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Judges' Freedom of Expression and the Reasonable Observer Test in International Soft Law: Relevant Documents, the Operationalization of the Test and the Scale of Expectations Placed on It[2]

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Abstract

The paper aims to discuss the reasonable observer test as a tool for assessing judges' expression. The argument begins by analyzing the relevant provisions of international soft law, as inscribed in the instruments developed and adopted by the CoE and the UN. Subsequently, an operationalization of the test is proposed by identifying the factors to be taken into account in the application of the test. In the following step, the expectations placed on the reasonable observer test are addressed, whereby the juriscentric ("strong") and post-analytical ("weak") positions are outlined. The former relies on Artur Kozak's law-philosophical conception, and the latter is underpinned by the topography of juristic power developed by Paweł Jabłoński and Przemysław Kaczmarek. The paper makes the case for the post-analytical approach, which places rather modest expectations on the reasonable observer test and considers it instrumental in structuring the discussion, rather than yielding indisputably reliable conclusions.

Keywords: freedom of expression, reasonable observer, judge, soft law, hard cases.

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Problem wolności ekspresji sędziego a test rozsądnego obserwatora z międzynarodowego *soft law* – relewantne dokumenty, operacjonalizacja testu oraz skala wiązanych z nim roszczeń[3]

Streszczenie

Cel artykułu stanowi ekspozycja testu rozsądnego obserwatora jako instrumentu służącego ocenie sędziowskiej ekspresji. Autor zaczyna od analizy relewantnych regulacji międzynarodowego *soft law*, przedstawiając dokumenty Rady Europy oraz Organizacji Narodów Zjednoczonych. Następnie proponuje operacjonalizację testu poprzez wskazanie czynników, na które winna zwrócić uwagę przeprowadzająca go osoba. W końcu praca podejmuje wątek statusu roszczeń wiązanych z testem rozsądnego obserwatora. W tym kontekście autor przedstawia dwa stanowiska: juryscentryczne („mocne") oraz postanalityczne („słabe"). Pierwsze z nich odwołuje się do koncepcji filozoficznoprawnej Artura Kozaka, z kolei jako ilustracja drugiego zostaje przedstawiona topografia władzy prawniczej Pawła Jabłońskiego oraz Przemysława Kaczmarka. Praca zmierza do przekonania o słuszności podejścia postanalitycznego. Składa ono umiarkowane roszczenia pod adresem testu rozsądnego obserwatora, przypisując mu raczej funkcję strukturyzowania rozmowy aniżeli dostarczania niezawodnych wyników.

Słowa kluczowe: wolność ekspresji, rozsądny obserwator, sędzia, miękkie prawo, trudne przypadki.

[3] Artykuł powstał w ramach badań nad projektem „Wolność ekspresji sędziego jako wykonawcy roli zawodowej" (Narodowe Centrum Nauki, nr 0201/0016/21).

Introduction

Judges' freedom of expression has recently aroused a lively interest in jurisprudence. This development has been fueled by a range of factors, including the crisis of liberal democracy in some of Central European countries[4] and the public's expectation that judges should "explain law," which results in the involvement of administration-of-justice professionals in public debates (including on social media).[5] Crucially, "expression" in this paper is taken to mean any mode of communicating one's feelings, experiences, and thoughts. This implies that while the thematic concerns of this paper encompass the freedom of speech, they are not limited to this issue alone, since not all expression is necessarily verbal. In my argument, I discuss the reasonable observer test as a tool for assessing judges' expression, basically in terms of its (non)admissibility. In doing so, I analyze the relevant provisions of international soft law and propose an operationalization of the reasonable observer test by identifying the factors to be taken into account in its application. Subsequently, I consider the degree and range of expectations placed on the reasonable observer test, whereby I outline the juriscentric ("strong") position and the post-analytical ("weak") one. The former is underpinned by Artur Kozak's philosophical conception of law,[6] while the latter[7] is exemplified by the topography of limits to juristic power developed by Paweł Jabłoński and Przemysław Kaczmarek.[8]

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4 For a more thorough discussion, see: P. Jabłoński, P. Kaczmarek, M. Wojtanowski, *Wolność ekspresji sędziego. Próba konceptualizacji* (forthcoming in the journal "Państwo i Prawo").

5 A. Seibert-Fohr, *Judges' Freedom of Expression and Their Independence: An Ambivalent Relationship*, [in:] M. Elósegui, A. Miron, I. Motoc (eds.), *The Rule of Law in Europe. Recent Challenges and Judicial Responses*, Cham 2021, p. 100 ("judges are increasingly inclined to speak to the media, to partake in social media and to express their views in matters related to society"); T. Kakhidze, M. Jimsheleishvili, I. Chitashvili (Transparency International Georgia), *Limits of Freedom of Expression of Judges*, Tbilisi 2021, p. 15 ("A traditional and, until recently, official view was that judges must not become involved in public discourse outside of courtroom. Today, however, this approach has changed"). See also: M. Laskowski, *Uchybienie godności urzędu sędziego jako podstawa odpowiedzialności dyscyplinarnej*, Warszawa 2019, pp. 170–176; M. Wróblewski, *Granice ekspresji i wypowiedzi sędziego – zarys problemu*, "Krajowa Rada Sądownictwa" 2017, 1, pp. 33–34.

6 A. Kozak, *Granice prawniczej władzy dyskrecjonalnej*, Wrocław 2002; idem, *Myślenie analityczne w nauce prawa i praktyce prawniczej*, Wrocław 2010. Kozak's conception has been made available to the Anglophone reading public by R. Mańko, *A. Kozak's Juriscentrist Concept of Law: A Central European Innovation in Legal Theory*, "Review of Central and East European Law2020, 45.

7 See, in particular: A. Bator, Z. Pulka (eds.), *A Post-Analytical Approach to Philosophy and Theory of Law*, Berlin 2019; M. Stambulski, *Wiadomość od cesarza. Pojęcie prawa w teorii analitycznej i postanalitycznej*, Warszawa 2020.

8 P. Jabłoński, P. Kaczmarek, *The Limits of Juristic Power from the Perspective of the Polish Sociological Tradition*, Berlin 2019; iidem, *O grze interpretatora z tekstem prawnym i czynnikami pozatekstowymi w derywacyjnej koncepcji wykładni prawa*, "Archiwum Filozofii Prawa i Filozofii Społecznej" 2020, 2.

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My reasoning is underpinned by an examination of international soft law instruments, including Opinion No. 1 (2001) and Opinion No. 3 (2002) of the Consultative Council of European Judges (henceforth, respectively, CCJE 1 and CCJE 3) as the Council of Europe's documents,[9] and The Bangalore Principles of Judicial Conduct from 2002 (henceforth: "Bangalore Principles")[10] along with the Commentary on the Bangalore Principles of Judicial Conduct from 2007 (henceforth: "BP Commentary")[11] as the United Nations' documents. Importantly, soft law is a notoriously elusive and contested problem field, with heated disputes even concerning the very notion itself. As Anthony Aust has put it: "There is no agreement about what is 'soft law', or indeed if it really exists."[12] Without going into the details of this polemic, I adopt Jacek Barcik's view that, even if soft law instruments "are not legally binding for states, conformity to them is part of good practice and our civilization's standard, while non-compliance may put a state at risk of various decentralized sanctions stipulated in the international law system."[13] Soft law is a repository of – often general and axiologically entangled – premises that usefully support drawing up and interpreting so-called hard law.

A Reasonable Observer in International Soft Law Instruments

A convenient starting point for my discussion is provided by opinions of the Consultative Council of European Judges. Point 12 of CCJE 1 reads: "Judicial independence presupposes total impartiality on the part of judges. When adjudicating between any parties, judges must be impartial, that is free from any connection, inclination or bias, which affects – or may be seen as affecting – their ability to adjudicate independently. In this regard, judicial independence is an elaboration of the fundamental principle that 'no man may be judge in his own cause.' This principle also has significance well beyond that affecting the particular parties to any dispute.

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9 CCJE, Opinion no. 1 of the Consultative Council of European Judges (CCJE) for the attention of the Committee of Ministers of the Council of Europe on standards concerning the independence of the judiciary and the irremovability of judges (2001) and CCJE, Opinion no. 3 of the Consultative Council of European Judges (CCJE) to the attention of the Committee of Ministers of the Council of Europe on the principles and rules governing judges' professional conduct, in particular ethics, incompatible behaviour and impartiality (2002).

10 The Bangalore Principles of Judicial Conduct (2002).

11 UNODC, Commentary on the Bangalore Principles of Judicial Conduct (2007).

12 A. Aust, *Handbook of International Law*, Cambridge 2010, p. 11.

13 J. Barcik, *Standardy udziału sędziów w sferze publicznej w dokumentach międzynarodowych*, "Krajowa Rada Sądownictwa" 2017, 1, pp. 36–37.

Not merely the parties to any particular dispute, but society as a whole must be able to trust the judiciary. A judge must thus not merely be free in fact from any inappropriate connection, bias or influence, he or she must also appear to a reasonable observer be free therefrom. Otherwise, confidence in the independence of the judiciary may be undermined." This provision implies that the reasonable observer test serves to establish whether (or not) the public perceives a judge as impartial and independent. It is acknowledged that there may be a difference between the actual state of affairs and a reasonable observer's assessment. Crucially, the latter is given precedence, which produces a challenge to judges, as they must not only abide by proper standards, but also consolidate the public belief that this is indeed the case.

The concept of a reasonable observer recurs in CCJE 3, a document adopted barely one year after CCJE 1. Its Point 28, which follows a point specifying that judges must not be isolated from their societies and, thus, generally have the right to engage in "extra-professional activities of their choice," states: "However, such activities may jeopardise their impartiality or sometimes even their independence. A reasonable balance therefore needs to be struck between the degree to which judges may be involved in society and the need for them to be and to be seen as independent and impartial in the discharge of their duties. In the last analysis, the question must always be asked whether, in the particular social context and in the eyes of a reasonable, informed observer, the judge has engaged in an activity which could objectively compromise his or her independence or impartiality." A reasonable observer surfaces here in conjunction with judges' social and public participation, which stems from the imperative of judges remaining in touch with the perspective of "common" citizens. Judges should be capable of understanding actual social problems and avoid reducing them mechanically to abstract concepts of legal discourse. In this context, the reasonable observer test serves to draw a line between judges' desired responsiveness and the kind of expression that could cast their impartiality or independence in doubt. Notably, both paragraphs employ "prudential" wording that insists on refraining from any expression interpretable, be it only potentially, as incompatible with the judge's role (as exemplified in the modal verbs "may be seen…" and "which could…").

A reasonable observer is also evoked in UN documents. To begin with, point 1.3 in the Bangalore Principles, which focuses on the value of "independence," demands: "A judge shall not only be free from inappropriate connections with, and influence by, the executive and legislative branches of government, but must also appear to a reasonable observer to be free therefrom." This particular excerpt weaves the reasonable observer test into considerations concerning judges' political neutrality (in the context of relations between the judiciary and the other powers) and, consequently,

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sketches a rather concretely circumscribed locus of its application. Nevertheless, another provision of the Bangalore Principles appears to picture the reasonable observer test as applied in a far broader scope, exceeding even the proposals of the CCJE Opinions. Specifically, highlighting the value of "integrity," point 3.1 insists: "A judge shall ensure that his or her conduct is above reproach in the view of a reasonable observer". While the value of "integrity" is deemed in this passage to be "essential to the proper discharge of the judicial office," the obligation of being above reproach is not relativized or limited to strictly professional pursuits alone. Courtroom practice is not the only criterion on which the proper discharge of the judicial office hinges. The standard defined in point 3.1 refers to judges' activities in both public and private realms.[14] Furthermore, the phrase "above reproach" again implies a "prudential" approach, urging caution to avoid any potential objections to judges' expression (from a reasonable observer's perspective).

Additionally, the reasonable observer test is invoked in the Bangalore Principles in connection to judicial disqualification. Point 2.5, which concerns the value of "impartiality," proclaims: "A judge shall disqualify himself or herself from participating in any proceedings in which the judge is unable to decide the matter impartially or in which it may appear to a reasonable observer that the judge is unable to decide the matter impartially." Again, the phrase used in the passage – "in which it may…" – indicates that whatever may as much as stir suspicions (in this case, about the lack of impartiality) must be avoided by judges. Emphatically, in the vein of point 12 of CCJE 1, this provision presupposes situations in which judges can in fact be perfectly capable of issuing impartial verdicts, but the objections of a reasonable observer anyway prevail.[15] The discussion goes on to register particular reasons for disqualification, with the listing, crucially, not being enumerative (as indicated by the preceding phrase: "Such proceedings include, but are not limited to, instances where"): "the judge has actual bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts concerning the proceedings (point 2.5.1); the judge previously served as a lawyer or was a material witness in the matter in controversy (point 2.5.2); or the judge, or a member of the judge's family, has an economic interest in the outcome of the matter in controversy (point 2.5.3)" The regulation is additionally complemented by the doctrine of necessity: "Provided that disqualification of a judge shall not be required if no other tribunal

[14] See points 103 and 104 of the BP Commentary. Cf. also point 6.1 of the Bangalore Principles on the value of "competence and diligence", which holds that: "The judicial duties of a judge take precedence over all other activities."

[15] Cf.: Venice Commission, *Report on the Freedom of Expression of Judges*, CL-AD(2015)018, 2015, p. 11.

can be constituted to deal with the case or, because of urgent circumstances, failure to act could lead to a serious miscarriage of justice."[16]

Tellingly, the reasonable observer test can be to a certain extent associated with provisions that do not explicitly reference this tool itself but deal with functionally related issues. Good examples include the "objective test" in point 20 of CCJE 3 and insistence on "the perceived impartiality and political neutrality" in point 4.11.3 of the Bangalore Principles, to cite but a couple of multiple instances.[17]

The Reasonable Observer Test: An Operationalization

If in the preceding section my argument relied on CCJE 1, CCJE 3 and the Bangalore Principles, this part of my reasoning is mainly underpinned by the BP Commentary. I discuss two groups of factors attributable to the "full" reasonable observer test. One of these groups comprises direct factors, and the other indirect factors. Thereby, the former are factors to be taken into account in the analysis in order to arrive at sound conclusions, while the latter concern the analysis itself, yet help illumine the interpretive circumstances in which the person applying the test faces (as can be seen, this distinction itself is rather fluid and contestable). Among the direct factors, **the nature of the issue** to be settled by means of the reasonable observer test is of primary concern. As implied by the provisions cited above, the fundamental aim is to see whether a given instance of expression conforms with the judiciary values, such as impartiality, political impartiality, independence, and integrity. Crucially, in liberal democracies, these issues cannot possibly be pondered without taking into account that judges are citizens and, as such, enjoy civil rights and liberties, including the freedom of expression (Article 19 of UDHR,[18] Article 10 of ECHR,[19] Article 11 of CFR,[20] and Article 54 of the Constitution of the Republic of Poland, specifically for the Polish jurisdiction). As the BP Commentary germanely observes: "It has been argued that the use of these and similar factors [particular aspects to be included in analysis, see below] would assist in striking a balance

16 See also point 52 of the BP Commentary, which offers a general statement that: "The perception of impartiality is measured by the standard of a reasonable observer."

17 Interestingly, although a reasonable observer is not explicitly mentioned in the Bangalore Principles in conjunction with the value of "propriety" (value 4), the BP Commentary often refers to the reasonable observer test in this very context. See. point 112 and the following.

18 Universal Declaration of Human Rights (1948).

19 European Convention on Human Rights (1953).

20 Charter of Fundamental Rights of the European Union (2000).

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between public expectations and the judge's rights" (point 106 *in fine*). I also believe that this is a proper understanding of the "cultural meaning" of the reasonable observer test. The test helps settle the tension between judges' civil rights and freedoms on the one hand that the special social function they perform on the other.

With the central issue being decided, **particular aspects** to be taken into account when applying the reasonable observer test can be addressed. Again, the BP Commentary is a helpful source, as its point 106 arguably offers a comprehensive list that bears out the utility of the document in this respect.[21] Before the particular factors are enumerated, it is explicated that: "It has been suggested that the proper question is not whether an act is moral or immoral according to some religious or ethical beliefs, or whether it is acceptable or unacceptable by community standards (which could lead to the arbitrary and capricious imposition of a narrow understanding of morality), but how the act reflects upon the central components of the judge's ability to do the job for which he or she has been empowered (fairness, independence and respect for the public) and on the public's perception of his or her fitness to do the job." This observation implies that the analysis should be informed by teleological thinking. Rather than only relying on a contemplative scrutiny of community standards or religious/ethical belief in order to decide whether a judge's act can be regarded as proper or improper, one should first of all investigate whether a judge is capable of realizing the judicial *telos* of the administration of justice and the execution of the right to a fair trial. Subsequently, six aspects to be taken into account in applying the test are set forth: (a) The public or private nature of the act and specifically whether it is contrary to a law that is actually enforced; (b) The extent to which the conduct is protected as an individual right; (c) The degree of discretion and prudence exercised by the judge; (d) Whether the conduct was either harmful to those most closely involved or reasonably offensive to others; (e) The degree of respect or lack of respect for the public or individual members of the public that the conduct demonstrates; (f) The degree to which the conduct is indicative of bias, prejudice or improper influence. Besides the "general requirements" of the analysis catalogued in point 106 of the BP Commentary, the document also contains more detailed guidelines referring to some very concrete circumstances (e.g., examples of unwelcome situations related to inappropriate connections with and influence by the executive and legislative branches of government addressed in point 38, and illustrations regarding the reasonable apprehension of bias marshaled in point 90).

While the basic public/private distinction is cited in the first item listed in point 106 of the BP Commentary, the theme of **the spheres of judges' activity** is so salient

[21] Cf.: J. Barcik, op. cit., p. 41; M. Laskowski, op. cit., p. 194.

that it deserves being highlighted. Although an individual's identity as a judge forms a meta-layer of his/her life as a whole, the liberal-democratic *acquis* holds that this issue must not be conceived of in an overly absolutist manner, which means that the autonomous needs of the private sphere must be accommodated to some degree as well. Additionally, it makes sense to propose a more precise division of the sites of judges' activity, including: a) the courtroom; b) private life; and c) public life outside the courtroom.[22] This tripartite division is inherently relative, which means that a given kind of expression is not permanently bound to a given sphere. This breeds the problem of the primary context of expression possibly becoming obliterated; for example, the grounds of judgment can be cited in media discourse (and not necessarily accurately, to boot), or a private message on an instant messenger can be publicly revealed, etc. This circumstance should also be taken into account by the person applying the reasonable observer test.

As mentioned, indirect factors refer to the analysis itself. For one, the analysis can be **abstract to various degrees**. On some occasions, considerations are structured around a defined, concrete conjuncture, and on others they aspire to a greater generality (I believe though that, in the latter case, the analysis is in fact also relativized to a certain set of actual situations). **The temporal dimension** of the problem under scrutiny is another important factor. Specifically, as the reasonable observer test can be applied either *ex ante* or *ex post*, it must be considered whether the test is used to assess a potentially planed instance of expression or one that has already taken place (however, imaginary situations of hypothetical rather than any immediate applicability also can be distinguished). Yet another issue to be taken into account is that **law operates in various modes**, and thus produce effects both *ex lege* and through concretization. In relation to judicial disqualification, if the reasonable observer test yields negative results, two actions may follow, one of them being the exclusion of the judge by the power of law in place (*iudex inhabilis*), and the other being such an exclusion as a result of a motion filed to this effect (*iudex suspectus*). The reasonable observer test will more often than not be correlated with the latter circumstance, given that the relevant legal provisions are usually of a less concretized and more evaluative nature. Segueing to the following section of this paper, the last factor to be taken into account is **the difficulty of the cases** to be analyzed by means of the reasonable observer test. In jurisprudence, cases are usually divided into so-called easy cases and hard cases. The distinction is in fact typological rather than classificatory, so many actual situations can evade any easy categorization, raising doubts as to whether they are "still" easy cases or perhaps "already" hard cases. This imprecision notwithstanding, I believe that the

[22] P. Jabłoński, P. Kaczmarek, M. Wojtanowski, *Wolność ekspresji…*, p. 4".

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easy/hard division in fact captures an essential truth about our confrontations with law. Sometimes, we navigate law smoothly, without even noticing it, but on other occasions, the problems we face call for conscious and more painstaking reflection. As far as the reasonable observer test is concerned, the very need to use this tool basically implies that hard cases are at stake. The following section ponders how much can be expected of the reasonable observer test in this context, given that the tool is intrinsically complex, transversal and rife with discretional moments. The juriscentric approach places considerable expectations on the reasonable observer test, whereas the post-analytic approach tempers such expectations.

Expectations of the Reasonable Observer Test: Two Approaches

Juriscentrism is an original law-philosophical conception developed by Artur Kozak. Kozak's project is interpretable as an attempt at legitimizing the notion that lawyers take a special position in the social division of labor as, at a certain point in historical development, they proved to be a historical necessity. In this context, Leszek Koczanowicz has used a vivid metaphor of a "legal *deus ex machina*."[23] In the juriscentrist view, the practices and pursuits of lawyers are determined by the imperatives of the so-called legal institutional subworld.[24] Juriscentrism does not attribute the capacity of conscious reflection to rank-and-file lawyers, to whom Kozak refers as "cogs," since they are not regarded as sovereign subjects. As a result of orchestrated secondary socialization, lawyers are pictured as believing that what they do makes up the only possible reality and rests on the immovable foundations of the juristic *logos*.

Kozak supported the toolbox developed by the analytical theory of law (for which he sought a "deeper" philosophical justification[25]), with the rational lawmaker pictured as the jewel in the juriscentric crown. In this model, the rational lawmaker is understood as a model construct that embodies juristic culture and "supplants" the sociological lawmaker. Kozak highly assessed the institutionalization of the premise of the lawmaker's rationality among Polish lawyers. He insisted that: "A lawyer who would seek to relinquish this notion on the pretense that it

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23 L. Koczanowicz, *Niekonsensualna koncepcja demokracji a perspektywa juryscentryczna. Refleksje nad tekstem Artura Kozaka Dylematy prawniczej dyskrecjonalności, między ideologią polityki a teorią prawa*, [in:] P. Jabłoński et al. (eds.), *Perspektywy juryscentryzmu*, Wrocław 2011, p. 88.

24 In this respect, Kozak was inspired by P.L. Berger, T. Luckmann, *The Social Construction of Reality: A Treatise in the Sociology of Knowledge*, Penguin 1991.

25 Cf. M. Stambulski, op. cit., p. 227.

grounds lawyers' discretionary power is like a person who claims that it is enough to cross out the law of gravity from physics textbooks to make flying possible."[26] Juriscentrism also endorses other constructs analogous to the notion of the lawmaker's rationality (as its "unique, ontologically justified equivalents"), such as "a model judge" and "a skilled recipient of the text of law."[27] Given this, Kozak would in all likelihood embrace the properly interpreted rational observer test as well. In the juriscentric approach, provided its prior popularization and institutionalization, the reasonable observer test would serve to reconstruct due models of judiciary expression from the uncontested and conclusive institutional legal reality. This stance, however, raises a problem of excessive expectations typical of all model constructs, such as the reasonable observer and the rational lawmaker. These are, after all, models which are affected by several interpretive circumstances, many of which tend to be axiologically entangled to a considerable degree (see point 106 of the BP Commentary). It is doubtful whether, given such enmeshments and complexities, it is at all possible to eliminate the subjective moment, understood as a judge's conscious and independent interpretive work that sometimes entails "navigating" competing cultural patterns. Michał Paździora has observed that juriscentrism has neglected "the moments of lawyers' practice that require creative action."[28] Kozak's likely response would be that, in his project, the properly implemented socialization precluded such moments in the first place. Nevertheless, it is quite probable that when vouching to accomplish such a feat juriscentrism has made but empty promises.

To outline the post-analytical approach to the reasonable observer test, I will build on the topography of the limits to juristic power as charted by Paweł Jabłoński and Przemysław Kaczmarek. Jabłoński and Kaczmarek have identified four limits to juristic power: politico-legal culture, the text of law, juristic culture and individual axiological sense. Politico-legal culture depicts the political morality of a given society, which provides legal practitioners with fundamental axiological reference points. The text of law denotes legal provisions. Juristic culture represents a mandatory set of knowledge and skills that a person needs to perform as a law professional. The individual axiological sense, an aspect neglected in juriscentrism, refers to respective lawyers' value-judgments. To put it simply, proper limits constitute the primary factuality, within which successive limits are "contained" (the relation-

[26] A. Kozak, *Granice prawniczej władzy…*, p. 154. Kozak's fond and often restated idea was that culture was potentially as magisterial as nature. In this respect, his views were probably inspired by the work of Arnold Gehlen (cf. A. Gehlen, *W kręgu antropologii i psychologii społecznej. Studia*, Warszawa 2001, e.g., p. 115).

[27] A. Kozak, *Granice prawniczej władzy…*, p. 151, n. 65.

[28] M. Paździora, *Racjonalność praktyki prawniczej w projekcie juryscentryzmu Artura Kozaka*, [in:] P. Jabłoński et al. (eds.), *Perspektywy juryscentryzmu…*, p. 88.

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ship of supplementarity). Having been conclusively established, a given limit can later be modified only by way of exception (the relationship of correction).[29]

At this point, the distinction into easy cases and hard cases proves relevant, because it is against this background that the salience of the individual axiological sense as conceived in the post-analytical model is brought into relief. Specifically, the post-analytical view holds that in easy cases the first three limits raise no major doubts about how a given problem concerning the judge's expression is to be assessed, and the subject's role comes down to properly identifying the requirements produced by the first three limits (emphatically, though, the subject is "present"). In hard cases, the subject's role exceeds the competent identification of the requirements of politico-legal culture, the text of law and juristic culture, with his/her individual axiological sense tipping the balance. Within Jabłoński and Kaczmarek's topography of limits, there are basically two kinds of hard cases. In one of them, one's individual axiological sense serves to specify the solution to a given problem. As the conclusions inferred from the first three limits are not clear, the subject must "work through" tradition (this ties in with the relationship of supplementarity). In the other variant, one's axiological sense "overcomes" the conclusions indicated by one of the other limits (this ties in with the relationship of correction). This is exemplified in a situation where a judge dispenses with a solution resulting from the text of law. Importantly, even in such situations the relationship of supplementarity is still relevant, because the individual axiological sense is swayed to reject solutions ensuing from the text of law by the remaining factors (politico-legal culture and juristic culture).[30]

Such a substantial role of the individual axiological sense as unavoidable in applying the reasonable observer test to hard cases would by default be deplored as an aberration by juriscentrism. While, in the juriscentric view, to decide on hard cases in line with Jabłoński and Kaczmarek's model would be irrational,[31] the post-analytical approach to juristic power considers the subject's adoption of responsibility when judging hard cases to be an optimum position that should not

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29 P. Jabłoński, P. Kaczmarek, *The Limits of…*, pp. 16–22; iidem, *O grze interpretatora…*, op. cit., pp. 51–52. As one of its notable features, this model emphasizes that the text of law is not self-sufficient, a claim that is controversial especially from the point of view of early positivist ideas about law. In this context, the literature has amply pointed out that provisions concerning the freedom of judges' expression are indeed imprecise. See: R. Mikosz, *Granice wolności wypowiedzi sędziego*, [in:] A. Biłgorajski (ed.), *Granice wolności wypowiedzi przedstawicieli zawodów prawniczych*, Warszawa 2015, pp. 56, 60; E. Maniewska, *Apolityczność jako wyznacznik granic wolności wypowiedzi sędziego dotyczących ustawowych reform sądownictwa (i ich krytyki)*, „Państwo i Prawo" 2019, 7, pp. 42–43".

30 Cf.: P. Jabłoński, P. Kaczmarek, M. Wojtanowski, *Wolność ekspresji sędziego…*, pp. 23–25.

31 Cf.: M. Pichlak, *Tożsamość prawa w juryscentrycznej wizji praktyki prawniczej*, [in:] P. Jabłoński et al. (eds.), *Perspektywy juryscentryzmu…*, pp. 134–135.

be disowned.[32] This is caused by the fundamental skepticism about the capacity of the juristic subworld to implement quite as extensive institutionalization processes as those envisaged by Kozak. With its emphasis on the "subjective moment," the post-analytical approach is better equipped to accept indeterminacy, contestability and dynamics of culture.[33] This is an important aspect, given the current constitutional crisis in some Central European countries.

Conclusion

In my argument, having outlined international (UN and CoE) soft law provisions pertaining to the reasonable observer test, I proposed an operationalization of this test. In applying the test, a range of direct factors should take into account (the nature of the issue, particular aspects, and the relevant sphere of a judge's activity). There is also a set of indirect factors to be considered (the relative abstractness and temporal aspect of the analysis, different modes in which law operates, and the difficulty of the case) as they can also valuably illumine the problem under analysis. My major insights concern the nature of the issue that the reasonable observer test is supposed to assess. Specifically, to state that the test is applied exclusively to see whether a judge complies with certain standards, such as impartiality, political neutrality, independence, etc., would be quite reductive and would fail to do justice to the complexity of the matter. The point is that this formula does not give due regard to the rights and liberties that judges enjoy as citizens, while these are integral to the issue and, as such, must also be taken into account and weighed accordingly.[34] Therefore, the reasonable observer test is used to confront the problem of the judge's Janus face. Whereas judges fall within the compass of human-rights regulations, which use a general quantifier ("everyone"), they are also entrusted with a very special public function, which legitimizes certain limitations on judges' expression. Another crucial insight concerns the teleological approach which should inform the application of the reasonable observer test in order to avoid "the arbitrary and capricious imposition of a narrow understanding of morality" (point 106 of the BP Commentary). In analyzing a judge's expression, it must be kept in mind that the

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32 In this context, see: P. Kaczmarek, *Zwrot etyczny*, [in:] P. Skuczyński, S. Sykuna (eds.), *Leksykon etyki prawniczej. 100 podstawowych pojęć*, Warszawa 2013.

33 Cf.: points 102 and 105 of the BP Commentary.

34 Cf. T. Kakhidze, M. Jimsheleishvili, I. Chitashvili, op. cit., p. 7. The status of a judge does not automatically invoke restrictions on freedom of expression, however, a judge must refrain from expressing such opinions which cast doubt on the authority and impartiality of the judiciary. Emphatically, the bolstering of the freedom of judges' expression in certain sphere can support rather than undercut judiciary independence. Cf. A. Seibert-Fohr, op. cit., pp. 108–109.

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ultimate aim is to establish whether s/he is capable of properly administering justice and executing the right to a fair trial.[35] According to the BP Commentary, even if a judge is privately involved in "interests or activities that might be offensive to segments of the community," this does not automatically entail that s/he is unable to realize his/her judicial *telos* (point 105).

As its central aim, this paper has juxtaposed the juriscentric ("strong") and post--analytical ("weak") positions on of the reasonable observer test, with my narrative rather explicitly siding with the post-analytical approach. Despite my non-centrist stance, I believe that the post-analytical model should not be construed as a simple negation of the juriscentric emphasis on juristic culture. Rather, the post-analytical approach seeks to somewhat attenuate this emphasis by objecting to the "elimination" of the subject's role in the interpretation of legal stipulations while at the same time avoiding the pitfall of "exalting" the subject (which happens in Rafał Mańko's critical model[36]). Given the multiplicity of pertinent and mostly evaluative factors and circumstances, the reasonable observer test will not fully disburden the subject.[37] The tool is mainly applied in hard cases, in which the subject's axiological sense will indispensably complement the test. We are fundamentally faced here with conflicting ontological visions of juristic institutional reality. Juriscentrism views it as determinate, uncontested, and static. In this way, it inadvertently promotes arrangements that are convenient to cynical lawyers who seek to capitalize on this configuration for their own benefit. Kaczmarek has observed that this results in undesirable practices which are rationalized as "actions based on the institutional structure and guided by its imperative."[38] Another related risk has been pointed out by Sylwia Wojtczak in her discussion of the notion of the lawmaker's rationality. As she notes, references to constructs authorized by their apparent scientific provenance tend to be used in practice as *ad verecundiam* arguments.[39] Nonetheless, I believe that the reasonable observer test is not a tool devoid of agency and can work as a valuable mechanism for establishing relevant premises and, at least, structuring discourse on judges' expression. Those denying that this has its uses risk being dismissively classified as Herbert Hart's "disappointed absolutists."[40]

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35 Cf. O. Khotynska-Nor, L. Moskvych, *Limits of a Judge's Freedom of Expressing His/Her Own Opinion: The Ukrainian Context and ECTHR Practice*, "Access to Justice in Eastern Europe" 2021, 3(11), pp. 172, 179.

36 R. Mańko, *W stronę krytycznej filozofii orzekania. Polityczność, etyka, legitymizacja*, Łódź 2018.

37 For the limits to expectations placed on the reasonable observer test, cf. W. Jasiński, *Uwagi o interpretacji zasady bezstronności sądu*, [in:] H. Izdebski, P. Skuczyński (eds.), *Etyka prawnicza. Stanowiska i perspektywy 3*, Warszawa 2013, pp. 88–89; J. Barcik, op. cit., p. 40.

38 P. Kaczmarek, *Tożsamość prawnika jako wykonawcy roli zawodowej*, Warszawa 2014, p. 111.

39 S. Wojtczak, *Wpływ konceptu „racjonalnego prawodawcy" na polską kulturę prawną*, [in:] J. Czapska, M. Dudek, M. Stępień (eds.), *Wielowymiarowość prawa*, Toruń 2014, pp. 98–99.

40 H.L.A. Hart, *The concept of law*, Oxford 1997, pp. 138–139.

Importantly, the reasonable observer test concerns the social perception of judges' expression and does not fathom their actual mental states. The recognition of the utility of this tool is bound up with the obvious futility of designs to "get inside the subject's head" and, even more, with the belief that how the public perceives judges' activity indeed matters more than what their intentions are. Last, but not least, some attention is due to what can be called "the reasonable observer paradox". Point 28 of CCJE 3 invokes a "reasonable, informed observer", and point 77 of the BP Commentary implies that being "informed" is intrinsic to a reasonable observer. This begs the question about whether, in this way, the test itself perhaps makes it potentially possible to be devolved into a rather artificial mechanism that yields results "removed" from the real perspective of the members of the public.[41] I, for one, believe that at times it would be reasonable to assume that "common citizens" are actually uninformed or inadequately informed. It is quite unrealistic to expect that they are really versed in certain intricate principles of legal discourse. In other words, one should be cautious not to place exaggerated, normative demands on a reasonable observer's knowledge, because otherwise the reasonable observer construct may prove to have nothing in common with real members of the public, and the test itself may become contrived and comprehensible to lawyers alone, morphing into a tool of their power. Admittedly, this outcome would be welcome by juriscentrism, in which a wide gap between juristic culture and popular cultural competence is framed as a necessity rather than a problem. However, it would be a challenge from the viewpoint of the post-analytical model, which champions the possibly most inclusive professional culture of lawyers (believed to be dependent, by virtue of the relationship of supplementarity, with the ideas embraced by politico--legal culture shared by entire society).

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[41] A similar problem is also noted by W. Jasiński, op. cit., pp. 91–93.

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