

Purpose and nature of press criticism - selected aspects

KEY WORDS

freedom of expression, duties of a journalist, press criticism, permitted criticism

ABSTRACT

The main aim and meaning of journalistic activity is to provide information and use journalistic criticism as a tool of social control. Journalistic activity is an important control mechanism that contributes to the proper functioning of democratic structures. Press criticism, although valuable and desirable, is not an absolute value. It has its limits, beyond which it becomes an abuse of freedom of expression. Setting limitations for press criticism *in abstracto* is very difficult, but it is also necessary to protect other goods and values.

The legal basis for freedom of expression and, consequently, also for criticism which is part of that freedom, is found in the provisions of the Constitution of the Republic of Poland of 2 April 1997¹ and the related detailed provisions of the Act of 26 January 1984 - Press Law² which have been subjected to closer analysis³.

Under Article 54 (1) of the Constitution of the Republic of Poland, everyone is guaranteed the freedom to express their views, to acquire and disseminate information. Freedom of expression entails the right to criticism whose special beneficiary is the press and journalists constituting the press. Therefore, a question arises - what is criticism and what role does it play in the social life? The research objective expressed in the question should lead to determining the nature and purpose of criticism in journalistic work.

The role and significance of criticism in journalistic activity is evidenced by the fact

¹ Constitution of the Republic of Poland of 2 April 1997, Dz. U. [Journal of Laws] of 1997, No. 78, item 483, as amended.

² Act of 26 January 1984 - Press Law, Dz. U. of 1984, No. 5, item 24, as amended (hereinafter: PL).

³ In this context, it should be noted that press criticism was also indirectly addressed by the provisions of Art. 212 of the Act of 6 June 1997 - Penal Code which guarantees protection against libel, and Art. 23-24 of the Act of 23 April 1964 - Civil Code relating to the protection of personal rights. Neither those issues, nor the case-law of the European Court of Human Rights, will be analysed here since they are dealt with in separate studies.

that the Press Law makes references to criticism in five places. This is quite meaningful considering the fact that the legal act is relatively short and has only 54 Articles containing substantive provisions. Already in Art. 1 of the Act, which is a programme statement, the legislator says that “in accordance with the Constitution of the Republic of Poland, the press enjoys the freedom of speech and fulfils the citizens’ rights to be reliably informed, the right to transparency of public life as well as the right to control and social criticism”. The scope of the right to criticism is defined by the successive Articles of the Press Law: Art. 5 in which this right is linked to the principle of freedom of expression, and Art. 6 which imposes on all enumerated entities (state bodies, state-owned companies, other state organisational units, as well as cooperative organisations of trade unions, self-government organisations and other social organisations, within the scope of their public activity) the obligation to reply to received press criticism, and prohibits them from hindering the collection of critical material by the press, or suppressing criticism in any other way. The right of criticism is also guaranteed by Art. 41 of the Press Law which constitutes the countertype of criticism, and Art. 33 of the said Law which penalises the obstruction, or suppression of press criticism. All those provisions constitute the institution of the right of criticism. Therefore, in order to understand the nature of criticism, they need to be considered jointly. Any other approach would lead to incorrect conclusions and, consequently, arouse serious reservations concerning the interpretation.

Despite multiple references to criticism, the Press Law does not provide a definition of the concept, leaving this task to the doctrine and judicature which have not so far worked out a single, generally acceptable interpretation of this notion. In the light of the rather inconsistent views, the approach suggested by Jacek Sobczak can be adopted here according to which press criticism means presenting the negative evaluations and phenomena related to social life in a manner that is reliable, compliant with the law and the principles of social conduct⁴. Since the structure of every critical utterance contains descriptive elements relating to the statement of facts, as well as evaluations and generalisations of those facts, which are articulated in a specific form, it is additionally supplemented by providing it with a literary form of expression and the purpose it is supposed to serve. “The doctrine assumes that criticism should cover three thematic spheres. The first one traditionally includes debating speeches, postulates and synthetic proposals suggesting the need for changes in various areas of life. In this sphere, criticism is a political discussion. The second sphere involves the confrontation of the actual

⁴ See J. Sobczak, *Prawo prasowe. Komentarz*, [Press law. A commentary] Warszawa 2008, p. 276.

state of affairs with intentions, declarations, promises, programmes and social needs. The third sphere concerns incidental issues, is interventional and highly personalised in its nature, and deals with mismanagement, irresponsibility, lack of competence and negligence⁵. Press criticism is particularly significant due to the medium through which it is communicated to the public, which not only enhances its effectiveness, but also strengthens its impact. This is especially important considering the fact that a critical allegation is stigmatising and once made publicly, even if subsequently denied and withdrawn, the accused person will never be completely cleared of suspicion.

Like freedom of expression, press criticism is not absolute in its nature, which indicates that not every manifestation of it is allowed. This means that press criticism is subjected to legal restrictions. The boundaries of permitted press criticism are set out in Art. 41 of the PL which makes it conditional upon meeting three criteria: fulfilment of the objectives and tasks of the press defined in Art. 1 of the PL (expressing criticism to serve the public interest), the requirement of conformity with the truth; reliability and compliance with the principles of social conduct. In accordance with Art. 41 of the PL, legal protection covers the publication of truthful and reliable reports of public sittings of the Sejm (lower chamber of the Polish Parliament), currently also of the Senate, local government units and their bodies⁶. Moreover, the law protects the publication of reliable, socially compliant negative evaluations of scientific or art works, or of other creative, professional or public activity, on the condition that those evaluations contribute to achieving the objectives specified in Art.1 PL, i.e. providing reliable information, transparency of public life and the broadly understood social control. In line with the legislator's intention, this provision applies accordingly also to satire

⁵ Ibidem, p. 277.

⁶ When quoting the exact current content of Art. 41 of the PL: "Publishing truthful and reliable reports of public sittings of the Sejm, national councils and their bodies, as well as publishing reliable, socially compliant negative evaluations of scientific or art works, or of other creative, professional or public activity serves the objective of implementing the tasks specified in Art. 1 and remains under protection of the law; the provision shall accordingly apply to satire and caricature", it is hard to disagree with the statement that the substantive error contained in the quoted provision concerning the non-existent national councils is indicative of the negligence of the legislator who has amended the law several times overlooking the existence of the Senate or local governments, see E. Nowińska, *Wolność wypowiedzi prasowej*, [Freedom of expression of the press] Warszawa 2007, p. 180. On 27 May 1990, communal national councils were replaced by communal bodies, in accordance with the Act of 10 May 1990 - Introductory Provisions to the Local Government Act and the Act on Local Government Employees, Dz.U. of 1990, No. 32, item 191 as amended. Moreover, the provisions of Art. 41 of the PL should also apply to the Senate and reports of its public sittings. Pursuant to Art. 95 (1) of the Constitution of the Republic of Poland "the legislative power in the Republic of Poland shall be exercised by the Sejm and the Senate", and the provisions of the Constitution are the supreme law (Art. 8(1)) and as such supersede the provisions of statutes (Art. 87 (1)).

and caricature. What is meant here are not works as defined by the Copyright Law⁷, but rather a critical evaluation of work, or its result. Public activity means all issues that evoke reasonable interest in the society, even if only on a local scale, including political, social, economic and professional activities⁸. Moreover, although this has not been explicitly stated anywhere, it is beyond any doubt that issues evoking public interest include both those which aroused such interest independently of any publications, and those which became interesting to the public only after publication⁹. In view of the above, it can be incontestably assumed that the scope of press criticism thus defined encompasses practically everything that is the object of social interest, and certainly all manifestations of activity that belong to the public sphere.

The nature of press criticism

Press criticism can have the form of a descriptive or evaluative statement. Descriptive statements i.e. statements of facts, refer to situations or events which took place in the objective reality, whereas evaluative utterances, i.e. value judgements are subjective reflections relating to the work or activity of the criticised person. In the first case, a [descriptive] critical allegation can be subjected to examination to prove its veracity or falsehood, while in the second [evaluative] case, the criticism is not subjected to verification to determine its truth or falsehood, and an investigation of its validity would not be based on any intersubjectively verifiable measure¹⁰. Press criticism relating to facts, referred to as *ad rem* criticism, is an activity expected by the press recipients, and its duty is to ultimately fulfil the citizens' rights to reliable information, transparency of public life and efficient social control, and consequently, to serve the society and the state which is a common good. Since the state is a common good of all citizens, it seems appropriate and understandable to voice concerns about the matters of the state community, and stigmatise any symptoms that might harm the community. *Ad rem* criticism, criticism relating to the matter, which fulfils the statutory criteria concerning the goals and tasks of the press and complies with the requirement of

⁷ Within the meaning of the Copyright Law, a work is any manifestation of creative activity with an individual character, established in any form, regardless of its value, designation or manner of expression, Art. 1 (1) of the Act of 4 February 1994 on Copyright and Related Rights, uniform text *Dz. U.* of 2006, No. 90, item 631, as amended.

⁸ See the verdict of the Supreme Court of 24 January 2008, I CSK 338/07, *OSNC-ZD* [Reports of the Supreme Court Civil Chamber –Supplements] 2008, no. 4, item 110.

⁹ See the verdict of the Supreme Court of 10 December 2003, V KK 195/03, *OSNKW* [Reports of the Supreme Court Criminal and Military Chamber] 2004, no. 3, item 25.

¹⁰ See the verdict of the Court of Appeal in Kraków of 12 January 1994, I ACr 314/93 [in:] B. Gawlik, *Dobra osobiste: Zbiór orzeczeń Sądu Apelacyjnego w Krakowie* [Personal rights: Reports of the Court of Appeal in Kraków], Kraków 1999, pp. 100-114.

truthfulness and reliability of evaluations, constitutes a countertype, i.e. a circumstance excluding unlawfulness of an act¹¹. The phrase used by the legislator to state that the publishing of negative evaluations of works or activities is protected by the law should be construed as precluding unlawfulness of actions of a journalist who satisfied the requirements referred to in Art. 41 of the PL. Adopting another interpretation of the provision would mean that the norm is void, deprived of normative value¹². A critical statement falls within the scope of the countertype of criticism if the critic directs his words against the evaluated work, or the activity of a particular person, rather than the person themselves. Criticism aimed at evaluating an individual, their attributes, qualities, attitudes and behaviours, referred to as *ad personam* criticism, does not fall within the scope of the countertype, and is therefore not protected by the law. In the light of Art. 41, personal criticism is not permitted, which has been confirmed by the case-law according to which “Critical statements and negative evaluations contained in them should not be directed at a person, but at their work, activity or the function performed by that person in a particular social system. Holding office, pursuing a career or another activity are functions which carry a value [meaning: W.L.] for the society, and the manner in which the functions are performed cannot be unimportant to the society, and, consequently, cannot be excluded from criticism”¹³. In view of the above it should be stated that the provisions of the Press Law apply exclusively to *ad rem* criticism, whereas *ad personam* criticism does not lie within the scope of the countertype and, as such, is not protected by the law, which means it is unlawful.

The adopted classification serves organizational purposes, it enables setting the limits of criticism as well as identifying the countertype of criticism and impermissible criticism. Although the classification should be considered valid, it has to be highlighted that it is not possible to draw a clear-cut distinction between criticism directed at a person and criticism of their work or activity due to the simple reason that criticising someone’s work or activity will always influence the assessment of that particular person. Behind every work or activity there is an individual acting as the driving force, thanks to whom the work or activity came into being and was materialised. In other words, criticism of a work or activity of a particular

¹¹ ”In the situations described in Art. 41 of the PL, a primary violation of the law takes place, but the unlawfulness is secondarily removed as a result of special regulation and the occurrence of the countertype”, see M. Olszyński [in:] M. Brzozowska-Pasieka, M. Olszyński, J. Pasieka, *Prawo prasowe. Komentarz*, [Press law. A commentary] Warszawa 2013, p. 382.

¹² See P. Sobolewski, Głosa do wyroku Sądu Najwyższego z dnia 7 listopada 2002, II CKN 1292/00 [Commentary on the verdict of the Supreme Court of 7 November 2002, II CKN 1292/00], OSNC [Reports of the Supreme Court Civil Chamber] 2004.

¹³ See the verdict of the Supreme Court of 17 December 1965, VI KO 14/59, OSNKW 1966, no. 2, item 14.

person will, in fact, be the criticism of that person, even though it is not expressed directly, but indirectly through their works or activity.

“Within the meaning of Art. 41 of the PL, criticism is a pejorative evaluative statement based on facts, aimed at exercising social control over matters of public importance”¹⁴. It is worth noting that in Art 41 of the PL the legislator uses the term “evaluation”, precisely speaking “negative evaluation”, and not “criticism”. In the colloquial language, an evaluation is an oral or written judgement about the value of something, an opinion about something or someone, an assessment, criticism¹⁵. Those terms can hardly be treated as synonymous. An evaluation can be positive or negative. The legislator explicitly refers to negative evaluation, i.e. criticism. Criticism thus understood seems to be a narrower concept than evaluation, because unlike evaluation (which is positive or negative, depending on the adopted criteria), it can only be negative. There is therefore no such thing as positive criticism, only positive evaluation. Since the latter deals with aesthetic assessment, it remains outside the scope of interest of the legislator who decided that due to its positive effect, it causes no harm to anybody, and is therefore not an object of particular protection. The foregoing is also confirmed by the joint texts of the provisions mentioned at the beginning of the paper, especially of Art. 41 (6) of the PL, Art. 6(4) of the PL and Art. 44(1) of the PL which unequivocally suggest that criticism is construed as an expression of negative evaluations. It would be illogical to undertake action to impede the collection of critical materials by the press or suppress criticism in any other way if criticism was not understood as an expression of disapproval, or a negative evaluation of a work or activity. The legislator would have difficult explaining why it protects the freedom of speech which includes expressing certain opinions in a positive manner, and restricts positive criticism, i.e. one which involves making favourable, appreciative, and therefore positive statements about the object of criticism. Assuming that the lawgiver is reasonable, a different interpretation of those concepts and treating them as synonymous would result in Art. 41 of the PL becoming redundant. Thus, Sobczak rightly stresses that the use of the term “evaluation” instead of “criticism” indicates that the legislator wanted to expressly emphasise the distinction between all criticism and those types of criticism which address scientific, or art works, and creative, professional or public activity. However, it is difficult to determine what has been excluded from evaluations,

¹⁴ J. Sobczak, *Prawo do krytyki...*, [The right to criticism], op. cit., p. 55.

¹⁵ See the entry “evaluation” [in:] *Słownik języka polskiego*, [Dictionary of the Polish language] ed. M. Szymczak, Warszawa 1988, v. 2., p. 416; *Uniwersalny słownik języka polskiego*, [Universal dictionary of the Polish language] ed. S. Dubisz, Warszawa 2006, v. 2, p. 1101.

and consequently from criticism within the meaning of Art. 41 of the PL, since the scope of those “evaluations” was very broadly defined¹⁶.

A semantic interpretation suggests that the lawgiver limits the concept of criticism exclusively to negative evaluations with a clearly pejorative sense. Thus, the classification of the forms of criticism laid down in the doctrine, according to which the concept includes praise, approval, *strictu sensu* criticism, and disapproval¹⁷ is not justified on normative grounds. If criticism is a pejorative evaluative statement expressing disapproval of the described state of affairs, aimed at implementing social control and enabling verification of the irregularities in the public life which are important to the society, it cannot simultaneously be praise or approval which serve totally different purposes. Such an interpretation of the concept of criticism is also supported by Art. 1 of the PL because the controlling function of the press can only be implemented through negative evaluation. It constitutes an important factor in the development and shaping of social relations. Criticising negative phenomena in the social and economic life contributes to their elimination and, consequently, to improving social relations, removing irregularities, increasing the efficiency of management, which translates into an atmosphere of credibility and trust. Press criticism fulfils its function when the publicly stigmatised phenomena become essentially eliminated, the criticised persons change their behaviour, bear criminal or disciplinary liability, or when instruments are put in place to prevent irregularities and evil¹⁸. A similar understanding of press criticism seems to be suggested by Ewa Nowińska according to whom critical statements are negative statements - since positive statements are permitted, they do not require special protection¹⁹.

Press criticism, as a component of freedom of expression, is an extremely precious and desirable value since it constitutes means through which the citizens exert influence on the course of affairs in the state. It is a sort of control mechanism which is essential for the proper functioning of democratic structures. However, like freedom of expression of which it is part,

¹⁶ J. Sobczak, *Prawo do krytyki...*, op. cit., p. 57.

¹⁷ “Praise means that the evaluator considers a particular state of affairs to be optimal, close to perfection. An approval recognises a certain reality or activity as appropriate and reasonable, but so distant from perfection that they do not deserve praise. In the strict sense of the term, criticism is an analytical judgement about the reality, expressing doubts about the need to undertake certain activities, or validity of a particular state of affairs, or supporting or negating this type of need and validity. Finally, criticism can assume the form of disapproval which takes place when the critic does not see any positive aspects of the existing state of affairs”, see J. Sobczak, *Prawo prasowe...*, op. cit., p. 276.

¹⁸ See the verdict of the Supreme Court of 19 August 1987, III AZP 2/87, OSNC 1988, no. 2-3, item 25.

¹⁹ See E. Nowińska, *Wolność wypowiedzi...*, op. cit., p. 181.

press criticism is not a value in itself²⁰. Therefore, when addressing the issue of dissemination of negative evaluations, it is important to identify the goal pursued by the journalist who makes the critical allegations. Permitted criticism lying within the scope of the countertype is a pejorative statement incriminating the object of criticism in order to achieve the goal of serving the public interest, which is an emanation of the common good. Consequently, criticism is aimed at rectifying the reality, which differs from the previously adopted assumptions deemed optimal. Its basic task is to inform citizens of issues that evoke public interest, and exercise social control, especially over the people in power. As a result, criticism influences the shape of public life and is an important tool for involving citizens in governing the state.

Premises of permitted press criticism

Based on the provisions of Art. 41 of the PL, three spheres of journalistic activity can be distinguished, including, in the first place, publishing truthful and reliable reports of public sittings of the Sejm, currently also of the Senate and local government units and their bodies; secondly, publishing reliable, socially compliant negative evaluations of scientific or art works, or of another creative, professional or public activity; thirdly - satire and caricature. The difficulty here lies in defining the conceptual scope of those spheres of journalistic activity, which stems from the lawgiver's use of the concepts of truthfulness and reliability. Assuming that the lawgiver is rational, the dichotomy cannot be coincidental which means it is not possible to view the concepts of truthfulness and reliability as synonymous. Such reasoning is confirmed by distinguishing between publications concerning facts and those concerning evaluations. With respect to the former, the criterion of truthfulness or falsehood of information can be used, whereas in relation to the latter only evaluative categories can be applied which need not be true, although they cannot be totally arbitrary as they must be reliable and compliant with the principles of social conduct. In the light of Art. 41 of the PL, the criterion of truthfulness cannot be applied to value judgements which express evaluations, views, opinions, comments, etc.. Their legal classification is primarily based on reliability.

The requirement of reliability means the obligation to provide at least rational argumentation when making a negative evaluation. Reliability referred to in Art. 41 of the PL is the same reliability that was mentioned in Art. 12 (1) of the PL. Thus, the concept should be understood, in accordance with the principles of legislative technique, in a uniform manner, as

²⁰ W. Lis, *Zakres dozwolonej krytyki prasowej* [Scope of permitted press criticism] [in:] *Współczesne media. Wolne media?*, [Contemporary media. Free media] v. I, eds. I. Hofman, D. Kępa-Figura, Lublin 2010, p. 76.

honesty, solidity, dutifulness, concreteness, and accountability for words. Additionally, the concept of reliability includes such notions as: compliance with the principles of the trade, refraining from using unlawful tricks, absence of deliberate misleading²¹. Bohdan Michalski additionally points out that professional reliability means a relationship in which the sphere of facts is separated from the journalistic commentary, evaluation, or criticism. Reliability entails compliance with the rules of collecting and using information, fulfilling the duties towards the informants, and acting in a loyal manner²². Provisions of Art. 41 of the PL may in no case be construed as diminishing the journalist's obligation of applying due care in collecting and using press material, or relaxing the requirements concerning the truthful presentation of facts, or as condoning the infringement of personal rights, but rather as setting of boundaries for freedom of expressing negative evaluations²³. Nowińska points out that the concept of reliability thus understood contains the imperative to at least attempt to establish the actual course of the described phenomena, this being in line with the principles of social conduct which require refraining from making ungrounded allegations²⁴. A similar view was taken by Elżbieta Czarny-Drożdziejko who asserts that journalistic reliability concerns the manner of gathering and using the collected press material. In other words, only the materials which have been checked and verified should be used in a publication²⁵. In this context, mention must be made of the stance taken by the Supreme Court in its ruling of 18 February 2005 according to which if a journalist proves that in gathering and using press materials he acted in the defence of a socially legitimate interest and observed the principles of particular care and reliability, he cannot be held liable for unlawful action²⁶. The requirement of particular care and reliability means that the journalist is only liable for the method of his actions, but not for their outcome. This indicates that when a journalist can provide evidence concerning the use of a particular method of action, even when the action results in making an untrue critical allegation, he is not held liable. Nevertheless, in a situation where despite observing the principles of due care and reliability, the critical allegation proves to be untrue, the journalist is obliged to withdraw the

²¹ See J. Sobczak, *Prawo prasowe*, op. cit., p. 407; idem: *Prawo do krytyki a kontratyp zniesławienia* [Right to criticism and the countertype of libel], „*Studia Medioznawcze*” [Media studies] 2013, no. 2, p. 60.

²² See B. Michalski, *Podstawowe problemy prawa prasowego* [Basic problems of the press law], Warszawa 1998, p. 83 et seq.

²³ See the verdict of the Supreme Court of 4 March 2010, I CSK 291/09, unpublished.

²⁴ See E. Nowińska, *Wolność wypowiedzi...*, op. cit., p. 183.

²⁵ See E. Czarny-Drożdziejko, *Dziennikarskie dochodzenie prawdy a przestępstwo zniesławienia w środkach masowego komunikowania*, [Journalistic investigation of the truth and the crime of libel in mass media], Kraków 2005, p. 402.

²⁶ See the resolution adopted by seven judges of the Supreme Court of 18 February 2005, II CZP 53/04, OSNC 2005, no. 7-8, item 114.

allegation, this obligation being also confirmed by the codes of professional conduct.

On the other hand, the requirement to comply with the principles of social conduct is a clear indication that the impassable boundary of a critical statement is the dignity of a human being²⁷ which is inviolable, and it is the duty of the public authorities to ensure that it is respected and protected. From the rules of social conduct, that is, the social norms determining the acceptable and recognised rules of behaviour, manner of acting in interpersonal contacts and presented attitudes, follows the obligation to respect every individual and their sense of personal dignity. The human dignity, which is the source of freedom of the press, simultaneously sets the boundaries for that freedom. The foregoing clearly indicates that the exercise of freedom of the press cannot take place at the expense of dignity which is an absolute value of fundamental importance to human existence, and, as such, can never be contested. Compliance of press criticism with the rules of social conduct should be understood as its compliance with good morals that is the fact of observing ethical and moral norms. Therefore, even the most accurate, insightful and substantively unchallengeable negative evaluation cannot violate the universally respected standards of ethical and social values²⁸.

The obligation of reliability is closely related to the duty of a journalist (the press in the subjective sense) to provide truthful presentation of the described phenomena, referred to in Art. 6 (1) PL. What is meant here is, of course, the truth which can be established by using the human cognitive apparatus and the means available to people. For the purposes of practical application in journalistic activity, it can be assumed that the “truth is the compliance of statements or findings relating to people, facts and states of affairs with that which really, is or was possible to find out. (...) The truth must be objective, which means that it corresponds to the reality, and that the findings were made in accordance with the generally accepted principles of logical reasoning and the existing state of knowledge. This precludes the possibility of replacing the objective truth with a journalist’s subjective truth”²⁹. Certainly, the obligation to provide truthful presentation of the described phenomena applies to information concerning facts whose authenticity or falsehood can be proven, while leaving out evaluations. One may, however, ask if, in view of the obligation of truthful presentation of the described phenomena and the obligation of reliability which involves the imperative to, at least, try to establish the actual course of the described phenomena, the journalist is allowed to formulate

²⁷ See the resolution of the Supreme Court of 28 May 1971., III PZP 22/70, OSNC 1971, no. 10, item 188; likewise, the verdict of the Court of Appeal in Warsaw of 9 March 2005, VI ACa 753/04, *Legalis*.

²⁸ See J. Sobczak, *Prawo do krytyki...*, op. cit., p. 55.

²⁹ See B. Michalski, *Podstawowe problemy prawa prasowego* [Basic problems of the press law], Warszawa 1998, p. 81.

evaluations in an arbitrary manner? This question acquires additional significance when we confront it with the journalist's obligation to apply special care and accuracy when collecting and using press materials, especially to verify the truthfulness of the gathered information (Art. 12, par. 1, point 1 PL). The answer to this question should be unequivocally negative. Although the author of a value judgement cannot be required to prove its truthfulness, it can be expected that the presented evaluations have a sufficient factual basis, that is, that they were based on verifiable facts. One cannot fail to notice that the evaluations disregarding the existing factual basis represent a violation of the basic journalistic obligations that stems from the norms of the positive law, as well as from ethical and social norms contained in numerous ethical codes.

Ewa Ferenc-Szydelko stresses that the right to criticism is integrated with the right to information, because evaluative statements must, by nature, refer to facts³⁰. This obligation is logically correlated with the requirement that criticism must not be detached from reality. A similar view was expressed by Joanna Sieńczyło-Chlabicz who points out that critical allegations must not be ungrounded, and should be based on reliable data and an accurate ascertainment of the facts relating to a particular case³¹. Journalists cannot limit themselves to publishing value judgements because such an activity has nothing to do with the tasks of the press. Dissemination of untrue information is incompatible with the principles of social conduct and, as such, it is always unlawful³². Falsehood has no value, what is more, it compromises the concept of freedom of expression, undermining the very essence of that freedom. Any other understanding of freedom of expression, including the right to criticism, would mean granting approval to the constant lowering of cultural standards and reducing the level of decency, sensitivity and responsibility³³.

An evaluative statement which contains no reference to factual substance leads to falsification of the reality, since evaluations usually rely on a factual basis³⁴. Furthermore,

³⁰ See E. Ferenc-Szydelko, *Prawo do krytyki w świetle przepisów prawa prasowego i innych ustaw* [The right to criticism in the light of the press law and other legislation], *Opolskie Studia Administracyjno-Prawne* [Opole Administrative and Legal Studies] 2008, p. 37.

³¹ See J. Sieńczyło-Chlabicz, *Krytyka prasowa i jej granice w świetle orzecznictwa sądów polskich* [Press criticism and its boundaries in the light of Polish case-law], "Glosa. Prawo gospodarcze w orzeczeniach i komentarzach" [Gloss. Economic law in court rulings and commentaries] 2006, no. 2, p. 116.

³² See Z. Radwański, Glosa do wyroku Sądu Najwyższego z dnia 14 maja 2003, I CKN 463/01 [Commentary on the verdict of the Supreme Court of 14 May 2003, I CKN 463/01], *OSP* [Reports of Court of Labour] 2004, no. 2, item 22, p. 94.

³³ See the verdict of the Supreme Court of 22 June 2004, V KK 70/04, OSNKW 2004, no. 9, item 86.

³⁴ See B. Kosmus [in:] *Prawo prasowe. Komentarz*, [Press law. A commentary], eds. B. Kosmus, G. Kuczyński, Warszawa 2011.

publishing only value judgements has nothing to do with the objectives and tasks of the press referred to in Art. 1 of the PL: “Every value judgement (evaluation, opinion) is based on certain facts and circumstances that provide the grounds for expressing that opinion, evaluation or view. Hence the natural tendency to verify the expressed evaluations by analysing the factual circumstances providing the basis for those evaluations, and checking whether the facts justify the expressed evaluation³⁵. Value judgements, although not subject to classification in terms of accuracy or falsehood, must (should), by nature, refer to a certain (subject to judgement) state of affairs (specific reality). It is therefore legitimate to require that they have a sufficient factual basis. Criticism can be regarded as reliable and objective only when it is based on verifiable facts that are assessed in a civilised manner. The idea is that the reader should be able to determine which part of the critical text is factual, and which represents the critic’s opinion that can also be subjected to assessment and accepted or rejected. Critical evaluations must be expressed against the background of facts communicated by the critic, otherwise it is impossible for the reader to confront the factual sphere with critical evaluations, which results in the critical text being neither reliable nor objective³⁶. The requirement of objectivity of criticism, put forth in the case-law and doctrine, involves avoiding bias, excessive malice and aggressiveness. Polemical zeal does not entitle the critic to make aggressive and rude statements³⁷. A journalist who makes critical allegations in public may be wrong, may miss the point, but must not make allegations if they are not based on verifiable facts. The right to criticism is not unrestrained, and must not be construed as the right to make groundless or insufficiently verified allegations³⁸. The question of how strongly and thoroughly one has to substantiate the expressed allegations depends on how serious those allegations are. The principle should be that the more serious an allegation is, the greater care and caution needs to be applied when collecting and using information.

In this context, it is debatable although not unjustified to say that criticism which focuses on third-rate elements and is merely a form of harassing the criticised individual³⁹ should not be permitted, for at least two reasons. Firstly, in accordance with the principle of freedom of expression, everybody has the right to voice their opinion on any subject and any

³⁵ L.K. Jaskuła, *Prawo do dobrego imienia a wolność prasy* [The right to good reputation and freedom of the press], Warszawa 2008, p. 196.

³⁶ See A. Kopff, Glosa do wyroku z dnia 19 września 1968r., 2 CR Z 91/68 [A commentary on the verdict of 19 September 1968, 2 CR Z 91/68], „Nowe Prawo” [New law] 1970, no. 7-8, p. 1188.

³⁷ See J. Sobczak, *Prawo prasowe...*, op. cit., p. 858; idem, *Prawo do krytyki...*, op. cit., p. 61.

³⁸ See the verdict of the Supreme Court of 17 October 2001, IV KKN 165/97, “Biuletyn Sądu Najwyższego” [Bulletin of the Supreme Court] 2002, no. 2, p. 19.

³⁹ See B. Kosmus [in:] *Prawo prasowe...*, op. cit., pp. 541-542.

circumstances, including those of third-rate importance. Secondly, it is unclear who should decide about what to include in the catalogue of phenomena that can be criticised, what is important and relevant, what deserves to be exposed, and what is merely an insignificant detail that is not worth deeper reflection, or being the object of public debate. Adopting this view would indicate that some topics are important, while others are not. Such activities, which in fact limit the right to criticism to that which is important (and not third-rate), and therefore bear the features of preventive censorship, would constitute an unjustifiable and, more importantly, prohibited interference with the principle of freedom of expression. However, the Supreme Court was right when it decided that the intensity of criticism should be proportional to the scale of the described negative phenomenon. A disproportionate criticism of reality is an abuse of the countertype of press criticism, and is not protected by the law, resulting in criminal and civil liability⁴⁰.

When speaking of the objectives of permitted criticism, one must not overlook the requirement of public interest which this criticism is expected to serve. Public interest is firmly anchored in the Press Law, first in Art. 1 of the PL according to which press fulfils the citizens' right to be reliably informed, to transparency of public life and the broadly understood social control, and then in Art. 10 (1) of the PL which provides that the task of a journalist consists of serving the society and the state, and in Art. 44 (2) of the PL which affords protection to criticism published in the legitimate public interest. Serving the legitimate public interest is understood as dissemination of true information on individual facts or recurrent events which affect, or may affect an unspecified group of people or the entire society, and, from the point of view of that group or entire society, deserve to be supported or criticised. Criticism should be objective and reliable i.e. refer to evaluated phenomena which have been verified for compliance with the reality, and compare them to the desired model. The expressed evaluations should be adequate and proportional to the result of the comparisons. An aggressive, unfavourable tone of press publications, offensive phrases insulting the human dignity, untrue information which compromises good reputation, or unfair insinuations cannot, in the light of the above-quoted provisions, be regarded as an undertaken in the legitimate social interest⁴¹. "Criticism is a socially useful [and desirable - W.L.] activity if it is undertaken in the public interest, if it is not intended to harass another person, is reliable and objective, and simultaneously, does not cross the boundaries needed for achieving the social goal of criticism which it is expected to serve. The boundaries cannot, however, be

⁴⁰ See the verdict of the Supreme Court of 28 September 2000, V KKN 171/98, OSNKW 2001, no. 34, item 31.

⁴¹ See the verdict of the Supreme Court of 8 February 2008, I CSK 334/07, Lex no. 457843.

delineated in a general manner, since they are defined by the unique circumstances of each individual case. Criticism which does not present any facts, but contains only evaluations using strongly negative adjectives, or criticism which makes unverified allegations and is based solely on rumours, gossip, and presumptions can hardly be recognised as reliable and objective⁴². Acting in the social interest requires that the journalist should provide the person whose work or activity was criticised with an opportunity to respond to those critical allegations and present their point of view. Presenting only value judgements made by persons who, for various reasons, are ill-disposed towards the criticised individual, and leaving out the favourable opinions, a biased selection of sources of information, or using manipulation - all this results in misrepresentation of that individual and insults their dignity, or good reputation. Such criticism not only does not serve the public opinion, but is also a manifestation of an instrumental approach to its audience who have the right to objective, complete, reliable and true information.

Form of press criticism

Both the doctrine and case-law recognise that the form of criticism is important for setting the boundaries for critical statements. “A journalist who has acquired the right to make negative judgements about all kinds of creative, professional or public activity, has not been released of the obligation to preserve an appropriate form of criticism. A violation of this form results in both criminal and civil liability, even if the journalist was right from a substantive point of view”⁴³. Press criticism which oversteps the boundaries of a socially acceptable form cannot be regarded as permitted, even if it is substantively valid, justified by a legitimate objective and importance of the subject matter, and has been undertaken in the public interest. Press criticism must not (should not) develop into personal attacks, or private wars discrediting persons at the centre of press attention, having as its only goal humiliation or, much worse, causing the civil death of the criticised individual⁴⁴. The right to criticism should not turn into hurling insults, or the right to use offensive language expressing contempt for another person’s

⁴² L. Gardocki, *Europejskie standardy wolności wypowiedzi a polskie prawo karne* [European standards of freedom of expression and the Polish criminal law] [in:] *Standardy praw człowieka a polskie prawo karne* [Human rights standards and the Polish criminal law], eds.. J. Skupiński, J. Jakubowska-Hara, Warszawa 1995, p. 231.

⁴³ J. Sobczak, *Prawo prasowe...*, op. cit., p. 292; See the verdict of the Supreme Court of 1 July 2009, III KK 52/09, OSNKW 2010, no. 1, item 2.

⁴⁴ See W. Lis [in:] W. Lis, P. Wiśniewski, Z. Husak, *Prawo prasowe. Komentarz* [Press law. A commentary], Warszawa 2012, p 139.

dignity⁴⁵. The way in which critical allegations are made must conform to the universally accepted standards of public debate. An important tool for assessing the acceptable form of a critical statement is an analysis of the language used. A concentration of words deemed offensive, or clearly negative expressions in one statement cannot be seen as an acceptable form of conducting a public debate. The case-law recognises that the form of criticism (the literary form) should have an influence on setting the boundaries for criticism. One of the verdicts has stated that “Criticism aimed at improving the reality is not an unlawful action, despite using excessively expressive descriptions and negative evaluations, as well as excessively harsh wording and arguments, if this is justified by the importance of the issues addressed and the type of literary form used”⁴⁶. Another ruling states that “The form of a piece of writing certainly plays an important role in determining the boundaries of that which is recognised as permissible, acceptable, and falling within the limits specified for a given genre. Different evaluation criteria should be applied to a press article presenting important events or the conduct of particular individuals, than to a reportage, a review, or a column (...). All that does not mean that the literary form used for expressing judgements, opinions or criticism results in the absence of unlawfulness of the author’s actions⁴⁷. There is no normative base for making the illegality of criticism conditional upon the literary form through which it was expressed, or favouring certain of its forms, except satire and caricature, which was explicitly laid down in Art. 41 of the PL. It would be difficult to make the scope of protection dependent upon the form of criticism in a situation where the choice of the form is totally subjective and depends only on the author’s individual preferences and abilities⁴⁸. Thus, although the literary form of a critical statement should be taken into account when considering the scope of accountability, it cannot be a decisive factor.

Boundaries of permitted press criticism

The aspiration of the press to improve the reality and achieve moralistic objectives should be restricted by supreme values relating to the individual human being whose interests the press should serve. This clearly demonstrates that criticism, just like freedom of expression, is not absolute in its nature, but like other values, can and should be subjected to limitations. Setting

⁴⁵ See the verdict of the Supreme Court of 3 November 2004., I IV KK 132/04, Lex no. 1374; the verdict of the Supreme Court of 20 November 2002, II CKN 1033/00, Lex no.77049.

⁴⁶ See the verdict of the Court of Appeal in Warsaw of 28 February 2008, VI ACa 821/07, LexPolonica no. 1960167.

⁴⁷ See the decision of the Supreme Court of 1 July 2009, III KK 52/09, OSNKW 2010, no. 1, item 2.

⁴⁸ See *Media a dobra osobiste* [Media and personal rights], eds. J. Barta, R. Markiewicz, Warszawa 2009, p. 200.

such boundaries is, however, extremely challenging. The boundaries cannot be precisely measured, or imposed beforehand, because they are defined by different factors, like e.g. the type of criticism, circumstances under which it is articulated, importance of the objective for which it was undertaken, as well as social practices and personal traits of the criticised persons. On the other hand, the terminal boundaries of permitted criticism should not be too flexible, even taking into account the above-mentioned factors⁴⁹.

In many cases it is extremely difficult to determine the limits of permitted criticism and capture the point at which criticism ceases to be legal and begins to infringe upon personal rights. The case-law sometimes takes the view that the classification of a critical allegation as a value judgement, or a factual statement depends on the level of intensity of evaluative elements in the critical statement⁵⁰. The level of intensity of evaluative elements is determined from the point of view of an average reader representing the opinions of reasonable and honest people in the environment to which the criticised person belongs. It needs to be stressed, however, that this is a fictitious structure created by the adjudicating panel for the purposes of solving a particular case, i.e. *de facto* by the court⁵¹ which first defines the model of evaluation, next assumes the role of an average reader, and finally evaluates itself. Moreover, opinions typical of the environment to which the criticised person belongs may not have a decisive value, at best they can only represent one of the many circumstances that help to determine the level of sensitivity of an average reader. Under specific circumstances, those general rules of court procedure have to be completed with ascertainments and arguments relating to the realities of particular, actual situations which are different in each case.

The boundaries of permitted criticism depend on the status of the person, their social standing and the role they play in the public life. Consequently, different evaluation standards can be applied to critical opinions referring to public and private individuals. The assumption is that a person who engages in public activity willingly subjects themselves to enhanced interest and assessment on the part of others. A public figure who chooses to engage in public activity must be able to adopt a self-distancing attitude and display a considerably higher level of tolerance towards unfavourable, vicious, or even hostile remarks and comments. The boundaries of permitted criticism are wider with respect to public persons than private individuals, even when the criticism concerns an activity which is not directly related to the

⁴⁹ See the verdict of the Supreme Court of 19 September 1968, II CR 291/68, OSNCP 1969, no. 11, item 200.

⁵⁰ See the verdict of the Court of Appeal in Kraków of 12 January 1994, I ACr 314/93 [in:] B. Gawlik, *Dobra osobiste...*, op. cit., pp. 100-114.

⁵¹ See the verdict of the Supreme Court of 8 February 2008, I CSK 334/07, Lex no. 457843.

performed public functions, but which affects the social perception of that person. Under no circumstances, however, should the broader boundaries of permitted criticism endorse the publication of untrue information or dishonest use of press materials⁵².

Press criticism is protected by the law, specifically by the provisions of Art. 6 (5) of the PL which prohibit obstruction of collection of critical materials, and suppression of criticism. The guarantees contained in the provisions allow journalists to prepare and publish critical materials. Otherwise, it would be much harder, and in some cases even impossible, for the press to perform its control function which involves voicing criticism in the public interest⁵³. Impeding the collection of critical materials and suppressing criticism is prohibited by Art. 44 (1) of the PL, under the penalty of a fine, or restriction of liberty. The same penalty applies to a person who abuses their position or function, acting to the detriment of another individual because of press criticism published in the legitimate public interest (Art. 44 (2) PL). It should be recognised that “Article 44 (1) of the PL mirrors Art. 6 (4) of the PL with respect to criminal matters, the latter stating that it is prohibited to hinder the press in collecting critical materials, or suppress criticism in any other way. Paragraph 2 of the above-mentioned provision is related to the protection afforded by Art. 5 (2) of the PL, according to which no one can be subjected to any detriment or allegations on grounds of providing information to the press, as long as they acted within the limits prescribed by the law”⁵⁴. In addition to penalising the obstruction or suppression of press criticism, the legislator also imposes punishment on retaliatory action taken in response to press criticism published in the legitimate public interest. Obstruction or suppression of press criticism is a deliberate crime intended to achieve a particular result - the perpetrator does not want certain information or opinion to reach the general public, and become universally known and accessible to an unspecified group of people. To this end, the perpetrator uses all possible means of exerting influence and methods of operation in order to force the journalist to act in a specified manner. In the latter case, the point is not to achieve a result, but to act to the detriment of another person on account of publishing press criticism. Both of those crimes can only be committed deliberately with a direct, or probable intent. Both of them are conduct crimes, which means that the conduct itself is the offence, and there is no need for the criminal to achieve the intended result. Obstruction or suppression of press criticism is a crime that can be perpetrated

⁵² See the verdict of the Supreme Court of 5 April 2002, II CKN 1095/99, OSNC 2003, no. 3, item 42; the verdict of the Supreme Court of 5 June 2009, I CSK 465/08, unpublished.

⁵³ For information on forms and ways of obstructing and suppressing criticism see W. Lis [in:] W. Lis, P. Wiśniewski, Z. Husak, *Prawo prasowe...*, op. cit., p. 161.

⁵⁴ M. Olszyński [in:] M. Brzozowska-Pasieka, M. Olszyński, J. Pasieka, *Prawo prasowe...*, op. cit., p. 402.

by anyone, while acting to the detriment of another person due to press criticism is an individual crime. It can only be committed by a person who holds a position, or fulfils a function which provides them with a real opportunity to act to the detriment of the individual who was in some way involved in press criticism published in the legitimate public interest. The crimes referred to in Art. 44 of the PL are prosecuted *ex officio*.

Summary

It can be concluded that under the existing normative acts, press criticism is a reliable and socially compliant presentation of negative judgements concerning the activities of certain persons, or the results of their work that are not unimportant to the society due to the role played by those individuals in the public life. The aim of press criticism is to improve the reality and eliminate the discovered irregularities. Criticism which fulfils the moralistic goal and is oriented towards the future has a considerably strong impact. Therefore, criticism must not be a tool for discrediting, destruction or ridicule, it must not focus solely on condemning the detected irregularities. Such criticism does not have the attributes of permitted criticism, especially reliability and compatibility with the rules of social conduct⁵⁵. This type of criticism certainly does not seek to improve the reality, or contribute to the creation of a civil society. In view of the findings, it can be stated that there is nothing improper about press criticism as such, however the abuse of criticism is unlawful. It is definitely not the kind of criticism that drives things forward, motivates people to change behaviour in accordance with the principles of social conduct, promotes creativity, or contributes to moral renewal of the society, and creation of a new quality.

⁵⁵ See I. Dobosz, “Glosa do wyroku Sądu Najwyższego z dnia 17 kwietnia 2002. IV CKN 925/00” [Commentary on the verdict of the Supreme Court of 17 April 2002. IV CKN 925/00], *OSP* [Reports of the Court of Labour] 2003, no. 5, item 60; W. Lis, “Zakres dozwolonej krytyki...”, *op. cit.*, p. 77.

Normative acts

Constitution of the Republic of Poland of 2 April 1997, Journal of Laws of 1997, No. 78, item 483, as amended.

Act of 26 January 1984 Press Law, Dz. U. of 1984, No. 5, item 24, as amended Act of 10 May 1990 Introductory Provisions to the Local Government Act and the Act on Local Government Employees, Dz. U. of 1990, No. 32, item 191 as amended.

Act of 4 February 1994 on Copyright and Related Rights, uniform text, Dz. U. of 2006, No. 90, item 631, as amended.

Case law

Verdict of the Supreme Court of 19 September 1968, II CR 291/68, OSNCP [Reports of the Supreme Court Civil and Labour Chamber] 1969, no. 11, item 200.

Verdict of the Supreme Court of 28 September 2000, V KKN 171/98, OSNKW [Reports of the Supreme Court Criminal and Military Chamber] 2001 no. 34, item 31

Verdict of the Supreme Court of 05 April 2002, II CR 1095/99, OSNCP 2003, no. 3, item 42.

Verdict of the Supreme Court of 24 January 2008 I CSK 338/07, OSNC-ZD [Reports of the Supreme Court Civil Chamber –Supplements] 2008, no. 4, item 110.

Verdict of the Supreme Court of 8 February 2008, I CSK 334/07, Lex no. 457843.

Verdict of the Supreme Court of 5 June 2009 I CSK 465/08, unpublished.

Verdict of the Supreme Court of 4 March 2010 I CSK 291/09, unpublished.

Decision of the Supreme Court of 17 October 2001, IV KKN 165/97, Biuletyn Sądu Najwyższego [Bulletin of the Supreme Court] 2002, no. 2,p 19.

Decision of the Supreme Court of 10 December 2003, III KK 195/03, OSNKW 2004, no. 3, item 25.

Decision of the Supreme Court of 22 June 2004, V KKN 70/04, OSNKW 2004 no. 9, item 86

Decision of the Supreme Court of 1 July 2009, III KK 52/09, OSNKW 2010, no. 1, item 2.

Resolution of the Supreme Court of 17 December 1965, VI KO 14/59, OSNKW 1966, no. 2, item 14.

Resolution of the Supreme Court of 28 May 1971, VI KO 22/70, OSNKW 1971, no. 10, item 188.

Resolution of the Supreme Court of 19 August 1987, VI KO 2/87, OSNKW 1988, no. -3, item 25.

Resolution adopted by seven judges of the Supreme Court of 18 February 2005, II CZP 53/04, OSNC 2005, no. 7-8, item 114.

Verdict of the Court of Appeal in Kraków of 12 January 1994, I ACr 314/93 [in:] B. Gawlik, Dobra osobiste. Zbiór orzeczeń Sądu Apelacyjnego w Krakowie [Personal rights. Reports of the Court of Appeal in Kraków], Kraków 1999, pp. 100-114.

Verdict of the Court of Appeal in Warsaw of 9 March 2005, VI ACa 753/04, Legalis.

Verdict of the Court of Appeal in Warsaw of 28 February 2008, VI ACa 821/07, LexPolonica no. 1960167.