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**Judicial Activism in Poland – Remarks against the Background of
a Resolution of the Formation of the Combined Civil Chamber,
Criminal Chamber and Labor Law and Social Security Chamber
of the Supreme Court of 23 January 2020 (BSA I-4110-1/20)**

Keywords: judicial activism, resolution of the Supreme Court, divergences in the interpretation of law, constitutional crisis in Poland

Słowa kluczowe: aktywizm sędziowski, uchwała Sądu Najwyższego, rozbieżności w wykładni przepisów prawa, kryzys konstytucyjny w Polsce

Abstract

The paper aims at analyzing the phenomenon of judicial activism in Poland against the background of a resolution of the formation of the combined Civil Chamber, Criminal Chamber and Labor Law and Social Security Chamber of the Supreme Court of 23 January 2020 (BSA I-4110–1/20). The author discusses the Supreme Court's powers to resolve divergences in the interpretation of law and then provides an analysis of the nature of the resolution of the Supreme Court. The considerations made in the context of the paper lead to the conclusion that in situations of a threat to the rule of law the courts not only have a right but also an obligation to take active measures to protect the common good.

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Streszczenie

**Aktywizm sędziowski w Polsce – uwagi na tle uchwały składu
połączonych Izb: Cywilnej, Karnej oraz Pracy i Ubezpieczeń Społecznych
Sądu Najwyższego z dnia 23 stycznia 2020 r. (BSA I-4110-1/20)**

Celem artykułu jest analiza zjawiska aktywizmu sędziowskiego w Polsce na tle uchwały składu połączonych izb: Cywilnej, Karnej oraz Pracy i Ubezpieczeń Społecznych Sądu Najwyższego z dnia 23 stycznia 2020 r. (BSA I-4110–1/20). Autor omawia kompetencję Sądu Najwyższego do rozstrzygania rozbieżności w wykładni przepisów prawa, a następnie dokonuje oceny znaczenia uchwały Sądu Najwyższego w kontekście zjawiska aktywizmu sędziowskiego. Rozważania podjęte na gruncie niniejszej pracy prowadzą do wniosku, że w sytuacji zagrożenia dla praworządności, sądy nie tylko mają prawo, lecz także obowiązek podjąć aktywne działania na rzecz ochrony dobra wspólnego.

I. Introductory Notes

Judicial activism is a phenomenon that must be considered in every legal and political order². Contrary to what Montesquieu wrote, judges have long ceased to be just the “mouth of the law”. Their role has undergone a substantial transformation, what was associated with the transition from a syllogistic to an argumentative model of law application³.

The issue of judicial activism has become particularly relevant in the context of the problems recently faced by the judiciary in Poland, which have consequently led to a deepening of the constitutional crisis. The reforms in the justice system, initiated in 2015, have fundamentally changed the principles

² L. Morawski, *Kilka uwag w sprawie sędziowskiego aktywizmu*, [in:] *Dyskrecjonalność w prawie. Materiały XVIII Ogólnopolskiego Zjazdu Katedr Teorii i Filozofii Prawa. Miedzeszyn k. Warszawy, 22–24 września 2008 r.*, Warsaw 2010, p. 93.

³ According to the syllogistic model, the application of law by court is an automatic logical operation – the judge only deduces legal consequences arising from legal norms. According to the argumentative model, the application of law is a process of weighing arguments and choosing the best decision from among different variants.

of functioning and the position of individual judicial authorities, compromising the constitutional values of the independence of courts and impartiality of judges. Under such circumstances, on 23 January 2020, a resolution of the formation of the combined Civil Chamber, Criminal Chamber and Labor Law and Social Security Chamber of the Supreme Court of 23 January 2020 (BSA I-4110–1/20 case)⁴ was passed, being an expression of judicial activism. This resolution encourages reflection on the phenomenon of judicial activism with account being taken of the Polish experience.

However, it should be noticed at this moment that the presented paper is not devoted to a detailed analysis of the contents of the Supreme Court's resolution. Instead, it is focused on the meaning of the resolution, viewed in the context of the phenomenon of judicial activism in Poland. Consequently, this paper outlines only the general problems addressed by the resolution and the circumstances in which it was adopted.

II. Judicial Activism – The Argumentative and Political Activism

Judicial activism is a broad phenomenon of a complex nature, capable of taking many different forms and variations⁵. For the purposes of this article, two main ways through which the phenomenon is manifested are indicated⁶.

The first approach to judicial activism focuses on the adjudicating activities of courts and includes situations in which the judge makes a creative decision, not directly determined by legal provisions (argumentative activism). The decision in question results from the choice made by the judge,

⁴ The resolution of the formation of the combined Civil Chamber, Criminal Chamber and Labor Law and Social Security Chamber of the Supreme Court of 23 January 2020, BSA I-4110–1/20, OSNKW No. 2/2020, item 7. A full text of the resolution in English is available on the official website of the Polish Supreme Court, at: <http://www.sn.pl/aktualnosci/SitePages/Wydarzenia.aspx?ItemSID=602-0dc69815-3ade-42fa-bbb8-549c3c6969c5&ListName=Wydarzenia> (15.04.2020).

⁵ In the Polish doctrine of constitutional law, B. Banaszak and M. Bernaczyk have made an attempt to define the phenomenon of judicial activism. B. Banaszak, M. Bernaczyk, *Aktywizm sędziowski we współczesnym państwie demokratycznym*, Warsaw 2012.

⁶ The list is obviously not exhaustive due to the complexity and multi-faceted nature of the phenomenon of judicial activism.

reflecting the value system he stands for, and is taken within the limits of the discretionary power granted to the person. Therefore, the argumentative activism relies for the most part on creative interpretation of legal provisions, although it is also claimed that courts in Poland actually often create law. This shall relate in particular to the situations in which the result of the adjudicating activity of courts includes an element of what is termed normative novelty. The foregoing allows to observe that also in the countries of the continental law system the creation of law has become a collective venture in which participate all the three sorts of power (though operating through different rules and forms)⁷.

According to the other approach, the phenomenon of judicial activism is not solely limited to the adjudication-related activities of courts, but includes any steps taken by courts and tribunals to implement the principles of justice and the rule of law. It should be remarked that nowadays the competences vested with courts and tribunals go beyond the mere application of law or control of compliance of legislative acts with the Constitution. Especially the highest judicial authorities (including the Polish Supreme Court and the Constitutional Tribunal) enjoy special powers, e.g. those related to elections, resolution of a conflict of powers or ensuring uniformity of jurisprudence. These powers are instrumental not only as far as legal order shaping is concerned, but are not devoid of political significance, either. Under that approach, judicial activism is ever more frequently politically-oriented (becoming what is termed political activism), as it results in the judicial authority stepping outside the limits of the regular adjudicating activity to participate in public discourse and to influence the political and legal order of the state⁸.

The two mentioned approaches to judicial activism are not mutually exclusive. In practical terms, the political activism most often takes the form of the argumentative activism. Therefore, they can be termed, respectively, the judicial activism *sensu stricto* and judicial activism *sensu largo*, as the latter includes both the adjudicating activities and other forms of activity of courts and tribunals, manifested through their so-called special powers.

⁷ L. Morawski, *Główne problemy współczesnej filozofii prawa. Prawo w toku przemian*, Warsaw 2005, pp. 290–306.

⁸ Ibidem.

III. Active Role of the Supreme Court in Poland – Resolution of Divergences in the Interpretation of Law

The legislator has assigned the Supreme Court an active role in the Polish legal system by shaping its powers. Pursuant to Art. 83 of the Act of 8 December 2017 on the Supreme Court⁹, the First President of the Supreme Court or President of the Supreme Court¹⁰ has been authorized to submit a request for settlement of a legal question to the Supreme Court sitting in a formation of 7 judges or other appropriate composition in case of a discrepancy in the interpretation of legal provisions underlying the process of adjudication, as exercised by common courts, military courts or the Supreme Court.

The construct of a legal question has been introduced into the Polish legal order to ensure the uniformity of judicial decisions. It is one of the means of judicial oversight exercised by the Supreme Court over courts of common competence and the military ones. Legal questions referred to in the Art. 83 of the mentioned Act, are presented to the Supreme Court *in abstracto*, and therefore in isolation from the circumstances of a particular case (abstract questions). At the same time, pursuant to the Art. 82 of the Act, legal questions may also be addressed *in concreto*, i.e. in connection with doubts as to the interpretation of legal provisions arising during the examination of a specific case by the Supreme Court (specific questions).

The starting point for directing a request to resolve a legal question is the existence of divergences in the interpretation of legal provisions. It should be noted that divergences must be clear. As the Supreme Court has point-

⁹ The Act of 8 December 2017 on the Supreme Court (consolidated text: Journal of Laws of 2019, item 825, as amended; hereinafter: the “Supreme Court Act”). It should be noted in passing that adoption of the law provoked much criticism from the legal circles. It was that very Act that lowered, in its original version, the retirement age of judges of the Supreme Court and the Supreme Administrative Court of Poland and granted to President of the Republic of Poland a discretionary right to extend the period of active service of judges of the Supreme Court after they reach the newly set retirement age. The provisions were finally repealed due to the action brought by the European Commission under Art. 258 TFEU for failure to fulfil obligations. See judgment of the Court of Justice of the European Union of 24 June 2019, case C-619/18, *Commission v. Poland*, ECLI:EU:C:2019:531.

¹⁰ First President of the Supreme Court heads the Supreme Court, directing its work and representing the Court on the outside, whereas a President of the Supreme Court guides the operation of one of the Court’s Chambers.

ed out¹¹, “about divergences in the jurisprudence of common courts or the Supreme Court can only reasonably be talked of when distinct lines of jurisprudence are formed, represented by at least a certain group of decisions supplied with arguments supporting each of the concepts. Unlike them, individual rulings, incidentally deviating from the mainstream of interpretation, especially ones of common courts (the situation is different with the Supreme Court judgments) do not actually satisfy the condition for existence of a divergences in jurisprudence”. The divergences thus have to stem from well-established, conflicting lines of jurisprudence. The assessment of the legitimacy of an application for resolving divergences varies depending on whether the divergence has arisen in the jurisprudence of the Supreme Court or common courts or military ones. When it comes to divergences occurring in the judicial practice of the Supreme Court, the reaction to the request should be faster due to the risk of their becoming widespread in jurisprudence. The courts of lower instances, due to the authority of the Supreme Court, strive to hand down their rulings in a manner consistent with the jurisprudence adopted by the former, so as to limit the risk of their judgments being challenged under the control exercised by higher courts. Therefore, the need for immediate reaction in case of a divergences in the Supreme Court’s jurisprudence can also be talked of when the discrepancy results from just a single ruling presenting interpretation different from the previous one¹².

Attention should be paid to the fact that the divergences should concern the interpretation of legal provisions by courts within the discretionary powers granted to them. The assumption of the Polish legislator that divergences in the interpretation of legal provisions are possible, leads to the conclusion that the legislature also assumed a possibility of the existence, within Poland’s legal system, of the phenomenon of judicial activism, as the highest judicial authority has been provided with an instrument intended in fact to correct the consequences the activism may evoke. The structure of the Supreme Court’s powers alone requires the Court to be proac-

¹¹ Decision of the Supreme Court of 14 October 2015, I KZP 10/15, OSNKW 2015, No. 11, item 89.

¹² K. Szczucki, Art. 83, [in:] *Ustawa o Sądzie Najwyższym. Komentarz*, Warsaw 2018, pp. 436–437.

tive, thus providing a proof that the phenomenon of judicial activism may be supported by the law itself.

Divergences in the interpretation of legal provisions are resolved by the Supreme Court through resolutions. Due to the formation in which the Supreme Court considers applications made to resolve a legal question, the resolutions most often acquire the power of legal principles. In the Polish legal order, according with Art. 84 of the Act on the Supreme Court, the power of legal principle has been reserved for resolutions of the Supreme Court adopted in the full formation, the formation of the combined chambers and that of the entire chamber. Where a resolution is passed by a panel of 7 judges of the Supreme Court, in order for it to be given the value of a legal principle, the judges have to adopt a decision on the matter. A resolution having the force of a legal principle is binding on all formations of the Supreme Court. When resolving any case, the Supreme Court is therefore obliged to make a ruling in a manner consistent with resolutions enjoying the power of legal principles. From the formal point of view, such resolutions are binding only on the Supreme Court, but they are, nevertheless, not without impact on the jurisprudence of common and military courts. Due to the position of the Supreme Court, the resolutions having the power of legal principles exert a real influence on the jurisprudence of lower courts which must consider a risk of their decisions being appealed against. In case of a lower court intending to take a position different than that expressed in a Supreme's Court resolution with the power of a legal principle, presenting appropriate arguments would be required to prompt the Supreme Court to depart from that principle¹³. Only such a solution could ensure the implementation of one of the statutory tasks of the Supreme Court, which is to guarantee the uniformity of jurisprudence while implementing the principle of legal certainty.

¹³ Departure from a legal principle requires a resolution passed by the appropriate composition of the Supreme Court after a legal question has been submitted once again for a decision thereon. A legal principle may also be departed from in case of a change in the legal situation – if the content, period or scope of application of the provision to which the legal principle applies has changed (see judgement of the Supreme Court of 8 August 2007, II UK 23/07, OSNP 2008, No. 19–20, item 296).

IV. Resolution of the Formation of the Combined Civil Chamber, Criminal Chamber and Labor Law and Social Security Chamber of the Supreme Court of 23 January 2020

The described competence was recently exercised by the Supreme Court having adopted a resolution of the formation of the combined Civil Chamber, Criminal Chamber and Labor Law and Social Security Chamber, in which the Court challenged the power to adjudicate of the judges appointed with the involvement of the National Council for the Judiciary¹⁴ established in the mode provided for by the Act of 8 December 2017 amending the Act on the National Council for the Judiciary and certain other Acts¹⁵.

It should be noted at this stage that pursuant to the Art. 179 of the Constitution of the Republic of Poland¹⁶, judges are appointed by the President of the Republic of Poland at an application by the National Council for the Judiciary. Thus, the National Council for the Judiciary has a significant impact on personnel matters of the judiciary in Poland. Thus, it is necessary for it to remain independent of the political authorities.

The National Council for the Judiciary is a central public authority which position is hard to define within the system of classical separation of powers. It does not carry out responsibilities in the field of justice, although its tasks are related to the functioning of the judiciary. According with Art. 186 of the Polish Constitution, the National Council for the Judiciary was established to safeguard the independence of courts and judges (para. 1). The body's fundamental competences include presenting candidates for the position of judges to President of the Republic of Poland and the right to submit a request to the Constitutional Tribunal regarding the conformity to the Constitution of normative acts to the extent that they relate to the independence of courts and judges (para. 2).

¹⁴ Informally, the National Council for the Judiciary (Polish abbreviation: "KRS"), formed according with the Act of 8 December 2017 amending the Act on the National Council for the Judiciary and certain other Acts, has been dubbed the "Neo-KRS". This term is also used by the author in further considerations.

¹⁵ The Act of 8 December 2017 amending the Act on the National Council for the Judiciary and certain other Acts (Dz.U. 2018, item 3, as amended, hereinafter: "the Act amending the Act on the National Council for the Judiciary").

¹⁶ Constitution of the Republic of Poland of 2 April 1997 (Dz.U. No. 78, item 483, as amended, hereinafter: "the Constitution of Poland").

Although the composition of the National Council for the Judiciary is of a mixed nature¹⁷ and covers representations of all the three powers, under the amended Act on the National Council for the Judiciary in December 2017 essential changes were made in the mode of election of representatives of the judiciary to the body. This aroused opposition on the side of the legal circles and public opinion. The new regulations vested the right to elect 15 judges being members of the National Council of the Judiciary with the Sejm (the first chamber of the Parliament)¹⁸, whereas under the previous legal regime the judges were elected by assemblies of representatives of individual courts. Consequently, the judiciary was deprived of the opportunity to have impact on its representation in the National Council. The fullness of rights in this respect was transferred onto the Sejm, having become entitled to elect judges, in the first vote, by a 3/5 majority in the presence of at least half of the statutory number of deputies, and if such a choice could not be made in the first vote – by an absolute majority, in the presence of at least half of the statutory number of deputies, in the second vote. This means that under the current legal status, it is the parliamentary majority in Poland that determines the composition of the National Council of the Judiciary.

Among legal scholars the new procedure of electing judges to the National Council for the Judiciary raised doubts regarding its compliance with the Constitution of Poland¹⁹. It was pointed out that due to the mixed nature of

¹⁷ Pursuant to the Art. 187 para. 1 of the Constitution of Poland, the National Council for the Judiciary (KRS) is composed of 25 members: 4 deputies and 2 senators elected, respectively, by the Sejm (the first chamber of the Parliament) and the Senate (the second chamber of the Parliament), for a period of 4 years, First President of the Supreme Court, President of the Supreme Administrative Court, 15 members elected from among judges of the Supreme Court, administrative courts, courts of appeal, regional courts and military courts for a four-year term of office, the Minister of Justice and one person appointed by President of the Republic of Poland.

¹⁸ As Art. 9a of the Act of 12 May 2011 on the National Council for the Judiciary (KRS) (consolidated text: Dz.U. 2019, item 84, as amended) provides, 15 members of the Council are elected by the Sejm, for a joint four-year term of office, from among judges of the Supreme Court, courts of general competence, administrative courts and military courts.

¹⁹ A. Rakowska-Trela, *Krajowa Rada Sądownictwa po wejściu w życie nowelizacji z 8.12.2017 r. – organ nadal konstytucyjny czy pozakonstytucyjny?*, [in:] *Konstytucja. Praworządność. Władza sądownicza: aktualne problemy trzeciej władzy w Polsce*, eds. Ł. Bojarski, K. Grajewski, J. Kremer, G. Ott, W. Żurek, Warsaw 2019, pp. 107–122.

the National Council, each of the powers represented on the body should be allowed to freely elect their representatives. In this context, it was argued that the National Council of the Judiciary, in a composition formed according to the new rules, was not provided sufficient guarantees of independence from both the legislature and the executive authorities and became a *de facto* political structure. This, in turn, raised a question about the status of the judges appointed following the neo-KRS recommendation (including, in particular, a doubt whether they had the power to adjudicate).

A response to the question was provided by the Supreme Court by means of the mentioned resolution²⁰ stating that in Poland's criminal and civil proceedings the composition of court which includes a judge appointed with the involvement of the so-called Neo-KRS should be deemed vitiated. The resolution has established a right to challenge rulings issued by common courts and military courts with the participation of such judges after the day of publication of the resolution, while in relation to rulings of the Supreme Court – regardless of the date on which they were given (concerning also those issued before January 23 2020).

V. Conclusions

The current political situation in Poland is one of the main factors instilling a growth of judicial activism in this country, what reflects the resolution of the Supreme Court discussed in this paper. Undoubtedly, the resolution displays traits of political commitment – it concerns issues of particular importance for the state system, and refers to the principles of independence of courts and judges, as well as the division and balance of powers. At the same time, its creative character, determined by the very nature of the Supreme Court's powers, cannot be ignored. The legal effects caused by the resolution cannot be directly inferred from the provisions of law, while the decision itself is a result of the Supreme Court's in-depth analysis, not limited to the subsumption of the factual situation under provisions of law.

²⁰ The resolution of the Supreme Court was adopted in implementation of the judgment of the EU Court of Justice of 19 November 2019 in joined cases C-585/18, C-624/18 and C-625/18 (ECLI:EU:C:2019:982), initiated by applications for preliminary rulings submitted by the Supreme Court.

The claim that the Supreme Court resolution reveals political commitment should, however, in no case have a negative connotation. The Polish case shows that courts not only may, but in some instances even have to engage politically in order to protect the basic principles and values that underlie the rule of law. Political commitment is justified in any event when it serves to protect the common good, i.e. the good of all members of the political community, and therefore the principles, values and goals that constitute the common foundation of political life in a particular society. In no case should the common good be identified with the good of the majority. As Polish experience shows, the interest of the majority is not the same as the common good of all citizens. Therefore, the interests of the majority should give way to the interests of the minority when the former are contrary to constitutional principles and values. It can be assumed then that it is the interests of the minority, and not the majority, that are supposed to serve the attainment of the common good²¹.

At the same time, Polish experience shows that under the conditions of a constitutional crisis, judicial activism may result in individual centers of judicial power fighting each other. In such context, the phenomenon of judicial activism should be assessed unambiguously negatively. It is worth noting that the resolution of the Supreme Court was adopted against the background of an alleged conflict of powers between the Supreme Court and the Sejm and between the Supreme Court and President of the Republic of Poland. It was only two days before the scheduled date of the Supreme Court meeting that Marshal of the Sejm requested the Constitutional Tribunal to resolve the dispute. The request was submitted with the intention to prevent the Supreme Court from passing the resolution²². For obvious reasons, in the actions supposed to stop the passing of the resolution, participated the completely politically-dependent Constitutional Tribunal²³. However, both the factual and le-

²¹ Ibidem.

²² According to the Art. 86 para. 1 of the Act of 30 November 2016 on the organization of the Constitutional Tribunal and the mode of proceedings before the Constitutional Tribunal (consolidated text: Dz.U. 2019, item 2393), the initiation of proceedings before the Constitutional Tribunal shall suspend proceedings before the bodies involved in a conflict of competence.

²³ At this point, it should be noted that the Constitutional Tribunal has been made a part of the system of political forces existing in Poland. Out of the 15 judges of the Constitutional

gal circumstances testified to the apparent nature of the alleged competence dispute²⁴, which enabled the Supreme Court to further proceed in the case. This did not stop the Constitutional Tribunal from exercising the political will underlying its actions, and following the request to resolve the competence dispute, on January 28, 2020²⁵ it ruled that the powers of the Supreme Court to issue resolutions be suspended inasmuch as they concern establishment of the composition of the National Council for the Judiciary, the procedure for presenting candidates for the position of a judge to President of the Republic of Poland, the exercise of the prerogative of President of the Republic of Poland to appoint judges, as well as the competences to perform the office of a judge by a person appointed by the so-called Neo-KRS. In addition, the Constitutional Tribunal also suspended retroactively the application of the Supreme Court's resolution, only to rule on its annulment in April 2020²⁶. This, in turn, has moved the situation to a higher level of abstraction, as the legal construct of invalidity of Supreme Court rulings is unknown to Polish law (nor is the Constitutional Tribunal authorized to review the constitutionality of Supreme Court rulings). The described actions of the Constitutional Tribunal should therefore be considered as an attempt to combat the Supreme Court.

The example of Poland shows that the phenomenon of judicial activism entails both opportunities and threats to the judiciary. On the one hand, it gives the courts and tribunals an opportunity to counteract irregularities, acting as a brake on the actions of the other two powers. On the other hand, whenever it becomes an instrument of politicized centers of judicial power, it actually leads to the exercise of a political will. In this context

Tribunal, as many as 14 are ones recommended by the parliamentary majority. Meanwhile, the established procedure for the appointment of judges of the Constitutional Tribunal does not offer to the opposition an opportunity to propose their own candidate. A. Bień-Kacała, *Illiberal judicialization of politics in Poland*, "Comparative Law Review" 2019, vol. 25, pp. 198–213.

²⁴ See items 8–9 of the justification to the resolution of the Supreme Court.

²⁵ See decision of the Constitutional Tribunal of 28 January 2020, Kpt 1/20 (M.P. item 103).

²⁶ The judgment was issued as a result of an application lodged by the Prime Minister to examine the compliance of the Supreme Court resolution with the Constitution of the Republic of Poland. Cf. judgment of the Constitutional Tribunal of 20 April 2020, file reference: U 2/20 (M.P. item 376).

arises a question whether judicial activism will prove to be an opportunity or a threat to the Polish system of justice. Time will show which of the options will, in fact, prevail.

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