Against the Instrumentalization of Law: Justice for the Convicted in the Brześć Trial

Judgment of the Supreme Court of 25 May 2023, II KK 453/22
Acquitting Convicts in the Brześć Trial[1]

The example of the Brześć trial should be a lesson on the role of the law and the courts in a democratic state under the rule of law, a lesson not only for judges, but also for representatives of the executive and legislative branches of government, and finally a lesson for all of us. The case should also serve as a warning against the temptation to succumb to political emotions in an unmeasured fashion, the temptation to fight political opponents using the instruments of the state and the law, and the temptation to take actions contrary to the law, including the Constitution, to achieve political goals and expand the scope of power.

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Commentary

Introduction. Political and historical context: An indication of the knotty problems and the momentousness of the ruling

It is rare that the Supreme Court directly addresses education in terms of the fundamental values of a democratic state under the rule of law. In the 25 May 2023 judgment of the Supreme Court in the Brześć case, the conclusions are of timeless significance. The ruling has the hallmarks of a precedent and is groundbreaking in the sense that, while closing a certain historical chapter in the history of the Polish justice system, it lays the foundation for a new, hopefully better, one. The verdict of acquittal in the

[1] LEX No. 3588627.

Brześć trial is not only the closure, after nearly a century, of a dark case from the 1930s, but is a reckoning with the past in the name of building a law-abiding future.

In Poland, a post-communist country, the attitude to the past and historical policy is extremely important, as national identity and consciousness are built on it, including in legal terms. In the past, there have been controversial rulings by the Supreme Court in the area of settling the past. Among the most questionable is certainly the resolution of the Supreme Court's Enlarged Composition of 20 December 2007, the importance of which was highlighted by its inclusion in the book of legal principles. The thesis of this resolution states that: "courts adjudicating criminal cases of offenses under the decree of the Council of State of 12 December 1981 on martial law (Journal of Laws No. 29, item 154) were not exempt from the retroactive application of criminal provisions of statutory rank."[2] The resolution significantly reduced the possibility of a reckoning with the communist past, and had a chilling effect, undermining confidence in the judiciary ever since. Not only did the Supreme Court fail to recognize the contradictions with domestic and international law of its decision, but also, in giving its consent to the retroactivity of criminal law in the past, it failed to recognize the importance of the historical moment and, as a result, ignored the socio-political context and the possible positive educational effect of the resolution. In this case, the effect was negative; it was as if the Supreme Court announced that in Free Poland, there can be no question of a lawful settlement of the past.

The Brześć case, well known to historians, lawyers, and certainly to a large part of the public, is a symbol of the dark period of *Sanacja* rule. For years in the People's Republic of Poland, the case was an excellent propaganda tool used to discredit the achievements of the interwar period in the twentieth century. Criticism, while fully deserved, cannot obscure the essence of the matter, namely the instrumentalization of the judiciary by the executive branch. This aspect was aptly grasped by the Supreme Court in the ruling under review, exposing the historical leadership role of Józef Piłsudski.

The progressive instrumentalization of the judiciary marks a shift away from democracy toward authoritarianism and further toward totalitarianism. Lawyers of the pre- and post-war periods were aware of this. In a monograph entitled *Sprawidliwość sowiecka* (Soviet Justice) (first edition, 1945), Kazimierz Zamorski and Stanisław Starzewski wrote that "In Western Europe, the view has become entrenched that the justice system, in order to fulfill its task, must conform to two essential conditions: 1. to

[2] Ref. I KZP 37/07 Critical glosses to this resolution: J. Zajadło, *Five minutes of anti-philosophy of anti-law*, "Gdańskie Studia Prawnicze – Przegląd Orzecznictwa" 2008, No. 1, p. 161; W. Zalewski, *Iuspositivism versus justice*, "Gdańskie Studia Prawnicze – Przegląd Orzecznictwa" 2008, No. 3, p. 127. For a partially critical gloss by M. Królikowski see: *Glosa to the resolution of the Supreme Court of December 20, 2007 (ref. 1 KZP 37/07)*, "Przegląd Sejmowy" 2008, No. 3, p. 243; see also: a critical discussion of this resolution in the context of German jurisprudence in W. Kulesza, *Crimen lease iustitie. Criminal liability of judges and prosecutors for judicial crimes under Nuremberg, German, Austrian and Polish law*, Łódź 2013, pp. 450–453. See also: Judgment of the Constitutional Court, OTK ZU 8A/2010, item 81, OJ No. 205, item 1364.

be based on certain general principles, on values independent of the interests or value judgments of particular groups or individuals; 2. to be independent in its structure and activity from the will of the governed."[3] Meanwhile, Soviet justice was obviously characterized by different principles determined by the Leninist motto that "the court is an instrument of the power of the proletariat and the working peasantry."[4] The Polish justice system was moving dangerously toward subordination to the rulers.

The Brześć trial contradicted the principles of the tripartite division of power and was an extreme violation of the rule of law. What if the Piłsudski camp had the support of a significant part of society if it violated the law? As András Sajó rightly points out: "Democracy as the rule of the people can be totalitarian, not so much because the crowd tends toward totalitarianism, but simply because democracy has totalitarian potential."[5] The principle of the independence of the judiciary from the rulers of the state was formed through the struggle against the doctrine of the supremacy of the ruler in the name of individual rights. The Brześć trial proved how easy it was to reverse this process.

1. The historical and legal problem

The court battle for the acquittal of the defendants is impressive. For lack of space, this gloss omits the very interesting legal threads related to the restoration of trial records. Also omitted are the key legal and procedural problems related to the question of the finality of the decision and the possibility of filing a cassation against the verdict issued in 1933.

2. The key substantial legal problem

From the justification of the Supreme Court's judgment of 25 May 2023, it appears that in the Brześć trial, the Court of Appeals shared the position of the court of first instance and "adopted a legal assessment of the defendants' behaviour, recognizing that they committed a crime under Article 102 Part I in conjunction with Article 100 Part III of the 1903 CC, consisting of taking part in a conspiracy to overthrow by violence the government in power in Poland at the time and to replace them with other persons, albeit without changing the fundamental state system, except that, applying Article 2, Section 1 of the 1932 CC, they used Article 97, Section 1 in conjunction with Article 95 of the 1932 CC as the basis for conviction."

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[3] K. Zamorski, S. Starzewski, *Justice of the Soviets*, Warsaw 1994, p. 21. It is worth pointing out that the first edition of this valuable book was published while the war was still in progress, in the spring of 1945 in Italy in the II Polish Army Corps.

[4] *Ibid.*, p. 27.

[5] A. Sajó, *Ruling by Cheating. Governance in Illiberal Democracy*, Cambridge 2021, p. 32.

In its further arguments, the Supreme Court, in its May 2023 judgment, focuses on the elements of Article 95 of the 1932 Criminal Code, including the signifier "by violence," rightly inferring that the provision was about "physical violence." The Supreme Court shared the position of legal doctrine[6], that mental coercion, i.e. a threat, cannot be a means of criminal action within the limits of Article 95 of the 1932 Criminal Code. The Supreme Court, relying on both documentary and historical material, also held that "since it has not been shown (established) that the defendants were participants in such an agreement that sought to remove by violence members of the government in power in Poland at the time (that they participated in such a group, organization, party, association, society, association, or otherwise defined structure that sought to do so), and thus belonged to a conspiracy to overthrow the government, then regardless of other important considerations, their behaviour did not exhaust the elements of the crime charged and attributed to them of participation in a conspiracy formed for the purpose of committing a crime under Article 100 of the 1903 Criminal Code (Article 97 of the 1932 Criminal Code)." This statement became the basis for the acquittal of the defendants.

Neither finding above is in doubt. Article 97 of the Penal Code, in conjunction with Article 95 of the Penal Code, required intentionality in the form of a willingness to remove by violence "the Diet, Senate, National Assembly, Government, Minister or courts," or to seize their power. Article 97 § 1 of the 1932 Criminal Code stipulated that a person who enters into an agreement with other persons to commit a crime specified in Articles 93, 94, or 95 is punishable by imprisonment. As accepted in the literature, "liability under Article 97 § 1 can be referred to only if the agreement is to commit a strictly defined act. Thus, the mere examination of the mood of others, or even the production of a general mood in the direction of a crime under Articles 93–95 is not sufficient. What is not required is an agreement to act according to a strictly defined plan. This condition, which was in the draft of the Codification Commission, has not been maintained in the current text. The existence of a plan of action is therefore indifferent, a strictly defined end goal is sufficient."[7] The goal of the defendants was not to "remove by violence" the Government, or at least that has not been proven beyond any doubt. The Supreme Court's consideration rightly focuses on the subjective side, for from the subjective point of view, any agreement aimed at a state crime was sufficient for a conspiracy under Article 97 of the 1932 Criminal Code. This agreement did not entail either the "creation of an organization" or of a "union."[8]

Since the crime of Article 97 § 1 of the Penal Code, in conjunction with Article 95 of the Penal Code, according to the Supreme Court's findings, was not committed, the substantive law was defectively applied in the 1930s in a situation where the regulations required the target to use physical violence, which was not used and, more importantly, they required the admission of a conspiracy, of which there was none. In

6 Cf. W. Makowski, *The Criminal Code. Commentary*, Warsaw 1937, p. 332.
7 See also: S. Glaser, A. Mogilnicki, *The Criminal Code. Commentary*, Kraków 1934, p. 340.
8 Cf. J. Makarewicz, *The Criminal Code. Commentary*, Lviv–Warsaw–Kraków 1938, p. 311.

its May 2023 verdict, the Supreme Court meticulously highlighted the legal problem against a background of errors in factual findings.

However, it behooves the author of this gloss to note that the Supreme Court should refer a little more extensively to the problem of intertemporal law, for here some doubt can be found.

To begin with, an elementary formal finding needs to be emphasized. The legal basis that the District Court in Warsaw adopted in its 13 January 1932 verdict, convicting defendants Wincenty Witos, Kazimierz Bagiński, Norbert Barlicki, Adam Ciołkosz, Stanislaw Dubois, Władysław Kiernik, Herman Lieberman, Mieczysław Mastek, Adam Pragier, and Józef Putk, could not have been the provisions of the 1932 Criminal Code, since that code came into force on 1 September 1932, nearly nine months after the verdict. The Polish President issued his decree on 11 June of that year. The change of qualification was made by the Court of Appeals ruling on 20 July 1933, thus already under the new law.

The question arises of assessing the correct application of the norms of intertemporal law. Article 2, Section 1 of the 1932 Penal Code had content similar to the current Article 4 of the 1997 Penal Code. Since the defendants were originally charged with an act under Article 102 Part I in conjunction with Article 100 Part III of the 1903 Criminal Code, it was necessary to consider whether the former law was more relevant to the perpetrators. The 1903 Penal Code provided for a heavy prison sentence of up to eight years for an act under Article 102, while Article 97, Section 1 of the 1932 Penal Code provided for "imprisonment," which, according to Article 39, Section 1 of the same Penal Code, was for a minimum of six months and a maximum of fifteen years, and therefore *prima facie* a harsher punishment, at least as far as the upper limit of the statutory sanction was concerned. Perhaps the decisive circumstance was the lower limit of the statutory sanction in Article 102 of the 1903 Penal Code, which set aggravated imprisonment under the 1917 Transitional Provisions for one year.[9] Of course, a simple comparison of statutory sanctions alone does not yet determine anything definitively on the question of "relevance," but it seems that for the sake of clarity, it would be good to address the issue.

3. Political and legal issue

It is not the material-legal issues, which are quite trivial in fact, that constitute the epochal significance of the ruling in question. Its importance in terms of transformative justice has already been mentioned. Its systemic significance should now be exposed. The May ruling of the Supreme Court touches on the fundamental issue of the effects

[9] Cf. W. Makowski, *Penal Code temporarily in force in the Republic of Poland on the lands of the former Russian partition*, Vol. I, *General Part*, Warsaw 1921, p. 89 *et seq.* and the same, *Penal Code temporarily in force in the Republic of Poland on the lands of the former Russian partition*, Vol. II, *Part II–XIX*, Warsaw 1921, p. 50.

of the detrimental influence of the executive on the judiciary and the effects of the negation of the principle of tri-partite division of power. In 1933, the independence of the judiciary was undermined in the name of legalizing Józef Piłsudski's political decision. Only with the passage of time is it possible to assess in full the extent of the detrimental impact of the 1933 Court of Appeals decision approving the District Court's ruling. There was a collapse of the moral authority of the government and the courts, resulting in the further decay of the state and drift toward an authoritarian state. Knowledge of the political and sometimes purely financial corruption of the judges and prosecutors involved in the Brześć trials became widespread.[10] In the long run, the Brześć trial cast a shadow over the perception of the judiciary of the Second Republic. The Supreme Court rightly says that "This case should also serve as a warning against the temptation […] to take actions against the law, including the Constitution, to achieve political goals and expand the scope of power."

4. The problem of the legitimacy of the judiciary

It is not difficult to find parallels in the ruling of the Supreme Court with the current situation in the judiciary. The importance of the good standing of the authority of judges was already pointed out before the war,[11] and research in this regard is also being carried out now.[12] A great deal has already been written about the current crisis caused by the post-2015 changes in the judiciary.[13] There is no doubt that restoring the credibility of the courts has become a key issue. The words of Bronisław Wroblewski are telling; he writes that "A great deal is required of judges. A judge must stand high mentally and morally. This is one of the very few sentences that has not been and is not questioned and is sometimes upheld even by those who, with the slogan of judicial independence

[10] Cf. A. Mogilnicki. *Memoirs of a lawyer and judge*, Warsaw 2016, p. 335 *et seq*. The author writes: "The judges who tried this case were quickly promoted immediately afterwards, with the exception of Judge Leszczynski, who voted for acquittal in the court of first instance and filed a dissenting opinion, but was outvoted by two other judges, Hermanowski and Rykaczewski. […] The prosecutor who conducted the investigation and 'watched over' the prisoners in Brześć was Czeslaw Michalowski, who later became Minister of Justice as a reward for this, and after his resignation from this position was given a very lucrative position as a mortgage writer in Warsaw; Car ceased to be a minister after this trial, as he was appointed Speaker of the new Sejm, but, as long as he was a minister, he mainly directed the course of the trial and everything connected with it, especially the way the prisoners in the Brześć Fortress were handled. The prosecution in this trial was brought by prosecutor Witold Grabowski, who also became Minister of Justice after Michalowski" – *ibid.*, p. 335.

[11] Cf. B. Wróblewski, *Ability and legal mental culture of criminal judges*, imprint from vol. X of the Vilnius Legal Yearbook, 1939; *idem*, W. Świda, *Sentencing in the Republic of Poland*, Vilnius 1939.

[12] Cf. W. Zalewski, *Why do people need courts? Judging in times of crisis of confidence* [in:] *Legitimization of judicial power*, ed. A. Machnikowska, Gdańsk 2016, pp. 211–229; J. Królikowska, *Judges on punishment, punishing and impunity. Sociological analysis of the judicial dimension of punishment*, Warsaw 2020.

[13] Cf. e.g. *Rule of Law as a Universal Value. Jubilee Book of Professor Krzysztof Wojtowicz*, ed. A. Kozłowski, Wrocław 2022.

on their lips, cast more or less elaborate nets to affect the judiciary."[14] Nowadays, more people are being removed from adjudication for failing to meet an "impartiality test."[15] To make matters worse, there is an undermining of the credibility of the European Court of Human Rights (ECHR) by the Polish Constitutional Court, which "monitors" the jurisprudence of other courts and tribunals, and even worse, rules on the scope of the non-application of the ECHR, especially Article 6.[16]

5. Lesson for the future

Sociological writing emphasizes that the activity of judges that affects the formation of legal awareness is "extremely modest."[17] Compounding this state of affairs are, of course, legal restrictions, but there is also little awareness among judges of the importance of their work. Rarely are there rulings that appreciate the social dimension in shaping the social consciousness of citizens.[18] I hope that we may be able to properly appreciate the Supreme Court's decision in the Brześć case and appreciate its importance. The Supreme Court restores justice to the accused and gives proper meaning to the law and the rule of law. A historical antecedent has multiple meanings. First and foremost, it gives the right perspective as to what is important to the state and society. While not denying the good intentions of "good change," it should be remembered that the road to hell is paved with good intentions.

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14 B. Wróblewski, *Ability…*, p. 3.

15 Cf. Resolution of the Supreme Court I KZP 2/22, OSNK 2022/6/22, LEX No. 3348360, OSP 2023/2/13, and, for example, Order of the Supreme Court III KK 114/23, which dealt with the circumstance of a judge's participation in a procedure conducted under the amended law on the National Council of the Judiciary and a reasonable doubt about the judge's objective and subjective impartiality, LEX No. 3568272.

16 A. Wyrozumska, *Judgment of the Constitutional Court (K 6/21) on the ruling of the European Court of Human Rights in the Xero Flor case, which allegedly "does not exist"*, "Europejski Przegląd Sądowy" 2023, No. 2, pp. 4–15.

17 J. Królikowska, *Judges on punishment…*, p. 325.

18 However, cf. Order of the Supreme Court IV KO 36/23, dated May 25, 2023, LEX No. 3567076, in which the Supreme Court stated that "The external image of the functioning of the courts requires that we avoid any situation that may pose a threat to the formulation of rational opinions that not only considerations of merit determine how a case is decided."

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Summary

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Against the Instrumentalization of Law: Justice for the Convicted in the Brześć Trial

The acquittal after ninety years of Prime Minister Wincenty Witos and others convicted in the Brześć trial is a landmark ruling. The author seeks to demonstrate the multifaceted nature of this Supreme Court verdict in the context of the implementation of transformational justice with regard to judicial crimes of the communist period. The gloss approvingly assesses the interpretation of the criminal law adopted by the Supreme Court including, in particular, Article 97 of the Criminal Code of 1932.

Keywords: justice, acquittal, criminal law, separation of powers, instrumentalization of law.

Streszczenie

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Przeciw instrumentalizacji prawa – sprawiedliwość dla skazanych w procesie brzeskim

Uniewinnienie po 90 latach premiera Wincentego Witosa i innych skazanych w procesie brzeskim jest orzeczeniem przełomowym. Autor stara się wykazać wieloaspektowość tego wyroku Sądu Najwyższego w kontekście realizacji sprawiedliwości transformacyjnej również w odniesieniu do przestępstw sądowych okresu komunistycznego. W glosie aprobująco oceniono wykładnię prawa karnego przyjętą przez SN, w tym zwłaszcza art. 97 Kodeksu karnego z 1932 r.

Słowa kluczowe: sprawiedliwość, uniewinnienie, prawo karne, podział władzy, instrumentalizacja prawa.