

Dobrochna Ossowska-Salamonowicz¹

The problem of press freedom in matters of special public importance in the press law (1918–2018)

Keywords: freedom of expression, “public watchdog”, public concern, Press Act

Słowa kluczowe: wolność słowa, obserwator życia publicznego, interes publiczny, prawo prasowe

Abstract

Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual’s self-fulfilment. It is applicable not only to “information” or “ideas” that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no “democratic society”. This freedom is subject to exceptions, which must, however, be construed strictly, and the need for any restrictions must be established convincingly.

Streszczenie

Problem wolności prasy w sprawach szczególnej wagi publicznej w prawie prasowym (1918–2018)

Wolność wypowiedzi stanowi jedną z zasadniczych podstaw społeczeństwa demokratycznego. Jest ona jednym z podstawowych warunków jego rozwoju i spełnienia każdej

¹ ORCID ID: 0000-0002-6617-9096, PhD, The Department of Constitutional Law of Faculty of Law and Administration of University of Warmia and Mazury in Olsztyn. E-mail: dobrochna.ossowska@gmail.com.

osoby. Ma ono zastosowanie nie tylko do „informacji” czy też „poglądów”, które są przychylnie przyjmowane, uznawane za nieobraźliwe albo obojętne, ale również do tych wypowiedzi, które obrażają, szokują lub wprowadzają niepokój. Takie są wymogi pluralizmu, tolerancji i szerokich horyzontów myślowych, bez których nie ma „społeczeństwa demokratycznego”. Wolność ta poddana jest wyjątkom, które muszą być jednakże ściśle interpretowane, a konieczność jakichkolwiek ograniczeń musi być przekonująco ustalona.

✱

The process of building Polish statehood after 1918 required the unification of legislation. The problem also concerned the regulations that existed so far, referring to the functioning of the press in each of the partitions². The first decree in this matter came into effect from February 8, 1919. It was to apply until the unification of the press law in all the lands of the Polish State and began to apply first on the lands previously under Russian rule³. In Art. 1 guaranteed freedom of the

² At the time of the establishment of the Polish State in 1918, three different press legislation. In the former Austrian Partition, the Press Act of 17 December 1862 was in force along with additional provisions, such as certain provisions of the Act of 15 October 1868, the Act of 9 July 1894, the Imperial Decree of 11 August 1914, Art. VIII and IX of the Act of 17 December 1862 concerning certain additions to the universal 7th Military Penal Law, § § 309 and 310 of the Universal Penal Law of 1852, point A, Art. VI of the Act of 22 May 1873, introducing the Act on Criminal Procedure and Chapter XXVII of the Act on Criminal Procedure of 23 May 1883 (ie criminal procedure). In the former Prussian partition the press act of 7 May 1874 was in force together with the relevant provisions of the German Criminal Code of 1871 (eg, § 41, § 184 b) and the German criminal procedure of 1877 (e.g. § 7 § 2), and moreover, the ordinance of the Minister of the former Prussian district of 1 June 1921 regarding the obligatory supply of free copies of the print. In the former Russian Partition, two Polish decrees were in force on 7 February 1919: a decree on temporary press regulations and a decree on provisional regulations on printing plants and print collections. In addition, several provisions of the Russian Penal Code of 1903 were in force (Article 293 (2) and (4), 294 a, 296–300, 303–309). In addition to the aforementioned provisions, there were also provisions regarding the printed word, including district-specific regulations pertaining to the press and included in the industrial, commercial and tax regulations. More: Z. Papierkowski, *Problemy prawno-prasowe*, “Rocznik Nauk Społecznych” 1949, No. 1, pp. 70–71; J. Sobczak, *Prawo prasowe*, Warsaw 2000, pp. 29–72.

³ Decree on temporary press regulations (Dz.P.P.P. 1919, No. 14, item 186).

press. He introduced the principle that the press freedom is subject only to those restrictions that are provided for in the Penal Code or specified in statutes. On February 18, 1919, Circular No. 129 of the Minister of the Interior appeared, commenting on the provisions of the Decree. It stated that the press was “free within the limits of the law”, and representatives of the administrative authorities should be guided by “objectivity, never personal or political considerations”⁴.

From June 8, 1927, the ordinance of the President of the Republic of May 10, 1927 on press law (Dz.U. No. 45, item 398) was in force, according to which the press is free and subject to restrictions resulting from this regulation and criminal laws. Indirectly, the issue of the admissibility of the interference of the press into the privacy of an individual concerns Art. 53 of the above-mentioned President’s regulation. According to it, in cases of crime against honor committed in the print, evidence of truth, good faith or probability is inadmissible in cases provided for in other statutes, and also in the following cases: a) if the insult affects the private or family life of the libel, or (b) if the allegation was not made in defense of a legitimate public or private interest, or (c) if the allegation of shame has been made, unless the facts in the same letter indicate the justification for the objection. Proof of truth, good faith or probability does not exclude punishment of the accused for insult, if the insult arises from the manner of giving the given circumstance or its broadcasting, especially through a combination of loyalty or petrification⁵.

The next press law of 21 November 1938 defined the freedom of the press somewhat differently. According to Art. 1 of the press law, the limit of the freedom of the press is a common good. The essence of the freedom of the press was based on the lack of state authorities’ powers to influence the content of publications (in practice, prohibition of preventive censorship) and to limit interference by the authorities in cases when the press material already published contained traits of crime (or breached the rules of order). General goods were understood as identical to the interest of the state⁶. These very laconic

⁴ Cyt za: R. Habielski, *Ewolucja prawa prasowego w Drugiej Rzeczypospolitej. Zakres i recepcja*, “Studia Medioznawcze” 2013, No. 4, p. 80.

⁵ Ordinance of the President of the Republic of 10 May 1927 on press law (Dz.U. No. 45, item 398).

⁶ R. Habielski, *Ewolucja prawa prasowego w Drugiej Rzeczypospolitej. Zakres i recepcja*, “Studia Medioznawcze” 2013, No. 4, s. 89.

regulations have been replaced by the current regulations of the press law of January 26, 1984⁷.

Analysis of currently applicable regulations also does not allow for precise delineation of the limits in which public media can reveal facts about people's private life. Usually there is a collision between two constitutional values – the right to respect for the privacy of the individual and the right (obligation) of the media to present events and assess social phenomena. There is no doubt that only information on real events, ascertained by the journalist fairly, can be considered to be in accordance with the legal order. However, it raises doubts as to how far the media are allowed to inform about the private life of people in order to achieve the overriding objectives of the publication⁸. Ambiguity in the practice of the courts is also resolved the question whether a particular publication is a violation of personal rights (in particular honor and good name) or not, due to the convention of publication or the purpose of publication adopted by the author.

Implementation of the task of reliable information by the press should primarily consist in presenting the discussed phenomena in accordance with the truth. However, reliable information can not be identified only with real representation and in any case describing it in a way that is not in accordance with the actual state of affairs, should be interpreted as a case of unreliable information. Circumstances that exclude unlawfulness, even if the journalist presents false information, or sharp and unfavorable assessments, will in fact maintain his special diligence and reliability in collecting materials, if it is shown that the journalist acted in defense of a socially justified interest⁹. The behavior of a journalist, acting in defense of a socially justified interest, with special diligence and faithfulness in collecting and using press material, causes that its publication is not an unlawful act also when it turns out that this material contains false information. Journalists' obligations of a reliable information (Art. 1 of the Act from 1984 – Press Law) and a true presentation of phenomena (Art.

⁷ C.t. Dz.U. 2018, item 1914.

⁸ A. Partyk, *Granice prawa mediów publicznych do przedstawiania faktów z życia prywatnego osób*, LEX/el. 2014.

⁹ Judgment of the Warsaw Court of Appeal of 20 January 2017, I ACa 2139/15, LEX No. 233172; Judgment of the Warsaw Court of Appeal of 23 December 2014, I ACa 933/14, LEX No. 1661256.

6 sec. 1 of the Act of 1984 – Press Law) can't be equated with the requirement to prove the truthfulness of the charges. This would lead, while limiting the resources available to journalists, to significantly reduction of the possibilities of fulfilling tasks facing the press in a democratic society¹⁰.

The dissemination in the press of real information about individual facts or recurring events that affect or may refer to an unidentified group of people or the whole society, and from the point of view of this group or the whole society deserve support or criticism should be regarded as acting in the name of a legitimate social interest¹¹. A socially justified interest as a circumstance that eliminates the unlawfulness of violating a personal good can't be understood in the abstract. It is a concrete concept and must result from a specific situation that requires the defense of this interest, even in violation of the reputation of another person or institution¹². To assess the legitimate social interest as the premises for repealing the unlawfulness of the violation of personal rights by the press critic, the state of law and the rules of social co-existence at the time of publishing the press material are of decisive importance¹³.

In the doctrine, as Jacek Sobczak points out, it is assumed that the criticism should cover three thematic circles. The first one includes discussion-related statements, postulates and synthetic proposals, signaling the needs of changes in various areas of life. "In this area, criticism is a political discussion. The second circle is the confrontation of the actual state of affairs with the intentions, declarations, promises, programs and social needs. The third circle refers to incidental issues and has an interventional, strongly personalized character, its subject is mismanagement, irresponsibility, lack of competence and negligence"¹⁴.

In its judgment of May 12, 2008 (SK 43/05)¹⁵, the Constitutional Tribunal of the Republic of Poland noted the difficulty of specifying what is a social-

¹⁰ Judgment of the Krakow Court of Appeal of 17 September 2015, I ACa 665/15, LEX No. 1957382.

¹¹ Judgment of the Gdańsk Court of Appeal of 21 May 2014, V ACa 237/14, LEX No. 1498896.

¹² Judgment of the Supreme Court on 27 April 2004, II CK 204/03, LEX No. 585751.

¹³ Judgment of the Krakow Court of Appeal of 6 February 1992, I ACr 364/91, LEX No. 1680330.

¹⁴ J. Sobczak, *Prawo prasowe. Komentarz*, Warsaw 2008, <https://sip-1lex-1pl-10000f4815aa4.han.uwm.edu.pl/#/commentary/587240133/37573> (27.11.2018).

¹⁵ Judgment of the Constitutional Tribunal of 12 May 2008, SK 43/05, LEX No. 376365.

ly justified interest and discrepancies emerging in the doctrine. He pointed out that this is a kind of legal referral, because its content is not determined by a legal provision. The normative significance will be specified in a *casu ad casum*, taking into account the facts and axiological arguments established in a given criminal case. Interpretation of the category of “socially justified interest” can and should refer to axiology adopted in the applicable law, in particular in the Constitution of the Republic of Poland¹⁶.

The press has the right to present phenomena assessed as reprehensible, it may also express negative assessments, including in the form of questions and doubts, if the described phenomena are important for the transparency of public life, arouse public interest and their presentation is in a legitimate public interest. The perspective of possible legal proceedings should not lead to conformist behavior, self-censorship or refusal by the press to take up controversial topics to the detriment of the public interest. This does not mean, of course, allowing unrestricted behavior of journalists and can not justify excesses, because journalists are explicitly obliged to respect the personal rights of the persons described in the publication¹⁷.

While weighing the conflict between the values of freedom of the press and people’s personal rights affected by press material, it must be borne in mind that the freedom of the press and other media is not a value given to journalists or the media, but serves the public by providing comprehensive information and shaping views by expressing assessments about events of general importance. It is not possible, therefore, to assume that society would benefit from the freedom of speech understood as approving the dissemination of false information or interpretations distorting reality in a way devoid of any actual justification or presentation of press material in a way that does not allow the reader to distinguish statements about facts from the assessment formulated by the author or citing views as irrefutable facts¹⁸. Unreliable information is in fact a misinformation.

Only when the message is true, and at least when the information that journalists were found to have reliable information about, established by them

¹⁶ A. Żurawik, „*Interes publiczny*”, „*interes społeczny*” i „*interes społecznie uzasadniony*”, „*Ruch Prawniczy, Ekonomiczny i Socjologiczny*” 2013, No. 2, s. 65.

¹⁷ Judgment of the Supreme Court of 11 August 2016, I CSK 419/15, LEX No. 2087104.

¹⁸ Judgment of the Supreme Court of 29 November 2016, I CSK 715/15, LEX No. 2186564.

using all the means available to them, and thus information reliably, can be said about realizing citizens' right to be fairly informed. The lack of such features in the journalists' proceedings definitely excludes the possibility of invoking by them Art. 1 of the Act of 1984. Press law. It also excludes the effectiveness of referring to the grounds for exclusion of unlawfulness in the form of acting in the public interest and within the limits of permitted criticism.

Press, realizing specified in Art. 1 of the Press Law Act, the duty of honestly informing citizens and using the principle of openness of public life and social control and criticism, should look at the hands of politicians, in particular those who obtain a mandate through democratic elections (such as councilors, deputies, presidents, etc.). It is difficult to agree with the view of Bartosz Rodak, who thinks that a journalist does not have to be an educated lawyer, so when writing a text he can use words with some freedom and does not have to use words in a sense known only from penal laws with pharmaceutical precision. Requiring the use of words in journalistic texts in the sense given to them by the law (including the legal doctrine and jurisprudence) is completely meaningless and leads in addition to the situation in which the court assesses the press material from a purely linguistic perspective, without taking into account the cultural context or motivation which the journalist followed. Therefore, it should be acceptable for the journalist to use the term "criminal" in the colloquial sense (that it is a person who breached the law – not necessarily committing an offense under penalty), and not in a legal sense (a person who has been legally convicted of a crime) as long as it is not malicious (or contrary to the principles of journalistic ethics and journalistic diligence required by Art. 12 of the press law)¹⁹.

In the case of *Jucha and Żak v. Poland* The European Court of Human Rights considers the exercise of the freedom of expression carries with it "duties and responsibilities" which also apply to the press. Consequently, the safeguard afforded by Art. 10 of the Convention²⁰, to journalists in relation to reporting on issues of general interest is subject to the proviso that they are acting in good faith in order to provide accurate and reliable information in accordance with the ethics of journalism. The Court considers that in the present

¹⁹ B. Rodak, *Glosa do wyroku ETPC z dnia 23 października 2012 r., 19127/06, LEX/el. 2012.*

²⁰ https://www.echr.coe.int/Documents/Convention_ENG.pdf (27.11.2018).

case the applicants complied with those obligations. When preparing their articles, they approached a significant number of M.C.²¹'s former collaborators and fellow local politicians to have as objective a picture of him as possible. They requested M.C. to comment on the court cases in which he had been involved; however, their requests were refused. Furthermore, the content and the tone of the articles were on the whole fairly balanced. The domestic courts limited their assessment to certain passages from the articles and somehow disregarded the general critical opinion about M.C.'s activities as a local politician which was supported by information from various sources. Having regard to the overall context of the series of articles published by the applicants, the Court considers that they do not appear to have been a gratuitous personal attack on M.C. It emerges from the articles, which were not in that part contested by M.C., that he was a divisive and antagonistic figure in local politics as evidenced by a number of statements quoted in the two articles. In this connection, the Court notes also the very negative assessment of M.C. expressed in a statement of the municipal council signed by thirty-four councillors. Since M.C. was a controversial figure in local politics, he should have been prepared to display a greater degree of tolerance when exposed to scathing remarks about his performance or policies²². Lastly, the Court has accepted on many occasions that a degree of exaggeration and immoderation is allowed for those who take part in a public debate on issues of general interest²³.

In the instant case (*Błaja v. Poland*), the impugned article published in 2007 contained allegations that the claimant, who was a prosecutor at the local public prosecutor's office at the material time, had been involved in drug trafficking. The article alleged that she had been present at a meeting held on an unspecified date in a street in Łódź while her former husband was purchasing amphetamines from certain persons against whom criminal proceedings were pending at the time of the publication. It further alleged that the prosecuting authorities knew about her involvement in the alleged drug trafficking

²¹ Local politician, Tarnów councillor, serving his third mandate on the municipal council, tried to become the President of Poland and a member of the Senate.

²² *Kubaszewski v. Poland*, No. 571/04, § 43, [http://hudoc.echr.coe.int/eng?i=001-97031\(27.11.2018\)](http://hudoc.echr.coe.int/eng?i=001-97031(27.11.2018)).

²³ *Dąbrowski v. Poland*, No. 18235/02, § 35, [http://hudoc.echr.coe.int/eng?i=001-78562\(27.11.2018\)](http://hudoc.echr.coe.int/eng?i=001-78562(27.11.2018)).

but chose not to prosecute her. It also insinuated that she was a drug addict herself and that it was likely that she was sharing drugs with her colleagues. In its practice the Court has distinguished between statements of fact and value judgments. While the existence of facts can be demonstrated, the truth of value judgments is not susceptible of proof. Where a statement amounts to a value judgment, the proportionality of the interference may depend on whether or not there exists a sufficient factual basis for the impugned statement, since even a value judgment may be excessive if it has no factual basis to support it. The more serious such an allegation, the more solid the factual basis has to be.

Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. Not only does the press have the task of imparting information and ideas: the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of "public watchdog" in imparting information of serious public concern²⁴. Although the press must not overstep certain bounds, in particular in respect of the reputation and rights of others and the need to prevent the disclosure of confidential information, its duty is nevertheless to impart information and ideas on all matters of public interest²⁵.

The Supreme Court referred to its own case-law to the effect that journalists were obliged to be diligent when gathering material for the purposes of their articles but that, at the same time, they had a right to draw their own conclusions from material thus gathered (I CK 200/2008). The Press Act 1984 obliged them to comply with the obligation of diligence by contacting persons about whom they wished to write prior to the publication of such material (I CSK 385/07).

The Constitutional Court in its judgments in cases nos. P 10/06 (30 October 2006) and SK 43/05 (12 May 2008) underlined the importance of freedom of expression in a democratic society, while stressing that the dignity of an

²⁴ Gawęda v. Poland, No. 26229/95, § 34, <http://hudoc.echr.coe.int/eng?i=001-60325> (27.11.2018) and Kaperzyński v. Poland, No. 43206/07, § 56, <http://hudoc.echr.coe.int/eng?i=001-110171> (27.11.2018).

²⁵ M. Zaremba, *Komentarz do Art. 41*, [In:] *Prawo prasowe. Komentarz*, ed. M. Zaremba, Warsaw 2018.

individual had also to be protected by the authorities. In the case of conflict between freedom of expression and the right to private life, the latter could prevail over the former. The Constitutional Court further held that protection of one's reputation and good name, which were inextricably linked with the dignity of a person, by means of the criminal law did not of itself infringe the relevant provisions of the Constitution. Civil sanctions could be sufficient if they made it possible to re-establish the previous state of affairs. However, the consequences of the infringement of one's good name could not be reversed and subsequent apologies could not eradicate the fact of the infringement.

Literature

- Habielski R., *Ewolucja prawa prasowego w Drugiej Rzeczypospolitej. Zakres i recepcja*, "Studia Medioznawcze" 2013, No. 4.
- Papierkowski Z., *Problemy prawno-prasowe*, "Rocznik Nauk Społecznych" 1949, No. 1.
- Partyk A., *Granice prawa mediów publicznych do przedstawiania faktów z życia prywatnego osób*, LEX/el. 2014.
- Rodak B., *Glosa do wyroku ETPC z dnia 23 października 2012 r., 19127/06*, LEX/el. 2012.
- Sobczak J., *Prawo prasowe*, Warszawa 2000.
- Sobczak J., *Prawo prasowe. Komentarz*, Warszawa 2008.
- Prawo prasowe. Komentarz*, ed. M. Zaremba, Warszawa 2018.
- Żurawik A. „*Interes publiczny*”, „*interes społeczny*” i *interes społecznie uzasadniony*”, "Ruch Prawniczy, Ekonomiczny i Socjologiczny" 2013, No. 2.