

Judgment of 4th July 2002, P 12/01
LIABILITY FOR FAILURE TO FILE FOR BANKRUPTCY

Type of proceedings: Constitutional complaint; Question of law referred by a court Initiator: A natural person; District Court for Szczecin	Composition of Tribunal: 5-judge panel	Dissenting opinions: 0
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Legal provisions under review	Basis of review
Power of court to issue a temporary order prohibiting the pursuit of economic activity, or the occupation of certain positions within companies and cooperatives, by persons having breached the duty to file for bankruptcy [Regulation of the President of the Republic of Poland on Bankruptcy Law 1934: Article 17 ² (inserted in 1997)]	Rule of law Freedom of economic activity Principle of proportionality Principles concerning criminal liability Right to court Freedom to choose and pursue a profession [Constitution: Articles 2, 22, 31(3), 42, 45(1) and 65(1)]

Prior to 1st October 2003, on which date the Bankruptcy and Reorganisation Act 2003 entered into force, the Bankruptcy Law 1934 remained operative, as introduced by a regulation of the President of the Republic of Poland and having the force of a statute.

The aim of judicial bankruptcy procedure is primarily to obtain sources from the assets of an insolvent entrepreneur to satisfy – to the greatest possible degree – their creditors. Given the danger that the debtor’s assets may gradually diminish, it is desirable for a declaration of bankruptcy to be made as soon as possible. The Bankruptcy Law 1934 imposed the duty upon insolvent entrepreneurs (or where the entrepreneur is a legal person, upon the persons representing that entity) to file to the court for bankruptcy. As regards entrepreneurs being natural persons, the time-period for the obligatory filing of such an application expired two weeks from the day on which they ceased to pay their debts. As regards entrepreneurs being legal persons, the time-period expired two weeks from the day on which their assets were insufficient to satisfy their debts (Article 5 of the Bankruptcy Law 1934).

Article 17² of the Bankruptcy Law, challenged in this case, was inserted by the Amendment Act 1997 and introduced a sanction for failure to fulfil the aforementioned duty. According to § 1 of this Article, a person having failed to comply with the duty to file for bankruptcy within the relevant time-period could be deprived – for a period of 2 to 5 years – of the right to: pursue economic activity on their own account; to act as an entrepreneur’s representative; or to be a member of the supervisory board or audit committee of a joint stock company, a limited liability company or a co-operative. A qualification located at the end of that paragraph – stating “unless the person is not at fault” – indicated that the burden of prov-

ing the absence of fault rested with the person having breached the duty. Proceedings were to be instituted *ex officio* (§ 3) and take place before a court conducting the bankruptcy procedure (§ 2).

The Tribunal's judgment in the present case was delivered following the joint examination of a question of law referred by the District Court for Szczecin and a constitutional complaint lodged by Marcin K.

The initiators of the constitutional review submitted that Article 17² of the Bankruptcy Law envisaged a sanction which, although imposed in civil proceedings, is in essence of a penal character, since it fulfils preventive and educational functions, as opposed to compensatory functions. It was argued that the statutory regulation of applying this sanction presumed the defendant's fault, that the proceedings were initiated by the court *ex officio* and were not adversarial in nature (there was no prosecutor) and that the defendant's right to defence was limited by virtue of the fact that the process was governed by provisions of civil procedure and not criminal procedure. Moreover, it was alleged that the possibility exists for a person to be punished twice for the same act (Article 586 of the Commercial Companies Code envisages a criminal sanction for failure to file for bankruptcy), thereby infringing constitutional principles concerning criminal liability (Article 42), impartiality of the courts (Article 45(1)) and the rule of law (Article 2).

The author of the constitutional complaint also questioned the conformity of the reviewed sanction with constitutional guarantees of freedom of economic activity (Article 22) and freedom to choose and pursue a profession (Article 65(1)), in conjunction with the requirement of proportionality when limiting constitutional rights and freedoms (Article 31(3) of the Constitution).

RULING

The challenged provision conforms to Articles 2, 22, 45(1) and Article 65(1), read in conjunction with Article 31(3), of the Constitution and is not inconsistent with Article 42(1)–(3) of the Constitution.

PRINCIPAL REASONS FOR THE RULING

1. Freedom of economic activity does not offer a justification for entrepreneurs breaching the law, nor does it protect them against liability for a lack of professionalism.
2. It is one of the State's fundamental tasks to guard the functioning of commerce, which may justify restricting the freedom of economic activity (conclusion derived from Article 20 and Article 22 of the Constitution). The law does not grant the right to occupy a particular position or to pursue a particular profession. Article 65(1) of the Constitution ensures the freedom to choose and pursue a profession and to choose the place of work but it simultaneously endows the legislator with the competence to introduce exceptions. In particular, the legislator may, whilst respecting the principle of proportionality (Article 31(3)), condition the pursuit of certain professions upon observance of regulations having importance for the proper functioning of those professions.
3. It follows from the constitutional right to court (Article 45(1)) that the legislator is obliged to specify a court which is competent to examine cases of a particular kind.

4. The principles described in Article 42 of the Constitution (relating to criminal liability) do not presuppose that repressive measures, and *a fortiori* sanctions which are not repressive in nature, may only be imposed by the criminal courts. Accordingly, in principle, it is not impermissible for other courts to be granted the authority to impose such sanctions, including civil courts adjudicating upon commercial cases.
5. The inclusion within the Constitution of provisions concerning the presumption of innocence as one of the citizen's rights and freedoms may, in some situations, justify analogical application of this principle in other repressive proceedings, particularly disciplinary proceedings. Nevertheless, it is difficult to relate the content of Article 42(3) of the Constitution to statutory procedures enacted not for the purpose of imposing repressive measures, but in order to create various safeguards, for example to promote proper pursuit of economic activity.
6. The liability envisaged in Article 17² of the Bankruptcy Law provides for *ex officio* application, by the court hearing the bankruptcy proceedings, of a measure which is vexatious to some degree (temporarily prohibiting the pursuit of economic activity on one's own account and the occupying of certain positions within the commercial environment) against a person having breached the duty to file for bankruptcy, as arising from Article 5 § 1 or 2. Application of this measure does not essentially amount to repression for breach of the duty, but is aimed at protecting others from the consequences of unprofessional conduct.
7. The similarity of the measure envisaged in Article 17² of the Bankruptcy Law to the penal measure imposed by the courts on the basis of Article 41, read in conjunction with Article 39(2), of the Criminal Code – prohibiting a person from occupying a particular position, exercising a particular profession or pursuing an economic activity – does not indicate that the former is a criminal provision. The compared provisions have different purposes and dissimilar normative content.
8. Since the liability provided for by Article 17² of the Bankruptcy Law is based on the unlawfulness of a performed act, there are no grounds for the defendant to benefit from the presumption of innocence. The phrase “unless the person is not at fault” in § 1 of the reviewed Article should be understood as indicating that the person having breached the duty to file for bankruptcy may, nevertheless, be released from liability if they show that they did everything that could reasonably be expected to avoid breaching the duty.
9. Within the Polish Constitution 1997, certain aspects of the rule of law principle, which is expressed as a general clause in Article 2, are defined in separate provisions. Accordingly, they have been excluded from the general principle's scope of application. In particular, the basis for protecting constitutional rights and freedoms should be sought not in Article 2 but in other provisions of the Constitution.

Provisions of the Constitution

Art. 2. The Republic of Poland shall be a democratic state governed by the rule of law and implementing the principles of social justice.

Art. 20. A social market economy, based on the freedom of economic activity, private ownership, and solidarity, dialogue and cooperation between social partners, shall be the basis of the economic system of the Republic of Poland.

Art. 22. Limitations upon the freedom of economic activity may be imposed only by means of statute and only for important public reasons.

Art. 31. [...] 3. Any limitation upon the exercise of constitutional freedoms and rights may be imposed only by statute, and only when necessary in a democratic state for the protection of its security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons. Such limitations shall not violate the essence of freedoms and rights.

Art. 42. 1. Only a person who has committed an act prohibited by a statute in force at the moment of commission thereof, and which is subject to a penalty, shall be held criminally liable. This principle shall not prevent punishment of any act which, at the moment of its commission, constituted an offence within the meaning of international law.

2. Anyone against whom criminal proceedings have been brought shall have the right to defence at all stages of such proceedings. He may, in particular, choose counsel or avail himself - in accordance with principles specified by statute - of counsel appointed by the court.

3. Everyone shall be presumed innocent of a charge until his guilt is determined by the final judgment of a court.

Art. 45. 1. Everyone shall have the right to a fair and public hearing of his case, without undue delay, before a competent, impartial and independent court.

Art. 65. 1. Everyone shall have the freedom to choose and to pursue his occupation and to choose his place of work. Exceptions shall be specified by statute.