Legal Culture, Path Dependence and Dysfunctional Layering in Belgian Corporate Insolvency Law

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Abstract

The history of Belgian corporate insolvency law demonstrates the lasting effect and the replication of implicit legal-economic conceptions. Even though since the middle of the nineteenth century pre-insolvency proceedings were made available in Belgium, the effectiveness of these proceedings was limited. This was due to the dysfunctional juxtaposing of proceedings and the reluctance of the legislator to change earlier approaches. Closely related thereto was the lack of impact assessments preceding legal reforms and the continuation of ideas regarding the restrained powers of courts and preferential treatment of secured creditors. Debates in Parliament turned around principles, not around the effect or harmonisation of laws. MPs typically had had legal training; economic analyses were largely absent. In the course of the twentieth century, new ideas on broader intervention by judges were put down in draft bills, but only a small portion of them made it to become legislation. The 1997 law on restructuring proceedings went farthest in granting competences to the commercial court for assessing the feasibility of reorganization schemes, but this was readjusted in 2009. As a result, judicial restraint is still present and the rights of secured creditors are considered paramount, this in spite of contrary foreign examples. Strong path dependence in Belgian corporate insolvency law is the result of prevailing beliefs and cannot be attributed to lobbying efforts or deliberate choice.

I. Introduction

Patterns of structure in law provide challenges for legislators that are intent on launching legal reforms. They have to separate the good from the bad. Their efforts to craft legislation entail a process of selection; parts of the existing laws that are considered necessary are kept, whereas others are left out or rewritten. Yet, however, this process of selection is not always combined with thorough impact assessments and it can be biased because of certain beliefs. Scholars have indeed identified the lasting impact of past choices on insolvency laws of the present day.[1] As is the case for any

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[1] For example Bradley Hansen and Mary Hansen, "The Role of Path Dependence in the Development of U.S. Bankruptcy Law, 1880–1938" (2007) 3 *Journal of Institutional Economics* 203.

legislation, new laws show a tendency to integrate parts of previous ones; complete legislative overhauls are exceptional.

For the theme of corporate insolvency, the problem of path dependence in legislation is particularly compounded. Corporate insolvency legislation addresses market-related problems, but it remains a product of processes of decision-making. Therefore, the developments inciting the drafting of legislation often do not directly determine the sections in new laws; this in spite the fact that thorough adjustments are often necessary. Attempts to harmonise pre-insolvency procedures over large areas, which are for example nowadays taking place within the European Union, have to address the legislative traditions of the national jurisdictions of its member states.[2]

This article demonstrates that the adaptability of laws relating to corporate insolvency has often been taken for granted by legislators responding to financial crises. Yet also, notwithstanding the perceived connections of such laws with fluctuating economic developments implicit opinions of policymakers were crucial in influencing the contents of laws. Stubborn parts of laws were reproduced due to legal-ideological conceptions; they locked in certain legal approaches towards corporate insolvency, even in the face of profound changes of context. The result was often the ineffectiveness of laws, thus contributing to the inefficiency of the legal framework in an economic sense.

All this is illustrated by way of an historical investigation of Belgian bankruptcy law reforms, from the early nineteenth century until the present day. A clear sign of ineffectiveness and inefficiency of legislative outcomes was the layering of new procedures on top of older ones. Juxtaposed procedures were aimed at limited goals, but because they overlapped in scope even though they had different effects, they were not effective. A further problem was the perpetuated view on judicial discretion, which was kept to a minimum. Even today, as a result of all of this, Belgian legislation requires judges to remain largely passive in corporate insolvency procedures, notwithstanding supranational legislative trends to the contrary. It is not choice, constrained or otherwise, but rather the weight of implicit convictions in processes of law-making, therefore, that lies at the heart of this phenomenon.

II. Path Dependence, Legal Culture and Corporate Insolvency

The development of the contents of corporate insolvency legislation over time offers a window into the concept of path dependence. Path dependence is a notion that has migrated from economic studies to legal scholarship.[3] Currently, path dependence is frequently mentioned in analyses of economic and corporate law from a normative perspective. In economic studies of law, it is commonly emphasized that law moves in the direction of economically efficient rules, yet also that that this development is hampered by legislation that is biased or flawed.[4] With regard to corporate law, views of rational choice are common in "contractarian" theories. The choices of well-informed

[2] Gerard McCormack, Andrew Keay and Sarah Brown, *European Insolvency Law. Reform and Harmonization* (Edward Elgar Publishing, 2017), 225-302.
[3] Ron Harris, "The Uses of History in Law and Economics" (2003) 4 *Theoretical Inquiries in Law* 659, 678-84.
[4] With regard to corporate law, see Henri Hansmann, Reinier Kraakman and Richard Squire, "Law and the Rise of the Firm" (2006) 119 *Harvard Law Review* 1333. The law-and-finance approach considers continuity as being related to the core features of legal systems: Rafael La Porta *et al.*, "Law and Finance" (1998) 106(6) *Journal of Political Economy* 1113.

actors regarding their agreements of lending, cooperation and organisation are central in these theories. The perpetuation of existing structures, such as standards of contract or organisational menus for companies in legislation, is considered to be efficient inasmuch as they contain efficient solutions.[5]

Analysis of this sort often formulates the direct relation between economic variables, political processes of law-making, and the ensuing legislation in normative terms. By contrast, among political scientists, continuity in legal settings is analysed as a property of politics and law. It has been argued that the analysis of this phenomenon cannot be based on economic concepts such as efficiency or increasing returns.[6] Yet, however, arguments relating to political processes are common in normative scholarship on corporate law and insolvency law as well. Corporate and economic legislation may be explained as resulting from efforts of lobbying, equilibriums of conflicting interests, or practices of corporate finance. Such structures may prevent the adoption of rules that are entirely efficient in an economic sense.[7]

In all the academic disciplines mentioned above, distinctions have been drawn between policy continuity that does not engender inefficiency and path dependence that hampers or excludes the adopting of better alternatives. For the latter, a further distinction was made between path dependence that leads to non-optimal results and for which at the moment of choice there was an awareness that it would, or path dependence that proves inefficient only afterwards.[8] Another distinction relates to the efficiency of changing the path after the non-optimal results have become clear.[9] This article is concerned with path dependence that results from decisions for non-optimal solutions; decisions can be changed without excessive costs, but continuity lasts (strong path dependence).[10]

This article argues that such strong path dependence can ensue from a blurred cognition of effects due to an overvaluing of variables that do not relate to economic efficiency. In respect of the outcome of decision-making processes, for the purpose of further analysis, some concepts can be borrowed from political science. The opting for continuation of policies in a context of changing circumstances has been labelled as "drift". "Drift" entails deliberately maintaining norms or institutions because of their changed effects in relation to a new context.[11] The concept of drift provides a caveat: not every choice for

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[5] For this argument in contractarian and other literature, see Russell Korobkin, "Status Quo Bias and Contract Default Rules" (1998) 83 *Cornell Law Review* 609; Marcel Kahan and Michael Klausner, "Path Dependence in Corporate Contracting" (1996) 74 *Washington University Law Review* 347; Lucian Bebchuk and Mark Roe, "A Theory of Path Dependence in Corporate Ownership and Governance" (1999) 52 *Stanford Law Review* 127.

[6] Paul Pierson, *Politics in Time. History, Institutions, and Social Analysis* (Princeton University Press, 2011).

[7] Horst Eidenmüller, "Comparative Corporate Insolvency Law", in Jeffrey Gordon and Wolf-Georg Ringe (eds), *The Oxford Handbook of Corporate Law and Governance* (OUP, 2018), paragraph 10.

[8] Stan Liebowitz and Stephen Margolis, "Path Dependence, Lock-in and History" (1995) 11 *Journal of Law, Economics, and Organization* 205, 206-07 (second degree path dependence, which concerns inefficiency that becomes evident *ex post*).

[9] Mark Roe, "Chaos and Evolution in Law and Economics" (1996) 110 *Harvard Law Review* 641, 647-52 (semi-strong path dependence, for which the costs of change outweigh the benefits of continuity).

[10] Ibid., 651-52.

[11] Jacob Hacker, Paul Pierson and Karen Thelen, "Drift and Conversion: Hidden Faces of Institutional Change", in James Mahoney and Karen Thelen (eds), *Advances in Comparative-Historical Analysis* (CUP, 2015), 180-208.

continuation is path dependent.[12] Therefore, the moment at which decisions are made, and the variables that come into play at that moment, must be assessed.

A milder variety of path dependence has been categorised as "layering": it is concerned with the attachment of new elements to existing institutions, resulting in legal change.[13] "Layering", as well as "drift", have been analysed both as results of choice, following sound impact assessments, and as consequences of regulatory failure.[14] Legal scholars have considered dysfunctional layering as well, which ties in with strong path dependence. Alan Watson, for example, labelled the addition of new remedies and procedures to existing ones, without changing the latter, as generally detrimental. He identified such "legal scaffolding" as a process that has existed since Roman times, and which was determined by conceptions of continuity in spite of more urgent factors.[15]

One explanation for inappropriate stasis in legislation can be the conceptions of lawmakers and stakeholders, which are not *per se* identical with their interests. Scholars of comparative law and sociology of law have identified the perceptions of lawyers and legislators as a relevant variable of legal development. Lawrence Friedman assigned the label of "internal legal culture" to the attitudes and views of legal professionals.[16] Comparative lawyers tend to emphasize the impact of deeply ingrained cultural assumptions of lawyers, judges and policy-makers on the contents of the law that they produce. These assumptions can have the form of a "regulatory style", that is a combination of ideas and values that are embedded within a legal system and which steer interpretation.[17]

Another related concept is "law in the minds", which encompasses the "habits of thought" that are shared by legal professionals.[18] Some scholars of economic analysis of law have proposed theories on the co-evolution of law and the economy, taking into account the changing views of practitioners and of interest groups as well.[19] Theoretical notions have been put to empirical tests. With regard to policymakers, however, legal culture analysis has virtually not been done. In political studies, also concerning nineteenth-century Belgium, the impact of economic ideology and of the interests of MPs

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[12] On continuity as a deliberate choice because of cost-effectiveness, see, for example, Louis Kaplow, "An Economic Analysis of Legal Transitions" (1986) 99 *Harvard Law Review* 509, 522-7. Some law-and-economics scholars have labelled path dependence, in the sense of stability procured in a system of binding precedent, as beneficial. See, for example, Richard Posner, "Past-Dependency, Pragmatism, and Critique of History in Adjudication and Legal Scholarship" (2000) 67 *University of Chicago Law Review* 573, 585-86; Paul Rubin, "Why is the Common Law Efficient?" (1977) 6 *Journal of Legal Studies* 51.

[13] Karen Thelen, *How Institutions Evolve. The Political Economy of Skills in Germany, Britain, the United States, and Japan* (CUP, 2004), 35.

[14] For an overview of literature on this theme, see Eric Windholz, *Governing Through Regulation. Public Policy, Regulation, and the Law* (Routledge, 2018), 100-127.

[15] Alan Watson, *Society and Legal Change* (Temple University Press, 2001), 87-97.

[16] Lawrence Friedman, *The Legal System. A Social Science Perspective* (Russell Sage, 1975), 223-68.

[17] The term was coined in law-and-finance literature. For a critical appraisal, see Beth Ahlering and Simon Deakin, "Labor Regulation, Corporate Governance and Legal Origin: A Case of Institutional Complementarity?" (2007) 41 *Law & Society Review* 865; Simon Deakin, "Legal Origin, Juridical Form and Industrialisation in Historical Perspective" (2009) 7 *Socio-Economic Review* 35.

[18] William Ewald, "Comparative Jurisprudence I: What Was it Like to Try a Rat?" (1995) 143 *University of Pennsylvania Law Review* 1889, 2111.

[19] For example Glenn Atkinson and Stephen Paschall, *Law and Economics from an Evolutionary Perspective* (Edward Elgar Publishing, 2016).

on their voting behaviour in matters of economic policy has been analysed.[20] But, however, with regard to the influence of legal culture in this regard, statements have been mostly descriptive and generalising.[21]

The topic of corporate insolvency law has been addressed from some of the abovementioned perspectives. The creditors' bargain-approach, which is advocated by Thomas Jackson and Douglas Baird, is prevalent in legal-economic studies of American insolvency law. This theory is closely related to the abovementioned evolutionary "contractarianism". The creditors' bargain theory considers bankruptcy legislation and procedures as necessary evils for addressing a "common pool" problem. According to Jackson and Baird, insolvency calls for settling and coordinating competing claims of creditors, all of whom want full payment of their debt, but this is impossible since the sum of all debts exceeds the value of the debtor's assets.

Following the creditors' bargain theory, insolvency procedures are to leave the decision as to which method will be used with the creditors; in case negotiated solutions fail, the insolvent firm must be dissolved in an orderly manner, and the proceeds from a public sale must be distributed among the creditors. Moreover, insolvency procedures should respect the contractually determined position of creditors and their ranking. Secured creditors have preference over non-secured creditors; the absolute priority rule is to be upheld, which means that shareholders receive payment after preferential creditors.[22] Other scholars have extended this theory, so as to make it encompass the rights of stakeholders other than creditors.[23]

Normative positioning pervades the studies mentioned. Insolvency is considered to be a modality of debt and most legal and economic scholars analyse it in terms of a phenomenon that is susceptible to optimal choice. By contrast, scholars like Elizabeth Warren have warned not to analyse insolvency on the basis of determinist theories and to appreciate the contexts. It is often mentioned that bankruptcy laws are related to other features of the economic system, and pertain to a local "culture" that develops over time within jurisdictions, national or otherwise, where they apply.[24] Legal-realist studies have demonstrated that beliefs of attorneys and lawyers can provide an explanation for the high regional divergence in the interpretation of legislation on consumer bankruptcy.[25] The historical development of opinions has been analysed as

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[20] Maarten van Dijck, *De wetenschap van de wetgever. De klassieke politieke economie en het Belgische landbouwbeleid 1830-1884* (Leuven University Press, 2008); Maarten van Dijck and Tom Truyts, "Ideas, Interests, and Politics in the Case of Belgian Corn Law Repeal, 1834-1873" (2011) 71(1) *Journal of Economic History* 185.

[21] Stressing the need for empirical analysis in this regard, see Roger Cotterell, "Is There a Logic of Legal Transplants?", in David Nelken and Johan Feest (eds), *Adapting Legal Cultures* (Hart, 2001), 71-92, 80-1.

[22] Thomas Jackson, *The Logic and Limits of Bankruptcy Law* (Harvard University Press, 1986); Edward Morrisson and Douglas Baird, "Bankruptcy Decision Making" (2001) 17 *Journal of Law, Economics and Organization* 356.

[23] Donald Korobkin, "Contractarianism and the Normative Foundations of Bankruptcy Law" (1993) 71 *Texas Law Review* 541.

[24] Joseph Stiglitz, "Bankruptcy Laws: Basic Economic Principles", in Stijn Claessens, Simeon Djankov and Ashoka Mody (eds), *Resolution of Financial Distress. An International Perspective on the Design of Bankruptcy Laws* (World Bank, 2001), 1-24, 3-4; Jacob Ziegel, *Current Developments in International and Comparative Corporate Insolvency Law* (OUP, 1994), 266.

[25] E.g. Teresa Sullivan, Elizabeth Warren and Jay Westbrook, "The Persistence of Local Legal Cultures: Twenty Years of Evidence from the Federal Bankruptcy Courts" (1994) 17 *Harvard Journal of Law and Public Policy* 801.

well. Historical-institutionalist approaches to American bankruptcy law have demonstrated that changing views, as well as debates amongst groups of stakeholders, influenced the contents of legislation.[26]

However, the analysis of legislative processes regarding economic and corporate law has not always taken implicit but pervasive political-ideological ideas into account. Scholars pointing to the systemic overhang due to "legal origins" have identified structural features of processes of law-making as determining,[27] and not so much the conceptions of lawmakers. Nor has Western-European corporate insolvency law attracted much attention from the perspectives mentioned here. Debates on the feasibility of legal borrowing and on convergence, which flourished among legal scholars in the 1990s, as well as the approaches of legal-origins and varieties-of-capitalism scholarship have not resulted in thorough case studies of the national insolvency regimes.

III. The Starting Point: The 1807 Commercial Code and its Condemnation of Judicial Discretion and Economic Analysis of Bankruptcy

In 1807, the French government issued its *Code de commerce*, which was imposed on the territories of the Southern Netherlands as well, part of the French Empire at that time. When these areas declared independence as the Kingdom of Belgium in 1830, the French Commercial Code was maintained, without changes.[28] The French Commercial Code listed rules regarding "*commerçants*" (i.e. merchants) and contained a sizeable chapter on insolvency ("*faillite*"). The code provided a one-gateway-approach towards merchants' insolvency. Every insolvency proceeding had to start with a declaration in bankruptcy by the commercial court, which was a court of lay judges, being merchants. Negotiations leading up to a composition ("*concordat*") were possible afterwards, but requirements for compositions were high. A majority of creditors had to consent, and they had to represent three-fourths of the debts. If conditions were not met, liquidation was the default outcome. In other respects, the sections of the code were also harsh. Debtors facing payment problems were incarcerated or placed under guardianship (Article 453), for example.[29]

As concerning the position of the court during insolvency procedures, the Commercial Code imposed passive powers of coordination only. In that regard, considerable authority was given to the creditors of the insolvent party. The assembly of non-secured creditors decided on a proposal of composition. From within the court, a commissioned judge (*juge commissaire*) was appointed, who was in charge of supervising the administration of the bankruptcy trust (Article 454). However, the actual administrators

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[26] Iain Ramsay, "U.S. Exceptionalism, Historical Institutionalism, and the Comparative Study of Consumer Bankruptcy" (2015) 87 *Temple Law Review* 947; David Skeel, "An Evolutionary Theory of Corporate Law and Corporate Bankruptcy" (1998) 51 *Vanderbilt Law Review* 1325.

[27] La Porta *et al.*, above note 4.

[28] Ernst Holthöfer, "Handelsrecht und Gesellschaftsrecht: Belgien", in Helmut Coing (ed), *Handbuch der Quellen und Literatur der neueren europäischen Privatrechtsgeschichte (vol. 3/3)* (Beck, 1986), 3277-3472, 3287-91.

[29] Pierre-Cyrille Hautcœur and Nadine Levratto, "Faillite", in Alessandro Stanziani (ed), *Dictionnaire historique de l'économie droit* (LGDJ, 2007), 159–167; Jean Hilaire, *Introduction historique au droit commercial* (PUF, 1986), 325-30; Romuald Szramkiewicz and Olivier Descamps, *Histoire du droit des affaires* (LGDJ, 2013), 384–94.

of the bankruptcy trust were trustees (*agents* and *syndics*), who were usually chosen from amidst the creditors (Articles 456, 480).

The same philosophy of agency for the creditors was evident in the rules regarding secured creditors. Creditors who held a mortgage or pawn as collateral for their debts were considered superpriority "separatist" creditors. They could ignore insolvency procedures, even negotiations on a composition, and they were allowed to take their collateralised assets out of the estate (Articles 520, 535). Moreover, at the end of the procedures, the commercial court issued a judgment on the insolvent's fate that was based on the report of the commissioned judge, but this report formulated the creditors' opinions. They decided whether the effects of the insolvent debtor were to be sold publicly or whether a composition was accepted; the creditors also agreed on the "excusability" of the debtor (Article 613). If in the course of insolvency procedures, no traces of criminal behaviour had been found, the merchant could be declared "excusable", which made him eligible for re-entry in the market at a later time ("rehabilitation"), but only after all debts had been paid (Article 614). The court was not allowed to impose compositions on the creditors if majority requirements were not met; a "cram down" proceeding as exists under the US Chapter 11-proceeding was not envisaged by the Napoleonic legislator.

Underlying the restricted powers of the judges in insolvency trials were the economic beliefs of the legislators. At the beginning of the nineteenth century, liberal ideas as to the state's obligation to preserve the rights of creditors were ubiquitous in French intellectual circles. The Commercial Code had been presented as a "*garantie*" for merchants in their relations with their debtors, ensuring legal certainty in the enforcement of debts.[30] This same view is evident in a treatise that had been written in 1801 by Vital Roux, a merchant-banker from Lyon, who was a member of the drafting committee of the *Code de commerce*.[31] Consequently, the assembly of creditors was considered the best suited for assessing the creditworthiness of their debtor and for voting on measures to be taken. Rights of insolvent debtors were regarded as minimal, also because insolvency was considered to result from recklessness or lack of professionalism.[32]

Closely related to these opinions was the view that bankruptcy was not an economic problem, with possible impacts on stakeholders other than the creditors, but rather a matter of enforcement of debts. The legislator did not intend creditors to preserve a viable business. The decision on whether a composition or public sale was chosen, and on whether criminal prosecution was to be started, was a blunt "yes" or "no". The individual vote of each creditor depended on whether he wanted to immediately receive payment of his debt or only after a while. Compositions indeed did not grant discharges, and re-entry was conditioned on full repayment of all debts. The only evaluation regarding the continuity of the debtor's business that creditors were purported to make

[30] Jean-Etienne-Marie Portalis and Frédéric Portalis (eds), *Discours, rapports et travaux inédits sur le Code civil* (Librairie Joubert, 1844), xliii.
[31] Vital Roux, *De l'influence du gouvernement sur la prosperité du commerce* (Dentu, 1801), I:373 (on the legal obligation for wholesale merchants to keep books, which he considered "a *garantie* of the law" to the benefit of their creditors).
[32] Hilaire, above note 29, 90; Szramkiewicz and Descamps, above note 29, 349.

was whether a postponement of payment would yield a higher return than proceeds from a public sale.[33]

The mentioned economic beliefs were conflated with elements of legal culture. Enlightenment authors such as Montesquieu, and the French revolutionaries in their wake, had deemed the powers of Old Regime judges to be too excessive. Inquisitorial powers, in criminal affairs, were to be controlled and restricted on the basis of laws. The separation of powers, which was imposed during the French Revolution, meant that judges were to follow the letter of the law.[34] In civil lawsuits, too, judges were to show restraint; the procedures were based on the initiative and agency of the litigants. In 1806, a Code of Civil Procedure had been promulgated, heralding these principles.[35] The 1807 Commercial Code listed rules of procedure for commercial courts as well, but they mostly complemented the code of the preceding year.

The blending of views on procedure with the economic convictions mentioned is evident in the drafting process of the Commercial Code. According to a first proposal, dating from 1801, the commissioned judge would receive ample powers, even to the extent that he could impose measures upon the assembly of creditors. Judges of different courts protested against this proposal, however, which they considered to be too intrusive on the rights of creditors.[36] The mixture of legal-cultural and economic views was not only enshrined in legal texts; they were passed on during the training of jurists at university, and they were held by most legal practitioners and policymakers, the latter of whom usually had a degree in law as well.[37]

IV. Perpetuation in the 1851 Bankruptcy Reform

When the French Empire was dissolved after the demise of Napoleon, and before the Belgian state was established, the Southern Netherlands were merged with the Kingdom of the (Northern) Netherlands. Initiatives were taken to create a new Commercial Code for the now United Kingdom of the Netherlands, but these efforts failed when Belgium declared its independence in 1830.[38] After Belgian independence, the Belgian government publicly proclaimed that a Belgian Commercial Code would be drafted, and that new legislation on mercantile insolvency would be written. In practice, however, it

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[33] Roux, above note 31, I:398-99, I:465 (identifying *concordat* with postponement of payment) and I:326, I:465 (the creditors *decide* on or *sign* the *concordat*, whereas the judge *deliberates* on the criminal charges against the bankrupt). See also Philippe Legras, *Projet d'un code des faillites, surséances, cessions judiciaires et banqueroutes* (Imprimerie Bailleul, 1799), 64-67 (proposal of new legislation on mercantile insolvency, mentioning the powers of the creditors "to accept or reject" a proposed composition; however, in contrast to the later Code, Legras envisaged that the debtor could make several proposals).

[34] Jean-Marie Carbasse, *Histoire du droit pénal et de la justice criminelle* (PUF, 2000), 353-363.

[35] Serge Dauchy, "La conception du procès civil dans le Code de procédure civile de 1806", in Loïc Cadiet and Guy Canivet (eds), *1806 – 1976 – 2006. De la commémoration d'un code à l'autre: 200 ans de procédure civile en France* (LexisNexis, 2006), 77-89.

[36] Philippe Paschel, "L'apparition de l'intérêt public dans le droit des faillites. Le commissaire du gouvernement du projet de code de commerce de 1801" (2014) *Forum Historiae Iuris*, available at: <http://www.forhistiur.de/2014-03-paschel/>.

[37] Frédéric Audren and Jean-Louis Halpérin, *La culture juridique française* (CNRS Editions, 2013). This monograph fleshes out the "legal culture" as conveyed at university and its impact on the development of law in nineteenth-century France. For Belgium, there is no comparable study. For an introduction, see Bart Coppein, "Rechtsonderwijs en rechtsleer", in Margo De Koster, Dirk Heirbaut and Xavier Rousseaux (eds), *Deux siècles de justice* (Leuven University Press, 2015), 110-29.

[38] Holthöfer, above note 28, 3287-89.

took twenty years before modest changes were made to the French Commercial Code, which continued to be used. A fundamental reason for this was the dependence from French legal culture, which permeated the Belgian courts and universities. French legal treatises, commenting on the Napoleonic codes, were for most of the nineteenth century the only legal literature that was used in Belgium.[39]

The French ideas on restraint of judges, powers for creditors and bankruptcy as debt enforcement persisted in Belgium. In the wake of a severe financial and economic crisis, a Belgian law of April 1851 on *faillite* and *concordat* revised the code's sections in a modest way. Most parts were kept, and small modifications were made, which were mostly inspired by the equally limited French reform of 1838.[40] The adherence of the Belgian legislator to the French legal-economic conceptions is clear in the few articles of the 1851 law that were new. For example, the law introduced a new proceeding, labelled "*sursis de paiement*", literally "suspension of payments". Upon a brief suspension of claims following a court injunction, a moratorium of at most one year could be granted provided that the majority of creditors approved it. It was required that the debtor had to be able to recover following the protection against enforcement and the postponement of debts. Insolvency procedures could be started only on the condition of "cessation of payments" ("*cessation des paiements*"), which was definitive insolvency. *Sursis* was concerned with temporary "*cessation*" only.[41]

The new proceeding of *sursis* was partially based on Dutch examples. It is telling that these examples were modified, however, so as to make them fit with the abovementioned French legal-economic conceptions. In the Northern Netherlands, in the eighteenth century a government-imposed moratorium could be applied for by "honest but unfortunate" debtors ("*surseance*").[42] In 1814, King William I of the United Kingdom of the Netherlands had extended this regulation to the South. The automatic stay on claims that was a consequence of the moratorium applied for up to a year, it involved both secured and non-secured creditors and creditors could not prevent that it was imposed.[43]

In 1826, a new Dutch law, still under the United Kingdom, had altered the proceeding of *surseance*, under the influence of French ideas. It provided that the debts of secured creditors were not suspended during the twelve-month period of relief.[44] This shift in policy came after prolonged efforts to codify Dutch law. Over time the compilers had become more susceptible to French legislative ideas at the expense of their national tradition. As a result, the Dutch generalising approaches towards all creditors, secured and unsecured, gave way to a regime that was more favourable for secured creditors, who were now deemed superpriority "separatists".[45] The 1851 Belgian law went further

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[39] Dirk Heirbaut and Matthias Storme, "The Belgian Legal Tradition: From a Long Quest for Legal Independence to a Longing for Dependence?" (2006) 14 *European Review of Private Law* 645, 650.

[40] Dirk Heirbaut, *Een beknopte geschiedenis van het sociaal, het economische en het fiscaal recht in België* (Academia Press, 2013), 118-19.

[41] Law of 18 April 1851, *State Gazette* 24 April 1851.

[42] Johannes van der Linden (ed), *Groot Placaatboek inhoudende de placaaten ende ordonnantien van de edele groot mog. Heeren staaten van Holland en West-Friesland…* (Allart, 1796), 564-5 (15 November 1793).

[43] Decree of 23 November 1814, *Pasinomie*, 2nd series, I:359.

[44] Law of 23 March 1826, *State Gazette* no. 48.

[45] For example, with regard to silent and general pledges of movables, the Roman-Dutch law was changed in favour of the stricter French approach. See Egbert Koops, *Vormen van subsidiariteit. Een historisch-comparatistische studie naar het subsidiariteitsbeginsel bij pand, hypotheek en borgtocht* (Boom Uitgevers,

in transforming the Dutch moratorium. It required that the *sursis* was to be decided on by the creditors, and that it could only be accepted if a majority of creditors representing three-fourths of the debts (in sums) would agree (Article 599). As had been the case in the 1826 Dutch law, the claims of secured creditors were not stalled by the moratorium, except for creditors having mortgages on immovable property that the debtor used during the moratorium (Article 606).

This points to path dependence. The Belgian legislator created a proceeding that was similar to the French insolvency proceeding. Moreover, it reflected the same policy considerations of creditor-steered procedures, which were rooted in the conviction that bankruptcy was an issue of debt enforcement. During the preparatory work leading up to the bill, in the legislative committee, as well as in the plenary assembly of Parliament, creditors' rights and the rights of secured creditors were conceived of as opposed to the debtor's right to request relief. There was no assessment of the possible effects of the draft legislation, but only a theoretical deliberation on the basis of legal concepts.[46]

The legislators' lack of impact analysis is also evident in the juxtaposing of solutions, which reflects hesitations on the ineffectiveness of existing legislation. For example, the proceeding of *concordat*, upon insolvency, was kept without changes. This resulted in a legislative framework allowing for two procedures for "honest but unfortunate" debtors. Yet, however, even though the scope was similar, the outcomes of both procedures differed. Whereas *sursis de paiement* froze the claims of secured creditors with mortgages on immovable properties that were used by the debtor, when a composition under insolvency (*concordat*) was made these secured creditors were not involved (see table 2). Because *sursis* affected mortgages, the creditor with a mortgage voted on the *sursis*, but this was not the case in the proceeding of *concordat*: secured creditors, also those having mortgages were exempted. Secured creditors did not have a say on the composition and they could retrieve their pledges without limitations.

This hybrid legislation was problematic because, when *sursis de paiement* was started, the creditor having a mortgage on facilities of the debtor had no incentive to vote in favour of the *sursis*. He was more inclined to push the debtor towards insolvency procedures, because then the mortgaged immovable could easily be expropriated. Moreover, considering that mortgages were usually for large debts, creditors with mortgages had a strong voice in the voting process on *sursis*. During the preparation of the 1851 law, no member of Parliament noticed the dysfunctional layering: the issue of the ambiguous position of creditors with mortgages was not raised.

Legal scaffolding is also evident in the creation, and poor integration, of a third composition proceeding codified in the 1851 law, the "swift" *concordat*. Specifically, if the debtor having financial difficulties declared himself insolvent, and could not be held culpable for treacherous behaviour towards his creditors, then an accelerated proceeding for reaching a *concordat* could be started. The debtor was invited to propose

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2013), 223-42; Vincent van Hoof, *Generale zekerheidsrechten in rechtshistorisch perspectief* (Wolters Kluwer, 2015), 243-96.

[46] Debates of Parliament, Chamber of Representatives, 23 December 1849, 316-19; 10 December 1850, 245-48; 12 April 1851, 1197-8; Debates of Parliament, Senate, 27 March 1851, 169-72; Documents of Parliament, Chamber of Representatives, "*Exposé des Motifs*", 22 December 1848 (Session 1848-49, no. 90), 60-61; Documents of Parliament, Senate, Report of the Commission, 9 April 1850 (Session 1849-50, no. 66), 90.

an agreement and creditors were to vote on the proposal within a short period of time. The proceeding was implemented in order to stimulate debtors to come forward with their financial problems.[47] However, it was very difficult to achieve any successful result. The majority rules were stricter than for the regular *concordat*, which was intended for insolvency procedures that had been started by creditors (see table 3). Three fourths of creditors, representing five sixths of the debts (in sums), were to approve the scheme that was drafted by the debtor (Article 520). Again, as with the regular *concordat*, secured creditors were not involved, nor were those having mortgages on immovable properties that were needed by the debtor.

The swift proceeding of *concordat* was largely without effect, because it was not adapted to existing rules, most of which were not changed. The attempts of the Belgian policy makers to offer lenience to cooperating debtors, were obstructed by a broad legal category of "bankruptcy". In the law of 1851, the criminalisation of unprofessional behaviour, which had characterised the Napoleonic crime of "simple bankruptcy", was kept (Articles 573-574). This meant that the bar to consider an insolvent debtor as bankrupt remained very low. Considering this, presenting oneself as being insolvent in order to negotiate a composition was very risky. The debtor in that case always ran the risk of losing everything. If majority requirements for a composition were not met, or when "simple bankruptcy" was made likely, insolvency procedures were bent towards definitive dispossession and liquidation. Therefore, the third composition proceeding of "swift" *concordat* was ineffective and useless.

V. The Preventive Composition (1883)

Another example of unwieldy layering combined with path dependence concerns the Belgian law of 1883 that implemented the proceeding of "preventive composition" ("*concordat préventif*"). In the early 1880s, which was a time of crisis, many European countries changed their bankruptcy laws. But conditions on debtor-in-possession arrangements were still high. The 1877 German *Reichskonkursordnung* continued to follow the French example by allowing compositions upon insolvency only.[48] The English Bankruptcy Acts of 1861 and 1869 went farthest in acknowledging out-of-court compositions on the condition that they were registered and that a sufficient majority of creditors consented.[49] But, even in England, the one-gateway-approach largely prevailed. This meant that in-court negotiations were possible only following the categorisation of the insolvent debtor as being "bankrupt".

The Belgian "preventive composition" proceeding of 1883 was a pre-insolvency proceeding. Its purpose was to negotiate a composition without running the risk of being dragged into liquidation, or when the winding up of the business was inevitable, to

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[47] Pierre Joseph Maertens, *Commentaire de la loi du 18 avril 1851 sur les faillites, banqueroutes et sursis…* (Polack-Duvivier, 1851), 509-12.

[48] Anke Meier, *Die Geschichte des deutschen Konkursrechts, insbesondere die Entstehung der Reichskonkursordnung von 1877* (P. Lang, 2003), 145.

[49] On the approaches in these and other nineteenth-century English laws, see Pierre-Cyrille Hautcœur and Paolo di Martino, "The Functioning of Bankruptcy Law and Practices in European Perspective (ca. 1880–1913)" (2013) 14 *Enterprise and Society* 579, 584-586; Michael Lobban, "Bankruptcy and Insolvency", in William Cornish *et al.* (eds), *The Oxford History of the Laws of England. XII: 1820-1914, Private Law* (OUP, 2010), 820-822; Jérôme Sgard, "Bankruptcy Law, Majority Rule, and Private Ordering in England and France (Seventeenth-Nineteenth Century)" (2010 Working Paper), 16-18, available at: <http://spire.sciencespo.fr>.

allow for quick re-entry since the rules on rehabilitation did not apply. It was the first time, moreover, that a two-gateway strategy was pursued. The dissolution of the debtor's estate was no longer considered as the normal outcome if negotiations with creditors did not succeed. After a first attempt in 1872, two members of Parliament, Antoine Dansaert and Adolphe Demeur, submitted a proposal of law in 1879, for providing debtors in financial difficulties with the possibility to deliberate on a scheme of debt with their creditors, under the supervision of the commercial court. The aim was to have indebted merchants remain in possession of their estate and to prevent the categorisation of insolvent.[50]

In June 1883, the law was passed. It stipulated that a request for "preventive composition" made the applicant, who had not ceased payments in a permanent way and who was "honest but unfortunate", eligible for a stay of enforcement of debts, which then lasted a couple of weeks until all debts had been inventoried. If the moratorium was granted, the debtor kept his property, but he was not allowed to make new contracts or alienate effects in any way. Yet however, secured creditors could seize their collateral, even if the scheme was accepted by the majority of creditors. In that regard, the French legacy of considering secured creditors as superpriority "separatists" was still very strong. A modest opening towards economic assessments of the viability of businesses was that creditors could have deliberations on proposals made by the debtor, which could be amended and subjected to a new vote (Article 11). Yet, however, as had been the case in previous legislation, mercantile insolvency was mostly conceived of as concerning traders and not firms.

The new proceeding of "preventive composition" was set side-by-side with the procedures of *sursis* and the "swift" *concordat*. The latter two procedures remained within the law of 1851, which for the most part was left intact. The strange result of all this was that debtors in comparable circumstances could choose whether to exclude secured creditors with mortgages or not (see table 2). In the preparatory documents preceding the issuing of the 1883 law, one cannot find any commentary on the possible awkward effects of such an approach. The central issue in the debates in Parliament was to what extent a temporary relief and stay could be granted by the court when not all creditors were known, and at the expense of these creditors, when they could not raise objections. The extent of the moratorium, along with its relation to *sursis de paiement*, was not discussed.[51]

The result of the juxtaposing of procedures, which had been layered on top of older ones, was that, since 1883, debtors with financial difficulties could start four composition procedures (see table 1). For all four, the commercial court was the competent court. They all were only concerned with merchants and entrepreneurs and – when the law was interpreted broadly – commercial companies. Two were post-insolvency procedures (*concordat* and "swift" *concordat*), two were pre-insolvency procedures (*sursis de paiement* and *concordat préventif*), yet requirements of entry were comparable. All four required insolvent parties to be of good faith, "honest but

[50] Documents of Parliament, Chamber of Representatives, Proposition of Law 9 December 1879 (Session 1879-80, no. 28), available at: <http://www.dekamer.be/digidoc/DPS/K2296/K22961228/K22961228.PDF>.
[51] Debates of Parliament, Chamber of Representatives, 29 May 1883, 1163-72; 30 May 1883, 1178-81; 31 May 1883, 1187-98, in particular 1197-8; 1 June 1883, 1199-1212, in particular 1201-2; 5 June 1883, 1215-8, in particular 1216.

unfortunate", and in a position to retrieve their former fortune. However, majority rules and the consequences of these four procedures, in particular for secured creditors, were different (see tables 2 and 3). Nevertheless, awareness of these divergent layerings did not come soon. In a modest reform of the 1883 law, in 1887, the "swift" *concordat* was abandoned, [52] but this was motivated mainly because it was never used in practice, not because of any perceived inconsistency.[53] Why it was never used in practice, seems not have occupied the minds of the legislators.

VI. The Profile and Approaches of Members of Parliament

Both in the run up to the 1851 and 1883 reforms, members of Parliament deliberated on the purposes and on provisions of drafts of legislation. In these periods, members of Parliament still belonged to the highest strata of Belgian society. It was only in 1893 that the high thresholds of taxable income for gaining access to the suffrage system were abandoned in favour of general (male) suffrage, even though this was mitigated by a system of multiple voting for proprietors and educated men.[54] Most of the members of Parliament were lawyers and judges. Heads of large enterprises pursued political careers as well, and a number of them succeeded in gaining access to Parliament. However, their profiles were not all that different from those of other MPs. In the period of 1870-1880, between 20 and 25 per cent of the members of the Chamber of Representatives were merchants or entrepreneurs.[55] But, in those years, at least 75 per cent of members of the Chamber of Representatives had studied law at university, and amongst those alumni were also many bankers and captains of industry. Of the 194 members of Parliament in the period mentioned, only one had a degree in business administration.[56] These numbers correspond largely with those of the period shortly before 1851.[57]

Some of the members of Parliament were commercial judges when elected, or continued to be so during their parliamentary mandate.[58] By law it was not required that they have a law degree, and in practice nearly all judges in the commercial court were (former) entrepreneurs and bankers.[59] One of the proponents of the 1879 proposal, Antoine Dansaert, was president of the Brussels commercial court. The co-sponsor of the proposal, Adolphe Demeur, was a lawyer by training. The commercial judges in the Belgian Parliament were often heard in debates over commercial and economic issues.

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[52] Law of 29 June 1887, *State Gazette* 30 June 1887.

[53] Léon Lowet and Jules Destrée, *Du concordat préventif de la faillite: commentaire pratique de la loi du 29 juin 1887* (Larcier, 1892), 212.

[54] Els Witte, Jan Craeybeckx and Alain Meynen, *Political History of Belgium From 1830 Onwards* (VUB Press, 2009), 114.

[55] Daniel Coninckx, "De sociaal-politieke samenstelling van de Belgische Kamer van Volksvertegenwoordigers (8 augustus 1870-15 mei 1880)" (1986) 17 *Revue belge d'histoire contemporaine* 339, 358.

[56] Ibid., 356. On the virtual absence throughout the nineteenth century of Belgian MPs who were trained in economics, see also Guido Erreygers and Bert Mosselmans, "Economists in the Belgian Parliament (1831-1918)", in Massimo Augello and Marco Guidi (eds), *Economists in Parliament in the Liberal Age (1848-1920)* (Routledge, 2005), 49-76, 54-59.

[57] Frederik Verleden, "Het volk en zijn vertegenwoordigers"(2004) 21(4) *Samenleving en Politiek* 60. See also Samuel Tilman, *Les grands banquiers belges (1830-1935). Portrait collectif d'une élite* (Académie royale de Belgique, 2006), 124-126.

[58] Since 1848, members of Parliament could not be judge during their period of office. However, judges in the commercial courts were not considered as official judges, and they could thus combine both posts.

[59] Georges Martyn, "Le débat à propos des tribunaux de commerce en Belgique depuis 1807", in Anne Girollet (ed), *Le droit, les affaires et l'argent* (Société d'histoire du droit, 2009), 445-62, 448 and 450.

They had first-hand knowledge of commercial litigation and were aware of pressing issues, but the solutions that they proposed were usually not very different from those advocated by other MPs. They were not immune to the fact that debates tended to centre around a few topics only, and that detailed scrutiny of existing laws and their harmonisation was rare.[60]

The debates over the 1851 and 1883 reforms clearly demonstrate focused attention on the part of MPs towards a small number of issues. Short-sightedness and neglect of thorough impact analysis followed from a bias of framing problems in relation to general principles. Ensuring the rights of the bona fide debtor, who was to be allowed to continue his business, and reconciling these rights with the rights of creditors were most central in the debates. However, the harmonising of these conflicting rights was not discussed in great detail, and proposals of sections of law for the most part passed without controversy. Only when the aforementioned general themes were touched upon would MPs venture into debates. Even so, the drafters of the proposals did not think through the contents of the proposals too much, either. What was intended was the creation of new procedures, even though they were layered on top of others with detrimental effects.

Path dependence was closely related to such dysfunctional layering. The members of Parliament discussing the plans of reform, as well as those who drafted the bills, did not question the basic ideas of the French Commercial Code. This resulted in the continued reliance on the rules of *concordat*, for example, in particular as concerning majority requirements. These rules were copied into other procedures, but also the original procedures were kept. The lawmakers hesitated on whether to overhaul the law that was in effect completely, which points to their lack of impact assessments.

As a result of all this, the French view that judges were not to replace the creditors remained prominent. There was little consideration given to economic conditions. The debaters sometimes used statistical data, but only to show that procedures were rarely used. In 1883, however, statistics on insolvency litigation were detailed enough to infer from them conclusions on the relative share of types of enterprises, types of debt and regional distributions.[61] The continued focus on general principles, and the scaffolding resulting from path dependence, rendered the contents of the laws that were crafted mutually incoherent, and therefore not useful in practice. Already shortly after 1851, *sursis de paiement* was almost never used.[62] The same happened with regard to *concordat préventif*. In 1899, for example, 113 "preventive compositions" were made, though almost twice as many applications had been filed (203). Most of these petitions were redirected towards insolvency and liquidation during the procedures, mostly when

[60] In fact, petitions and proposals of legal reform were written by law clerks, who since 1869 were jurists. See, for example, the proposal written by René Piret, the law clerk in the Brussels commercial court: René Piret, *La réforme du régime légal du concordat préventif* (Groeninghe, 1942).

[61] E.g. *Administration de la justice criminelle et civile de la Belgique. Justice civile. Période de 1861 à 1875. Résumé statistique* (Moniteur belge, 1879), III: 56-60. This report contains tables of data regarding the number of applications and judgments, but also concerning the profession of insolvents, the size of debts and the regional differences in the mentioned data.

[62] *Administration de la justice criminelle et civile de la Belgique. Justice civile. Période de 1861 à 1875. Résumé statistique* (Moniteur belge, 1879), 64. Unfortunately, there is no data on the use of the "swift" *concordat* between 1851 and 1887.

majority requirements were not met, but also because the judges considered the debtor not to be the victim of unfortunate circumstances, or in a position to recover.[63]

The alienation from economic practice, also in the 1880s, is the more remarkable since economic conditions were changing tremendously after 1857, when a liberal government was elected to office. This government pursued politics of tariff reduction and tax cuts; the last vestiges of the professional guild-structure of the Old Regime, such as the Chambers of Commerce, were prohibited; and the profession of stockbroker was deregulated.[64] These political actions coincided with changes in litigation before the commercial courts, where more, as well as increasingly complex cases, were brought.

The opening-up of trade had democratising effects. Middling groups grew more numerous, and as a result they were involved in lawsuits before the commercial courts as well. The new complexity was due to a rise of corporations and limited partnerships in which many investors and administrators were involved.[65] The phenomenon was present not only in Belgium, but also in France for example.[66] In tandem with the changing nature of trials before the commercial courts, reform of the procedure and of the organisation of these courts was planned. A call for professional judges in the commercial courts was made in 1856, when it was proposed to add a lawyer-president to the commercial court of lay judges. Following heavy protests, though, this project was altered and in 1869 it was required that only the law clerk would have a law degree.[67] The reforms of the mercantile insolvency procedures responded to the mentioned developments as well. But in spite of changing economic conditions, and even across borders, the Belgian policymakers mainly stuck to their old recipes.

VII. Enduring Lock-in despite Foreign Examples and Novel Approaches

Over the course of the twentieth century, the above-mentioned views on restricting powers of judges and on guaranteeing the rights of secured creditors remained largely intact. This was the case notwithstanding economic crises and the influence of foreign examples to the contrary (in particular from France and the US).

In the first years after its promulgation, the 1883 law was not very successful. Only during the crisis of the 1930s did "*concordat préventif*" gain wider acceptance: in those years for every three insolvency liquidations one *concordat préventif* was signed.[68] Times of crisis invited new measures, as had happened before, but then as well new procedures could be launched in addition to existing ones. In 1934, for example, "controlled administration" ("*gestion contrôlée*") was introduced. A merchant or

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[63] *Administration de la justice criminelle et civile de la Belgique, période de 1886 à 1897. Résumé statistique* (Moniteur belge, 1898), 70 and 75; *Statistique judiciaire de la Belgique. Statistique pénale: 1900. Statistique civile et commerciale: 1899-1900* (Moniteur belge, 1902), 220.

[64] Max Suetens, *Histoire de la politique commerciale de la Belgique depuis 1830* (Librairie encyclopédique, 1955), 48-80; Witte *et al.,* above note 54, 61-72.

[65] Dave de Ruysscher, "Praktijkgerichtheid in de rechtbank van koophandel (19de-21ste eeuw)", in Dave de Ruysscher (ed), *Rechtspreken en lekenparticipatie. Noodzaak of traditie?* (Maklu, 2013), 157.

[66] Pierre-Cyrille Hautcœur and Nadine Levratto, "Petites et grandes entreprises face à la faillite en France au XIXe siècle : du droit à la pratique" in Alessandro Stanziani and Nadine Levratto (eds), *Le capitalism au futur antérieur* (Bruylant, 2011), 199-266; Claire Lemercier, *Un modèle français de jugement des pairs. Les tribunaux de commerce, 1790-1880* (Habilitation-Thesis, 2012), 363.

[67] Martyn, above note 59, 456.

[68] *Gerechtelijke statistiek van België, jaren 1931-1940* (Van Muysewinkel, 1942), 233-45.

commercial firm in financial difficulties could apply for a temporary moratorium, which entailed the supervision over the firm by court-appointed trustees. These trustees were not only to assist in the administration of the debtor's estate. They decided on the outcome of the proceeding as well: either assets were liquidated, or a restructuring scheme was drafted. This scheme allowed for a tailored approach, and the 1934 proceeding was new in considering corporate rescue as a multi-faceted economic issue. Still, the arrangement of controlled administration did not deviate from the long-held restrictive attitudes towards judges: a majority of creditors, representing half of the debts, had to comply, and judges were not to interfere. The provisional suspension affected secured creditors, but the restructuring scheme did not.

The law implementing the proceeding of "controlled administration" was conceived of as temporary and expired at the end of 1935.[69] The economic problems following the end of World War II were a new invitation to adjust the laws on mercantile insolvency, which was more often considered as corporate insolvency than had been the case in the nineteenth century. In 1946, it was decided to keep the proceeding of *concordat préventif*, and a decree was issued that coordinated the provisions of the 1887 law, which had confirmed most sections of the 1883 law.[70] However, early openings towards an economic analysis of bankruptcy, which had been the drafting of a restructuring scheme under "controlled administration" and the fact that the 1883 law had allowed for subsequent "deliberations" among creditors over proposals by the debtor, were left out. The 1946 law corroborated the nineteenth-century legal-economic views to a large extent. Again, the juxtaposing of *sursis*, *concordat* and *concordat préventif* (now called *concordat judiciaire*) remained; sections of older laws were put in a new, more logical order, but their contents were not thoroughly modified.

In the 1970s, new peaks in the numbers of bankruptcies triggered initiatives for legislative reform. In 1975, the Belgian government appointed a committee of experts to draw up legislation on the restructuring of businesses with financial difficulties. A resulting draft bill of June 1976, on "*gestion assistée*" ("assisted restructuring"), was accepted with amendments by the Chamber of Representatives, but it did not pass to become legislation because Parliament was dissolved before the draft bill could be given a vote.[71] The draft bill was very much in line with French legislative reforms of the 1960s, in particular with the proceeding of *suspension provisoire*.[72] A French law of 1967 on this proceeding had attributed broad powers to the commercial court in outlining and deciding over the fate of insolvent enterprises. The rights of stakeholders, in particular those of workers, were held to be more important than those of creditors. The commercial court was deemed a safeguard of regional economic interests.[73]

The 1976 Belgian draft bill allowed commercial courts to act not only in accordance with the demands of the debtor, but also *motu proprio* and at the injunction of the Minister of

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[69] Royal Decree no. 11 of 15 October 1934, *State Gazette* 15-16 October 1934; Royal Decree no. 38 of 7 December 1934, *State Gazette* 9 December 1934.
[70] Regent's Decree of 27 September 1946, *State Gazette* 11 October 1946.
[71] Documents of Parliament, Chamber of Representatives, 22 June 1976 (Session 1975-76, no. 937/1), 14 January 1977 (Session 1976-77, no. 937/21); Documents of Parliament, Senate, 27 January 1977 (Session 1976-77, no. 1030).
[72] Debates of Parliament, Chamber of Representatives, 25 January 1977, 899.
[73] On this procedure, see Jan Dalhuisen, *Compositions in Bankruptcy. A Comparative Study of the Laws of the EEC Countries, England and the USA* (Sijthoff, 1968), 62-65.

Economic Affairs, the council of the enterprise and even of workers' unions. If recovery was possible but the economic problems had regional effects, a trustee was appointed to draw up a recovery plan. The creditors could be heard, but this was not mandatory. The acceptance of the plan was a decision of the court, not of the creditors, the rights of who were suspended from the date of the request onwards.

In spite of the novel approaches, in many ways, the draft bill bears witness to the same haphazard techniques of legislating that had marked the 1851, 1883 and 1946 laws. The proceeding of *gestion assistée* was not meant to replace existing procedures but was set up as an alternative to the three mentioned composition procedures of *sursis*, *concordat* and *concordat judiciaire*. Furthermore, the rules concerning the rights of secured creditors were again different as compared to the procedures mentioned. Under the provisions, a temporary suspension of claims applied upon submittal of the application until the passing of a recovery plan, and this suspension affected all debts, including secured debts. However, the recovery plan could not impose cuts on debts for secured creditors. The recovery plan could contain reductions, for unsecured debts only, and suspensions for secured debts. But, however, the plan could only be in effect for a maximum of three years. After that period, the debtor had to repay the creditors in full provided that "business went better". In short, as for secured debts, *gestion assistée* was different from both *concordat judiciaire* and *sursis* (see table 2).

Since the debtor could initiate the *gestion assistée*, he had the choice of three procedures when facing financial difficulties. When having debts that were securitised with mortgages, *sursis* was the most rewarding. If collateralised debts were only for pawned assets, then *gestion* was the best option. *Concordat judiciaire* was feasible only when non-secured debts were to be addressed (see table 2). *Gestion* entailed dispossession of the firm's management, which was not the case with *sursis* and *concordat judiciaire*. Yet, as was explained above, these variants were not a matter of intentional differentiation, but rather of a combination of hesitation to suppress legislation or to fundamentally recast mercantile insolvency regulations.

Following the failure of the 1976 draft bill, in 1978 a legislative proposal was drafted by liberal MPs,[74] which did not opt for French solutions, but rather implicitly embraced American ideas. The draft legislation aimed at a partial harmonisation of the existing procedures. It was intended to reconcile *gestion assistée* (now labelled *redressement assisté,* "assisted administration") and *concordat judiciaire*, but it did not mention or aim to change *sursis*, even though in practice it was rarely used.[75] In the 1978 proposal, *redressement assisté* was a voluntary proceeding that was open only for applicants of good faith. The recovery plan could not be imposed upon the creditors without their approval, which required a majority of half the creditors and half the debts (in sums). In *concordat judiciaire*, reorganisation schemes had to be accepted by half of the creditors representing two thirds of all debts (in sums) (see table 3). As for secured creditors, they could be forced to accept reductions (to a maximum of 25% of their debts) in which case they were eligible to vote on the plan (see table 2).

The American ideas are evident in a modest "cram down". In contemporary US bankruptcy practice, it was possible for the bankruptcy court to enforce a reorganisation

[74] Documents of Parliament, Chamber of Representatives, 28 February 1978 (Session 1977-78, no. 308/1).
[75] Documents of Parliament, Chamber of Representatives, 22 June 1976 (Session 1975-76, no. 937/1), 1.

scheme even if not all classes of creditors had accepted it.[76] The 1978 proposal stated that "assisted administration" could be imposed even if less than half the creditors had accepted it (which was the rule), provided that they represented at least half the totality of debts. The earlier ideas of strong courts were thus still present in the 1978 proposal: the commercial court could impose "assisted administration", for example. Again, the proposal did not pass to become a law. This was mainly due to an ideological shift of the liberal party and of employers' representatives in the early 1980s, who now came to oppose interventionism.[77]

After two new failed attempts to pass legislation – in October 1983[78] and December 1985[79] – another drafting committee was appointed in 1987, which presented its conclusions in 1991. However, these were met with scepticism since they did not propose elaborate changes. In April 1993, two members of Parliament belonging to the liberal party, Jean Gol and Jacques Simonet, offered a new draft of legislation. It proposed to recast *concordat judiciaire* as "*concordat de réorganisation*"; it built partially on the 1976 proposal in acknowledging that measures, including a reorganisation plan, could be forced upon creditors, and also secured creditors. In most respects, though, the proposal stepped away from the ideas of the 1970s. It provided, for example, that the creditors and the members of personnel of the enterprise were invited to vote on the reorganisation plan. The court was not deemed powerful enough to impose such a scheme.

Both the inclusion of secured creditors and their voting rights were inspired by the example of the American Chapter 11 proceeding in the 1978 Bankruptcy Act, which was mentioned in the proposal.[80] Yet it is evident that the American ideas regarding stronger courts were considered incompatible with Belgian insolvency law. This – as well as the failed attempts to launch *gestion/redressement assisté(e)* – are examples of how path dependence lasted because of the continued unspoken views of legislators on the restraint of judges in processes of economic decision-making. The foreign examples could serve as inspiration, but they were not considered acceptable if they went against the predominant legal-economic views held by the members of Parliament.

After lengthy debates and further amendments in the 1990s, ultimately two laws were issued in 1997, one on insolvency and another on *concordat judiciaire*. The 1997 law on *concordat judiciaire* largely followed the outlines of the 1993 proposal, but still contained traces of the 1970s approaches. For example, it was stated that the court had to check the viability of the reorganisation plan. Restructurings were aimed at corporate rescue and were no longer considered a privilege for debtors of good intent.

For the first time, a Belgian law on mercantile insolvency fully allowed for an economic approach of insolvency and corporate rescue. The aim of the law was to preserve businesses, and to protect debtors against creditors wanting to liquidate the debtor's

[76] Such provisions had been inserted in US bankruptcy legislation in the 1930s. See Charles Booth, "The Cramdown on Secured Creditors: an Impetus Towards Settlement" (1986) 60 *American Bankruptcy Law Journal* 69, 77-8.
[77] See Ophelia Ongena, *Een geschiedenis van het sociaal-economisch overleg in Vlaanderen (1945-2010)* (Academia Press, 2010), 93.
[78] Documents of Parliament, Chamber of Representatives, 28 October 1983 (Session 1983-84, no. 775/1).
[79] Documents of Parliament, Senate, 20 December 1985 (Session 1985-86, no. 73/1).
[80] Documents of Parliament, Chamber of Representatives, 19 April 1993 (Session 1992-93, no. 976/1).

firm. As a result, it was written into the law that the restructuring scheme could differentiate among categories of debts (Article 29 § 3); moreover, the commercial court was given powers to check whether measures proposed by the debtor were functional, as directed towards continuity of his business (Article 9 § 2). These features were remnants of draft proposals of the 1970s and 1980s; they were kept because the attention of the legislator was directed mainly towards insolvency and not towards *concordat judiciaire*. This explains why one of demands of the influential employers' association VBO, to diminish the role of the commercial court, was neglected.[81]

Secured creditors were blocked from recovering their collateral for as long as the reorganisation plan had not been voted on. If they did not agree with the plan, a suspension of recovery could be imposed only for a maximum of eighteen months, whereas non-secured creditors could be affected by a plan for two years at most (Articles 30 and 34). The 1997 reform of the bankruptcy law finally abolished *sursis de paiement*, and also *concordat* upon insolvency, thus reducing the number of composition procedures for "honest but unfortunate debtors" to one. But even so, many earlier lines of thought were preserved. The proposals of reorganisation had to be approved by a majority of creditors, representing half the total debt (Article 34). No voting by classes or a "cram down" in the American sense was provided.

In 2009, a new law was passed, which reformed *concordat judiciaire* and which established several reorganisation procedures. Again, the impetus to reform bankruptcy law was economic crisis. Not only American, but also French procedures served as examples. The *concordat judiciaire* was abolished and replaced with three sets of measures. They included a mediated agreement with some creditors, an in-court reorganisation proceeding and an in-court split-up of parts of the enterprise. The mediated agreement was French,[82] whereas the other two bear traces of the US Chapter 11 proceeding. As was the case under the 1997 law, restructuring plans were voted on by creditors making up a 50 percent majority (in number and debts). Secured creditors could not lift their pledges during the provisional suspension and could be affected by the reorganisation plan. Their rights could be stalled, though only for a maximum period of 18 months. They were not held to accept reductions.

The competence of judges, however, to interfere with negotiations was reviewed, and again restricted as compared to the 1997 law. VBO had advocated for this approach; members of Parliament followed suit,[83] even though a majority of commercial judges had demanded wider economic assessment authority for the commercial court.[84] Restricted powers were written into the law. It provided that a restructuring scheme cannot be refused by the court if the majority requirements are met, except for when it infringes on the "public order" or formal requirements. It was expressly stated during the debates in Parliament that courts were not to test the feasibility of restructuring

[81] "VBO wil wetgeving over gerechtelijk akkoord modernizeren" (*De Tijd*, 2 October 1991).7
[82] Andrew Tetley and Marcel Bayle, "Insolvency Law in France", in Otto Lobo (ed), *World Insolvency Systems: A Comparative Study* (Carswell, 2009), 195-278, 199, noting "*conciliation*" (introduced in 2005).
[83] VBO urged for a restriction of judicial control, for reasons of cost reduction. See High Council of Justice, *Report on Insolvency Law* (29 March 2006), 6-7.
[84] Ibid., 7-8.

plans, and the economic viability of the firms affected, but that this was the prerogative of the assembly of creditors.[85]

The legal reforms of 1997 and 2009 demonstrate a higher influence from lobbying forces and ideological approaches. Employers' representatives had a large say. Yet, the 1997 law reflects the higher weight of legal borrowing from foreign laws, even though its contents were also path dependent in that they mimicked legislative proposals of the 1970s and 1980s. But all in all, the earlier legal-economic conceptions prevailed, which was when the 2009 reform was implemented. Highly significant was the neglect of views held by commercial judges; as had been the case before, legislation was based on economic appreciations but to a very modest extent. Expert committees could draw on the expertise of practitioners, but the outcomes corroborated previous approaches.

VIII. Conclusion: Path Dependence of Legal Culture and its Dysfunctional Effects

Since the early nineteenth century, in Belgium, the continued juxtaposing of procedures, aimed at providing relief for insolvent merchants and enterprises, cannot be explained without references to the mind-set of lawmakers. Their convictions as well as their style of addressing problems were directly responsible for neglecting topics that needed deep harmonisation in order to be effective. The way in which laws were devised had a profound influence on their contents. The legislators handled policy issues on the basis of general considerations rather than by way of economic assessments or impact analysis. The purposes of saving merchants from liquidations in insolvency obfuscated the question of the efficiency of procedures that left secured creditors virtually untouched. Members of Parliament did not resort to statistics; evidence-based legislation, taking into account the interplay of procedures and economic variables, was absent in matters of mercantile insolvency for a long time.

An important cause for these tactics lies in the profile of lawmakers. Their legal backgrounds fostered a replication of Enlightenment ideas on restricted judicial powers. A lack of economic and business-related training added to the understanding of bankruptcy as a conceptual, rather than an economic affair. Ideas that were at the basis of the 1807 Commercial Code were reinforced time and time again. As a result, the view that judges could only marginally interfere with creditors' interests prevailed, from the early nineteenth century until the present day. Sometimes new ideas were written into laws, but when the insolvency laws were rewritten there commonly was a relapse to the older positions. A remnant from the 1970s conception that judges could check the economic feasibility of restructuring schemes and veto the assembly of creditors was present in the 1997 law, but was abandoned in 2009. The 1946 law left out the earlier rules regarding creditors' deliberations and amendments on proposed restructuring schemes.

Creditors' interests remain therefore heavily protected under Belgian law. A brand-new law, dated 11 August 2017 and which will enter into effect on 1 May 2018, confirms much of the above. The law reinstates most sections of the 2009 law with regard to judges' powers,[86] and in this respect goes against views of the European Commission,

[85] Documents of Parliament, Chamber of Representatives, 1 October 2007 (Extraordinary Session 2007, no. 160/001), 31 (Article 45).
[86] Law of 11 August 2017, *State Gazette* 11 September 2017.

which recommends a "cram down" proceeding modelled after the US Chapter 11-proceeding.[87] Moreover, for a long period of time, up until 1997, existing procedures were not thoroughly modified; instead, new ones were added and previous procedures remained in effect. This juxtaposing of procedures further reflected a superficial understanding of the economic problems related to bankruptcy and reorganisations. Lawmakers were hesitant to recast their legislation.

The example of the history of Belgian corporate insolvency demonstrates the important effect which legal culture can have. Legal scaffolding is closely related to a legislative culture that is based on principles rather than empirical assessments. Political ideology played a part in this, but a more important variable was the legal education of legislators, which provided few incentives to loosen up their style of conceiving of mercantile insolvency as a matter of debt enforcement. This ensured a continued, yet unarticulated, effect on the contents of laws. In this regard, path dependence in Belgian insolvency law is a matter of constraints. It is not the result of an equilibrium of conflicting interests or of avoidance of costs involved with change. Nor does it pertain to a "regulatory style", but rather to the profile and conceptions of lawmakers that have changed little throughout the country's history.

[87] EU Commission Recommendation of 12 March 2014, C (2014) 1500. A Directive proposal, dated 21 November 2016, elaborates on this Recommendation: COM(2016) 723 def – 2016/0359 (COD).