

Legal Conditions of Media Functioning. Part I

KEY WORDS

press law, journalistic profession, limits of freedom of the press, authorization, defamation, journalistic confidentiality

ABSTRACT

Legal boundaries of the freedom of the press are determined by: the Constitution, the Press Law Act and the regulations of the Penal Code (Art. 212, Art. 216), and the legal norms of the Civil Code defending personal rights. Elements of the journalistic ethical code should also play a considerable part. Freedom of the press is not boundless, although it is difficult to overestimate its meaning for the process of democratization. Free press stimulates discussion and allows for the shaping of public opinion. However, more and more often, press abuses its position in order to deliberately and maliciously undermine the good name and honesty of other people. The power of the press means that politicians, who to a large extent shape the law, are willing to make substantial concessions in terms of press law to avoid the risk of offending the journalistic industry, which has a huge impact on public opinion.

Press law is a legal discipline which has been looking for its own niche in the Polish legal system for a long time. Some wanted to include it as a branch of administrative law, while others pointed out its links with penal law. Recently, it is becoming more and more common to see press law as one of the disciplines of the intellectual property protection law. Opting for the latter concept, however, one cannot ignore the fact that the press law differs—and significantly so—from the remaining disciplines of this legal branch, and its links with administrative as well as penal and civil law are clear. Yet of late, due to significant rulings issued by the Constitutional Tribunal, a trend can be observed to decriminalize such behaviour of journalists, editors-in-chief, and publishers which, at the time the current law was being developed, the legislator made criminal offences. They are only seen as civil offences now, which strengthen the bond between press law and the broadly understood civil area of law¹. It is worth to note here a clear desire of certain journalistic and political circles to make journalists only exceptionally liable to civil action for infringing personality rights and

¹ See: J. Sobczak, *Podstawy prawne działalności środków społecznego przekazu* [Legal basis of the activity of mass media], in: *Media w państwie współczesnym* [Media in a modern state], sci. ed. J.W. Adamowski, Warszawa 2001, p. 29–32; *idem*, *Prawo prasowe* [Press Law], Warszawa 2000, p. 74–89.

violating someone's dignity of privacy. It is apparently aimed at granting journalists a broad personal immunity, which seems to be particularly dangerous for the social peace of the state. The desire for total journalistic unaccountability for words may result in turning the means of mass communicating into a convenient tool of political manipulation. Even today, journalists claiming with full social approval to be the fourth power, actually appear to play the role of the legislative, executive, and judicial powers, since they know best what the shape of legislative acts should be; they have the best answers how to govern, as well as what decisions the court should give in certain cases². Simultaneously, journalists are an unelected power, non-sovereign, and not accountable to anyone³. Calling the press the fourth power, we forget that power must result from election, not from usurpation or nomination, and that such power must be controlled. Meanwhile, journalists want to control, yet themselves are unwilling to accept any control from anyone, hiding themselves behind the shield of the freedom of speech which, in their opinion, is an integral attribute of the journalistic profession and was established for the benefit of journalists. At the same time, they seem to deny the argument that free press exists for the recipient, the reader, and that a journalist is just a depositary of this freedom, which ultimately belongs not to him but to the recipient. Freedom of the press does not mean that a journalist can deliver false information to the reader, that he can lie, distort the facts, manipulate the recipient, or impose on him a one-sided view of reality. The means of mass communicating—according to the nomenclature adopted in Art. 14 of the

² As J.W. Adamowski is right to point out, the notion of the “fourth power” was coined from the moniker “fourth estate”, which was to be used by Edmund Burke in 1774, who said during a speech that “there were three Estates in Parliament, but in the Reporters’ Gallery yonder, there sat a Fourth Estate more important than they all.” A similar phrase was used by Thomas Babington Macaulay, who wrote in September 1828 in the “Edinburgh Review” that “the gallery in which the reporters sit has become a fourth estate of the realm.” See J.W. Adamowski, *Czwarty stan. Media masowe w pejzażu społecznym Wielkiej Brytanii* [The fourth estate: Mass media in the social landscape of the United Kingdom], Warszawa 2006, p. 9. Some of the writers, however, associate the term “fourth power” with the statement of Honoré Gabriel Riqueti, comte de Mirabeau; see J. Baszkiewicz, *Nowy człowiek, nowy naród, nowy świat. Mitologia i rzeczywistość rewolucji francuskiej* [New man, new nation, new world: The mythology and reality of the French Revolution], Warszawa 1993, p. 91 ff. In Polish, the term “estate” was used to refer to the social strata which existed until the end of the 18th century. It was used in this meaning by Jesuit Piotr Skarga, who wrote that “human kind is divided into three estates: those who pray, defend, and work”; see J. Sobczak, *U podstaw doktrynalnych liberalnej koncepcji wolności prasy* [At the doctrinal foundations of the liberal concept of freedom of the press], in: *Czy istnieje IV władza? Wolność prasy w teorii i praktyce* [Is there a 4th power? Freedom of the press in theory and practice], ed. by T. Gardocka, J. Sobczak, Toruń 2010, p. 36 ff. The concept of the fourth power refers to the control function of the means of communication, called metaphorically in the doctrine and judicature, especially in the rulings of the European Court of Human Rights in Strassbourg as the “watch dog” due to the role it should fulfil in relation to authorities, and also due to the fact that it shapes the attitudes, opinions, and views of citizens. This term seems fairly well-grounded both in journalism and scientific reflection.

³ K.T. Toepfritz, *Czy koniec czwartej władzy?* [The end of fourth power?], in: *Polityka a środki masowej informacji*. Materiały z konferencji zorganizowanej przez Komisję Kultury i Środków Przekazu z inicjatywy Marszałka Senatu RP prof. Longina Pastusiaka 24 lutego 2004 r. [Politics and means of mass information: Proceedings of a conference organized by the Committee of Culture and Media on the initiative of the Marshal of the Senate of the RP Prof. Longin Pastusiak on 24 February 2004], Warszawa 2004, p. 38–41.

1997 Constitution—must not become the “means of social compulsion”. At present, the press does not express the will and views of its recipients. Indeed, on many occasions it speaks against their interests and expectations, and thus not in the interest of the society but against it. Journalists do not describe and comment the reality any longer but to shape it instead, for example by creating the so-called factoids. The reasons underlying this are complex and should be analyzed by a sociologist, rather than a lawyer or media expert. Alas, such a reflection has yet to appear, and not just in the Polish academic writing. It seems that there is a real threat that the means of mass communicating will be incapacitated by ownership matters, dependence of journalists on capital groups, publishers, and—finally—on editors-in-chief, who express the views and interests of media outlets and make sure that the editors, press title, radio or television station does not compromise the interests of the parties who own them⁴.

This is compounded by a peculiar model of a journalist, a man convinced of his own infallibility, who never doubts the legitimacy of the arguments he makes or the views he presents, not always well-read and often showing disastrous gaps in his general humanistic knowledge. Simultaneously, such a journalist is characterized by the lack of tolerance and understanding of the views of others, reluctance to admit to his own mistakes, lack of courage, independence, truthfulness, and a propensity to prevaricate.

It has been stressed in the literature, on many occasions, that the journalistic profession requires expertise, while remarking that it should be practiced in compliance with professional ethical standards⁵. It is noted that good and moral performance of professional roles expresses itself as a morally good self-judgement, as an inseparable trait of a journalist’s good character and good work. An internally good person is an individual of a develop moral sensitivity and is not influenced by the immoral environment. Should her moral sensitivity erode, leading to crossing moral boundaries—without any critical reaction—with time, these new immoral boundaries become an accepted standard⁶.

The reaction to violating the standards of journalistic ethics, or any professional ethics at all, takes the form of delimiting moral conducts by establishing codes of ethics. So, according to many scholars, a journalists’ code of conduct should be a miracle cure to the non-compliance with the principles of professional ethics by journalists. It is underlined in the

⁴ J. Sobczak, *Czy czas na zmianę prawa prasowego?* [Is it time to change the press law?], in: *Polityka a środki masowej informacji...*, p. 26–33.

⁵ *Media i dziennikarstwo w Polsce 1989–1995* [Media and journalism in Poland 1989–1995], ed. by G.G. Kopper, J. Rutkiewicz, K. Schliep, Kraków 1996, p. 9; P. Legutko, D. Rodziewicz, *Mity czwartej władzy* [Myths of the fourth power], Kraków 2002, p. 159.

⁶ A.T. Kronman, *The Lost Lawyer. Failing Ideals of the Legal Profession*, London 1994, p. 11 ff.

literature that creating codes of conduct is, on one hand, a symptom of megalomania of the group and, on the other, a sign of high professional ambitions and hidden complexes regarding the groups which, due to the social roles they fulfil, enjoy a special prestige and have had sets of ethical norms regulating their activities of a long time. These groups include physicians, barristers, notaries, and architects. Therefore, creating a code of ethics, on one hand, shows the need of social advancement of the given profession, while on the other it seems to ensue from a certain trend, followed by numerous professional circles⁷.

Ethical codes inherently indicate how the representatives of a certain profession should behave when performing their functions. The content of these codes is, on one hand, directed to a target professional group, and simultaneously to the customers of that group, recipients of the goods produced by the group or the services it provides⁸. Therefore, it is from the content of the code of conduct that the members of a given group of corporation should be able to learn how to act, and those who are not members of the profession but interact with its representatives should find the standards binding their contractors. The number of journalistic ethical codes—also known as “charters of media”, “charters of journalism”, “charters of ethics”, “declarations of rights and obligations”, etc.—is constantly growing both in Poland and throughout the world. The ubiquity of ethical codes, however, does not attest to the need for them or the benefits they bring. Beyond doubt, however, codes of conduct improve the credibility of a given profession, and thus indirectly contribute to the economic success of its representatives. This is true for the journalistic profession as well⁹. Still, it is impossible to deny that many journalists and a significant group of media scholars question all benefits derived from the creation and existence of journalistic codes of conduct, considering them as needless self-limitations and unnecessary obligations. They claim that journalists are extremely sensitive people of honed sense of morality and decorum, to which traits they give voice by performing their difficult and responsible profession¹⁰. In the criticism of the need to create journalistic codes of conduct, it is often brought to attention that they are usually very general and somewhat tentative, so that it is difficult to find in them not only the indications

⁷ N.G.E. Harris, *Codes of kondukt for journalists*, in: *Ethical issues in Journalism and the Media*, ed. by A. Belsey, R. Chadwick, London–New York 2006, p. 62.

⁸ I. Lazari-Pawłowska, *Etyki zawodowe jako role społeczne* [Professional ethics as social roles], in: *Etyka. Pisma wybrane* [Ethics: Selected works], Wrocław 1992, p. 84.

⁹ C.-J. Bertrand, *Deontologia mediów* [Deontology of the media], Warszawa 2007, p. 71; T. Sasińska-Klas, *Etyka zawodów medialnych, czyli jak zachowywać się przyzwoicie w świecie mediów* [Ethics of media professions, or how to behave decently in the media world], in: *Komunikatorzy: Wpływ, wrażenie, wizerunek* [Communicators: Influence, impression, image], ed. by A. Drzyciński, Warszawa–Bydgoszcz 2000, p. 333 ff.

¹⁰ M. Kunczik, A. Zipfel, *Wprowadzenie do nauki o dziennikarstwie i komunikowaniu* [Introduction to the science of media and communication], Warszawa 2000, p. 100–103. See also: C.G. Christians, T.L. Covert, *Teaching Ethics in Journalism Education*, 1980, p. 30–31.

necessary to solve the more complex issues but everyday concerns as well. It is sometimes argued that the existence of ethical codes is a sanctioned form of self-censorship which restricts the independence of a journalist and, as a result, the freedom of speech. It is also noted that the codes dull the ethical sensitivity and the sense of personal responsibility, while creating dangerous control mechanisms and promoting the conformization of society¹¹.

The creation of journalistic codes of conduct is also seen as a sign of insecurity and a form of defence against the rising waves of dislike and distrust of recipients, as some authors question whether codes can contribute to lift the level of journalistic morality in practice¹². The codes are seen as a mechanism, convenient for the media, which exist to convince the public opinion that the means of communication and the journalists working for them do not require any control because they present high moral standard and reliable methods of self-control¹³. According to some scholars, the journalistic codes of conduct serve more to build the external image of the profession than to internally regulate the behaviour of journalists. The emergence of journalistic codes is indicated as a consequence of the fact that declared morality is not directly reflected in moral practice. Such is the nature of moral declarations that, without taking a greater risk, they can be made public under unrealistic banners, promising to fulfil obligations which can never be met in practice. Yet the authors of codes realize, to a greater or lesser extent, that the implementation of the norms they contain is extremely difficult, and the responsibility for the promises and declarations is impossible to enforce due to the lack of any administrative or organizational sanctions. In literature, the journalists themselves as well as the majority of media experts praise the laudable phrases of the ethical codes, pointing out that they set high moral standards, protect the informants of the journalists, provide the employees of the means of communication with a sense of security,

¹¹ Ch. Frost, *Media Ethics and Self-Regulation*, Harlow 2000, p. 95.

¹² On the issue of establishing international standards of journalistic ethics, cf.: J. Sobczak, *Dylematy etyki dziennikarskiej* [Dilemmas of journalistic ethics], "Człowiek i Społeczeństwo" [Human and Society] 2005, Vol. XXIV, p. 135–157; see also: B. Golka, *Etyka dziennikarska: utopia czy ratunek?* [Journalistic ethics: Utopia or salvation?], „Zeszyty Prasoznawcze” [Notebooks of Press Studies] 1995, No. 1–2, p. 22–32; T. Płonkowski, *Amerykańska koncepcja społecznej odpowiedzialności dziennikarzy* [American concept of social responsibility of journalists], Warszawa 1995, p. 77–87; L. Brajnościć, *Deontologia periodistica*, Madrid 1978; see also: K. Nordenstreng, *Profesjonalizm i etyka dziennikarska w procesie przemian. Komentarz do Deklaracji Paryskiej* [Professionalism and journalistic ethics in the process of change: A commentary to the Paris Declaration], "Przekazy i Opinie" [Messages and Opinions] 1986, No. 4; F. Geyer, *Les codes déontologiques dans la presse internationale* [Deontological codes in the international press], Brussels 1976, p. 6; W. Pisarek, *Kodeks etyki dziennikarskiej* [Journalistic ethical code], in: *Dziennikarstwo i świat mediów* [Journalism and the media world], ed. by Z. Bauer, E. Chudziński, Kraków 1996, p. 289–298.

¹³ T. Laitila, *Journalistic codes of ethics in Europe*, in: *Communication Theory & Research. An EJC Anthology*, ed. by D. McQuail, P. Holding, E. De Bens, London 2005, p. 194; D. Pritchard, M.P. Morgan, *Impact of ethic codes in judgements by journalists: A natural experiment*, "Journalism Quarterly" 1989, No. 66, p. 47.

protect personal rights, and eliminate fraud and abuse¹⁴. The contents of codes contain the same fundamental principles, identical prohibitions, and references to similar core values. They usually specify that a journalist must be competent, independent, loyal, honest, truthful, and thorough, and must respect personal rights of others particularly dignity. It is stressed that he has not to lie and not to plagiarize, has to serve the human rights, respect democracy, promote public debate, and promote the aesthetics of speech¹⁵. It can be observed in the doctrine that European codes particularly stress veracity, honesty, respect for privacy, accountability to public opinion, independence, integrity, loyalty, disinterestedness, the need to distinguish facts from opinions, the necessity to protect the professional unity of the milieu, the urge to protect the freedom of speech and beliefs, and the indispensability of respecting the copyrights¹⁶. Thus, the codes do not exceed the mandates of the Decalogue, while the contents generated are either journalistic obviousness or ethical clichés¹⁷. It is stressed that the journalistic codes of conduct serve more to create the external image of the press than to regulate journalistic behaviour. The underlying goal of their existence is the self-promotion of the environment, a particular title, editor, professional group, etc. The journalistic profession is shown as glorious service, and the newsperson as someone fulfilling an important mission, acting out of conviction, selflessly serving the society, the public good, and—above all—truth, law, and justice. In practice, one may often find out otherwise. It has been observed that, thanks to the codes of conduct, the journalistic circles can easily shield themselves from public criticism referring to the slogans contained within. It is also worth to mention that the provisions of the journalistic ethical codes gloss over the rights and obligations of the owners of press titles and radio and television stations who, through their decisions, can and do commit the infringements of not just ethical but often legal rules as well. Actually, journalists are quite often just tools in their hands¹⁸.

Therefore, the views that the norms of ethics suffice to protect an individual from unfounded attacks by journalists, which violate their personal rights, honour, dignity, and privacy, turn out to be—as shown by the rulings of the European Court of Human Rights in

¹⁴ A.D. Gordon et al., *Controversies in Media Ethics*, New York 1999, p. 58.

¹⁵ C.-J. Bertrand, *Media Ethics & Accountability Systems*, New Brunswick–London 2000, p. 44–45.

¹⁶ T. Laitila, *Journalistic...*, p. 198 f.

¹⁷ J. Jastrzębski, *Na rynku wartości. O mediach i etyce dziennikarskiej* [On the market of values: About the media and journalistic ethics], Wrocław 2009, p. 107–108.

¹⁸ J. Sobczak, *Manowce i złudzenia normatywnej etyki dziennikarskiej* [Stray paths and mirages of normative journalistic ethics], in: *Etyka w mediach. Wybrane problemy teorii i praktyki* [Ethics in the media: Selected problems of theory and practice], ed. by R. Kowalczyk, W. Machura, Vol. 1, Poznań 2009, p. 9–28.

Strasbourg—just a dream¹⁹. Denying the need of normative regulation of press law, journalists often refer to the mission they fulfil in the society and underline that the projected legal measures should broaden the field of freedom rather than set its limits. It is associated with a peculiar notion of freedom of the press, seen as an attribute of the journalistic profession as well as a guarantee of its independence and a kind of immunity and impunity. They see freedom and freedom of the press in particular, as the right of an individual not to limit oneself in anything. They consider this freedom as original with respect to the law, which is external and plays a limiting and regulative role, and forget that for a freedom to be established and ensured it must be codified and recognized by the law. In this absolutist treatment of freedom, it is understood as an absolute license to act and even a source of values²⁰.

The limits of freedom of the press

Without neglecting the importance of freedom of the press for the democratization processes, it is best not to forget that this freedom is not without limits, and that setting its limits prevents its transformation into a tool to manipulate the public opinion in the direction mandated by the state or, more precisely, by the ruling political elite²¹. The relationship between public opinion and democracy should be obvious. Democracy in its classic form requires that the people determine the form of the state²². The views on what public opinion is varied in the course of history²³. Since the late 18th century the role of public opinion gradually increased, and the interests of liberal democracy focused on the press as the tool of

¹⁹ The judicature of the European Court of Human Rights was frequently analyzed in this aspect. On this subject, see I.C. Kamiński, *Swoboda wypowiedzi w orzeczeniach Europejskiego Trybunału Praw Człowieka w Strasburgu* [Freedom of expression in the rulings of the European Court of Human Rights in Strasbourg], Ed. III, Kraków 2006; *idem*, *Ograniczenia swobody wypowiedzi dopuszczalne w Europejskiej Konwencji Praw Człowieka* [Limits to the freedom of expression allowed under the European Convention on Human Rights], Warszawa 2010; J. Sobczak, *Swoboda wypowiedzi w orzecznictwie Trybunału Praw Człowieka w Strasburgu* [Freedom of expression in the judicature of the European Court of Human Rights in Strasbourg], “Ius Novum” Part I 2007, No. 2–3, p. 5–38; Part II 2007, No. 4, p. 5–43.

²⁰ J. Sobczak, *Prawo prasowe. Komentarz* [Press Law: A commentary], Warszawa 2008, p. 30–31.

²¹ W. Sokolewicz, *Prasa i konstytucja* [The press and the Constitution], Warszawa 2011, p. 26.

²² On this issue, see: D. Held, *Models of democracy*, Stanford 1936, p. 231.

²³ According to J. Adams, in the American system it was not all the citizens but their parliamentary representation that constituted the public opinion. See: J. Adams, *Myśli o rządzie* [Thoughts on Government], in: *Historia idei politycznych. Wybór tekstów* [History of political ideas: Selected texts], prep. by S. Filipowicz et al., Warszawa 2000, p. 169. British utilitarians saw the public opinion as the sovereign and sanction of power. The basis exemplifying the rule of public opinion was the majority principle. Cf. J. Bentham, *The Constitutional Code*, in: *The works of Jeremy Bentham*, prep. by J. Bowring, Edinburgh 1838–1843, Vol. 9, p. 47. In the utilitarianism concept, public opinion is understood as an actual entity in the public sphere, an auditor, which should be reflected by the organs making up the legal system of the state. See: J.S. Mill, *O wolności* [On Liberty], in: *idem*, *Utilitarianism. On Liberty* [Utylitaryzm. O Wolności], Warszawa 1959, p. 45. About the changes in the understanding of public opinion, see: C.J. Glynn et al., *Public Opinion*, Oxford 1999, p.56.

public discourse, while journalists, associated with it, became public officials comparable to judges²⁴. It was argued that the guarantee of freedom of the press and discussion is a factor allowing the public opinion to take shape; therefore, the press generates opinions of citizen's sparks off discussion, and contributes to the formation of political will outside of representative bodies²⁵. In contrast to the liberal model, the theory of public opinion in elitist democracy was formulated, according to which public opinion is based on stereotypes leading to misunderstandings, mistakes, and contradictions in relations between people²⁶. In the concept of participatory and deliberative democracy, in its various forms relating to the thought of J.J. Rousseau, public opinion is what combines the political, civic, and social spheres into an undivided whole²⁷. It was only in the first half of the 20th century that public opinion began to be viewed as the phenomenon which polls attempt to capture²⁸. Challenging the role of public opinion as a rational and reliable actor in the public sphere, the development of participatory governing forms, popularization of the means of mass social communicating, and the development of modern research techniques based on representative sample led to the decline of the idea of public opinion in the sense as K.M. Baker and J. Habermas saw it²⁹. Without engaging in considerations regarding the shaping of public opinion, it needs to be said that law has to take into consideration the special role fulfilled by journalists in the shaping of public opinion. The significance of this role is indubitable, yet one cannot turn the blind eye to the fact that it may turn out to be dangerous, or even detrimental, for democratization. As a result, it is impossible to conclude that no regulatory framework should bind the functioning of the press and the activity of journalists.

It is worth to remember that freedom of the press, under Art. 14 of the Constitution, is a constitutional principle, developed and detailed in Arts. 54, 73, and 213 Section 1 of the Basic Law. The principle formulated in Art. 14 of the Constitution provides each individual

²⁴ P. Schoefield, *Utility and Democracy. The Political Thought of Jeremy Bentham*, Oxford 2006, p. 260–261. The history of techniques used to present the assessment of public opinion can be found in: S. Herbst, *Numbered Voices. How Opinion Polling Has Shaped American Politics*, Chicago–London 1993, p. 46–68.

²⁵ J.S. Mill, *Considerations on Representative Government*, New York 1969, p. 121–122; J. Bentham, *A Fragment on Government*, Cambridge 1998, p. 96–98; *idem*, *On the Liberty of Press and Public Discussion*, London 1821; B. Baum, *Freedom, Power and Public Opinion: J.S. Mill on the Public Sphere*, “History of the Political Thought” 2001, No. 23 (3).

²⁶ W. Lippmann, *Public Opinion*, New York 1997, p. 48. In this concept, public opinion is constructed by experts in the art of persuasion and propaganda, politicians and specialists of advertising and public relations, with whom journalists collaborate; J.L. Walker, *A critique of the elitist theory of democracy*, in: *Political Elites in a Democracy*, ed. by P. Bachrach, New York 2010, p. 75.

²⁷ J.J. Rousseau, *Umowa społeczna* [The Social Contract], Warszawa 1966, pp. 36, 150.

²⁸ Ch. Lilly, *Speaking Your Mind Without Elections, Surveys, or Social Movements*, “Public Opinion Quarterly” 1983, No. 47, p. 462.

²⁹ K.M. Baker, *Politics and Public Opinion*, in: *Pre-revolutionary France*, ed. by J.R. Cesner, J.D. Popkin, Berkeley 1987, p. 204–246; J. Habermas, *The Public Sphere: An Encyclopedia Article*, “New German Critique” 1964, No. 3, p. 50.

with the ability of informed and active participation in the exercising of power, for which freedom of the press is a precondition. In case law, and especially in the judicature of the Constitutional Tribunal, already under the legal state which existed prior to entry into force of the Polish Constitution of 1997, it was unequivocally established that every individual is naturally entitled to freedom of speech. Simultaneously, it was noted that the role of constitutional regulations is to confirm the existence of this freedom, define its basic aspects, and establish the essential guarantees and necessary limitations³⁰. In this situation, the wording of Art. 14 of the Constitution imposes an obligation on the state to refrain from any intervention which infringes on freedom of the press and other means of social communication³¹. Therefore, freedom of the press both gives substance to and guarantees the freedom of speech³². Freedom of the press also serves as a guarantee regarding human rights, at the same time protecting also freedom of conscience and religion.

In any deliberation on freedom of the press, one cannot avoid the question, controversial for journalists themselves, of the status of journalistic profession, that is, the

³⁰ Justification of the Resolution of the Constitutional Tribunal from 2 March 1994, W 3/93 OTK 1994 No. 1 item 17 p. 157.

³¹ The considerations of terminological issues have to be left on the side, including the scope of meaning of the following terms: “means of social communication” (Pol. *środki społecznego przekazu*, used in the Constitution), “means of mass transfer” (Pol. *środki masowego przekazu*, used by the Press Law), and “means of mass communication” (Pol. *środki masowego komunikowania*, used by the legislator in Art. 212 and 216 of the 1997 Penal Code), as well as the relationship between these terms and “mass media” and “media”, and between “freedom of the press” and “freedom of speech”, “freedom of expression”, “freedom of thought”, “freedom of communication”, “freedom of information”, and “freedom of [artistic] expression”. “Freedom of expression” (“freedom to express one’s views”) is linked with “freedom of communication” and “freedom of gathering and disseminating information”. Both these freedoms are on one hand derived from “freedom of expression” while on the other they are the sense and principle of it. Without freedom of communication, freedom of expression is deprived of its social reason and significance. The transfer of expression which cannot be freely received by another entity, which does not enable communication between at least two individuals, does not allow the exchange of thoughts, opinions, and views, does not implement “freedom of expression” and reflects no more than “freedom of thought”. The principle of “freedom of communication” is the exchange of opinions and information, which is only possible in bi- and multi-lateral interpersonal contacts. It must be stressed, however, that contrary to popular opinion “information” and “communication” are terms differing in scope and information is but a constituent of communication. Also, “freedom of information” does not encompass the liberty to exchange views and opinions, being limited to the ability to transfer data and information. Therefore, “freedom of information” is a narrower notion than “freedom of expression”. On this subject, see: J. Sobczak, *Prawo prasowe...*, p. 32–35.

³² Judgment of the Constitutional Tribunal from 23 March 2006, OTK – A 2006 No. 3 item 32. It is pointed out in the literature, however, that it is a mistake to identify freedom of the press with freedom of speech or expression. See: W. Sokolewicz, *Prasa...*, p. 67. The Justification of the Judgment of the Constitutional Tribunal from 12 May 2008, SK 43/05 OTK ZU 2008 No. 4 item 57 states that in the subject aspect freedom of the press is a reflection of freedom of speech, being derived from freedom of expression. It was also stressed that the legislator of the constitutional system included freedom of expression among civil and human personal rights and freedoms, following the Justification of the Judgment from 19 September 2000 (V KKN 171/98 OSN KW 2001 issue 3–4 item 31) that “The essence of freedom of speech, which is derived from freedom of expression, is the right to freely express opinions in the spoken form and to have it fixed and published as handwriting, print, audio recording, or audio-visual recording. Freedom of the press can be fully realized only when freedom of thought, belief, speech, information, and publication really exist. It is in freedom of the press that the freedoms mentioned here are reflected and embodied (...). Without freedom of the press there can be no full realization for freedom of expression (the freedom to express one’s opinion and to gather and disseminate information).”

status of the people who are the depositaries of freedom of speech. The discussion of who is a journalist, what is expected from adepts of the profession, if journalists should be required to have some skills, education, or ethical values at all, and finally whether journalism is a profession or rather a service or vocation is all the more difficult since the notion of profession, from both sociological and legal point of view, was the source of many doubts and disputes³³. The difficulty in defining profession is compounded by the co-existence in literature of both the term “profession” and the notion of liberal profession, while in the normative acts and doctrine there are also professions of public trust and regulated professions. First, the notion of liberal profession is highly controversial. It is stressed in the literature that a liberal profession is characterized by being practiced personally and systematically, and comprises a set of intellectual activities. Practicing a liberal profession requires certain qualifications, which does not always mean the same as completion of university studies, and has to provide livelihood, while the undertaken activities should be socially useful: pursue a social mission and protect essential values in areas of public interest. In other words, a liberal profession should stand out because its practitioners carry out a certain social mission³⁴. Second, the notion of profession of public confidence, as referred to in Art. 17 Section 1 of the Constitution has no legal definition³⁵. In the context of the above, it should be said that journalism is a liberal profession and is quite successful in pretending to the role of a profession of public trust yet, at present, does not perform this function³⁶.

³³ On this issue, cf.: K. Wojtczak, *Zawód i jego prawna reglamentacja. Studium z zakresu materialnego prawa administracyjnego* [Profession and its legal restriction: A study in material administrative law], Poznań 1999, p. 25–108.

³⁴ J. Sobczak, *Dziennikarstwo – zawód, misja czy powołanie?* [Journalism: Profession, mission, or vocation?], Poznań 2004, p. 7–30.

³⁵ It is pointed out in the doctrine that the distinctive feature of public trust is their quasi-missionary nature, thus distancing oneself from the pursuit of profit and practicing the profession to meet a public need. See: M. Kulesza, *Pojęcie zawodu zaufania publicznego* [Notion of profession of public trust], in: *Zawody zaufania publicznego a interes publiczny – korporacyjna reglamentacja versus wolność wykonywania zawodu*. Materiały z konferencji zorganizowanej przez Komisję Polityki Społecznej i Zdrowia Senatu RP przy współudziale Ministerstwa Pracy i Polityki Społecznej pod patronatem Marszałka Senatu RP Longina Pastusiaka 8 kwietnia 2002 r. [Professions of public trust and public interest – corporate regulation vs. freedom of practice: Proceedings of a conference organized by the Committee of Social Policy and Health of the Polish Senate in cooperation with the Ministry of Labor and Social Policy under the patronage of the Marshal of the Senate of the RP Longin Pastusiak on 8 April 2002], Warszawa 2002, p. 27; W.J. Wołpiuk, *Zawód zaufania publicznego z perspektywy prawa konstytucyjnego* [Profession of public trust from the constitutional law perspective], *ibidem*, p. 34.

³⁶ M. Kulesza, *Pojęcie zawodu zaufania...*, p. 25–31. The journalistic profession is still a liberal one, in spite of various bonds imposed on its representatives by publishers and editors-in-chief, despite the financial inferiority of its practitioners, uncertainty of the future, and lack of social security. It is a profession of hobbyists and social activists, especially when they perform their work in local and sub-local press. A profession of people convicted of their professional mission, and thus unable to listen to the arguments of people with whom they do not agree. Cf.: J. Sobczak, *Dziennikarstwo – zawód, misja...*, p. 22–23.

Press law: the need for changes

The Press Law Act (Pol. *ustawa prawo prasowe*) currently in force is a normative act that is highly imperfect and unsuitable to the present state of the means of mass communication. It was born 27 years ago in utterly different political, social, economic, and technological circumstances. In spite of having been amended many times, it still contains a range of discrediting provisions and, even though this issue was repeatedly raised in various academic papers, continues to mention the Constitution of the Polish People's Republic (Pol. *Polska Rzeczpospolita Ludowa – PRL*) (Art. 2), as well as the Journal of Laws of the PRL and the Official Gazette of the PRL "Monitor Polski" [Polish Monitor] (Art. 9). In its content, the Act refers to Art. 254 of the expired Penal Code of 1969 (Art. 16 Section 1), and mentions voivodeship courts, which have long been replaced by regional courts (Art. 20). What is more, the wording of the Act refers to the broadcasting activity of the Committee of Radio and Television "Polish Radio and Television" (Pol. *Komitet do Spraw Radia i Telewizji "Polskie Radio i Telewizja"*), which does not exist anymore, and forbids a person convicted for a crime against the fundamental political and economic interests of the Polish People's Republic from being an editor-in-chief, unless a period of 10 years from completing the sentence has already passed (Art. 25 Section 3). It also mentions supreme and central state authorities (Art. 34 Section 1), even though this distinction was characteristic of the Constitution of 1952 and was not adopted in the Constitution of 1997. Also, it still contains Chapter III, which deals with the Press Council, even though it has not been established for years. There were also profound changes introduced in the content of the Act by the rulings of the Constitutional Tribunal, which struck down some of its provisions as unconstitutional. Therefore, one should not be surprised by the voices calling for the change of the Act, heard from diverse milieus and academic circles in particular. One has to admit that, since the system transformation, none of all subsequent legislative initiatives aimed at changing the press law, whose respective advantages and disadvantages are just as impractical to consider here as it is difficult to compare their proposed solutions, have been successful. Only some of them were even discussed by parliamentary committees. The authors of the abovementioned projects were not determined enough to set their sights at a modern reconstruction of this field of law. Also, the submitted projects did not attempt to define the status of journalistic profession or to define the limits and guarantees of freedom of the press. Indeed, the authors of consecutive proposals, while they often declared freedom of the press in the title of the draft law, seemed to forget that formal and material guarantees as well as defining the limits are of utmost importance to freedom, since contrary to the common belief neither freedom of

speech nor freedom of the press derived there from are absolute, which was also pointed out many times by the European Court of Human Rights in Strasbourg. Basically, the draft laws submitted and presented to the Sejm did not attempt to regulate the relations between the owners, publishers, and journalists, ignoring in this regard the course of the debate which took place somewhat independently from the legislative process in the press, in which a number of requests was presented, including limiting the access of foreign capital to the press sector. The debaters could not decide either whether only the functioning of the printed press should be regulated, or rather a single common regulation which would also include radio and television is necessary. The issue which escaped their attention completely was the Internet press and journalism³⁷ as well as the question of blogs and bloggers³⁸. It was also neglected that

³⁷ Answering the fundamental question whether the press exists in the Internet, one has to state that this fact is being questioned even by journalists and media scholars themselves. For a lawyer, the existence of press in the Internet is indubitable, at least since the Supreme Court issued a decision on 26 July 2007 in the Case IV KK 174/07. The press in the Internet takes two basic forms. First, there is electronic press, co-existent with its printed form; second, that which exists purely in electronic form. The Decision of the Supreme Court with Justification was published in “Biuletyn Prawa Karnego Sądu Najwyższego” [Bulletin of the Penal Law of the Supreme Court] 2007, No. 15, p. 33–37; see also the gloss of approval by J. Taczkowska, *Orzecznictwo Sądów Polskich* [Judicature of Polish Courts] 2007, No. 6, item 60. In the justification of the judgment, the Supreme Court clearly stated that daily newspapers and magazines are press, as well as “all existing and coming into existence due to technological progress means of mass transfer, which disseminate periodical publications using print, video, audio, or any other dissemination method” (Art. 7 Section 2 pt. 1 *in fine*). Dailies and magazines, even when published in the form of internet communication, remain press titles. The Supreme Court noted, that a person who disseminates a newspaper or magazine via the Internet without registration at the appropriate Regional Court—both when this message accompanies one fixed on paper and when it exists purely in electronic form—satisfies the criteria of an offence under Art. 45 of the Press Law Act. The legislator broadly defines the notion of the press, including in it, e.g., daily newspapers, magazines, agency services, regular telex messages, bulletins, radio and television programs, and newsreels. The existing means of communication, such as radio and television stations, corporate broadcast centres, and all other existing and nascent means of communication which disseminate periodical publications using print, video, audio, or any other dissemination technique. Finally, in the light of the stature, the press are teams of people and individual persons who carry out journalistic activity. Magazines and newspapers, by being published in the form of internet communication, do not lose the press title status; cf. J. Barta, R. Markiewicz, *Internet a prawo* [Internet and law], Kraków 1998, p. 35–41; J. Sobczak, *Naruszenie praw do tytułu prasowego* [Infringement of the rights to a press title], in: *Naruszenia praw na dobrach niematerialnych* [Infringements of incorporeal property rights], ed. by T. Szymanek, Warszawa 2001, p. 237–250. In the light of the Press Law regulations, it cannot be disputed that press refers to periodical publications which do not constitute a closed, uniform whole and are issued at least once per year (Art. 7 Section 1 pt. 1 of the Press Law). Another unequivocal provision of the Act says that a daily newspaper (Pol. *dziennik*) is a periodical printed message as well as audio or audio-visual transmission issued more often than once per week (Art. 7 Section 2 pt. 2 of the Press Law); there is a similar rule pertaining to magazines (Art. 7 Section 2 pt. 3 of the Press Law). See: J. Sobczak, *Ustawa prawo prasowe. Komentarz* [The Press Law Act: A commentary], Warszawa 1999, pp. 113, 273–274; J. Barta, R. Markiewicz, *Internet a prawo*, p. 35–41; J. Barta, R. Markiewicz, A. Matlak, *Prawo mediów* [Media law], Warszawa 2005, p. 95; E. Nowińska, M. du Vall, *Komentarz do ustawy o zwalczaniu nieuczciwej konkurencji* [Commentary to the Act on Fighting Unfair Competition], Warszawa 2001, p. 184; E. Nowińska, *Nieuczciwa reklama w Internecie* [Unfair advertising in the Internet], in: *Internet – problemy prawne* [Internet: Legal issues], Lublin 1998, p. 51; broader references can be found in: J. Barta, R. Markiewicz, *Internet a prawo*, p. 35–41.

³⁸ R. Ostrowski, *Nowe Media – Internet. Szansa czy zagrożenie dla polskiego społeczeństwa?* [New media – the Internet: An opportunity or a threat for the Polish society?], in: *Media masowe w praktyce społecznej* [Mass media in social practice], ed. by D. Waniek, J.W. Adamowski, Warszawa 2007, p. 297–307; M.P. Pręgowski, *Blogosfera a dziennikarstwo obywatelskie* [Blogosphere and civil journalism], in: *Media – między władzą a społeczeństwem* [Media – between the authority and the society], ed. by M. Szpunar, Rzeszów 2007, p. 115–132;

materials in the Internet are presented under different rules than in the printed press³⁹. Even though the representatives of doctrine and practice agreed for many years that the current press law should be revised or possibly replaced by a better and more perfect normative act, there was never any consensus regarding the character and depth of the changes. In essence, journalists, editors-in-chief, publishers, representatives of the associations of journalists and publishers, and politicians as well could not take an unequivocal position on the legal solutions they prefer, what should be included in the content of the drafted law, and which issues it should regulate. To some extent, this state of affairs stems from the fact that the press law currently in force, in spite of all its striking shortcomings, is a fairly convenient statute not only for the journalists themselves but also for the editors-in-chief and publishers. It ensures freedom of speech to the journalists, allowing some of them, essentially with impunity, to violate personal rights or legally protected secrets as well as to express statements constituting insult or defamation. The legal boundaries formulated in other legal acts, such as the Penal and Civil Codes, are insufficient barriers to these forms of activity. The temptation to engage in them is all the greater because in many titles, albeit not in all of them, the journalistic ethos has been shattered and journalists are sometimes encouraged by their superiors, editors-in-chief, and publishers to undertake actions contrary to the journalistic

K.D. Trammel et al., *Rzeczpospolita blogów (Republic of Blog): Examining Polish bloggers through content analysis*, "Journal of Computer-Mediated Communication" 2006, No. 11/3; I. Sierakowska, "Polityk blogiem silny" [Politician strong in the blog], *Rzeczpospolita* on 18 August 2006 r. Blogs have become popular only in recent years, yet they have an enormous impact. Aware of this phenomenon, the European Parliament recognizes blogs as part of the new media, aiming at regulating this sphere. This provokes outrage of some journalistic communities which believe that the independence of blogs is their advantage. The advocates of regulating this sphere point out that bloggers can defame, humiliate, violate human dignity, lobby, and cause panic both in the economic and political spheres with impunity. So far, the European Parliament seems to prefer encouraging blogger to voluntarily register and sign their blogs in such a way that it is clear who is the author of texts, their publisher, and which financial interests the blog represents. See: D. Pszczółkowska, *Europarlament chce opanować blogosferę* [The European Parliament wants to control the blogosphere], „Gazeta Wyborcza” on 24 June 2008, p. 13.

³⁹ The co-existence of similar—yet not identical—forms of press (electronic and printed on paper) may give rise to many problems regarding the accountability for defamation, necessity of rectification, etc. Future historians and press scholars may also encounter a difficult issue of the content of individual messages. The latter issue is already known today with regard to local variations, in practice usually quite varied, content-wise. One must not forget that also these internet messages which are not press may include content which is defamatory, violate personal rights and privacy, the right of publicity, and infringe on copyright. All these facts, however, do not give grounds to call these messages press. It is possible to defame, violate private rights, dignity and privacy, and the right to publicity, as well as infringe on copyright in books, flyers, one-off issues, leaflets—yet nobody will state on these grounds that they are press in the meaning of Art. 7 Section 2 pt. 1 of the Press Law and, consequently, need to be registered. In conclusion, it has to be restated that while the Internet (World Wide Web) is not press, press can be published in the Internet (an independent network). Cf.: J. Sobczak, *Zniesławienie w internecie* [Libel in the internet], in: *Oblicza Internetu. Opus universale. Kulturowe, edukacyjne i technologiczne przestrzenie Internetu* [Faces of the Internet: Opus universale: Cultural, educational, and technological spaces of the Internet], ed. by M. Sokołowski, Elbląg 2008, p. 28–53; J. Sobczak, *Granice wolności internetowych gatunków dziennikarskich* [Limits of the freedom of online journalistic genres], in: *Internetowe gatunki dziennikarskie* [Online journalistic genres], ed. by K. Wolny–Zmorzyński, W. Furman, Warszawa 2010, p. 180–195.

deontology. Also for editors-in-chief, the Press Law is a highly convenient normative act as it does not protect the status of a journalist as an employee or collaborator of a newspaper; virtually no social or professional rights are assigned to journalists, leaving them completely at the mercy of not just publishers, but often the changing heads of editorial boards as well. Frequent changes of editorial policies, usually associated with political shifts, present journalists with difficult moral and professional dilemmas. In such situations, the legislator does not leave journalists any choice. All they can do is to leave the title or to use their professional skills and talents in the service of ideas they do not accept. The current press law does not regulate the relations between editors-in-chief and journalists either, referring in such cases to legal acts of lower order, such as editorial statutes or charters. Therefore, the Press Law Act does not clearly define the extent of the obligations of journalists towards their editor-in-chief and editors. Delegating these issues to charters and individual work contracts is detrimental not only to the status of journalists, their social situation, but indirectly to freedom of the press as well, being the source of many practical doubts. Finally, the current press law is a normative act extremely convenient for the publishers and owners of papers. Practically speaking, it hardly defines their obligations at all. It allows them to freely shape the structure of editorial offices and influence personal changes in individual titles at will. While an editor-in-chief has the right to decide the whole activity of the editors, it is not him but the publisher, as the producer of a collective publication, who in the light of copyright law holds the rights to the collective work which a daily newspaper or a magazine indubitably is. What is striking is that there is no clear definition of the notions of owner and publisher in the press law. This terminological chaos and identifying these two entities with each other complicates the relations between them. What also seems convenient to the publisher is the lack of precise solutions regarding dismissal of an editor-in-chief.

It was also voiced in the discussion that, in spite of the severe failings of the Act currently in force, it is a legal act to which journalists are already accustomed, know its content, and are aware of various legal pitfalls. It was also pointed out that—in the case of adopting a new act—there is a risk associated with wasting significant judicial efforts, especially of the Supreme Court, regarding such important issues as journalistic privilege, the question of registration, and the issue of replies and rectifications. One must not forget that, the imperfections of the current Press Law Act notwithstanding, its wording contains the highest standard of protection of the journalistic privilege, so that no state organ, including the court and prosecutor's office, can compel a journalist to testify. This principle was confirmed

by multiple rulings by the Supreme Court⁴⁰ and is an important part of the protection of the journalistic profession.

While the misunderstandings regarding the content of press law seem to stem, on one hand, from the extent of freedom of the press and, on the other, the question for whose benefit this freedom is defined, it is the specific questions which turn out to matter in practice. These include, first and foremost, the problem of the emergence and existence of the press, and more specifically whether periodical online communications, blogs, etc. should be included among the press. As has already been mentioned, the judiciary and the vast majority of the doctrine support the thesis that all periodical publications, within the meaning of Art. 7 Section 2 item 1 of the Press Law are press, regardless whether they are printed on paper or purely electronic messages⁴¹. It is worth noting that under Art. 54b of the Press Law, the regulations regarding legal accountability and proceeding in press cases apply accordingly to violations of the law related to transferring human ideas using other than the press means of dissemination, regardless of the transfer technique, in particular non-periodical publications and other products of print, audio, and video. Therefore, Art. 54b of the Press Law—in connection with the appropriate specific provision, of course—may become the grounds for accountability of persons publishing online materials which are libellous, defamatory, or violate personal rights. It also makes it possible to make the publishers of non-periodical publications,

⁴⁰ Resolution of the Panel of Seven Judges of the Supreme Court from 19 January 1995, I KZP 15/94, OSN KW 1995, issue 1–2, item 1; Decision of the Supreme Court from 15 December 2004, III KK 278/05, OSN KW 2005, issue 3, item 28; Decision of the Supreme Court from 20 October 2005, II KK 184/05, *Prokuratura i Prawo* [Prosecution and law], suppl. *Orzecznictwo* [Judicature] 2006, No. 2, item 110. On this subject, cf.: J. Sobczak, *Kilka argumentów z zasad interpretacji prawa na rzecz względnego charakteru tajemnicy dziennikarskiej w procesie karnym* [Several arguments from the principles of law interpretation in favour of the relative nature of journalistic privilege in penal proceedings], in: *Reforma prawa karnego, propozycje i komentarze*. Księga pamiątkowa Profesor Barbary Kunickiej–Michalskiej [Penal Law reform, proposals and comments: Memorial book dedicated to Prof. Barbara Kunicka–Michalska], ed. by J. Jakubowska–Hara, C. Nowak, J. Skupiński, Warszawa 2008, p. 405–419; *idem*, *Tajemnica dziennikarska. Zakres, rola gwarancyjna, zakazy dowodowe – aspekty procesowe i skutki w zakresie prawa karnego materialnego* [Reporter's privilege: Scope, guarantee role, inadmissibility in evidence – procedural aspects and consequences in material penal law], in: *Współzależność prawa karnego materialnego i procesowego* [Interdependence of material and procedural penal law], ed. by Z. Ćwiakalski, G. Artymiak, Warszawa 2008, p. 387–412; *idem*, *Tajemnica dziennikarska* [Journalistic privilege], „*Studia Medioznawcze*” [Media Studies] 2005, No. 1 (20), p. 13–28; *idem*, *Granice prawne tajemnicy dziennikarskiej* [Legal boundaries of journalistic privilege], „*Ius Novum*” 2007, No. 1, p. 48–69.

⁴¹ Presently, during press registrations, the court does not verify the rights to the title or if the title infringes on the sphere of someone's subjective rights. Cf. the Decisions of the Supreme Court from 1 December 1997, III CKN 443/97, OSNC 1998, No. 5, item 88; from 18 August 1999, I CKN 502/99, OSNC 2000, No. 3, item 50; from 5 March 2002, I CKN 540/00, OSNC 2003, No. 2, item 29; from 13 June 2002, V CKN 1040/00, OSNC 2003, No. 7–8, item 111. The institution of registration does not provide effective or full protection of the name of a press title. The ensuing rights are formal, and their existence is determined not by a legal relationship but only the fact of registration, constituting the basis and cause of assigning to a given subject an area of ability to perform certain actions. Taking into consideration this formal nature of registration proceedings, it bears no significance in the assessment of the illegality of action regarding its name in the situation when it infringes on subjective rights to the firm of a third party.

including books, liable in the same way. Raising the above issue, it is worth noting that the future regulation of the press law should clearly resolve the issue of the existence and extent of registration. Still, the legislators should take note of the current Art. 54b of the Press Law. Another question which will have to be considered in the discussion of the necessary changes to the press law is the access to the journalistic profession. While generally being in favour of a free access to this occupation, it is worth to mention that even in Europe, in highly democratic countries, e.g. in France, there are regulations which stratify the journalistic profession and bestow the full extent of journalistic rights only to those who fulfil certain requirements. Understandably, introducing similar regulations seems to enjoy little popularity among journalists since it may become a tool to suppress freedom of speech by limiting access to the profession. On the other hand, many people find it incomprehensible that performing many seemingly simple occupations depends on having one's qualifications, predispositions, skills, not to mention the level of ethics examined, while someone previously convicted, suffering from a mental illness, or legally incapacitated can be a journalist.

What also has to be solved is the issue of authorization, especially in the context of the judgment of the European Court of Human Rights in Strasbourg from 7 July 2011⁴², as well as the questions of rights and obligations of journalists and journalistic privilege. The current legal state in the latter area should be considered as a model for all European countries. What might be considered in the course of legislative work is only the possibility to introduce inadmissibility in evidence of the information protected by such journalistic privilege, modelled on the regulations regarding clergy–penitent privilege, attorney–client privilege, and psychiatrist–patient privilege. In practice, the point of contention turns out to be the right of interested parties to publish rectifications and replies⁴³. Although the latter questions cannot

⁴² *Wizerkaniuk v. Poland*, Application no. 18990/05; cf.: M. Górski, *Glosa do wyroku ETPC z dnia 5 lipca 2011 r. 18990/05* [Commentary to the Judgment of ECHR from 6 July 2011 18990/05]; cf.: Judgment of the Constitutional Tribunal from 29 September 2008, sign. SK 52/05, with Separate Opinions of Judge Andrzej Rzepliński; cf.: J. Taczowska, *Autoryzacja wypowiedzi* [Authorization of expression], Warszawa 2008; W. Machała, *Autoryzacja – ograniczenie czy gwarancja wolności słowa?* [Authorization – limitation or guarantee of freedom of speech?], „Palestra” 2006, No. 7–8, p. 110–113; I.C. Kamiński, *Autoryzacja wypowiedzi a europejskie standardy swobody wypowiedzi* [Authorization of expressions and the European standards of freedom of expression], in: *Autoryzacja wypowiedzi w prawie prasowym – wyrok TK i co dalej?* [Authorization of expressions in the Press Law: What after the Judgment of the Constitutional Tribunal?], ed. by A. Bodnar, D. Bychawska–Siniarska. Proceedings of a scientific conference organized by the Observatory of Freedom of Media in Poland on 13 January 2009, Warszawa 2009, p. 19–25.

⁴³ The significance of rectifications was frequently pointed out in the Council of Europe system and in the judicature of the European Court of Human Rights and Fundamental Freedoms. Rectification is a statement made by an interested party, and thus subjective. However, the statement of a journalist which the interested party wants to rectify is also subjective. The position that claims that the right to rectification suppresses freedom of the press is a blatant example of appropriation of this freedom by journalists, editors-in-chief, publishers, and owners of the press. The press—both as a whole and as individual journalists—is not the holder of freedom of speech, as this freedom is given to all citizens. The press is the depositary of this freedom, since it has to realize

be discussed here, it is worth to note the incomprehensible resistance of the journalist community against the subjectivist concept of press rectification, which allows its author to present his own version of the events⁴⁴. It is also impossible to assume that a publication of a rectification inconsistent with the actual state of affairs threatens freedom of the press. It should be recalled that freedom of the press was formulated and exists for the benefit of citizens, and a journalist is just a depository of this freedom. The argument that it is only possible to publish such rectifications which the editor-in-chief considers as true undermines the basic legal principle *nemo est iudex in propria causa* (“no-one should be a judge in his own cause”). According to the advocates of objectivist concept, editor-in-chief would be such a judge, as he would first de facto decide on the publication of a press material asserting a certain state of affairs, and then would have to decide whether or not to publish a rectification, in which someone else would question the state of affairs presented in the original material. It is worth to mention that checking the truthfulness of a rectification before its publication, indubitably contrary to the legislator’s will, would make this legal instrument meant as

the right of both the whole society and individuals to complete and reliable information, exchange of ideas and opinions, and free communication. The attempts to limit rectifications and replies are a direct and clear threat to freedom of the press and negate the freedom of information. Hindering rectifications is a non-institutional form of censorship, illegal and dangerous to freedoms of thought, speech, and expression. Limiting the ability to rectify, refusing to publish them, violates the aforementioned freedoms, being a form of disregarding the recipients, both individually and collectively. Denying rectification makes it largely impossible for information, views, and ideas to collide, and prevents free public debate. The Court in its judicature generally did not take up the issue of responding to press criticism either in the form of rectification or reply. The tone of justifications of numerous judgments allowed to draw the conclusion that the Court recognizes this right as one of the guarantees of freedom of speech. This is why the position found in the Decision from 2005 may be somewhat surprising, as it states that the right to reply is an important part of freedom of expression protected by the provision of Art. 10 of the Convention—yet, according to the Court, this right does not confer unlimited freedom of access to the media. Usually, just as in the Polish legal system, the right to rectify or reply is quite strictly regulated. The Court, however, supplemented this thesis with the statement that private means of communication should in general enjoy the editorial freedom in deciding to publish private letters or not. Still, it was added that in exceptional circumstances it is possible to legally require the publication of a retraction or apology (Mylnuchuk v. Ukraine, Decision of the Court from 5 July 2005, Application no. 28743/03; see: M.A. Nowicki, *Europejski Trybunał Praw Człowieka – przegląd orzecznictwa (lipiec–wrzesień 2005)* [European Court of Human Rights – review of judicature (July–September 2005)], “Palestra” 2006, No. 1–2, p. 166). The position of the court in this regard is objectionable. First, it is incomprehensible why private means of communication were separated from the rest. It is unknown what is the criterion of such a division and why the Court decided to confer this advantage on these media. It seems that in present times the majority of means of communication is private and belong to various companies, corporations, etc. Second, the publication of letters which express the views of some person on more or less important aspects of social life is one thing, and the right to publish a rectification or reply is something entirely different. Third, it is impossible to find out what the Court meant when it limited the right to publish rectification to “exceptional circumstances”.

⁴⁴ Advocates of the subjectivist concept are: B. Kordasiewicz, see: *idem, Jednostka wobec środków masowego przekazu* [Individual in view of the means of mass communication], Wrocław–Warszawa–Kraków 1991, p. 97; J. Sobczak, see: J. Sobczak, *Ustawa prawo prasowe. Komentarz*, Warszawa 1999, p. 309; *idem, Prawo prasowe. Komentarz*, Warszawa 2008, p. 734 ff.; B. Kosmus, *Sprostowanie i odpowiedź* [Rectification and reply], Warszawa 2006, pp. 15, 102; the objectivist concept is defended by: B. Michalski, W. Gontarski, and J. Naumann; see: B. Michalski, *Podstawowe problemy prawa prasowego* [Fundamental problems of the Press Law], Warszawa 1998, p. 63 ff; W. Gontarski, *Kiedy sprostowanie, kiedy odpowiedź?* [When a rectification, when a reply?], “Rzeczpospolita” on 22 July 2003; J. Naumann, *Odpowiadać czy nie – oto jest pytanie* [To reply, or not to reply, that is the question], “Rzeczpospolita” on 19 December 2005.

protection from unjustified (even subjectively) press attacks a dead letter. The protection it offers would become illusory. A much simpler yet, consequently, extremely long way would be to demand protection of personal rights based on the provisions of Art. 24 of the Civil Code. In such proceedings the party violating these rights, thus also a journalist, is required to prove that he acted according to the law and demonstrate that the information he published was true. If one should adopt the objectivist concept in regard to rectification, then the person who demands a rectification would have to prove each time in front of the editor-in-chief—being here a judge in his own cause—that the content of the rectification is true. As a consequence of such efforts, in the case of editor-in-chief's ill will or inability to look objectively, the interested party would still be faced by a difficult civil suit⁴⁵.

Is there a need to change other normative acts as well?

The postulates to amend the Press Law are accompanied by proposals of changing other laws as well. In particular, the journalistic community demands the wording of Art. 212 of the Penal Code to be repealed, and usually Art. 216 of the Penal Code as well, at least with regard to journalists. It is also argued that the existence of accountability for libel threatens freedom of the press, which at the occasion is usually considered as the most important and absolute. The postulates of this kind are completely mistaken and unjustified. While taking the view that it is not acceptable to punish journalists with imprisonment for deliberately posting defamatory contents, one should agree with the European Court in Strasbourg that publishing such contents must not remain without responsibility, and not just civil responsibility. The provision of Art. 212 of the Penal Code guards the values, rights, freedoms, and personal rights which are equally important as freedom of the press. It is meant to protect human dignity, integrity, and good reputation. It is impossible to assume that these values deserve protection to a lesser extent than freedom of speech, expression, and the press. It is worth noting that the Charter of Fundamental Rights of the European Union—which is still a political, not a legal document—treats human dignity, and not freedom of the press, as the fundamental value. Repealing the wording of Art. 212 of the Penal Code completely or with regard to journalists would make it possible to mistreat and ruin people with total impunity for political, personal, racial, religious, and sundry other reasons. Still, civil responsibility of the

⁴⁵ It must be stressed that the legislator clearly signals the readiness to depart from the subjectivist concept in only one case. It is done on the wording of Art. 11 Section 1 pt. 4 of the Press Law which forbids the publication of rectifications undermining facts confirmed by a binding verdict of a court. This ban is a clear exception to the rule. It is only in regard to a final judgment that a party demanding a rectification cannot present his or her concepts contrary to the facts stated in that binding verdict.

defaming journalists, press titles, and publishers seems insufficient, since rich tabloids could still find it profitable to engage in such activities. Excluding journalists from the rigours of Art. 212 of the Penal Code would be granting them personal immunity from accountability for libel. Considering the doubts present in the doctrine about who is a journalist, should e.g. news processors or copy editors be included, there would have been doubts about the extent of responsibility in practice. Moreover, granting such immunity would violate the principle of equality before the law, since a person who defamed someone in a private conversation would be criminally liable, while a journalist who disclosed such information to the public through means of mass communication would be exempt from such liability. Even though the damage done by the content of his false and libellous statement would be significantly more substantial than that caused by someone defaming orally, e.g. in a public meeting. For similar reasons it is impossible to agree with the demands of some publicists to discard the possibility of journalists being held accountable for violating personal rights. Additionally, it should be said that the wording of Art. 213, along with the amendments introduced by the legislator to comply with the judgment of the Constitutional Tribunal from 5 May 2008, seem to provide sufficient protection of freedom of the press⁴⁶.

Being of the opinion that the current Press Law as a normative act is highly unfortunate, obsolete, and completely detached from the present-day reality, one still has to conclude that we must not rush to amend this law, and that legislative activities should be preceded by a serious discussion both in the journalistic community and among lawyers. It seems important to ensure a proper atmosphere for such a discussion, as the attempts of similar debates undertaken so far have often turned into a show of scandalous mutual accusations, full of personal attacks and caustic remarks, while the issues at hand became secondary. It is also important that the new Press Law should not come into being as a normative act created by one professional or political group or another, so that it would not have to be identified with the leader of some journalistic faction. It should be remembered that the area with which press law is concerned only seems to relate to a single professional group. In fact, the regulations included in the Press Law pertain to a very broad social sphere, and their practical implications essentially affect all citizens. It is important for the journalists that they would understand in the course of the discussion that the Press Law is meant to protect not only them but also the recipients of the press and that—as was rightly noted in the

⁴⁶ Judgment of the Constitutional Tribunal from 5 May 2008, sign.SK 43/05 OTK – A 2008, No. 4, item 57. See Art. 1 pt. 27 of the Act from 5 November 2009 Amending the Penal Code Act, Code of Criminal Procedure Act, Executive Penal Code Act, Penal and Fiscal Code Act, and some other Acts, Dz.U. 2009 No. 2006 item 1589, with later amendments.

joint concurring opinion of judges Garlicki and Vučinić of the European Court of Human Rights in Strasbourg to the Judgment in the case of *Wizerkaniuk v. Poland*—“[i]n Poland, as in many other countries, journalists are not always angels.” One should also agree with the statement that it is not rare for journalists to denigrate their political adversaries, deliberately presenting their views inaccurately during public debate, and manipulate the society. The conclusion that the press more and more often abuses its strong position to intentionally and maliciously undermine good reputation and integrity of other people also seems true and justified. The power of the press is such that politicians, who to a large extent decide the shape of law, are ready to make very far-reaching concessions in the area of press law lest they incur the wrath of the powerful journalistic community which has a profound impact on the public opinion. This servility towards the press bodes ill to the society, ordinary people, and in the long run also those politicians who for various reasons are going to be attacked by the press.