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The Culture of Justification and Public Reason: Comments on the Motion of Members of the Polish Parliament to the Constitutional Tribunal[2]

1. Introduction

The question of limits of public authority is one of the most important issues faced by modern liberal democracy. In legal philosophy, this issue was dominated by Ronald Dworkin's critique of legal positivism, in which he rejected the view that the enactment of a law by an authority is sufficient for its legitimization. For Dworkin, a law is legitimate if it protects the standards of liberal morality and therefore has moral value[3]. Of course, court judgments based on the standards of liberal democracy cannot be regarded as easy. In pluralistic societies even the people who are open to compromise and use common sense for solving problems may find themselves in fundamental disagreement with others regarding political or moral grounds for making decisions[4]. If this is the case, we should perhaps accept that in a liberal democracy which tolerates different viewpoints a court decision can be simultaneously justified and unjustified and that from time to time many of us will disagree with a given ruling for moral reasons. If the rule of law is to be different from the authoritarian rule, in which obedience is based on coercion, it is necessary to establish a forum where conflicts relating to the exercise of public authority will be resolved. According to Aharon Barak[5], in democracies such a forum is provided by independent courts.

But more suitable and modest account of the idea of the rule of law than the one proposed by Barak can be found in David Dyzenhaus' distinction between the culture of justification and the culture of authority. In 2017, I analysed the amendments introduced by the Polish Act on the Supreme Court, which concerned the Court's functioning. This

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[3] See: D. Dyzenhaus, *Legality and Legitimacy: Carl Schmitt, Hans Kelsen and Hermann Heller in Weimar,* Oxford 1999, pp. 5–7.
[4] See: W. Walluchow, *On the Neutrality of Charter Reasoning*, in: J. Ferrer Beltrán, J.J. Moreso, D.M. Papayannis (eds.), *Neutrality and Theory of Law*, Dordrecht–Heidelberg–New York–London 2013, pp. 207–210.
[5] A. Barak, *Proportionality: Constitutional Rights and Their Limitations*, Cambridge 2012, p. 245.

article is a continuation of the abovementioned analysis. In my opinion, the distinction between the culture of justification and the culture of authority is also an interesting contribution to another discussion about public reasons[6]. If one accepts the basic requirements of the culture of justification (described below), the obvious question arises about which manner of argumentation should be adopted in the culture of justification. Despite the numerous difficulties, it seems that the most expedient solution is to invoke the public nature of those reasons. In this respect, the best alternative is the idea of public reason formulated by John Rawls. The overall thrust is that only such exercise of public power is legitimate which is based on proper public reasons[7].

In this paper I consider Dyzenhaus' distinction of legal culture into the culture of justification and the culture of authority and conclude that the argumentation adopted in the culture of justification can often be best understood in the light of the philosophical ideal of public reasons. Following Ron den Otter, I see public reasons as such reasons which a reasonable sceptic could deem at least not to be unreasonable. Then, borrowing the example from an article by Wojciech Ciszewski, I demonstrate how to apply Otter's idea of public reasons to the motion of Members of the Polish Parliament to the Constitutional Tribunal to adjudicate on the constitutionality of the law permitting the termination of pregnancy in cases of severe and irreversible impairment of the foetus or incurable condition that constitutes a threat to its life. My illustration is taken from the Polish law, but there is no reason to assume that the general manner of argumentation is country-specific.

2. The culture of justification and the culture of authority[8]

For Dyzenhaus, the culture of justification is situated between the culture of reflection (in other words the culture of authority) and the culture of neutrality[9]. Dyzenhaus derived a culture of reflection from the ideas of Jeremy Bentham, for whom the creation of law by the legislature was the ideal form of law-making, as it reflected the will of the majority of society in parliament. The task of the courts is to apply the law in such a way that their decisions best reflect the will of the legislature[10]. On the other hand, the culture of neutrality emphasizes that the judicial activity of the courts draws its legitimacy from the liberal principles that underpin democracy. Hence, the task of the courts is to maintain and uphold these principles.

The culture of justification takes the middle way between the culture of reflection /authority and the culture of neutrality. With the culture of reflection, it shares the

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[6] M. Smolak, *Kultura władzy i kultura uzasadniania w ujęciu Davida Dyzenhausa jako kategorie analizy proponowanych zmian w ustawie o Sądzie Najwyższym* [Eng. *Employing David Dyzenhaus' Conception of the Culture of Authority and the Culture of Justification for Analysing Changes Proposed by the Act on the Supreme Court*], "Ruch Prawniczy, Ekonomiczny i Socjologiczny" 2017/4, pp. 19–20. Available in English at: http://bit.do/RPEiSMSmolak, accessed on: 21.02.2019. In the following part, I refer to the English translation of the text.

[7] See more: W. Sadurski, *Judicial Review and Public Reason,* Sydney Law School Research Paper 17/38, available at: http://ssrn.com/abstract=2965225, accessed on: 21.02.2019.

[8] The part of my article concerning the culture of justification and the culture of authority according to Dyzenhaus, comes from my earlier text: M. Smolak, *Employing*…, pp. 20–24.

[9] G. Hooper, *The Rise of Judicial Power in Australia: Is There Now a Culture of Justification?* "Monash University Law Review" 2015/1, pp. 102–135.

[10] For Dyzenhaus, like for Lon L. Fuller, there is no definitive difference between substantive law and procedural law, between the rational justification process and the justification of a decision. See: D. Dyzenhaus, *Proportionality and Deference in a Culture of Justification*, in: G. Huscroft, B.W. Miller, G. Webber (eds.), *Proportionality and the Rule of Law. Rights, Justification, Reasoning*, Cambridge 2015, p. 235.

belief that the will of the people – reflected in the decisions of the legislature – must be given preference. At the same time, the culture of justification shares, with the culture of neutrality, the belief in the importance of the principles of liberal democracy for the legitimacy of law[11].

The culture of justification assumes that the legislature is the primary agent that creates the law, but at the same time it rejects the assumption that the results of elections or the will of the voters constitute the basis of a healthy democracy. The basis for a properly functioning liberal democratic state is that all the authorities and voters involved in the decision-making process believe in the value of transparency and are always ready to be held accountable[12].

Dyzenhaus' notion of the culture of justification is complemented by the concept of respect for the legislature, which means that the reasons presented by the legislative or executive branches should be treated with respect, or "deference as respect". Deference as respect is evident when, in its deliberations, a court pays attention to the reasons provided by the legislature in favour of a certain decision, rather than another. Nevertheless, the idea of deference as respect does not imply subordination of the judiciary to the executive or legislative branches, but rather requires that judges pay special attention to the arguments put forward by authorities of the executive or legislative, or to the rationales that can be reconstructed. This reasoning should primarily be concerned with establishing the relationship between the arguments and the decision made by the legislature. In all decisions, this relationship must meet one essential standard, namely the standard of reasonableness[13]. In other words, if there are problems with interpretation, the task of the courts is to assume that the decisions of the legislative and the executive are, at least in principle, reasonable and rational due to the fact that they are in line with liberal principles and human rights, for example. Only grossly unfair and unjustified measures that are adopted by the state may be considered unreasonable[14].

Moshe Cohen-Eliya and Iddo Porat offer an interesting interpretation of the culture of justification and the culture of authority. The authors succinctly define the culture of authority as a culture that requires justifications at the stage of assigning authority, but once authority is assigned, the authority sees no further need to justify its decisions. In contrast, in the culture of justification, even after authority has been assigned, the authority is still required to justify all its decisions. As Cohen-Eliya and Porat emphasize,

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[11] Dyzenhaus stressed that this distinction between cultures should be associated with Etienne Mureinik, a South African constitutionalist and theoretician of law. In the early 1990s, Mureinik famously observed that the South African Constitution is a bridge leading from its apartheid past, belonging to the culture of authority, to its future, which must be the culture of justification. See: E. Mureinik, *Bridge to Where? Introducing to Interim Bill of Rights*, "South African Journal on Human Rights" 1994/10, pp. 31–32.

[12] Of course, Dyzenhaus is a proponent of legal constitutionalism, not political constitutionalism. If we accept political and legal constitutionalism as certain extremes, we can assume that legal constitutionalism implies preference for liberal principles that are in conflict with the will of the legislature, even if it is democratically legitimized, while political constitutionalism proclaims that democracy always abandons liberal principles in the event of a conflict. See: D. Dyzenhaus, *Law as Justification: Etienne Mureinik's Conception of Legal Culture*, "South African Journal on Human Rights" 1998/14, p. 34.

[13] D. Dyzenhaus, *Dignity in Administrative Law: Judicial Deference in a Culture of Justification*, "Review of Constitutional Studies" 2012/1, pp. 135–136.

[14] Dyzenhaus also says that Fuller's view is central to a culture of justification, which links the doctrine of proportionality with the doctrine of respect for the properly reasoned decisions of the public authority. From this perspective, the principle of proportionality is an integral part of a culture of justification. See more: D. Dyzenhaus, *Proportionality and Deference*…, pp. 463–465. See also: M. Lewans, *Deference and Reasonableness Since Dunsmuir*, "Queen's Law Journal" 2012/1, pp. 59–98; C. Misak, *A Culture of Justification: The Pragmatist's Epistemic Argument for Democracy*, "Episteme" 2008/1, pp. 94–105.

the culture of justification consists of directives requiring, firstly, that any decisions of the public authority be justified by means of providing the reasons when those decisions affect the legally protected interests of individuals; and, secondly, that these decisions be ultimately derived from the normative political order of a given society. In the culture of justification, the authorities are required to formulate a substantive justification for all of their actions, in order to demonstrate their legitimacy. In other words, the decisions of a public authority draw their legitimacy from the reasons that the authority provides in the process of justifying its decisions. Cohen-Eliya and Porat also assert that the culture of justification manifests itself, for example, through embracing a broad conception of fundamental rights, through emphasizing the role of extra-legal moral and political principles in the process of applying and interpreting the constitution, through lack of barriers to substantive review, and through the introduction of a two-stage process of justification: namely, identification of infringements, followed by an assessment of how public authorities justify such infringements[15].

Cohen-Eliya and Porat emphasize that other characteristics of these legal cultures can be identified through an analysis of the basic assumptions of liberal democracy. First and foremost, these include the problem of legitimizing authority. In the culture of authority, justification is particularly relevant when power is granted, whereas in the culture of justification, even if an authority has been legitimized, its decisions still require justification. The second issue concerns the scope of authority. In the culture of authority, the scope of authority is clearly defined by the law. Within these prescribed limits, the courts' task is not to decide whether or not the decisions of an authority are legitimate, but merely to establish that the authority has the power to make decisions. In contrast, in the culture of justification, any decision of a public authority has to be justified, since the legitimacy of that decision is rooted in the justification – not in the fact of its being vested with authority. The third issue is the question of fundamental rights. In the culture of authority, the law sets a boundary on the exercise of public authority, in the sense that the boundary cannot be crossed. In the culture of justification, the law is treated as a value *per se*: one which should be advanced, supported, and implemented. Laws should be the point of reference for court decisions, as substantive criteria which form the basis for assessing any activities of the authority. The fourth issue is that of the limits of reason. The culture of authority is sceptical about human beings' ability to reason and tends to emphasize human frailty as a barrier to rational thinking – judges being no exception in this regard. Too much depends on the person, rather than on the reasons the person presents. On the other hand, the culture of justification is more optimistic and assumes that human beings are capable of formulating rational arguments and deliberating thoughtfully, and that they are capable of accepting rational and reasonable decisions. The fifth issue concerns the theory of democracy, on which these two cultures take different views. The culture of authority is closely linked with the pluralist idea of democracy, while the culture of justification is associated with deliberative democracy. In the pluralist theory, democracy is an arena for the cut and thrust of different views and interests, such as the location or allocation of goods. In a deliberative democracy, decisions acquire their legitimacy due to the way in which they are taken. Authority is legitimized not so much through compromise, as on the basis of consent, which can be reached through deliberation.

[15] See: M. Cohen-Eliya, I. Porat, *Proportionality and the Culture of Justification*, „The American Journal of Comparative Law" 2011/2, pp. 462–465.

For the above reasons, it should be borne in mind that the culture of justification is not based on the so-called popular/populist opinions about what is good or bad. In this regard, it is an elitist culture, seeking to eliminate from the courts the prejudice and irrationality that are typical of the general public. The culture of justification can also be seen as *sui generis*, anti-local and anti-nationalist, in the sense that it is not sensitive to the criterion of nationality.

Two further ideas are important factors in the development of the culture of justification: perfectionism and rationalism. The former is the European concept of the organic state and the law. In this view, a state is not the territory where a given collection of individuals lives, whose relations are determined by the state. A state is rather a union of people who share the same values, and promote or protect them. The role of individuals is determined by the community of which they are members. The State expresses the solidarity of the community, and emphasizes its permanent connection with it. Rationalism is a phenomenon related to the Enlightenment ideas of rationality and the objectivity of law, including the perception of law as a science. The culture of justification assumes the rationality and objectivity of the law, and the rational and objective protection of human rights. Rationality and objectivity are fundamental elements of the culture of justification[16].

3. The idea of public reason

The distinction between legal cultures, proposed by Dyzenhaus, is an interesting suggestion on how to solve the problem of determining the limits of public authority and, consequently, the problem of implementing the principle of the separation of powers in a way that prevents conflicts from arising. The culture of justification does not require courts to regard the laws violating liberal principles as non-binding. Instead, the judiciary should demand that the executive and the legislature justify their decisions, examine such justifications, and decide whether or not they are reasonable[17]. So, if one accepts the basic requirement of the culture of justification, i.e. that decisions of the public authority should be justified, one arrives at an obvious question about which reasons should be accepted in the culture of justification. I argue that the most expedient solution is to invoke the public nature of those reasons. In this respect, the best alternative is the idea of public reason conceived by John Rawls[18]. Two arguments are vital here. Firstly, Rawls clearly delineates the boundary between public and non-public reasons. Secondly, one of the traits of public reason is the presumption that citizens of a liberal-democratic society are reasonable. Obviously, public reason is not necessarily shared by the entire community, not even a majority. Many other circumstances need to be allowed for, therefore it cannot be a common standard. On the other hand, there are such public reasons which are accepted almost universally. It is also true that the latter include some that tend to be accepted without much reason or rationality, for instance based on prejudice. Moreover, if the sources of knowledge about the moral

[16] Cohen-Eliya and Porat also stress the historical and intellectual causes behind the spread of the culture of justification: the development of the doctrine of human rights; the fall of nationalism and the rise of humanism and internationalism; the transition from elitism and suspicion towards popular democracy; the reduced role of European nations, the deep-rooted European faith and optimism in legal objectivity and rationalism. For more extensive discussion, see: M. Cohen-Eliya, I. Porat, *Proportionality*…, p. 465.

[17] M. Smolak, *Employing*…, p. 21.

[18] J. Rawls, *Theory of Justice,* Oxford 1971, pp. 19–21. See also: J. Rawls, *Political Liberalism,* New York 1993, p. 137.

convictions of the community members lack credibility (for instance, if they are based on astrological signs), then the consensus about invoking particular public reasons is exceedingly difficult to achieve[19].

John Rawls's fundamental idea is very simple: legitimacy of political action depends on the manner in which it is justified. Thus, only those regulations, decisions, initiatives or postulates which are appropriately justified are deemed legitimate[20]. According to Wojciech Ciszewski, the notion of public reason under Rawlsian theory covers two aspects: a substantive one and a procedural one[21]. The substantive aspect includes a variety of values, principles, modes of reasoning and argumentation, which provide political decision-makers with legitimate grounds for action. For Rawls, reasons of this kind are "acceptable to all free and equal citizens who respect the democratic system (public reasons)"[22]. Within the substantive aspect, the principle of acceptability can be distinguished: political action can be legitimized solely by reasons that can be accepted by a reasonable democratic citizen[23].

On the other hand, for Ciszewski, the procedural aspect of Rawlsian public reason refers to the manner in which political decision-makers invoke public reason. Within the procedural aspect, two principles may be distinguished: those of transparency and sincerity. According to the former, "the justification for political action should be accessible to all citizens"[24]. According to the latter, the justification for political action that a decision-maker promulgates publicly should be the factor that motivates the decision-maker to undertake said action. It means that, when assessing a decision, we should be able to reasonably reach the conclusion that the considerations which have been affirmed as its justification (as opposed to any other reasons) account most pertinently for the decision that has been taken[25].

How should one appeal to a public reason in legal argumentation? As I have written in an earlier article:

> Den Otter put forward an interesting solution to the problem: public reasons are such reasons that a reasonable sceptic could recognise as sufficiently convincing in a given argumentation[26]. These reasons would not stand the test in an ideal circumstances of deliberation. Nor are they the kind of reasons that every reasonable person in specific conditions could find particularly strong or that would be suitable as a rationale. These are reasons that such reasonable individuals could deem at least not unreasonable. To approach it from a different angle, argumentation relying on public reason should be conducted in such a fashion that a reasonable sceptic would be convinced[27].

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[19] T. Chirkowska-Smolak, M. Smolak, *Is There An Imitative Ratio Legis, and if so, How Many Are There?*, in: V. Klappstein, M. Dybowski (eds.), *Ratio Legis. Philosophical and Theoretical Perspectives*, Dordrecht 2018, p. 154.

[20] See: W. Sadurski, *Legitimacy of Law in a Liberal State: The Contours of Public Reason*, "Sydney Law School. Legal Studies Research Paper" 14/08, available at http://ssrn.com/abstract=2387140, accessed on: 21.02.2019.

[21] W. Ciszewski, *Rozum publiczny w praktyce – kwestia legitymacji moralnej wniosku grupy posłów o stwierdzenie niekonstytucyjności przesłanki aborcyjnej* [Eng. *Public Reason in Practice: The Moral Legitimacy of the Constitutional Complaint Lodged by Polish MPs Challenging the Constitutionality of the Abortion Law*], "Ruch Prawniczy, Ekonomiczny i Socjologiczny" 2018/3, pp. 19–21. Available in English at: http://bit.do/RPEiSWCiszewski, accessed on: 21.02.2019. In this paper, I refer to the English translation of the text.

[22] W. Ciszewski, *Public Reason*…, p. 20.

[23] W. Ciszewski, *Public Reason*…, p. 20.

[24] W. Ciszewski, *Public Reason*…, p. 20.

[25] W. Ciszewski, *Public Reason*…, pp. 20–21.

[26] R.C. den Otter, *Can a Liberal Take his Own Side in an Argument? The Case for John Rawls's Idea of Political Liberalism,* „Saint Louis Law Journal" 2005/49, p. 336 ff. See also: R.C. den Otter, *Judicial Review in an Age of Moral Pluralism*, Cambridge 2009, pp. 94–108.

[27] T. Chirkowska-Smolak, M. Smolak, *Is There*…, p. 154.

Sometimes reasons can be rationally questioned or challenged by any reasonable sceptic because of their imitative nature. They are "imitative reasons". The term "imitative reasons" is intended to denote such reasons whose aim is to convince somebody that some statements seem to be true or some judgements are justified, but about whose validity other people have doubts. The only thing in evidence is an intention to engender a conviction among the addressees of the reasons that such an effect does arise.

Therefore, one may formulate the following standard: public reason may become the basis of argumentation if a reasonable sceptic is unable to rationally question or challenge it. Regardless of their possible objections, such a sceptic – recognizing their responsibility for the community – can accept the reason as sufficiently convincing, or at least not unreasonable[28]. Moreover, such a structure of public reason seems to be consistent with the culture of justification. This culture demands reasons which no reasonable sceptic living in pluralistic society would challenge, nor would they dispute a judgment based on them, even if they would personally prefer a different judgment. Hence, appealing to public reasons makes it possible for each citizen to accept the decision as theirs, even if they strongly oppose the substance of the adopted decision. It is nevertheless a product of a decision-making process which involves reasons that cannot be reasonably challenged or thrown into question[29].

As can be seen, the requirement imposed on entities, in particular on judges, the duty to validate public reasons by mean of a test of the reasonable sceptic is an interesting and promising approach. Moreover, it represents a response to all those who challenge the legitimacy of constitutional courts to adjudicate in the matters of protection of human rights and the limits of such protection.

4. Example of analysis: eugenic reason for pregnancy termination[30]

The test of a reasonable sceptic in legal argumentation is clearly illustrated by applying the substantive and procedural principles of public reason (the principle of acceptability, and the principles of transparence and sincerity). Let me examine this test in the field of availability of abortion. Members of Parliament have motioned the Constitutional Tribunal to adjudicate on the constitutionality of laws that permitted termination of pregnancy in cases of severe and irreversible impairment of the foetus or an incurable condition representing a threat to its life. It may be noted that, in accordance with the so-called "abortion compromise" in force at present, termination is admissible only in three cases (when the life or health of the mother is at risk; in case of impairment or morbid condition of the foetus; or when the pregnancy results from an offence). The motion is concerned with a particular case of admissibility of termination, namely with the so-called "eugenic reason", whereby termination is allowed when there is a high likelihood of the feotus being impaired or affected by a severe condition. So the question arises: is the action of the group of MPs morally acceptable for a reasonable sceptic?

Ciszewski notes two arguments raised by promoters of the motion to support their request to prohibit termination for eugenic reasons. Firstly, all people – including at the prenatal stage of development – have the right to individual dignity and, therefore, to a particularly construed claim to protection of life. This may be defined as the

[28] R.C. den Otter, *Can a Liberal*…, p. 356.
[29] See also: T. Chirkowska-Smolak, M. Smolak, *Is There*…, pp. 154–155.
[30] I borrow the example analysis from the abovementioned article by Ciszewski. W. Ciszewski, *Public Reason*…

right-to-life argument. Secondly, the MPs submit that the varied extent of protection of life of particular persons depending on their health constitutes inadmissible discrimination. This argument may be termed the unequal-treatment argument[31].

According to Ciszewski, the right-to-life argument rest on the assertion which has been characterized in the motion as a broad understanding of the notion of the *human being*. It specifies the range of entities who have the right to dignity and thus can be granted fundamental rights and freedoms, including the right to life. In case of the unequal-treatment argument, Ciszewski distinguishes two premises. Firstly, beings in the prenatal period also have the right to dignity, and hence fundamental rights and freedoms. The second premise is the non-discrimination principle which states that making the legal position of persons, in particular the extent of protection of their rights, dependent on such criteria as ethnicity, gender or health is a form of inadmissible discrimination. The MPs believe that the eugenic reason represents a violation of that principle, as according to the questioned statute, abortion is legal when there is a high probability that the foetus is severely impaired or affected by an incurable, life-threatening illness. Thus, the situation of the foetuses is contingent upon the prognosis of their health problems. Ciszewski notes that because the promoters see no sound justification for such selection of human beings, they consider the state of affairs to be an instance of unjustified discrimination[32].

Is the argumentation described above at least not unreasonable in the light of conditions set forth by the three principles of public reason? Can these arguments be considered to be public reasons?

Starting with the principle of acceptability, one should ask whether the reasons provided in the motion are acceptable to a reasonable democratic citizen. I share Ciszewski's opinion that the argumentation of the motion does meet that condition. A reasonable citizen would be able to share it regardless of the personally professed worldview. In their argumentation, the promoters "do not refer to religious dogma or God's will; neither do they refer to sacred texts"[33].

As for the principle of transparence, the action of the promoters satisfies this requirement as well; their action is overt, while its justification is available to the public. But I again side with Ciszewski, who believes that the principle of sincerity is infringed. As for the right-to-life reason, he notes that public reasons cited in the motion seem to justify a much broader scope of modifications in the Polish abortion law than the motion itself suggests, as they challenge the possibility of termination of pregnancy also when the health of the mother is at risk (medical reasons) and when the pregnancy resulted from an offence (legal reasons). After all, Ciszewski argues, if the right to life that all human beings are vested with to prohibits killing, and every instance of termination is a form of killing, then it is not understandable why the eugenic reason alone constitutes a violation of that right[34].

As to the unequal-treatment reason, Ciszewski states that if the differences in the scope of protection of life due to prognosis are an instance of inadmissible discrimination, it would appear that making that scope conditional on the manner of conception is at least an "equally reprehensible" act. After all, one can hardly imagine circumstances

[31] W. Ciszewski, *Public Reason*…, pp. 22–23.
[32] W. Ciszewski, *Public Reason*…, pp. 23–24.
[33] W. Ciszewski, *Public Reason*…, p. 27.
[34] W. Ciszewski, *Public Reason*…, pp. 28–29.

in which the manner of conception would justify unequal positions of persons. Thus, when the reasoning of the promoters is applied to the case of termination for legal reasons, one may arrive at the conclusion that foetuses which develop following an offence are discriminated against[35].

Thus, I agree with Ciszewski's critical evaluation of justification for the motion by a group of MPs concerning the constitutionality of the so-called eugenic reason. It does not meet the third of the key requirements resulting from public reason, namely the requirement for sincerity of actions of political decision-makers. A justification of political action that is declared publicly by a decision-maker should be the actual factor which inspires the decision-maker's action. Yet, the reasons of the MPs are "imitative reasons" in the meaning described above.

5. Conclusions

The aim of this paper was very modest. I wanted to demonstrate and provide an example of how the ideas of the culture of justification and of public reason can be applied as legitimizing devices in legal justifications. Using the test of a reasonable sceptic, I have argued that the culture of justification can be best understood by reference to the idea of public reason. In other words, all those regulations, decisions, initiatives or postulates must fulfil one essential standard, namely the standard of substantive and procedural aspects of public reason[36].

One should ask about the ramifications that the concept of public reason associates with failure to adhere to the principles of political legitimacy. In Rawls's conception, the postulate of an appropriate legitimization of political action was merely an obligation of moral nature, but it did not entail any farther-reaching sanctions. It would be worthwhile to note, however, that many of Rawls's continuators admit the possibility of treating the requirements of public reason as a binding legal rule (*legal duty*). As such, they would be elements which – among other things – make up the substance of the principle of the rule of law.

Finally, if we accept the basic requirement of the culture of justification: that decisions of the public authority be justified by providing the reasons behind them, it is necessary to acknowledge that the abovementioned motion by the group of MPs is an example of the culture of authority, which requires justification of the actions of an authority only at the moment when power is granted to it, after which the authority no longer perceives the need to justify its decisions. When different political groups adopt the principles of such a culture, there is a high risk of arbitrary and unjustified actions, especially when it comes to the protection of the fundamental rights of the individual.

The Culture of Justification and Public Reason: Comments on the Motion of Members of the Polish Parliament to the Constitutional Tribunal

Abstract: The aim of the paper is to demonstrate how the culture of justification and the public reason can serve as legitimacy device in legal justifications. The idea of the culture of justification, proposed by David Dyzenhaus, makes an interesting contribution to the

[35] W. Ciszewski, *Public Reason*…, p. 29.
[36] D. Dyzenhaus, *Dignity in Administrative*…, pp. 135–136.

discussion on how to make headway with the problem of determining the limits of public authority. Applying Ron den Otter' test of a reasonable sceptic, the author argues that the culture of justification becomes a good political and moral tool for limiting the exercise of public authority, if such a culture is understood and explained in light of the idea of public reason.

Keywords: culture of authority, culture of justification, public reason, test of a reasonable sceptic

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