis on the restitution of Polish cultural assets, one more interesting perspective should be considered. It concerns the recently discussed re-privatization of real estate or movable monuments that the communist authorities after 1944 took over from natural persons without indicating the proper legal basis [24]. The importance of the discussion increased after the Ministry of Justice presented to the Council of Ministers on 20 October 2017 the partially controversial points of the bill on compensation for certain wrongs caused to individuals due to taking over real estate or movable monuments by the communist authorities after 1944. Chapter V of the bill formulates the premises and rules for returning to individuals of cultural assets nationalized by the authorities of communist Poland after 1944. Article 42 of the draft of the commented bill states that the entitled person and at his or her request may be restored ownership of movable property, which is a cultural asset or monument under separate national laws adopted by the State Treasury or the municipality of the capital city of Warsaw. Article 43 of the draft Act proposes that the provisions of the Act of 14 June 1960 – the Code of Administrative Proceedings should be applied in cases of restoring ownership of movable items [25].

A potential change would mean that the return of assets would be determined by administrative decisions issued by voivodes competent for the location of the assets (Article 43 (4) of the bill under discussion). The Legislative Council acting under the Prime Minister's authority criticized the proposed administrative procedure for the restitution of movables that are cultural assets lost by private persons [26]. The draft did not provide an argument in favor of such a proposal. The additional manifestation of inconsistency was the fact that the author referred to the construction of Article 222 of the Civil Code in many other parts of the draft. It provides that the owner of an item may demand the person in charge of that item a claim for its release on the grounds of a civil law procedure rather than administrative procedure [27].

It is worth pointing out that in practice, the prerequisites for restoring the historical ownership of a movable item contain notable exceptions which should be interpreted in two ways, depending on whether the legal interests of the parties demanding the release of the lost items or the interests of the state in the broader understood protection of the national heritage of the Republic of Poland are considered. Under Article 42 (3) of the draft, ownership of an asset shall not be restored if it was a part of or belonging to real estate taken over by the State Treasury or the commune of the capital city of Warsaw, was not in the public collection according to Article 2 (6) of the u.r.n.d.k., was entered on the World Heritage List, or fulfilled the conditions resulting from Article 50 (4) of the u.o.z.i.o.n.z.[2]. It is worth emphasizing that a possible application for restoring the ownership of an asset should be submitted within a maximum period of 12 months from the date of entry into force of the proposed act. The deadline for applying is not subject to reinstatement (Article 43 (3) of the bill). Moreover, the State Treasury could redeem the object in question by granting the current owner a cash benefit of 20% of the value of the monument (Article 47 and Article 48 (2) of the draft).

[2] In this case, these are the premises related to the occurrence of a threat in the form of the possibility of destruction, theft, damage, loss, or illegal export abroad of a movable monument entered in the register of monuments or on the World Heritage List. In such circumstances, a movable monument may be taken over by way of an administrative decision by a voivodeship conservator of monuments or – in the case of monuments entered on the World Heritage List – by the minister in charge of culture and national heritage – by the State Treasury for compensation of the market value of the taken over cultural asset.

All the conditions as mentioned above make it difficult or even impossible in practice for individuals to recover the historic items lost. In one of the Main Board of the Association of Notaries of the Republic of Poland's resolutions, an opinion was expressed that this would not lead to re-privatization or facilitate the return of cultural assets to their pre-war owners, but would result in the nationalization of cultural property. In the subject literature, the bill excludes the possibility of restitution of historic real estate, thus granting the State Treasury a privileged legal situation and the right to take over the ownership of those real estates about which a transparent legal situation would not be clarified within 12 months [29, p. 98]. According to M. Domińczak, if the bill enters into force, it "sanctions and makes the robbery of movables by the State de facto binding" [30]. Although in the current conditions of regulating the critical and socially problematic issue of restitution of Polish cultural assets, both by the state and individuals, "a fairer solution is unfortunately no longer possible" [30]. Moreover, it is difficult to disagree with A. Drozd, who believes that "the function of the restitution of cultural property is, as a rule, not to protect the property rights of the owner of a cultural asset" [15, p. 171]. The essence of the realization of the legal model of restitution is the primacy of public and social interest, skillfully balanced on the grounds of constitutional and civil law protection of property rights.

It should be assessed that the possible entry into force of the Act will not only contribute to maintaining the current status quo in the protection of cultural property but will additionally provide the state with more reliable means of protection against the necessity to consider an exponentially growing number of applications of natural persons for the return of movable monuments seized during the functioning of the People's Republic of Poland. In the assessment of the issue, it should be stressed that it is difficult to reconcile the public interest with the individual interest in the context of writing about the restitution of cultural property in Poland raised in the latest subject literature [6, p. 187-9]. The literature shows a peculiar dispute between communitarians and liberals when defining the relations and connections between the citizens' use of their property rights and the need for the broad legal protection of cultural heritage, including restitution procedures [5, p. 77-140]. It appears ambiguous and questionable to reconcile both parties to the dispute in the coming years of strengthening the foundations of the restitution system of Polish cultural assets. However, the brief experience of the legislator in applying the provisions of the u.r.n.d.k. seems to indicate the need to develop legal means to provide the state with additional possibilities of adequate protection of national heritage through the implementation of restitution procedures. Moreover, the present ruling camp shows a far-reaching understanding of the communitarian ideal regarding, in particular, the organization of the system of restitution of cultural property and the protection of the Republic of Poland's national heritage in general.

Summary and conclusions

The arguments put forward allow for the following conclusions:

1. Restitution of cultural property is a complex process carried out with the participation of various public authorities and aimed at realizing an important public and social interest related to the protection of the national heritage of the country.
2. In the years 2011-2018, it was not possible to develop a systemic approach to the implementation of the process of restitution of cultural assets in Poland, and numerous practical

difficulties made it impossible to achieve satisfactory results in respect of cultural assets recovered by Polish authorities.

3. The Act on the Restitution of National Cultural Property is in force too shortly to be able to draw reliable assessments of the future evolution of the restitution process in Poland. The key challenge is to improve cooperation and coordination of activities between authorities involved in the restitution of cultural goods, both domestically and abroad. A separate challenge is to reconcile the public and private interests related to the planned statutory compensation of citizens for damage resulting from the nationalization of private cultural assets during the People's Republic of Poland.

The presented arguments seem to confirm the accepted thesis that a coherent system of restitution of cultural property has not been developed in Poland, both before enacting the Act on the Restitution of National Cultural Property and against its background of the application. However, the statutory regulation was a vital impulse to stimulate change and a way to raise the importance of the issue of restitution of cultural assets. In the literature, one can find a similar opinion that the u.r.n.d.k. did not contribute to the development of a uniform strategy, let alone a system, as far as the restitution of cultural goods brought out of the Republic of Poland's territory in violation of legal regulations is concerned, especially in the aftermath of the events of World War II. One can share the view that the legal status in the field of the restitution of national property introduced in May 2017 is far from the functioning of "regulations as a certain system of protection" [16, p. 163]. Despite this, the new legislative regulation has brought some impetus to the reform of the state's activities connected with the implementation of the restitution process. Moreover, it has contributed to raising the importance of the topic and increasing interest in it in the scientific community and society itself.

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Conflict of interests

The author declared no conflict of interests.

Author contributions

The author contributed to the interpretation of results and writing of the paper. The author read and approved the final manuscript.

Ethical statement

The research complies with all national and international ethical requirements.

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Restytucja polskich dóbr kultury w Polsce – uwagi de lege lata i podstawy oceny systemu Przyczynek do dyskusji

STRESZCZENIE

Celem artykułu jest przestawienie stanu prawno-faktycznego restytucji polskich dóbr kultury oraz wskazanie na wybrane, interesujące wątpliwości, problemy i kwestie sporne związane ze stosowaniem obowiązującego prawa. Analizę oparto na przepisach prawnych, najnowszym piśmiennictwie i statystykach skuteczności restytucji dóbr kultury w Polsce w latach 2011-2017.

Postawiono tezę, że w Polsce nie udało się wypracować spójnego systemu restytucji dóbr kultury, zarówno przed uchwaleniem, jak i na tle stosowania ustawy o restytucji narodowych dóbr kultury. Regulację można traktować, jako istotny sposób pobudzenia zmian oraz zwiększenia rangi problematyki restytucji dóbr kultury.

Restytucja polskich dóbr kultury w latach 2011-2017 to proces złożony, napotykający na szereg problemów. Przyjęcie ustawy o restytucji narodowych dóbr kultury, mimo licznych głosów krytycznych, może stanowić ważny impuls rozwojowy ze względu na liczne trudności w skutecznym egzekwowaniu idei restytucyjnej w Polsce w ostatnim okresie.

SŁOWA KLUCZOWE ochrona dziedzictwa kulturowego, dobro kultury, prawo, zabytek

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