

Who should Issue a Permit for the Memorial? Administrative Law as a Platform for the Conflict over the Construction of the Monument to the Victims of the Smoleńsk Tragedy in Warsaw

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Abstract. Circles associated with the ruling Law and Justice party decided to build a monument to the victims of the crash of a Polish government airplane in Smoleńsk on April 10, 2010 in Piłsudski Square in Warsaw. However, the authorities of that city, associated with the political opposition, were not positive about the project. Government bodies instrumentally used (and even abused) existing institutions of administrative law to build the monument despite the opposition of the local self-government. First, control over Piłsudski Square was taken away from the city authorities. Then the square was declared a closed area of military importance so that the city authorities could not make it difficult to obtain permission to build the monument. Finally, the Polish parliament created special legislation to make it more difficult to remove the monument in the future.

Keywords: Smoleńsk air disaster, Smoleńsk monument, instrumentalization of law, memory laws, construction law.

Kas turėtų išduoti leidimą statyti paminklą? Administracinė teisė kaip konflikto platforma: paminklo Varšuvoje Smolensko tragedijos aukoms atminti atvejis

Santrauka. Lenkijos valdančiosios partijos „Teisė ir teisingumas“ atstovai nusprendė Juzefo Piłsudskio aikštėje Varšuvoje pastatyti paminklą 2010 m. balandžio 10 d. Lenkijos vyriausybės lėktuvo katastrofos Smolenske aukų atminimui. Tačiau su tuomete politinė

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opozicija sieta Varšuvos miesto valdžia projektą įvertino neigiamai. Nepaisant vietos savivaldos pasipriešinimo, valstybinės valdžios institucijos pasinaudojo (ir net piktnaudžiavo) veikiančiomis administracinės teisės institucijomis, kad paminklas būtų pastatytas. Pirmiausia buvo apribotos miesto valdžios galimybės kontroliuoti Pilsudskio aikštę. Blokuojant miesto valdžios turimus įrankius ir siekiant ap sunkinti leidimo statyti paminklą išdavimą, ji buvo paskelbta uždara karinės reikšmės teritorija. Galiausiai Lenkijos parlamentas sukūrė specialius teisės aktus, apsunkeinančius galimybę pašalinti paminklą ateityje.

Reikšminiai žodžiai: Smolensko lėktuvo katastrofa, Smolensko paminklas, įstatymo instrumentalizacija, atminties įstatymai.

Introduction

The interrelationship of law and social collective memory is usually investigated in the context of the creation and application of specialized legal regulations in this area – so-called *memory laws*. This term was coined in France in 2000s as a name for legislation penalizing i.a. Holocaust negationists.¹ According to Uladzislau Belavusau and Aleksandra Gliszczyńska-Grabias “such laws enshrine state-approved interpretations of crucial historical events. They commemorate victims of past atrocities as well as heroic individuals or events emblematic of national and social movements.”² They explain, that “[m]emory laws affect us in various, often controversial ways. They sometimes impose criminal penalties on speech or conduct deemed offensive to the plight of heroes and victims. <...> Children everywhere grow up reading state-approved texts designed to impact not merely a knowledge, but an interpretation of history. Governments everywhere designate national memorial ceremonies or authorize the construction of public monuments.”³ It is clear that the *memory laws*

¹ Nikolai Koposov, *Memory Laws, Memory Wars. The Politics of the Past in Europe and Russia* (Cambridge: Cambridge University Press, 2018), 1.

² Uladzislau Belavusau and Aleksandra Gliszczyńska-Grabias, “Introduction: Memory Laws: Mapping a New Subject in Comparative Law and Transitional Justice,” in *Law and Memory. Towards Legal Governance of History*, eds. Uladzislau Belavusau and Aleksandra Gliszczyńska-Grabias (Cambridge: Cambridge University Press, 2017), 1.

³ Belavusau and Gliszczyńska-Grabias, 1.

quite often and thoroughly studied by scholars⁴ are specialized legal regulations created for the sole purpose of legal governance of history.

Marta Buholc names four areas of particular intense reciprocal relationship between law and memory in the context of memory activism: memory laws (defined as above), truth seeking initiatives, mnemonic mobilization in the struggles for historical justice, and constitutional memories.⁵ Also in the case of this broader area of regulation, it is easy to see that their impact on social collective memory has had to be one of the contexts considered by the legislator.

There are also such legal acts which do not have the primary intention of shaping collective memory, but it is easy to see that they can be used for this purpose. The laws regulating street naming can serve as an example. In the same procedure, a street can be given a name that is both completely historically neutral or that commemorates a certain person or event. This is being investigated by researchers from various countries.⁶

However, there are situations where only in the practice of applying the law it becomes apparent that some regulations are relevant to the implementation of certain projects of shaping social collective memory. An analysis of the content of legislation without the context of a particular case may lead to the conclusion that it has no relevance to the subject matter, but later in practice it nevertheless turns out that it is decisive. Examining the role of such legislation in the implemen-

⁴ For state of research on memory laws see e.g.: Uladzislaw Belavusau, "The Rise of Memory Laws in Poland an Adequate Tool to Counter Historical Disinformation?," *Security and Human Rights* 29, Issue 1–4 (2018): 37–38.

⁵ Marta Buholc, "Law," in *The Routledge Handbook of Memory Activism*, eds. Yifat Gutman and Jenny Wüstenberg (London and New York: Routledge, 2023), 150.

⁶ See e.g.: Michael Hebbert, "The Street as Locus of Collective Memory," *Environment and Planning D Society and Space* 23: 581–596; Vasile Docea, "History, Ideology and Collective Memory. Reconstructing the Identities of Timisoara by Means of Monographies and Street Names during the Communist Regime (1947–1989)," *Acta Universitatis Sapientiae European and Regional Studies* 1, no. 1 (2010): 83–102; Bartłomiej Różycki, "Renaming Urban Toponymy as a Mean of redefining Local Identity: The Case of Street Decommunization in Poland," *Open Political Science* 1, no. 1 (2017): 20–31.

tation of the politics of memory is only possible using the case study method. First, it is necessary to identify a specific conflict, and then analyze all the legal instruments that were used by both sides of the dispute. The results of such research make it possible to identify new areas (often specific to a particular country or region) in which there is an intense reciprocal relationship between law and memory.

The installation of monuments in public space often becomes the topic of heated disagreements. Situations in which there is a serious dissension in society about the appropriateness of commemorating a particular person or event (in general or in some specific way or place) are frequent. Usually these conflicts are analyzed from the perspective of politics, sociology or history. However, it should be remembered that in a democratic state under the rule of law, all major interventions in public space must take place on the basis of and within the limits of the law. That is why legal regulations can become a tool in the hands of those who want to press through the establishment of a certain monument. In turn, opponents of the same commemoration can use legal institutions to prevent the criticized initiative. Therefore, such conflicts can be a good subject for a case study on regulations whose significance for social collective memory is not obvious.

This paper is a study of such a case from Poland. It analyzes the instrumental use of administrative law to build a Monument to the Victims of the Smoleńsk Tragedy on Piłsudski Square in Warsaw. Aside from the introduction and conclusion, the paper consists of five parts. First, relevant information about the Smoleńsk Tragedy, the place where it was to be commemorated and the monument itself is briefly gathered. Then the legal regulations governing the construction of monuments in Poland are presented. The following sections analyze how instrumental use of existing and newly created laws has been used by Poland's ruling political forces to take control of the site of the intended commemoration, to authorize the construction of the monument despite the objections of local authorities, and to protect it from possible attempts to remove it in the future.

1. Monument to the Victims of the Smoleńsk Tragedy on Piłsudski Square in Warsaw – subject, manner and place of commemoration

1.1. The Smoleńsk Tragedy

Smoleńsk Tragedy is the name commonly used in Poland for the plane crash that took place at Smoleńsk North Airport near the city of Smoleńsk, Russia, on April 10, 2010. At the time, a Tupolev Tu-154 M belonging to the Polish Air Force crashed while attempting to land. There were 96 people on board the machine, all of whom died. Among the delegation going to the ceremonies marking the seventieth anniversary of the Katyń massacre⁷ were the president of the Republic of Poland Lech Kaczyński and his wife Maria Kaczyńska, the last president of the Republic of Poland in exile Ryszard Kaczorowski, deputy speakers of the Sejm and Senate, 18 members of parliament and the most important commanders of the Polish army.

The Smoleńsk Tragedy briefly united society and the political class. However, it soon proved to be a source of new conflicts and divisions. The first protests erupted after the announcement that the presidential couple would be buried at Wawel Castle. Subsequent tensions arose over the further fate of the cross spontaneously erected by scouts in front of the Presidential Palace shortly after the catastrophe, the investigation into the crash or the issue of returning the wreckage of the plane to Poland. Attitudes toward the disaster overlaid the lines of Poland's long-standing political divisions, leading to an intensification of conflicts.⁸ The topic of the Smoleńsk catastrophe

⁷ This was a war crime committed by the NKVD in the spring of 1940 – the Soviets executed then at least 21,768 Polish citizens (including many Polish Army officers). See: Anna M. Cieniala, Natalia S. Lebedeva and Wojciech Materski, eds., *Katyń: A Crime Without Punishment. Annals of Communism Series* (New Haven: Yale University Press, 2008).

⁸ Agnieszka Bejma, „Od afery Rywina do katastrofy smoleńskiej – nowe (utrwalone) podziały społeczno-polityczne w Polsce,” *Studia Politologiczne*, nr 29 (2013): 127–128.

continued to play an important role in the electoral campaign ahead of the 2015 presidential and parliamentary elections.⁹ Along with the catastrophe, the “Smoleńsk myth” constructed around the figure of the tragically deceased president was born. Its manifestations include numerous films, books or exhibitions devoted to the Smoleńsk Tragedy, marches and happenings related to it or even recitals of “Smoleńsk songs.”¹⁰ This event had a very great impact on Polish social and political reality. Initiatives to commemorate it in the public space should therefore come as no surprise to anyone.

1.2. Piłsudski Square

Regardless of any controversy surrounding the Smoleńsk catastrophe, there was no doubt about the unprecedented magnitude of the tragedy. It is therefore not surprising that discussions about the need to commemorate it began shortly after the victims’ funerals. The debates focused on three potential locations. Two of them were specified precisely from the beginning. The first was the crash site at the Smoleńsk North Airport, while the second was the section of the Powązki Military Cemetery in Warsaw, where 28 of the crash victims were buried. The third location was to be some open urban space in the Polish capital, suitable for a commemoration of this kind.¹¹

Initially, there was even discussion of erecting a monument in front of the Presidential Palace on Krakowskie Przedmieście Street. It was supposed to commemorate only Lech Kaczyński, replacing the monument to Prince Poniatowski, that would have to be moved

⁹ Arkadiusz Nyzio, „Znacząca nieobecność? Katastrofa smoleńska w kampaniach wyborczych 2015 roku,” in *Oblicza kampanii wyborczych 2015*, eds. Małgorzata Kulałowska, Piotr Borowiec and Paweł Ścigaj (Kraków: Wydawnictwo Uniwersytetu Jagiellońskiego, 2016), 436.

¹⁰ Paweł Sendyka, „Narodziny „mitu smoleńskiego”,” *Prace Etnograficzne*, nr 1 (2013): 49.

¹¹ Halina Taborska, „Pomniki smoleńskie w Warszawie – lokalizacje, dzieła, kontrowersje,” *Zeszyty naukowe PUNO*, nr 7 (2019): 15.

to another location, which aroused great controversy.¹² Later, locations (already for two individual monuments: to the victims of the Smoleńsk catastrophe and separately to Lech Kaczyński) were also indicated on Krakowskie Przedmieście Street, but at a slightly greater distance from the Presidential Palace. This variant was supported by the chairman of the Law and Justice party, Jarosław Kaczyński (brother of the president, who died in the crash), and Jacek Sasin – a Law and Justice party politician particularly involved in the construction of the monuments.¹³ However, the local government of Warsaw did not want to agree to this location, pointing out that it was not accepted by the city’s conservator of monuments. Instead, they proposed (in agreement with some of the families of the victims of the crash) to erect the monument at the corner of Trębacka Street and Focha Street, in the immediate vicinity of Krakowskie Przedmieście Street.¹⁴

In January 2018 Jacek Sasin rather unexpectedly announced that a new location for the monuments which would be “easier to carry out” would be announced soon, and according to him, no properties managed by the authorities of Warsaw can be considered in this context.¹⁵ On February 7, 2018, ‘Social Committee for the Construction of Monuments: The late President of the Republic of Poland Lech

¹² Anna Szulc, „Pomnik smoleński przed Pałacem. Co prezydent Duda zlecił w sekrecie?”, *Newsweek*, March 21, 2016. Accessed August 20, 2023, <https://www.newsweek.pl/polska/tajny-projekt-pomnika-lecha-kaczynskiego/ph1lkne>

¹³ Michał Wotjczuk, „3 mln zł za dwa pomniki ofiar katastrofy smoleńskiej. „Mają nie być okazałe, ale bardzo okazałe”,” *Gazeta Wyborcza*, April 13, 2017. Accessed August 20, 2023, https://warszawa.wyborcza.pl/warszawa/7,54420,21631078,3-mln-zl-za-dwa-pomniki-ofiar-katastrofy-smolenskiej-maja.html#S.embed_link-K.C-B.1-L.2.zw

¹⁴ Portal Samorządowy, „Warszawa: Radni decydują o lokalizacji pomnika smoleńskiego,” April 9, 2015. Accessed August 20, 2023, <https://www.portalsamorzadowy.pl/komunikacja-spoleczna/warszawa-radni-zdecyduja-o-lokalizacji-pomnika-smolenskigo,69385.html>

¹⁵ Dziennik Gazeta Prawna, „Sasin: Na początku przyszłego tygodnia podamy nowe lokalizacje pomników smoleńskich,” January 26, 2018. Accessed August 20, 2023, <https://www.gazetaprawna.pl/wiadomosci/artykuly/1100549,jacek-sasin-na-poczatku-przyszlego-tygodnia-podamy-nowe-lokalizacje-pomnikow-smolenskich.html>

Kaczyński and the Victims of the 2010 Smoleńsk Tragedy' has announced that the Smoleńsk monument will be built in the immediate vicinity of Piłsudski Square.¹⁶

Marshal Józef Piłsudski Square (this is the full name) is located in Warsaw's Śródmieście district, between the Saxon Garden and Molière, Królewska, Tokarzewski-Karaszewicz and Ossolińscy Streets. It was created as the courtyard of the Saxon Palace (built in 1712–1727 through a major expansion of the manor house that previously existed there). In the interwar period, the Tomb of the Unknown Soldier was located under the colonnade of the palace. The fragment of the colonnade with this tomb is the only part of the Saxon Palace that survived after the structure was blown up by German troops in 1944 (measures have now been taken to rebuild it). During the People's Poland period, the square was called Victory Square.¹⁷ Piłsudski Square was the site of many events of a different nature: both the parades of the German occupiers during World War II, official celebrations in People's Poland (such as the May Day parades), but also manifestations of the anti-communist opposition or the Mass celebrated by Pope John Paul II and the funeral ceremonies of Cardinal Stefan Wyszyński.¹⁸ Therefore, there is no doubt that this is a place of special significance for the history of Warsaw and Poland.

It is worth mentioning that, according to public opinion research, the idea of building a Smoleńsk monument in Piłsudski Square has not gained widespread support. In a poll commissioned by the Rzeczpospolita daily newspaper, 60.8% of respondents said that the monument should not be erected in this location. Only 17.6% of people expressed support for its construction in this site. 21.8% had no

¹⁶ Wprost, „Ogłoszono miejsce postawienia warszawskiego Pomnika Ofiar Tragedii Smoleńskiej,” February 7, 2018. Accessed August 20, 2023, <https://www.wprost.pl/kraj/10102659/ogloszono-miejsce-postawienia-warszawskiego-pomnika-ofiar-tragedii-smolenskiej.html>

¹⁷ Eugeniusz Szwankowski, *Ulice i place Warszawy* (Warszawa: Państwowe Wydawnictwo Naukowe, 1970), 269.

¹⁸ Bartłomiej Kaczorowski (ed.), *Encyklopedia Warszawy* (Warszawa: Wydawnictwo Naukowe PWN, 1994), 638.

opinion.¹⁹ In a poll conducted only among Warsaw residents at the request of the capital's City Hall, as many as 71% of people voted against the construction of a Smoleńsk monument in Piłsudski Square.²⁰ The location finally designated for the Monument to the Victims of the Smoleńsk Tragedy was therefore highly controversial not only among politicians, but also in society.

1.3. Monument to the Victims of the Smoleńsk Tragedy

The commemoration was initiated by the 'Social Committee for the Construction of Monuments: The late President of the Republic of Poland Lech Kaczyński and the Victims of the 2010 Smoleńsk Tragedy,' established on April 26, 2016, which was also the organizer of the public fundraising for this purpose. It included many leading Law and Justice party politicians, including Jarosław Kaczyński, Mariusz Błaszczak and Marek Kuchciński. It also included relatives of some of the victims of the crash and right-wing journalists, such as Bronisław Wildstein and Marcin Wołski.²¹ Therefore, this social organization cannot be considered apolitical.

The social committee organized a competition to develop a design for a Monument to the Victims of the Smoleńsk Tragedy. It was resolved on October 19, 2017 by a jury chaired by Prof. T. J. Żuchowski, an art historian from Adam Mickiewicz University in Poznań. The chosen design was submitted by Jerzy Kalina, a graduate of the Painting Department of the Academy of Fine Arts in War-

¹⁹ Rzeczpospolita, „Sondaż: Czy pomnik smoleński stawiać na placu Piłsudskiego,” February 14, 2018. Accessed August 20, 2023, <https://www.rp.pl/spoleczenstwo/art9934341-sondaz-czy-pomnik-smolenski-stawiac-na-placu-pilsudskiego>

²⁰ Michał Wojtczuk, „71 proc. warszawiaków w sondażu przeciwko budowie pomnika smoleńskiego na pl. Piłsudskiego,” *Gazeta Wyborcza*, November 22, 2017. Accessed August 20, 2023, <https://warszawa.wyborcza.pl/warszawa/7,54420,22681241,71-proc-warszawiakow-w-sondazu-przeciwko-budowie-pomnika-smolenskiego.html>

²¹ „Skład Komitetu,” Komitet Społeczny Budowy Pomników: Śp. Prezydenta RP Lecha Kaczyńskiego oraz Ofiar Tragedii Smoleńskiej 2010 roku. Accessed August 20, 2023, <http://web.archive.org/web/20190121152818/http://komitetspolecznybudowypomnikow.pl/sklad-komitetu.html>

saw, sculptor, theater and film set designer, as well as creator of documentary films and theater performances.²²

The monument was unveiled on April 10, 2018, the eighth anniversary of the catastrophe. It has the form of a black block 6 meters high. Its shape is reminiscent of an airplane passenger boarding stairs. On its front are 96 names of the victims in alphabetical order.²³ The author of the monument said this about his intentions: “I wanted the usually empty square to resemble an airport waiting for the return, and in this space there was a gangway with lights.”²⁴

2. Polish legal regulations on the construction of monuments

Before describing the case of the Monument to the Victims of the Smoleńsk Tragedy, it is necessary to clarify what legal regulations apply to the erection of monuments in Poland. The key legal act in this context should be considered the *Construction Law*.²⁵ Its Article 3 point 3 puts the monuments in the category of structures. According to Article 3 point 1, a structure is one of the types of construction structures. Article 3 point 7, on the other hand, states that the construction of a construction structure is construction work. According to Article 28 Section 1 of the Construction Law, construction work can only be started on the basis of a construction permit decision. The law provides for many exceptions to this rule, but the construction of a monument is not one of them. Therefore, an analysis of all these definitions leads to the conclusion that the erection of a monument in Poland requires a construction permit in the form of an adminis-

²² Taborska, „Pomniki smoleńskie w Warszawie – lokalizacje, dzieła, kontrowersje,” 36.

²³ Maria Czapotowicz-Głowacka, „Narracje heroiczne w przestrzeni miejskiej”, *Stan Rzeczy*, nr 19 (2020): 191.

²⁴ „To nie są tylko schody do nieba”. Jerzy Kalina o pomniku smoleńskim, *Polskie Radio* 24. Accessed August 20, 2023, <https://polskieradio24.pl/130/5927/artykul/2717701,tonie-sa-tylko-schody-do-nieba-jerzy-kalina-o-pomniku-smolenskim>

²⁵ Ustawa z dnia 7 lipca 1994 r. Prawo budowlane (consolidated text: Dz.U. 2023 poz. 682).

trative decision. Pursuant to Article 82 Section 2 in conjunction with Article 28 Section 1a, such a decision is issued by the relevant local self-government authorities at the level of the powiat.²⁶ Warsaw (like other large cities in Poland) has the status of a city with the right of a powiat. This means that it is not part of any powiat, and its local government authorities perform all the tasks assigned in various laws to powiat authorities. Consequently, in Warsaw, as a rule, it is the municipal authorities that have the authority to issue decisions on construction permits. As will become immediately apparent, in order to obtain a permit it is necessary to dispose of the land for construction purposes. Art. 3 point 11 of the Construction Law defines this as the possession of a legal title arising from ownership, perpetual usufruct, management, limited right in rem or a contractual relationship providing for the right to carry out construction work. This means that the entity authorized to obtain a construction permit is not always the owner of the land. In certain situations, the right to dispose of real estate for construction purposes may be held by someone else, based on one of the above-mentioned legal titles.

It is necessary to clarify here the meaning of Article 18 Section 2 point 3 of *the Law on Municipal Self-Government*,²⁷ which stipulates that adopting resolutions on the erection of monuments is the exclusive competence of the municipal council (and therefore, in the case of urban municipalities, the city council). It should be pointed out that this provision is only related to the manner of exercising ownership rights in the event that the monument in question is to be located on land owned by the municipality.²⁸ It does not give the municipal council the right to decide on the erection of monuments

²⁶ A powiat (sometimes translated as county) is the second of three levels of local government in Poland, located above a municipality and below a voivodeship.

²⁷ Ustawa z dnia 8 marca 1990 r. o samorządzie gminnym (consolidated text: Dz.U. 2023 poz. 40).

²⁸ Beata Chanowska-Dymlang, „Rada gminy nie jest upoważniona do wyrażenia zgody na budowę pomnika,” *Legalis administracja*, August 23, 2017. Accessed August 20, 2023, <https://gov.legalis.pl/rada-gminy-nie-jest-upowazniona-do-wyrazenia-zgody-na-budowe-pomnika/>

on land that has other owners (i.e. private or state-owned). It should be understood as an indication that in the case of the construction of a monument on land owned by the municipality, it is the municipal council (and not, for example, the president of the city) that should make the decision. The entity erecting a monument on its own land is only required to obtain a construction permit.

3. Struggle for control over Piłsudski Square

As outlined above, in order to obtain a building permit, it is necessary to have the right to dispose of the property on which the project is to be located for construction purposes. Piłsudski Square is owned by the State Treasury.²⁹ However, for many years it was the Warsaw authorities that held the right to dispose of this property for the construction purposes, as described above, necessary to build the monument. This legal state of affairs requires clarification.

The *Law on Real Estate Management*³⁰ in its Article 43 introduced the institution of the so-called permanent management. This is a public-legal form of possession of national or municipal real estate by organizational units without legal personality, distinct from limited rights in rem or civil law contracts.³¹ As a rule, state property can only be put under the management of a state organizational unit, and local government property only to a local government organizational unit.³² However, the political system reforms carried out in Poland in the 1990s created exceptions to this rule. The structure of

²⁹ Tomasz Urzykowski, „Plac Piłsudskiego. Wojna wojewody z Zarządem Dróg Miejskich o „serce stolicy”,” *Gazeta Wyborcza*, October 27 2017. Accessed August 20, 2023, <https://warszawa.wyborcza.pl/warszawa/7,54420,22571263,plac-pilsudskiego-wojna-wojewody-z-zarzadem-drog-miejskich.html>

³⁰ Ustawa z dnia 21 sierpnia 1997 r. o gospodarce nieruchomościami (consolidated text: Dz.U. 2023 poz. 344).

³¹ Anna Trembecka, „Trwały zarząd jako forma władania nieruchomościami publicznymi na przykładzie miasta Krakowa,” *Acta Scientiarum Polonorum. Administratio Locorum* 16, nr 3 (2017): 216.

³² Leszek Bielecki, „Zarządzanie nieruchomościami a trwały zarząd nieruchomością,” *Rocznik Administracji Publicznej*, nr 1(2015): 10.

local government was then changed. In addition to communes and voivodships (the number of which was significantly reduced), a new, intermediate level of local self-government was introduced – powiats.³³ As a result, it was necessary to adjust the categories of public roads. Until then, there were national, municipal and voivodeship roads, and powiat roads had to be introduced as well. According to Article 103 of the *Introductory Provisions of the Laws Reforming Public Administration*,³⁴ national and provincial roads were listed in an ordinance of the Council of Ministers. The existing national and provincial roads not included in this list became powiat roads as of January 1, 1999. Powiat road authorities became the legal successors of the previous road authorities through the appropriate application of Section 2 of Article 49 of the *Law on Real Estate Management*. This provision stipulates that permanent management should be established over real estate in favor of the entities taking over the corresponding tasks.

Piłsudski Square is included in the list of powiat roads in Warsaw, as a city with rights of the powiat.³⁵ According to the regulations analyzed above, that is why the area had been under the permanent management of the Warsaw City Road Authority since the late 1990s.³⁶ According to Section 2 of Article 43 of the *Law on Real Estate Management*, an entity to which real estate has been given into permanent management has the right to carry out construction work on the

³³ See: Arkadiusz Ptak, „Territorial Self-government during Transformation in Poland. Significance, Evolution and Conclusions de lege ferenda,” in *Transformacja polska – oczekiwania i rzeczywistość*, eds. Joanna Dzwonczyk and Jerzy Kornaś (Kraków: Wydawnictwo Uniwersytetu Ekonomicznego, 2010), 311–321.

³⁴ Ustawa z dnia 13 października 1998 r. Przepisy wprowadzające ustawy reformujące administrację publiczną (Dz.U. nr 133 poz. 872).

³⁵ „Wykaz dróg powiatowych w Warszawie,” Zarząd Dróg Miejskich w Warszawie. Accessed August 20, 2023, https://zdm.waw.pl/wp-content/uploads/2018/07/2015-02-20_DZP_5_PN_5_15_Wykaz_drog_powiatowych_w_Warszawie.pdf

³⁶ Tomasz Żółciak, „Wojna o Plac Piłsudskiego w Warszawie. Władze stolicy mają plan, jak go odzyskać,” October 31, 2017, *Dziennik Gazeta Prawna*. Accessed August 20, 2023, <https://wiadomosci.dziennik.pl/wydarzenia/artykuly/561558,spor-plac-pilsudskiego-wladze-stolicy-kontra-wojewoda.html>

property. Permanent management is one of the legal titles that are the basis for disposing of real estate for construction purposes according to Art. 3 point 11 of the Construction Law, discussed in the previous section. Therefore, in such a legal situation, the Warsaw Municipal Road Administration was the entity authorized to obtain a building permit for the investments planned in the area of Piłsudski Square, even though the owner of the property was the State Treasury.

However, on October 25, 2017 the Minister of Infrastructure and Construction issued a decision to transfer Piłsudski Square into permanent management to the Mazovian Voivode.³⁷ It should be noted here that in the Polish administrative structure there is a kind of dualism at the voivodship level. In addition to local government (headed by a marshal of the voivodship appointed by the voivodship assembly coming from direct elections), there is also government administration, headed by a voivode (representative of the Council of Ministers in the voivodship, appointed by the Prime Minister). This means that, as a result of the decision of the Minister of Infrastructure and Construction, the management of Piłsudski Square was taken away from a local government unit (linked to the political opposition) and transferred to a body fully dependent on the parliamentary majority.

It should be noted that in accordance with Article 46a Section 1 of the Law on Real Estate Management, as a rule, the Minister of Infrastructure and Construction had the right to issue a decision to terminate permanent management, and in accordance with Article 60 Section 3 in conjunction with Section 1, was allowed to subsequently transfer the property to permanent management for the needs of the voivodship office. Therefore, there is no obvious violation of the law here. However, it is worth to analyze the authorities' communicated motives for this decision to assess whether the law was instrumentally used in this case to achieve political goals.

In a statement published on October 27, 2017, the Mazovian Voivode stated that the decision to transfer to him Piłsudski Square

³⁷ Urzykowski, „Plac Piłsudskiego.”

for permanent management was made at his request. He justified it by the fact that “it is a place that primarily serves the organization of state ceremonies and therefore should be under the supervision of the government administration.”³⁸ On the other hand, the authorities of Warsaw pointed out that so far there have been no problems with the organization of state ceremonies at the site, and besides, the Tomb of the Unknown Soldier itself is still located on a separate plot still owned by the city, so any ceremonies that include the tomb will still have to be organized in consultation with the authorities of Warsaw. The local government also argued that taking the management of the property away from the Warsaw Municipal Road Administration is impossible as long as it includes powiat roads.³⁹ It seems that the government administration in this case partially conceded to the city authorities. However, this did not involve returning the management of Piłsudski Square to the local self-government unit. Instead, an division of the plot of land was made to exclude streets adjacent to the square.⁴⁰

In the manner described above, the government authorities took control of Piłsudski Square from the local self-government. They used legitimate means to do so. However, it is significant that they were employed only at this moment, despite the existence of an unchanged legal status for many years. When asked by journalists whether taking control of the square was not a step towards building a monument there to the victims of the Smolensk catastrophe, the Mazovian Voivode replied that another location had been chosen for

³⁸ „Oświadczenie w sprawie placu Piłsudskiego w Warszawie,” Wojewoda Mazowiecki, October 27, 2017. Accessed August 20, 2023, <https://web.archive.org/web/20180210002409/https://www.mazowieckie.pl/pl/aktualnosci/komunikaty/34763,Oswiadczenie-w-sprawie-placu-Pilsudskiego-w-Warszawie.html>

³⁹ Żółciak, „Wojna o Plac Piłsudskiego w Warszawie.”

⁴⁰ Patrycja Wieczorkiewicz and Paweł Gawlik, „Plac Piłsudskiego podzielony na nowo. Rzecznik ratusza: Nie było konsultacji,” *Gazeta Wyborcza*, January 5, 2018. Accessed August 20, 2023, <https://warszawa.wyborcza.pl/warszawa/7,54420,22861523,plac-pilsudskiego-podzielony-na-nowo-rzecznik-ratusza-nie.html>

it.⁴¹ Admittedly, Piłsudski Square was not officially designated as a place of commemoration until several months later, in early 2018. The issue of permanent management was the most important issue in the context of Piłsudski Square for only a short time. Just a few days later, further legally momentous events occurred that would eventually lead to the construction of the Monument to the Victims of the Smoleńsk Tragedy there.

4. “Militarization” of Piłsudski Square

Taking over the management of Piłsudski Square from Warsaw’s local authorities was only the first stage of seizing effective control over the site by government authorities through legal measures. The decision issued on October 31, 2017 by the Minister of Internal Affairs and Administration is of the most momentous significance.⁴² It says that the Minister has declared plots of land encompassing Piłsudski Square a so-called closed area.

The aforementioned decision was issued on the basis of Article 4, Section 2a of the *Geodetic and Cartographic Law*,⁴³ which states that closed areas are established by the competent ministers and heads of central offices by decision. But what is this „closed area”? The Geodetic and Cartographic Law, in its Article 2, contains a glossary consisting of definitions of terms used in the act. Its point 9 specifies that closed areas are understood to be areas of a restricted character for reasons of state defense and security, defined by the competent ministers and heads of central offices. According to the jurisprudence of the Polish administrative courts, the very fact of recognizing an area as a closed area determines the designation of that area for purposes

⁴¹ Urzykowski, „Plac Piłsudskiego.”

⁴² *Decyzja nr 231 Ministra Spraw Wewnętrznych i Administracji z dnia 31.10.2017 r. w sprawie ustalenia terenu zamkniętego*. Accessed August 20, 2023, <https://archiwum-bip.mswia.gov.pl/bip/komunikaty/25079,Decyzja-nr-231-Ministra-Spraw-Wewnetrznych-i-Administracji-z-dnia-31102017-r-w-s.html>

⁴³ Ustawa z dnia 17 maja 1989 r. Prawo geodezyjne i kartograficzne (consolidated text: Dz.U. 2023 poz. 1752).

related to national defense and security.⁴⁴ This means that the Minister of Internal Affairs and Administration has recognized Piłsudski Square as an area of special military significance.

The regulations on closed areas for the purposes of national defense and security are quite laconic, but an analysis of their content allows to understand quite well what was the aim of the legislator introducing these regulations. There is a number of solutions in the Geodetic and Cartographic Law that allow for the classification of information on technical infrastructure, plots of land, buildings and dwellings located in closed areas. Land and building records maintained for an area where a closed area has been designated must immediately be brought into compliance with regulations on the protection of classified information. The literature indicates that this requirement comes out of the need to ensure security and state defense readiness.⁴⁵ It follows that the essence of closed areas should be a limited access to information about what is located within them. This would be hard to achieve in the case of an open, publicly accessible space located in the heart of a large city, such as Piłsudski Square.

The *Ordinance of the Minister of Defense on Closed Areas Necessary for State Defense*⁴⁶ contains a list of closed areas where the Minister of Defense supervises surveying and mapping work. It includes, inter alia, command posts of the Armed Forces of the Republic in a state of threat to state security and war, facilities for radio reconnaissance and combat and national air and anti-aircraft defense, telecommunications facilities for the transmission of classified information constituting state secrets, war ports, military airports or ammunition depots and warehouses. It should be borne in mind that this is not a

⁴⁴ Monika Ziniewicz, „Administracyjnoprawne ograniczenia procesu inwestycyjno-budowlanego na terenach zamkniętych w Polsce,” *Studia Iuridica Toruniensia*, t. XXIX (2021): 490.

⁴⁵ Mirosław Karpiuk, „Tereny zamknięte ze względu na obronność i bezpieczeństwo państwa ustanawiane przez organy administracji rządowej,” *Ius Novum*, nr 4 (2016): 199.

⁴⁶ Rozporządzenie Ministra Obrony Narodowej z dnia 18 lipca 2003 r. w sprawie terenów zamkniętych niezbędnych dla obronności państwa (Dz.U. nr 141 poz. 1368).

complete enumeration of closed areas, because the supervision of the Minister of National Defense over surveying and mapping work has not been introduced for all of them, but it clearly comes out from this enumeration that the legislator was concerned with areas very directly related to state defense, with strictly military use. There is no doubt that Piłsudski Square is not such an area.

On November 17, 2017, a little more than two weeks after the decision discussed above was issued, the Ministry of Internal Affairs and Administration released a written statement,⁴⁷ informing that Piłsudski Square will continue to be accessible to residents and tourists, and its area will not be fenced off. This was most likely to dispel doubts that may have come out of the colloquial understanding of the term closed area. The Ministry further wrote that “Piłsudski Square is a place where national holidays and major ceremonies are held.” It did not indicate what role the area has for state defense. It did not explain what connection the said state holidays and celebrations have with state defense.

So what was the most likely real purpose of declaring Piłsudski Square a closed area? The answer must be sought in the already cited *Construction Law*. The key is Section 3 point 5 of Article 82, which stipulates that the architectural and construction administration body of first instance (i.e. the entity competent to issue decisions on construction permits) in the case of objects and construction work located in closed areas is the voivode. This is an exception to the already mentioned general rule, according to which construction permits are issued in Poland by the head of the powiat (and in the case of cities with the rights of a powiat – such as Warsaw – by the president of the city). This means that the recognition of Piłsudski Square as a closed area automatically shifted the competence to issue building permits (as described above, required in the case of erecting a monument) from a local self-government body, controlled by one side of

⁴⁷ „Oświadczenie MSWiA w sprawie placu Piłsudskiego,” Ministerstwo Spraw Wewnętrznych i Administracji. Accessed August 20, 2023, <https://archiwum.mswia.gov.pl/pl/aktualnosci/16730,Oswiadczenie-MSWiA-w-sprawie-placu-Pilsudskiego.html>

the dispute over the Smoleńsk monument, to an authority directly controlled by the government, coming from the political group that is the other side of that dispute.

The matter of issuing building permits should be considered most important in the context of the construction of the Monument to the Victims of the Smoleńsk Tragedy, but it is worth to mention the second area in which the competencies of Warsaw's local authorities have been drastically reduced in a result of the recognition of Piłsudski Square as a closed area. According to Article 3 Section 1 of the *Law on Spatial Planning and Development*,⁴⁸ the shaping and conducting of spatial policy on the territory of the municipality, including the adoption of local spatial plans, is one of the municipality's own tasks. However, this does not apply to closed areas. According to Article 4 Section 1 of this law, the determination of land use, the location of public purpose investments and the determination of the ways in which land is used and developed shall be made in a local spatial plan. However, Article 4 Section 2 point 2 stipulates that with regard to closed areas, only the boundaries of these areas are established in the local spatial plan.

What is more, in the case of spatial planning and development, the recognition of a particular site as a closed area results in a transfer of authority similar to that of a building permit. According to Article 51 of the discussed law, in matters of determining the location of a public purpose investment, decisions are issued by the head of the municipality (i.e. the local government). However, if it is a public purpose investment in a closed area, the voivode (i.e. the representative of the government) is authorized to issue the decision. Importantly, such a decision is necessary precisely when the area in question is not covered by a spatial plan (and, as described above, such a plan is not drawn up for a closed area). Therefore, recognizing Piłsudski Square as a closed area not only made it impossible for the Warsaw authorities to determine the manner of its development in

⁴⁸ Ustawa z dnia 27 marca 2003 r. o planowaniu i zagospodarowaniu przestrzennym (consolidated text: Dz.U. 2023 poz. 977).

the local spatial plan, but also deprived them of the authority to issue a decision to determine the location of a public purpose investment necessary in the absence of a plan. Referring the provisions of the Law on Spatial Planning and Development to the case of the Monument to the Victims of the Smoleńsk Tragedy, it should be pointed out that the application for a decision establishing the location of a public purpose investment was submitted by Jacek Sasin on behalf of the social committee on January 29, 2018, and the Mazovian Voivode issued the decision on February 2. It became binding on February 5, 2018.⁴⁹ It is worth recalling that the location of the monument was made public by the social committee on February 7, 2018, that is, when much of the paperwork required for its construction had already been completed.

Therefore, it can be considered that the recognition of Piłsudski Square as a closed area was another step towards the construction of a Monument to the Victims of the Smoleńsk Tragedy in Warsaw, in defiance of the local authorities of that city. After the “militarization” of the square, the state authorities could not only freely dispose of the property (which they ensured for themselves by taking over the management of the square by the voivode), but also gained the certainty that there would be no problems with obtaining a building permit, since the competence to issue one was also given to the voivode. It seems that in the case of the decision to declare Piłsudski Square a closed area, legal measures were used in the political dispute in a much more instrumental way than in the matter of taking over the management of the square. Indeed, the claim that in this situation a legal institution was used contrary to its intended purpose envisaged by the legislator is not groundless. The law in this case has become an instrument for achieving political goals. Similar doubts were expressed by the authorities of Warsaw.

⁴⁹ Portal Samorządowy, *Wojewoda mazowiecki zatwierdził lokalizację Pomnika Ofiar Tragedii Smoleńskiej*, February 7, 2018. Accessed August 20, 2023, <https://www.portalsamorzadowy.pl/polityka-i-spoleczenstwo/wojewoda-mazowiecki-zatwierdzil-lokalizacje-pomnika-ofiar-tragedii-smolenskiej,103790.html>

It should be noted that the decision to establish a closed area is not an administrative decision. This means that it cannot be appealed or challenged in an administrative court.⁵⁰ In such a situation, the authorities of Warsaw took another option. On March 27, 2018, they filed a notice of possible commission of a crime by the Minister of Internal Affairs and Administration Mariusz Błaszczak of exceeding his powers to the prosecutor's office. The Warsaw authorities indicated that the recognition of Piłsudski Square as a closed area despite the absence of factual grounds related to defense and state security reasons is an abuse of legal institutions. The notice stated that the real purpose of these actions was to deprive the local authorities of the powers they are entitled to under the binding law related to decision-making in the field of spatial planning and development.⁵¹ However, the District Prosecutor's Office in Warsaw refused to open an investigation, stating that no crime had been committed in this situation.⁵² The authorities of Warsaw filed a complaint against this decision with the competent court. The latter recognized the complaint and ordered the prosecutor's office to launch an investigation. However, it was discontinued in 2021. The prosecutor's office again cited the absence of the elements of a criminal act.⁵³ It should be pointed out that the position of Attorney General at the time was held by Zbigniew Ziobro – one of the members of the 'Social Committee

⁵⁰ Karpiuk, „Tereny zamknięte ze względu na obronność i bezpieczeństwo państwa ustanawiane przez organy administracji rządowej,” 197.

⁵¹ „Zawiadomienie o możliwości popełnienia przestępstwa,” Miasto Stołeczne Warszawa, Accessed August 20, 2023, https://um.warszawa.pl/document-s/39703/7003459/2018_03_27_m_st_warszawa_zawiadomienie.pdf/adb2c111-d0df-e4f0-ce39-83af5329713a?t=1634498830960

⁵² Kamil Siałkowski, „Spór o pl. Piłsudskiego. Prokuratura musi jeszcze raz zbadać, czy Mariusz Błaszczak nie przekroczył uprawnień,” *Gazeta Wyborcza*, October 30, 2018. Accessed August 20, 2023, <https://warszawa.wyborcza.pl/warszawa/7,54420,24111978,spor-o-plac-pilsudskiego-prokuratura-musi-jeszcze-raz-zbadac.html>

⁵³ Michał Wojtczuk, „Jest decyzja prokuratury w sprawie przejścia placu Piłsudskiego przez rząd,” *Gazeta Wyborcza*, September 27, 2021. Accessed August 20, 2023, <https://warszawa.wyborcza.pl/warszawa/7,54420,27620065,plac-pilsudskiego-wziety-w-kamasz-jest-decyzja-prokuratury.html>

for the Construction of Monuments: The late President of the Republic of Poland Lech Kaczyński and the Victims of the 2010 Smoleńsk Tragedy.’

The application of regulations created to protect military areas, such as firing ranges and naval bases, to an open, public space in the center of the Polish capital made it possible to build the Monument to the Victims of the Smoleńsk Tragedy at a site designated by a committee associated with the politicians of Law and Justice party. In this place it is worth reminding that Minister of Internal Affairs and Administration Mariusz Błaszczak, who issued the controversial decision, was one of the members of this committee. However, this was not the last situation in which regulations were creatively used in relation to this monument. The ruling majority decided to reach for such extraordinary legislative solutions that were designed to secure the monument for the future.

5. Monument protected by a special law

In the section on the history and architecture of Piłsudski Square, it was mentioned that preparations are underway to rebuild the Saxon Palace, which was once located there. This project also has a legal dimension. Both the genesis and content of the regulations for the planned reconstruction are related to the history of the Monument to the Victims of the Smoleńsk Tragedy.

The decision to reconstruct the Saxon Palace was made by President Andrzej Duda when he made the solemn declaration on November 11, 2018, as part of the celebration of the centennial of Polish independence.⁵⁴ Just a few days later, the newspaper *Dziennik Gazeta Prawna*, citing anonymous sources connected with the government, reported that the authorities were considering enacting a special law

⁵⁴ Oficjalna strona Prezydenta Rzeczypospolitej Polskiej, „Prezydent podpisał deklarację o restytucji Pałacu Saskiego.” Accessed August 20, 2023, <https://www.prezydent.pl/aktualnosci/polityka-historyczna/100-rocznica-odzyskania-niepodleglosci-rp/aktualnosci/11-listopada---symboliczny-początek-odbudowy-palacu-saskiego,8259>

separately regulating the rules for the implementation of only this one investment. According to unnamed ruling party politicians, such a solution was to be necessary because the Saxon Palace was to be rebuilt on land belonging to the city, and the story of the construction of the Monument to the Victims of the Smoleńsk Tragedy showed that the Warsaw authorities are unwilling to cooperate on government projects.⁵⁵

A draft of the new legislation was submitted to the first chamber of the Polish parliament on July 7, 2021.⁵⁶ Just over a month later, the *Act of August 11, 2021 on the preparation and implementation of investments in the reconstruction of the Saxon Palace, the Brühl Palace and the townhouses on Królewska Street in Warsaw* was passed.⁵⁷

The new law has ruthlessly resolved the problem of ownership of the land on which the Saxon Palace is to be reconstructed. According to its Article 37 Section 1, real estate in the area where the reconstruction will be carried out automatically becomes the property of the State Treasury by force of law, after the voivode issues a decision on determining the location of the investment. This is a special mode of property acquisition by the state. The provisions of the *Real Estate Management Act*⁵⁸ allow expropriation of real estate for public purposes only after a separate procedure, to which the entire Chapter 4 of this law is dedicated. In the case of the reconstruction of the Saxon Palace, it was decided to speed up the proceedings not only

⁵⁵ Tomasz Żółciak, „Lex Saski receptą na ewentualny opór władz Warszawy,” *Dziennik Gazeta Prawna*, 20 November 2018. Accessed August 20, 2023, <https://www.gazetaprawna.pl/wiadomosci/artykuly/1356455,lex-saski-recepta-na-ewentualny-opor-wladz-warszawy.html>

⁵⁶ Druk nr 1388 Przedstawiony przez Prezydenta Rzeczypospolitej Polskiej projekt ustawy o przygotowaniu i realizacji inwestycji w zakresie odbudowy Pałacu Saskiego, Pałacu Brühla oraz kamienic przy ulicy Królewskiej w Warszawie, July 7, 2021. Accessed August 20, 2023, <https://www.sejm.gov.pl/Sejm9.nsf/druk.xsp?nr=1388>

⁵⁷ Ustawa z dnia 11 sierpnia 2021 r. o przygotowaniu i realizacji inwestycji w zakresie odbudowy Pałacu Saskiego, Pałacu Brühla oraz kamienic przy ulicy Królewskiej w Warszawie (Dz.U. 2021 poz. 1551).

⁵⁸ Ustawa z dnia 21 sierpnia 1997 r. o gospodarce nieruchomościami (consolidated text: Dz.U. 2023 poz. 344).

in terms of expropriating the necessary real estate. Procedures for determining compensation for their former owners were also simplified, as well as those for the construction supervision of the ongoing investment. As a result, the law has stirred up controversy in various circles. Architectural historians have issued an open letter against it. Their concerns included the exclusion of the rebuilt Palace from the supervision of the monument protection service.⁵⁹ Legal community criticized the law for drafting errors and ambiguities, in addition to severe restrictions on the powers of local government.⁶⁰

Therefore, the reconstruction of the Saxon Palace involves a similar dispute between government authorities and local self-government as the construction of the Monument to the Victims of the Smoleńsk Tragedy. However, the government learned from the first conflict and did not rely solely on already existing legal instruments. In this case, it has decided to create completely new regulations that will allow the implementation of the intended project without the possibility of resistance from local authorities.

The dispute over the construction of the Monument to the Victims of the Smoleńsk Tragedy was one of the reasons for the special law on the reconstruction of the Saxon Palace. At the same time, its provisions also directly regulate the legal situation of the monument itself. Article 36 of the analyzed act gave special legal protection to Marshal Józef Piłsudski Square with the following objects located there: Tomb of the Unknown Soldier, Monument to Józef Piłsudski, Papal Cross, Monument to Lech Kaczyński and Monument to the

⁵⁹ Katarzyna Domagała, „Ciąg dalszy kontrowersji wokół odbudowy Pałacu Saskiego. Eksperti piszą otwarty list sprzeciwu, projekt wraca do Komisji Kultury,” *Architektura i Biznes*, July 22, 2021. Accessed August 20, 2023, <https://www.architekturaibiznes.pl/odbudowa-palacu-saskiego-list-otwarty-ekspertow,8380.html>

⁶⁰ Katarzyna Żaczkiewicz-Zborska, „Odbudowa Pałacu Saskiego z poważnymi usterkami w ustawie,” *Prawo.pl*, July 23, 2021. Accessed August 20, 2023, <https://www.prawo.pl/samorzad/bledy-i-niedomowienia-w-ustawie-o-odbudowie-palacu-saskiego,509608.html>; Business Insider Polska, „Odbudowa Pałacu Saskiego może przebiegać w atmosferze skandalu. Problematyczna specustawa,” August 16, 2021. Accessed August 20, 2023, <https://businessinsider.com.pl/wiadomosci/odbudowa-palacu-saskiego-moze-przebiegac-w-atmosferze-skandalu/r7798pe>

Victims of the 2010 Smoleńsk Tragedy. According to this provision, the urban layout encompassing the square and these objects is inviolable (of course, including the reconstructed Saxon Palace).

This is a situation unprecedented in the Polish legal system, consisting of general and abstract norms as a rule, in which the legislator decided to secure the future of several specific monuments at the level of an act of statutory rank. This demonstrates the great importance attached to these objects by the political force that formed the parliamentary majority at the time the discussed law was passed. The legislation lists all the objects located in Piłsudski Square, but the presence there of the Tomb of the Unknown Soldier, the Papal Cross or the Monument to Józef Piłsudski does not raise any dispute in principle. Therefore, it can be presumed that the main purpose of introducing the discussed provision in the Law on the Reconstruction of the Saxon Palace was to protect the controversial Monument to the Victims of the Smoleńsk Tragedy and the Monument to Lech Kaczyński.

Conclusions

On the basis of the analysis presented above, it can be concluded that the instrumental use of administrative law allowed the construction of a monument desired by the political forces controlling the government administration in the very center of the city, whose local authorities expressed open opposition to commemoration at this particular site.

First, the voivode took control of the site where the monument was to be erected. He exercised his authority in this case, and there is no violation of the law in this case. However, the justification for this decision cannot be considered convincing. The claim that it was issued solely to facilitate the construction of the Monument to the Victims of the Smoleńsk Tragedy seems justified.

Shortly thereafter, legal instruments created to ensure the national security and defense were used to circumvent the requirement to ob-

tain positive decisions from local authorities before building a monument under construction law and spatial planning law.

Finally, special provisions drafted to protect the Smolensk Tragedy Victims Monument have been introduced into the newly created legislation, so that its removal will be difficult even if there is a change in the balance of political forces in the future.

It is therefore clear that the instrumental use of the law can be a way to break the resistance of opponents to the implementation of a certain memory policy in the public space even when these opponents are democratically elected local self-government authorities.

The pattern in which the conflict over the monument's construction revolves between the right-wing populist central government and the liberal local municipal authorities linked to the opposition to the forces establishing illiberal democracy can be observed not only in Poland. A very similar case took place in Hungary ruled by Viktor Orbán's Fidesz. Right-wing state authorities intended to erect a new monument to the victims of the German occupation of Hungary in Liberty Square in Budapest. The city authorities originating from political circles opposing Fides resisted against that project. Therefore, the Orbán government issued a decree declaring the project an issue of particular importance with regard to the national economy. As a result, construction of the monument could begin not only without the required permits, but also without a tender process.⁶¹

The story of the legal dispute over the Monument to the Victims of the Smoleńsk Tragedy proves that a democratic state needs mechanisms to prevent the circumvention of the law and the extremely instrumental use of legal institutions contrary to their intended purpose by the legislator in order to achieve current political goals. Even the issue of building a monument in a certain square may be a situation in which such mechanisms for protecting the rule of law as an independent prosecutor's office, a constitutional judiciary or tools for enforcing compliance with the principles of good legislation will

⁶¹ Ágnes Erőss, "'In Memory of Victims': Monument and counter-monument in LibertySquare, Budapest," *Hungarian Geographical Bulletin* 65, no. 3 (2016): 241.

be crucial. Their functioning is necessary so that disputes over the placement of controversial commemorations in the public space can be resolved within the framework of the social debate proper to a democratic state, and not through the use of legal tricks.

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