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JUDICIAL ACTIVISM AND THE MULTICENTRICITY OF THE LEGAL SYSTEM

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Abstract

Judicial activism arises when a judge makes a choice that reflects his or her own decision rather than a choice determined by the legislator. In judicial activism of a political nature, courts assume responsibility for resolving social problems, often through hidden activism, presenting judicial choices as if they were compelled by legal provisions. Such activism challenges the separation of powers by replacing legislative value judgments with judicial ones while portraying them as constitutionally mandated. It has created a new dimension of legal multicentricity: rather than coexisting, the judicial branch competes with the legislative branch within the same normative space. In this confrontational model, courts effectively displace legislative decisions with judicially created norms claimed to derive from the Constitution.

Keywords: judicial activism, multicentricity of the legal system, hidden activism, separation of powers, judicial branch

1. Introduction. The contemporary significance of judicial activism

On 20 March 2026, the Polish Supreme Administrative Court issued a judgment ordering the transcription of a marriage certificate concerning a same-sex marriage concluded in Germany[1]. Polish law does not permit same-sex marriages; however, the transcription of a marriage certificate concluded abroad would, in effect, result in the recognition of a same-sex marriage in Poland as well. The judgment of the Supreme

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1 Judgment of the Polish Supreme Administrative Court of 20 March 2026, II OSK 216/21, https://orzeczenia.nsa.gov.pl/doc/CE82955F7B

Administrative Court was delivered with reference to the judgment of the Court of Justice of the European Union of 25 November 2025[2], in which the Court held that the provisions of the Treaty on the Functioning of the European Union and the Charter of Fundamental Rights must be interpreted as precluding legislation of a Member State which, on the ground that the law of that Member State does not allow marriage between persons of the same sex, does not permit the recognition of a marriage between two same-sex nationals of that Member State concluded lawfully in another Member State.

These judgments have generated controversy in Poland, and the Polish government has initially refrained from amending domestic legislation to allow for the technical transcription of a marriage certificate between two persons of the same sex. Following the judgment of the Court of Justice of the European Union, the Polish Prime Minister Donald Tusk, regarded as a liberal and pro-European politician (having served as President of the European Council for five years), stated that *no one will impose anything on us in this matter*, and that issues concerning the status of same-sex unions should be regulated in a manner *that the majority of Poles, through a parliamentary majority, considers appropriate*[3]. After several months, however, this position changed in response to growing socio-political pressure. In May 2026, the Prime Minister instructed that a regulation be prepared to permit the transcription of same-sex marriage certificates[4]. The regulation was subsequently issued by the Minister of Digital Affairs on 22 May 2026[5].

The judgments mentioned above constitute examples of rulings through which courts establish general norms governing issues of social life with strong axiological overtones, generating significant social disputes and controversy. Both in Poland and abroad, such judgments have often concerned matters such as same-sex marriage or the permissibility of abortion. Such judgments include, inter alia:

– the 1973 judgment of the United States Supreme Court in *Roe v. Wade*, according to which the Constitution guarantees a woman's right to terminate her pregnancy[6];

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[2] Judgment of the Court of Justice of the European Union of 25 November 2025, C-713/23, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:62023CJ0713

[3] *Premier Tusk o wyroku TSUE: nikt niczego w tej sprawie nie będzie nam narzucał.* [Prime Minister Tusk on the CJEU judgment: no one will impose anything on us in this matter]. 2025. https://www.pap.pl/aktualnosci/premier-tusk-o-wyroku-tsue-nikt-niczego-w-tej-sprawie-nie-bedzie-nam-narzucal. (Accessed on: 12 July 2026).

[4] *Premier o transkrypcji aktów małżeństw jednopłciowych: to nie otwiera możliwości adopcji.* [Prime Minister on the transcription of same-sex marriage certificates: this does not open the possibility of adoption]. 2026. https://www.pap.pl/aktualnosci/premier-o-transkrypcji-aktow-malzenstw-jednoplciowych-nie-otwiera-mozliwosci-adopcji. (Accessed on: 12 July 2026).

[5] Regulation of the Minister of Digital Affairs of 22 May 2026 amending the Regulation on the Standard Forms of Documents Issued for Civil Status Registration, Dz.U.2026.667, https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU20260000667/O/D20260667.pdf.

[6] Judgment of the United States Supreme Court of 20 January 1973, *Roe v. Wade,* 410 U.S. 113, https://supreme.justia.com/cases/federal/us/410/113/.

- the 2022 judgment of the United States Supreme Court in *Dobbs v. Jackson Women's Health Organization*, according to which the Constitution does not confer a right to abortion[7];
- the 2015 judgment of the United States Supreme Court in *Obergefell v. Hodges*, according to which the Constitution requires a State to license a marriage between two people of the same sex[8];
- the 1997 judgment of the Polish Constitutional Tribunal, according to which unconstitutional was a regulation permitting termination of pregnancy on the ground that a pregnant woman found herself in difficult living conditions or a difficult personal situation[9];
- the 2020 judgment of the Polish Constitutional Tribunal, according to which unconstitutional was a regulation permitting termination of pregnancy on the ground of a high probability of severe and irreversible fetal impairment or an incurable illness threatening the fetus's life[10].

These judgments are commonly regarded as manifestations of judicial activism. For the purposes of this article, judicial activism is understood in accordance with the definition proposed by Lech Morawski, according to which it arises when a judge makes a choice that reflects his or her own decision rather than a choice determined by the legislator[11]. It should be noted, however, that the concept of judicial activism has been defined in a variety of ways in the literature and remains the subject of considerable scholarly debate. A detailed discussion of these definitional issues falls outside the scope of the present analysis.

2. Multicentricity as a consequence of judicial activism of a political nature

Judicial activism is a phenomenon that is inevitable and cannot be wholly avoided. At the same time, it is highly diverse. It is difficult to criticize judicial activism consisting in filling legal gaps where the law is silent and a decision must nevertheless be made. Criticism should, however, be directed at judicial activism of a political nature, in which courts assign themselves the role of resolving social problems[12], often assuming

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7 Judgment of the United States Supreme Court of 24 June 2022, *Dobbs v. Jackson Women's Health Organization,* 597 U.S. 215, https://supreme.justia.com/cases/federal/us/597/19-1392/.

8 Judgment of the United States Supreme Court of 26 June 2015, *Obergefell v. Hodges,* 576 U.S. 644, https://supreme.justia.com/cases/federal/us/576/644/.

9 Judgment of the Polish Constitutional Tribunal of 28 May 1997, K 26/96, https://ipo.trybunal.gov.pl/ipo/Sprawa?cid=3&sprawa=3100.

10 Judgment of the Polish Constitutional Tribunal of 22 October 2020, K 1/20, https://ipo.trybunal.gov.pl/ipo/Sprawa?cid=3&sprawa=22412.

11 Lech Morawski: Zasada trójpodziału władzy. Trybunał Konstytucyjny i aktywizm sędziowski. [The tripartite division of powers principle. The Constitutional Tribunal and judicial activism]. *Przegląd Sejmowy*, 4. (2009), 65.

12 Bogusław Banaszak: Aktywizm orzeczniczy Trybunału Konstytucyjnego. [Judicial activism of the Constitutional Tribunal]. *Przegląd Sejmowy,* 4. (2009), 75.

the form of hidden activism, referring to the attitude of a judge who presents his or her decision as deriving from legal provisions while knowing that it is in fact the result of his or her own choice[13]. This type of activism appears to constitute a violation of the principle of separation of powers, according to which the making of generally binding law – often involving axiological choices intended to reflect the will of society – is the role of the legislative branch.

Judicial activism of a political nature appears to have resulted in the emergence of another dimension of the multicentricity of the legal system. The multicentricity of the legal system is generally understood as a situation in which different centers may, in a binding manner, fill through their activity the same legal space[14]. Traditionally, multicentricity has been studied primarily in the context of the same legal space being filled by the domestic legislator and the EU legislator. Unlike this dimension of multicentricity, the filling of the same legal space by the legislative and judicial branches is confrontational rather than coexistential in nature[15]. The judiciary leads to the annihilation of decisions made by the legislature, replacing them with its own norms, while presenting them as allegedly rooted in the Constitution.

3. The legal foundations of judgments reflecting judicial activism

It is therefore necessary to examine which constitutional provisions were (allegedly) contradicted by the regulations challenged in the aforementioned judgments.

3.1. Judgment of the Supreme Court of the United States of 1973 in Roe v. Wade

The Supreme Court held that:

> *State criminal abortion laws [...] that except from criminality only a life-saving procedure on the mother's behalf, without regard to the stage of her pregnancy and other interests involved, violate the Due Process Clause of the Fourteenth Amendment, which protects against state action the right to privacy, including a woman's qualified right to terminate her pregnancy*[16].

In accordance with the the Due Process Clause of the Fourteenth Amendment to the United States Constitution: *nor shall any State deprive any person of life, liberty,*

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13 Morawski op. cit. 66.

14 Ewa Łętowska: Multicentryczność współczesnego systemu prawa i jej konsekwencje. [The multicentricity of the contemporary legal system and its consequences]. *Państwo i Prawo,* 4. (2005), 4.

15 Cf. Artur Kotowski: Zjawisko multicentryczności systemu prawa z perspektywy koncepcji integracyjnej. [The phenomenon of legal system multicentricity from the integrative concept perspective]. *Studia Prawnicze,* 4. (2015), 103–104. https://doi.org/10.37232/sp.2015.4.4

16 Judgment of the Supreme Court of 20 January 1973, *Roe v. Wade,* 410 U.S. 113, https://supreme.justia.com/cases/federal/us/410/113/.

or property, without due process of law[17]. This clause has been interpreted by the U.S. Supreme Court as providing numerous protections extending beyond procedural safeguards.

3.2. Judgment of the Supreme Court of the United States of 2022 in Dobbs v. Jackson Women's Health Organization

The Supreme Court held that: *The Constitution does not confer a right to abortion*. In the majority opinion, Justice Samuel Alito stated that: *That provision [the Due Process Clause of the Fourteenth Amendment] has been held to guarantee some rights that are not mentioned in the Constitution, but any such right must be "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty.*[18]*"*

The comparison between 1973 and 2022 clearly demonstrates that, although the constitutional text, including the Fourteenth Amendment and the Due Process Clause, remained unchanged, its interpretation by the Supreme Court differed fundamentally over time.

3.3. Judgment of the Supreme Court of the United States of 2015 in Obergefell v. Hodges

The Supreme Court held that: *The Fourteenth Amendment requires a State to license a marriage between two people of the same sex*[19].

Here, too, the Due Process Clause of the Fourteenth Amendment served as the constitutional foundation for the Court's reasoning. The Court's reliance on the Due Process Clause illustrates the extent to which its broad and indeterminate wording may serve as a basis for recognizing virtually any protection the Court chooses to incorporate within its scope.

3.4. Judgment of the Polish Constitutional Tribunal of 1997

The Constitutional Tribunal held that a regulation permitting the termination of pregnancy on the grounds that the pregnant woman was in difficult living conditions or a difficult personal situation was inconsistent with Article 1 and Article 79(1) of the provisions of the 1952 Constitution that remained in force[20]. Article 1 provided that:

> *The Republic of Poland shall be a democratic state governed by the rule of law, implementing the principles of social justice*, while the Article

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[17] The Constitution of the United States of America, Amendment XIV (1868), https://www.senate.gov/civics/resources/pdf/US_Constitution-Senate_Publication_103-21.pdf.

[18] Judgment of the Supreme Court of 24 June 2022, *Dobbs v. Jackson Women's Health Organization,* 597 U.S. 215, https://supreme.justia.com/cases/federal/us/597/19-1392/.

[19] Judgment of the Supreme Court of 26 June 2015, *Obergefell v. Hodges,* 576 U.S. 644, https://supreme.justia.com/cases/federal/us/576/644/.

[20] Judgment of the Constitutional Tribunal of 28 May 1997, K 26/96, https://ipo.trybunal.gov.pl/ipo/Sprawa?cid=3&sprawa=3100.

> 79(1) stated that: *Marriage, motherhood, and the family shall be under the protection and care of the Republic of Poland. Families with many children shall receive special care from the State*[21].

3.5. Judgment of the Polish Constitutional Tribunal of 2020

The Constitutional Tribunal held that a regulation allowing termination of pregnancy due to a high probability of severe and irreversible impairment of the fetus or an incurable disease threatening its life was inconsistent with Article 38 of the Constitution of the Republic of Poland of 1997[22]. Article 38 provides that: *The Republic of Poland shall ensure the legal protection of the life of every human being*[23].

Especially striking was the Tribunal's derivation, in its 1997 judgment, of the prohibition of abortion on the grounds that the pregnant woman is in difficult living conditions or a difficult personal situation from the clause of a democratic state governed by the rule of law. Addressing this issue, Ryszard Bugaj – a member of the Constitutional Committee of the National Assembly that drafted the new constitution adopted in 1997 – stated:

> *had we known that the Tribunal would, on the basis of the article stating that the Republic is a state governed by the rule of law, challenge the provision on the right to terminate pregnancy on so-called social grounds, we probably would not have included this article in the Constitution at all*[24]. Referring to other rulings of the Tribunal that were likewise only tenuously grounded in the constitutional text, Bugaj argued: *When reading the Tribunal's judgments [...], I rubbed my eyes and wondered whether, when voting for the Constitution, I was in full possession of my mental faculties. [...] The content of constitutional norms is of little importance. What matters is who sits on the Tribunal. Strictly speaking, everything depends on the views held by the majority of judges (sometimes a very narrow one)*[25].

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[21] Announcement of the Chairman of the Council of State of 16 February 1976 on the publication of the consolidated text of the Constitution of the Polish People's Republic adopted by the Legislative Sejm on 22 July 1952, Dz.U.1976.7.36, https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU19760070036/O/D19760036.pdf. Act of 29 December 1989 amending the Constitution of the Polish People's Republic, Dz.U.1989.75.444, https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU19890750444/T/D19890444L.pdf.

[22] Judgment of the Constitutional Tribunal of 22 October 2020, K 1/20, https://ipo.trybunal.gov.pl/ipo/Sprawa?cid=3&sprawa=22412.

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[24] Cited in: Eliza Olczyk – Bernadeta Waszkielewicz: Ostry spór polityków o rolę Trybunału. [A fierce dispute among politicians over the role of the Constitutional Tribunal]. *Rzeczpospolita,* 111. (2007), A1.

[25] Ryszard Bugaj: Trybunał Konstytucyjny, czyli trzecia izba parlamentu. [The Constitutional Tribunal: the third chamber of parliament]. *Rzeczpospolita,* 91. (2011), A15.

4. The distinctive features of multicentricity resulting from judicial activism

Each of the judgments discussed above was delivered within a distinct legal and institutional context and could warrant a separate analysis. Such an examination, however, falls beyond the scope of the present article. It is nevertheless worth reiterating that, in my view, these judgments exemplify a broader judicial tendency to invalidate legislative choices and replace them with standards formulated by the judiciary and presented as deriving from the Constitution. From this perspective, they illustrate a form of multicentricity in which the judiciary seeks to occupy the same normative space as the legislaturę, doing so in a confrontational manner.

It is important to recognize that the relationship between the legislative and judicial branches as centres occupying the same normative space is inherently asymmetrical.

(1) The legislative branch possesses direct democratic legitimacy – it is explicitly empowered by the people (the sovereign) to enact generally binding law, which often involves making controversial and axiologically significant decisions. The judiciary lacks such legitimacy.

(2) Statutes enacted by the legislature are the outcome of a legislative procedure in which proposed provisions are subjected to various forms of consultation, enabling different groups and actors in social life to present their views. If proposed solutions are manifestly contrary to public opinion, various forms of social opposition may lead to the abandonment of controversial solutions. Judgments issued by the judiciary, by contrast, are rendered in a manner that excludes or substantially limits the expression of society's voice. This, moreover, follows from the very nature of the judiciary, which renders judgments not on the basis of the will of society but on the basis of determining what (allegedly) follows from legal provisions. This is obvious in the context of resolving individual cases, but not in the context of formulating general norms.

(3) Decisions of the legislature – as noted – may be overturned by the judiciary. Decisions of the judiciary resulting in the formulation of general norms, however, are difficult for the legislature to challenge. The recognition that general norms resulting from judicial decisions are in fact rooted in the Constitution (which is often highly questionable) essentially means that changing them would require constitutional amendment.

(4) Legislative bodies are elected for fixed terms; their members may seek re-election and are politically accountable to voters for their decisions. In courts and tribunals that formulate general norms, judges are sometimes appointed for an indefinite period (the U.S. Supreme Court) or for long, non-renewable terms (the Polish Constitutional Tribunal – 9 years). There is no political accountability, nor should there be – such accountability is, in principle (with some exceptions), incompatible with the judicial branch. The just resolution of disputes may often be unpopular with the public. However, it seems that in a democratic state, those who make decisions on general matters, significantly affecting the functioning of society and the lives of individuals, should bear political responsibility. In his dissenting opinion to the 2020 judgment of the Constitutional Tribunal, Judge Leon Kieres stated: *The Tribunal has a strictly*

> *defined constitutional function. It is not a legislative body and cannot replace members of parliament in making controversial decisions and bearing the associated responsibility before the electorate*[26].

The increasing prominence of judicial activism of a political nature has contributed to a growing perception of courts and tribunals formulating general norms, such as supreme courts and constitutional courts, as political institutions. Consequently, in many jurisdictions, considerable attention is devoted to the appointment of judges with clearly identifiable political or ideological orientations, based on the expectation that their judicial decisions will reflect those orientations. In some instances, politically constituted courts and tribunals are relied upon to resolve issues that would otherwise require legislative action, thereby enabling politically contentious decisions to be made without the electoral accountability ordinarily borne by the legislature. To the extent that courts and tribunals engage in the formulation of general norms, they may be regarded as performing functions analogous to those of a supra-legislature or a de facto third chamber of parliament. From this perspective, such developments raise serious concerns regarding the principle of the separation of powers. Illustratively, information concerning the political affiliation of judges is publicly available in relation to the supreme courts of U.S. states[27].

5. Conclusions. Addressing the risks associated with judicial activism

The foregoing considerations raise the question of how the risk of courts and tribunals encroaching upon the domain constitutionally assigned to the legislature may be addressed. At the outset, it should be emphasized that judicial review of the hierarchical conformity of normative acts remains an indispensable component of a constitutional legal order. Review of the constitutionality of statutes and of the legality of executive acts constitutes an essential safeguard of the rule of law.

In my view, however, such jurisprudence should be more balanced. The opposite stance to judicial activism is judicial restraint. As Richard Posner has pointed out, judicial restraint is based on deference and reticence[28]. The deferential approach consists in avoiding conflicts with the decisions of other branches of government, while the reticent approach is founded on the assumption that judges should not be making policy decisions. Accordingly, under judicial restraint, judges respect the decisions of elected representatives, assuming laws are constitutional unless proven otherwise.

At the same time, reliance on judicial restraint alone cannot provide a sufficient institutional safeguard, as such restraint ultimately depends on the interpretive approach

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[26] Dissenting opinion by Judge Leon Kieres to the judgment of the Constitutional Tribunal of 22 October 2020, K 1/20, https://ipo.trybunal.gov.pl/ipo/Sprawa?cid=3&sprawa=22412.

[27] *State supreme courts in the United States*. https://en.wikipedia.org/wiki/State_supreme_courts_in_the_United_States (Accessed on: 12 July 2026).

[28] Richard A. Posner: *The federal courts: challenge and reform*. Cambridge, Harvard University Press, 1996. 314 ff.

adopted by individual judges. The central issue, therefore, is whether the legal system can provide institutional mechanisms capable of limiting judicial encroachment upon matters reserved to the legislative branch.

One possible solution might be a regulation that existed in Poland before 1997, that is, before the new Constitution came into force. Under the provisions in force at that time, if the Constitutional Tribunal has issued a ruling that a statute is inconsistent with the Constitution the Sejm (the lower house of the Polish parliament) could:

- recognize a ruling as justified – in which case it would make appropriate amendments to the act covered by the ruling or repeal it in whole or in part;
- recognize the act covered by the ruling as consistent with the Constitution – in which case it would dismiss the ruling of the Constitutional Tribunal[29].

The possibility of dismissing a ruling of the Tribunal allowed the Sejm to prevent unjustified encroachment by the Tribunal into the sphere of establishing general norms.

One possible objection to the foregoing solution concerns the situation in which the legislature itself openly enacts statutes that are inconsistent with the Constitution. Under such circumstances, a legislature unwilling to comply with judgments declaring statutes unconstitutional could effectively deprive the constitutional tribunal (or, in other jurisdictions, the supreme court) of its role in the constitutional system. This objection must, however, be considered in a broader institutional context. A legislature prepared to enact legislation in manifest disregard of constitutional constraints is likely to make every effort to neutralise the constitutional court or the supreme court, primarily by subordinating it. Indeed, comparative constitutional experience suggests that legislatures prepared to disregard constitutional constraints frequently seek not only to circumvent constitutional review but also to capture the institutions entrusted with exercising it. In such circumstances, even the most carefully designed legal safeguards are of limited practical significance if the independence of the judiciary and its constitutionally guaranteed institutional autonomy are not respected.

At the same time, it should not be overlooked that the judiciary likewise bears responsibility for preserving the constitutional balance of powers. By refraining from judicial activism of a political nature and respecting the constitutional limits of its own authority, the judiciary contributes to maintaining the integrity of the principle of the separation of powers.

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