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## THE STATUS OF THE PROVINCIAL INSPECTOR OF MONUMENTS IN CIVIL PROCEEDINGS IN THE LIGHT OF ACT ON THE PRESERVATION AND MAINTENANCE OF MONUMENTS

### INTRODUCTION

Issues regarding the legal and procedural protection of monuments are among a broad range of measures designed to protect the essential values characterising cultural heritage, enshrined in the Polish Constitution.<sup>2</sup> In the current state of the legislation<sup>3</sup> these measures lie within the discretion of both the organs of public authority whose role is to preserve monuments, in particular those concerned with conservation work (art. 4 PMM), and the owners and possessors of monuments who are obligated to take care of them (art. 5 PMM).<sup>4</sup>

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<sup>2</sup> The duty to preserve monuments and the cultural heritage stems directly from the provisions of the Constitution of the Republic of Poland of 2 April 1997, Journal of Laws No. 78, item 483 as amended [hereafter referred to as PC]. Already at the beginning, the preamble alludes to the obligation to bequeath to future generations anything of value that is part of the over 1000-year-long heritage. Also, among its provisions one finds relatively numerous references not only to the protection of the common good of all citizens (art. 1 and 82 PC) but also to the preservation of the national heritage, products of culture, and the national, cultural heritage (art. 5, art. 6 paras. 1 and 2, art. 73 PC).

<sup>3</sup> See the Act of 23 July 2003 on the preservation and maintenance of monuments, Journal of Laws of 2014, item 1446 as amended [hereafter referred to as PMM].

<sup>4</sup> The subjective scope of this possession concerns the current administrator of monuments see A. GINTER and A. MICHALAK, *Ustawa o ochronie zabytków i opiece nad zabytkami. Komentarz* (Warsaw:

The key figure of public administration who realises tasks associated with the protection of monuments is the provincial inspector of monuments [Pol. *wojewódzki konserwator zabytków*]. The inspectors are equipped by the national legislator with a number of legal instruments with a view to protecting monuments, such as procedural instruments to be put into use in judicial proceedings concerning cases falling within the realm of criminal, administrative and civil law. Under the provision of art. 95 PMM, when the preservation of cultural heritage is at stake, both the competent minister responsible for culture and the preservation of national heritage and a provincial inspector of monuments can assume the role of a party in a case heard under administrative and civil proceedings, or a public prosecutor in proceedings concerning an offence.

On the face of it, such an interpretation of the status of the regional inspector of monuments in court proceedings seems to be “a weapon for combating crimes against monuments, and an instrument used in the legal protection of monuments under administrative and civil law.” An examination of the practical application of the said regulation in respect of civil proceedings, however, appears to contradict this view. Hence the purpose of our considerations will to offer an interpretation of the status of the provincial inspector of monuments in civil proceedings, who will be regarded as a party to a civil case concerning the protection of monuments under art. 95 PMM. Inasmuch as the legislator explicitly defines the role and criteria of the official’s participation in cases concerning the preservation of monuments heard in civil proceedings, this is done in a casual and imprecise manner, which calls for necessary remarks to be made in this regard.

## 1. THE LEGAL STATUS OF THE PROVINCIAL INSPECTOR OF MONUMENTS

Determined by the constitutional obligation to safeguard the common good, the organisation of organs of public administration, i.e. the bodies instituted to protect cultural heritage in general, is largely conditioned by the structure of both the cen-

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Wolters Kluwer, 2016), Lex No. 83193. Taking into consideration, however, the purpose of regulating the care of monuments, we need to clarify that the scope encompasses – apart from the owner – the possessor of a monument which is subject to some form of statutory protection, not only an independent possessor but also a dependent possessor, an actual holder or an immediate holder.

tral administration<sup>5</sup> and the local self-governments.<sup>6</sup> This organisational structure has its underpinnings in art. 89 PMM, which makes reference to organs appointed specifically to preserve objects of cultural heritage.<sup>7</sup> These are: a minister competent for culture and the preservation of national heritage, on whose behalf the tasks and competences in this regard are executed by the General Inspector of Monuments as well as the provincial governor [Pol. *wojewoda*], on whose behalf the tasks and competences in this regard are executed by the provincial inspector of monuments. Hierarchically, the authorities instituted to preserve monuments in Poland report to the Minister for Culture and National Heritage.<sup>8</sup>

Seen as an element of the administrative structure which is responsible for monuments conservation tasks outlined above, the provincial inspector should be regarded as an organ of the combined (general) local administration of the province [Pol. *województwo*].<sup>9</sup> The office of provincial inspector of monuments is held by a person who satisfies the statutory criteria regarding citizenship, education, work history, who has knowledge of the functioning of public administration and the provisions of law governing the preservation of monuments, who has a clean criminal record (art. 91 para. 2 PMM), appointed and recalled by the provincial governor by the permission of the general inspector of monuments (art. 91 para. 1 PMM).

A provincial inspector of monuments is backed by the provincial office of monument preservation (art. 92 para. 1 PMM), which supports the former in the execution of his tasks.<sup>10</sup> The legislator enumerates, among others, the following tasks: realising tasks which result from the National Programme for the Preservation and Maintenance of Monuments, preparing financing plans within the available budget, financing plans for the preservation and maintenance of monuments, keeping a provincial register and inventory of monuments and gathering documentation

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<sup>5</sup> For more, see K. ZALASIŃSKA, *Prawna ochrona zabytków nieruchomych w Polsce* (Warsaw: Wolters Kluwer, 2010), 197–210.

<sup>6</sup> For more, see K. ZEIDLER, “Gmina, powiat, samorząd województwa jako składowe systemu ochrony dziedzictwa kultury,” *Gdańskie Studia Prawnicze* 34 (2015): 182–95; R. WASZKIEWICZ, “Zadania gmin w dziedzinie ochrony dóbr kultury,” *Annales UMCS* 39 (1992): 317–24.

<sup>7</sup> R. GOLAT, *Ustawa o ochronie zabytków i opiece nad zabytkami. Komentarz* (Kraków: Zakamycze, 2004), 161–2.

<sup>8</sup> SCHMIDT, “Organizacja organów ochrony zabytków jako antywartość systemu prawnej ochrony zabytków,” in *Antywartość w prawie administracyjnym*, ed. A. Błaś (Warsaw: Wolters Kluwer, 2016), 216ff.

<sup>9</sup> M. CHERKA and K.A. WĄSOWSKI, “Komentarz do art. 90 ustawy o ochronie zabytków i opiece nad zabytkami,” in *Ustawa o ochronie zabytków i opiece nad zabytkami. Komentarz*, ed. M. Cherka (Warsaw: Wolters Kluwer, 2010), 317.

<sup>10</sup> For more, see R. PŁASZOWSKA, “Organizacja organów ochrony zabytków,” *Przegląd Prawa Publicznego* 6 (2016): 103–5.

in this regard, issuing decisions and certificates in matters specified by the Act and in separate provisions, supervising conservation research, restoration and construction works, other tasks related to monuments, as well as archaeological research, organising and executing inspection in respect of preservation and maintenance of monuments, drafting provincial plans for the protection of monuments in the event of an armed conflict or crisis situations and the coordination of activities serving to realise those plans, dissemination of knowledge of monuments, cooperating with other organs of public administration in matters concerning monuments protection (see art. 91 para. 4 PMM). Additionally, the provincial inspector of monuments is, in principle, the authority of first instance for matters related to the preservation and care of monuments, competent to issue administrative decisions in this regard (art. 93 para. 1 PMM). Importantly, the above-mentioned inventory of tasks realised by the provincial inspector of monuments is not exhaustive and for reference only. It does not constitute a basis for the issuance of decisions of a binding nature.<sup>11</sup>

The existence of such a broad spectrum of tasks requires that a provincial inspector of monuments have the necessary legal instruments to carry them out. By way of example, besides issuing administrative acts of a binding nature pursuant to the Act on the preservation and maintenance of monuments and separate provisions,<sup>12</sup> the provincial inspector has numerous preventive competences,<sup>13</sup> as well as the capacity to enter into agreements for an amicable settlement of legal disputes, administrative agreements to facilitate the realisation of tasks related to public administration,<sup>14</sup> performing acts of civil law<sup>15</sup> or factual acts.<sup>16</sup>

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<sup>11</sup> M. CHERKA and K.A. WĄSOWSKI, "Komentarz do art. 92 ustawy o ochronie zabytków i opiece nad zabytkami," in *Ustawa o ochronie zabytków*, 320.

<sup>12</sup> This is illustrated, for example, by art. 83a para. 1 of the Act of 16 April 2004 on nature conservation (Journal of Laws of 2016, item. 2134 as amended), which provides that a permission to remove a tree or a shrub from premises which have been entered in the inventory of monuments is issued by the regional inspector of monuments.

<sup>13</sup> Related, for instance, to the exercise of control of the observance and application of provisions governing the protection of monuments (art. 38 para. 1 PMM) or the exercise of entitlements concerning protection from the destruction or removal of monuments (see for example art. 10 para. 2, art. 32 paras. 3–5, or art. 36 para. 1 PMM).

<sup>14</sup> For example, the agreement no. 140/2012, entered into on March 30, 2012 in Lublin, between the Governor of Lublin Province and the Municipality of Lublin (Official Journal of Lublin Voivodship, item 1329).

<sup>15</sup> For example, agreements concluded by a provincial inspector of monuments, who has the discretion to use the budget resources, with a possessor or owner of a monument in order to co-finance conservation, restoration or construction works on the monument entered into the register (art. 74 para 1 PMM).

<sup>16</sup> For example, by making the documentation made for a monument available free of charge to the owner or possessor thereof. P. GWOŹDZIEWICZ, "Ograniczenia prawa własności zabytków," *Roczniki Administracji i Prawa* (2009): 120.

Among these, the procedural entitlements of provincial inspectors of monuments are of special significance. Owing to their participation in “conservation proceedings, conservation authorities are able to realise their statutory tasks with respect to monument preservation, the latter consisting in taking relevant preventive measures as stipulated by art. 4 of the Act in question.<sup>17</sup> As a result, this applies also to activities associated with specific legal procedures,<sup>18</sup> in particular to the assurance of legal protection of monuments with respect to civil proceedings at court.<sup>19</sup>

## 2. THE PROCEDURAL STATUS OF A PROVINCIAL INSPECTOR OF MONUMENTS APPEARING IN CIVIL PROCEEDINGS IN THE LIGHT OF THE CURRENT LEGISLATION

Firstly, it should be emphasised that inasmuch as the activity of public authorities (provincial inspectors of monuments in particular), intended to protect monuments in judicial proceedings, derives directly from the necessity to secure the special social interest, that is the common good, the procedural protection of interests of private entities who have a title to objects of cultural heritage is in fact a logical consequence of their property interests being protected. As a result, the enforcement of the judicial protection of subjective rights gains importance in terms of legal protection of monuments, which at the same time – being a legacy or a historical imprint of human activity – currently remain an object of individual subjective rights in most cases. This is corroborated by the doctrine of civil procedural law, which accepts that, in a concrete sense, the protection provided under civil proceedings covers both private interests (protection in the internal sense) and public interests (external protection). Consequently, protection in the internal sense is provided if the court is under the obligation to protect the general (public) interest in the course of particular civil proceedings, which inherently implies protection covering private interests. On the other hand, the external aspect gains importance when the legislator refers matters related to public-law relations for review in the course of civil procedure. In this case the protection of the public interest becomes the chief objective of these proceedings.<sup>20</sup>

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<sup>17</sup> *Ustawa o ochronie zabytków*, 172.

<sup>18</sup> M. DRELA, “Dobro kultury jako przedmiot ochrony prawno rzeczowej,” *Państwo i Prawo* 11 (2002): 56.

<sup>19</sup> K. ZEIDLER, *Prawo ochrony dziedzictwa kultury* (Warsaw: Wolters Kluwer, 2007), 220.

<sup>20</sup> P. RYLSKI, “Ochrona interesu publicznego w postępowaniu cywilnym – przyczyny, przejawy, skuteczność,” in *Interes publiczny a interes prywatny w prawie*, ed. T. Giaro (Warsaw: Stowarzyszenie Absolwentów Wydziału Prawa i Administracji Uniwersytetu Warszawskiego, 2012), 73–74.

The regulation concerning the procedural status of a provincial inspector of monuments in civil proceedings is extremely general and brief. According to art. 95 point 1 PMM, both the competent minister responsible for matters related to culture and the conservation of national heritage and a provincial inspector of monuments can assume the role of a party in a case heard under criminal proceedings.

Inasmuch as the economical wording of this regulation seems to be sufficient for the procedural status of a provincial inspector of monuments in administrative or criminal proceedings because a clear and adequate reference is made to the rights of identified participants of the proceedings,<sup>21</sup> it is not only insufficient for monument protection but also defective for this important sphere of legal order where the rules of substantive law enforcement are established for civil cases as being mandatory.<sup>22</sup> The regulation is imprecise and made in a manner which is not consistent with the nomenclature, especially the catalogue of participants of civil cases.

The legislator explicitly provides that a provincial inspector of monuments can take part in civil proceedings concerning the protection of monuments not as a party thereto (either claimant or defendant)<sup>23</sup> but “having the rights of a party.” The existing body of legislation and literature of the subject will not offer a direct reference to the category of subjects “having the rights of a party” in civil proceedings. However, one notices some resemblance to the procedural status of the so-called other (remaining) subjects (participants) of civil proceedings. The legislator subsumes not

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<sup>21</sup> Entities which are parties in administrative proceedings. These would be: a social organisation (art. 31 §3 of the Act of 14 June 1960 “Code of Administrative Procedure”, Journal of Laws of 2016, item 23 as amended [hereafter CAP]), a prosecutor (art. 188 CAP), the Commissioner for Civil Rights Protection (art. 14 point 6 of the Act of 15 July 1987 on Commissioner for Civil Rights Protection, Journal of Laws of 2014, item 1648 as amended), the organs of the Inspectorate of Environment Protection (art. 16 para. 3 of the Act of 20 July 1991 on the Inspection for Environmental Protection, Journal of Laws of 2016, item 1688); for more on this, see J. JENDROŚKA, “Uczestnicy na prawach strony w ogólnym postępowaniu administracyjnym,” *Acta Universitatis Wratislaviensis. Prawo* 143, no. 857 (1985): 103–8; the subsidiary prosecutor in criminal proceedings (just like in the case of a victim, see art. 53 of the Act of 6 June 1997 “Code of Administrative Procedure”, Journal of Laws of 2016, item 1749 as amended); and the public prosecutor in minor offence cases (the latter is constituted by administrative organs both at the government and local level, state inspection authorities, local self-government inspection authorities, as well as municipal and city guards – if they revealed offences for which they submitted a petition for punishment within their capacity (art. 17 §3 of the Act of 24 August 2001 “Code of Misdemeanour Procedure”, Journal of Laws of 2016, item 1713 as amended).

<sup>22</sup> Ł. BŁASZCZAK, “Wprowadzenie historyczne. Pojęcie i funkcja postępowania cywilnego,” in *Postępowanie cywilne*, ed. E. Marszałkowska-Krześ (Warsaw: Wydawnictwo C.H. Beck, 2013), 5.

<sup>23</sup> Clearly, this does not apply to situations in which the provincial inspector of monuments appears as a party in civil proceedings, representing as such the State Treasury, since his status is one of an entity involved in ordinary legal relations and exercising his powers in the sphere of *dominium*.

only the prosecutor<sup>24</sup> or NGOs under this category (art. 61–63 CCP), but over time the list of subjects who were allowed to participate in civil proceedings without being substantively empowered to do so would become extended by further organs.<sup>25</sup>

In doctrine, the said legal construct is referred to as substitution of a party. This concept refers to a situation when “a particular entity is empowered, or has an entitlement to appear in his own name as a party to court proceedings in place of the entity subject to the legal norm invoked in the claim.”<sup>26</sup> In other words, a person who is not empowered substantively has a right to act in his own name but simultaneously on behalf of the empowered person, instead or alongside them.<sup>27</sup>

Moreover, the jurisprudence of civil procedural law distinguishes in this regard two subcategories of substitution: substitution and subrogation. The former is realised when a person acting in his own name appears in proceedings on behalf of another person who also is entitled to bring proceedings. Subrogation occurs when solely an entity who is not substantially empowered (who is substituted) has the entitlement to act in proceedings, whereas the entity who is subject to the legal norm invoked in the claim does not have that entitlement.<sup>28</sup>

The nature of substitution in the light of procedural law is inherently tied with the category of the entitlement to act in civil proceedings, which apart from being the capacity to act as a party or the capacity to perform actions in court proceedings constitutes an essential attribute of a party<sup>29</sup> and is conceived as an entitlement deriving from substantive law to act as a party in a particular proceeding.<sup>30</sup> The literature of the subject stresses that when applying for legal protection to the court, an entity should remain in such a relation to the subject matter of the proceedings so as to be

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<sup>24</sup> Art. 7 and art. 55–60 of the Act of 17 November 1964 “Code of Civil Procedure”, Journal of Laws of 2016, item 1822 as amended [hereafter referred to as CCP].

<sup>25</sup> For example, the District (or Municipal) Consumer Ombudsman, Labour Inspector, Commissioner for Civil Rights Protection, Ombudsman for Children’s Rights, Ombudsman for Patients’ Rights, Insurance Ombudsman, Head of the Financial Supervision Authority, President of the Office of Competition and Consumer Protection, President of the Public Procurement Office, the head of a social welfare centre, or the head of a district family assistance centre. P. CIOCH and J. STUDZIŃSKA, *Postępowanie cywilne* (Warsaw: Wydawnictwo C.H. Beck, 2016), 97–106.

<sup>26</sup> W. BRONIEWICZ, A. MARCINIAK, and I. KUNICKI, *Postępowanie cywilne w zarysie* (Warsaw: LexisNexis, 2014), 146.

<sup>27</sup> See also J. JODŁOWSKI, Z. RESICH et al., *Postępowanie cywilne* (Warsaw: Wolters Kluwer, 2016), 236.

<sup>28</sup> A. ZIELIŃSKI, *Postępowanie cywilne. Kompendium* (Warsaw: Wydawnictwo C.H. Beck, 2016), 68.

<sup>29</sup> Entitlement to act in a specific civil proceeding, construed as a jurisdictional condition, determines the validity of a claim and its absence provides grounds to dismiss a claim. BRONIEWICZ, MARCINIAK, and KUNICKI, *Postępowanie cywilne*, 140.

<sup>30</sup> CIOCH and STUDZIŃSKA, *Postępowanie cywilne*, 130.



able to justify his interest (entitlement) in bringing action against another entity.<sup>31</sup> If – under the classic model – this entitlement to act as a party in a particular case is reserved to the real subject of the contentious substantive-law relation, a party to this relation and a party in court proceedings may not always be compatible. The national legislator allows the option to give the entitlement also to those subjects who are external with regard to the contentious relation if their involvement in particular civil proceedings contributes to the protection of rights of the substantively empowered entities, or this entitlement can secure public order or protect special categories of interests, be it indirectly individual, collective, group or social ones.<sup>32</sup>

Taking into consideration the above argumentation and searching for a general platform for the application of substitution in court proceedings in the case of entities other than those having a substantive entitlement, especially in the case of state authorities whose involvement in court proceedings focuses mainly on protecting a wider, abstractly conceived interest, doctrine has distinguished special cases of the entitlement to act in judicial proceedings. Some authors – in opposition to a private entitlement to bring proceedings – use the construct of a public entitlement,<sup>33</sup> granted to public authorities, which lies in the interest of the public. It covers all cases when a public authority institutes proceedings or joins in ongoing proceedings in order to protect the public interest.<sup>34</sup> At times, besides a public entitlement, the option to participate in a civil case involving entities remaining beyond the underlying, contentious substantive-law relation which constitutes the grounds for the enforcement of their claims is associated with the granting of the so-called extraordinary entitlement, unique in itself since it will be granted with respect to the functions of particular organs serving to protect supra-individual, collective, group or public interests, while the adoption of direct substitution is not sufficient in this regard.<sup>35</sup>

Substitution in judicial proceedings is also a form of overcoming the cardinal principle of the free disposition of the parties used in civil procedure. It is inseparably connected with a principle governing relations under private law, that is the principle of autonomy of the will of subjects of law, who principally can freely use their own range of entitlements, especially establish, extinguish or modify the content of

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<sup>31</sup> WALIGÓRSKI, *Zarys polskiego procesu cywilnego* (Kraków: Państwowe Wydawnictwo Naukowe, 1952), 43.

<sup>32</sup> K. GAJDA-ROSZCZYŃSKA, “Udział podmiotów innych niż materialnie uprawnione jako stron w procesie cywilnym a kryterium interesu prawnego – zagadnienia wybrane,” *Polski Proces Cywilny* 3 (2015): 364.

<sup>33</sup> CIOCH and STUJZIŃSKA, *Postępowanie cywilne*, 132–3; WALIGÓRSKI, *Zarys polskiego procesu*, 44.

<sup>34</sup> ZIELIŃSKI, *Postępowanie cywilne*, 68–69.

<sup>35</sup> GAJDA-ROSZCZYŃSKA, “Udział podmiotów,” 363–4.



civil-law relations, depending on their active or passive status.<sup>36</sup> The said possibility to act within the scope of one's entitlements under civil procedure is referred to as free disposition. Based on that, parties are permitted to make free decisions (dispose of) regarding the institution of proceedings, making claims or bringing charges, the kind and scope of legal protection claimed, or even they may decide to give up their claims.<sup>37</sup> When establishing the construct of substitution in judicial proceedings, the legislator considered the significant requirements stemming from the interest of substantively empowered subjects or the need to safeguard public interest, and as a result imposed a restriction on the possibility of exclusive and independent disposal of not only the subject matter but also individual procedural measures.<sup>38</sup>

In view of the foregoing and considering the status of a provincial inspector of monuments in civil proceedings, we should emphasize that this organ's activities are aimed and driven by the commitment to safeguard the proper condition and protection of monuments. Essentially, these activities manifest a specifically perceived but broader interest, related to an abstract and unique, constitutionally safeguarded interest, which is a subcategory of collective interest;<sup>39</sup> the latter constitutes an important element of the social (public) interest due to the existence of the duty to protect the common good (the general interest).<sup>40</sup> For these reasons, it should be assumed that a provincial inspector of monuments who takes part in civil proceedings while having the rights of a party, due to his involvement in judicial proceedings intended to protect the public interest (the common good is protected as monuments are preserved), has a public (extraordinary) entitlement to act in court proceedings. At the same time, due to its unique character, this solution is directly conditioned and justified by the provisions of substantive law (art. 95 para. 1 PMM).

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<sup>36</sup> Under some circumstances, the principle of the free disposition of parties is described as an „equivalent” of the principle of autonomy of will exercised in judicial proceedings. ZIELIŃSKI, *Postępowanie cywilne*, 25.

<sup>37</sup> As noted by Flaga-Gieruszyńska, this principle makes the subject matter dependent on the will of the party bringing a claim, hence pursuant to art. 321 §1 CCP the court will not be able to issue a judgement in respect of the subject matter which was not included in the claim, or to award more than is being claimed. T. ANUKIEWICZ et al., *Postępowanie cywilne. Komentarz praktyczny dla sędziów i pełnomocników procesowych* (Warsaw: Wydawnictwo C.H. Beck, 2016), 339.

<sup>38</sup> W. BERUTOWICZ, *Zasada dyspozycyjności w postępowaniu cywilnym* (Warsaw: Wydawnictwo Prawnicze, 1957), 19–20; R. FLEJSZAR, *Zasada dyspozycyjności w procesie cywilnym* (Warsaw: Wydawnictwo C.H. Beck, 2016), 212–20.

<sup>39</sup> GAJDA-ROSZCZYŃSKA, „Udział podmiotów,” 367.

<sup>40</sup> IDEM, „Komentarz do art. 7 Kodeksu postępowania cywilnego,” in *Komentarz. Art. 1–729*, vol. 1 of *Kodeks postępowania cywilnego*, ed. A. Góra-Błaszczkowska (Warsaw: Wydawnictwo C.H. Beck, 2013), 76; IDEM, „Udział podmiotów,” 371.

By acting as a party in a civil proceeding concerning monuments preservation, a provincial inspector of monuments is not strictly speaking a party, but the proper application of provisions related to a party's rights in a civil proceeding seems justified, provided that the party possesses only procedural entitlements. Therefore, not being a party to the contentious relation which underlies the proceedings, he may not perform dispositive acts having a substantive character (substantive dispositions<sup>41</sup>), and consequently may not dispose of the rights which the subject matter of the proceedings directly involves. For that reason, a provincial inspector of monuments who is involved in a given proceeding as a substitute possesses all attributes of a party in the formal sense, including the right to perform all dispositive acts which have a formal character (acts of legal procedure) yet are not connected with the disposal of the substantive subject matter of the claim.<sup>42</sup>

The personal scope of substitution in judicial proceedings is governed by the content of art. 95 point 1 PMM, encompassing a competent minister responsible for culture and national heritage and a provincial inspector of monuments. It must be assumed that the legislator determined their status as competitive.<sup>43</sup> If, then, one public substitute is involved in a proceeding, another will not be permitted to take part in it; for this reason their mutual relation will qualify as mutually competitive.<sup>44</sup>

At the same time, just like in a situation when a prosecutor or other subjects who have no substantive entitlement participate, it is uniform joinder of parties. It occurs when the nature of the contentious legal relation or a provision of the law implies that the judgement in the case is to apply indivisibly to all of the participants.<sup>45</sup> For this reason, every instance of the provincial inspector of monuments participating

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<sup>41</sup> J. MOKRY, *Czynności procesowe podmiotów dochodzących ochrony praw w postępowaniu cywilnym* (Wrocław: Wydawnictwo Uniwersytetu Wrocławskiego, 1993), 90.

<sup>42</sup> See the judgement of the Supreme Court dated May 4, 1966, file ref. no. II CR 103/67, *Orzecznictwo Sądu Najwyższego – Izba Cywilna/Pracy*, no. 2 (1967), item 25.

<sup>43</sup> The wording of this provision uses the conjunction ‚or’ whereby an alternative is provided, denoting the mutual exclusivity of two sentence parts or two coordinate clauses. In support of this, see the judgement of the Regional Administrative Court in Białystok dated July 17, 2012, file ref. no. II SA/Bk 271/12, Lex No. 1253577. For a different interpretation, see M. CHERKA and K.A. WĄSOWSKI, „Komentarz do art. 92 ustawy o ochronie zabytków i opiece nad zabytkami,” in *Ustawa o ochronie zabytków*, 328. This view deserves criticism as being impossible to reconcile with the obligation resulting from the principle of legality that the organs of public authority act on the basis of, and within the limits of the law (art. 7 PC). The participation in any judicial proceedings of more than one substitutes who represent the public interest would raise reasonable doubts as to the interests of the other parties being infringed, especially in respect of the equal status of the parties.

<sup>44</sup> B. BARUT-SKUPIEŃ, *Współuczestnictwo procesowe w postępowaniu cywilnym i sądowniczym* (Warsaw: Wydawnictwo C.H. Beck, 2014), 24–25.

<sup>45</sup> CIOCH and STUDZIŃSKA, *Postępowanie cywilne*, 96.

in the proceedings will have effects under substantive law in respect of persons who are substantially entitled by the contentious legal relation.

In judicial practice, doubts have arisen with respect to the question whether the participation of a provincial inspector of monuments acting as a public substitute in civil proceedings has a compulsory character, or whether such participation is conditional solely upon an autonomous decision of the authority, made after all factual circumstances have been considered and the purposefulness of the participation has been assessed in terms of its value for monuments preservation, or whether the fact that one of the substitutes has not been summoned can constitute a procedurally faulty act and a potential reason for the invalidity of the proceedings or grounds for using an extraordinary means of recourse, that is a complaint in cassation. In its decision, the Supreme Court indicated that the participation has a facultative (non-compulsory) character, and the court under no obligation to summon him *ex officio* to take part in the proceedings. As a result, if the provincial inspector of monuments does not demonstrate any procedural initiative in this regard despite being informed by the court of the subject matter of the ongoing proceedings, “his non-participation cannot be deemed as a reason for the invalidity of the proceedings, but it cannot even qualify as a procedurally faulty act that impacts the outcome of the proceedings.”<sup>46</sup>

The permissibility of the provincial inspector’s participation in civil proceedings as a party applies in principle to the possibility of participating in every stage of the proceedings. As jurists rightly point out in the literature, in the light of the regulation of art. 95 PMM the joining of ongoing proceedings is conditional only upon an organ’s decision,<sup>47</sup> being independent of any other acts, even if the court has been formally notified of the authority’s willingness to participate. This means in particular that a provincial inspector of monuments can join in a given proceeding at any time and in a direct manner by using a specific procedural measure.<sup>48</sup>

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<sup>46</sup> See the decision of the Supreme Court dated February 5, 2010, file ref. no. III CZ 67/09, Lex No. 686069; decision of the Supreme Court dated April 9, 2010 r., file ref. no. III CSK 336/09, Lex No. 602267. Analogically, with respect to judicial-administrative proceedings, see the judgement of the Regional Administrative Court in Poznań dated April 22, 2015, file ref. no. IV SA/Po 1390/14, Lex No. 1761226.

<sup>47</sup> This does not apply to a situation when it is actually involved in the proceedings based on the decision of the court to notify it of the pending proceedings (for instance in delimitation proceedings concerning a historical property) or requesting it to present its opinion on the case, when the court is seeking information essential for a valid resolution of a case (for example, in co-ownership dissolution proceedings). BRONIEWICZ, MARCINIAK, and KUNICKI, *Postępowanie cywilne*, 115.

<sup>48</sup> CHERKA and WĄSOWSKI, “Komentarz do art. 95 ustawy,” 328–9.

Bearing in mind the permissibility of the provincial inspector of monuments taking part in civil proceedings, the provision of art. 95 para. 1 PMM should be regarded as *lex specialis* in relation to the provisions of civil procedure, especially art. 64 CCP. As a substitute in proceedings, this organ acquires a capacity to be a party in civil proceedings and a capacity to validly perform acts in civil proceedings.

Significantly, the crucial reason for the involvement of a provincial inspector of monuments in a civil proceeding, deducible from a literal and functional interpretation of art. 95 para. 1 PMM, is the need to ensure protection of monuments, conceived as a broader interest, manifested by the need for a public authority to join in court proceedings whose subject matter is related to the preservation, management or maintenance of a monument in any possible degree. The content of such a restriction must therefore follow from the nature of the protected interest, which is evaluated in the light of the legal definition of monument preservation.<sup>49</sup> If the decision to update the criteria of participation in particular civil proceedings depends on the inspector's autonomous appraisal of the circumstances of the case, it is ultimately the court which decides whether the case can be qualified as one involving the sphere of monuments protection.<sup>50</sup>

When attempting to outline the subjective scope of cases in which the provincial inspector of monuments can participate as a party due to the need to protect respective monuments, we need to note that the range of potential cases is not limited only to litigious proceedings but it may encompass non-litigious proceedings as long as they pertain to the sphere of monument protection. Therefore, having a definition of monuments protection and knowing the goals pursued by the provincial inspector of monuments, we easily arrive at a potential catalogue of cases requiring his participation. At first sight, we can indicate, for example, cases concerned with protection of the ownership of a monument,<sup>51</sup> delimitation proceedings, cases concerning

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<sup>49</sup> The protection of monuments involves public authorities taking actions aimed at: ensuring legal, organisational and financial conditions permitting permanent preservation of monuments, their management and maintenance; preventing threatening factors which might reduce their value; preventing destruction and improper use of monuments; counteracting theft, loss and illegal export of monuments abroad; controlling the state of preservation and the purpose of monuments; consideration of protective measures regarding space planning and development; and shaping the natural environment (art. 4 PMM).

<sup>50</sup> See the justification of the decision of the Supreme Court dated April 9, 2010, mentioned earlier in the text; similarly, as regards the prosecutor (and due to his visibly analogous status to the one of the provincial inspector of monuments, yet not confirmed in legislation), see J. BODIO, „Interes prawny a interes publiczny prokuratora wytaczającego powództwo w trybie art. 7, 57 i 189 k.p.c.,” *Palestra* 1–2 (2015): 50–59.

<sup>51</sup> The list also includes cases concerning relations between neighbours and protection from nuisances if conduct pursued within the neighbouring property could damage the substance of historical building.

restricted rights in rem to a thing which is a monument or includes a monument,<sup>52</sup> proceedings in the matter of co-ownership dissolution,<sup>53</sup> usucaption,<sup>54</sup> or establishment of perpetual usufruct on land property where a historic building is located.<sup>55</sup> The list of such cases also contains proceedings related to the administration of joint property which includes a listed object, inheritance cases (in which the estate comprises items of historical value) or cases involving enforcement proceedings.

The literature, however, advocates the view that monument protection authorities are entitled to make claims under civil law only to the extent that the State Treasury has civil-law control over a thing, that is in relation to movable and immovable historical property which is owned by the State (and not under exclusive control of other state legal persons, for example state culture institutions which otherwise have the right to make claims under civil law resulting from activities which threaten the monuments in their care).<sup>56</sup> This view deserves extensive criticism as it is expressed *contra legem*. This is so because the provision of art. 95 point 1 PMM governs the sphere of permissibility of the provincial inspector's participation in civil proceedings as a party, and therefore as a substitute; this does not apply to a situation when he acts in particular proceedings as a party representing the State Treasury. What is more, the legislator does not even restrict the potential range of cases concerning monument protection, accepting it as a rule that when the proceeding is concerned with the protection of monuments, he inspector can participate in it and have the rights of a party thereto.

It must be noted that the participation of a provincial inspector of monuments in civil proceedings conducted with respect to monument protection may be realised in various actions. In other words, he can participate in proceedings in which the request for legal protection covers: enforcement of a payment,<sup>57</sup> the modification

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<sup>52</sup> For example, proceedings in the matter of establishing the right of way. See the decision of the Supreme Court dated December 8, 1999, file ref. no. II CKN 669/98, Lex No. 1231377.

<sup>53</sup> See the decision of the Supreme Court dated December 14, 2005, file ref. no. III CK 200/05, Lex No. 604117; decision of the Supreme Court dated December 13, 2012, file ref. no. III CSK 300/12, Lex No. 1281383.

<sup>54</sup> See the decision of the Supreme Court dated December 16, 2014, file ref. no. III CSK 360/13, Lex No. 1621346; the decision of the Regional Court in Kraków dated January 31, 2014, file ref. no. II Ca 1670/13, accessed February 10, 2017, [www.saos.org.pl](http://www.saos.org.pl).

<sup>55</sup> See the judgement of the Supreme Court dated June 2, 2016, file ref. no. I CSK 451/15, Lex No. 2064221.

<sup>56</sup> GOLAT, *Ustawa o ochronie zabytków*, 173.

<sup>57</sup> For example, the request for the payment of a specific amount resulting from the non-performance of a contract whose scope covered an asset of culture (Judgement of the Supreme Court of 20 June 2016, file ref. no. IV CSK 704/12, Lex No. 140525) or a action brought in connection with a prohibited act involving destruction of a listed building.

of an existing entitlement or legal relation,<sup>58</sup> or the determination of an entitlement or legal relation.<sup>59</sup>

Due to the lack of an explicit regulation which would permit a direct or even analogous application of provisions of the Polish law on public prosecution in respect of the provincial inspector of monuments, and taking into consideration the unique nature of the provision of art. 95 point. 1 PMM, the latter should be subject to a restrictive interpretation, in accordance with the *exceptiones non sunt extendae* principle.<sup>60</sup> Taking into consideration this regulatory context, it would be too restrictive to claim that the provincial inspector of monuments can institute civil proceedings concerning monument protection since this organ of public authority is empowered only to participate in an ongoing proceeding as a party in the formal sense.

Finally, we should outline the range of procedural entitlements enjoyed by the provincial inspector who takes part in the above-mentioned types of civil proceedings. Assuming that this organ is formally entitled by statute to act as a party in the procedural sense, it must be concluded that it may not dispose of the object of the proceedings as being only a representative of the public interest. Therefore, having all necessary procedural means, he has the entitlement to protect and preserve monuments in civil proceedings. Using these, he will be entitled in particular to submit statements, motions, objections, as well as provide facts and the evidence thereof. As part of the proceedings, the court is to serve pleadings on him, such as notifications of dates of hearings and pronounced judicial decisions. The inspector also has a right to appeal in all cases envisaged by the law.

## CONCLUSION

Despite its succinct character, the norm contained in art. 95 point 1 of the Polish act on the preservation and maintenance of monuments, serving to determine the status of the provincial inspector of monuments constitutes in practice an area

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<sup>58</sup> For example, when requesting the dissolution of marital joint property ownership where the joint property includes items listed in the register of objects of cultural heritage (Judgement of the Supreme Court of 28 March 2012, file ref. no. V CSK 163/11, Lex No. 1212826) or the termination of perpetual usufruct agreement.

<sup>59</sup> If the request has been submitted on the motion of the State Treasury, represented by the provincial inspector of monuments (Judgement of the Supreme Court of 16 February 2012, file ref. no. III CSK 201/11, Lex No. 1168891).

<sup>60</sup> Similarly, in I. GREDKA, „Prawnoprocesowe narzędzia ochrony zabytków w świetle ustawy o ochronie zabytków i opiece nad zabytkami,” in *Prawo ochrony zabytków*, ed. K. Zeidler (Warsaw: Wolters Kluwer – Gdańsk: Wydawnictwo Uniwersytetu Gdańskiego, 2014), 445.

of many uncertainties and polemics. The regulation at issue is overshadowed by the state of its implementation by the eligible constitutional organs of authority, which are obliged to preserve monuments. Our analysis of the application of the procedural entitlements of provincial inspectors of monuments, based on information generally accessible to the public, permits rather pessimistic observations.<sup>61</sup> It should be noted that the said procedural entitlements find very little, if not hardly any application nationwide.<sup>62</sup>

However, we should be in favour of the claim that the little degree of application of procedural entitlements by the provincial inspector of monuments with respect to civil cases is always the consequence of lack of will to act but it is often due to objective reasons, especially unawareness of ongoing proceedings or an event which justifies the launching of appropriate procedural initiative. Infrequently, such “procedural apathy” in this regard originates in organisational and financial deficiencies of an entitled authority, especially if a professional attorney is to be appointed while the proceedings are time-consuming and require substantial involvement of the authority.<sup>63</sup>

Simultaneously, it seems that a critical attitude to the binding regulation has been adopted by the legislator, who has recently undertaken intensive efforts to substantially review the wording of art. 95 PMM, both in respect of the structure of the organs empowered to provide protection to monuments by way of court proceedings and the very status of these organs within civil proceedings. However, the planned amendments call for extended considerations, which may provide research material for a separate study.

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<sup>61</sup> All requests to gain access to the public information concerning the application of the entitlements under art. 95 point 1 PMM over the last 5 years were sent electronically to provincial inspectors of monuments on November 29, 2016.

<sup>62</sup> The information obtained with respect to the said period demonstrates the involvement in court proceedings of only the Opole Province Inspector of Monuments (as a participant of proceedings concerning succession to an estate before the District Court in Opole), file ref. no. IX Ns 264/16) and the Local Office of the Lublin Province Inspector of Monuments in Chełm (as a participant of proceedings concerning the establishment of the right of way on the property adjoining a historical manor and park estate in Nowiny before the District Court in Krasnystaw, file ref. no. I Ns 1320/05, I Ns 505/09, I Ns 504/11, I Ns 2/15, and before the District Court in Zamość, the Local Krasnystaw Division, file ref. no. IX Ns 16/13 and before the Regional Court in Zamość, file ref. no. I Ca 219/11, I Ca 399/15).

<sup>63</sup> GREDKA, “Prawnoprocesowe narzędzia,” 448; O. JAKUBOWSKI, “Wykorzystanie unormowań art. 95 ustawy o ochronie zabytków i opiece nad zabytkami do walki z przestępczością przeciwko dziedzictwu narodowemu – propozycje rozwiązań,” *Opolskie Studia Administracyjno-Prawne* 8 (2011): 49–50.



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THE STATUS OF THE PROVINCIAL  
INSPECTOR OF MONUMENTS  
IN CIVIL PROCEEDINGS IN THE LIGHT OF  
ACT ON THE PRESERVATION AND MAINTENANCE OF MONUMENTS

Summary

This article presents considerations with regard to the status of the provincial inspector of monuments in civil proceedings. The entitlements of this public authority in respect of monument protection are set out in article 95 of the Act on the preservation and maintenance of monuments. The legislator, in a rather concise and imprecise manner, defines the status of the inspector in civil proceedings. Despite the cardinal importance of this regulation, it provides ground for a great deal of debate.

**Key words:** provincial inspector of monuments; civil procedure; preservation of monuments; maintenance.

*Translated by Tomasz Palkowski*



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