

A shift in teleology:
*Utilising bankruptcy legislation to protect employees in
times of economic downfall*

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Preface

During the course of my studies in both Dutch law and Accounting and Control, I noticed the absence of subjects part of the curriculum that would cover both subjects. While both research fields may seem to be two entirely different worlds at first, certain subjects are heavily recurring in both fields, such as the position of employees in our society. On top of that, it cannot be denied regulation and economics have quite the impact on one another. Another attempt to make such an impact can be identified in the plans to abolish dividend tax in The Netherlands in an attempt to draw shareholders in this direction.

During the lectures of a class on research paradigms, I approached Dr. Visser and asked for his permission to write on a topic that combined both research fields. Being far from a standard subject, I had expected at least some resistance. However, Dr. Visser turned out to be rather interested in the idea. This thesis would not have been written without his unwavering support and for that, I am deeply grateful.

Abstract

Bankruptcy practice in The Netherlands has undergone quite a shock last year. After the verdict in the case *FNV/Smallsteps*, pre-packs can no longer be used to restructure companies under new ownership. However, that manner of resolving the bankruptcy had saved almost 290.000 jobs in the latest economic depression. Currently, the degree of protection offered is economically seen more harmful, as the company takes months after the bankruptcy to restructure or the assets are simply liquidated. As a result, the bankrupt company's employees end up losing out on income and stability. Transforming bankruptcy law and practice to offer protection in a different way can achieve the same results, allowing for a pre-packed transfer of the company without the blockade of complete protection, merely casting out redundant employees. Both the employees and general state of the economy would end up being better protected, if executed correctly. However, quite a few manners of abuse of bankruptcy law should be considered before actively transforming the bankruptcy code and – practice, both legally and ethically.

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1. Introduction

1.1 Recent evolution of bankruptcy regulation

Bankruptcy procedures in The Netherlands can be initiated by every market player that has a certain interest in the declaration of bankruptcy, whether it is the insolvent-to-be or a creditor.¹ Once the preconditions for a declaration of bankruptcy are met, a liquidator is assigned by the court, who has to determine which creditor is entitled to what share of the insolvent estate in the form of collateral or liquidated assets; public law interferes with civil law procedures in an attempt to create a regulated environment in which the rights executed by creditors are resolved *pro rata parte*.² Since the Roman era, bankruptcy procedures have been characterised by the intention to distribute or execute the assets of the company accordingly among the creditors. It can be concluded that the teleological reasoning behind implementation of national bankruptcy legislation in its current state is to assist the creditors in their claims.

However, over the course of the last 50 years, three still ongoing developments are noticeable in insolvency legislation and practices, which highly differ in nature. The first of these developments is the strengthening of the position of large financial market participants in bankruptcies.³ The second development is recognition of certain security rights created by legal systems in other countries and harmonisation of these rights.⁴ The third development has a more socialist nature. An example of this can be seen when a company is declared bankrupt. Liquidators primarily have three ways to resolve bankruptcies. Firstly, it is a possibility that a firm fails to pay its creditors while it still has a high equity/debt ratio.⁵ If a liquidator gets assigned, the company will remain a going concern afterwards. The second method is complete liquidation of the firm's assets, leaving nothing but an empty shell that is all but disbanded. The last method is execution of the firm assets as a complete package, which functions as a recovery plan to restart the firm in an attempt to make it financially healthy once more.⁶ In The Netherlands, liquidators are allowed to let social responsibility, such as

¹ In The Netherlands, the directors of a bankrupt estate can be sued for increasing their credit when it is reasonable to assume those debts cannot be repaid. HR 8th of December 2006, *NJ* 2006/659, *JOR* 2007/38 (*Ontvanger/Roelofsen*). Therefore, they can have a certain interest in being declared insolvent before such a state is reached.

² Lokin 2012, p. 94.

³ E.g. through the ISDA-framework as well as the general terms & conditions used by Dutch banks (ABV).

⁴ See HR 14th of December 2001, *JOR* 2002/70 m.nt. H.L.E. Verhagen (*Sisal II*), 3.3 for an example of recognition: if a right exists according to Dutch law that is comparable both in purpose and effect, it should be enacted according to the Dutch variant. For harmonisation, see Zwolfe 2012, section V, chapter I-IV.

⁵ E.g. due to horrible administration.

⁶ Hahn 2011, p. 26-27.

maintenance of employment ratios and preservation of jobs, weigh in on the decision whether to liquidate or restart the company. Liquidators are even allowed to resolve the bankruptcy by company restart when it is reasonable to assume the total execution proceeds this way will be lower than when is chosen for total liquidation of the assets, as a means to preserve local employability.⁷

1.2 Labour contract protection in The Netherlands

Normatively seen, employees affected by Dutch labour contract regulations are rather well protected. In the normal situation, it is quite hard to fire employees in The Netherlands. Once employees have a contract for an indefinite amount of time, it requires a lot of effort to be able to terminate their labour contracts. There are only three methods to eliminate the contracts. The first method requires the employer to send a request to the UWV in which he asks for permission to fire the employee. That is only possible in two situations: Either the company is heading towards bankruptcy and can no longer carry the burden of the amount of salary or the employee has been ill for over two years and not capable to complete his tasks anymore.⁸ The other requires the employer to ask the competent court to terminate the contract, which can only be done if the employee is either continuously falling ill or there is one of the limitative situations in which the employer's wish to terminate the contract prevails over the protection of the employee. Such situations can include incapability of the employee, culpable acts or a relationship between the employer and the employee that is disturbed so badly, that reparation is no longer considered as an option.⁹

These two methods require a third party to sign the permission to fire the employee. It is referred to as the preventive dismissal test.¹⁰ As the name suggest, this requirement to fire employees is preventive, brought in place to protect employees from possible termination until the moment it is no longer reasonable to. The third method requires the company to go bankrupt. An administrator is allowed to fire all employees. The only pre-condition is that the bankruptcy was not requested merely to get rid of the employees. Such is considered misuse of bankruptcy.¹¹ In that case, the declaration of bankruptcy can be declared void. As a result, the labour contracts will relive again, once the respective employees tied to that declare so.

⁷ HR 24th of February 1995, *NJ* 1996, 472 m.nt. WMK (*Sigmacon II*).

⁸ Article 7:669, sub 1 in conjunction with sub 3, under *a* and *b*, in conjunction with 7:671a, sub 1 of the Dutch Civil Code.

⁹ Article 7:669, sub 1 in conjunction with sub 3, under *c* to *h*, in conjunction with 7:671b, sub 1 of the Dutch Civil Code.

¹⁰ Bouwens & Duk 2015, p. 399-440.

¹¹ HR 28th of May 2004, ECLI:NL:HR:2004:AP0084 (*Digicolor*).

However, any other action the administrator has taken with regards to the bankruptcy remains permanent.¹² On top of that, employees fired during a normal case of bankruptcy, other than with the current state of the pre-pack, will not necessarily receive a new contract under the same conditions as before the bankruptcy. Their old employers are currently free to offer them a contract under less attractive conditions than before.

1.3 The flash-bankruptcy in The Netherlands

When a state of bankruptcy is impending or imminent, a state of *moratorium* can be declared: debts and connected creditor's rights to seize assets are suspended.¹³ An administrator, who will also function as future liquidator, is then appointed to make up the balance and discuss the future of the debtor with its creditors.¹⁴ When the creditors reject to postpone exertion of their rights, the company is declared bankrupt. More experienced administrators can predict the reaction of the creditors, depending on the financial state of the company. In the last decade, a new development in insolvency practice arose. During the period of the *moratorium*, while bankruptcy was still imminent, administrators prepared the execution of the firm as a complete package, with the juridical execution itself happening on the date of the declaration of bankruptcy, with the firm restarting on that day. This method of execution was labelled as the "pre-pack".¹⁵

Opponents referred to this method of execution as the flash-bankruptcy.¹⁶ From the perspective of an outsider, the company was never truly bankrupt. While the firm may be controlled by different leadership compared to the day before, with fewer personnel and perhaps a changed concept, not much more is noticeable as the company activities resume within hours of the declaration of bankruptcy or never even truly stop. However, quite a few modifications occur behind the scenes. All current personnel's contracts are terminated, after which only a percentage is reinstated.¹⁷ Any legal protection against contract termination does not apply in cases of bankruptcy.¹⁸ Over the course of 2007-2016, almost 28.000 firms that

¹² Articles 13-13a of the Dutch Bankruptcy Code.

¹³ For The Netherlands, see art. 214 of the Dutch Bankruptcy Code. For the United Kingdom, see Insolvency Act 1986, Schedule B1, paragraph 40. For the United States, see the US Bankruptcy Code, paragraph 362a. In the UK and US, moratorium is automatically effective upon appointment of the administrator. In The Netherlands, the administrator has to declare it manually.

¹⁴ Van Zanten 2015, p. 227.

¹⁵ Polak/Pannevis 2014, paragraph 3.12.6.

¹⁶ E.g. see [De Waard 2014](#), accessed on the 2nd of April 2018.

¹⁷ Art. 40 of the Dutch Bankruptcy Code allows for the termination of all employee-related contracts. HR 12th of January 1990, NJ 1990, 662 (*Van Gelder papier*).

¹⁸ 7:666 of the Dutch Civil Code,

had people employed were declared insolvent.¹⁹ Consequently, the number of employees that were directly affected by these bankruptcies lays around 422.000.²⁰ Those numbers only involve employees whose companies have been declared bankrupt. Other employees indirectly struck by these bankruptcies were not included. Therefore, the number of employees affected may be even greater. However, the pre-pack was often used as a mechanism to restart companies in orderly fashion after the declaration of bankruptcy was given out. The number of employees that were re-employed with the restart of these insolvent companies is little more than a quarter, around 119.000. Those are the directly affected employees who were the least harmed of the bankruptcy. The total amount of jobs available due to restarts lays around 289.000.²¹

In June 2017, the European Court of Justice declared the pre-pack a “transfer of undertaking”.²² In her reasoning, she proclaimed the underlying intention of the pre-pack to differ from that of the actual bankruptcy procedure. Pre-packs are concentrated on preservation of the future of the firm, rather than ‘maximizing satisfaction of creditors’ collective claims’.²³ Therefore, the regulations regarding transfers of undertaking should apply to pre-packs.²⁴ Consequently, employees should be protected from termination of their contracts due to the transfer of undertaking by a pre-pack.²⁵ However, the reasoning of the European Court backfired. Effectively, it is no longer a possibility to diminish employee costs of a firm transferred under these conditions. As a result, the pre-pack is no longer effective in use. It has become an empty shell, having lost its potential to restructure companies and make them financially potent once again. Therefore, it will barely be used anymore in practice.²⁶ If there will no longer be any of these pre-packed transfers, then there will no longer be any employees to protect anymore in them either.

1.4 Research purpose

When a firm is declared insolvent, a number of adverse effects are produced (of which a few are already mentioned above) as direct consequences of that declaration. These adverse effects are especially noticeable in times of crisis, when a multitude of insolvent companies

¹⁹ CBS 2017, p. 3.

²⁰ CBS 2017, p. 6.

²¹ CBS 2017, p. 17.

²² ECJ 22nd of June 2017, [C-126/16](#) (*FNV/Smallsteps BV*). The term undertaking is used in law to define a firm, as was done in the case ECJ 23rd of April 1991, [C-41/90](#) (*Höfner*).

²³ ECJ 22nd of June 2017, [C-126/16](#) (*FNV/Smallsteps BV*), 48.

²⁴ Directive [2001/23/EC](#).

²⁵ Article 3, *Ibid* in conjunction with 7:663 of the Dutch Civil Code.

²⁶ Schaink 2017, under 2.

produce adverse effects, which stack cumulatively. The results consist of such severe consequences for the economy, that we can speak of systematic risk.²⁷ These effects have a procyclical character, ultimately leading to reduced ability to consume. The goal of this thesis is to illustrate how insolvency legislation and especially practice has the potential to reduce these procyclical effects, leading to a higher maintained level of consumption.

Consequently, containment of these adverse effects could especially become a powerful defence for the economy in times of economic recession. As Keay (2000) stated: “... *it is in the public interest that people are protected from the adverse effects which insolvency can produce.*”²⁸

While none of these effects can be prevented in their entirety as there will always remain a degree of market volatility, there are options available to apply a brake to the economic downfall, decreasing and containing it, by focusing on the reconstruction of firms rather than the interests of their major financial creditors. What makes bankruptcy legislation the perfect tool to reconstruct firms, is exactly because bankruptcy legislation regulates the end of the company. The task of the administrator is to generate as much capital as possible to cover the claims of the creditors on the insolvent estate. In that, he is allowed to temporarily allow continuation of the operations when profitability is reasonably expectable.²⁹ On top of that, the administrator has an extra task: he has the obligation to research the causes that led to the bankruptcy.³⁰ Within that task lies the possibility to research how the company could be restarted. The administrator is given insight in the whole situation surrounding the firm. When using that information, the possibility raises to reconstruct the firm into what best fits the current economic situation. In that, the pre-pack is an interesting mechanism to use. A state of bankruptcy allows for thorough measures in the reconstruction of the company. The pre-pack allows for a nimble reaction, creating the ability to respond rapidly to the necessity to reconstruct. During the next economic recession, it will again. Aside from that, employees deserve better practical protection than they have now. With the pre-pack becoming practically unusable, employees will be more likely to lose their jobs during a bankruptcy. In this thesis, the main aim is to find the best way to both conserve the state of the economy as much as possible and protect the employees as well as possible, both legally and in practice.

²⁷ See for example [raw data of the Dutch CBS on the volume of goods consumed](#), accessed on the 3rd of March 2018. Especially the period 2009-2014 dealt with harsh decreases in consumption.

²⁸ Keay 2000, p. 510.

²⁹ Polak/Pannevis 2014, p. 288

³⁰ Ibid, p. 251.

Therefore, The main research question addressed in this thesis is:

How do bankruptcy legislation and especially practice have the potential to reduce the procyclical effects produced by economic downfall in The Netherlands?

The terms procyclical effects and economic downfall take a prominent place both in the research question and the rest of the thesis. Therefore, they require further defining. Procyclical effects should be seen as the occurrence of systemic risk. It means that one default on a debt or complete company bankruptcy may consequentially trigger others. Systemic risk is therefore best described as the correlation of one default with another.³¹ The occurrence of systemic risk causes a domino effect, where the default of party A in the payment of party B results in unavailability for B to pay third party C. When systemic risk takes effect in multiple industries or on a larger scale within the same industry, it can mean a decrease in liquidity and profitability due to debts being uncollectible on a larger scale.³² On such a scale, that can result in systematic risk as well. Systematic risk is described as “the covariance of returns with economy-wide factors”, which both describes and captures the volatile aspect of the market.³³ Various studies imply that bankruptcy risk and systematic risk are most definitely positively related.³⁴ Systemic and systematic risk both occurring would show the procyclical effects as intended in the research question. Economic downfall, in turn, underlines the nature of these procyclical effects and the part of the business cycle the economy would be in. It should therefore be read as an ongoing recession without sight on stabilisation yet.

1.5 Thesis outline

The research question will be answered throughout chapter two to five. Chapter two and three contain the normative framework of the thesis. In chapter two, the critical paradigm will be discussed and why it is favoured over the mainstream and the interpretive paradigm. The importance of history and socialistic or ethical considerations will be examined upon in section 2.2. Hegel’s importance for the paradigm is explained in subsection 2.2.2. His recognition theory together with Axel Honneth’s concretising expansion of it is clarified in 2.3. In 2.4, the term public interest is explained as well as its position in tying it all together in a perfect knot. The methodology used in this thesis is then explained in chapter 3.

³¹ Kaufman & Scott 2003, p. 371-372.

³² Kaufman & Scott 2003, p. 372.

³³ Ross 1989, p. 5.

³⁴ E.g. Lang & Stulz 1992; Denis & Denis 1995.

Chapter 4 contains a description of the current situation. Its first subsection contains the historical development of insolvency legislation and its importance to this thesis. Secondly, the less obvious aspects of the purpose of insolvency legislation are discussed. The third subsection contains a small model, showing how the economy is affected from the beginning of a recession. The fourth subsection contains an explication of the shortcomings of insolvency legislation. The last subsection contains the theoretical blockades in the current situation, preventing the dawn of a new era in insolvency legislation. Firstly, it contains a plea on why insolvency law should favour the public interest rather than the civil interest. Secondly, the dangers of potential legal abuse are discussed. Thirdly, any change may give rise to further social or ethical conflict. A discussion on how these conflicts take effect and how they can be prevented follows. Lastly, the secured position of creditors holding financial collateral rights will be discussed.

In chapter 5, the desired situation will be discussed. A critical look will be taken at the potency of insolvency law to diminish the adverse effects produced in times of economic recession as much as possible. The best method to do that is to keep companies afloat in a healthy state. The pre-pack will be discussed as potent mechanic in combination with the period of surséance to restructure companies, so that they may be financially healthy once again.

Lastly, chapter 6 contains the concluding thoughts on this thesis. It consists of a summarising conclusion, used to highlight the important parts once more. Also, the limitations of this study are discussed.

2. Theoretical background

In this section, concepts and theories mentioned in the introduction are elaborated upon. It is meant to both illustrate the current situation and to explicate the theories relevant for the rest of the thesis, placing them in a normative framework. The first subsection will discuss the paradigm in which this thesis is written. The most useful perspective to discuss the situation would be the critical paradigm.³⁵ The critical perspective in accounting focuses on what should be, rather than what is.³⁶ The main topic of this thesis is how insolvency practice could halt or, at the very least, apply a strong brake to the procyclical, downward spiral in the business cycle. It is the most fitting paradigm to describe the situation that could be instead, because the complete package of measures have yet to be defined and do not exist in the current situation. It would be the best fit for weighing the current situation against any alternative.

2.1 The benefits of the critical paradigm

The critical paradigm is a rather old paradigm used by historical writers as Marx, Freud, Nietzsche and Hegel. As the works of the historical writers support, commonly used theory is mainly philosophical of nature, with ties to ethical or moral ideas. The application of the critical paradigm into the world of accounting research started as a movement in the 1970s. Ever since, the support for acceptance of this paradigm has been growing slowly but steadily.³⁷ The introduction of the paradigm was an attempt to incorporate more than just economic theory and positivist methods into the researching of behavioural, organisational and social aspects of accounting.³⁸

However, not everything about this paradigm differs from the mainstream and the interpretive ones. There are still some similarities with these other paradigms. One of those similarities is that the critical paradigm tends to apply qualitative research methods, just like the interpretive paradigm.³⁹ However, the difference with the application of those methods is that interpretive research would focus on doing field research on the relationship between two concepts that are present in this reality.⁴⁰ In the critical paradigm, a researcher can utilise theoretical explanation of the current situation and compare the current situation to an alternative reality,

³⁵ Chua 1986, p. 618 and further expands on the critical paradigm, comparing it to the positivist and interpretive paradigm.

³⁶ Richardson 2015, p. 71.

³⁷ Chua 1986, p. 619-626.

³⁸ Hopwood 1976, p. 4; Richardson 2015, p. 68.

³⁹ Chua 1986, p. 619.

⁴⁰ Lee & Lings 2008, chapter 3 on shaping reality.

which is not currently present. The alternative reality will form an important part of this thesis, as it will illustrate the most desirable situation, motivated by historical, ethical and philosophical theory. That reality, however, is not observable for actual evidence. The only weapon available to describe that reality is theory based on rationality, although rationalities are objects for analysis as well.⁴¹ The reflective nature of the critical paradigm is what makes it a perfect fit for this subject. The interpretive paradigm tends to focus its reflexivity on the researcher's actions, interactions and position to see whether it influences the data and knowledge, thus more on the research methods.⁴² The critical paradigm is different in that, honouring its name, as it allows the researcher to reflect even on the theory used and the observed situation itself.⁴³

Those same concepts of reality and reflection seem to pose problems regarding the use of the positivist paradigm. Within that paradigm, there is a settled reality out there, which is practically seen as the only truth. Critical theory rejects the existence of such a fixed reality.⁴⁴ A focus lays on the alternative situation, which will be discussed in this thesis. Positivism does not see those alternatives as parts of the reality that is the whole truth.⁴⁵ Also, reflexivity is done merely on the methods, dataset and results: the methods need to be strictly in order, the dataset needs to be complete enough to be useable and the interpretation of the results needs to be done without insinuating more than the data shows.⁴⁶ All this clashes with the basic idea behind the critical paradigm of reflection on the theory and its idea of rejecting merely superficial scientism, which positivist methods seem to promote.⁴⁷ However, that does not imply in the least that positivistic research methods or even whole positivist studies are useless within the critical paradigm. It is where positivism stops that a critical perspective can prove most beneficial to the studying of results or reasons behind those results.⁴⁸ In this thesis, whenever positivist or interpretive studies are used, they will be reviewed according to the critical standards as is required by correctly taking a critical point of view.

⁴¹ Mennicken & Miller 2014.

⁴² Schwartz-Shea & Yanou 2012, chapter 6.

⁴³ Habermas & Viertel 1974.

⁴⁴ Horkheimer 1993, p. 140; Hayek 1979, p. 15.

⁴⁵ Richardson 2015, p. 71.

⁴⁶ Richardson 2011; Richardson 2012; Richardson 2015, p. 71.

⁴⁷ Richardson 2015, p. 72; Hayek 1943.

⁴⁸ Richardson 2015, p. 76.

2.2 Important aspects of the critical paradigm

In the critical paradigm, certain subjects have an important place, both in the context of explaining and taking centre stage, being the research purpose behind articles and theses. Of these subjects, the most important ones for this thesis are history and ethics.

2.2.1 History in perspective

In a sense, a parallel can be drawn between the other paradigms' view on history as contribution to the understanding of an economic research subject and Latour's description of a black-boxed invention.⁴⁹ No longer is it relevant how the black box came to be, how it was constructed and how it could be utilised. The main focus lays purely on its input and output, while the construction process and mechanisms of the invention in question are forgotten or taken for granted, while the history of such an invention can be utilised to elaborate theory better than the black-boxed facts can.

Tinker et al. (1982) say the same thing about history and more, stating that historical analysis can be used as vital instrument in the quest to the understanding of the studied economical concepts, in contrast to being treated as just superfluous background information without further use.⁵⁰ Historical development should be used to elaborate on the transformation of phenomena in a critical analysis, according to Chua.⁵¹ However, it can also be utilised in a different way. Rather than describing how phenomena have transformed, one can also use it to describe how those phenomena did not transform. The presence of one development also means the absence of another. To be able to fully understand the transformations over time, it is required to understand the alternatives, which are the transformations that did not occur.⁵² The foundation of that statement lays with Derrida's philosophy,⁵³ in whose sense the history of insolvency law could take a prominent place in the process of elaborating on economic, political and policy developments.⁵⁴

2.2.2 Socialism, ethics and Hegel

The most important contributor to the paradigm and theories, which will take an important place in this thesis, is Hegel. However, Hegel would not want to be identified as a critical writer. Such intentions would place him in the same group of writers as Kant, which he very

⁴⁹ Latour 1987.

⁵⁰ Tinker et al. 1982.

⁵¹ Chua 1986, p. 619-620.

⁵² Richardson 2015, p. 69; Chua 1986, p. 619.

⁵³ Derrida 1982.

⁵⁴ Tabb 1995; Martin 2005; Tinker et al. 1982.

much opposed.⁵⁵ The answer to the paradox between Hegel's desires as a writer and the world's perspective of his works lies within Hegel's representation of his philosophy. Hegel's philosophy can be seen as "the basis for determining the role of revolutionary thought in social transformation."⁵⁶ It was his philosophy that inspired the Frankfurt School, which gave rise to and helped develop the critical theory into what it is today. It also was his recognition theory that inspired Marx and his fellow socialistic writers to produce literature with the stress on the socialistic and ethical problems in society.⁵⁷ Until this day, socialism and ethics remain prominent topics in critical research. Critical writers as Foucault and Cooper tend to question capitalist subjects as governmental power over human subjects and the working man as the victim of (neo-) liberalism, treated as human capital and heavily exploited by a capitalistic society.⁵⁸ These topics also function as key to this thesis. While at some points firm reconstruction may even seem to promote liberalism, this is not the case. The main interests in this thesis are protecting the affected employees, halting the power of the financial institutions and controlling the recession in a way the business cycle does not engage in a free fall. Also, ethical control of the mechanism to reconstruct financially unhealthy firms should help prevent the abuse of these mechanics by capitalist hands.

2.3 Recognition theory

The theory of recognition, its foundation laid by Hegel and further construction performed by Honneth, will hold a special place in this thesis. It will help in explaining how people behave in certain situations. To be able to fully understand how the recognition theory functions, the origins of the theory need to be clear. Firstly, we will need to take two steps back from Honneth to discuss the basics laid out by Fichte. After that, Hegel's pursuits of the original recognition theory will be discussed. In the second subsection, Honneth's expansion on Hegel's theory and the functioning of his own contribution to the theory of recognition will be discussed.

2.3.1 Origin of the theory of recognition

In the field of law philosophy, the natural right was a subject that returned many times over the course of history.⁵⁹ That theme is also where the story of the historical development of the recognition theory begins, with Kant, Husserl, Hobbes and Locke on one side with Fichte and

⁵⁵ Hegel 1976, paragraph 5.

⁵⁶ Rockwell 2004, p. 143.

⁵⁷ Visser 2017, p. 6.

⁵⁸ Mennicken & Miller 2014; Cooper 2015; Foucault 2010.

⁵⁹ For a partial oversight and collection of the recurring theme, see for example Mertens 2012, p. 34-48, 109-113 and 129-130; Posner 2009, p. 125-129, 134-139 and 230-247.

Hegel on the other. The first group of writers proposed, each in their own theories, that humans would gain understanding of the environment and in particular, the self by analysing the self and by self-reflection. Fichte would go against these theories by saying that an individual's consciousness needs to hypothesize it is an individual, which in turn needs to be recognised by another individual. Once a person recognises the claims and possible actions of other individuals, only then that person will understand what actions he himself can take.⁶⁰ The result can be best explained as a multidimensional interpretive ontology: without recognising the abilities of another human to understand and to take action, one cannot recognise these qualities within himself either.⁶¹ Therefore, both humans are mutually dependent on each other for recognition. Only when they recognise each other, they are truly free individuals.

Hegel took the second step in the process of developing the recognition theory. He claimed that the human self-consciousness exists in itself and for itself solely for the reason that it exists for another self-consciousness.⁶² Merely introspecting oneself is not enough. One must recognise for oneself that one requires another to recognise him. In his *Grundlinien der Philosophie des Rechts*, Hegel used this theory to construct his view on the ethical life.⁶³ Without recognition it is impossible for us to realise freedom. Without freedom, there is no right or wrong on the moral compass either. Hegel was the first to utilise that theory to propose the existence of a struggle for recognition: The multiple self-consciousnesses each wish to attain certainty of their being for themselves.⁶⁴ They desire to confirm their existence and independence by contradicting or objectifying the existence of the others. These self-consciousnesses struggle in a life-and-death conflict with themselves and each other. Each consciousness seeks to incorporate the other into its own territory as an object that is not tied to itself, therefore being unburdened by such externalities. However, these self-consciousnesses cannot annihilate the other either, as there would be no one to recognise them when they do. Such an action would result in self-annihilation, since they need another self-consciousness to recognise them to be a definite self-consciousness themselves. In that, Hegel lays the stress on the autonomy of each party involved, within the limits of dependence on each other: each self-consciousness has the choice not to recognise another, at the risk of annihilating itself. As recognition is dependent on both self-consciousnesses, the act of

⁶⁰ Fichte & Neuhouser 2000.

⁶¹ Hegel refers to it as intersubjectivity.

⁶² Hegel 1976, p. 229.

⁶³ Honneth 1995, p. 5.

⁶⁴ Hegel 1976, p. 232 and further.

recognising the other from merely one side would not have any aspired results. Those results are only achieved by means of the actions of both.⁶⁵ This form of recognition cannot be forced, only given by the free will of both parties. It is also the requirement to be able to feel experience freedom and that Hegel defined as ethical right. Therefore, such a relation of mutual recognition intensifies and gives form to what freedom and right truly is.⁶⁶

2.3.2 Honneth's struggle for recognition

Honneth continues where Hegel left off, focusing specifically on the aspect of Hegel's intersubjectivity. Intersubjectivity would be necessary to identify how self-realisation is accomplished. It also plays an important part in how recognition can help with the comprehension and justification of social movements, as well as set the norms required to behave in a way Hegel would refer to as ethical right. Honneth sees three patterns of intersubjective recognition: love, rights and solidarity.⁶⁷ Love consists of the physical and emotional demand, supplied by those close to the person.⁶⁸ If the supplication of love reaches a satisfactory level, a basic level of confidence in the self will be created by the self-consciousness. However, physical injury caused by another can negatively modify this basic level of self-confidence.⁶⁹

Honneth's second pattern, what he defines as rights, consists of the process of growth towards maturity in the understanding of what is ethical. This process continues as long as there are moral relationships with other consciousnesses. Honneth describes this as a process in which the self learns through interaction that his relational partner sees him as an individual who has the same rights as the partner. Just as with love, a basic awareness of the existence of these rights raises with the individual, referred to as self-respect. However, that also means that there is a method to break such awareness down again. Refusing the individual to exercise social or lawful rights can deteriorate the individual's connectedness to society. Consequentially, the individual may not participate in the society as would be expected of any individual part of it.⁷⁰

Honneth defines his third pattern, being solidarity, as the recognition of our abilities, achievements and personal attributes. It is essential for the development of a degree of pride

⁶⁵ Hegel 1976, p. 230-231.

⁶⁶ Williams 1997, p. 59.

⁶⁷ Honneth 1995, p. 92-130.

⁶⁸ Ibid, p. 95-96.

⁶⁹ Ibid, p. 101-104.

⁷⁰ Honneth 1992, p. 194-195; Honneth 1995, p. 118.

in who we are as individuals, differing from other individuals through those attributes and abilities, as there are no two individuals with the exact same, however close they may come.⁷¹ For this pattern, the basic level of a positive view on the self is called self-esteem. It is best explained as a degree of confidence in one's skills and personal characteristics by the other. Just like the other two basic levels, it can fall apart when one loses that recognition, by what Honneth signifies with the words denigration and insult.⁷²

These three patterns of recognition create three basic levels of recognition, which are necessary in the development of a positive view of oneself. It is only through the building of confidence, self-respect and self-esteem that a person can begin to perceive himself as an independent, sovereign and individuated being.⁷³ It is when these basic levels are destroyed, that recognition is refused to an individual. In turn, that provides motivation and justification for social struggles. It is through the behaviour of others that the individual can feel recognition is illegitimately refused. By accepting that there is a utopia in which every individual is recognised to the perfect degree, it is also possible to distinguish which social struggles work towards the utopian dream of absolute recognition and which move further away from it.⁷⁴ This does not only allow for identification of socio-political struggles on a larger scale as Honneth does, but also to motivate and justify that individuals would or would not take certain actions in reaction to certain events. It is exactly that last part of the recognition theory that will be used for in this thesis. What Honneth describes with his three patterns is an identifier, which can link specific behaviour to the reasons behind them. It cannot be used to explain actions and behaviour, but it does identify which events can trigger possible reactions. Human behaviour is invariably complicated to predict. Without the possibility to empirically verify their actions, there exists a necessity to rely on pure theory. What makes the recognition theory best suited for this thesis, is that it is created as a theory within the critical perspective, albeit accidentally.⁷⁵

2.4 The public interest

Public interest is a rather vague concept with an expansive reach: it holds slightly differing meanings in the fields of law and of economics.⁷⁶ However, both these areas are of importance to the discussion of this topic. Therefore, it will be held against the current scope

⁷¹ Honneth 1995, p. 122-123.

⁷² Ibid, p. 94 & 129.

⁷³ Ibid, p. 169.

⁷⁴ Ibid.

⁷⁵ Marasco 2015, p. 26.

⁷⁶ Horwitz 1982, p. 1423-1425.

of the bankruptcy law: the *civil* or *private interest* to be able to interpret the meaning of this concept correctly.

2.4.1 Civil versus public interest

In this thesis, the civil interest shows the original teleology behind the development of insolvency law. As was shown in paragraph 2.1, it was developed to help creditors in case of multiple defaults, protecting them against ‘the crimes committed by the debtor’ as well as against other creditors who may have faster or perhaps more persuasive methods to push the debtor for payment.⁷⁷ On top of that, there is the matter who exactly was seen as the victim in the case of a bankruptcy. Given the fact that only creditors could initiate a bankruptcy procedure and that a commissioner (later replaced with the combined creditors) had to grant the discharge to the debtor, shows that the initial goal behind the still developed in a creditor-oriented manner. The meaning of civil interest in this context clearly points at the connection between insolvency law and civil property execution laws, with in particular the civil agreement and property rights of creditors being protected against default of a debtor and fraudulent behaviour, by making goods inaccessible. The key relationship here is between the creditor and the debtor.

The public interest, in contrast, fathoms any interest that would benefit, other than merely the creditors. The most fitting way to characterise it, is the interests that would be served if insolvency legislation would be transformed to focus on corporate restructuring and reorganisations. Therefore, the public interest consists of many different interests and relations, as different pieces of a puzzle. The completed puzzle then shows the ultimate goal: the bigger picture. For this thesis, the cumulative relationship of the pieces consists of the many different interests that would be influenced by a change in the structure of insolvency law. One of the major interests is that of the government, being able to collect a more stable tax income. Another interest is that of the employees, maintaining their job. A third is the employers, both being able to adapt to changes in the economic situation more easily and, in certain sectors, getting more orders from the government because there is a bigger budget available. These factors are important in the maintaining of an economically stable situation. Combined, they form the public interest.

⁷⁷ Tabb 1995, p. 7. Creditors as court judges, politicians or (future) employers: the people that can make life during or after a bankruptcy procedure difficult.

2.4.2 Recognition theory and the public interest

“Every unique, historical struggle or conflict only reveals its position within the development of society once its role in the establishment of moral progress, in terms of recognition, has been grasped.”⁷⁸ This quote by Axel Honneth perfectly shows the connection between the recognition theory and the public interest. The recognition theory is meant to explain the place and meaning of political and societal struggles on a societal level in our history from a critical perspective. When Hegel and Honneth’s views are combined together, their expanded recognition theory can be used to identify which groups did (and currently do) not receive the full recognition they are supposed to receive. As Honneth explains when discussing his three patterns of recognition, not being given recognition can have severe consequences on a societal level. Considering that the public interest should be seen as the cumulative sum of the individual interests of larger groups of people and key players in a society, it is key that these groups of people receive the amount of recognition they are entitled to. In insolvency practice, the main pattern of recognition that is of importance, is the second pattern Honneth introduced, regarding rights. Practically every party involved in a bankruptcy has their rights infringed, no longer having the option to initiate action against the defaulting of their debtor by themselves. On top of that, these parties face the possibility of not receiving what they are owed in full or even at all, regardless of whatever form they were promised to receive it in.⁷⁹ This raises the question how the public interest would be best served under the recognition theory. The answer to that seems rather simple: giving involved parties the recognition they deserve. In that sense, the public interest would best be served by identifying key stakeholders in the bankruptcy procedure and ensuring the relationships with key stakeholders is maintained.⁸⁰ Otherwise, it will be difficult to continue operation after bankruptcy. Those stakeholders are the employees, key suppliers and key investors. As simple as the answer seemed, it is ever more so difficult to actually find the right balance between these stakeholders. In this thesis, the focus lays on the employees as stakeholder in bankruptcies. While the parts strengthening their rights may directly boost their position in a bankruptcy, strengthening that of the other stakeholders may indirectly affect their position as well.

⁷⁸ Honneth 1995, p. 168.

⁷⁹ Such as a monetary payments or financial security by a long-term contract.

⁸⁰ Aalbers & Dolfsma 2014, p. 18; James 2016, p. 492.

3. Methodology

The main research strategy used in this thesis is what Verschuren & Doorewaard would refer to as *desk research*. According to them, desk research has three main characteristics. Firstly, existing literature and data are used and reflected on. Secondly, there is no direct contact with the research subject. Lastly, the material is used from a different perspective than at the time of its production.⁸¹ These characteristics fit the subject well and will have a prominent place in this thesis. Firstly, the normative, legal sections are heavily dependent on existing literature and jurisprudence. In the discussion of legal subjects, literature and jurisprudence are almost given the same value as case law in the English system: a court is bound to follow a precedent.⁸² As such, literature and jurisprudence are given the same level of authority for the discussion of these topics. That also means that the discussion is often lead by authors different from the ones that have codified the legislation or have participated in the creation of jurisprudence. It is more often than not a product of a second hand. On top of that, a certain degree of justification is required regarding the use of jurisprudence in this thesis. In economic literature, jurisprudence is hardly ever used to justify anything. Especially in critical literature however, there are often calls for changes within the current boundaries of law or changes of the law itself. By using jurisprudence in the same manner as legal authors do, an author can contribute to the understanding of the current situation as well as current limitations regarding the transformation into the desired situation. Therefore, jurisprudence is extremely potent for any critical author in their description of the world, both as ally and as adversary. While it can aid in describing the current functioning of the world, it is most certainly a powerful tool in the investigation of current legal limitations to proposed changes by critical writers.

The data used in this case is second-hand as well. It was collected and published by the Dutch Central Bureau of Statistics (CBS).⁸³ Therefore, I am depending on data that was not gathered by myself. The data, however, comes with a rapport that seems well supported with information and arguments. However, the CBS is a government institution dedicated to doing research with the public interest in mind. Their results are gathered for public debates on

⁸¹ Verschuren & Doorewaard 2010, p. 194.

⁸² Rombauer 1978, p. 22-23. The Dutch Legal system does not have a system of precedence. Nevertheless, judges tend to follow the motivation of other judges when they see fit, be it for hierarchical reasons or because the other judge's motivation realises a viable solution.

⁸³ Centraal Bureau voor de Statistiek.

social matters.⁸⁴ Therefore, their statistics are subdued to a quality check. The published data is reasonably expected to be accurate, trustworthy and complete enough to be useful.

When performing desk research, one must be careful when applying second-hand material. Improper application of previously gathered data may result in a biased perspective and, consequentially, biased conclusions.⁸⁵ Both the data gathered by the CBS and existing literature should therefore not be taken out of context and not be considered of higher significance than they truly represent. Most legal literature is written with a normative point of view in mind. The focal point of the literature should therefore be considered to be the creation of a normative framework to fit practical cases in, handling them by the protocol the framework presents. While it is true this thesis has a rather normative tendency, the actual focal point is the practical outcome of the application of a framework. To be able to achieve the desired practical outcome, the normative framework required to pursue said practical outcome should be perceived as a means to an end, rather than an end by itself. This instrument should therefore be developed keeping the actual end in mind. The approach taken is therefore somewhat different than most legal literature. Rather than relying on a framework while explaining how to build towards a desired end, that end is defined first. The framework is then constructed to be compatible with the end itself, enabling the reaching of it. The end in question would be the social and economic consequences of a defensible, regulated structure that focuses on restarting companies for involved parties, rather than the liquidation for the benefit of creditors. The usual method is therefore turned around.

⁸⁴ See [the information on the organisation of the CBS](#), accessed on the 10th of september 2018.

⁸⁵ Verschuren & Doorewaard 2010, p. 199.

4. The current situation

Before we can properly reflect on the alternative situation and the exact differences compared to the current situation, the first step required to take is to identify the current situation and how it came to be. The historical development of insolvency legislation in The Netherlands, the United Kingdom and the United States of America will be discussed. This part of history is rather significant and relevant, because it illustrates how insolvency regulation has been focused on creditor rights and civil interest since its early stages. The United Kingdom and the United States receive special attention, because the pre-pack is still common practice in these countries. Then will be elaborated on the parts which together form the economic situation in The Netherlands and how adverse effects in an economic recession would affect them. Thirdly, the effects of insolvency legislation and practice on firm behaviour will be reviewed. The last subsection will discuss who benefits from current insolvency regulation and practices as well as identification of those who are left empty-handed.

4.1 Historical background on insolvency legislation

4.1.1 General criminal history

Ever since the Roman era, the basic principles of *paritas creditorum* and *pari-passu* of creditors and of have constituted the foundation of the position of creditors in the situation of default of debtors. These two principles are focused on the equality their claims. When a natural person or entity is declared insolvent, all claims creditors had on the insolvent debtor were treated as equal, regardless of the age of the claim and the financial or political status of the creditor.⁸⁶ In that era, the creditor-debtor relationships were personal and credit was not an object for trade; creditor and debtor considered each other fit to engage in such a relationship and were bound by their contract.⁸⁷ Such a degree of attachment of one another resulted in local crediting, on a smaller scale and with fewer risks involved. There was no need for extensive legislation on insolvency, which was made up merely of limited security rights. However, creditors were already protected by law in other ways. Acquiring more debt while not informing new creditors who wished for security rights on already secured goods was punishable by law.⁸⁸ However, creditor rights stretched beyond those of the debtors in case of a default. There existed even legislation constituting the right for creditors to mutilate the

⁸⁶ Lokin, G3. There were a few exceptions, with loans secured with pawns and mortgages, but other than for those, the basic principles reign supreme.

⁸⁷ Ibid, V3, based on Gaius 2, 38: "*Obligations, however constituted, are not susceptible to any of these [manners of transfer]*".

⁸⁸ Ibid, G70.

physique of their debtors, although it is debated in literature whether this law was actually enforced.⁸⁹ However, it is very well noticeable that these laws developed only in a creditor-oriented manner.

4.1.2 Dutch criminal history

In The Netherlands, the development of bankruptcy law remained at a standstill until the early 1500s. The reason behind this standstill was that mercantilism had hardly developed yet, due to which more developed insolvency legislation was still rather obsolete in the majority of default cases.⁹⁰ The first new development was under the rule of Carl V, who pictured the bankrupt debtor as a criminal. From 1531 on, bank rupture would be punished with the death penalty.⁹¹ His reason was that bankrupts and defaulting debtors would be stealing the welfare these ‘traders of good faith’ would bring.⁹² Next to that, roman bankruptcy regulations remained the common medicine against bankrupt debtors until the 1580s, during which the bigger cities developed their own, independent bankruptcy regulations.⁹³ The Netherlands was one of the first countries to decriminalise a normal bankruptcy, namely in 1659, albeit only a regional development at that point. Bankruptcy was only truly punishable when acts were committed with bad faith from that point on.⁹⁴ It was not until 1804 that the first official book of Criminal Law saw the light, officially codifying the acts of bad faith and unifying regulations for a wider area.⁹⁵ However, that book was quickly replaced as France invaded The Netherlands. In 1811, the French *Code Pénal* became the leading authority on bankruptcy legislation. The *Code de Commerce* contained the actual crimes. A rather new difference was made for procedures of defaulting merchants and non-merchants. Because the crimes were listed in the *Code de Commerce*, only merchants were capable of committing these as the law applied to merchants only.⁹⁶

4.1.3 English criminal history

England is an entirely different matter, as it had its first actual Bankruptcy legislation written in 1543. The preamble declared the insolvent a financial leech.⁹⁷ Early common law had a harsh treatment for insolvents, allowing creditors to push for incarceration of the insolvent

⁸⁹ Tabb 1995, p. 7.

⁹⁰ Holtius 1850, p. 19.

⁹¹ Van de Water 1729, p. 415.

⁹² Eeuwig Edict 1531, under II.

⁹³ Polak & Polak 1969, p. 3.

⁹⁴ Bloemarts 1881, p. 65.

⁹⁵ Keulen 1988, p. 36.

⁹⁶ Ibid, p. 38.

⁹⁷ Weisberg 1986, p. 21.

and forcing him to forfeit all of his possessions, stretching from physical property to the debtor's own life.⁹⁸ Common law had actions for the appraisal and execution of the goods of a debtor. However, creditors were not well protected from states of bankruptcy of a debtor and, in such times perhaps even more important, from other creditors and their claims.⁹⁹ A debtor could, for instance, keep house, meaning he would lock himself up in his own house, so that creditors could not reach him.¹⁰⁰

Not only creditors were awfully protected. At this point in time, creditors were free to pursue payment of debts after the resolving of a state of bankruptcy. Any and all debts that were left unpaid during the state of bankruptcy, be it partially or in full, or that were accumulated during the time the debtor was bankrupt, would still have to be paid after the state of bankruptcy came to an end.

All of this changed for the better in 1705, when the discharge of debts was first introduced in the Statute of Anne in England.¹⁰¹ However, discharge was given only to bankrupt debtors who were cooperative in the execution of their property. On top of that, they were granted an allowance out of the insolvent estate, dependent on the percentage of dividend paid to the creditors out of the bankrupt estate. Uncooperative debtors were not given any relief of debt after execution of their property by force. On top of that, fraudulent debtors were even sentenced with the death penalty.

4.1.4 American criminal history

The United States began quite some time later with the development of insolvency legislation, but one cannot blame them for that as they only achieved a state of independence on the fourth of July in 1776. Their first major development as a nation was the creation of a constitution, which contained a clause empowering the Congress to pass uniform laws for the whole nation.¹⁰² Despite that clause, the nation did not know permanent insolvency laws for a long time. Three Bankruptcy Acts were accepted, but only temporarily in reaction to what is referred to as the years of Panic, mainly being economic depressions.¹⁰³ The Act of 1800 was the first in America to grant discharges. However, the Act was revoked in 1803 and the states were free to create their own insolvency procedures again. In 1841, the second Act was

⁹⁸ Tabb 1995, p. 7.

⁹⁹ Ibid, p. 7.

¹⁰⁰ Ibid, p. 8.

¹⁰¹ 4 Anne, ch. 17 (1705).

¹⁰² U.S. Constitution, art. I, paragraph 8, 4th clause.

¹⁰³ Act of 1800 in response to the Panic of 1797, Act of 1841 in response to the Panic of 1837 and the Act of 1867 in response to the Panic of 1857. See Tabb 1995, p. 14.

accepted by the Congress. This Bankruptcy Act allowed for voluntary filing by a debtor for bankruptcy and, after having their property executed, for being granted a discharge of all debts. With that, the United States became the leading nation in the world in the development of bankruptcy legislation.¹⁰⁴

4.1.5 Other developments in insolvency legislation

Another two later developments deserve mentioning. First of all, it is noticeable The Netherlands, as only one of the three above, never introduced a discharge of debts. For corporations, that was because the corporation would be officially disbanded after an insolvent bankruptcy. For the natural person, there was not any possibility to be granted any form of discharge, except by creditor's remittance, until the *Wet Schuldsanering Natuurlijke Personen* was accepted in 1998.¹⁰⁵ Generally, after three years of controlled paying off the creditors as much as possible, a person could be granted a discharge.

The other noteworthy development is regarding employee protection in bankruptcy proceedings. In 1977, the European Economic Community accepted the first Directive on transfer of undertakings.¹⁰⁶ It was meant to safeguard the rights of employees when undertakings change ownership. Any protection they would have had under their old employer, they have during and after the transfer of the undertaking as well.¹⁰⁷ Van Zanten raised the question whether this protection exists as well when a company is sold and transferred as a whole entity during a state of bankruptcy. The Dutch Minister of Justice pleaded for an exception in case of bankruptcy.¹⁰⁸ In the case *Abels*, the European Court of Justice confirmed bankruptcy to be an exceptional situation and said that employee protection does not work here.¹⁰⁹ This exception was codified in an adapted version of the old Directive in 1998.¹¹⁰ The adaption accepted in 2001, forced countries to safeguard employees against misuse of this decrease in employee protection.¹¹¹

¹⁰⁴ McCoid 1988, p. 361-362.

¹⁰⁵ This section of the Dutch Bankruptcy Code grants conditional discharge to a natural person. The conditions are absolute, being that the person has to forfeit the part of their income above an upper limit set by a judge and any goods that are not qualified as basic needs. The combined creditors will be paid from these proceeds.

¹⁰⁶ Directive 77/187/EEC.

¹⁰⁷ Van Zanten 2007, p. 63-64.

¹⁰⁸ Scholman 1985, p. 903.

¹⁰⁹ ECJ EG 7th of February 1985, *NJ* 1985, 900 (*Abels*).

¹¹⁰ Directive 98/50/EEC.

¹¹¹ Directive 2001/23/EEC.

In 2002, the United Kingdom passed the Enterprise Act 2002, allowing for the English version of the pre-pack.¹¹² The United States developed a primal, simple version in 1978, allowing for transference of the firm's active rather than the firm as a whole. This was possible after filing for a chapter 11 procedure, comparable to the Dutch surséance-procedure, temporarily protecting the company from creditors' rights to execute the goods of the debtor.¹¹³ The results were noteworthy: administration procedures were completed more quickly while realisations drastically increased.¹¹⁴ In The Netherlands, the first company to restart using the Dutch pre-pack method was D.E.P.T in 2012.¹¹⁵ The difference with the common law situation is that the Dutch variant is not a separate asset sale, but a transfer of the company as a whole, including private contracts necessary to continue operating. In that year alone, over a hundred companies are estimated to have followed in D.E.P.T.'s footsteps.¹¹⁶

However, all that came to an end in 2017, when the European Court of Justice added an extra note to the case *Abels*. In the case *FNV/Smallsteps*, the European Court concluded that pre-packs do not get the same exception as normal bankruptcies.¹¹⁷ The goal is said to be the transfer of undertakings rather than maximising realisations for the creditors. Therefore, the regulations regarding transfers of undertakings should be respected in the pre-pack situation. That had different results for the three countries discussed earlier. The United States, not being part of the European Union, was not affected. The United Kingdom could continue reorganising companies using their pre-pack method, as they have little employee protection. However, that does not apply to The Netherlands. The Dutch have an expansive set of legislation to protect employees in nearly all circumstances, including during the transfer of undertaking.¹¹⁸ Therefore, the pre-pack is no longer usable to diminish the costs by reorganising and restructuring the personnel of the company.

4.2 Hidden aspects of insolvency legislation

In the previous section, the evolution of insolvency legislation was described. Noticeable was a comparable evolution among the different areas. A number of historical reasons were mentioned why insolvency legislation is present in its current state. Shortly summarised, these are creditor protection and regulation of claim handling. However, there are two less obvious

¹¹² In the United Kingdom, there is a separate procedure for it, which practically is a bankruptcy procedure in a very short and simplified form. See Finch 2009, p. 393-394.

¹¹³ Tollenaar 2011, nr. 3; Moore & Slusher 2007, nr. 9.

¹¹⁴ Goode 2011, p. 473.

¹¹⁵ Van Almelo 2014, p. 18.

¹¹⁶ Ibid, p. 21.

¹¹⁷ ECJ 22nd of June 2017, [C-126/16](#) (*FNV/Smallsteps BV*).

¹¹⁸ Book 7, title 10 of the Dutch Civil Code, specifically article 7:666.

aspects that should also be considered when reasoning why insolvency legislation still remains in its current form. The first can be found in the purpose of corporate governance. Government regulations are used to influence behaviour.¹¹⁹ In some sense, bankruptcy can be seen as the end of a firm. In the majority of the cases without restructuring of the company, there will not be any assets left in the insolvent estate to be able to continue the operation of the company with. Thereupon, the company will face juridical dissolution.¹²⁰ With such a horrifying perspective in case the company goes bankrupt, the board of directors would want to prevent such a state in any way they possibly can. It has a repulsive effect on the direction the company is financially heading in. The second one confirms and strengthens the first aspect. It can be found in the application of Honneth's third pattern. Owning a company that performs well makes it an achievement for others to see. In turn, the owners and directors will receive recognition for their performance. On top of that, employees working or having worked for well-performing companies may have a more attractive profile for future positions. In the shadow situation, the recognition given will be reduced and possibly a denigrating attitude will rise when the company is heading towards a state of financial distress and bankruptcy. These two reasons make bankruptcy legislation seem like quite the solid structure to regulate the behaviour of companies. Then, why exactly should bankruptcy legislation be changed?

4.3 Adverse effects in the Dutch economy

What better way to identify how exactly an economic depression strikes, to show how and which parties and economic relations are influenced, as well as influence others as a continuous downward spiral. The particular areas of interest are the parties regulating the supply and demand of labour and the taxation system. In that last part, consumption, property and labour taxation will be discussed. Labour taxation is tied to the social security system, which practically is a part of the taxation system.¹²¹ Assumed will be that the current situation is the set economic standard. Any changes are described keeping the current situation in mind.

4.3.1 Labour supply and demand

The key players in the business cycle are the firms and their employees, as they are the first to feel the consequences of a starting recession. Starting with the default of either firms or their

¹¹⁹ Tyler 2006, p. 24.

¹²⁰ Kroeze & Maeijer 2015, nr. 383; Article 2:19, sub 1, under c of the Dutch Civil Code.

¹²¹ E.g. Value Added Taxation (BTW), taxation of Real Estate property rights (Onroerende Zaak Belasting), taxation of motorised vehicle property rights (motorrijtuigenbelasting) and others. Other than VAT and sales tax, these can be classified as property or wealth taxation.

natural person debtors due to a series of investments not yielding the expected or promised results, a certain degree of systemic risk may take effect. Party A will not be able to pay its debts to party B. In turn, party B may default in the payment of his debts to party C.¹²² On a larger scale, systematic risk may take effect as well.¹²³

When a firm is declared bankrupt, there are multiple parties that feel the consequences. The first and most obvious to notice the effects are the creditors, who are directly tied to the state of bankruptcy of the company. It remains unsure whether they will receive payment of their claim on the insolvent estate, be it in full or merely in partial. The insecurity lingers above their head until the administrator reveals the answer by either paying the creditor or by making the distribution list public.¹²⁴

The employees of bankrupt firms is the one group that has to deal with perhaps the worst of consequences. The pain seems little at first: their salary claims up until thirteen weeks before the firm is declared insolvent, are insured by a governmental institution which also handles social security claims. Also, that same institution can be requested by the bankruptcy administrator to insure the next six weeks after the declaration of bankruptcy as well.¹²⁵ As a result, there is a time span of nineteen weeks in which the employees are guaranteed to be paid their salary in full. However, that time span was not chosen without reason, as such security comes at a rather steep price: practically all other employee protection against the termination of employment contracts is ruled out when a firm is declared bankrupt.¹²⁶ With only six weeks to find a new employer before the employees will face the loss of their job and, consequentially, a noticeable drop in income, their financially seemingly secure positions are in grave danger. No longer is their future safely set in stone.

That is where job insecurity comes into play. Just like with the public interest, job security is defined as a combination of different factors: the chance of termination of the current job contract, the chance of finding a new job and, relatively seen, the expected value of the current job, the expected value of being unemployed and the expected value of the next job.¹²⁷

¹²² Kaufman & Scott 2003, p. 371-372.

¹²³ Ross 1989, p. 5.

¹²⁴ The credit can be paid sooner if it should be treated as a preferential right, which is only the case when that status is constituted by the law, see article 3:277 of the Dutch Civil Code and Polak 2014, paragraphs 11.6 & 11.7.

¹²⁵ Polak/Pannevis 2014, paragraph 4.7.5.7 and article 61 in conjunction with article 64 of the Dutch Law on Unemployment (Werkeloosheidswet).

¹²⁶ Polak/Pannevis 2014, paragraphs 4.7.5.1 and 4.7.5.2, also article 40 of the Dutch Bankruptcy Law (Faillissementswet).

¹²⁷ OECD 1997, p. 134-137.

Not only does losing one's full or partial income lower the potential expenditures during the time the employee will be unemployed, but it can also lower the employee's expenditures before or even without them actually losing their job.¹²⁸ That has a number of serious consequences to the business cycle. On a small economic scale, with just these two participants to the economy, it would result in a decrease in consumption. Consequently, the firms would see a decrease in their sales, whereupon there could be a decrease in workload and employee necessity. As a result, a cutting of the costs could be necessary for the firm to remain financially healthy.

One of the posts that can be cut are employee costs. That can be achieved by cutting in the benefits of the employees¹²⁹ or in the amount of employees. They are the ones to feel the aftershocks of the decrease. This is where the effects of both systemic and systematic risk show their true impact. The income generated by the total group of employees will decrease further, which can result in even less consumption. As a result of the reduced sales and income, both firms and natural people may become strangled in a net of liquidity shortage and default problems. On top of that, there will be less room for investments as well. This can cause a continuous, downward spiral in the business cycle. The ones most affected by these changes are the employees. When the demand for labour decreases and the supply increases, the price for labour will decrease as well.¹³⁰ Not only will the ex-employees be negatively affected in their spending power, but the offered salary when applying for the next job can be lower as well due to the newly created difference in supply and demand.

However, the real situation is slightly more complicated than described above. These two parties are not the only two groups of participants in the economy, as the government also plays a significant role. In this context, they fulfil the role of legal person. As if they were a civil corporation, they require to purchase goods and services in order to reach the goals set out for them. In these actions, general contract and property laws apply to them too. Also, the rules and regulations regarding labour contracts apply to them as well.¹³¹ However, their acting as any other civil company is by far not the whole of their contribution to the Dutch economy.

¹²⁸ Wolter 1998, p. 405-409.

¹²⁹ Referred to as secondary or tertiary conditions of the labour contract. See Bouwens 2015, p. 43-44.

¹³⁰ Edgmand et al. 1996, chapter 3.2.

¹³¹ There are divergences of some of these articles in specified laws though. An example is the military's probation time, which is six months rather than the conditional maximum of up to two months for non-military personnel. See article 9 of the General Military Regulations for Civil Servants (Algemeen Militair Ambtenarenreglement), compared to article 7:652 of the Dutch Civil Code.

4.3.2 The Dutch taxation system

The government's spending power is for the majority defined by their income from a source of taxation. To be able to explain the effects of and on taxes as well as the government's spending power, these taxes have to be grouped. Normally, these types of taxes are categorised as either direct or indirect taxes.¹³² However, this division does not fulfil any purpose in this context, as the effects will be different for types of taxation in the exact same category. Therefore, a different distinction will be made, consisting of three groups: Taxes on consumption¹³³, taxes on property rights¹³⁴ and taxes on labour¹³⁵.

Taxes on consumption are directly tied to consumption levels. That means the income generated by these taxes is very sensitive to changes in the business cycle, just like consumption itself is; These taxes are indefinitely correlated with measured consumption levels.¹³⁶ As was stated in the previous section, consumption levels can decrease due to job insecurity.¹³⁷ As a direct consequence of said decrease, taxes on consumption will yield less tax income for the government. With value added taxes and excise duties expected to make up 22,7% of the total tax generated income of the government in 2018, a decrease in tax income due to reduced consumption would have a significant impact on the government's spending power.¹³⁸ As a consequence, the government would be unable to invest as much as they had desired and had previously planned both in their civil servant employees and contracted civil companies, providing these groups of employees with less work accordingly. Consequently, there would be less employees needed to complete the tasks given to them. Thereupon, a

¹³² See for example the [Summary of the Miljoenennota 2018](#) for both the division and tax generated revenue. When including the social security premiums under the term taxation, which seems reasonable as they are collected by the same method wage tax is, it is noticeable that less than 1% of their total revenue is dependent on other sources than taxation.

¹³³ See *ibid.* Value added tax (btw/omzetbelasting), excise duties (accijnzen) and import taxes (invoerrechten) are indefinitely tied to consumption. Environmental and insurance taxes can be tied to both consumption and property.

¹³⁴ See *ibid.* Vehicle excise duty (motorrijtuigenbelasting) is a clear example of taxation on property. While it is named an excise duty, merely holding the vehicle to your name is enough to have to pay the full tax, regardless of usage. Also, municipalities collect taxes on ownership of real estate and dogs.

¹³⁵ See *ibid.* Examples are income tax for natural people (loon- en inkomstenbelasting), profit tax for corporations (vennootschapsbelasting) and dividend tax for shareholders (dividendbelasting). Also, the premiums for social security (premies werknemersverzekeringen and volksverzekeringen) are tied to income tax. These are paid as part of the total percentage that makes up the first two of four tax brackets. Therefore, they should not be seen as entirely separate units.

¹³⁶ Van Doesum 2014, p. 382.

¹³⁷ Wolter 1998, p. 405-409.

¹³⁸ Samenvatting Miljoenennota 2018.

percentage of the employees of affected firms could get fired. The respective groups depending on government contracts would see their total income gradually decrease.¹³⁹

Taxes on labour and profit are the next group to feel the aftershocks of decreased consumption levels.¹⁴⁰ Reduced consumption will result in less work, whereupon there will be a reduced demand for personnel. A company cannot keep their full staff employed if they do not produce the revenue to cover for it. The result will be a gradual decrease in the employment rates of the affected population and their total income. That has various consequences for tax generated revenue and government expenses. The tax revenue generated by profit is first to decrease.¹⁴¹ Partially due to contract protection, a company cannot instantaneously adapt to depressive economic changes by downsizing.¹⁴² When the need and possibility arises, a percentage of the employee contracts are terminated due to redundancy.¹⁴³ In principle, that would mean a similar decline in tax revenue from labour sources. However, there is a social security system in The Netherlands preventing such a decline. A percentage of the tax employees pay goes directly to a social security fund. From that fund, employees receive unemployment benefits equal to 70-75% of their last earned salary.¹⁴⁴ Over those benefits, they have to pay tax as well.¹⁴⁵ Therefore, the tax income decreases by a smaller percentage than income generated by labour. However, the tax expenditures increase to cover these salaries. On top of that, the tax agencies only see a percentage of the benefits returned, as the rest is for the ex-employee to spend. Due to the rising costs to cover these benefits and reduced tax income in the downward spiral of the business cycle, the spending capacity of the government in other areas will decrease.

Taxes on property are a different matter. These are tied to the ownership of certain goods. That means the goods were already purchased at a previous point in time. Therefore, the income generated by these taxes does not seem affected by changes in the business cycle at first. However, these taxes are a returning expenditure. Therefore, they do encumber the

¹³⁹ See Miljoenennota 2009-2011, appendix 3.2.

¹⁴⁰ Taxes on profit should be recognised as labour tax, as profit is income generated by labour as well.

¹⁴¹ Ibid.

¹⁴² Temporary labour contracts cannot be terminated before their termination date, unless hard to fulfil conditions apply. Apart from labour contracts, other contracts are protected to a certain degree as well. Rent contracts (7:290 of the Dutch Civil Code) and even negotiations broken off in a certain stage are eligible for at least damages (HR 18th of June 1982, NJ 1983, 723, r.o. 3.5).

¹⁴³ Mostly under conditions of damages or re-employment if there is demand for labour within the first 6 months, see: Ministerie SZW 2017, p. 4-5.

¹⁴⁴ See the [webpage of the UWV](#), the instance handling the payment of the social security claims. However, this is not the only group who can claim an income from that fund. People who have reached the retirement age, will receive a basic income from the fund as well.

¹⁴⁵ See the [webpage of the Dutch tax authorities](#).

spending abilities of those who have to pay them. The moment someone would be unsure about maintaining their income, it is reasonable to assume they would attempt to cut expenditures in order to remain more financially secure, which can mean cutting these taxes. It is hard to predict when taxes on property would feel the effects of the depression. While it seems reasonable to assume people will attempt to cut those expenditures as soon as they notice they will not be able to realise enough income to support it, there is an argument against that claim in Honneth's recognition theory. Possession of certain property, such as large houses and expensive cars, are seen as achievements.¹⁴⁶ Such property can be seen as a measurement tool, used to create a standard for a certain lifestyle which humans want to achieve.¹⁴⁷ A contrario reasoned, the loss of such property could mean failure in the eyes of other individuals. Not only would there be less property to be recognised for, but the road to achieving the recognition goals will be longer again than before; it will feel as multiple steps backwards rather than forwards. As a consequence, the individual could be prone to the direct loss of recognition or even denigration by others. Therefore, there is reason to assume not all of the property with tied tax burdens will be instantaneously jettisoned the moment an individual's income and spending power are cut. Individuals will try to hold on to these objects for as long as possible. The tax generated revenue by property tax is set to gradually decline correspondingly, with perhaps some lag to account for.

During a state of economic downturn, the spending power of all these parties involved gradually decreases. As can be seen in the paragraphs above, the parties share a certain dependence on each other for the height of their income. When one of the parties generates a significantly lower revenue, they practically end up pulling the others down with them.

Focusing bankruptcy legislation on the restructuring of companies can keep these adverse effects on employee recognition and protection, as well as on the economy to a minimum. Considering the economical stakes, a call for action can be considered more of a necessity than just a possibility to fare a certain course.

4.4 The shortcomings in bankruptcy practice

However, not everyone will agree to that. Certain parties profit of the current situation and will want to avert any and all change reducing their profitability. Inequality between these and the other parties has become the most tarnished part in the history of bankruptcy practice.

¹⁴⁶ Reece & Brandt 2009, p. 85.

¹⁴⁷ Schor 1998, p. 3.

Sight of the historical ideology that used to be the foundation of bankruptcy legislation, was lost. In the whole of said history, one purpose clearly shined through, floating above insolvency legislation like an ideological sun: Insolvency legislation was designed to regulate insolvency procedures, granting creditors and their claims an equal status in comparison to one another. The only exceptions were those with security rights on certain goods, allowing them to have a privileged claim on that good. Those security rights used to be the only exception to the standard procedure. Now, they have become the standard procedure itself rather than the exception they were meant to be.

4.4.1 Inequality in Dutch bankruptcy practice

In The Netherlands, the banks have a binding standard contract of terms and conditions, which apply to each of their customers. In that, it does not matter whether the bank has an outstanding loan to them or not. The moment the customer owes money to the bank, the bank receives a security right on all goods of said customer to secure the debt with.¹⁴⁸ On top of that, the Dutch Supreme Court decided to allow banks the right to simply register a right of pledge on all of their debtors' property, by registering a note with the tax office handling security rights saying nothing more than those exact words. It is considered verifiable enough when the administrator is able to determine who those debtors were at the moment of registration, to see if the bank is indeed eligible to see their preferential claims granted.¹⁴⁹ That means the major financial institutions tend to have a preferential claim on most of the goods of the company.

And that is not the end of it either. Suppliers are capable of supplying goods under the reservation of ownership, meaning they retain ownership until the supplied goods are paid for.¹⁵⁰ Creditors cannot have preferential claims on goods that are not property of the debtor. However, the Dutch Supreme Court ruled otherwise. Apparently the debtor has a right of conditional ownership on those goods. Therefore, the creditors can have a conditional security right on the conditional property rights resting on those goods. That conditional right granting security then automatically becomes a full-grown security right once the conditions of ownership, meaning payment of the supplier, are fulfilled.¹⁵¹ As a result, the financial institutions can almost automatically and instantaneously place a security right on all goods

¹⁴⁸ Article 24 in conjunction with article 26 of the general terms & conditions of Dutch banks (Algemene Bankvoorwaarden).

¹⁴⁹ HR 3rd of February 2012, *NJ* 2012, 261, r.o. 2.36 (*Dix q.q./ING*).

¹⁵⁰ See article 3:92 of the Dutch Civil Code.

¹⁵¹ HR 3rd of June 2016, ECLI:NL:HR:2016:1046, r.o. 4.2 (*Rabobank/Reuser*).

eligible for such a right.¹⁵² Those that suffer from the inequality tend to be the minor creditors: suppliers of goods that were already sold, owners of a building rented by the debtor, lease companies or creditors with other forms of credit, such as unsecured loans.¹⁵³ The major financial institutions have the edge over the rest of the claimants in a bankruptcy procedure.

In nearly all of history surrounding security rights, pledges required the secured item to be held in the physical grasp of the party that would be eligible to the proceeds.¹⁵⁴ Since that changed, these major institutions manage to gain a security right on most of the goods of their debtors with very little effort. In case of a default or bankruptcy, the institutions take these goods from the insolvent estate to execute them purely for their own gain, leaving the rest of the creditors with barely anything at all.¹⁵⁵ When focussing on restarting bankrupt companies, one of the biggest problems such a creditor can cause, is the taking away of all the secured goods in the insolvent estate to execute them. The administrator needs to be able to transfer these goods with the rest of the company to be able to deliver a package that is ready to continue operating again. On top of that, an incomplete package will decrease the price a curator can ask for a bankrupt company. Taking the goods out of the insolvent estate would therefore put the other creditors at another major disadvantage, as they will need to make do with even less proceeds from the sale of the insolvent firm.

4.4.2 Inequality and recognition

The struggle for recognition demonstrates an effect on the mentioned parties and every relationship between them in the situations where recognition is either not given, no longer given or even denied. In bankruptcy practice, there are three thinkable situations where the amount of recognition is denied, reduced or lost. Firstly, small creditors are not held on an equal footing anymore and are no longer treated as such. Major financial corporations were already noticed to have strong lobbying power in other studies.¹⁵⁶ However, they were granted more power in laws specifically designed to grant them such power in those cases. In this case, the basic principles behind insolvency legislation are simply dismissed, which were specifically designed over the course of history to cut such comparative power differences

¹⁵² Which is any good that does not qualify as real estate or has to be registered, such as airplanes.

¹⁵³ Although even secured loans would come second if the bank registers their pledge sooner, which tends to happen first thing in the morning.

¹⁵⁴ See Lokin 2012, G69, p. 186. Most countries in continental Europe changed that only near the end of the 20th century or early in the beginning. In France, this construction was upheld the longest of all, until 2008. See Zwolve & Lokin 2014, Part V, chapter I and II.

¹⁵⁵ Van Galen 2014, 4, second paragraph.

¹⁵⁶ E.g. Mügge 2006, p. 1014-1016; Quaglia 2008, p. 568; Posner 2010, p. 45; Posner & Véron 2010, p. 405; Lall 2012; Young 2012; Chalmers 2015, p. 486

between creditors short. In the light of the initially intended equality of creditors, there is a denying of the historical right in the current situation to the weaker parties. Such denying of their equal rights is found in the refusal of payment of their outstanding credit as well as the inequality in payment of creditors in a case of insolvency. Careful application of the recognition theory would classify such matters as the denying of rights to smaller creditors, all for the benefit of the already powerful major financial institutions. For the purpose of balancing these powers out again, insolvency legislation and practice will need to be reformed.

Secondly, the bankrupt firm itself is an object which one can be recognised for. A firm performing well, being able to maintain the status quo or even grow can be seen as an achievement for the owners, directors and its personnel in the sense of Honneth's third pattern of recognition. Being tied to such a company performing well would result in recognition for this achievement. When one attempts to reason a contrario, having to diminish the company size or no longer having the opportunity to invest would have the opposite effect. The involved parties would find the degree of recognition they held in a more financially stable situation now decreased or even completely lost.

Thirdly, employees that lose (part of) their income due to the company's state of bankruptcy and without having actively contributed to it, find themselves somewhere in between Honneth's second and third patterns. First, the original promises made to the employees in the terms negotiated in their labour contracts will no longer be fulfilled, for the benefit of the other parties. They find themselves coming in second-to-last place, being completely dependent on other parties who will decide over their future.¹⁵⁷ Secondly, their skills and knowledge will remain on an equal level, but they will be recognised less for it. With a decrease in labour demand and an open opportunity for employers to renegotiate employee contracts for lower wages, employees are likely to receive less salary-based appreciation for their input. Ex-employees and reinitiated employees with lower wages may feel denigrated or even insulted for being denied the degree of recognition for their skills and effort they previously held. The result of that can be a feeling of being denigrated for receiving a lower salary or being dependent on benefits while the employee has proven himself to possess certain levels of skill or knowledge in the past, enabling him to benefit the company. As a

¹⁵⁷ The owners would be the ones in last place. Then again, their position granted them the opportunity to steer the company in another direction.

consequence, the employee might be unwilling to participate in the labour market again until the wrongs done to him have been righted.

4.5 Hurdles on the path to reformation

Having considered the historical development of insolvency legislation and its place in society together with its rather current aspects which result in negative effects, we have arrived at what is perhaps the key part of this thesis: concrete identification of the points that require change. First of all, the civil interest needs to make way for the public interest. As long as the civil interest prevails, nothing but the leftovers of the insolvency procedure remain for the public interest. Secondly, any possible legal misuse has to be considered beforehand and preventive action taken. Insolvency procedures should not be used for other purposes than actively breathing new life into companies. Thirdly, its practical execution needs to be considered.

4.5.1 Public over civil

The first step required is to reform the ideology behind insolvency legislation. The civil interest needs to make way for the public interest. However, major financial institutions now hold the most powerful position among creditors. They will not let their lobby power go to waste and let their rather outstanding position get taken away by watching from the sidelines as tamed sheep. There has to be a good reason for the legislator to stand up against such economic giants to risk possible economic counteraction as well. For that, the legislator has to be either convinced of the success of the redeveloped bankruptcy structure or see the consequences of their own mistakes in the current legislation. Those mistakes can already be perceived in the numbers that are present now. In the current state, the next recession will strike even harder, with not a single possibility to halt its ravaging effect on the economy. The result will be that all the private interests will suffer. As the public interest is the cumulative of these interests, it will suffer as well. Unfortunately, there seems to be the problem that the banks are being overprotected while the lower and even the middle class will suffer from the downturn of the economy even worse. The chances that the legislator will take action seem rather low at this point in time due to earlier discussed lobbying power. However, keeping the main aim of bankruptcy legislation the protection of civil interest may deem useful after all for the time being. The legislator's view may change after the effects of the next economic depression will be visible. The current legal circumstances will then show their economic downsides in the next depression. There will be a directly comparable situation to the company restructuring of the past depression and the difference the restructuring made.

However, then the damage will already be done. As a result, the employees and the middle class will be economically impaired. The horrifying prophecy will then have become reality.

4.5.2 Legal problems

Secondly, we need to take a look at the possibility of legal loopholes. The most important practical problems that require careful consideration, are possibilities of ethically fraudulent behaviour. By making misuse of a bankruptcy procedure, firms can victimise a great number of involved parties. Such dangers have to be considered and, preferably, preventively taken care of. There are two rather obvious parties that can be duped by harmful exploitation of bankruptcy procedures: the creditors and the employees.

When the company is declared bankrupt, the creditors' hands are tied by the administrator and the court. Depending on the liquidity and liquidation value of the insolvent estate, creditors receive a percentage of the money that they are entitled to.¹⁵⁸ The rest has to be depreciated as bad debt, as that part of the extended credit will never be paid. Allowing for a liquidation procedure and company reconstruction in times when liquidity problems are noticeable all over the economic situation, a reconstruction would practically result in the clearing of the balance sheet of debt. Assets would be liquidated in package form and sold to the highest bidder, who will win the bid at a fire sale price due to decreased liquidity. The proceeds will not be high enough to cover the majority of the accumulated debt by the insolvent. Therefore, bankruptcy procedures could be used to cheaply get rid of company debt. Not only would keeping such a possibility open hurt future transactions on the financial market, it would encourage current companies with low solvency ratios to apply for a bankruptcy procedure.

The verdict of the European Court restrained the administrator even further, by tying his hands until he is actually given the authority.¹⁵⁹ A bankruptcy administrator is not permitted to take any action for the bankrupt firm before the declaration of bankruptcy, other than perform research on the matter of insolvency and the action to take after the declaration. He requires authority over the insolvent estate, which needs to be given to him by the competent court.¹⁶⁰ The current focus lies entirely on realising the highest available liquidity to pay the bankrupt company's creditors with rather than on the reconstruction of the firm. That means he no longer has the availability to search for possible investors and make a package deal before the declaration of bankruptcy due to lack of authority and has to wait until the situation

¹⁵⁸ In this paragraph, liquidation means the sale of the bankrupt firm using the pre-pack method.

¹⁵⁹ ECJ 22nd of June 2017, [C-126/16](#) (*FNV/Smallsteps BV*), 48.

¹⁶⁰ Polak/Pannevis 2014, p. 250: the main task of the curator is liquidation of the insolvent estate.

is already dire. From the declaration of bankruptcy on, the company has to stop operating while the administrator takes care of things, unless profitability is to be reasonably expected. On top of all that, any returning obligations such as rent, interest and employee salary keep racking up the credit during bankruptcy. Of those credit posts, rent and employee salary have to be treated as preferential claims.¹⁶¹ Not only does the total credit rise in that period of time, but the preferential claims that have to be paid before the concurrent creditors receive their share increases as well. When the costs keep racking up like that, the price that can be considered an acceptable offer of an investor for the whole of the company increases too. Otherwise, those concurrent creditors are bound to object against the administrator's decision, as they feel they would receive more during full liquidation of the company.¹⁶² As a direct consequence, a restart is less likely to take place, both due to the rising price and the demands of the creditors.

One group of creditors in that procedure consists of the company's employees. As was noticed before, the employees have quite decent protection of salary payment. However, that protection is granted as insurance by governmental institutions, funded with tax payer's money. When the company cannot repay the institution the salary claim, the government has to utilise funds otherwise invested in other projects. The result would be a financially stable company, but at what cost? The utilised funds cannot be used in other projects anymore.¹⁶³

On top of that, the bankrupt company receives the opportunity to evade the contract protection employees are granted by Dutch and European regulations. In the current situation, the company needs quite a tight case and thick file on either their financial situation or the functioning and behaviour of every single employee, to be able to terminate contracts before the end of the time span they are signed for. Even then, it remains a costly process, which is meant to put companies off of attempting to end contracts until it has become both a necessity and inevitability in order to financially survive. However, bankruptcy procedures are exempted from such protection. Administrators can almost freely fire all company personnel, without having to pay attention to any of the protective mechanisms in place against employee contract termination and without having to account for repercussions.¹⁶⁴ As a result,

¹⁶¹ HR 19th of April 2013, ECLI:NL:HR:2013:BY6108 (*Koot Beheer/Tideman*) for rent, article 40 of the Dutch Bankruptcy Code for salary.

¹⁶² Polak/Pannevis 2014, p. 262. The main purpose of this procedure is to prevent and repair "mistakes made by the administrator", see HR 20th of January 2006, *NJ* 2006, 74 (*Bennink Bolt/Curatoren*).

¹⁶³ See paragraph 4.1.2.

¹⁶⁴ See article 13 and 13a of the Dutch Bankruptcy Code. Any action taken by the administrator is legally binding. Firing employees can be reversed if the employees desire so, but the firing of employees itself is an

chances are companies would steer towards bankruptcy procedures on purpose. The newly restructured company would benefit from misuse of this mechanism in many ways, with employees and social constructs carrying the costs of it. That is exactly what should be prevented at any cost.

4.5.3 Preventive measures

To be able to prevent a situation like that, checks and restrictions need to be brought in place. The first is an even more independent administrator or accountant that will handle the bankruptcy procedure and pre-pack sale. The insolvency practitioner will no longer represent the combined creditors, but the state. He will be handling in the public interest rather than the civil one. Insolvency practitioners already have a slight degree of such independence, allowing them to make decisions that contribute to the public interest.¹⁶⁵ Also, he has the ability to discover whether the situation was reasonably expectable and inevitable, since it is part of the practitioner's task to research the reason behind the bankruptcy. If there was any kind of opportunistic, fraudulent behaviour involved, there should be heavy repercussions to follow for the directors of the firm. Aside from carrying the costs of the bankruptcy procedure, there should be an increased degree of liability for directors guilty of behaviour which can be directly linked to a state of bankruptcy. Not only should they carry the difference in the proceeds of the negative estate, but compensate the state and employees for costs and loss of income as well. The reach should also be expanded, allowing for an open search and retrieval of hidden or misappropriated capital.

On top of that, the Dutch law had a rather new concept implemented in 2017. It allows the court to prohibit directors and 'actual managers' who have committed fraud to become directors or take top managing positions in other companies for a maximum of five years. The public prosecution office will be asked by the insolvency practitioner to request such a restraint from the court in the bankruptcy case.¹⁶⁶ Since it was originally developed to combat bankruptcy fraud, it would be the ideal measure in combination with the other mentioned ones to prevent misuse of the new bankruptcy procedure.¹⁶⁷ The light requirements for the court to actually sentence the accused to such a prohibition make for an excellent reason to apply this

action that has to be taken by administrators early on in the procedure. Considering that they will not have had the time to scrutinise the company and that causality lies with the filing of the bankruptcy, they would not be liable.

¹⁶⁵ HR 24th of February 1995, *NJ* 1996, 472 m.nt. WMK (*Sigmacon II*).

¹⁶⁶ Dutch Bankruptcy Code, articles 106a to 106e; Kreileman 2016, paragraph 7.1. Actual managers is the term used to define managers pulling the strings behind the scenes, apart from the directors. That means it should allow the state to prosecute those using directors as marionettes.

¹⁶⁷ Verrest & Heukels 2017, p. 51.

punishment.¹⁶⁸ Temporarily preventing the accused to manage a company again and taking the profitability of committing fraud out of the equation can both have a preventive effect on his future actions and a deterring effect on other possible committers, depending on the chance of conviction.¹⁶⁹ However, as was noticed by different writers, there is still a long way to go before the measure is in perfect working condition. As of now, there is still the case of key positions and certain company types not covered by the restraint.¹⁷⁰ In addition to that, information regarding companies outside The Netherlands is lacking. Such allows for a foreign legal person to act as director in The Netherlands, while the director of the foreign company may have a Dutch restraint. Any measures from the European Union against this possibility are currently still in development.¹⁷¹ Finally, the register for people with such a prohibition already exists, but there is no legislation attributing the possibility of publication. Therefore, the register is not public at this point, which is why the Dutch notaries cannot check for the existence of a restraint beforehand.¹⁷² While there is still a long way to go for these preventive measures until they are developed and effective, there is certainly future in it.

4.5.4 Reparative measures

There is also another ethical point that should be considered regarding the reinitiating of employees. As was noticed in paragraph 1.3, the total number of employees directly struck by the bankruptcy was over 420.000. Of those jobs that would originally have to be depreciated as lost, company restarts recreated around 289.000 jobs again. However, of those 289.000 jobs, only 119.000 vacancies were filled by employees previously struck by those bankruptcies. While the potency of focusing on restarting insolvent companies clearly could be in the public interest, an ethical and social point of view would require the amount of employees transferred to the restarted company to be equal, with perhaps a small deficiency for those that do not wish to be reinitiated.

In the case the company wishes to terminate employee contracts in a normal termination procedure due to employee redundancy, the Dutch Uitvoeringsinstituut Werknemersverzekeringen may approve the termination request conditionally. One of the conditions on which the approval is granted, is that the employer does not have the right to hire different people than the fired employees for existing functions in the half year to

¹⁶⁸ Ibid, p. 52-53.

¹⁶⁹ Wright 2010, p. 3.

¹⁷⁰ Kreileman & Bulten 2016, paragraph 3.1, 4.1, 4.2, 6.4.

¹⁷¹ Zilinsky 2016, p. 183-184.

¹⁷² Kreileman & Bulten 2016, paragraph 2.3.

come.¹⁷³ However, employers are allowed to offer the old employees a new contract for a lower salary than before. Any employees rejecting the new contract lose their right of the reinitiating privilege. That would allow the employer to find new personnel on a larger section of the labour market, enabling him to hire people from a larger pool of candidates for a potentially lower price. Under perfectly ethical conditions, employees will need to be reinitiated under the old contract's primary conditions.¹⁷⁴ Forcing any employers with liberal ideas to reinitiate employees deemed necessary for the continuation of the company under the old conditions of their contract is a necessity to be able to achieve the goals of this revision of bankruptcy legislation, which include both protecting employee rights and preservation of the economy. Otherwise, employers would have too much of an opportunity to reduce the salary of their employees, which will cause a similar effect as the situation described in section 4.3. Implementation of an extra article or paragraph enforcing this rule could achieve the wanted result rather easily.

4.5.5 Financial collateral

A state of bankruptcy fixates the insolvent estate in such a way, that nothing can change the content of the insolvent estate without consent of the administrator.¹⁷⁵ There are only two exceptions to that rule. The first exception exists of changes that benefit the insolvent estate, either by shrinking the absolute credit, growing the absolute debit or increasing the debit/credit ratio, allowing for a better rate of coverage for the creditors. The second exception consists of the separatist creditors, who can claim the goods which they have a security right on for execution purposes.¹⁷⁶

To be able to make any real difference in the new situation, the administrator needs the privilege to take action at a moment's notice and without interference from creditors claiming to have preferential rights over certain goods. Therefore, it should be the case that a bankruptcy fixates the insolvent estate even more absolutely than it does now, no longer allowing creditors to take goods out of the estate after bankruptcy.

Aside to that, the proceeds of an open auction liquidation are expected to decrease when focussing on restarts, due to a forced package sale at a fire-sale price and due to lack of time

¹⁷³ 7:681 of the Dutch Civil Code, under d.

¹⁷⁴ Bouwens & Duk 2015, p. 43-44. Primary conditions involve salary-bound and holiday clauses. Any (secondary) extras would reasonably need to be tempered with. Otherwise, there would not be need to fire personnel either.

¹⁷⁵ Article 20 of the Dutch Bankruptcy Code; HR 12th of April 2013, ECLI:NL:HR:2013:BY9087 (*Megapool/Laser*).

¹⁷⁶ Article 57 of the Dutch Bankruptcy Code.

to find a suitable buyer for an honest price. Therefore, an administrator needs more time to operate to be able to find a buyer for a better price. If he does not succeed in that quest, then the creditors last in line should not feel the consequences for that, as they will truly be left empty-handed. It would be unreasonable to make any difference between these creditors in what percentage of their claim they will see fulfilled due to these potentially lower proceeds. The only solution left at that point is equality of creditors.

These points combined show that it is not without reason returning to the basics of bankruptcy legislation is deemed a necessity. The equality of creditors, be it a single man or a large institution, is a key principle in the history of bankruptcy legislation. To be able to effectively and reasonably handle bankruptcies by restarting without putting the smaller creditors at an even bigger disadvantage, as well as to enable the administrator to carry out his new duty consisting of restarting the company as effectively as possible, we need to redevelop bankruptcy legislation and practice keeping these ideas in mind.

5. The desired situation

When weighing all these points against one another, there are three adverse effects noticeable. First of all, the discussed incomes are quite dependent on one another. An increase for one participant in the cycle can instigate a continuous increase in the whole of the business cycle. The same thing goes for a decrease, potentially lowering the results of all the other parties. In this chapter, a potential halt for the decrease will be discussed. The second point of interest is that the ones taking the hardest fall currently are the employees. Not only do they receive less overall recognition for their abilities, but they may even become dependent on benefits, which is another blow to the recognition of their abilities. On top of that, the smaller companies pay the price, having to depreciate bad debt for the gain of the major financial market players in case of the bankruptcy of their mutual debtor. The question we are left with is: how should insolvency legislation and practice then change to provide a solution for these problems? This chapter will elaborate on the answer to that question. To come to such an answer, the adverse effects and the mechanics that will be used to reduce them in the desired situation will be discussed.

5.1 Transformation of bankruptcy procedures

To create a desirable situation for the involved parties, there are two areas that require change. Firstly, there should be minor changes in legislation. Secondly, the practice should take a different form, comparable to the previous pre-pack.

5.1.1 Speed of action

Two minor hurdles in legislation prevent us from focussing on the restructuring of insolvent companies once more. The first hurdle concerns the security rights which can be exploited even in bankruptcy.¹⁷⁷ The reason behind that lays within article 57 of the Dutch Bankruptcy Code. It literally states the following in paragraph 1: “*Holders of pledges and mortgages can exercise their rights as if there were no bankruptcy*”. Solely removing this paragraph from the Bankruptcy Code would already achieve most of the goals set out in the previous paragraph, by enabling the administrator to focus on the package deal without having to take the probability into account that the goods in the insolvent estate are burdened with a security right.¹⁷⁸ While it would not solve the issue with the distribution of proceeds among creditors

¹⁷⁷ The following exists for surséance as well, laid down in article 232 under 1°. As is explained later, the same reasoning applies to that.

¹⁷⁸ Considering the ease at which major financial institutions can secure goods, which was discussed in 4.2.2, the existence of security rights are more probable than not in case the bankrupt company owes money due to a taken loan.

as the secured creditors would still be paid first, it would enable the administrator to act immediately after the declaration of bankruptcy.¹⁷⁹ The administrator would no longer have to consider the danger of anyone tearing the assets of the company apart, enabling him to take action at the considerable, appropriate speed. That allows him not only to work more efficiently, but also grants him the opportunity to carefully evaluate offers as the competition for the proceeds of the goods is eliminated. Allowing the bankruptcy administrator to take action at such a considerable pace has been found to reduce the costs of bankruptcy procedures overall due to faster resolving of the situation, leaving more for the creditors struck by their debtors' state of bankruptcy in the United Kingdom.¹⁸⁰

Surséance of payments is an interesting mechanic for that in many ways. When granted, the court grants the debtor temporary breathing room, giving him a chance to find a way out of liquidity predicaments. An administrator is appointed to supervise the process. If the debtor is unable to solve his financial problems within the set time, then the surséance will get converted to a state of bankruptcy. It is not without reason surséance is often referred to as the first step to bankruptcy, though.¹⁸¹ In 90% of the cases, surséance leads to a state of bankruptcy.¹⁸²

However, it is quite potent in combination with the pre-pack. Allowing the administrator to take reconstructive action in a reasonable time span under the protection of the surséance the moment any change in financial situation is no longer probable could allow for fast, healthy restarts with package liquidations for a reasonable price rather than a fire sale one. Creating the foundation for a separate, swift procedure authorising the asset sale as is common practice in the United Kingdom would enable administrators to start reconstructing companies as early on as possible. As a result, general bankruptcy costs would decrease, leaving more of the proceeds for the affected creditors. In turn, the amount of bad debt would decrease as well, which would have to be depreciated otherwise by these creditors. As such, the chance of systemic risk occurring would be reduced. The public interest would be served by this, as it would both help to reduce consequential bankruptcies and to keep affected companies healthier, reducing the damage to their liquidity a bit. As a direct consequence, the affected

¹⁷⁹ Normally, the administrator has to wait at least two weeks to give the security holders the opportunity to claim and execute the secured goods. After that, the administrator can execute them as he sees fit. Security holders would still be the first to receive the proceeds from the execution of those goods though, after the costs of the bankruptcy procedure have been paid. See HR 22nd of June 2007, *NJ* 2007, 520 (*ING/Verdonk*) and HR 30th of October 2009, LJN BJ0861 (*Hamm q.q./ABN Amro*).

¹⁸⁰ Goode 2011, p. 473.

¹⁸¹ Couwenberg 2004, under 3.

¹⁸² Vriesendorp 2013, p. 61.

companies' employees would face a decreased risk of job termination due to impending bankruptcy. In that, both the public interest in general and employee interest specifically will be served.

5.1.2 Package deal

However, such results require a second change in bankruptcy legislation as well. In the United Kingdom as well as the United States, the administrator has the privilege to sell the assets as a package rather than transfer the whole of the firm.¹⁸³ By allowing for such a transfer of purely the assets of the insolvent estate, the new exploiter of the firm has room to negotiate on contract conditions regarding rent, loans and labour, rather than being forced to continue under the old ones.¹⁸⁴ Since the development of bankruptcy legislation happened in a rather similar fashion, even though the time and place differed for most developments, implementing such a mechanism may have the same positive effect.

By choosing to create a package deal of necessary assets for a restart, transference of undertaking as it was meant by the European Court of Justice can be evaded. The Court defined a non-exhaustive list of indications which can be used to define whether or not the whole undertaking is transferred in a different case, which were from then on referred to as the Spijkers-criteria.¹⁸⁵ The Spijkers-criteria consist of a set of non-limitative indicators whether or not we are dealing with a company merely changing in name rather than identity.¹⁸⁶ Each of these indicators question the current firm's comparability is to the old company. The first and most important indicator is the nature of the firm. It practically questions the firm's activities. However, it is not seen as enough if the new or, in this case, restarted company practices the exact same operations. Other similarities are required, such as the company structure and task division, reinitiating (nearly) all of the old employees, using the exact same assets and the duration of the time gap between the two companies.¹⁸⁷

¹⁸³ Finch 2009, p. 393-394; Moore & Slusher 2007, nr. 9.

¹⁸⁴ In case of a BV/NV, the contract party is the company rather than the investor. Transferring the ownership of the firm forces him to take on the old contracts under the old conditions. Renegotiation can help to cut the costs. However, it could have negative consequences for the employee contracts as well. Therefore, possibilities regarding renegotiation of labour contracts should be restricted. More on that will be discussed in paragraph 5.3.

¹⁸⁵ ECJ 18th of March 1986, *NJ* 1987, 502, r.o. 11-13 (*Spijkers/Benedik*).

¹⁸⁶ They are merely indicators, non-decisive ones on a non-limitative list. That means that any other factor urging a judge towards the decision that they are dealing with a transferred company is a legitimate reason for them to use their discretionary power and rule the situation a transference of undertaking.

¹⁸⁷ Bouwens & Duk 2015, p. 303-304. There is also a difference for companies that are labour intensive (such as cleaning companies) and those that are more capital intensive (such as hospitals). Those characteristics add more weighed value to the employee file and assets respectively, diminishing the value of the other indicator.

5.1.3 Spijkers-criteria in practice

The existence of such a construction can raise questions regarding the judgment whether or not such a sale would be considered a transfer of undertaking. It should be entirely possible to work around the rules set by the European Union. Changing the identity of the company will definitely create a different impression. While the Spijkers-criteria may seem easy to be fulfilled when a company is restarted, a lot of room is left for change. Firstly, outsourcing or insourcing certain processes can help with the reshaping of the image, just as well as a redistribution of tasks would. Secondly, surséance of payments can play an important role in evading the classification of transfer of undertaking.¹⁸⁸ It should be considered a break in operations. No longer does the company operate at its full potential, as creditors may cause issues during that period of time, preventing smooth operation. Suppliers may no longer supply unless payment of the goods can be guaranteed and is paid in full. As such, the period a company resides in a state of surséance should be considered in the time gap between the old and restarted company. Thirdly, Immaterial active cannot be counted in the transfer as it is built up dependently on the company's reputation. With a change in identity, the old company's reputation cannot be considered to be transferred to the new company. Clients notice the change as well, therefore they will be coming out of their own free will and curiosity rather than their past experiences with the old company. Lastly, the management of the company no longer has full power of attorney over the company.¹⁸⁹ Therefore, there is an evolution in company structure. For that exact reason, the company already undergoes a transformation of important parts of its identity.

While there is still discussion possible on the interpretation of the Spijkers-criteria, it is also defensible to say the goal of the bankruptcy procedure is no longer to transfer the company. The reason behind the redeveloped bankruptcy legislation would be to control an economy's downturn, slowing down or preventing the collateral bankruptcies caused in recessions as much as possible on a larger scale. Anything that would happen to the bankrupt company, would be in the interest of the public and the employees rather than the creditors and company exploiters. The company will have become a tool to achieve a certain result, rather than the goal of the procedure.

On top of that, the labour law section in the Dutch Civil Code has a structure which focuses heavily on protection of employees. When laws no longer protect employees in practice and

¹⁸⁸ Title 2 of the Dutch Bankruptcy Code (Faillissementswet), comparable to the American chapter 11 procedure.

¹⁸⁹ Article 228 of the Dutch Bankruptcy Code (Faillissementswet).

thus are in conflict with their own purpose and the structure of that particular code, it is reasonable to no longer apply these laws at all. Finally, legally forcing the buyer to pick his employees from the pool of employees victimised by the bankruptcy procedure, reinitiating them under their old contractual clauses by enforcing the principle of proportionality commonly used in termination of contracts for redundant employees, would eliminate it from useful indicators.¹⁹⁰ When such an indicator has become an enforced, legal standard, it can no longer be used to confirm the identity of the firm. The only exception would be a firm continuing operations without any employees. However, those should be limited in their abilities to hire for the first few months as well. That way, the reduced employee protection by transference of undertaking will be compensated by forced rehires for any employee not considered redundant. Bankruptcy procedures could no longer be used to rid a firm of personnel for any reason other than absolute necessity to survive.

5.2 *The desired situation*

Now the mechanics are clear, the effects need to be considered. To be able to make a proper comparison, the desired situation needs to be discussed. In a critical perspective, the critique on the current situation tends to be followed by a wish for a social transformation.¹⁹¹ Such a transformation then creates a new alternative, differing from reality. There is a slight difference with this case. The desired situation has already existed at one point, albeit not in its completed state. The verdict of the European Court of Justice in the case *FNV/Smallsteps BV* blocked the path insolvency practice was taking.¹⁹² Therefore, its alternativeness of the desired situation lies not in the fact it was never there, but that it is no longer around.

5.2.1 *Employees in the past recession*

The economic downfall in the past recession was already controlled to a degree. In the period between 2007 and 2016, around 28.000 companies with employees working under contract were declared bankrupt in The Netherlands. Those companies had a total of 422.000 employees working for them the moment they were declared bankrupt. Employees of bankrupt companies have their salary credit claims largely secured.¹⁹³ However, they will practically end up being unemployed the moment their salary protection ends if the bankruptcy is resolved with a liquidation of the bankrupt company's assets. Employees have

¹⁹⁰ Bouwens & Duk 2015, p. 412-415.

¹⁹¹ Visser 2017, p. 6

¹⁹² ECJ 22nd of June 2017, [C-126/16](#) (*FNV/Smallsteps BV*).

¹⁹³ They are secured for the 13 weeks before and the 6 weeks once their contracts are terminated after the declaration of bankruptcy, see 4.1.1, *supra* note 104.

nothing to gain from their employer being in a state of bankruptcy for an extensive period of time, with the insecurity about the future lingering above their heads. It is in their best interest to see the bankruptcy of their company resolved as quickly as possible, preferably with a restart and re-employment. Otherwise, they will suffer from the full consequences of unemployment in the end anyway.

5.2.2 Labour supply and demand

It is, however, still possible to engage in a pre-packed transfer of the firm, although the buyer of the firm will be obligated to offer all the old employees a contract with the exact same conditions as before the bankruptcy. The opportunity to reduce the costs is greatly taken from him, lowering the initial price the investor would be willing to pay for the firm. If the European Court of Justice had decided on a similar case ten years beforehand, we would not have seen as many restarts in the period of economic recession. Those restarts were good for a total of 119.000 re-employments and 170.000 vacancies.¹⁹⁴ Had there not have been as many companies restarted with the help of the pre-pack, the recession would have left The Netherlands with an even more downturned economy, due to the loss of another 289.000 jobs on top of the ones that already were lost. While some damage that has been caused by the volatility of the markets has been controlled for, there is more to gain still. Shifting the full focus to making firms financially healthy can save us from falling into such a deep recession again.

It is not only the preservation of welfare that justifies such a solution. Employees still receive the shortest end of the stick in bankruptcy ordeals. However, a restarting company requires employees to be able to operate, even if the number required is only a percentage of the number of employees that were previously employed. As a result of such a restart, the amount of employees that effectively lose their job would be reduced by the percentage that is reinitiated. Therefore, focussing on company restarts should reduce the amount of jobs lost. Aalbers et al. shows that employee retention after bankruptcy in The Netherlands remained quite high.¹⁹⁵ It should be noted the n in this study is relatively small, though, both in general and compared to the number of restarted companies reported by the CBS. Also, the state of the business cycle should also be considered. These companies filed for bankruptcy quite late into the recession. The possibility that these companies were able to financially survive due to the timing should be considered as well.

¹⁹⁴ CBS 2017, p. 17.

¹⁹⁵ Aalbers et al. 2018, p. 49.

Taking that possibility in consideration, there should also be a control in place for the possibility that there will be difference between labour supply and demand as well. Such a difference could cause a potential decrease in labour price, whereupon participation in the labour market becomes less attractive. With a more constant price for labour and a higher rate of employment, the national income should remain at a higher level, allowing for a higher degree of consumption. Consumption, in turn, would not be affected as much by job insecurity as there will be a higher number of jobs retained.¹⁹⁶ Altogether, the economy would remain more in balance than in a comparable situation without such control. A higher number of employees would therefore maintain their jobs and their salary than before.

5.2.3 The Dutch taxation system

In the current situation, a decrease in tax revenue was noticeable in at least two out of three tax categories. In the desired situation, that should be different. When states of insolvency are resolved at a higher speed and when more employees remain employed, employee income should remain more constant and higher over time. In turn, income tax revenue should not decrease at such a devastating speed. Aside to that, a lower budget will be required to cover all the costs of social welfare. With a higher budget and lower costs, there will be more room to invest in the economy, which will help them keep it afloat even better.

With employees mostly maintaining their jobs and their income, GDP should remain more in balance. Because more employees maintain their jobs, job insecurity should not strike as devastatingly as it did in Wolter 1998.¹⁹⁷ With a lower effect from job insecurity affecting the public spending, consumption levels should also suffer less decreases. Due to its dependence on it, the levels of consumption tax revenue should follow the example of consumption. Altogether, tax revenue should remain closer to the budget plans of the government. In turn, that would leave them with more to invest in the economy. Those projects will further result in employment opportunities by allowing the government to invest in areas necessary to keep the economy afloat.¹⁹⁸

The effects on property taxation is more difficult to predict. It is unsure yet whether there would be any changes in property taxation revenue at all. Also, the possibility exists that these effects are lagged. Any claims connected to property taxation would require more research, preferably in a positivistic paradigm.

¹⁹⁶ Switzerland was noted to be negatively impacted by job insecurity in the past, see note 108 and Wolter 1998.

¹⁹⁷ Wolter 1998, p. 405-409.

¹⁹⁸ Such as road development et cetera.

6. Conclusion

6.1 Concluding thoughts

In this thesis, bankruptcy legislation and practice, as well as its function in the economy has been examined. The basis was formed by a layered research question: *How do bankruptcy legislation and especially practice have the potential to reduce the procyclical effects produced by economic downfall in The Netherlands?*

Having examined the current situation, the conclusion can be reached that as things are now, the situation is far from perfect and has only gotten worse over the last few years. In the current situation, the ones who profit from a bankruptcy case are the large financial institutions, while having to take the least action in return. Smaller creditors often end up losing their whole investment, which tends to require more careful thought before investing than major financial institutions require, due to the impact a bad debt could have on the smaller creditor. Major financial institutions engage in massive amounts of business transactions every day which can cover some bad debt, while the impact on smaller creditors is too big to simply ignore.

That aside, the downward spiral in the business cycle causes negative consequences for every party involved, who on top of that are connected. Any stabilising actions the bankruptcy practice used to offer by keeping companies operating with as little downtime as possible by using the pre-pack is considered to be no longer an option. The result of it all is that when one party loses, the others feel the consequences and end up losing too. There was reason to believe more could be done to decrease the downfall of the economy, keeping the general welfare on a more stable level. However, I believe there is room to evade the judgment of the European Court. There seems to be opportunity still for proper control, even more so when redeveloping the method bankruptcies are handled. However, the road to the desired situation is still long.

Firstly, bankruptcy legislation should make the English version of the pre-pack both a possibility and the standard, allowing for a transfer of merely the assets necessary to restart the company in a slimmed down form. Such a format was proven to have a useful effect in the United Kingdom, increasing the percentage of the proceeds that remained due to lower costs of the bankruptcy procedure. In The Netherlands, the Dutch pre-pack has shown to have saved nearly 290.000 jobs, giving employees and the economy more stability. In practice, the only differences with the English pre-pack were that a full bankruptcy procedure was still

required in The Netherlands and that the complete group of employees had to be transferred. It was employee overprotection that has caused the downfall of the Dutch pre-pack, while it is not necessarily a breaking point. There is a lot of room to focus on company reconstruction still, while saving the employees in the process as well. With the focus on public rather than civil interest, it is no longer defensible that everything has to be transferred in full. No longer is the goal the transfer of the company, but the preservation of the economic situation. In that, regulations surrounding the transfer of undertaking no longer achieve the goals they were written to serve. However, they do not serve those goals anymore in the current situation either. The slimmed down version of the pre-pack could solve all these problems.

However, such a solution comes in the form of a certain mechanism. Said mechanisms are tools, which can be used for actions they were never designed for, which includes potential misuse. Not only could such misuse have severe consequences for the financial market, it could have an effect that would result in a similar situation we are in now. Such consequences should be prevented at any cost, by restricting the use of the mechanism. Reverting to the past principles of bankruptcy legislation can help with that. Co-operation with the public prosecution's office to restrict fraudulent directors and taking whatever they have as punishment, as well as letting a third party control the process of restructuring can solve the majority of the problems, as possible offenders will take extra care not to act out of line, in fear of the consequences. While the security mechanisms that should prevent fraudulent behaviour are already in place, they are far from perfectly shaped. A lot of work is still required to bring everything in working order. Implementing the system now without considering those faults will most definitely result in a failure. Regardless, these ideas definitely have potential to protect the economic state of welfare in future times of crisis. Everyone would benefit from better economic control in a recession, allowing for company restructuring while protecting the employees, who are affected by it most. Especially that makes it worthy of consideration.

6.2 Limitations

While a lot of factors and possibilities are taken into account, it is doubtful everything has been considered in this thesis. I may have overlooked potential problems with the effects in practice of the mechanisms, both reconstructive and protective. The reason lays within the critical paradigm, as there are no practical results to work with. Everything is based on reason and theory. While it can be challenging to find these problems, experiments may give rise to results worth considering. Therefore, it may be useful to develop an experiment in an

environment that allows for the desired situation to come into practice. Especially the results of job insecurity and effects on property taxation revenue or missed possibilities of misuse in the desired situation could potentially be uncovered with evidence from experiments.

Aside to that, the desired situation in this thesis destroys the rather secure position of large financial institutions. In the past, the collapsing of financial institutions required governments to interfere and support said institutions for the sake of the citizens who would otherwise lose their money. The consequences of taking their secure position away may have severe results on the economy. Further research should study the effect such a collapse would have on the economic state and whether it is possible to prevent the possibility of economic downfall through other monetary safekeeping mechanisms, as giving banks a trustee position rather than allowing them to actually invest the money earned by the hard-working labourers.

While these limitations seem to have arisen due to the choice in perspective and methodology, it seems unlikely that any other choices would have yielded more favourable results. Firstly, this research can be seen as a precondition required to be fulfilled before one can reach the point where the missing information can be utilised and placed in proper perspective. Secondly, it can function as the pilot in a large scaled research project from which insolvency law, accountancy, macroeconomics, philosophy and psychology could all benefit.

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