

*Programme for the Foundations of Law &
Constitutional Government
Faculty of Law
University of Oxford*

The Polish constitutional crisis and institutional self-defence

Oxford, 9 May 2017

We invite you to a symposium on the Polish constitutional crisis, to be held in Oxford on 9 May 2017. The main purpose of the symposium will be to reflect, from a theoretical perspective, on the controversial events around the Polish Constitutional Tribunal since mid-2015.

Constitutions vest state institutions, like the courts or the presidency, with powers they can use to defend themselves or some important values against violations by other state institutions [Barber 2013]. Whether those powers are used constitutionally or unconstitutionally depends on constitutional rules and principles. It is possible for a constitution to allow (or even require) acting against some legal or constitutional rules, e.g., in accordance with doctrines of effectiveness or necessity [Barber and Vermeule 2017]. Also, irrespective of what a constitution requires, there may be cases where an official (a judge, a minister) all things considered (morally or politically) ought to do something the law prohibits her from doing.

If a court perceives an attack on its own constitutional role or on some important values, coming from another state institution, the court may be justified in bending substantive and procedural rules to resist that attack. Or at the very least, be justified in more 'creative' interpretation of those rules than in ordinary circumstances. The court may even be justified in presenting its actions as entirely lawful, orthodox and devoid from broader institutional (political) considerations, because this may be a condition of securing compliance from the public or other officials [Barber and Vermeule 2017]. However, courts should show both epistemic and political modesty in embarking on such course of action and seriously consider deference to other institutions as an alternative to intervention [Ibid.].

The question we want to ask in this symposium is how this general theoretical framework applies to the events around the Polish Constitutional Tribunal, beginning with the ill-fated change of the statute regulating the Tribunal in June 2015 and an election of five judges in October 2015, through the series of actions of the new

Law and Justice ('PiS') government and of the Constitutional Tribunal and its individual members (notably the then President of the Tribunal, Andrzej Rzepliński), ending with the most recent events resulting in the election of a PiS-nominated judge, Julia Przyłębska, as President of the Tribunal.

We invite the panellists and the commentators to reflect on the extent to which the various actors of this drama could have justified their actions (even if they did not do so themselves) as constitutional (or perhaps unconstitutional, but still morally or politically proper) defence of important values.

In particular, we pose the question whether a perceived threat to the rule of law or to constitutionalism could have, in this context, justified actions that to some extent violated those values.

We also ask the participants to evaluate the public reasons ('official stories') given by the various actors from the perspective of justifiability of 'fictions' or 'simplifications' while attempting to protect an important value in an effective (e.g. publicly acceptable) way.

The symposium will consist of a panel of four presentations of around 15 minutes, given by Polish academics, followed by commentary from scholars associated with the Programme. Texts of the presentations will be circulated among the confirmed attendees in advance.

Symposium contributions will be published online. The symposium will also be video-recorded and we plan to make the recordings available on YouTube.

References:

Barber 2013: N. W. Barber, 'Self-defence for Institutions' (2013) 72 Cambridge Law Journal 558.

Barber and Vermeule 2017: N. W. Barber and A. Vermeule, 'The Exceptional Role of Courts in the Constitutional Order' (2017, forthcoming) Notre Dame Law Review.

More information [available on our website](#).