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THE PROCEDURAL STATUS  
OF THE PROVINCIAL INSPECTOR OF MONUMENTS  
IN CIVIL PROCEEDINGS  
IN THE LIGHT OF LEGISLATIVE CHANGES

INTRODUCTION

The protection of essential values inherent in monuments requires proper legal measures which should be available to both monument owners and possessors, who are obliged to maintain the monuments under their control (art. 5 PCM<sup>2</sup>), and competent public administration bodies, whose role is to safeguard the cultural heritage and monuments (art. 4 PCM). Of the wide range of legal measures used for the protection of monuments, the powers of authorities intended to protect monuments vested in them under procedural law have a great deal of importance. One method of enforcing the protection of one's rights is judicial protection of one's subjective rights, which is reflected in the legal system for the protection of monuments, the latter conceived not only as heritage or mark in history but in majority of cases as objects of relevant subjective rights.

The key figure among the bodies of public administration which pursue tasks involving monument protection is the provincial inspector of monuments

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<sup>2</sup> See Act of 23 July 2003 on the protection and care of monuments, Journal of Laws of 2014, item 1446 as amended [hereafter cited as PCM].

[Pol. *wojewódzki konserwator zabytków*].<sup>3</sup> The inspector has a special role to play with respect to monument protection so they are equipped by the national legislator with a number of indispensable legal instruments. These are special procedural entitlements which can be applied in judicial proceedings in criminal law, administrative law and civil law cases.

If the previously applicable regulations – which could be seen as potential means for the realisation of goals involving monument protection – should on the whole be evaluated favourably despite their noticeable defects and some understandable doctrinal scepticism associated therewith, the recent legislative changes in respect of the wording of art. 95 PCM seem at least dubious, if not flawed. For this reason, our further considerations will characterise the current status of the provincial inspector of monuments in civil proceedings concerning monuments protection, considering the projected changes in this area. The goal of our study will be in particular to present crucial reservations concerning the correctness and validity as well as the actual consequences of the adopted solutions.

#### THE PROCEDURAL STATUS OF THE PROVINCIAL INSPECTOR OF MONUMENTS IN CIVIL PROCEEDINGS AGAINST THE PREVIOUS LEGISLATION<sup>4</sup>

The provincial inspector of monuments, who is an organ of the governmental, combined (general) administration of the province, competent in matters regarding the protection and care of monuments, fulfils a range of statutory tasks in this area. The scale of the tasks entrusted to provincial inspectors of monuments requires that they have the necessary legal instrumentation to perform those effectively. Such tasks include the issuance of administrative acts of a sovereign character<sup>5</sup> pursuant to the

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<sup>3</sup> As provided by art. 89 PCM, the authorities in charge of monuments protection are: a minister competent for the protection of culture and national heritage, on whose behalf the tasks and competences in this regard are exercised by the General Inspector of Monuments, as well as the provincial governor [Pol. *województwo*], on whose behalf the tasks and competencies in this regard are exercised by the provincial inspector of monuments.

<sup>4</sup> For more on this topic, see J. TRZEWIK, “*Status procesowy wojewódzkiego konserwatora zabytków w postępowaniu cywilnym na tle art. 95 ustawy o ochronie zabytków i opiece nad zabytkami*,” *Roczniki Nauk Prawnych* 27, no. 2 (2017): 77–96.

<sup>5</sup> The catalogue of tasks realised by the provincial inspector of monuments provided by the law is not exhaustive and has an illustrative character, so it does not constitute a sole authorisation to issue decisions of a sovereign character. See *Ustawa o ochronie zabytków i opiece nad zabytkami. Komentarz*, ed. M. Cherka (Warsaw: Wolters Kluwer, 2010), 320.

act on the protection and care of monuments or separate regulations,<sup>6</sup> powers of a preventive nature,<sup>7</sup> amicable resolution of legal disputes by means of settlement, capacity to enter into administrative agreements to facilitate the realisation of tasks related to public administration, performance of acts of civil law<sup>8</sup> or even factual acts.<sup>9</sup>

From the pragmatic point of view, special importance should be attributed to the procedural powers of the provincial inspector of monuments. Their proper use makes it possible to correlate the realisation of statutory obligations related to the performance of public tasks with corresponding protective measures which have a positive impact on the object under protection.<sup>10</sup> This applies especially to activities undertaken as part of specific legal procedures, as well as the realisation of legal protection of monuments in the course of judicial civil proceedings.<sup>11</sup>

According to the previous wording of the provisions of the act on the protection and care of monuments, in cases regarding monuments protection, the minister competent for culture and protection of national heritage or the provincial inspector of monuments were permitted to act as: parties in administrative and civil proceedings, auxiliary prosecutors in criminal proceedings, or public prosecutors in proceedings concerning petty offences (art. 95 PCM).

Taking into consideration the above argumentation it seems valid to say that the activities undertaken by the provincial inspector of monuments in the course of civil proceedings aimed at ensuring the adequate state of repair and protection of monuments – activities which in fact reflect a broader, social (public) interest<sup>12</sup> –

<sup>6</sup> To take but one example, see art. 83a para. 1 of the act of 16 April 2004 on nature conservation, Journal of Laws of 2016, item 2134 as amended, providing that a permission to remove a tree or a shrub from a property which has been entered in the register of monuments is issued by the provincial inspector of monuments.

<sup>7</sup> These relate to a number of competences with regard to conservation supervision of the observance and application of regulations related to monuments protection (art. 38 para. 1 PCM) or the exercise of authority concerning prevention of destruction or exports of monuments (art. 10 para. 2, art. 32 paras. 3–5, and art. 36 para. 1 PCM).

<sup>8</sup> For example agreements concluded between a provincial inspector of monuments, who is authorised to use budget resources, and the keeper of a monument concerning the co-financing conservation, restoration or construction works on the monument entered in the register (art. 74 para. 1 point 2 PCM).

<sup>9</sup> For example, making the monument documentation available free of charge to the owner or possessor of the monument. See. P. GWOŹDZIEWICZ, „Ograniczenia prawa własności zabytków,” *Roczniki Administracji i Prawa* 9 (2009): 120.

<sup>10</sup> Cf. R. GOLAT, *Ustawa o ochronie zabytków i opiece nad zabytkami. Komentarz* (Kraków: Zakamycze, 2004), 172.

<sup>11</sup> See K. ZEIDLER, *Prawo ochrony dziedzictwa kultury* (Warsaw: Wolters Kluwer, 2007), 220.

<sup>12</sup> See K. GAJDA-ROSZCZYŃSKA, “Udział podmiotów innych niż materialnie uprawnione jako strony w procesie cywilnym a kryterium interesu prawnego – zagadnienia wybrane,” *Polski Proces Cywilny* 3 (2015): 371.

made it possible to grant him a public (extraordinary) entitlement with respect to the proceedings.<sup>13</sup> Every time his procedural involvement was intended to protect the public interest, that is protect monuments, which in fact was directly motivated and validated by the regulation of substantive law (art. 95 para. 1 PCM).

Acting in the capacity a party in civil proceedings, the provincial inspector of monuments was not treated as a party to a contentious relation, however. Despite the lack of such a legal construct within the subjective scope of civil proceedings, we may notice some degree of similarity to the procedural status of the so-called other (remaining) subjects (participants) of civil proceedings, such as the public prosecutor (art. 7 and 55–60 CCP<sup>14</sup>), non-governmental organisations (art. 61–63 CCP), and other subjects specified in statutes.<sup>15</sup>

The said legal construct is referred to in the doctrine as substitution in court proceedings. It 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>16</sup> In other words, an entity who in reality is not empowered substantively is capable of acting in its own name as a party but on behalf of the empowered subject, instead or alongside it.<sup>17</sup>

In the proceedings, the provincial inspector of monuments was not therefore empowered to perform dispositive acts of a substantive character but he only had procedural rights. As a consequence, he would not dispose of the rights associated directly with the subject of the proceedings.<sup>18</sup>

His procedural status with respect to a minister competent for culture and national heritage, indicated in the hypothesis of art. 95 point 1 PCM, was to be regarded as competitive participation.<sup>19</sup> Therefore, the participation of one of the statutory public substitutes excluded the participation of the other in proceedings.

At the same time, this constituted a uniform joinder of parties because the potential binding decision of the court applied indivisibly to all participants.<sup>20</sup> Alterna-

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<sup>13</sup> See P. CIOCH and J. STUDZIŃSKA, *Postępowanie cywilne* (Warsaw: Wydawnictwo C.H. Beck, 2016), 132–33.

<sup>14</sup> Act of 17 November 1964, The Code of Civil Procedure, Journal of Laws of 2016, item 1822 as amended. [hereafter cited as CCP].

<sup>15</sup> Including but not limited to the Commissioner for Civil Rights Protection, Ombudsman for Children’s Rights, Ombudsman for Patients’ Rights, Insurance Ombudsman, or the President of the Office of Competition and Consumer Protection.

<sup>16</sup> W. BRONIEWICZ, A. MARCINIAK, and I. KUNICKI, *Postępowanie cywilne w zarysie* (Warsaw: LexisNexis, 2014), 146.

<sup>17</sup> See J. JODŁOWSKI et al., *Postępowanie cywilne* (Warsaw: Wolters Kluwer, 2016), 236.

<sup>18</sup> See the judgment of the Supreme Court dated May 4, 1966, file ref. no. II CR 103/67, *Orzecznictwo Sądu Najwyższego – Izba Cywilna/Pracy* (1967), no. 2, item 25.

<sup>19</sup> See JODŁOWSKI et al., *Postępowanie cywilne*, 208.

<sup>20</sup> See CIOCH and STUDZIŃSKA, *Postępowanie cywilne*, 96.

tively, the participation of a provincial inspector of monuments in the proceedings would have substantive-law effects with respect to persons who were substantially authorised by the contentious legal relation.

The permissibility of the provincial inspector's participation in civil proceedings as a party applied in principle to the possibility of participating in every stage of the proceedings. He was allowed to join in a given proceeding at any stage and directly by using a specific procedural measure.<sup>21</sup>

#### THE PROCEDURAL STATUS OF THE PROVINCIAL INSPECTOR OF MONUMENTS IN CIVIL PROCEEDINGS AGAINST THE CURRENT LEGISLATION

According to the current wording of art. 95 para. 1 PCM, in civil cases concerning protection of monuments and cultural heritage, including public collections, restitution of cultural assets such as those unlawfully removed from the territory of Poland, the minister competent for the matters of culture and protection of national heritage has the powers of a public prosecutor provided for by the provisions of the Code of Civil Procedure. The content of the referred provision was determined as a result of the adoption of a law on the restoration of national cultural property,<sup>22</sup> which to a certain extent amended separate provisions governing the issue of monuments protection.<sup>23</sup> The objective of this law, however, was to transpose the directive 2014/60/EU<sup>24</sup> to the Polish national legislation in order to ensure protection of the integrity of the cultural heritage of each of the Member States by facilitating them to enforce their rights to regain their cultural assets which had been unlawfully removed from their territories to other Member States.

When we analyse these legislative changes, it becomes clear that, in its regulatory activity, the legislator focused mainly on empowering the bodies of public administration to realise tasks related to the restitution of cultural assets. This applies

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<sup>21</sup> See CHERKA and WĄSOWSKI, *Ustawa o ochronie zabytków*, 328–29.

<sup>22</sup> Act of 25 May 2017 on the restitution of national cultural property, *Journal of Laws* of 2017, item 1086 [hereafter cited as RNCP].

<sup>23</sup> A relevant legislative submission represented by the governmental draft law on the restitution of national cultural property (Sejm paper no. 1371) was registered with the Chancellery of the Sejm early in March 2017. The bill was adopted by the Sejm on May 25, 2017, and after the President signed it on June 2, 2017, it came into force on June 20, 2017.

<sup>24</sup> Directive of the European Parliament and of the Council of 15 May 2014 on the return of cultural objects unlawfully removed from the territory of a Member State and amending Regulation No. 1024/2012, *Official Journal of the EU* L 159/1 of 28 May 2014, and *Official Journal of the EU* L 147/24 of 12 June 2015.

also to the area of judicial proceedings, including civil and criminal proceedings, making reference in this regard to powers provided for in art. 95 PCM.

In the opinion of the legislator, its previous redaction was seriously defective. As it was clearly indicated in the statement of grounds for the bill of the restitution of national cultural property, this provision gave rise to material interpretative doubts when in the previous wording, potentially making this provision impossible to be applied consistently with its purpose. In the light of the structural assumptions of civil proceedings, the provision of art. 95 point 1 PCM enabled the minister competent for culture and protection of national heritage or the provincial inspector of monuments to act as a party in a respective judicial proceeding.

Inasmuch as this formulation did not give rise to any objections with respect to administrative procedure, it was completely out of tune with the nomenclature and subjective scope of participants of civil proceedings. It seems that the elimination of that defect required merely the inclusion of specific references to the law of civil procedure (substitution in court proceedings based on the public entitlement to act in judicial proceedings). Among the various forms of involvement of third parties envisaged by the Code of Civil Procedure and reflected in art. 95 para. 1 PCM, this formulation in fact corresponds to the that of the role of the public prosecutor in civil proceedings.

This correlation was actually noted by the legislator,<sup>25</sup> which provided an argument that in order to remove the said defect it would be necessary to introduce a reference to the competences stipulated for this body by the regulations of civil procedure. With this in mind, the legislator amended art. 95 para. 1 PCM. According to the current wording and structure of this provision, in civil cases concerning protection of monuments and cultural heritage, including public collections, restitution of cultural assets such as those unlawfully removed from the territory of Poland, the minister competent for the matters of culture and protection of national heritage has the powers of a public prosecutor provided for by the provisions of the Code of Civil Procedure.

From the statement of grounds for the bill it transpires that this significant amendment – after its scope has been extended also to restitution cases – will remove this legal loophole. It seems, however, that by introducing this indispensable adjustment to the regulations governing the possibility of recovering lost cultural goods the legislator considerably reduced the possibility of protecting monuments by way of civil proceedings.

The new wording of art. 95 PCM expressly provides for important procedural rights within the framework of civil proceedings yet restricting them only to one monuments protection authority – the central body of government administration represented by a minister competent for the matters of culture and protection of na-

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<sup>25</sup> See the grounds for the bill of the restitution of national cultural property.

tional heritage. The existing defectiveness of the system of monuments protection, resulting from the inability of provincial inspectors of monuments to effectively use this possibility,<sup>26</sup> should not, however, deprive them of their capacity to enforce measures of monument protection in the course of judicial proceedings, especially in the view of the fact that the previous structure of the provisions specifying the powers of the provincial inspector of monuments regarding civil cases was assessed as quite positive by the doctrine.<sup>27</sup> Rather than deregulating the status of the provincial inspector of monuments in civil proceedings, it would be more sensible to provide support, at least substantive and concerning expertise (especially in legal matters), for the local administrative authorities which are competent for monuments protection and willing to participate in particular judicial proceedings in this regard.

Changes, when applied without reasonable justification and in practice restricting the legal measures that serve to protect monuments, give the impression of a legislative error or omission. In the statement of reasons for the draft law on the restitution of the national cultural property, the part addressing the motives of the modifications of art. 95 explicitly indicates that within the existing legislation “both organs can act as parties in civil proceeding,” and due to uncertainty surrounding the proper correlation of the regulation with civil proceedings, in particular taking into account correspondence to the position of a public prosecutor in proceedings, this situation must be rectified and it validates the said modifications. This formulation seems to suggest that the projected amendment, motivated indeed by a real need, was to involve not so much a restriction of the subjective scope of this provision as to adapt it to the basic requirements of civil procedure, yet maintaining the existing circle of authorised entities. This assessment is further supported by the fact that given similar doubts concerning the adjustment of the regulation of art. 95 PCM to the premises of criminal procedure, the legislator left intact the catalogue of authorised entities.<sup>28</sup>

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<sup>26</sup> See TRZEWIK, *Status procesowy*, 92.

<sup>27</sup> As emphasised by I. Gredka, the role which the minister of culture and national heritage or the provincial inspector of monuments can play in administrative, civil, criminal and cases involving petty offences cannot be overestimated. None of the organs of legal protection or even an expert appearing before the court can supersede these entities in terms of their expertise combined with their experience in the area of monuments protection and specific sensitivity which makes the care of cultural heritage possible. Gredka believes that the function which is to be fulfilled by the said entities using their procedural rights is essential and the adoption of a relevant regulation in this respect should be viewed as fully justified. See I. GREDKA, “Prawnoprocesowe narzędzia ochrony zabytków w świetle ustawy o ochronie zabytków i opiece nad zabytkami,” in *Prawo ochrony zabytków*, ed. K. Zeidler, 448–49 (Warsaw–Gdańsk: Wolters Kluwer, 2014).

<sup>28</sup> As the statement of grounds for the amendment of the regulation suggests, with regard to the role of both organs in criminal procedure, the previous wording of art. 95 para. 2 is also legislatively

THE MINISTER COMPETENT FOR MATTERS OF CULTURE  
AND PROTECTION OF NATIONAL HERITAGE  
IN THE PLACE OF THE PROVINCIAL INSPECTOR OF MONUMENTS –  
ANALYSIS OF PROCEDURAL RIGHTS  
AGAINST THE AMENDED LEGISLATION

It should be remembered that pursuant to art. 89 PCM, the minister competent for the matters of culture and protection of national heritage exercises his tasks and competences related to monuments protection through the General Inspector of Monuments, who is a secretary or undersecretary of state at the office serving the minister. In the doctrine, this fact is regarded as a considerable impairment or even recession of this function in comparison with the earlier legal state, when this body had the character of a central organ of governmental administration, organisationally distinct and supported by a structurally subordinate office.<sup>29</sup>

The subjection of the system of monuments protection to the combined administration raises reasonable doubts in the doctrine in terms of the efficient operation of such a system. Due to the specific characteristics of monuments protection, it is often postulated that specialist services be created to deal with individual fields composed of qualified officers instead of instituting one organ subjected to the provincial governor who would have consultative bodies. Looking from this perspective, it is hard to understand the shifting of the weight towards the apparatus of the

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defective because it lays down that they can act “in the capacity of an auxiliary prosecutor” without mentioning their role as an aggrieved party. The defectiveness of this provision is manifested by its incompatibility with art. 53 of the act of 6 June 1997, The Code of Criminal Procedure, Journal of Laws of 2016, item 1749 as amended, which associates the status of an auxiliary prosecutor with that of a victim. The necessity for the participation of a minister as a party (i.e. in the capacity of an aggrieved party) during the preparatory proceedings cannot be contested. Indeed, this stage is essential for the outcome of criminal proceedings. The further course of the case hinges on the effectiveness and completeness of the investigation and taking of evidence. The active participation of a specialised entity, represented by a minister and the subordinate institutions, involving the provision of materials and initiation of specific proceedings related to evidence-taking, supervision of the validity of decisions issued by the Prosecution service or the Police as legal remedies, is crucial in criminal procedure for the attainment of the goals of proceedings related to cultural assets. This state of affairs was further exacerbated by the introduction of the principle of an adversarial process in criminal proceedings. A removal of the said defect of the existing wording of art. 95 para. 2 PCM requires a demonstration that both entities operate within the framework envisaged for both the victim and the auxiliary prosecutor in criminal proceedings. With this in mind, the legislator introduced art. 95 para. 2 PCM.

<sup>29</sup> See B. SZMYGIN, “System ochrony zabytków w Polsce – próba diagnozy,” in *System ochrony zabytków w Polsce. Analiza, diagnoza, propozycje*, ed. B. Szmygin (Lublin–Warsaw: Polski Komitet Narodowy Międzynarodowej Rady Ochrony Zabytków ICOMOS, Biuro Stołecznego Konserwatora Zabytków Urzędu Miasta Stołecznego Warszawa, Politechnika Lubelska, 2011), 8.



central administration. The entire picture of the situation is further confused by the fact that the General Inspector of Monuments, being the actual subject fulfilling the tasks of the minister in the said area, is additionally burdened by multiple and diverse public tasks, especially those of organising and organisational character. What is more, at present there are not requirements whatsoever concerning the competencies expected of the holders of this office, which requires the support of advisory bodies due to the diversity and complexity of issues associated with monuments protection.<sup>30</sup> As a result, taking the above doubts into consideration as well as the implemented changes causing the provincial inspector of monuments to lose his procedural rights in civil proceedings, we cannot offer any optimistic outlook for the real possibilities of monuments protection by way of civil procedure.

Further, it is extremely important that when modifying the wording of art. 95 PCM the legislator virtually founded the procedural status of the minister competent for the matters of culture and protection of national heritage on the position attributed so far to the public prosecutor.<sup>31</sup> This is not an extraordinary situation because in the system of civil procedure the regulations concerning the participation of the prosecutor in civil proceedings has become a model institution for the determination of the involvement of entities other than subjects substantively authorised in civil proceedings and acting towards the protection of individual interests on the basis of substitution in court proceedings.<sup>32</sup> In practice, however, the legislator's approach to this issue is quite diverse. When determining the procedural status of an entity acting as a party, the legislator indicates that, on the one hand, this entity acts in the capacity of a prosecutor (take, for instance, the case of the Ombudsman for Children's Rights or Commissioner for Civil Rights Protection), but on the other prescribes the application of provisions related to prosecutors, respectively (as in the case of inspectors of the National Labour Inspectorate or district or municipal consumer ombudsmen). When defining the legal status of the minister in art. 95 PCM, the legislator provided explicitly that the minister has the powers of a prosecutor, which clearly demonstrates that the provisions of civil procedure governing the sphere of the prosecutor's procedural right must be applied directly.

<sup>30</sup> See R. PŁASZOWSKA, „Organizacja organów ochrony zabytków,” *Przegląd Prawa Publicznego* 6 (2016): 100–101.

<sup>31</sup> The scope of specific powers of the prosecutor was set forth, among others, the following provisions: art. 7, art. 55–60, art. 87<sup>1</sup> §2, art. 106, art. 154 §1, art. 158, art. 210 §1, art. 301, art. 325, art. 398<sup>1</sup> §1 and §2, art. 398<sup>3</sup> §2, art. 398<sup>4</sup> §3, art. 398<sup>5</sup> §2, art. 398<sup>7</sup> §1, art. 398<sup>8</sup> §1, art. 398<sup>11</sup> §4, art. 398<sup>18</sup>, 424<sup>2</sup>, 428 §1, art. 448 §1 and §2, art. 449 §1 and §2, art. 454 §§1–4, art. 457, art. 511 §2, art. 546 §2, art. 572 §2, art. 598<sup>1</sup> §1, art. 598<sup>11</sup> §1, art. 762 §3 and art. 768 of the Code of Civil Procedure.

<sup>32</sup> See GAJDA-ROSZCZYŃSKA, *Udział podmiotów*, 371.

Such a formulation can also raise a number of substantial doubts of practical nature,<sup>33</sup> especially that the prosecutor is obliged to exercise his procedural rights if statutory conditions for his intervention are met – given the fact that the authority to take procedural steps has been juxtaposed with the obligation (having connotations under public law) to undertake necessary actions. The said obligation to act falls within the scope of official duties of the prosecutor, who – as a public official – carries out his statutory tasks with respect to the safeguarding of the rule of law, effectively removing the arbitrariness of the application of his procedural rights.<sup>34</sup> Against this background, it seems though that the legislator’s intention with respect to a minister competent for the matters of culture and protection of national heritage – stemming from the reference to the status of a prosecutor in civil procedure – applies only to the possibility of using the procedural rights available to the prosecutor but it does not concern the obligation to undertake necessary action. Therefore, the discretionary appraisal of all of the actual circumstances and the decision of this organ will affect the application of procedural measures for monuments protection.

The adoption of such a position permits the conclusion that there are no justified arguments for the appropriate application of art. 59 CCP with respect to the General Inspector of Monuments in judicial proceedings concerning monuments protection, thus obliging the court to notify the prosecutor of every case in which his participation is deemed necessary. Therefore, bearing in mind that the bodies of public authority act only and solely on the basis and within the limits of the law, it would be hard to require the General Inspector of Monuments, who has in fact been isolated from the information of any contraventions save for public media reports,<sup>35</sup> to undertake any procedural measures.

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<sup>33</sup> They may concern, for example, the reaching of a court settlement because a reference for the application of provisions governing uniform participation in the case when the prosecutor brings an action for the benefit of a particular person, i.e. art. 73 §2 sentence 2 CCP, will require the consent of all the participants to be able to enter into an agreement, waive a claim or accept an action. A literal reading of this provision, although the prosecutor is treated merely as a party in the formal sense, could lead to an erroneous conclusion claiming that the prosecutor is authorised to influence the disposal of the substantive rights of another person. Similarly, see Z. ZAWADZKA, “Pozycja procesowa prokuratora w postępowaniu cywilnym,” *Prokuratura i Prawo* 6 (2010): 128.

<sup>34</sup> See A. KOŚCIÓŁEK, *Elektroniczne czynności procesowe w sądowym postępowaniu cywilnym* (Warsaw: Wolters Kluwer, 2012), 37–38.

<sup>35</sup> This is important, as the inspection of the Supreme Audit Office suggests, because even provincial inspectors of monuments have been deprived of access to substantial information of ongoing proceedings related to monument protection. They are not notified of ongoing proceedings by courts because no such obligation exists. They are not authorised to obtain such information on their own, either, because, being entrusted with numerous tasks involving protection, they do not conduct de facto supervision of historic monuments. See *Informacja o wynikach kontroli. Współdziałanie wojewódzkich konserwatorów zabytków oraz jednostek samorządu terytorialnego*, accessed July 10, 2017, <https://www.nik.gov.pl/plik/id,10533,vp,12862.pdf>.

The general regulations of civil procedure envisage two forms of participation of the public prosecutor in a proceeding. Art. 7 CCP lays the legal basis for the participation of a prosecutor, and as such it provides that he can request that, in principle, proceedings in every case be instituted (initiated); likewise, he can take part in any pending proceedings if so demanded by the rule of law, citizens' rights or public interest. Consequently, similar powers will be available by way of statutory reference also to the minister competent for the matters of culture and protection of national heritage, acting through the General Inspector of Monuments, whenever a given proceeding will be a civil case involving the protection of monuments and cultural heritage, including public collections, restitution of cultural assets such as those unlawfully removed from the territory of Poland. The nature of these criteria permits the argument that the protection provided by this body in civil proceedings will essentially remain outside the sphere of private-law interests, unless it corresponds to the legal interest of the substantially authorised party to the case.<sup>36</sup>

The first situation implies that if a party in the substantive sense does not decide to get involved in an instituted proceeding, the said minister will act independently in the capacity of the claimant in the formal sense based on the proper application of provisions of law. The involvement of a person who is substantially authorised will lead to a situation in which this person will also act as a party in the formal sense, that is another claimant. As a result of the mutual relations of these entities, relevant provisions governing uniform participation will apply (art. 73 §2 CCP).<sup>37</sup>

In the situation when the public prosecutor (minister), bringing an action pursuant to art. 57 CCP, does not act on behalf of a specified person, he files a statement of claim against all persons who are parties to the legal relation to which the action is related. In such circumstances his legal status is different because he uses his own, independent formal-law and substantive-law entitlement, becoming the sole complainant in the case, so he can deal with the object of the judicial proceedings.

In the other case under our scrutiny, the public prosecutor has an independent procedural status as indicated expressly in the law by being not connected with any of the parties because in this situation the prosecutor (or a minister) may join proceedings at any stage (*in principio* art. 60 §1 CCP). He cannot, however, perform acts which are inadmissible at a particular stage of the case or request that actions performed in the proceedings before his joining be repeated. It is relevant for

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<sup>36</sup> See A. FRANUSZ, "Dokonywanie czynności dyspozytywnych o charakterze materialnym w procesie z powództwa prokuratora na rzecz oznaczonej osoby," *Prokuratura i Prawo* 9 (2016): 111–12.

<sup>37</sup> See the resolution of the 7 justices of the Supreme Court dated February 23, 1970, file ref. no. III CZP 81/69, Lex no. 1028.

the fullest possible protection of monuments that the minister competent for the matters of culture and protection of national heritage is authorised to conduct all acts of legal procedure available at a given stage without the consent of the party which he joined or even in the face of the party's express objection.<sup>38</sup>

By outlining the procedural rights available to the minister participating in the civil proceedings concerning monuments protection – by reference to the procedural rights of the public prosecutor – he will be authorised to undertake measures intended to protect or secure monuments in judicial proceedings. He will have this special option to submit any declarations and motions he deems appropriate as well as adducing facts and evidence to support them. As part of proceedings in a particular case, the court will be obliged to hand over all pleadings to him, including notices of dates and court sessions, as well as judgements already handed down (*in fine* art. 60 §1 CCP). The prosecutor is also enabled to appeal any appealable court decision regardless whether he took part in the proceedings or whether he never joined them (art. 60 §2 CCP).<sup>39</sup>

However, the reference made by the legislator to the procedural rights of the prosecutor is dubious because the doctrine of civil procedural law has long questioned the legitimacy of the idea of maintaining the procedural position of the prosecutor in judicial proceedings,<sup>40</sup> arguing that it overly infringes the principle of disposition, deeming it to be unsubstantiated in the legal system of a democratic state of law.<sup>41</sup> As a result, we increasingly hear voices in the literature of the subject in favour of reducing, if not removing, the procedural rights of the public prosecutor (and, as a consequence, those of a minister competent for the matters of culture and protection of national heritage in cases concerning monuments protection).<sup>42</sup>

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<sup>38</sup> See A. ZIELIŃSKI, *Komentarz do art. 60 Kodeksu postępowania cywilnego*, in *Kodeks postępowania cywilnego. Komentarz*, ed. A. Zieliński (Warsaw: Wydawnictwo C.H. Beck, 2014), 135.

<sup>39</sup> See M. SYCHOWICZ, "Komentarz do art. 60 Kodeksu postępowania cywilnego," in *Komentarz do art. 1-366*, vol. 1 of *Kodeks postępowania cywilnego*, ed. K. Piasecki, 268–69 (Warsaw: Wydawnictwo C.H. Beck, 2010).

<sup>40</sup> See S. MARCINIĄK, "Krytyka fundamentalnych zasad polskiego postępowania cywilnego w związku z przeobrażeniami ustrojowymi państwa," accessed July 10, 2017, <http://www.wglex.pl/krytyka-antysystemowa-sztuka-filozofia-polityka/>.

<sup>41</sup> See A. JAKUBECKI, "Naczelne zasady postępowania cywilnego w świetle nowelizacji kodeksu postępowania cywilnego," in *Czterdziestolecie kodeksu cywilnego. Zjazd katedr postępowania cywilnego w Zakopanem (7–9 października 2005 r.)*, ed. I. Ratusińska (Kraków: Wolters Kluwer Polska, 2006), 357.

<sup>42</sup> See T. ERECIŃSKI, "O potrzebie nowego kodeksu postępowania cywilnego," *Państwo i Prawo* 3 (2004): 8; A.G. Harla, "Uprawnienie prokuratora do wszczęcia postępowania w sprawie cywilnej (art. 7 k.p.c.) – uwagi de lege lata i de lege ferenda." *Palestra* 3–4 (2006): 35.

## CONCLUSION

The regulation of the procedural status of the provincial inspector of monuments provided by the previous wording of art. 95 point 1 PCM, despite its succinctness and imperfections – subject to criticism of the doctrine – constituted in practice a major component of procedural protection of monuments. The recent amendment – stimulated by a legislative intervention introducing the desirable law on the restitution of the national cultural property into the Polish legal system – which in effect removed the provincial inspector of monuments from the catalogue of entities authorised to perform acts of legal procedure in civil proceedings with respect to monuments protection, and as such it should be assessed very critically. The lack of a clear justification of the amendments, doubts concerning an unambiguous interpretation of the amended provisions as well as the failure to address the need for a comprehensive system of legal protection of monuments which would also cover procedural instruments for the enforcement of such protection in the framework of civil procedure, should be regarded as somewhat chaotic and pointless, and definitely not contributing to the building of a better system of monuments protection in Poland – in the part excising the powers of the provincial inspector of monuments.

At the same time, it seems that the critical appraisal of the amendments is in a way mitigated by legislative changes enabling effective restitution of the lost national assets of culture by public authorities. The applied legislative changes beg the question concerning their real consequences, which in the case of historical monuments may not always be subject to “restitution”.

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#### THE PROCEDURAL STATUS OF THE PROVINCIAL INSPECTOR OF MONUMENTS IN CIVIL PROCEEDINGS IN THE LIGHT OF LEGISLATIVE CHANGES

##### Summary

The article presents considerations on the procedural status of the provincial inspector of monuments in civil proceedings against the background of the recent legislative changes. The procedural rights of the monuments protection authority in civil proceedings are set out in art. 95 of the act on the protection and care of monuments. As a result of the newly introduced act on the restitution of the national cultural property into the Polish legal system, this provision has been modified by removing the provincial inspector of monuments from the catalogue of monuments protection authorities authorised to use the procedural means of monuments protection in civil proceedings. Despite the understandable need to fill in the legal gap enabling the return of seized cultural goods, the recent amendment still provides a platform for academic polemics.

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

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