„Krytyka Prawa", tom 15, nr 1/2023, s. 275–299, ISSN 2080-1084, e-ISSN 2450-7938, © 2023 Author.


**PRZEMYSŁAW WOŁOWSKI**[1]

# Trustee's Duty to Become Familiar with the Contents of the Mail Addressed to a Bankrupt and the Right to Privacy[2]

Submitted: 10.08.2022. Accepted: 29.11.2022

## Abstract

The publication looks into the conflict that occurs between values protected under the Constitution of the Republic of Poland – i.e. the right to privacy and the protection of communication versus the protection of property rights – in a situation of declaration of bankruptcy. Acting pursuant to Article 176(2) of the Bankruptcy Law, the legislator has a priori given preference to the protection of property rights over the right to privacy and the protection of communication. The conflict in question has been resolved in favour of bankruptcy creditors. The legislator's adoption of a hierarchy of values in the area of bankruptcy law does not, of course, deal with all the problems arising in the field of the conflict between these values, and does not mean that the solution chosen is in accordance with hierarchically higher norms – meaning constitutional norms. In principle, the Constitution of the Republic of Poland makes the legislator free to resolve conflicts of competing values protected under this normative act. What is important is that this conflict be resolved by the – legislator in a way that meets the requirements of Article 31(3) of the Constitution of the Republic of Poland.

**Keywords:** constitution, bankruptcy, privacy, trustee, bankruptcy estate.

[1] Prof. Przemysław Wołowski – Kozminski University (Poland); e-mail: pwolowski@kozminski.edu.pl; ORCID: 0000-0003-1386-5874.

[2] The research in this article has not been supported financially by any institution.

 DOI: 10.7206/kp.2080-1084.582

## Introduction

In line with Article 176(2) of the Act of 23 February 2003 – Bankruptcy Law,[3] a trustee shall notify postal outlets within the meaning of the Act of 23 November 2012 – Postal Law (Journal of Laws of the Republic of Poland of 2020, item 1041) of the declaration of bankruptcy. These outlets deliver mail addressed to the bankrupt to the trustee. The trustee, within seven days from the date of receipt of mail, shall notify the bankrupt of the receipt of mail that does not concern the bankruptcy estate or the retention of which is not necessary due to the content thereof, and shall give the bankrupt an opportunity to collect such mail. Mail addressed to a bankrupt is deemed to have been delivered on the expiration of thirty days from the date of delivery of the mail to the trustee.[4]

This regulation interferes with the right to privacy, especially with its component in the form of the protection of the secrecy of communication. The provision of Article 176(2) of the Bankruptcy Law not only points to the bankrupt's right to privacy, but also affects the right to privacy of the sender of mail addressed to the bankrupt.

This leads to the question of whether the normative content of Article 176(2) of the Bankruptcy Law is in line with the constitutional standards for the protection of the right to privacy – especially for the protection of the secrecy of communication. To put differently, it is necessary to consider whether the scope of interference with the right to privacy under Article 176(2) of the Bankruptcy Act violates or does not violate the norms provided for in the Constitution of the Republic of Poland of 2 April 1997.[5]

---

[3] Uniform text: Journal of Laws of the Republic of Poland of 2020, item 1228 as amended, hereinafter referred to as the Bankruptcy Law.

[4] In terms of electronic correspondence, the equivalent of Article 176(2) of the Bankruptcy Law is Article 176(2b) of the Bankruptcy Law. This provision stipulates that the trustee shall notify the minister in charge of information technology of the declaration of bankruptcy if the bankrupt has an address for electronic delivery, as referred to in Article 2(1) of the Act of 18 November 2020 on Electronic Delivery (Journal of Laws of the Republic of Poland, item 2320). The designated operator and qualified trust service providers shall ensure that correspondence addressed to a bankrupt at this address is also sent to the trustee's electronic delivery address. This publication does not look into Article 176(2b) of the Bankruptcy Law.

[5] Journal of Laws of the Republic of Poland of 1997 No. 78, item 483; hereinafter referred to as the Polish Constitution.

## Trustee's duty to become familiar with the contents of mail addressed to a bankrupt as an expression of the execution of the principle of protection of bankruptcy estate's interests

One of the guiding principles of bankruptcy proceedings is the principle of protecting the interests of the bankruptcy estate.[6] This principle stems from the fact that bankruptcy proceedings focus mainly on the assets of the insolvent debtor, and not on the person of the debtor.[7] These assets, as of the date of the declaration of bankruptcy, become bankruptcy estate, i.e. the bankrupt's assets, which are used to satisfy the bankrupt's creditors (Article 61 of the Bankruptcy Law).[8] This means that the bankruptcy estate is a fundamental institution of bankruptcy law,[9] and the satisfaction of creditors' claims in bankruptcy proceedings is a value protected by the norms of bankruptcy law. The protection of creditors' claims in bankruptcy proceedings is part of the constitutional protection of property and other property rights (Article 64 of the Polish Constitution).

The legislator, in order to protect the interests of bankruptcy estate, created a system that serves to protect these assets from depletion (i.e. the bankrupt's assets, used to satisfy the claims of bankruptcy creditors). The provisions that make up this system address diverse and sometimes very specific legal situations, and they share a common axiological foundation.[10] From the legislator's perspective, it is legitimate to create and protect bankruptcy estate because without the assets that constitute a bankruptcy estate it would not be possible to achieve the goals of bankruptcy proceedings. In particular, it would not be possible to achieve the recovery (repossession) goals of the bankruptcy law.[11]

The protection of the interests of bankruptcy estate should be considered as a mental shortcut because bankruptcy estate is not a subject of law, but an object of law, and remains the property of the bankrupt, who has lost the attributes of

---

6 Cf. P. Wołowski, *Kolizja zasady ochrony interesów masy upadłości z zasadą zaufania w prawie cywilnym*, Sopot 2018, pp. 30–36.

7 K. Flaga-Gieruszyńska, *Prawo upadłościowe i naprawcze*, Warszawa 2004, p. 64.

8 Of course, this provision is supplemented by the provisions governing the distribution of bankruptcy estate funds and amounts obtained from the disposal of property and encumbered rights (Articles 335–360 of the Bankruptcy Law).

9 E.g. cf. P. Janda, *Wyłączenia z masy – podobieństwa i różnice nowego i starego prawa upadłościowego*, "Prawo Spółek" 2003, 5, p. 40; P. Pogonowski, *Mienie wchodzące w skład masy upadłości – zagadnienia wybrane*, "Prawo Spółek" 1999, 6, p. 35.

10 P. Wołowski, *Kolizja…*, p. 33.

11 Cf. ibidem.

 DOI: 10.7206/kp.2080-1084.582

ownership in the broad sense.[12] The literature dealing with the matter in question emphasizes that the legislator's use of phrases like "the bankruptcy estate is enriched", "the debts of the bankruptcy estate" or "the bankruptcy estate is liable" is merely a mental shortcut[13] because these phrases refer to the bankrupt as a subject of law – but only insofar as the subject of the law is concerned, which in this case is the bankruptcy estate.[14]

Taking into account the fact that the main purpose of bankruptcy estate is recovery,[15] it should be assumed that the principle of protecting the interests of bankruptcy estate boils down to safeguarding the interests of bankruptcy creditors.[16] This claim is proven in the existing body of judicial decisions, which implies that the institution of ineffectiveness of the bankrupt's actions taken "with respect to the bankruptcy estate" means, in fact, ineffectiveness with respect to all bankruptcy creditors, since the bankruptcy estate is not a subject of law.[17]

The principle of protecting the interests of bankruptcy is mainly about safeguarding the interests of bankruptcy creditors by "freezing" the assets of the bankrupt.[18] The idea is to protect bankruptcy creditors from suffering loss caused by depletion of bankruptcy estate.[19]

A legal regulation that fits in with the principle of protecting the interests of bankruptcy estate is a set of provisions that require the trustee to become familiar with the contents of the mail addressed to the bankrupt (Article 176(2) and (2a) of the Bankruptcy Law). In order to perform this duty, the trustee shall notify post offices of the declaration of bankruptcy. Failure to notify post offices of a declaration of bankruptcy may result in the trustee's disciplinary liability (Article 169a of the Bankruptcy Law and 20b–20c of the Law of 15 June 2007 – on the license of a restructuring advisor[20]) and compensatory liability (Article 160(3) of the Bankruptcy Law).

---

12 E.g. cf. M. Allerhand, *Prawo Upadłościowe, komentarz*, Bielsko-Biała 1991, p. 85; P. Pogonowski, op. cit., p. 36; Z. Świeboda, *Komentarz do prawa upadłościowego i prawa o postępowaniu układowym*, Warszawa 1999, p. 59; F. Zedler, *Prawo upadłościowe i układowe*, Toruń 1997, p. 185; Statement for the bill – Bankruptcy and Reorganisation Law, Sejm paper no. 809, 4th term Sejm, p. 110.

13 Cf. A. Jakubecki, [in:] A. Hrycaj, A. Jakubecki, A. Witosz (eds.), *System prawa handlowego. Prawo restrukturyzacyjne i upadłościowe*, Vol. V, Warszawa 2016, p. 991; F. Zedler, [in:] A. Jakubecki, F. Zedler, *Prawo upadłościowe i naprawcze. Komentarz*, Lex 2011, a commentary to Article 61, remark 4.

14 P. Wołowski, *Kolizja…*, p. 35.

15 At the same time, it is necessary to bear in mind that bankruptcy estate may also serve as grounds for the sanative (remedial) function of bankruptcy law.

16 P. Wołowski, *Kolizja…*, p. 35.

17 Supreme Court's judgement of 03.10.2007, IV CSK 184/07, OSNC no. 2003/2008, item 142.

18 Cf. Supreme Court's resolution of 09.10.1998, III CZP 41/98, OSNC no. 2/1999, item 24.

19 T. Koherewicz, *Bezwzględny zakaz naruszania majątku masy upadłości*, "Prawo Spółek" 1999, 10, p. 39.

20 Uniform text: Journal of Laws of the Republic of Poland of 2022, item 1007.

After the notice of bankruptcy, postal facilities are required to deliver mail addressed to the bankrupt to the trustee. Pursuant to Article 176(2) of the Bankruptcy Law, the trustee is free to decide whether the mail should be handed over to the bankrupt.[21] According to the third sentence of Article 176(2) of the Bankruptcy Law, the trustee, within 7 days from the date of receipt of mail, shall notify the bankrupt of the receipt of mail that does not concern the bankruptcy estate or the retention of which is not necessary due to the content thereof, and shall give the bankrupt an opportunity to collect such mail.

It needs to be emphasised that mail shall be considered effectively delivered to the bankrupt only upon the expiration of 30 days from the date of delivery of the mail to the trustee (Article 176(2) of the Bankruptcy Law *in fine*).

The scope of Article 176(2) of the Bankruptcy Law covers all mail addressed to the bankrupt, regardless of its nature (official or private), type (ordinary or registered mail, letters, money, goods), and place of delivery (place of residence, business premises, etc.).[22] This means that the legislator did not provide for any exceptions to the duty imposed on postal facilities, which involves delivering mail addressed to a bankrupt to a trustee. As a result, the practical implementation of the principle of protection of the interests of bankruptcy estate under Article 176(2) of the Bankruptcy Law may result in a conflict with the right to privacy – especially with the protection of the secrecy of communication. This conflict becomes clear in situations when bankruptcy is declared by a natural person not engaged in business activity (Article $491^1$–$491^{24}$ of the Bankruptcy Law). In the so-called proper bankruptcy proceedings,[23] conducted against a natural person not engaged in business activity, there will be no correspondence concerning bankruptcy estate related to the bankrupt's business – because the bankrupt is not an entrepreneur. Actually, all correspondence will concern the bankrupt's private sphere of life.

Therefore, the only justification for interfering with the right to privacy and protecting the secrecy of a bankrupt's communication may be to protect the claims of bankruptcy creditors. However, when we take into account that the application of Article 176(2) of the Bankruptcy Law also interferes with the right to privacy and the protection of the secrecy of communication of the sender of mail addressed to a bankrupt, the argument for protecting the claims of bankruptcy creditors may not be sufficient to justify the trustee's interference with the right to privacy and thus deprive the bankrupt of the protection of the secrecy of communication.

---

21 P. Zimmerman, *Prawo upadłościowe. Prawo restrukturyzacyjne. Komentarz*, Legalis 2022, a commentary to Article 176 of the Bankruptcy Law, remark 6.

22 S. Gurgul, *Prawo upadłościowe. Prawo restrukturyzacyjne. Komentarz*, Legalis 2020, a commentary to Article 176 of the Bankruptcy Law, remark 3.

23 E.g. cf.: R. Lewandowski, P. Wołowski, *Prawo upadłościowe i naprawcze*, Warszawa 2014, p. 145.

 DOI: 10.7206/kp.2080-1084.582

It should be emphasized that a bankrupt may be sent mail by third parties – for example, those who have no legal ties with the bankrupt, and the content of such mail may concern private matters, such as the romantic relationship between the bankrupt and the sender of the mail.

## The right to privacy as a fundamental right of the individual

The right to privacy is considered one of the most fundamental rights and freedoms of every individual, where these rights and freedoms dating back to antiquity.[24] The period of antiquity also saw the emergence of the concept of privacy, which was the opposite of the sphere of public life and encompassed the sphere of domestic, family life – *oikos*.[25] Of course, in ancient times, the concept of "privacy" was very different from what it has come to mean in modern times.[26] However, the views that took shape in antiquity laid the foundation for the formation of the right to privacy as a fundamental right of the individual.

There was no substantial development in the area of individual rights until the late 17th and early 18th centuries.[27] In that period, ideas concerning the sphere of individual privacy were tied to another fundamental right – the right to freedom,[28] and the starting point of this idea was individualism, meaning the guarantee of freedom understood an individual's distinctiveness, which manifested itself as the right of the individual to a sphere of privacy free from interference from the state or society, taking the form of the right to own property, as well as as the right to unhampered self-fulfilment.[29] Privacy was recognised as the foundation of freedom. It was also acknowledged that the freedom of choice determined people's humanity.[30]

The opposite of the idea of individuality is the idea of universality, which implies that the entirety of citizens forming a state has a superior position over the indivi-

---

24 B. Banaszak, *Geneza praw człowieka i ewolucja systemów ich ochrony*, [in:] idem, A. Preisner (eds.), *Prawa i wolności obywatelskie w Konstytucji RP*, Warszawa 2002, pp. 2–3; W.G. Staples, *Encyclopedy of Privacy*, Vol. 1, Westport 2007, pp. 404–406.

25 Ł. Kołodziejczyk, *Prywatność w Internecie*, Warszawa 2014, p. 13.

26 E. Milczarek, *Prywatność wirtualna. Unijne standardy ochrony prawa do prywatności w Internecie*, Warszawa 2020, p. 19.

27 H. Izdebski, *Historia myśli politycznej i prawnej*, Warszawa 2001, pp. 112–113; J. Oniszczuk, *Koncepcje prawa*, Warszawa 2004, pp. 88–89; M. Jagielski, *Konstytucjonalizacja ochrony prywatności* [in:] R.M. Małajny (ed.), *Konstytucjonalizm a doktryny polityczno-prawne. Najnowsze kierunki badań*, Katowice 2008, p. 262.

28 M. Sadowski, [in:] E. Kundera, M Maciejewski (eds.), *Leksykon myślicieli politycznych i prawnych*, Warszawa 2004, p. 57.

29 Ibidem, p. 57.

30 J. Braciak, op. cit., p. 358.

dual and their rights.[31] Therefore, in some cases, such as those having to do with social security or justice, it was acknowledged that the state had the right to interfere with the sphere of one's private life.[32]

Privacy protection emerged as a distinct jurisprudential category in the language of the law and in the legal language only at the end of the 19th century,[33] and the right to privacy is included in the so-called first generation of human rights.[34]

In Poland, the axiological basis for the protection of privacy can be found in constitutional norms and in the regulations of many acts of international law.[35]

Article 47 of the Polish Constitution stipulates clearly that everyone has the right to the legal protection of private (personal) life. This provision guarantees the protection of private life not only in an individual's dealings with public authorities, but also with other public and private persons and institutions.[36]

The right to legal protection of private life is a subjective right,[37] granted to every subject of the law.[38] The protection guaranteed by Article 47 of the Polish

---

31 L. Wiśniewski, [in:] A. Preisner, T. Zalasiński (eds.), *Podstawowe problemy stosowania Konstytucji RP*, Wrocław 2005, p. 120; W. Zakrzewski, [in:] W. Skrzydło (ed.), *Polskie prawo konstytucyjne*, Lublin 2000, p. 163.

32 H. Szewczyk, *Ochrona dóbr osobistych w zatrudnieniu*, Kraków 2007, p. 18.

33 Cf. K. Motyka, *Prawo do prywatności*, "Zeszyty Naukowe Akademii Podlaskiej w Siedlcach", series: Administracja i Zarządzanie 2010, 85, p. 11.

34 These are fundamental civil and political rights formulated in the late 19th and early 20th centuries, inspired by a range of liberal concepts. They emphasise the need to maintain a certain sphere of life free from state interference, and therefore serve as means of defence and a way to enhance individual autonomy. In addition to the right to privacy, first-generation individual rights also include freedom of speech, equality before the law, personal integrity, and protection of human life. For more on the division of human rights into generations, see e.g.: P. Kuczma, *Prawa człowieka w zarysie*, Polkowice 2012, pp. 19–20; S. Stecko, *Prawa i wolności człowieka i obywatela w świetle Konstytucji RP*, "Przegląd Prawa Konstytucyjnego" 2018, 1, pp. 172–174. The literature dealing with the subject in question also presents the view that the "right to privacy" should fall into the category of a so-called third-generation right because it is established constitutionally only after World War II, which is many years after the introduction of privacy protection through ordinary legislation first. See: P. Sarnecki, [in:] L. Garlicki, M. Zubik (eds.), *Konstytucja Rzeczypospolitej Polskiej. Komentarz. Tom II*, Lex 2016, a commentary to Article 47, remark 1.

35 For instance, Article 12 of the Universal Declaration of Human Rights and Fundamental Freedoms, Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms of November 4, 1950 (OJ of 1993 No. 61, item 284); Article 17 of the International Covenant on Civil and Political Rights of December 19, 1966 (OJ of 1977 No. 38, item 167); Article 16 of the Convention on the Rights of the Child of November 20, 1989 (OJ of 1991 No. 120, item 526); Article 7 of the Charter of Fundamental Rights as established by the Treaty of Lisbon, signed in Lisbon on 13.12.2007 (Official Journal of the EU C 202, 7.6.2016, p. 389).

36 P. Winczorek, *Komentarz do Konstytucji Rzeczypospolitej Polskiej z 2.4.1997 r.*, Warszawa 2008, p. 114.

37 M. Florczak-Wątor, [in:] P. Tuleja (ed.), *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Lex 2021, a commentary to Article 47, remark 1.

38 M. Wild, [in:] M. Safjan, L. Bosek (eds.), *Konstytucja RP. Tom I. Komentarz do art. 1–86*, Legalis 2016, a commentary to Article 47, remark 49; Constitutional Tribunal's ruling of 24.06.1997, K 21/96, OTK 1997, no. 2, item 23.

 DOI: 10.7206/kp.2080-1084.582

Constitution includes not only the right of a subject of law not to be interfered with by public authority or other private entities in the sphere of private life, but also the right to demand that public authority provide effective protection.[39]

The term "private life" has not been defined by the legislator. Given the imprecision of the term, used with multiple meanings, it is not easy to express the idea of privacy in a normative sense.[40] While grasping the "semantic core" of this concept seems to be relatively easy, making out the "semantic shadow"[41] thereof in specific cases can be difficult and consequently raise questions as to its interpretation.

The literature dealing with the subject argues "that the sphere of private life encompasses circumstances in relation to which it is possible to acknowledge the primacy of the individual's interest over the public interest, the presumption of the primacy of the individual's right to be left alone over the public interest or the interest of other entities."[42] In other words, we can speak of privacy in the normative sense when an individual has the right "to shape the private sphere of their life in such a way that it is inaccessible to others and free from interference."[43] It is only up to the individual to decide whether the private sphere of their life can be interfered with by external parties or not.

The normative content of the concept of "private life" can be determined by inference *a contratio* in relation to the concept of "public life", which involves the involvement of the individual in social, political, and other public activities.[44] When it comes to the area of private life, the interest of an individual in being left alone is secondary, at least in principle, to the interest of other subjects,[45] which means that the concept is based on ideas of universality.

However, determining the scope of the normative content of the concept of "private life", which stands in opposition to the concept of "public life", is by no means easy because even the literature dealing with the matter in question tends to differ regarding the views on the normative content of the concept of "public life". The expansive view implies that the term "public life" should be understood as any relationship that does not involve personal ties, which means social or professional contexts.[46] According to the opposing view, the concept of "public

---

39 Ibidem, a commentary to Article 47, remark 50.

40 Cf. W. Szyszkowski, *Rozważania o prywatności*, [in:] W. Skrzydło (ed.), *Wybrane problemy prawa konstytucyjnego*, Lublin 1985, p. 189.

41 On the openness of legal language, see: H.L.A. Hart, *Pojęcie prawa*, Warszawa 2020, pp. 207–222.

42 M. Wild, op. cit., a commentary to Article 47, remark 55.

43 M. Safjan, *Prawo do ochrony życia prywatnego*, [in:] L. Wiśniewski (ed.), *Podstawowe prawa jednostki i ich sądowa ochrona*, Warszawa 1997, p. 71.

44 P. Sarnecki, op. cit., a commentary to Article 47, remark 3.

45 M. Wild, op. cit., a commentary to Article 47, remark 55.

46 See: P. Sarnecki, op. cit., a commentary to Article 47, remark 3.

life" cannot be automatically extended to include any relationship that does not involve personal ties because private life is not a relationship an individual chooses to be and remain in, but a specific interest, usually manifested in a certain range of dispositions, a "sphere of possibility" granted to the individual.[47] At the same time, according to the ruling of the European Court of Human Rights, there is no reason to presume that the concept of "private life" (within the meaning of Article 8 of the Convention) is to be interpreted in a way that excludes professional or business activities because it must be acknowledged that it is the professional field where most people have a significant – if not the most frequent – opportunity to interact with the outside world.[48]

It is now indisputable that the concept of "private life" consists of such components of privacy as:

1) privacy as the right to be left alone;
2) privacy as protection of the individual from unsolicited third-party interference;
3) privacy as the right to control the disclosure of personal information;
4) privacy as the right to respect private secrets, i.e. not to disclose secret information about the individual to third parties;
5) privacy as the right to respect intimacy.[49]

However, the components that make up the concept of "private life" are not an exhaustive list. With changes in social or economic life, this list will become modified and grow to include new spheres of life of individuals.

## Freedom and protection of the secrecy of communication as a component of the right to privacy

Article 49 of the Polish Constitution guarantees both freedom and protection of the secrecy of communication. They can be restricted only in situations specified in the law and in the manner prescribed therein. In a structural sense, the freedom and protection of the secrecy of correspondence is a component of the right to privacy.[50] In light of the above, in interpreting Article 49 of the Polish Constitution,

---

47 M. Wild, op. cit., a commentary to Article 47, remark 55.

48 Niemietz v. Germany, Application No. 13710/88, Lex No. 81278.

49 Cf. J. Sieńczyło-Chlabicz, *Naruszenie prywatności osób publicznych przez prasę. Analiza cywilnoprawna*, Kraków 2006, p. 79.

50 M. Wild, op. cit., a commentary to Article 49, remark 1.

 DOI: 10.7206/kp.2080-1084.582

it is possible to refer to the general norm of Article 47, which protects the right to privacy in the broad sense. In particular, such treatment is advisable when "the content to be communicated concerns private life, family life, honour and reputation, and information concerning personal decision-making."[51] Any interference with the secrecy of communication may then become an act of invasion of privacy.[52]

Article 49 of the Polish Constitution implies the obligation of the Republic of Poland to ensure freedom of communication and the obligation to protect the content included in the communication process. The subjective scope of this freedom and protection of the secrecy of communication encompasses all individuals – including legal entities.[53]

The material scope of freedom of communication covers not only the secrecy of correspondence, but also all kinds of interpersonal interactions.[54] The scope of constitutional protection includes all manners of communication, regardless of the circumstances.[55] Also, the question of whether the exchange of information concerns strictly private life or professional – including business – activity remains indifferent to the guarantees given under Article 49 of the Polish Constitution. There is no such sphere of an individual's personal life where constitutional protection would be excluded or by itself limited. As a result, in each of the possible spheres of life, the individual has a constitutionally guaranteed freedom to exchange and obtain information, including sharing information about themselves.[56]

As a general rule, the protection of the secrecy of communication will be violated when the contents of the transmitted message becomes available to a third party who is not the intended recipient – the addressee – of the message.

Article 49 of the Poland Constitution implies the duty of public authorities to refrain from actions that interfere with the freedom and secrecy of communication – meaning a duty not to obtain the contents of communication, not to disclose these contents, not to force them to be disclosed by those concerned themselves, and to protect communication activities from third-party attacks.[57] These authorities are also obligated to take measures that will actually "ensure" this freedom and secrecy in horizontal relations.[58]

---

51 B. Banaszak, *Konstytucja Rzeczypospolitej Polskiej*, Legalis 2012, a commentary to Article 49, remark 5.

52 Ibidem, a commentary to Article 49, remark 5.

53 P. Sarnecki, op. cit., a commentary to Article 49, remark 4; M. Wild, op. cit., a commentary to Article 49, remark 7.

54 CT judgement of 20.06.2005, K 4/04, OTK-A 2005, no. 6, item 64.

55 CT judgement of 30.07.2014, K 23/11, OTK-A 2014, no. 7, item 80; CT judgement of 21.04.2015, U 8/14, OTK-A 2015, no. 4, item 49.

56 CT judgement of 30.07.2014, K 23/11, OTK-A 2014, no. 7, item 80.

57 M. Florczak-Wątor, op. cit., a commentary to Article 49, remark 3.

58 M. Wild, op. cit., a commentary to Article 49, remark 7.

## Trustee's duty to become familiar with the contents of mail addressed to a bankrupt in light of the standards of protection of the right to privacy and the protection of the secrecy of communication

There is a view in the literature dealing with the subject matter in question that a trustee, when opening mail addressed to a bankrupt, does not violate the secrecy of correspondence if they act within the statutory limits.[59] In light of the above, one should argue that acting within the statutory limits does not always mean acting in accordance with the law since a situation where the law conflicts itself is not, contrary to what may seem, a rare phenomenon, and the greatest tensions occur in the legal system between justice and legal security.[60] The case is no different when the trustee opens correspondence addressed to a bankrupt. In order to implement the principle of protecting the interests of bankruptcy estate and, more specifically, to protect the interests of bankruptcy creditors, i.e. to satisfy their claims (legal security), the legislator has granted trustees the right – without exceptions – to interfere with the right to privacy and the secrecy of communication, the protection of which is guaranteed under Articles 47 and 49 of the Polish Constitution (justice).

Article 176 (2) of the Bankruptcy Law may be an unjust and inexpedient rule[61] in that it is inconsistent in content with the right to privacy and the right to protect the secrecy of communication, both expressed in hierarchically higher-tier norms. The rights granted under Articles 47 and 49 of the Polish Constitution are not absolute, though, and therefore there may be exceptions to the protection of these rights, but they must fall within the framework of the standard of protection of fundamental rights and freedoms guaranteed by the Polish Constitution.

The practical application of the bankruptcy law applied has produced a view that the content of Article 176(2) of the Bankruptcy Law meets the constitutional standards of legal protection of communication because:

---

59 R. Adamus, *Prawo upadłościowe. Komentarz*. Legalis 2021, a commentary to Article 176, remark 6 and literature cited therein.

60 For more on the issue of law vs. law, see e.g.: J. Zajadło, *Uwagi wstępne. Pogarda dla donosicieli*, [in:] idem (ed.), *Fascynujące ścieżki filozofii prawa*, Warszawa 2008, pp. 19–31; M. Glanc-Żabiełowicz, *Ostatnia deska ratunku*, [in:] J. Zajadło, K. Zeidler (eds.), *Fascynujące ścieżki filozofii prawa* 2, Warszawa 2021, pp. 35–47; W. Zalewski, *Sprawiedliwość, która leczy*, [in:] J. Zajadło (ed.), op. cit., pp. 31–39.

61 Rule as understood and interpreted by R. Dworkin, that is, applied in an *all-or-nothing fashion*. R. Dworkin, *Is law a system of rules*, [in:] idem (ed.), *The Philosophy of Law*, Oxford 1977, p. 45.

 DOI: 10.7206/kp.2080-1084.582

"(1) the overriding goal of any bankruptcy proceedings is to satisfy creditors' claims "to the maximum extent possible";
2) according to the age-old legislative and praxeological rule, whoever sets the goal, gives also the means required to achieve it *(qui dat ius ad finem, dat ius ad media ad finem necessaria)*;
3) it appears that mail addressed to a bankrupt often contains valuable information on the bankrupt's property relations – in addition to information on their personal matters."[62]

Regarding the claim that Article 176(2) of the Bankruptcy Law meets the constitutional standards of legal protection of communication, it is important to stress, firstly, that, *de lege lata*, not all bankruptcy proceedings aim first and foremost to satisfy the claims of creditors to the greatest extent possible since, according to Article 2(2) of the Bankruptcy Law, proceedings regulated by the Law in question, when initiated against natural persons, should also be conducted in such a way as to allow the bankrupt's liabilities not discharged in the bankruptcy proceedings to be remitted. In light of this regulation, in the case of bankruptcy proceedings against individuals, the goal of recovery has become tantamount to the goal of debt relief. In other words, the legislator in such a situation does not give priority to the interests of bankruptcy creditors over the interests of a reliable debtor.[63]

Secondly, the view of the compatibility of Article 176(2) of the Bankruptcy Law was formulated only through the perspective of the protection of the interests of bankruptcy estate, i.e. protection of bankruptcy creditors, and leaves aside the value of the right to privacy and the protection of the secrecy of communication.

The analysis of the issue in question does not take into account the wording of Article 31(3) of the Polish Constitution, which defines the prerequisites for restricting constitutional rights and freedoms. The purpose of this provision is to guarantee minimal protection of constitutional rights and freedoms.

In terms of upholding the standard of protection of privacy and secrecy of communication, Article 176(2) of the Bankruptcy Law should be evaluated through a test of fulfilment of the prerequisites indicated in Article 31(3) of the Polish Constitution. It is necessary to bear in mind that Article 31(3) of the Polish Constitution also applies to laws that formulate specific limitation clauses (e.g. Article 53(5) of the Polish Constitution) and laws that stipulate that the scope and forms of a given right shall be determined by an act (e.g. Article 67(1) of the Polish

[62] S. Gurgul, op. cit., a commentary to Article 176, remark 3.

[63] Cf. P. Wołowski, *Cel oddłużeniowy jako jeden z naczelnych celów postępowania upadłościowego*, "Przegląd Prawa Egzekucyjnego" 2016, 12, pp. 11–27.

Constitution).[64] Therefore, the analysis of Article 176(2) of the Bankruptcy Law in terms of interference with the right to privacy and the protection of the secrecy of communication, which may be restricted only in cases specified in a given act and in the manner defined therein (Article 49 of the Polish Constitution), will be carried out taking into consideration the provisions of Article 31(3) of the Polish Constitution.

## The constitutional prerequisites for restricting the right to privacy and the protection of the secrecy of communication

The right to privacy – including the right to the protection of communication – are absolute rights, subject to limitation under certain conditions, just like other constitutional values. However, in order for the legislator's interference with values which are granted legal protection by constitutional norms to meet the standards of such protection, the prerequisites of Article 31(3) of the Polish Constitution must be collectively fulfilled. According to this provision, restrictions on the exercise of constitutional freedoms and rights may be established only by law – and only if they are necessary in a democratic state to ensure its security or public order or to protect the natural environment, public health and morals, or the freedoms and rights of others. These restrictions must not violate the essence of freedoms and rights (Article 31(3) of the Polish Constitution *in fine*).

### The statutory form of restriction of the right to privacy and the protection of the secrecy of communication

According to Art. 31(3) of the Polish Constitution, restrictions on the right to privacy and on the protection of the secrecy of communication are permitted only on the grounds of a normative act – one equivalent to an act of the Polish parliament. This is the fundamental prerequisite for the interference with the right to privacy and the protection of the secrecy of communication to be compliant with the Polish Constitution. Thus, the Polish Constitution establishes the principle of exclusivity of the law when restricting constitutional rights and freedoms. In light with this principle, all important issues related to the limitation of rights and freedoms guaranteed by the Polish Constitution should be regulated by law – and specifically by the relevant act of the legislature.[65]

---

64 P. Tuleja, [in:] idem (ed.), op. cit., a commentary to Article 31, remark 2.

65 Ibidem, a commentary to Article 31, remark 2.

 DOI: 10.7206/kp.2080-1084.582

The legislator's interference with a bankrupt's right to privacy and the protection of the secrecy of communication has been regulated in a normative act equivalent to an act of the Polish parliament (Article 176(2) of the Bankruptcy Law). However, this does not mean that the requirement concerning the statutory form under Article 31(3) of the Polish Constitution has been met. For this requirement to be met, it is the legislator who must normalise all the substantive and procedural prerequisites in the relevant law for such restrictions to make it possible for the scope of restrictions to be precisely defined on the basis of the law itself.[66] The statutory regulation in this case must be complete, exhaustive, and precise. It needs to define all the essential elements of the restriction of a given constitutional freedom or right.[67] Therefore, the legislator should precisely indicate the circumstances in which restrictions may occur – and normalise the manner of restricting rights and freedoms. This requires, first and foremost, the general clauses and the rules of the prohibition of using them in this context to be specific.[68] Even if this is provided for by a law, but this law is too general, when it is a competence act which serves as a way to arrive at an ends-means inference, the prerequisite to have a specific statutory basis will not be met.[69]

The prerequisite for the legislator's legitimacy of interference with the right to privacy and the protection of the secrecy of communication is a court bankruptcy order since the bankrupt is the one against whom the bankruptcy order is issued (Article 185(1) of the Bankruptcy Law). Thus, if a debtor is not declared bankrupt, the trustee will not interfere with this debtor's right to privacy and protection of the secrecy of communication.

According to Article 176(2) of the Bankruptcy Law, the trustee, within 7 days from the date of receipt of mail, shall notify the bankrupt of the receipt of mail that does not concern the bankruptcy estate or the retention of which is not necessary due to the content thereof, and shall give the bankrupt an opportunity to collect such mail. In order for the provision of Article 176(2) of the Bankruptcy Law to be fulfilled, the trustee must become familiar with the contents of the correspondence addressed to the bankrupt and then determine whether or not it concerns bankruptcy estate. The provision of Article 176(2) of the Bankruptcy Law does not govern the manner in which the trustee should become familiar with the contents of correspondence addressed to the bankrupt. The provision in question does not specify whether the trustee is required to become familiar

66 Cf. e.g. CT judgement of 10.03.2010, U 5/07, OTK-A 2010, no. 3, item 20; CT judgement of 29.10.2013, U 7/12, OTK-A 2013, no. 7, item 102; CT judgement of 21.04.2015, U 8/14, OTK-A 2015, no. 4, item 49.

67 CT judgement of 21.04.2015, U 8/14, OTK-A 2015, no. 4, item 49.

68 Cf. e.g. CT judgement of 12.12.2005, K32/04, OTK-A 2005, no. 11, item 132.

69 Ibidem.

with the contents of the correspondence addressed to the bankrupt personally[70] or whether the trustee has the right to entrust this activity to an employee of a restructuring advisory firm.[71] In other words, the context in which the legislator used the term "trustee" in Article 176(2) of the Bankruptcy Law remains unclear. Is the trustee to be understood as a non-judicial body of bankruptcy proceedings or a specific person who has been appointed to act as a trustee in bankruptcy proceedings? Taking into account the fact that a person licensed as a restructuring advisor, who has been appointed to act as a trustee in bankruptcy proceedings, does not have to perform all activities in the proceedings in person.[72] In practice, it is quite common for correspondence addressed to a bankrupt be forwarded by such a person to an employee of a restructuring advisory firm to verify whether it concerns bankruptcy estate or not. Such a situation will occur in particular when the functions of the trustee in bankruptcy proceedings are performed by a commercial company whose partners bearing unlimited liability for the company's obligations or the company's management board members are licensed as restructuring advisers (Article 157(2) of the Bankruptcy Law).

Even assuming that it was the legislator's intention to make the duties arising from the content of Article 176(2) of the Bankruptcy Law performed by the trustee personally, it should be borne in mind that it is impossible or very difficult to verify if it is so in practice.

The statutory basis set forth in Article 176(2) of the Bankruptcy Law should be considered incomplete. This provision does not offer a precise definition of all the essential elements of the limitation of the right to privacy and protection of the secrecy of communication. The legal norm reconstructed on the grounds of Article 176(2) of the Bankruptcy Law should be considered too general and rather vague – a norm from which an ends-means inference can be drawn. This norm grants the trustee a great deal of freedom when it comes to the scope of interference with the right to privacy and thus rules out the protection of the secrecy of communication.[73]

As a result, it should be acknowledged that Article 176(2) of the Bankruptcy Law does not meet the requirement of completeness, precision of the statutory

---

70 P. Zimmerman speaks in favour of performing this duty in person. Cf. P. Zimmerman, op. cit., a commentary to Article 176 of the Bankruptcy Law, remark 6.

71 Of course, a "restructuring advisory firm" should be treated somewhat figuratively because the legislator does not impose an obligation to run a firm on restructuring advisers.

72 In particular, these will be activities of a technical, executive, and similar nature. In addition, the trustee may grant powers of attorney to provide other entities with legal capacity. The trustee may also grant legal representation in court, administrative, administrative-court, and arbitration proceedings (Article 161(1) of the Bankruptcy Law).

73 J. Korzonek, *Prawo upadłościowe i Prawo o postępowaniu układowym. Komentarz*, Wrocław 1992, p. 344.

 DOI: 10.7206/kp.2080-1084.582

basis for interference with the right to privacy and the protection of the secrecy of communication.

## The proportionality test of restriction of the right to privacy and the protection of the secrecy of communication

The principle of proportionality is a fundamental element of the principle of a democratic state of law. The essence of the principle of proportionality is that in order to consider the legislator's interference with fundamental rights and freedoms as acceptable within the meaning of Article 31(3) of the Polish Constitution, this interference must not be excessive. "From among the possible measures to take, it is necessary to choose the least burdensome for the subjects against whom they are to be applied, or ones burdensome to the maximum extent necessary to achieve the objective pursued."[74] In light of the above, in determining the constitutionality of the restrictions imposed by the legislator, the Constitutional Tribunal seeks to answer the following questions:

1) does the adopted legislative regulation serve and is it necessary for the formation of legal order in a given sphere of social relations?
2) is the legislator's intended purpose achievable without violating the basic legal standards expressing the essence of the rights it concerns?
3) is the statutory regulation indispensable to protecting the interest and the constitutional value to which it is linked?
4) is the outcome of the adopted regulation proportionate to the burdens it imposes on the citizen?[75]

## The need to regulate the formation of legal order in a given sphere of social relations

The expression used in Article 31(1) of the Polish Constitution reading "only when necessary in a democratic state" is fundamental to the delineation of permissible restrictions on constitutional freedoms and rights. This expression creates a prerequisite of necessity in a democratic state for the adoption of restrictions on constitutional rights and freedoms.

The motivation behind the legislator's interference with the right to privacy and the protection of the secrecy of communication under Article 176(2) of the

[74] CT judgement of 25.02.1999, K23/98, OTK 1999, no. 2, item 25.

[75] See: Ibidem.

Bankruptcy Law is the protection of the interests of bankruptcy estate. The estate is one of the auxiliary institutions of bankruptcy law because without the assets constituting the bankruptcy estate, it is impracticable to carry out the functions of bankruptcy law – especially the recovery function. Therefore, the implementation of mechanisms designed to protect bankruptcy estate from depletion is highly legitimate. Thus, the necessity of restricting the right to privacy and the protection of communication is supported by the purpose of the functions of bankruptcy law – in particular the recovery function,[76] meaning the protection of the property rights of the bankrupt's creditors.

## The legislator's possibility of achieving the intended purpose without violating the basic legal standards expressing the essence of the rights it concerns

This prerequisite involves determining that it is really necessary to interfere with the scope of a given constitutional right or freedom in given circumstances. At the same time, the legal measure interfering with the scope of a constitutional right or freedom should be effective, i.e. actually serving the purpose intended by the legislator.

One of the effects of declaring bankruptcy is that the bankrupt is deprived of the right to manage and the ability to use and dispose of property included in the bankruptcy estate (Article 75(1) of the Bankruptcy Law). The bankrupt's assets, which make up the bankruptcy estate, are then managed by a trustee (Article 173 of the Bankruptcy Law). In order for the trustee to effectively manage the bankruptcy estate and carry out the duties entrusted to them by the legislator – especially to liquidated the bankrupt's assets and satisfy the bankrupt's creditors, it is legitimate to grant the trustee the authority to review the contents of correspondence addressed to the bankrupt that concerns the bankrupt's estate. Therefore, the consequence of declaring bankruptcy is that there is a real need to interfere with the bankrupt's right to privacy and the protection of communication. At the same time, the legislator's interference with the right to privacy and the protection of communications, as provided for in Article 176(2) of the Bankruptcy Law, is an effective measure as it makes it possible to monitor the correspondence addressed to the bankrupt, which then may, for instance, thwart any attempts to deplete (conceal, dispose of components of) the bankruptcy estate. This means that Article 176(2) of the Bankruptcy Law actually does serve the purpose intended by the legislator, i.e. it effectively serves to protect the interests of bankruptcy estate.

[76] Cf. P. Wołowski, *Kolizja…*, p. 67.

 DOI: 10.7206/kp.2080-1084.582

## The indispensability of statutory regulation for the protection of the interest and the constitutional value to which it is linked

The prerequisite of indispensability means that the statutory solution adopted by the legislator is to protect certain values in a manner and to an extent that could not be achieved by other means.

It needs to be stressed first that the effectiveness of the provision of Article 176(2) of the Bankruptcy Law does not imply indispensability *a priori*; it does not suggest that the interests of bankruptcy estate cannot be protected by any other means. As shown earlier, the scope of Article 176(2) of the Bankruptcy Law covers all mail addressed to the bankrupt, regardless of its nature (official or private), type (ordinary or registered mail, letters, money, goods), and place of delivery (place of residence, business premises, etc.). The provision of Article 176(2) of the Bankruptcy Law encompasses not only mail whose contents indicate that it concerns bankruptcy estate. The power of the trustee to open such mail also applies to mail that does not concern bankruptcy estate (e.g. a letter from a loved one, the contents of which include that person's sensitive data). This means that the effectiveness of this provision goes beyond protecting the interests of bankruptcy estate.[77] In other words, the effects of applying Article 176(2) of the Bankruptcy Law also go beyond the sphere of bankruptcy proceedings.

This is an irrational solution because the main responsibilities of a trustee include to immediately take possession of the bankrupt's property, manage it, secure it from becoming destroyed, damaged, or appropriated by unauthorised third parties, and proceed to liquidate it (Article 173 of the Bankruptcy Law), and the declaration of bankruptcy does not affect the bankrupt's legal capacity and capacity to perform legal acts (Article 185(2) of the Bankruptcy Law). Declaring bankruptcy makes the bankrupt deprived of the right to manage and the ability to use and dispose of property included in the bankruptcy estate (Article 75(1) of the Bankruptcy Law). Consequently, it would make sense for the legislator's interference with the right to privacy and the protection of communication to apply only to correspondence concerning bankruptcy estate. However, limiting this interference only to this type of correspondence could be merely window dressing since in practice, determining whether certain correspondence pertains to bankruptcy estate requires becoming familiar the contents of this correspondence. As a result, there is a question of whether the circumstances considered legitimise the legislator's extensive interference with the right to privacy and the protection of communication given the fact that indispensability also means using the least burdensome

[77] J. Korzonek, op. cit., p. 343.

means possible when dealing with those whose constitutional rights or freedoms are being restricted.

## The requirement for statutory regulation to remain proportionate to the objectives whose protection justifies the restriction of fundamental rights and freedoms

The requirement that the statutory regulation remain in proportion to the objectives whose protection justifies the restrictions made on fundamental rights and freedoms means using measures that are the least burdensome for the subjects whose constitutional rights or freedoms are being restricted. Interference with the sphere of an individual's status must therefore remain in reasonable and appropriate proportion to the objectives whose protection justifies the restriction imposed.[78]

In view of the above, the question arises whether there exists another, less burdensome measure that will offer an equally effective way to achieve the goal intended by the legislator – which is to protect the interests of bankruptcy estate by monitoring correspondence addressed to the bankrupt.

To answer the question posed, it should first be emphasised that the interference with the right to privacy and the protection of communication is actually an act of a trustee, who is a private entity engaged in business activity that requires a restructuring adviser license. Moreover, such a trustee is not a public official. This aspect is not insignificant since becoming familiar with the contents of correspondence addressed to a bankrupt also results in the fact that there occurs a violation of the sender's right to privacy and the protection of communication. It is not hard to imagine that if a trustee becomes familiar with the contents of correspondence addressed to a bankrupt, it may result – in extreme cases – in a violation of human dignity (of the bankrupt or the sender). This will be the case, for instance, if the content of the correspondence includes information about the sender's love life. While such strong interference with the bankrupt's right to privacy and the protection of their communication can be justified to some extent by the protection of the interests of bankruptcy estate and the objectives of bankruptcy proceedings, the interference with the sender's right to privacy and the protection of their communication – which may involve numerous aspects of their private life – is

[78] More extensively on the matter: e.g. B. Banaszak, *Konstytucja…*, a commentary to Article 31, note 20; L. Bosek, M. Wild, *Kontrola konstytucyjności prawa. Zagadnienia ustrojowe, procesowe i materialnoprawne. Komentarz praktyczny dla sędziów i pełnomocników procesowych. Wzory pism procesowych*, Warszawa 2014, pp. 267–280; L. Bosek, M. Szydło, [in:] M. Safjan, L. Bosek (eds.), op. cit., a commentary to Article 31, notes 138–154; J. Oniszczuk, *Wolności i prawa socjalne oraz orzecznictwo konstytucyjne*, Warszawa 2005, pp. 62–63; M. Zubik, *Konstytucja III RP w tezach orzeczniczych Trybunału Konstytucyjnego i wybranych sądów. Zbiory Orzecznictwa Becka*, M. Zubik (editing and foreword), Warszawa 2011, pp. XXXI, pp. 181–184.

 DOI: 10.7206/kp.2080-1084.582

not justified by the protection of the interests of bankruptcy estate and the pursuit of the objectives of bankruptcy proceedings.

Taking the abovementioned aspect into consideration, it seems legitimate for such a strong interference with the right to privacy and protection of communication to be a duty carried out by a state body, i.e. an official receiver, a court, or an appointed judge – not by a private entity.

Another important aspect in this context is also the wording of Article 176(2) of the Bankruptcy Law, which implies that it the trustee who decides whether the bankrupt can claim any correspondence that does not concern the bankruptcy estate or the retention of which is not necessary due to the content thereof. At the same time, the legislator did not grant the bankrupt the right to review the correspondence addressed to them and kept by the trustee. This is a step back compared to the Bankruptcy Law of 1934,[79] which granted the bankrupt the right to review correspondence and the right to claim any correspondence that did not concern bankruptcy estate or the retention of which was not relevant to bankruptcy proceedings on account of the content thereof (Article 96 § 2 of the Bankruptcy Law).[80] If the trustee refused to hand over the requested correspondence to the bankrupt, the latter could lodge a complaint with an official receiver as the supervisory authority.[81] It appears that the current provision of Article 176(2) of the Bankruptcy Law does not offer the bankrupt and the sender of correspondence the minimum protection of the right to privacy and communication. Moreover, the bankrupt's situation has deteriorated significantly compared to the legal status granted to them under the 1934 bankruptcy law. This is because they have lost the right to review their correspondence – and thus the ability to control the qualification of individual pieces of correspondence as established by the trustee.[82] This means that in extreme cases, the bankrupt will never become familiar with the mail addressed to them. As a result, the measure of interference with the right to privacy and protection of communication applied by the legislator is not a measure that is the least burdensome for those whose constitutional rights or freedoms are being restricted. Interference with the sphere of privacy and protection of communication does not remain in reasonable and appropriate proportion to the objectives whose protection justifies the restriction imposed. Pursuant to Article 176(2) of the Bankruptcy Law, such a far-reaching interference with the right to privacy and the protection

79 Regulation of the President of the Republic of Poland of 24 October 1934 – Bankruptcy Law (uniform text in the Journal of Laws of the Republic of Poland of 1991, No. 118, item 512, as amended); hereinafter referred to as the 1934 bankruptcy law.

80 Cf. J. Korzonek, op. cit., p. 344.

81 Ibidem, p. 344.

82 P. Zimmerman, op. cit., a commentary to Article 176 of the Bankruptcy Law, remark 6.

of communication is not justified by the implementation of the principle of protecting the interests of bankruptcy estate and the intended objectives of bankruptcy proceedings.

## The functional relationship between the restriction of constitutional rights or freedoms and the value indicated in Article 31(3) of the Polish Constitution

Another prerequisite for restricting a constitutional right or freedom is the functional relationship between the restriction and the guarantee of the values mentioned in Article 31(3) of the Polish Constitution. As indicated above, the regulation contained in Article 176(2) of the Bankruptcy Law is primarily intended to protect bankruptcy creditors by protecting the interests of the bankruptcy estate, which constitutes the bankrupt's assets subject to their liability. It can be therefore claimed that there is a functional relationship between the normative content of Article 176(2) of the Bankruptcy Law and the protection of the property rights of entities that are the bankrupt's creditors – a relationship that falls within the scope of Article 31(3) of the Polish Constitution. This is so because the rights in question are constitutionally protected under Article 64 of the Polish Constitution.

Also, the functional relationship of limitation of the bankrupt's right to privacy and protection of communication will occur when the value upheld is the protection of public order, which depends to a significant extent on e.g. the speed and efficiency of proceedings. There is no doubt that the efficiency of proceedings before the court as a public authority and the interest of the administration of justice are constitutional values and – at the same time – an essential element of public policy in the rule of law.[83]

## The prohibition of infringing on the essence of constitutional freedoms and rights

The final prerequisite for restricting constitutional rights and freedoms is the prohibition of violating the essence of constitutional freedoms and rights (Article 31(3) of the Polish Constitution *in fine*). This prerequisite is about preventing excessive interference with the content of a constitutional right or freedom which may lead to a violation of their essence. After all, there is a certain minimum content of each freedom and right the deprivation of which is tantamount to the abolition of the freedom or right in question. This means that the scope of the restrictions

[83] Cf. CT judgement of 26.11.2013, SK 33/12, OTK-A 2013, no. 8, item 124.

 DOI: 10.7206/kp.2080-1084.582

made must not cancel the basic components of a given subjective right, causing it to be deprived of its real content and leading to its transformation into a mere semblance of a right.[84] This is because such a situation triggers a violation of the essence of this right and its basic content, which is unacceptable under the Polish Constitution.[85]

When analysing Article 176(2) of the Bankruptcy Law, whose normative content interferes with the right to privacy and the protection of communication, it appears that the content of this provision invalidates the basic components of these rights. This claim stems from the fact that the normative content of Article 176(2) of the Bankruptcy Law actually abolishes the right to privacy and the protection of communication. It is fair to say that this provision does not offer these values the minimum level of protection. This is particularly evident when the violation of the essence of the right to privacy and the protection of communication is considered from the perspective of the sender of correspondence to a bankrupt. Bearing in mind that the legislator's interference with the right to privacy and the protection of communication is a consequence of the declaration of bankruptcy of the addressee of mail, it is clear that the violation of said values pursuant to Article 176(2) of the Bankruptcy Law, which are part of the mail sender's subjective rights, should be kept to a minimum. However, this is not the case because the provision of Article 176(2) of the Bankruptcy Law also covers mail whose content does not concern bankruptcy estate – meaning mail that can be considered strictly private correspondence. Such an extensive interference with the right to privacy and the protection of communication is not justified by the protection of the interests of bankruptcy estate, i.e. the economic, property-related interests of bankruptcy creditors.

## Conclusion

The practical application of Article 176(2) of the Bankruptcy Law results in a conflict of values protected under the Polish Constitution – the right to privacy and the protection of communications versus the protection of property rights. Acting pursuant to the provision in question, the legislator has *a priori* given preference to the protection of property rights over the right to privacy and the protection of communication. The conflict in question has been resolved in favour of bankruptcy creditors.

---

84 Cf. Z. Zawadzka, *Wolność prasy a ochrona prywatności osób wykonujących działalność publiczną. Problem rozstrzygania konfliktu zasad*, Warszawa 2013, pp. 212–213.

85 P. Wołowski, *Kolizja…*, p. 69.

The legislator's adoption of a hierarchy of values in the area of bankruptcy law does not, of course, deal with all the problems arising in the field of the conflict between these values, and does not mean that the solution chosen is in accordance with hierarchically higher norms – meaning constitutional norms. In principle, the Constitution of the Republic of Poland makes the legislator free to resolve conflicts of competing values protected under this normative act. What is important is that this conflict be resolved by the legislator in a way that meets the requirements of Article 31(3) of the Constitution of the Republic of Poland. These requirements are not met when it comes to Article 176(2) of the Bankruptcy Law. First, Article 176(2) of the Bankruptcy Law does not meet the requirement of completeness, precision of the statutory basis for interference with the right to privacy and the protection of the secrecy of communication. Second, this provision is a regulation that fails to pass the proportionality test of restriction of the right to privacy and the protection of the secrecy of communication. Third, the provision of Article 176(2) of the Bankruptcy Law violates the essence of the right to privacy and the protection of communication. Ultimately, the provision of Article 176(2) of the Bankruptcy Law does not meet the constitutional standard for the protection of the right to privacy – including the protection of communication.

## Bibliography

Adamus R., *Prawo upadłościowe. Komentarz*, Legalis 2021.

Allerhand M., *Prawo Upadłościowe, komentarz*, Bielsko-Biała 1991.

Banaszak B., *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Legalis 2012.

Banaszak B., *Geneza praw człowieka i ewolucja systemów ich ochrony*, [in:] B. Banaszak, A. Preisner (eds.), *Prawa i wolności obywatelskie w Konstytucji RP*, Warszawa 2002.

Bosek L., Szydło M., [in:] M. Safjan, L. Bosek (eds.), *Konstytucja RP. Tom I. Komentarz do art. 1–86*, Legalis 2016.

Bosek L., Wild M., *Kontrola konstytucyjności prawa. Zagadnienia ustrojowe, procesowe i materialnoprawne. Komentarz praktyczny dla sędziów i pełnomocników procesowych. Wzory pism procesowych*, Warszawa 2014.

Braciak J., *Prawo do prywatności*, [in:] B. Banaszak, A. Preisner (eds.), *Prawa i wolności obywatelskie w Konstytucji RP*, Warszawa 2002.

Dworkin R., *Is law a system of rules*, [in:] R. Dworkin (ed.), *The Philosophy of Law*, Oxford 1977.

Flaga-Gieruszyńska K., *Prawo upadłościowe i naprawcze*, Warszawa 2004.

Florczak-Wątor M., [in:] P. Tuleja (ed.), *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Lex 2021.

Glanc-Żabiełowicz M., *Ostatnia deska ratunku*, [in:] J. Zajadło, K. Zeidler (eds.), *Fascynujące ścieżki filozofii prawa 2*, Warszawa 2021, s. 35–47.

Gurgul S., *Prawo upadłościowe. Prawo restrukturyzacyjne. Komentarz*, Legalis 2020.

 DOI: 10.7206/kp.2080-1084.582

Hart H.L.A., *Pojęcie prawa*, Warszawa 2020.
Izdebski H., *Historia myśli politycznej i prawnej*, Warszawa 2001.
Jagielski M., *Konstytucjonalizacja ochrony prywatności*, [in:] R.M. Małajny (ed.), *Konstytucjonalizm a doktryny polityczno-prawne. Najnowsze kierunki badań*, Katowice 2008.
Jakubecki A., [in:] A. Hrycaj, A. Jakubecki, A. Witosz (eds.), *System prawa handlowego. Prawo restrukturyzacyjne i upadłościowe*, Vol. V, Warszawa 2016.
Janda P., *Wyłączenia z masy – podobieństwa i różnice nowego i starego prawa upadłościowego*, "Prawo Spółek" 2003, 5.
Koherewicz T., *Bezwzględny zakaz naruszania majątku masy upadłości*, "Prawo Spółek" 1999, 10.
Kołodziejczyk Ł., *Prywatność w Internecie*, Warszawa 2014.
Korzonek J., *Prawo upadłościowe i Prawo o postępowaniu układowym. Komentarz*, Wrocław 1992.
Kuczma P., *Prawa człowieka w zarysie*, Polkowice 2012.
Lewandowski R., Wołowski P., *Prawo upadłościowe i naprawcze*, Warszawa 2014.
Milczarek E., *Prywatność wirtualna. Unijne standardy ochrony prawa do prywatności w Internecie*, Warszawa 2020.
Motyka K., *Prawo do prywatności*, "Zeszyty Naukowe Akademii Podlaskiej w Siedlcach", seria: Administracja i Zarządzanie 2010, 85.
Oniszczuk J., *Wolności i prawa socjalne oraz orzecznictwo konstytucyjne*, Warszawa 2005.
Oniszczuk J., *Koncepcje prawa*, Warszawa 2004.
Pogonowski P., *Mienie wchodzące w skład masy upadłości – zagadnienia wybrane*, "Prawo Spółek" 1999, 6.
Sadowski M., [in:] E. Kundera, M Maciejewski (eds.), *Leksykon myślicieli politycznych i prawnych*, Warszawa 2004.
Safjan M., *Prawo do ochrony życia prywatnego*, [in:] L. Wiśniewski (ed.), *Podstawowe prawa jednostki i ich sądowa ochrona*, Warszawa 1997.
Sarnecki P., [in:] L. Garlicki, M. Zubik (eds.), *Konstytucja Rzeczypospolitej Polskiej. Komentarz. Tom II*, Lex 2016.
Sieńczyło-Chlabicz J., *Naruszenie prywatności osób publicznych przez prasę. Analiza cywilnoprawna*, Kraków 2006.
Staples W.G., *Encyclopedy of Privacy*, Vol. 1, Westport 2007.
Stecko S., *Prawa i wolności człowieka i obywatela w świetle Konstytucji RP*, "Przegląd Prawa Konstytucyjnego" 2018, 1.
Szewczyk H., *Ochrona dóbr osobistych w zatrudnieniu*, Kraków 2007.
Szyszkowski W., *Rozważania o prywatności*, [in:] W. Skrzydło (ed.), *Wybrane problemy prawa konstytucyjnego*, Lublin 1985.
Świeboda Z., *Komentarz do prawa upadłościowego i prawa o postępowaniu układowym*, Warszawa 1999.
Tuleja P., [in:] P. Tuleja (ed.), *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Lex 2021.
Wild M., [in:] M. Safjan, L. Bosek (eds.), *Konstytucja RP. Tom I. Komentarz do art. 1–86*, Legalis 2016.
Winczorek P., *Komentarz do Konstytucji Rzeczypospolitej Polskiej z 2.4.1997 r.*, Warszawa 2008.

Wiśniewski L., [in:] A. Preisner, T. Zalasiński (eds.), *Podstawowe problemy stosowania Konstytucji RP*, Wrocław 2005.

Wołowski P., *Kolizja zasady ochrony interesów masy upadłości z zasadą zaufania w prawie cywilnym*, Sopot 2018.

Wołowski P., *Cel oddłużeniowy jako jeden z naczelnych celów postępowania upadłościowego*, "Przegląd Prawa Egzekucyjnego" 2016, 12, s. 11–27.

Zajadło J., *Uwagi wstępne. Pogarda dla donosicieli*, [in:] J. Zajadło (ed.), *Fascynujące ścieżki filozofii prawa*, Warszawa 2008, s. 19–31.

Zakrzewski W., [in:] W. Skrzydło (ed.), *Polskie prawo konstytucyjne*, Lublin 2000.

Zalewski W., *Sprawiedliwość, która leczy*, [in:] J. Zajadło (ed.), *Fascynujące ścieżki filozofii prawa*, Warszawa 2008, s. 31–39.

Zawadzka Z., *Wolność prasy a ochrona prywatności osób wykonujących działalność publiczną. Problem rozstrzygania konfliktu zasad*, Warszawa 2013.

Zedler F., [in:] A. Jakubecki, F. Zedler, *Prawo upadłościowe i naprawcze. Komentarz*, Lex 2011.

Zedler F., *Prawo upadłościowe i układowe*, Toruń 1997.

Zimmerman P., *Prawo upadłościowe. Prawo restrukturyzacyjne. Komentarz*, Legalis 2022.

Zubik M. (editing and foreword), *Konstytucja III RP w tezach orzeczniczych Trybunału Konstytucyjnego i wybranych sądów. Zbiory Orzecznictwa Becka*, Warszawa 2011.

Translation of that article into English was financed under Agreement Nr RCN/SN/0331/2021/11 with funds from the Ministry of Education and Science, allocated to the "Rozwój czasopism naukowych" programme.