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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*

I. INTRODUCTION

In this article, I would like to start by describing the concepts of the culture of authority and the culture of justification, as formulated by David Dyzenhaus. This will be followed by an analysis of some of the changes proposed by the Act on the Supreme Court in Poland, which concern its functioning, organisation and structure, and which were conducted on basis of the foregoing legal cultures. In my opinion, the distinction between the cultures of authority and justification proposed by the Canadian theorist of law, makes an interesting contribution to the debate concerning the demarcation of public authority and, consequently, the principle of the separation of powers. In the conclusion of the article, I argue that the proposed changes to the functioning of the Supreme Court are examples of legislative action based on the directives of the culture of authority, which can sometimes lead to violations of the rule of law.

From legal, social and political perspectives, one of the most significant issues facing modern liberal democracy is the problem of the limits of public authority. In the reflections of legal philosophy, this issue was dominated by the Dworkinian critique of legal positivism. Ronald Dworkin rejected the legal positivist view that the law is legitimised by virtue of the fact of its being established by authority. For Dworkin, a legitimate law is one that has a moral value, meaning that it protects the standards of liberal morality.[1] This argu-

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[1] Another approach is the idea of constitutional legitimacy, which holds that a law is legitimised if it conforms to constitutional norms. The substantive provisions of the constitution that guarantee the fundamental rights of the individual are of particular significance here, as they categorise acts that violate the rights and freedoms of individuals guaranteed by the Constitution as being contrary to the axiology of the Constitution. For more extensive discussion, see: F.I. Michelman, Legitimation by Constitution (and the News from South Africa), *Valparaiso University Law Review* 44(4), 2010: 1015–1034.

ment was widely accepted, especially among those who hold that control over the activities of the public authorities by means of law is illusory.[2] Of course, the decisions of courts cannot be classed as easy when they are based on the standards of liberal democracy, especially if that society embraces pluralism. Thus, it is obvious that even people who strive to adopt a conciliatory approach to others, and use a healthy dose of common sense when solving problems, may find themselves in fundamental disagreement with others when it comes to the political or moral grounds for making decisions.[3] And if this is the case, perhaps we ought to accept that the decisions made by the courts can be simultaneously justified and unjustified. In other words, since we are dealing with a liberal democracy, which presupposes different viewpoints due to its embrace of pluralist principles, it is to be expected that from time to time many of us will disagree with the ruling of a particular court for moral reasons. Obviously, such disagreement can also be driven by fear, ignorance or prejudice. But it is also sometimes the case that our opposition to a court decision is reasonable and justified.

Therefore, we must accept the fact that a system of public authority based on the rule of law, and especially on the separation of powers, may one day run into crisis. If the principle of the rule of law really means the rule of law, and not the rule of an authoritarian ruler, obedience to whom is based on coercion, then there must be a forum in which conflicts relating to the exercise of public authority are resolved. It goes without saying that in democracies the independent courts provide such a forum.[4]

II. THE CULTURE OF AUTHORITY AND THE CULTURE OF JUSTIFICATION ACCORDING TO DAVID DYZENHAUS

Dyzenhaus pursued this line of thought in suggesting that within legal culture a distinction should be made between the culture of authority and the culture of justification.[5] He stressed that this distinction between cultures

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[2] Cf. D. Dyzenhaus, *Legality and Legitimacy: Carl Schmitt, Hans Kelsen and Hermann Heller in Weimar,* Oxford 1999.

[3] Cf. W. Walluchow, On the neutrality of charter reasoning, in: J.F. Beltran, J.J. Moreso, D.M. Papayannis (eds.), *Neutrality and Theory of Law*, Dordrecht, Heidelberg, New York, London 2013.

[4] Many examples of this kind of court activity can be provided, but two seem so important that they should be mentioned here. The first example concerns the ruling of the Bavarian State Court, which ruled that a cross cannot be placed in a public-school building, since the freedom of religion guaranteed in the Constitution is thus restricted. Another example, which is no less famous and which, as some say, is the most commonly used precedent in the history of the United States of America, is that of *Roe v Wade*, 1973, in which the Supreme Court granted women the right to abortion, and ruled that prosecuting the practice would be unconstitutional.

[5] The opposite idea would have to be that of 'popular constitutionalism'. The essence of popular constitutionalism is that the elected representatives of the people play a key role in resolving

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 a culture of authority, to its future, which must be a culture of justification.[6]

Let us now turn to a detailed description of the culture of justification, as presented by Dyzenhaus. At the outset, it is worth noting that the term 'culture' might suggest that the culture of justification consists of the principles of legal culture shared by the judiciary, the legislature and the executive. However, this distinction between the culture of authority and the culture of justification, in principle, is a tool for analysing the activities of the courts and the legislature, and not of all the public authorities.[7]

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. Dyzenhaus derived the culture of reflection from the ideas of Jeremy Bentham, for whom the creation of law by the legislature was the ideal form of lawmaking, as it reflects 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.[8] On the other hand, the culture of neutrality emphasises 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. It shares with the culture of reflection the belief that the will of the people—reflected in in the decisions of the legislature—must be given preference. At the same time, it shares with the culture of neutrality the belief in the importance of the principles of liberal democracy for the legitimacy of law. However, the culture of justification does not categorically demand that the courts treat laws that violate liberal principles as non-binding. The task of the court is to demand that the executive and the legislature provide the reasons for their taking such and such decision, and not another.[9] The courts should examine such justifications, and decide whether or not they are reasonable.

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constitutional problems. For more extensive discussion, see: K. Werhan, Popular constitutionalism, ancient and modern, *UC Davis Law Review* 46(1), 2012: 67–68.

[6] Cf. E. Mureinik, A bridge to where? Introducing to interim Bill of Rights, *South African Journal on Human Rights* 10(1), 1994. According to Mureinik, the South African Constitution must first be seen as an act whose purpose was, in its basic sense, to overcome the dramatic history of the apartheid era, and to lay the foundations for a state based on democratic principles and values. These basic values are: dignity, equality and freedom.

[7] G. Hooper, The rise of judicial power in Australia: is there now a culture of justification?, *Monash University Law Review* 41(1), 2015: 102–135.

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

[9] A.L. Young, *Democratic Dialog and the Constitution*, Oxford, 2017, ch. 4.

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 electorate 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.[10]

Dyzenhaus' notion of the culture of justification is complemented by the concept of respect for the legislature, meaning 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 a court's deliberations pay 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 the subordination of the judiciary to the executive or legislative branches, but rather requires that judges pay special attention to the reasons given by the executive or legislative authorities, 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 fulfil one essential standard, namely the standard of reasonableness.[11] 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 branches 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 the grossly unfair and unjustified measures that are adopted by the state may be considered unreasonable.[12]

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 a culture of justification, even after authority has been assigned, the authority is still required to justify all its decisions. As Cohen-Eliya and Porat emphasise, the culture of justification consists of directives requiring, firstly, that any decisions of the

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[10] Of course, D. Dyzenhaus is a proponent of legal constitutionalism, not political constitutionalism. If we accept that political and legal constitutionalism are certain extremes, then we can assume that legal constitutionalism prefers liberal principles that are in conflict with the will of the legislature, even if it is democratically legitimised, while political constitutionalism proclaims that democracy always abandons liberal principles in the event of a conflict. See: Law as justification, *South African Journal on Human Rights* 14(1), 1998: 34.

[11] D. Dyzenhaus, Dignity in administrative law: judicial deference in a culture of justification, *Review of Constitutional Studies* 17(1), 2012: 135–136.

[12] As Fuller suggests, in certain forms of social order (a legal order is an example of such an order) a decision is legitimised not only when it can pass the test of reasonableness, but also when it is the result of a rational argument. In other words, judges not only judge the content of a legal decision, but also address the ways in which it is justified. Cf. D. Dyzenhaus, Proportionality and Deference in a Culture of Justification, in: G. Huscroft, B.W. Miller, G. Webber (eds.), op. cit.: 233.

public authority should be justified by giving the reasons when those decisions affect the legally protected interests of individuals; and, secondly, that these decisions should be ultimately derived from the normative political order of a given society. In a 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 reason that the authority provides in the process of justifying its decisions. Cohen-Eliya and Porat also assert that a culture of justification manifests itself, for example, by embracing a broad conception of fundamental rights, by emphasising the role of non-legal moral and political principles in the process of applying and interpreting the constitution, by the lack of barriers to substantive review, and by the introduction of a two-stage process for evaluating the actions of public authorities: namely, first there is the identification of violations of the law, and then an evaluation of the manner in which the public authority justifies these violations.[13]

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 the legitimisation of authority. In the culture of authority, justification is particularly relevant during the establishment of power, whereas with the culture of justification, even if an authority has been legitimised, 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 law. Within these prescribed limits, the task of the courts is not to decide whether or not the decisions of an authority are legitimate, but is merely to establish that an authority is authorised to make a decision. In contrast, with 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 the authority possessing legitimacy. The third issue is the question of fundamental rights. In the culture of authority, the law constitutes a boundary on the exercise of public authority, in the sense that this boundary cannot be crossed. In the culture of justification, the law is treated as a value in itself—one which should be advanced, supported and implemented. Laws should be the reference point for court decisions, as substantive criteria which form the basis from which all the activities of the authority are assessed. The fourth issue is that of the limits of reason. The culture of authority is sceptical regarding the reasoning abilities of human beings and tends to emphasise human frailty as a barrier to rational thinking—judges being no exception in this regard. 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, an issue on which these two cultures take different views. The culture of authority is closely tied to the pluralist view of democracy, while the culture of

[13] Cf.: M. Cohen-Eliya, I. Porat, Proportionality and the culture of justification, *The American Journal of Comparative Law* 59(2), 2011. Also D. Dyzenhaus, Law as justification; M. Cohen-Eliya, I. Porat, op. cit.: 463–465.

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 concerning the distribution of goods. In a deliberative democracy, decisions acquire their legitimacy due to the way in which they are taken. Authority is legitimised not so much through compromise, as on the basis of consent, which can be reached through deliberation.

In conclusion, it should be borne in mind that the development of the culture of justification is inextricably linked to the traumatic experience of the Second World War. This war provided us with two lessons in political culture: deep suspicion of all so-called people's democracies, as these transformed into totalitarian regimes in the early twentieth century; and an acute awareness of the threat that lies within nationalism. Therefore, the culture of justification is not based on the so-called popular opinions about what is good or bad. In this regard, it is an elitist culture, seeking to eliminate the prejudice and irrationality characteristic of public opinion from the courts. 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, namely perfectionism and rationalism. The former is the European conception of the organic state and law. In this view, a state is not the territory on which 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 emphasises its permanent connection with it. Rationalism is a phenomenon related to the Enlightenment ideas of rationality and the objectivity of law. 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.[14]

III. AN ANALYSIS OF PROPOSED CHANGES TO THE FUNCTIONING OF THE SUPREME COURT

Let us recall the two basic assumptions of the culture of justification. The first is that this culture consists of directives which require that any decision of the public authorities should be justified by giving the reasons for it, when such a decision affects the legally protected interests of individuals. The second assumption is the category of deference as respect. This means that the judges (but not exclusively) should ensure that they respect the reasons put forward by the executive or legislative authorities, or the reasoning that could

[14] 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.

be reconstructed to indicate a rational link between the arguments and the conclusions of the legislature.

Now we can focus on the first of these assumptions in the light of changes proposed by the Act on the Supreme Court:[15] on 12 July 2017, a draft parliamentary bill on the Supreme Court was filed to the Polish Parliament (printed matter no. 1727 of the VIII Sejm), and then the Act was passed on 20 July 2017. In the justification of the bill on the Supreme Court (covering over 50 pages) it is stated that:

> the Act is part of a wider reform of the judiciary, including the amendment to the Act on the National Council of the Judiciary and the Common Courts Organisation, which is intended to ensure the fairness of judicial decisions, faster procedure and restore public confidence in the courts.[16]

Naturally, changes to the functioning of one of the most important judicial organs, namely the Supreme Court, which entail far-reaching transformations in the organisation, and changes with regard to the appointment of judges and their competences, must—in a democratic state—be carried out in a careful and deliberate manner, with the involvement of public consultation, so as not to surprise the citizens or undermine their trust in the state and the law established under it. However, the manner in which this bill was drafted and passed give cause for considerable concern.

It is very significant that the draft bill on the Supreme Court was filed as a deputies' bill, despite the fact that it concerns matters of crucial importance for the functioning of the Supreme Court and the justice system as a whole in Poland. Since the bill was filed in this way, it was not subject to extensive public consultation, let alone expert analysis, either before its submission to the Polish Sejm or later. Moreover, it was widely noted that those behind the bill did not publicly disclose its main purposes during the preparatory stages. Furthermore, the Supreme Court, the National Council of the Judiciary and the judiciary self-government bodies did not participate in any way during the preparation stage of the bill, even in individual consultations.[17] Incidentally, the draft bill on the Supreme Court was a project involving the regulation of the system and jurisdiction of a public authority and thus—under Article 123(1) of the Constitution—it is excluded from urgent procedures, and therefore passing the Act in an accelerated process was not possible. This requirement of cautious procedure with regard to the draft bill is also justified by the position of the Supreme Court in the system of public authority. The Supreme Court is the guardian of the Constitution due to the powers conferred on it

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[15] The analysis does not take into account recent changes to the Act on the Supreme Court proposed by the President, but in my opinion they do not change the essence of the analysis of the proposed changes in the draft parliamentary bill, in terms of the culture of authority and the culture of justification.

[16] Cf. The position of the Deans of the Faculties of Law on the Draft Bill on the Supreme Court.

[17] Cf. D. Mazur, W. Żurek, The judiciary in Poland on the threshold of 2017: challenges and threats, *Ruch Prawniczy, Ekonomiczny i Socjologiczny* 79(1), 2017 <doi:http://dx.doi.org/10.14746/rpeis.2017.79.1.2>.

by the Constitution and other statutes. It suffices to mention just a few of them in order to confirm this special position. The Supreme Court investigates electoral protests; ascertains the validity of parliamentary and presidential elections, and the validity of national and constitutional referendums; investigates complaints concerning the National Electoral Commission's rejection of the financial reports of political parties and election committees, and financial information on the manner in which the political party disburses its subsidy. The decisions taken by the Supreme Court in these cases have a direct impact on the financing of political parties from the state budget and the possibility of their participation in subsequent parliamentary elections. If we also bear in mind that due to their position in the Supreme Court, three judges are also members of the National Electoral Commission, and that the First President of the Supreme Court is, due to this position, also the President of the State Tribunal, it is clear that the drafting of the bill on the Supreme Court should have been stringently justified and subjected to public scrutiny.

We can now turn to the second assumption of the culture of justification to analyse the draft of the bill from this perspective. As the drafters of the bill write in the justification:

> The purpose of the bill is, in particular, to improve the functioning of the Supreme Court and to democratise the process of appointing judges to it. The new regulations are designed to guarantee that the role of judge will be fulfilled by persons with the highest professional and ethical qualifications.

Thus, the analysis of the solutions adopted in the draft bill on the Supreme Court leads to the conclusion that they do not foster the fair and efficient functioning of this institution. Moreover, as can be seen through the example of Article 87 § 1 of the draft bill, the Act will have an adverse effect on the functioning of the Supreme Court. According to this provision, when the Act comes into force the current Supreme Court judges will be retired, with the exception of those judges appointed by the Minister of Justice or possibly by the President of the Republic of Poland. The implementation of this provision, without leaving even a minimum number of judges, along with the appointment of new judges who have never adjudicated in the Supreme Court, will obviously not be conducive to the smooth functioning of this court. If the intent of the authors was to radically change the organisation of the Supreme Court, retiring all its judges and not proposing that the remaining judges stay in active service will inevitably destroy the work of this court.

The Act also introduces significant changes to the organisational structure and principles of the Supreme Court by introducing three chambers, namely the Public Law Chamber, the Private Law Chamber and the Disciplinary Chamber. Of course, if changes to the functioning of the Supreme Court did improve and expedite proceedings before it, these changes would be commendable, but the absence of a clear criterion for assigning cases to the different chambers certainly does not facilitate the functioning of the Supreme Court.

Moreover, the reduction of the number of judges in the Supreme Court from 93 to 44, until the implementing provisions come into force, will place a significant burden on the court and lengthen the proceedings, which will thereby violate the right of citizens to have their cases considered without undue delay. Similar outcomes may ensue from granting the Minister of Justice the authority to delegate district court judges for service as judges of the Supreme Court. Such a state of affairs will entail that the judges of the lowest rank, who have never ruled in an appellate court, will be able to hear cases in the Supreme Court. Furthermore, the delegated judges of district courts will be able to have a decisive impact on the proceedings, in a way that is contrary to the separate opinion of a Supreme Court judge.

IV. CRITICISM OF THE CULTURE OF AUTHORITY

The foregoing brief analysis of the draft changes to the functioning of the Supreme Court and the justification of the draft bill demonstrate that the latest actions of the legislature with regard to the Supreme Court pertain to a culture of authority. Of course, I am not arguing that the acceptance of the basic directive of the culture of authority—which is that there is no need for an authority to justify its decisions—is a defining feature of the current legislature, but in the case of the Act in question, it is very clearly present.

Dyzenhaus opposes the culture of authority, as he holds that acceptance of its directives entails acceptance of formalism in the application of law and the adoption of a formal-dogmatic approach to the rule of law. Such a position culminates in undesirable political and moral consequences. With regard to undesirable political consequences, the crucial issue is the violation of the rule of law, which could result in: unjustified interference with the rights of the individual, imbalance in the separation of powers, unlawful lawmaking, and threats to judicial independence. When it comes to the moral consequences, I have in mind a lack of confidence as to whether legal regulations are made in accordance with the public interest/common good, even if they are lawful.[18]

Let us just add that this consideration of the unfavourable or undesirable consequences of adopting the directives of the culture of authority leads directly to the question of whether the rule of law is the rule of moral principle. Why should trust in the state be considered a moral value? On the one hand, when the concept of the rule of law is treated as procedural morality, it reflects the idea that the necessary condition for the fulfilment of substantive objectives by means of laws is the way in which they are established.[19] On the other

[18] See D. Dyzenhaus, Introduction, in: idem (ed.), *Recrafting the Rule of Law: The Limits of Legal Order*, Oxford, Portland, Oregon, 1999: 6–7. And A. Hutchinson, Rule of law revisited: democracy and courts, in: D. Dyzenhaus (ed.), *Recrafting the Rule of Law*: 199.

[19] By referring to Fuller's famous eight conditions of legality, it can be stated that a law fulfilling the eight conditions of legality is a necessary condition for the law to have a moral value.

hand, the law does in any case implement conventional justice. Therefore it is important that the concept of the rule of law should be established as a set of moral standards, without assuming that these standards reflect a purpose. According to Dyzenhaus, the concept of the rule of law should not be identified either with the morality of social justice or with the will of the sovereign, even if this is legitimised by the outcome of democratic and free elections. This concept is best understood as the 'ethics of civility', which is expressed in the requirement that the state take care of all individuals. Similarly, Heller argued that the rule of law works best when it assumes that all people are worthy and deserve state care in the public sphere, and that they are involved in the public sphere and are recognised as citizens.[20]

As mentioned before, one of the undesirable consequences that ensues from the political adoption of the directives of the culture of authority, according to Dyzenhaus, is the threat to the principle of judicial independence. In this regard, it is worth revisiting his excellent book *Judging the Judges, Judging Ourselves: Truth, Reconciliation and the Apartheid Legal Order*, in which—while examining hearings, or rather written testimony, as no judge came in person to the Truth and Reconciliation Commission (TRC)—Dyzenhaus noted that a lot of testimonies contained phrases along the lines of: 'There is no point in digging up and dwelling on the past,' 'It is only now that we begin to learn what it was really like,' 'We had no choice, Parliament is sovereign', '95% of our work had nothing at all to do with apartheid.'[21]

All these utterances essentially revolve around one issue, namely the defence of the independence of the courts and the judiciary.[22] This issue is tied up with the question of whether a judge can be brought before a tribunal, a court or a committee which could pass judgment on whether a particular decision was the right one to make (and even whether it was morally right), or whether this would constitute a violation of the independence of the courts, which guarantees their independent adjudication.

In the light of these comments, the fact there were no judges present at the hearing before the TRC is significant. Had they participated in the hearings, they could have shown that in civil democracy there are citizens who shoulder a special responsibility. Such an acceptance of their responsibilities towards the state and democracy would have borne witness to their moral citizenship. They could have treated their presence as an opportunity to publicly demonstrate their responsibility for past actions, and their concern for the future—with regard to the relationship between the state, the courts and the citizen. This would have been an example of how judges can meet the requirements of the culture of justification: presenting their arguments publicly would not

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[20] See D. Dyzenhaus, Introduction: 8; also idem, *Judging the Judges, Judging Ourselves: Truth, Reconciliation and the Apartheid Legal Order*, Oxford 1998, 138–141. See idem, Introduction: why Carl Schmitt?, in: idem (ed.), *Law as Politics. Carl Schmitt's Critique of Liberalism*, London, 1998: 6–7.

[21] See D. Dyzenhaus, *Judging the Judges*: 165–168.

[22] For more extensive discussion see: J. Zajadło, Judicial conscience, *Ruch Prawniczy, Ekonomiczny i Socjologiczny* 79(4), 2017 <doi:http://dx.doi.org/10.14746/rpeis.2017.79.4.3>.

have constituted a violation of the principle of judicial independence. Dyzenhaus asserts that the relations between the legislative, judicial and executive branches are not dependent solely on the principles and norms set forth in the constitution, but also—and primarily—on how the judges perform their duties. Judges should perceive the role they play in the legal state as that of imposing the concept of 'legality', a concept which is not necessarily tied to the concept of 'compliance with the law'.[23]

V. CONCLUSION

If we accept the two basic requirements of the culture of justification—namely the requirement that the decisions of the public authority be justified, by providing the reasons behind them, and the requirement that the judges give deference to the reasons offered by the executive or legislative authorities, or to the reasons that judges themselves can reconstruct in order to identify the rational link between the arguments and the final conclusions of the legislature—it is necessary to acknowledge that with the case of the draft bill on the Supreme Court in Poland we are dealing with a culture of authority, which requires justification of the actions of an authority only at the moment of establishment, after which the authority no longer perceives the need to justify its decisions. Unfortunately, as Dyzenhaus points out, countries that underwent systemic transformation have a strong tendency to switch from a culture of justification to a culture of authority, in the same way that Germany did after 1933. When a government adopts the principles of the culture of authority, especially in 'young' democracies, there is an acute risk of arbitrary and unjustified actions, especially when it comes to the protection of the basic rights of the individual. The possible consequences of such actions are all too obvious.

The process described here can also be observed at work in the countries of Western Europe, although the origins are of a different nature to those in countries that have undergone systemic transformation. Particularly after the September 11, Western societies have made a slow but noticeable transition from states which link the fight against terrorism with restrictions on the rights of individuals. Thus, the conclusion that can be drawn is that the concept of the culture of justification can serve as the basis for a critical analysis of not just the 'young' democracies, but also the countries of 'Old Europe', described metaphorically by Dyzenhaus as the guardians of the Enlightenment flame.[24]

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[23] See ibidem: 151–152 and 167–168.

[24] D. Dyzenhaus, The past and future of the rule of law in South Africa, *South African Law Journal* 124(4), 2007: 761.

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Summary

The aim of this article is to describe two legal cultures, namely the culture of authority and the culture of justification, as formulated by David Dyzenhaus. This distinction between legal cultures proposed by the Canadian theorist of law makes an interesting contribution to the discussion on how to make headway with the problem of determining the limits of public authority and, consequently, the problem of implementing the principle of the separation of powers in such a way that conflicts do not arise. In general, with the culture of authority, justification of the actions of an authority is necessary only when it is being established, and once its authority has been established, the authority sees no further need to justify its decisions. Whereas in the culture of justification, after an authority has already been established, the rules of the culture of justification require that the authority continue to justify all its decisions. The reconstruction of these conceptions of legal cultures are illustrated by the recently proposed Act on the Supreme Court in Poland. The conclusion of the paper indicates that the proposed changes to the functioning of the Supreme Court are clear examples of legislative action based on the directives of a culture of authority, which may lead to violations of the rule of law.