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Some observations about contemporary challenges for the functioning of insolvency and restructuring law and practice

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1. Introduction

Thank you for the invitation to give a key note speech at the 23rd Annual Conference of the International Insolvency Institute taking place here in Amsterdam.

I start with a little alert. Unlike most of you, I am not an insolvency practitioner. As a judge, I have worked in first instance and appeal courts before I was appointed justice at the Supreme Court of the Netherlands. Insolvency and restructuring cases use to be a rather small part of my workload. However, according to my information, the focus of this speech should not be on insolvency and restructuring law and practice as such. I am asked to share some observations on a more abstract level, in which insolvency and restructuring law and practice are part of the legal system as a whole and are affected by a lot of developments, also outside the direct scope of daily work.

I would like to do this by taking the position of insolvency law within the legal system as a starting point. From there, I would like to touch upon a few points of the context in which insolvency and restructuring law and practice are functioning, before indicating that issues encompassing insolvency law have become more complex and that the potential circle of people and organisations involved in domestic and international insolvencies and restructurings has changed. Against this background, I will highlight the idea that the definition of value is not merely composed of economic capital, but also of human, social and natural capital. I will provide an example of value as a multi-layered concept within European insolvency and restructuring law. Then I will dwell upon the complexity of issues and involved stakeholders from the perspective of some rule of law topics. An essential aspect of the context of the position of insolvency law within the legal system is the rule of law as such. I presume that the position of insolvency law within the legal order considerably depends on the presence of an independent judiciary and a balance between the legislative, executive and judicial branches of state power within a rule of law based democracy.

For now, I will already reveal that a main point of my observations is that, in my opinion, an insolvency practitioner shows an up-to-date attitude when she or he is curious about contextual aspects of a case and willing to accept responsibility for an inclusive, value-based approach in which economic interests are arranged more horizontally next to human, social and natural interests of individuals and societies.

2. Something about the position of insolvency law within the legal system

Originally, the position of insolvency law within the legal system is in the essence a matter of seizure, procedure and enforcement. Bankruptcy is a way of execution of debts by means of an attachment of a debtor's entire property. The intention is that creditors will be paid as much of their claims as possible within the boundaries of the law. Usually, an insolvency practitioner is appointed in order to manage the assets of the debtor and to settle the insolvent estate in consultation with the creditors, monitored by a court. The creditors and the insolvency practitioner share an interest in the limitation of the costs of the settlement. This instrumental and economic focus of insolvency law is still rooted in the Dutch Law on Insolvency, which is in force since 1893, although the legislator modernizes some parts of it now and then.

The instrumental and economic focus of insolvency law implies that the functioning of insolvency law is heavily reliant on other parts of law and on being connected properly to the legal system as a whole. For instance, practising insolvency law within Europe is not possible without a profound knowledge of national civil and commercial law, European Union law and international law. Whether a claim is a secured, preferential or ordinary claim, in how far a claim exists, whether a contract between creditor and debtor is not properly fulfilled, etcetera, is far from being just a matter of insolvency law. Rights and interests structure relations between individuals, between the individual and the state and between states. These rights and interests also determine the obligations of people involved in an insolvency or restructuring procedure.

In the past decades, the instrumental and economic focus of insolvency law remained. It is not to be expected that this will change. A common part of the legal order of a rule of law based democracy is a proper procedure for cases in which a debtor ceased to pay his or her creditors. Such a procedure is not only a matter of access to justice for creditors and of legal protection for debtors. Its existence is also essential for the confidence in doing business in a certain country and accordingly for the economic wellbeing of its people.

3. Some contextual aspects of insolvency law

Therefore, this instrumental and economic focus of insolvency law can be considered a realistic starting point to look at the context in which insolvency and restructuring law and practice should be able to continue to perform their function.

It seems quite obvious that the interpretation and application of legal rules about seizure, procedure and enforcement is dominated not only by the facts of a case but also by the legal system and the society in which such rules are present. Their functioning is a dynamic process which is suitable for further development but which is, unfortunately, also sensitive for backsliding. The website of the International Insolvency Institute opts for the positive side, where it says:

> “The III is a global membership of leading professionals, scholars and judges with expertise in international insolvency law and practice to improve law and practice related to domestic and international insolvencies and restructurings in order to promote economic wellbeing, investment and the efficient administration of justice.”

The intention to promote economic well-being, investment and the efficient administration of justice indicates that an improvement of law and practice related to domestic and international insolvencies and restructuring should be related to both economy and justice.

In the context of justice, a rule of law based democracy needs not only an effective practice of insolvency law by means of seizure, procedure and enforcement, but also practitioners who effectively deal with the dynamic and challenging surroundings of insolvency law. For instance, nowadays, insolvency lawyers will sometimes have to deal with legal questions related to globalisation, digitalisation and sustainability, or related to countering fraud, corruption and undermining criminality.

Furthermore, not only the issues in the surroundings of insolvency law have become more complex. Also the potential circle of people and organisations involved in domestic and international insolvencies and restructurings have changed. In the essence, the original balancing between the interests of creditors and debtors in the payment of claims has expanded into the balancing of interests of quite a circle of parties on quite some more aspects than money shifting only.

In other words, although the value of the assets of an insolvent estate is still key for decisions of insolvency lawyers within insolvencies and restructuring, the definition of value is not merely composed of economic capital, but also of human, social and natural capital.

4. Value as a multi-layered concept

Presumably, this shift in the assessment of value is not specific for the field of insolvency law. Let us for instance have a look at some developments in the law of the European Union.

The legal position of natural and legal persons within the European Union is mainly determined by national law, notwithstanding the impact of European law. Whereas a few European countries started with the construction of a European economic area, other countries joined the circle of the then European Communities. The European cooperation project was transformed into the European Union. Today, the circle exists of 27 Member States. Initially, the issue of the project of European unification was an economic one, the creation of an internal market by the free movement of people, goods, services and capital. In the essence however, the European unification is a project of peace and freedom. Sadly enough, the European institutions and the Member States experience in our days the ongoing necessity of indicating the European cooperation as a project of peace and freedom because of the Russian attack on Ukraine. The European focus on peace and freedom is central for European integration. Article 67 paragraph 1 of the Treaty on the functioning of the European Union says that the Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States. This provision may be considered in connection with the Charter of Fundamental Rights of the European Union and the values on which the European Union is founded, i.e. the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities (article 2 of the Treaty on European Union). This set of provisions shows that the unification and consistency of European Union law are based on the fundamental freedoms of movement and existence of a citizen throughout the territory of the European Union.

By adding the human and social dimension to the economic approach, the internal market changed into an area of freedom, safety and law for natural and legal persons. This

so-called anthropocentric basis of European Union law[1] is becoming more and more visible, although the balancing of economic, human and social capital is far from crystallised, and although the EU accession to the - par excellence anthropocentric - European Convention on Human Rights, which accession is an obligation under Article 6, Paragraph 2, of the Treaty on European Union, does not proceed without difficulties.

When we look into European insolvency law for traces of this so-called anthropocentric basis of European Union law, we may for instance see that the EU Insolvency Regulation[2] takes both economic, human and social interests in consideration where it presumes that the registered office, the principal place of business and the habitual residence of an individual may be considered as the centre of the debtor's main interests and therefore as the starting points to determine in which country insolvency proceedings against a debtor may be opened. We may also find judgments of the Court of Justice of the European Union about the interpretation and application of EU law amidst economic, human and social interests. Here we could for instance think of judgments relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses in which is expressed that, next to economic interests, other rule of law based anthropocentric interests are just as important to assess how to deal with legal questions within insolvency and restructuring procedures. A major aspect of rule of law based anthropocentric interests is legal certainty for the people whose rights and duties are governed by the law. Legal certainty requires mainly clarity of legal provisions, consistency of their interpretation and application, and foreseeability of their significance in case of a dispute. In the case of FNV/Heiploeg, the Court of Justice of the European Union showed that the intention to improve law and practice related to domestic and international insolvencies and restructurings by developing pre-pack procedures cannot lead to the intended result if such procedures do not meet the requirement of legal certainty.[3] This judgment deals with the significance of EU Directive 2001/23[4] for pre-packprocedures. EU Directive 2001/23 is applicable to any transfer of an undertaking, business, or part of an undertaking or business to another employer as a result of a legal transfer or merger. However, Article 5 paragraph 1 of Directive 2001/23 provides an exception "where the transferor is the subject of bankruptcy proceedings or any analogous insolvency proceedings which have been instituted with a view to the liquidation of the assets of the transferor and are under the supervision of a competent public authority (which may be an insolvency practitioner authorised by a competent public authority)". In its judgment, the Court of Justice cited Recital 3 of Directive 2001/23. Recital 3 states that it is necessary to provide for the protection of employees in the event of a change of employer. According to the Court of Justice, "the pre-packprocedure at issue is governed solely by rules derived from case-law and [that] its application by different national courts is not uniform, with the result that, as the Advocate General pointed out in point 83 of his Opinion, it is the source of legal uncertainty." In a way, the judgment of the Court of Justice expresses that legal protection is

[1] See for instance R. Barents, De Europese ruimte: contouren van een nieuw rechtsbegrip, SEW 2018/6.
[2] Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast).
[3] Judgment of 28 April 2022 of the Court of Justice of the European Union, C-237/20, ECLI:EU:C:2022:321, *FNV/Heiploeg*, paragraph 54.
[4] Council Directive 2001/23 EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businessess or parts of undertakings or businessess.

not guaranteed without sufficient attention for the rule of law based economic, human and social interests of the employees.

As I said, presumably, the shift in the assessment of the value of the assets of an insolvent estate is not specific for the field of insolvency law. I would like to make a few more points indicating that, in the essence, the individual is central to a value-based approach of the law.

Criminal law demonstrates worldwide that the position of the accused, the victim and society within the trial of a crime are subject to rearrangements in which human dignity and human rights and freedoms are key. Nowadays, the emphasis on punishment and retaliation is often accompanied by attention for the living situation of the accused, the needs and rights of the victim and the general sense of justice in society. As far as the European Union is concerned, Article 82, Paragraph 2, under c, of the Treaty on the Functioning of the European Union states that the European Union may establish minimum rules concerning the rights of victims of crime, accompanied by an EU Directive.[5]

All over the world, problem-solving courts are a trend in the legal system to identify and eventually solve problems of individuals, in order to enable people within their communities to enjoy well-being and freedom. On the internet, one can find the opinion that bankruptcy courts in the United States are constituted as courts of equity and that they are, at least in certain key respects, problem-solving courts.[6]

The United Nations explicitly draw attention to the global interest in people-centered justice in our time. One of the 2030 UN Sustainable Development Goals is to "Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels."[7] Besides legal certainty and equality before the law, it is important for all people to have access to justice and to have some understanding of the law and the judiciary in order to effectuate their rights and obligations. Inclusive justice is of importance not only for vulnerable people in order to have access to justice. Its scope may, in a broader sense, also strengthen the legitimacy and effectiveness of the interpretation and application of the law by legal practitioners.

Whereas past wars and former slavery give rise to legal issues of truth finding, social acknowledgement, damages and prescription, climate change cases are brought before courts worldwide by individuals and groups who try to force governments and enterprises to take measures to safeguard the continuity of life on earth for current and future generations. Climate change may be perceived as a major challenge not only for policy makers and governments but also for the legal order of our time, together with challenges of topics such as migration, digitalisation and the perils of fake news.

Such challenges again indicate the complexity of today's legal issues and the circle of involved people. To address them successfully, an inclusive approach of human dignity and human rights and freedoms within a rule of law based democracy is both indispensable and complicating.

Maybe closer to daily practice, one may discern a tendency towards inclusiveness affecting company law. Historically, the assessment of the value of a business within company law is dominated by its value for the shareholders. Today, companies have an

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[5] Directive 2012/29/EU of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA.

[6] https://whoswholegal.com/features/the-us-bankruptcy-courts-as-equitable-problem-solving-tribunals1

[7] THE 17 GOALS | Sustainable Development (un.org)

influential position in society as manufacturer, employer, polluter, innovator, etcetera. Companies cannot serve the corporate interest without using human, social and natural capital and public infrastructure which are available in society. The role of companies within society invokes questions of responsibility which go beyond the interests of shareholders. For example, in France the Loi PACTE explicates the responsibility of companies within society and provides the opportunity to include its purpose or *raison d'être* in the statute of a company, consisting of the principles which the company adopts and for which it intends to allocate resources in the performance of its activity.[8]

4. Increased complexity and rule of law

The increased complexity of issues in the surroundings of the law and the extension of the potential circle of people and organisations involved have also reached the legislative, executive and judicial branches of state power within rule of law based democracies.

Regardless what issues are at stake and which circle of stakeholders is involved in a case, an independent judiciary must be available in a state to provide a judgment in accordance with the rule of law. It is essential for the functioning of the international insolvency and restructuring law and practice that such a judgment can be enforced in another state. An example which illustrates the need to be able to recognize eventual obstacles for the enforcement of a judgment, provides a judgment in a so-called Yukos-case. The Dutch Court of Appeal ruled in this case that the recognition of a Russian bankruptcy order, in the sense that legal effects are attributed to it in the Netherlands, was contrary to the public order and was therefore denied. The cassation appeal against this judgment was dismissed by the Dutch Supreme Court.[9]

If a legislator fails or is not able to provide legislation to regulate a complex issue and effective legal protection is at stake, people may try to get access to justice by bringing a case about such an issue to court. Cases on climate change provide a contemporary example, but the scope of such issues is much broader. For instance, we could also consider as an example the judgment of the Court of Justice of the European Union in the case of Google Spain v. Costeja about the right to have private information about a person be removed from internet search results and other directories under some circumstances.[10]

Whereas the legislator is free to decide to draft a law on a certain issue or not, a court is obliged to give a judgment, also in a case in which the court is asked to provide effective legal protection while the legislator did not provide legislation. When the individual interests to be weighed up are broad and general, the assessment of those interests by a court may encounter both the duty to provide effective legal protection and the primacy of the legislator to weigh up general interests.

Cases which include the question whether the legislator fails or is not able to exercise its task to provide effective legal protection, will often also include the question whether this, in the event of an affirmative answer, legitimizes court action. In a rule of law based democracy, a court which is part of an independent judiciary, will usually answer such

[8] Loi PACTE = Plan d'Action pour la Croissance et la Transformation des Entreprises. See for instance J.W. Winter e.a., Naar een zorgplicht voor bestuurders en commissarissen tot verantwoordelijke deelname aan het maatschappelijk verkeer, Ondernemingsrecht 2020/86, p. 471-474.

[9] Judgment of 18 January 2019 of the Supreme Court of the Netherlands, ECLI:NL:HR:2019:54.

[10] Judgment of 13 May 2014 of the Court of Justice of the European Union, C-131/12, ECLI:EU:C:2014:317, *Google Spain SL, Google Inc. v Agencia Española de Protección de Datos, Mario Costeja González.*

questions within the boundaries of the legal system and legal culture. For instance, a court will try to provide logical, truthful, fair and well-reasoned answers, based on the law and responsive towards legitimacy and effectiveness.

In the Netherlands, a duty to provide effective legal protection may give rise to examine whether a justice deficit exists. If so, the Dutch Supreme Court distinguishes mainly three possibilities for a court: providing recovery by the court, giving just a signal of the justice deficit to the legislator, and offering time for repair to the legislator while announcing the possibility of a follow-up by the court. The Dutch Supreme Court has ruled several times that its ordering possibilities are limited. A public body like the State may be ordered by the court to comply with a legal obligation, unless there are grounds for an exception in accordance with Article 3:296 of the Civil Code. In the 2019 judgment in the climate change case of the Urgenda Foundation against the State, the Dutch Supreme Court ruled that its case-law relating to orders to create legislation constitutes an application of this exception. The Court said that this case-law is based on the considerations that courts should not intervene in the political decision-making process involved in the creation of legislation, and that an order should not create an arrangement that applies to other people than the parties to the proceedings. Earlier judgments of the Dutch Supreme Court also show that the adoption of the possibility to give an injunction for legislation goes hand-in-hand with limitations for the judiciary, due to the political process.[11]

According to the 2019 judgment of the Supreme Court in the case of the Urgenda Foundation against the State, this limitation concerns the prohibition to issue an order to create legislation with a particular, specific content, without preventing courts to issue a declaratory decision to the effect that the omission of legislation is unlawful. Moreover, courts may also order a public body to take measures in order to achieve a certain goal, while it remains for the State to determine what measures will be taken and whether legislation will be enacted to achieve this goal.

In 2021, the Venice Commission gave its opinion on the legal protection of citizens in the child allowance case.[12] In this opinion, the Venice Commission implicitly told Dutch courts that a general deferential attitude of a court towards Parliament should not be an end in itself, in so far as this is potentially detrimental to the courts' review functions. This valuable observation on Dutch legal culture does not alter the fact that courts are not in a position to make legislation. Apart from their constitutional judicial position, courts generally lack sufficient information and are not equipped for making the relevant choices in a democratic process. Courts are not able to examine in advance the legitimacy and the effectiveness of a judgment in a case. A court will try to anticipate the possible impact in society of the answer to a certain legal question. The aim of a legal provision, the functioning of the law within the legal order and society and the effectiveness of a judgment are important points for a court's considerations. In the reasoning of a judgment a court will provide its arguments by taking into account different foreseeable perspectives of the acceptance of a judgment, as well as the confidence courts must inspire in the public.

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[11] Dutch Supreme Court, *Waterpakt*, ECLI:NL:HR:2003:AE8462, judgment of 21 March 2003; Dutch Supreme Court, *Faunabescherming*, ECLI:NL:HR:2004:AO8913, judgment of 1 October 2004; Dutch Supreme Court, *SGP*, ECLI:NL:HR:2010:BK4549, judgment of 9 April 2010; Dutch Supreme Court, *Thuiskopie*, ECLI:NL:HR:2014:523, judgment of 7 March 2014; Dutch Supreme Court, *Staat/Urgenda*, ECLI:NL:HR:2019:2007, judgment of 20 December 2019 (unoffical English translation of the judgment; unofficial English translation of the advisory opinion, ECLI:NL:PHR:2019:1026).

[12] Venice Commission, The Netherlands, Opinion on the legal protection of citizens, adopted at its 128th Plenary Session, 15-16 October 2021.

5. Information as part of transparency

This brings us to the aspect of information as part of transparency about the functioning of the rule of law in a country. In the Netherlands, it is sometimes rather easily said that lawmakers make unenforceable laws and the courts should just sort it out, or just the opposite that a court judgment interprets a law as if the court were a legislator. Such opinions often lack information about the state of the law, legal practice and behaviour of legal practitioners. In the Netherlands, the functioning of the rule of law was for a long time seen as self-evident. In the past years, awareness is growing that a rule of law based democracy needs to be both strong and resilient and that we have to maintain both aspects.

Amongst others, access to information about the functioning of state institutions is essential for people to recognize the legal order as part of their individual living situations. Last week, for the first time a Week of The Rule of Law was organised in the Netherlands. It was an initiative of the Dutch Academy for Legislation and the Dutch Supreme Court, in which soon other Dutch institutions participated, like the Council of State, Parliament and the Council for the Judiciary. The programme was a mixture of possibilities for the public to obtain information about the meaning of the rule of law for daily life, to visit the institutions and to have talks with their representatives. Last Saturday was an open house day in the buildings of the participating institutions. Also Dutch- and English-language walking tours past all participating organisations were offered. During the week, professionals could participate in dialogues on different issues of the functioning and the strengthening of the rule of law like rule of law and digitalisation, community courts and community-based justice, or the rule of law and wealth inequality.[13] The confidence that courts must inspire in the public is an incentive for court institutions in the Netherlands to try to find ways to inform the public and professionals not only about their judgments, but more general about their role in cooperation with other state institutions to uphold the values of the rule of law based democracy.

5. Closure

The increasing complexity of issues and the growth of stakeholders involved seem to be a tendency all around us within the legal order and society. The context in which insolvency and restructuring law and practice should perform their function is not a clear ensemble. In addition to legal knowledge and experience, a curious attitude is needed to gain insight in aspects of this context whenever relevant in a case. Which is of course why it is a good idea to have annual conferences to inform each other in a broad way about what is going on in your focus areas in different parts of the world. Insolvency practitioners have good reasons to stay within the instrumental and economic focus of insolvency law. In my opinion, it is quite obvious that one of the current challenges is how to involve human, social and natural capital in the assessment of economic capital, in a way that serves the functioning of insolvency and restructuring law and practice, and deliberately and justly balances the values of a rule of law based democracy in which economic interests are arranged more horizontally next to human, social and natural interests of individuals and societies.

[13] https://rechtenoverheid.nl/week-van-de-rechtsstaat.