



*A Reformatory Approach to State Regulation of Insolvency Law in
South Africa*

PART VI

**POLICY DEVELOPMENT AND CONSIDERATIONS WITH REGARD
TO THE REGULATION OF SOUTH AFRICAN INSOLVENCY LAW**

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CHAPTER 1: INTRODUCTION

The policy decision between decisive and gradual change is not simple. On the one hand the benefit of incremental change is that it reduces the likelihood of a radical mistake that would generate a sharp backlash from stakeholders or a loss of face by lawmakers. On the other hand, where a new institution is being constructed, a failure to proceed systematically, with all the components in place at the outset and perceptible progress from the beginning, may also lead to a backlash from stakeholders who lose confidence quickly and de-legitimize the institution.¹

The aim of this thesis, namely ultimately to propose a framework that can serve as a guideline for further law reform in this particular field of South African insolvency law, inherently suggests a change in approach towards the traditional regulation paradigm. In order to remain on the path of sound law reform, this part of the study considers and explores certain key elements to be considered in determining the parameters of a comprehensive regulatory policy in the South African insolvency law. Any discussion on policy matters has the potential to develop into a collection of abstract themed ideas, resulting in a confusing and contradicting message being sent to the parties involved. The challenge will be to pin down the relevant policy outcomes in order to provide a clear and predictable regulatory framework. Over the years there has been considerable debate on the reform of the insolvency laws in South Africa in general.² By contrast, progress on policy formulation aimed at improving the regulation of our insolvency law has been far more gradual, reflecting the inherent complexity of this part of our law.³

Several key themes have thus far emerged from this study. The first theme is the relationship between our local insolvency regime and internationally recognised norms and standards. It has

¹ Halliday “Lawmaking and Institution Building in Asian Insolvency Reforms: Between Global Norms and National Circumstances” 29 (hereafter referred to as Halliday “Lawmaking and Institution Building”) in the Organisation for Economic Co-operation and Development *Asian Insolvency Systems Closing the Implementation Gap* (2007).

² See Loubser “An International Perspective on the Regulation of Insolvency Practitioners” (2007) *SA Merc LJ* 123 (hereafter referred to as Loubser “An International Perspective on the Regulation of Insolvency Practitioners”). See also Calitz “The Role of the Master of the High Court as Regulator in a Changing Liquidation Environment: a South African Perspective” (2005) *TSAR* 728 at 734; See Burdette *Reform, Regulation and Transformation: The Problems and Challenges Facing South African Insolvency Industry* (2005) unpublished paper presented at the Commonwealth Law Conference, London (hereafter referred to as Burdette “Reform, Regulation and Transformation”); See also Walters *The Licensing, Regulation and Supervision of Insolvency Practitioners in the UK* (2006) unpublished paper presented at INSOL Europe Annual Conference, Romania, on file with the author. See Norris *Insolvency Practitioner Regulation in the United Kingdom* (2004) unpublished paper delivered at INSOL Congress, Cape Town, (hereafter referred to as Norris “Insolvency Practitioner Regulation in the United Kingdom”) on file with the author. Calitz “The Appointment of Insolvency Practitioners in South Africa: Time for change?” (2006) *TSAR* 721 (hereafter referred to as Calitz “The Appointment of Insolvency Practitioners in South Africa”).

³ At the National Insolvency Conference of the Association of Insolvency Practitioners of Southern Africa (hereafter referred to as “AIPSA”), August 2009, more than 200 delegates participated in the debate on the regulation of the insolvency industry and no general consensus could be reached.

been argued that globalisation is a development that is having a profound impact on the subject of economics as a whole – to such an extent that it has become the defining process of the present age.⁴ This development raises questions concerning the value to be obtained from conformity to such global standards, balanced against a distinctive and unique national path that reflects the peculiarities of national historical, cultural and legal developments.⁵ The challenge will thus lie in translating internationally identified standards and norms into our national context.

A second theme had been the dawn of a new democratic constitutional dispensation in South Africa. The Constitution⁶ provides a framework within which policy can be formulated and original legislation giving effect to that policy can be enacted and interpreted.⁷ The foundation of constitutionalism is that the power of the state is defined and circumscribed by law to protect the interests of society.⁸ Any law reform process should thus aspire to comply with the underlying values of the Constitution.⁹

This sentiment is also echoed by Evans:

In formulating new legislation the question is not whether constitutional requirements, underpinned by human rights interests, must form an integral part thereof, but rather to what extent policy changes should occur in order to align such legislation with the required constitutional principles and expectations, and how to achieve this while maintaining or balancing the interests of creditors, debtors, society and the state.¹⁰

This part of the study attempts to set out the broad areas for policy considerations. It cannot be exhaustive, as any policy process devolves and many policy matters will arise during the process of deliberation. The study will commence with a brief discussion of the existing policies underlying the South African insolvency law.¹¹ The advantages of engaging in a policy formulation process with the aim of setting the tone for future reform proposals will

⁴ Loots *Globalisation, Emerging Markets and the South African Economy* (2001) unpublished paper presented at the International Jubilee Conference of the Economic Society of South Africa, Johannesburg, (hereafter referred to as Loots) on file with the author.

⁵ Halliday “Lawmaking and Institution Building” 17.

⁶ Act of 1996. Hereafter referred to as the Constitution.

⁷ Hoexter *Administrative Law in South Africa* (2006) 22 (hereafter referred to as Hoexter).

⁸ Burns *Administrative Law under the 1996 Constitution* (2003) 28 (hereafter referred to as Burns).

⁹ See part IV above.

¹⁰ Evans *A Critical Analysis of Problem Areas in respect of Assets of Insolvent Estates of Individuals* (2009) 428 LLD dissertation University of Pretoria (hereafter referred to as Evans).

¹¹ For a detailed discussion of the philosophy of South African insolvency law refer to Bertelsmann *et al Mars: The Law of Insolvency in South Africa* (2008) 1 (hereafter referred to as Mars). See also Roestoff *'n Kritiese Evaluasie van Skuldverligtingsmaatreëls vir die Individu in die Suid-Afrikaanse Insolvensiereg* (2002) LLD dissertation University of Pretoria; Evans ch 7.



also be argued. Although the role of the state in insolvency law represents an interesting and controversial area of law, the legal pitfalls are myriad. To this end this study endeavours to address the underlying philosophies of the role of the state and underlines the need for institutional efficiency within an effective insolvency system. Drawing on leading international standards and guidelines, as well as snippets of legal policy in our domestic arrangement, the remaining chapters of this part of the study consider several policy goals and objectives to be considered in determining the parameters of a cohesive and comprehensive policy framework within this area of our insolvency law.

CHAPTER 2: EXISTING POLICIES AND POLICY CONSIDERATIONS IN SOUTH AFRICAN INSOLVENCY LAW

The *concursum creditorum*¹² is regarded as one of the key concepts of South African insolvency law.¹³ The concept entails that the rights of the creditor as a group are preferred to the rights of individual creditors. Evans mentions that: “[t]he predominant policy in South African insolvency is the collection of the maximum assets of the debtor for the advantage of creditors in insolvent estates ... If advantage to creditors cannot be shown in an application for the sequestration of a debtor’s estate, a court will refuse to grant that order.”¹⁴ These two principles fundamentally form the basis of South African insolvency law.¹⁵

In the previous part of this study¹⁶ the reflection on the South African Law Reform Commission’s review¹⁷ of South African insolvency law concluded that throughout the Commission’s review of the present insolvency law, the development of a formal regulatory policy did not at the time appear to have formed an integrated part of the reform agenda. If we take the recent communication by government on evident policy directions out of the equation,¹⁸ the only substantive provision which appears to deal with the aspect of regulation in our law is the recent amendments to the Insolvency Act relating to the appointment of insolvency practitioners.¹⁹

In 2003 the Minister of Justice and Constitutional Development,²⁰ reacting to persistent allegations of corruption in the appointment of insolvency practitioners, introduced the

¹² See *Walker v Syfret* 1911 AD 141 at 166; cf Swart *Die Rol van 'n Concursum Creditorum in Suid-Afrikaanse Insolvensiereg* (1990) LLD dissertation University of Pretoria (hereafter referred to as Swart); Mars 2.

¹³ See Mars 2.

¹⁴ Evans 3.

¹⁵ Having collective debt-collecting as its basic premise, South African insolvency law is also being classified as a creditor-friendly system as the primary object of the Insolvency Act 24 of 1936 (hereafter referred to as Insolvency Act of 1936 or the Insolvency Act) is not to provide debt relief to debtors. See Wood *Principles of International Insolvency* (2007) 4-5 (hereafter referred to as Wood); Mars 3. See part V above.

¹⁶ See part V ch 6 above.

¹⁷ See South African Law Commission *Review of the Law of Insolvency* Project 63 (2000) Report, vol I Explanatory Memorandum, and vol 2 Draft Bill (hereafter referred to as 2000 draft Insolvency Bill or draft Insolvency Bill). See also discussion by Evans at 9 and 430.

¹⁸ Keynote address by Deputy Minister of Justice and Constitutional Development (hereafter referred to as the Department of Justice), Mr A Nel, MP (hereafter referred to as the Deputy-Minister), at the International Association of Insolvency Regulators (“IAIR”) annual general meeting and conference, Sandton, 2009-10-12 (hereafter referred to as the Minister’s address) available at http://www.justice.gov.za/m_speeches/sp2009.html (last visited at 09-11-30).

¹⁹ See part IV above.

²⁰ Hereafter referred to as the Minister or the Minister of Justice.



Judicial Matters Amendment Act of 2003.²¹ According to this Act, section 158 of the Insolvency Act had been amended to read as follows:

Regulation and Policy

- (1) The Minister may from time to time make regulations not inconsistent with the provisions of this Act, prescribing –
 - (a) the procedure to be observed in any Master's office²² in connection with insolvent estates;
 - (b) the form of, and manner of conducting proceedings under this Act;
 - (c) the manner in which fees payable under this Act shall be paid and brought to account.
- (2) The Minister may determine policy for the appointment of a *curator bonis*, trustee, provisional trustee or co-trustee by the Master in order to promote consistency, fairness, transparency and the achievement of equality for persons previously disadvantaged by unfair discrimination.
- (3) Any policy determined in accordance with the provisions of subsection (2) must be tabled in Parliament before publication in the *Gazette*.²³

The stated aim of the legislation was first to create uniform procedures for the appointment of practitioners in all Master's offices and secondly to promote the general transformation policy of government in promoting consistency, fairness and transparency and the achievement of equality in these appointments by the various Masters.²⁴ From a formal perspective the basis of the English law on bankruptcy is to be found in the Insolvency Act 1986²⁵ as primary legislation, supported by the Insolvency Rules 1986,²⁶ a major piece of delegated legislation authorised by such primary Act.²⁷ The recent amendment to the present Insolvency Act thus follows a similar approach to enable the implementation and administration of the Amendment Act of 2003. As yet no formal policy document has been published or tabled in parliament, and therefore it is difficult to speculate on its final content.²⁸

²¹ Act 16 of 2003. Hereafter referred to as Judicial Matters Amendment Act of 2003 or the Amendment Act of 2003. See Loubser "An International Perspective on the Regulation of Insolvency Practitioners" 125.

²² Master of the High Court. Hereafter referred to as the Master or the Master's office.

²³ Section 158 of the Insolvency Act.

²⁴ *Memorandum on the Objects of the Judicial Matters Amendments Bill*, 2003 at par 2.2. However, the legislative amendment applies only to the appointment of practitioners by the Master and not those nominated by creditors and merely accepted and confirmed by the Master. See Loubser "An International Perspective on the Regulation of Insolvency Practitioners" 125.

²⁵ Hereafter referred to as the Insolvency Act 1986. The Act received Royal Assent on 1986-07-25 and came into force on 1986-12-29. See Milman 22.

²⁶ Insolvency Rules (SI 1986/1925) means the rules for the time being in force and made under s 411 and s 412 of Insolvency Act 1986 in relation to insolvency proceedings.

²⁷ See part III ch 3.

²⁸ Loubser "An International Perspective on the Regulation of Insolvency Practitioners" 125.

In a recent keynote address the Deputy-Minister of Justice acknowledged – “the urgent need to address the regulatory and institutional set-up.”²⁹ He subsequently refers to the following proposals submitted:

- The establishment of an ombud to deal independently with complaints and decisions regarding the administration of insolvent estates;
- The creation of an independent statutory body to exercise oversight and control over insolvency practitioners and to regulate the entry into and exit from the industry;
- The statutory recognition of the existing voluntary associations to enable the industry to self-regulate;
- The adoption of a dual administration process in terms of which the insolvency regulator (in this case the master) attends to the administration of small estates while the administration of big and complex estates is attended to by the insolvency practitioners.

Subsequently he also concluded that:

Although all the above mentioned proposals have advantages, funding, training and capacity building would still remain a challenge. The World Bank has correctly found that the capacity to enforce and apply legislation, is often more important than the statutory provisions which are in place.³⁰

The importance of a sound policy design process as a key component of any sound reform program can not be overstated. Not only do policies provide guidance on government’s objectives, and the norms and principles underlying these goals, but it also provide policy – and lawmakers with the opportunity to effectively manage the reform process which in turn depends on plans consisting of measurable outputs and agreed financial inputs.³¹

Although it should be noted that the Deputy-Minister’s lecture did not include any official commitment to policy direction or design and did not introduce any formal deadlines, the core of the message nevertheless implies that firstly it seems that the level of importance of the regulation of insolvency law had been raised, and secondly it presented us with a general indication of the policy direction Government is prepared to follow. Even though it is not apparent how much significance could be read into to the detail of the proposals set out in the

²⁹ See Minister’s address (n 18).

³⁰ See part III ch 6 above with regard to the international principle dealing with capacity and institutional building. Johnson “Towards International Standards on Insolvency: The Catalytic Role of the World Bank” (2000) *Law in Transition* 69 (hereafter referred to as Johnson).

³¹ Ball *Security Sector Governance in Africa: A Handbook* (2004) ch 4 (hereafter referred to as Ball *Security Sector Governance in Africa*) as available at <http://www.ssronline.org> (last visited at 09-11-12).



Deputy-Minister's address, it will nevertheless be feasible to refer to certain comments and proposals during the following discussion on policy considerations.

CHAPTER 3: POLICY CONSIDERATIONS FOR A REVISED REGULATORY REGIME

3.1 INTRODUCTION

This chapter identifies and discusses the key issues that arise in the design of a sound regulatory system. The strategic decisions within each of the three cornerstones of an insolvency system – namely the regulatory, institutional and legal frameworks – will be underlined and considered.³²

Before venturing down the path of policy considerations, one might first question the relevance and purpose of such a policy-developing process. It is submitted that the following statement on generic policy processes in Africa made in a recent study on “Security Sector Governance in Africa” could also be seen as relevant to any South African law reform process:

Policy is important because:

- (a) it provides clear guidelines for developing and implementing strategies;
- (b) it helps to discipline government behaviour, and to promote the optimal utilization of resources in the pursuit of specific objectives;
- (c) it promotes accountability by providing normative and practical guidelines; and
- (d) it encourages the predictability of government actions.³³

Within the context of South African insolvency law reform, it is vital to realise the critical importance of balancing difficult policy considerations when considering any law reform proposal. In the law of insolvency policy, objectives should not only add up on a commercial level, but should also reflect the values of our society.³⁴ While there are clearly certain aspects regarding the subject of regulation of insolvency law that transcend jurisdictional boundaries, these should be balanced against distinctive national circumstances.³⁵

Although dominant themes and general policies such as affirmative action³⁶ and Black Economic Empowerment³⁷ introduced by government as measures to redress the wrongs of the past are of huge importance when embarking on any insolvency law reform initiative, they should be balanced against the aim of restoring public confidence in the system and linking

³² See part I above.

³³ Ball *Security Sector Governance in Africa* par 4.1

³⁴ Johnson “Toward International Standards on Insolvency: The Catalytic Role of The World Bank” 2000 *Law in Transition* 69 (hereafter referred to as Johnson).

³⁵ Halliday “Lawmaking and Institution Building” 17.

³⁶ See Employment Equity Act 55 of 1998 ch 3. See Coetsee *The Fairness of Affirmative Action: An Organisational Justice Perspective* (2005) PhD dissertation University of Pretoria.

³⁷ Hereafter referred to as “BEE”. See *Broad-Based Black Economic Empowerment Act* 53 of 2003. See also BEE *Codes of Good Practice* as published in GG 29617 February 2007. The Act has its roots within the Freedom Charter of 1955.



reform to sustainable development through international investment. In South African insolvency law reform, the formulation of policy has to take place within the context of issues such as transformation of the insolvency industry on the grounds of race and gender, which are probably unique to South Africa.³⁸ In a modern pluralistic society it can be difficult to identify those principles which are truly representative of a nationwide consensus, or to articulate them except in very general or abstract terms. Nevertheless, for the purpose at hand, it is necessary to accept this challenge of reviewing the existing ethos with regard to regulation in our insolvency law, in order to strike a balance between a sustainable commercially motivated model and the meanings ascribed to a successful regulatory system within the international and local society.³⁹

As the reform of the insolvency process would undoubtedly include a wide-ranging transformation process, the final step in the policy development and strategic review processes would have to include the dissemination of the policy and other relevant materials to all stakeholders. Policy communication, dialogue and debate are at the centre of any policy process.⁴⁰ With the introduction or modification of any policy, it is critical to take into account the sentiments of the political and civil society, as well as the state. As far as possible, one should identify the major role-players required for the success of the policy (both inside and outside the organisation concerned), determine their attitudes toward the proposed changes, and analyse their influence over the formulation and implementation of the policy.⁴¹

The international best practice and standards drawn from international reference points on insolvency law issues such as the World Bank's *Principles for Effective Insolvency and Creditor Rights System*⁴² and the United Nations Commission on International Trade Law's⁴³ *Legislative Guide on Insolvency Law*,⁴⁴ as well as the substantive lessons from the comparative consideration of other insolvency regimes, provides us with sufficient material to create the ideal regulatory framework. The policy process thus provides a platform for

³⁸ See Burdette "Reform, Regulation and Transformation" 5.

³⁹ Johnson "Building Effective Insolvency Systems: Towards Principles and Guidelines" (1999) paper presented at Conference on Insolvency Systems in Asia, Sydney (hereafter referred to as Johnson "Building Effective Insolvency Systems: Towards Principles and Guidelines").

⁴⁰ *Security Sector Governance in Africa* par 4.4.1.

⁴¹ *Security Sector Governance in Africa* par 4.4.1.

⁴² See World Bank *Principles for Effective Insolvency and Creditor Rights System* (2001) (also referred to as *Principles*).

⁴³ Hereafter referred to as "UNCITRAL".

⁴⁴ See UNCITRAL *Legislative Guide on Insolvency Law* (2005) 10 (hereafter referred to as "UNCITRAL *Legislative Guide*" or "*Legislative Guide*").

research, debate and scrutiny with the aim of ultimately developing a realistic and achievable policy statement. It is also submitted that the careful examination of the relevant policy matters as well as the subsequent problem-solving process could hopefully lead to more informed legislative reforms in bankruptcy.

Policymakers involved in the South African insolvency law reform process will need to attend to particular strategic policy decisions in order to assess which areas of activity are the most problematic at any particular point in time, and sequentially design a response that will optimise the regulatory outcomes.⁴⁵ Firstly, a policy direction with regard to the dominant theme of the role of the state in our insolvency law will have to be considered. In a highly competitive world, institutions have to develop and innovate continuously and proactively. Reputation alone may not guarantee future continued existence and success.⁴⁶ Secondly, the various regulatory models available to regulate office-holders will have to be analysed in order to assess which model will best suit the local social and economic conditions. And thirdly, the interplay between the regulatory body and the office-holder will constantly have to be evaluated. The interaction between and coexistence of the different cornerstones of our insolvency system will subsequently have to be aligned in order for the system to operate as a whole.

In order to successfully implement policy and subsequent law reform proposals, it is necessary to develop long-term strategic plans and to translate these objectives into programmes that can be implemented and budgets that can support the specific plans and programmes.⁴⁷ Throughout the law reform process a realistic approach with regard to institutional capabilities and available resources will have to be maintained. Joyce appropriately states that how, and how swiftly, a regulatory framework can be developed, consistent and coherent with the overall structure of the legislation, will depend in some part on the existing structures and capacities as well as setting realistic timetables. This solution may encompass introducing some requirements and standards earlier than others, with the recognition that they may need to be raised or improved at a later stage.⁴⁸

⁴⁵ Knott *Regulatory Issues Impacting on Insolvency* (2001) unpublished paper presented at the National Conference of Insolvency Practitioners Association of Australia, Adelaide.

⁴⁶ Zhang “Developing a Regulatory Framework for Outsourcing of Insolvency Work in Hong Kong China” in *OECD Asian Insolvency Systems – Closing the Implementation Gap* (2007) 193.

⁴⁷ Ball *Security Sector Governance in Africa* par 4.6.2.

⁴⁸ Joyce *The Role of Insolvency Regulators in the Past and in the Future* (2003) 4 unpublished paper delivered at the International Insolvency Conference, Singapore, (hereafter referred to as Joyce “The Role of Insolvency Regulators in the Past and in the Future”) on file with the author.



3.2 THE ROLE OF THE STATE IN THE REGULATION OF INSOLVENCY LAW

3.2.1 Introduction

There are various contemporary means against which the relationship between the state and the law of insolvency can be measured. In its 1997 *World Development Report* the World Bank stated that there are “five fundamental tasks at the core of every government’s mission, without which sustainable, shared, poverty-reducing development is impossible.”⁴⁹ The five fundamental tasks are:

- (a) establishing a foundation of law;
- (b) maintaining a non-distortionary policy environment, including macro-economic stability,
- (c) investing in basic social services and infrastructure,
- (d) protecting the vulnerable and
- (e) protecting the environment.⁵⁰

Both the International Monetary Fund⁵¹ and the World Bank have placed great emphasis on the need to provide a regulatory framework which will provide the most efficient, effective and fair outcome for those for whose benefit an insolvency system exists.⁵² During the consulting stages of the World Bank’s process that culminated in its *Principles and Guidelines for Effective Insolvency and Creditor’s Rights System*,⁵³ the bank stated:

While there are clearly costs to be borne in maintaining a regulatory framework, these must be weighed against the benefits in providing a system that is efficient and effective and in which the public can have confidence.⁵⁴

⁴⁹ World Bank, *World Development Report 1997: The State in a Changing World* (hereafter referred to as 1997 World Development Report). See Heath “Consumer Bankruptcies: A New Zealand Perspective” (1999) *Osgoode Hall LJ* 428 at 442 (hereafter referred to as Heath).

⁵⁰ Heath 442.

⁵¹ Hereafter referred to as the “IMF”. IMF *Orderly and Effective Insolvency Procedures* (hereafter referred to as IMF *Orderly and Effective Insolvency Procedures*) (1999) available at <http://www.imf.org> (last visited at 09-11-30).

⁵² Halliday “Architects of the State: International Organizations and the Reconstruction of States in the Global South” (2008) *American Bar Foundation Research Paper no 08-01*; *Centre on Law and Globalization Research Paper no 08-01* (hereafter referred to as Halliday “Architects of the State: International Organizations and the Reconstruction of States in the Global South”) available at SSRN: <http://ssrn.com/abstract=1193162> (last visited at 30-11-09).

⁵³ See World Bank *Principles* (n 42).

⁵⁴ See Johnson “Building Effective Insolvency Systems: Towards Principles and Guidelines” 3; Mason “Cross-Border Insolvency Law: Where Private Law and Insolvency Law Meet” in Omar *International Themes and Perspectives* (2008) 36.

A very appropriate statement was also issued by the United States⁵⁵ Congress when the House of Representatives reported the passage of the 1978 Bankruptcy Code.⁵⁶ The Congressional Statement read:

The practice in bankruptcy is different for several reasons. First there is a public interest in the proper administration of cases. Bankruptcy is an area where there exists a significant potential for fraud, for self dealing, and for diversion of funds. In contrast the general civil litigation, where cases affect only two or a few parties at most, bankruptcy cases may affect hundreds of scattered ill-represented creditors. In general civil litigation, a default by one party is relatively insignificant, and though judges do attempt to protect parties' rights, they need not be active participants in the case for the protection of public interest in seeing disputes fairly resolved. In bankruptcy cases, however, active supervision is essential. Bankruptcy affects too many people to allow it to proceed untended by an impartial supervisor.⁵⁷

The scheme of regulation of insolvency practitioners in England and Wales⁵⁸ is one of government-monitored self-regulation.⁵⁹ As early as the 1880s senior staff members of the Board of Trade in England realised that the conceptual key to bankruptcy legislation is directly related to the state's role in the administration of insolvent estates.⁶⁰ English lawmakers shared a vision that bankruptcy law is not only the concern of creditors but affects the wider society, resulting in the acceptance that bankruptcy law should be viewed as a public policy measure. When formulating recommendations on law reform the Cork Committee⁶¹ observed that "the success of any insolvency system is very largely dependent upon those who administer it"⁶² and that –

... while the method of control over the administration of bankruptcy varies from country to country, in almost all bankruptcy systems creditors were originally given the primary responsibility for administering the process. In country after country however, this had led to scandal and abuse, and exclusive control has been progressively removed from creditors and varying degrees of official control have been introduced as it has increasingly accepted that the public interest is involved in the proper administration of the Bankruptcy system.⁶³

⁵⁵ Hereafter referred to as the "US".

⁵⁶ Also referred to as the Bankruptcy Code, Code, 1978 Act or Bankruptcy Reform Act of 1978. (Pub L No 95-598, 92 Stat. 2549 (1978) 11 USC. § 101, *et seq.* which was signed into law on 1978-11-06 and became effective on 1979-10-01).

⁵⁷ HR Rep NO 95-595, 95th Cong, 1st session 88 (1977) (Congressional Statement on the passage of new US bankruptcy law in 1978). See *New Zealand Law Commission Study Paper 34*.

⁵⁸ Hereafter referred to as the "UK".

⁵⁹ Norris "Insolvency Practitioner Regulation in the United Kingdom" 2. See Fletcher *The Law of Insolvency* (2009) 26.

⁶⁰ Lester *Victorian Insolvency: Bankruptcy, Imprisonment for Debt, and the Company Winding-Up in the Nineteenth Century England* (2003) 304.

⁶¹ See report of the *Review Committee on Insolvency Law and Practice* Chairman Sir Kenneth Cork GBE Cmnd 8558 London: Her Majesty's Stationery Office 1982 (*Cork Report*) at par 732 (hereafter referred to as *Cork Report*).

⁶² See Tolmie *Corporate and Personal Insolvency Law* (2003) 208.

⁶³ *Cork Report* at par 702.



Internationally, different models to regulate insolvency law have emerged. Regulation may be undertaken by a government agency or department or public body, one or more private sector professional bodies, or a combination of government and professional bodies.⁶⁴ The different systems are nonetheless all directed to securing and assuring public confidence in the system of regulation and the process of insolvency.⁶⁵ To set the scene for the discussion of the policy considerations with regard to the role of the state, the element of public interest as a wider dimension of insolvency law would have to be more closely examined.

3.2.2 Public Interest

In attempting to formulate a workable definition of the term “public interest” relating to insolvency law, Keay states the following:

... [f]or the purpose of insolvency law, that the public interest involves taking into account interests which society has regard for and which are wider than the interests of those parties directly involved in any given insolvency situation, that is, the debtor and the creditors.⁶⁶

The South African economy can only partially be categorised as a credit-based society.⁶⁷ It boasts a complex economy, ranging from a significant section of sophisticated lenders and corporate entities making use of credit facilities on a regular basis, to the informal sector representing a large portion of the economy,⁶⁸ which has not yet been exposed to the credit environment. During the past decade the demographics of our credit market have experienced a remarkable change and significantly the groups in society to which unsecured credit has become available have also expanded.⁶⁹

⁶⁴ IMF *Orderly and Effective Insolvency Procedures* at par 5.

⁶⁵ Joyce “The Role of Insolvency Regulators in the Past and in the Future” 4.

⁶⁶ Keay “Insolvency Law: A Matter of Public Interest?” (2000) *Northern Ireland Legal Quarterly* 525 (hereafter referred to as Keay “Insolvency Law: A Matter of Public Interest”).

⁶⁷ Seekings *Class, Race and Inequality in South Africa* (2005).

⁶⁸ Saunders *Estimates of the Informal Economy in South Africa: Some Macroeconomic Policy Implications* (2005) LLD dissertation University of Johannesburg.

⁶⁹ South Africa’s credit industry – worth an estimated R500 billion and with more than 20 million customers (*The Sunday Independent* (28-05-2006)) – had also recently been overhauled with the enactment of the National Credit Act 34 of 2005 (hereafter referred to as “NCA”). The NCA, which applies only to certain written credit agreements (s 8 of NCA), became fully operative on 2007-06-01. Although the new NCA will most certainly have an impact on credit usage and expenditure it has only a limited jurisdiction. See Scholtz *et al. Guide to the National Credit Act* (2008). See also Gross “Legislative Messaging and Bankruptcy Law” (2005-2006) *University of Pittsburgh LR* 504 at 514. See also See Niemi-Kiesiläinen “Introduction” (hereafter referred to as Niemi-Kiesiläinen “Introduction”) in Niemi-Kiesiläinen *Consumer Bankruptcy in Global Perspective* (2003) 11 (hereafter referred to as Niemi-Kiesiläinen, *Consumer Bankruptcy in Global Perspective*).

There are many causes for this growth and expansion of the availability of credit. On the supply side the availability of credit cards, especially during the past decade due to the deregulation of the consumer credit market, has extended credit in the form of credit cards to consumers which include a legacy of previously disadvantaged consumers with modest exposure to a free market economy.⁷⁰ On the demand side, in the midst of a global economic slowdown resulting mainly from rising food and fuel prices, South Africa has evidently also been experiencing tightening economic conditions.⁷¹ With the rise in ordinary expenses such as medical care, food prices and education and the lack of a well developed social welfare system, incurring debt often becomes the only practical solution for consumers who would otherwise prefer a lesser debt burden.

The reality is that financially less sophisticated and previously disadvantaged debtors are increasingly being induced to make use of increased credit opportunities and are forced to function in a market-based economy without the necessary financial literacy skills.⁷² As this component, of what could be described as a vulnerable group of society, are becoming part of the credit culture, the role of the state becomes even more pertinent in protecting the public interest at large, as well as that of the individual. In broader terms it is thus submitted that the state has to be involved in the regulatory framework of insolvency law, in protecting the rights of the more vulnerable consumer.

It is also possible to narrow the underlying principle of the role of the state down to more tangible issues. In two particularly relevant articles⁷³ Keay highlights the basic issues relating to interaction between the public interest and insolvency law and states the following:

It is possible to divide instances where the public interest is a factor in insolvency law into three very broad categories. First, it is in the public interest that insolvencies are resolved in an

⁷⁰ See Martin “The Role of History and Culture in Developing Bankruptcy and Insolvency Systems: The Perils of Legal Transplantation” (2005) *Boston College International & Comparative LR* 8 (hereafter referred to as Martin “The Role of History and Culture”); Ramsay “Consumer Credit Society and Consumer Bankruptcy: Reflections on Credit Cards and Bankruptcy in the Informational Economy” 18 (hereafter referred to as Ramsay “Consumer Credit Society”) in Niemi-Kiesiläinen, *Consumer Bankruptcy in Global Perspective*.

⁷¹ The *repo rate* rose from 7% in May 2006 to 12% in June 2008. The *prime rate* increased from 10.5% to 15.5%. In August 2009 the *repo rate* returned to 7% and the *prime interest rate* to 10.5%. See <http://www.statssa.gov.za> (last visited at 30-11-09).

⁷² Nga “An Investigative Analysis into the Saving Behaviour of Poor Households in Developing Countries: with Specific Reference to South Africa” (2007) LLM dissertation University of Western Cape.

⁷³ Keay “Insolvency Law: A Matter of Public Interest” 509; Keay “Balancing Interests in Bankruptcy Law” 2001 *Commercial Law World Review* 209 (hereafter referred to as Keay “Balancing Interests”).



orderly and expeditious way. Second, it is in the public interest to ensure that commercial morality is enforced, so as, *inter alia*, to prevent fraud and improper practices.⁷⁴

It has previously been submitted that one of the challenges that the Master faces, is the lack of specialisation within the organisation and the subsequent lack of service delivery. In addition, a large number of the functions that the Master presently performs could be characterised as “private” in nature, as the primary purpose thereof is to obtain repayment for creditors – as oppose to a “public” power which is evidently associated with a duty to act in the public interest rather than for private purposes.⁷⁵ When the decision to review the policy with regard to the nature and purpose of the regulatory authority in South African insolvency law is taken, it should be borne in mind that an organ of state⁷⁶ is capable of performing an administrative action when they exercise powers in terms of the Constitution, a provincial constitution or legislation – provided that the exercise of that power or performance of functions in terms of legislation are restricted to “public” powers or “public” functions.⁷⁷ In restricting the realm of the powers of such a regulatory body to merely powers characterised as being public in nature, not only would the broad philosophical values of the Constitution be absorbed, but moreover values such as lawfulness, reasonableness and procedural fairness would also be captured.⁷⁸

3.2.3 Orderly and Prompt Resolution of Insolvency Cases

The universal principle of insolvency law, which can be traced back to 1570,⁷⁹ is that the secured creditors are to be paid on a *pari passu* basis equally and rateably. Insolvency law represents procedures of an inherently collective nature in that each creditor forfeits the individual right to take action to enforce debt recovery, and in return must depend on the results of the collective proceedings.⁸⁰ The procedure is compulsory in order to ensure that there is a co-operative system which is orderly in nature.⁸¹ In order to optimise the outcomes and minimise the adverse effects of financial failure, it is this vital that the insolvency system operates at an optimal level. Insolvency laws and systems are increasingly being recognised

⁷⁴ Key “Insolvency Law: A Matter of Public Interest” 510.

⁷⁵ See “Insolvency Law Reform: Promoting Trust and Confidence” *New Zealand Law Commission Study Paper* 11 Wellington (2001) 33-35 (hereafter referred to as *New Zealand Law Commission Study Paper*); Hoexter 3.

⁷⁶ S 239 of the Constitution. See also Hoexter 192 as well as part IV ch 2 above.

⁷⁷ See Hoexter 9; see also part IV ch 3 above.

⁷⁸ See part IV par 3.2.3 above. See also the Promotion of Administrative Justice Act 3 of 2000 (hereafter referred to as PAJA).

⁷⁹ 13 Eliz ch 7 (1570). Key “Balancing Interests” 211.

⁸⁰ See Key “Balancing Interests” 211; Mars 29.

⁸¹ Key “Insolvency Law: A Matter of Public Interest” 511.

as a fundamental institution essential for the development of credit markets and entrepreneurship in developing countries, and in turn, those insolvency systems depend on the existence of sound and transparent institutional and regulatory frameworks.⁸²

In order to satisfy the economic imperative relating to effectiveness, an insolvency system depends not only on administrative and legislative standards, but also on the speed with which the system releases the proceeds of the assets back into the capital market.⁸³ It is thus important that any law reform is initiated with the ultimate target of creating a framework which provides not only for an effective insolvency system, but also for a support structure in order to create orderly and speedy resolutions to insolvency matters. It is interesting to note that the South African Law Reform Commission in its Explanatory Memorandum to the Draft Bill states in its report that “[e]ffective, speedy and fair procedures are important needs of stakeholders and formed the basis for this review”.⁸⁴ In his recent address the Minister states the following on the subject:

We are also alert to the fact that an efficient and effective insolvency legislative framework, with particular reference to the regulation of the insolvency industry, will contribute to releasing “frozen” money and assets back into the economy, which, in turn, can be put to good use in working for a better life for all.⁸⁵

3.2.4 Need for Commercial Morality

According to the *Cork Report*, “it is a basic objective of the law to support the maintenance of commercial morality.”⁸⁶ It is in the public interest that the community is satisfied that there has been no commercial impropriety or perpetration of fraud by the insolvent entering the bankruptcy process, or by the officers involved in a company being wound up.⁸⁷ The failure of a company manifests itself in economic terms, but it has also been recognised that insolvency law has significant implications for other social matters.⁸⁸

⁸² Joyce “The Role of Insolvency Regulators in the Past and in the Future” 2; Mistelis “Regulatory Aspects: Globalization, Harmonization, Legal Transplants, and Law Reform – Some Fundamental Observations” (2000) *The International Lawyer* 1057 (hereafter referred to as Mistelis).

⁸³ Report on Evaluation and Synthesis (2000) presented at UNICITRAL/INSOL/ IBA Global Insolvency Colloquium session, Vienna (hereafter referred to as Report on Evaluation and Synthesis Session) on file with the author.

⁸⁴ Explanatory Memorandum 10.

⁸⁵ See Minister’s address (n 18).

⁸⁶ *Cork Report* at par 191. See also Keay “Insolvency Law: A Matter of Public Interest” 510. *Bishopsgate Investment Management Ltd v Maxwell* [1992] 1 ALL ER 856 at 876. See also *Re Thellusson* [1919] 2 KB 735 at 764.

⁸⁷ Keay “Insolvency Law: A Matter of Public Interest” 513.

⁸⁸ Gross 23.



By means of the interrogation procedures South African insolvency law provides for the investigation of the affairs of an insolvent, the officers of a company, the directors or any concerned person.⁸⁹ The Act also stipulates that if it appears from the statements made during the interrogation that there are reasonable grounds to suspect that a person has committed an offence, the Master is obliged to transmit such records to the Director of Public Prosecutions.⁹⁰ However, it is very clear that the main objective of interrogations in South African insolvency law is recognised as the acquisition of information and the recovering of assets to the benefit of creditors, and is not conducted merely to foster commercial morality.⁹¹

The World Bank consultative draft notes that:

With the increasing awareness of the important role of insolvency in wider economic policies and the increasing emphasis on promoting business rescue and reorganization, there is an increasing demand on the knowledge and skills of the office holders. That is to say, the inevitability of financial failures is no longer followed by automatic assumptions of bankruptcy/liquidation, business close down, asset break up and dissolution. That knowledge and those skills need to be evident to provide the basis of appointment as office-holder, through a framework which tests competence and provides assurance that the office-holder will act professionally and impartially to secure the optimum outcome. While there are clearly costs to be borne in maintaining a regulatory framework, these must be weighed against the benefits in providing a system that is efficient and effective and in which the public can have confidence.⁹²

Unless misconduct is identified and punished and the reasons behind financial failures promptly and effectively investigated, the integrity of the credit system and as such the financial system on which our commercial life is based would be cast in doubt. The enforcement of commercial morality is consistent with public interest, and even more so in a developing economy, based on policies such as job creation and the attraction of international investment. It is thus safe to assert that an effective insolvency regime will involve the proper enforcement of duties affecting commercial morality by an efficient administrative and regulatory regime which can diligently carry out regulatory obligations and ensure that impartial office-holders with integrity and skill are appointed to carry out the statutory duties entrusted to them.⁹³ All these functions bear directly upon the degree of trust and confidence

⁸⁹ Sections 65; 66 and 152 of the Insolvency Act and ss 415-419 of the Companies Act.

⁹⁰ Section 67 of the Insolvency Act.

⁹¹ *Gumede v Subel* NO 2006 3 SA 498 (SCA) at par 506F. See also Calitz “Sections 417 and 418 of the Companies Act 61 of 1973 – relevance prevailing over the right to privacy *Gumede v Subel* NO 2006 3 SA 498 (SCA)” (2006) *Obiter* 403.

⁹² *Principles* 55–62.

⁹³ *New Zealand Law Commission Study Paper* 36.

that the commercial community (and the community at large) will have in the proper functioning of an insolvency system.⁹⁴

Given the above, it has hopefully been established that the state has a legitimate interest in ensuring that the institution of credit, the lifeblood of any economy, is not abused. It should be clear that the role of the state is a core element of any policy decision with regard to a regulatory system and demands a serious and in-depth investigation. In short, dealing with personal insolvency is a major concern that cannot simply be outsourced to the private sector, which would quite properly be driven by the profit line in delivering its service. Having added this caveat, it is necessary to state that if the role of the state in regulating insolvency law should continue, the impetus should fall on protecting the interests of the different role-players as well as the public as a whole.

3.3 THE REGULATORY FRAMEWORK

3.3.1 Introduction

This chapter offers some observations on the context in which policies relating to the regulatory framework should be developed and implemented. Insolvency regulation consists of two principal components. First, the design and development of an insolvency regulatory body within the South African insolvency law environment, as well as the techniques and methods it employs will be discussed, and, secondly, the independent qualifications and standards of those who are appointed to administer particular insolvency cases will receive attention.⁹⁵ The deliberation on the future role of the Master as well as the regulatory measures pertaining to the insolvency industry should be viewed as an opportunity to align the supervisory and regulatory aspects of South African insolvency law with international norms and standards as well as to maintain the integrity of and public confidence in the system.

⁹⁴ *New Zealand Law Commission Study Paper 37*. The office of the Master of the High Court is created in s 2(1) of the Administration of Estates Act 66 of 1965. See part V above.

⁹⁵ World Bank Regulatory Working Group “Insolvency Law and the Regulatory Framework” (2000) paper delivered at the Symposium, Washington DC (hereafter referred to as Regulatory Working Group “Insolvency Law and the Regulatory Framework” or the document prepared by the Working Group) available at <http://web.worldbank.org> (last visited on 09-11-30).



The following caution by Westbrook is extremely relevant in this context:

The choices made in reforming an insolvency law must be closely linked to the capacities (and institutional prejudices) of existing institutions or institutional reform must accompany legal reform.⁹⁶

3.3.2 The Regulatory Body

“It is now a truism to affirm that in all lawmaking a gap opens between on the books and law in action”.⁹⁷ It is precisely this gap that should represent a central focus theme in the development of policy with regard to the regulatory framework in the South African insolvency law. It is increasingly recognised by scholars that the effectiveness of any insolvency law relies heavily on the institutions of implementation.⁹⁸ The principal decision to be taken in the design and implementation of a regulatory regime concerns whether the Master as supervisory body should continue to exist (albeit in a revised shape), or whether a complete and independent regulatory agency should be introduced into our insolvency law.⁹⁹

The positive aspect of persisting with the Master as regulatory authority is that the centuries-old institution will remain “as is”, and no institutional or legislative changes will have to be considered.¹⁰⁰ Henning makes a very relevant statement when he mentions that law reform should take place for the right reason. He relates the story that business entity reform in South Africa was a response to the economic and political situation in the nation.¹⁰¹ It is submitted that the ultimate criterion should be whether it is possible for the Master to emerge as an efficient and effective institution capable of instilling commercial trust.

The remaining option entails establishing and implementing a new independent and complete regulatory agency responsible for overseeing and implementing the regulatory procedures in our insolvency law. The international profile of a regulatory body ranges from a government

⁹⁶ Westbrook “The Globalisation of Insolvency Reform” (1999) *New Zealand LR* 401 (hereafter referred to as Westbrook).

⁹⁷ Halliday “Lawmaking and Institution Building” 17.

⁹⁸ Ngok “Law-making and China’s Market Transition Legislative Activism at the Eighth National People’s Congress” in Pistor *et al Problems of Post-communism* (2002).

⁹⁹ Halliday “Lawmaking and Institution Building” 17.

¹⁰⁰ See part V above.

¹⁰¹ See Vestal “Business Law Reform in South Africa: The Right Path, The Right Reason” (2002) *Kentucky LJ* 829 (hereafter referred to as Vestal). See also Henning “Reforming Business Entity Law to Stimulate Economic Growth among the Marginalized: The Modern South African Experience” 2003 *Kentucky LJ* 91 (hereafter referred to as Henning).

department or agency to a professional body or a combination of the two. Against this background, the following statement by Halliday is significant:

... the implementation and institution building are as important as – indeed arguably more consequential than – formal lawmaking. It is a dangerous illusion that the legal framework and institutions of an effective insolvency system can be done cheaply. Effective bankruptcy systems require the careful design, infrastructural expenditure, and political will comparable to major infrastructural projects in transportation or energy or defence. This is especially so in circumstances where there is rapid economic development and social dislocation in a society that had previously invested little in legal institutions. Failure of government to act boldly and decisively can lead not only to incapacity but instability in society and ultimately the market.¹⁰²

During various discussions on different forms of regulation the option of self-regulation has been mentioned.¹⁰³ The term “public regulation” describes the more traditionally oriented regulatory system whereby a public authority being the all – embracing regulator, is responsible for setting the relevant legislation and subsequent rules and regulations, and also monitors the compliance by enforcing certain imposed sanctions. The advantages of such a public regulatory system is that one of the basic attributes of democratic sovereignty is that regulation is established and facilitated by democratically appointed authorities, and for this reason public regulation will as a rule not be challenged in terms of its authority to express the general public interests.¹⁰⁴ The public regulatory system also appears to be the more appropriate way to ensure the effective implementation of public policy.¹⁰⁵

The system of “self-regulation” is situated at the other end of the regulatory scale.¹⁰⁶ According to this system the stakeholders within the industry will draw up their own regulations in order to achieve certain goals and objectives and alternatively may also be laid down by a self-regulatory organisation created by the parties concerned. The advantages of a self-regulatory system is not only that the industry itself is perceived as more experienced and better placed to evaluate the risks and challenges within a certain industry, but it is perceived that interested parties within the industry may react more positively to their “own” rules than those imposed by a public authority.

¹⁰² Halliday “Lawmaking and Institution Building” 34.

¹⁰³ See various options explained in Minister’s address (n 18).

¹⁰⁴ Palzer *Self-Regulation, Co-Regulation, Public-Regulation* (2003) unpublished paper presented at workshop on “Co-Regulation of the Media in Europe” (hereafter referred to as Palzer) available at http://www.obs.coe.int/oea_publ/iris_special/2003.html (last visited at 09-11-30).

¹⁰⁵ Palzer 2.

¹⁰⁶ Palzer 3.



Another option is to develop a system of co-regulation which combines elements of self-regulation as well as the traditional public authority regulation to form a new and self-contained regulatory system.¹⁰⁷ This scheme combines elements of self-regulation and the traditional public regulation and the detail of the regulatory aspects and framework would depend on the various objectives as well as tasks to be performed. Within the South African context it would be apparent that in such a scheme the state or competent regulatory authority would indeed play a significant role. A key element would thus be that the state would be responsible for setting a legal framework and monitoring the functions of the system. Hence, the achievement of public policy goals would not be relinquished to societal control entirely and the responsibility for the implementation thereof remains with the state.¹⁰⁸ The degree of autonomy of the self-regulatory bodies as well as the influence over policy and rule making could be incorporated represents some of the key elements open for discussion and debate.

Any institutional reform initiative will however have to take cognisance of several challenges which could be encountered along the way. Apart from the costs implication and other resource constraints, issues such as institutional capacity, social, cultural and historical factors and political economy aspects may also feature.¹⁰⁹ Thus, as a result of the sheer gravity of introducing such institutional change it becomes even more important to introduce an initial policy process in order to conduct a realistic appraisal of the project, identify those factors that could influence policy outcomes and develop a policy containing clear and consistent objectives.¹¹⁰ In rethinking the structure of the regulatory system in our insolvency law, policy- and lawmakers will have the opportunity to reform the process and to develop a streamlined and effective system in line with international standards and guidelines.

3.3.3 Regulation of the Insolvency Profession

The term used in South Africa as well as a number of international jurisdictions to refer to the person in charge of the administration on an insolvent estate is “trustee”¹¹¹ or “trustee in bankruptcy”.¹¹² Terminologically this is an interesting choice of words which immediately

¹⁰⁷ Palzer 6.

¹⁰⁸ Palzer 7.

¹⁰⁹ Richter *Insolvency Law and Economic Development in Central and Eastern European Transition Countries* (2008) unpublished paper presented The Law and Society Association, Canada, on file with the author.

¹¹⁰ Ball *Security Sector Governance in Africa* par 4.6.1.

¹¹¹ The Draft Insolvency Bill (n 17) suggests that the generic term “liquidator” be used.

¹¹² Milman 67.

conjures up fiduciary connotations. Although the subject of agency would fall outside the scope of this study, those who administer insolvencies – whether by appointment by creditors, by the court or by a government department or public or statutory authority – are given functions and powers in relation to the debtor and the debtor’s assets under the authority of legislation.¹¹³ The assets and funds are not the property of the office-holder and he has a special duty to protect them. The nature of the appointment of an office-holder responsible for the administration of an insolvent estate therefore closely resembles that of the institution of stewardship and the legal principles associated with such responsibility.¹¹⁴

From time to time the suggestion that insolvency practitioners should be regarded as “officers of the court” has been made.¹¹⁵ With regard to the practitioners’ legal position as to subsequent ethical standards, Mars asserts that an insolvency practitioner is not an officer of the court but does however occupy a position of trust not only towards the creditors but also towards the insolvent himself.¹¹⁶ Meskin also concurs that it is doubtful whether an “officer of the court” is an appropriate designation in relation to the legal position of an insolvency practitioner, and in turn maintains that the trustee does however stand in a fiduciary relationship towards the insolvent and creditors.¹¹⁷ Hence this essentially entails that he should act honestly and with good faith on all his dealings.¹¹⁸

Following the English tradition most common law jurisdictions consecutively considers an office-holder to be an officer of the court.¹¹⁹ In addition it is also a determined common law principle that equity and impartiality imposes much more onerous duties on a fiduciary than would be the case if the relationship was solely governed by the common law principles.¹²⁰ The basic premise is that there can be no conflict between a person’s duty as a fiduciary and

¹¹³ Milman 65.

¹¹⁴ Milman 81.

¹¹⁵ See Minister’s address (n 18). See also Burdette “Reform, Regulation and Transformation” 8.

¹¹⁶ Mars 293.

¹¹⁷ Meskin par 4.20. See also *Thorne v Receiver of Revenue* 1976 2 SA 50 (C); *Hobson v Abib* 1981 1 SA 556 (N); *S v Reyneke* 1972 4 SA 366 (T).

¹¹⁸ See Meskin par 4.20.

¹¹⁹ See Finch *Corporate Insolvency Law: Perspectives and Principles* (2002) 378. See also Insolvency Act 1986 ss 117(5); 400(2) and Schedule B1.

¹²⁰ The common law heritage is also to be found reflected in the curious rule of professional ethics laid down in *Ex Parte James* (1874) LR 9 Ch App 609 and confirmed in: *Re Carnac, Ex Parte Simmonds* (1885) 16 QBD 308.



his private interests. The purpose of this rule is to ensure that fiduciary duties are not influenced by private considerations.¹²¹

The Cork Committee also recognised that trustees in bankruptcy occupy a fiduciary position *vis-à-vis* the estate.¹²² This obligation of stewardship is a common facet of English law where one person has been selected to oversee the assets of another. Clearly one outcome of this status is that a trustee should not profit from handling the estate assets over and above their agreed remuneration. As the court is responsible for the appointment of trustees in bankruptcy this additionally renders them officers of the court.¹²³ As such they become subject to the duty to act honourably as laid down by the court in *Ex Parte James*.¹²⁴ The principle was laid down as follows:

I am of the opinion that a trustee in bankruptcy is an officer of the court. He has inquisitorial powers given to him by the court and the Court regards him as its officer and he is to hold money in his hands upon trust for its equitable distribution among creditors. The court then finding that he has in his hands money which belongs to someone else, ought to set an example to the world by paying it to the person really entitled to it. In my opinion the Court of Bankruptcy ought to be as honest as other people.¹²⁵

A further common law principle associated with the ethical standards of a trustee comprises of the court's dim view on a trustee who allows his position to be compromised by aligning himself too closely with a particular creditor.¹²⁶ In the English case of *Re Ng*¹²⁷ this point was emphasised when it was stated that: “[a] trustee in bankruptcy is not vested with powers and privileges of his office so as to enable himself to accept engagement as a hired gun”.¹²⁸

¹²¹ See Meike “Fiduciary Duties and Office Holders Remuneration” *Insolvency Law Forum* available at <http://www.insolvencylawforum.co.uk/> (last visited at 09-11-30).

¹²² Cork Report par 781.

¹²³ Milman 68.

¹²⁴ See (n 104).

¹²⁵ *Ex Parte James* (n 104) at 614. See Milman 69. The Supreme Court of the United States stated in *Ex Parte Garland* 71 US 333 (1866) that “Attorneys and counsellors are not officers of the United States; they are officers of the court, admitted as such by its order upon evidence of their possessing sufficient legal learning and fair private character.” However, it was held in *Cammer v United States*, 350 US 399 (1956) that, for the purposes of 18 USC par 401(2), lawyers are not court “officers” in the same class as marshals, bailiffs, court clerks or judges.

¹²⁶ Milman 70.

¹²⁷ [1997] BCC 507.

¹²⁸ *Re Ng* (n 72) at 509.

Within a South African context Stander¹²⁹ holds the view that the trustee is not merely an agent of the creditors and subsequently refers to the case of *Gilbert v Bekker*¹³⁰ where the trustee had been regarded as merely the holder of an office and was regarded as a statutory officer *per se*.¹³¹ Stander is thus of the opinion that the trustee is a statutory officer acting in a fiduciary position, and continues to mention that in the South African insolvency law the trustee is in fact regarded as owner of the assets of the estate, although this situation finds no support in the Roman and Roman Dutch law.¹³²

Hence, it is submitted that although it has from time to time incorrectly been stated that an insolvency practitioner occupies the position of an officer of the court,¹³³ it is evident that the concerns relating to the ethical standards of practitioners could partly be resolved by means of a mechanism whereby practitioners are considered to be officers of the court.¹³⁴ The policy assessment in this regard would however have to be combined with the consideration on whether the courts ought to be responsible for the appointment of insolvency practitioners – consequentially rendering the practitioner an officer of the court.¹³⁵

There appears to be a definite need within the insolvency profession to protect its reputation and raise standards to an international level.¹³⁶ The question posed for policymakers is simply what is seen to be required of those who administer cases under a formal insolvency procedure. In 2000 the “Regulatory Working Group” of the World Bank produced a paper which focused on the importance of having independent qualifications standards for insolvency office-holders, which also emphasised the need for effective and periodic training programmes and considered the design and development of a regulatory body, techniques,

¹²⁹ See Stander *Die Invloed van Sekwestrasie op Onuitgevoerde Kontrakte* (1994) LLD dissertation Potchefstroom University for Christian Higher Education at 31 and further (hereafter referred to as Stander). See also Evans *A Critical Analysis of Problem Areas in respect of Assets of Insolvent Estates of Individuals* (2009) LLD dissertation University of Pretoria at 324 (n 43) (hereafter referred to as Evans).

¹³⁰ 1984 3 SA 774 (W).

¹³¹ *Gilbert v Bekker* (n 130) at 781E. See Mars 293.

¹³² Stander at 42.

¹³³ See *Shokkos v Lampert* 1963 3 SA 421 (W); Smith *Law of Insolvency* (1988) at 185-186 also describes the position of the trustee as an officer of the court. In the article of Cilliers “The development and significance of the title ‘officer of the court’” (1995) *THRHR* 603 (hereafter referred to as Cilliers) it had been suggested that the term “officer of the court” has over time been watered down to such an extent that it no longer has any legal significance. See also *Receiver of Revenue Port Elizabeth v Jeeva and Others, De Klerck and Others v Jeeva and Others* 1996 (2) SA 573 (SCA) at 584; Mars 239 at (n 2).

¹³⁴ *Gluckman v Wylde* 1933 EDL 322; *Rulten NO v Herald Industries (Pty) Ltd* 1982 3 SA 600 (D) at 609A-C. See Mars 293 at (n 4).

¹³⁵ See Cilliers 612.

¹³⁶ AIPSA Newsletter (March 2008). See Halliday “Lawmaking and Institution Building” 18.



methods, and benefits to be obtained from regulated procedures.¹³⁷ The document prepared by the Working Group had been expressed very largely in terms of “requirements” for an effective regulatory framework based on the experiences of a number of developed countries’ systems, and included certain key principles and recommendations.¹³⁸ The Minister in his mentioned address states the following on the subject:

There is an urgent need to lay down qualifications for insolvency practitioners. A balance must be struck between qualifications which will ensure that only capable and suitable persons qualify to be insolvency practitioners, on the one hand, and setting the bar too high, on the other. Based on international common practice there are various proposals with regard to the qualification of insolvency practitioners.¹³⁹

The context in which any policy is developed and implemented is critical. Key aspects of the South African context would include not only laying down standard entry qualification for insolvency practitioners, but also to introduce measures to ensure ongoing skills transfer and development. It is submitted that by introducing a scheme similar to the “Continuing Professional Development”.¹⁴⁰ Not only could such a CPD programme, assists with the updating of professional knowledge and the improvement of professional competence, but could also be developed as a skills transfer mechanism.

The core principle identified was that a regulatory framework should provide assurance as to the level of competence of those responsible for administering insolvencies. This was necessary to ensure the efficiency, effectiveness and integrity of and confidence in the insolvency system. To achieve this –

Office Holders will need to be:

- Competent, demonstrating by qualification and/or experience their knowledge and practical understanding of insolvency and related legislation and practice and related issues.
- Independent
- Insured/bonded against loss
- Knowledgeable about what is required in relation to individual cases
- Diligent, meticulous and scrupulous in carrying out their work.¹⁴¹

¹³⁷ World Bank Regulatory Working Group “Insolvency Law and the Regulatory Framework” Introduction.

¹³⁸ See introduction to Regulatory Working Group “Insolvency Law and the Regulatory Framework”.

¹³⁹ See Minister’s address (n 18).

¹⁴⁰ Hereafter referred to as “CPD”. According to the *SAICA Continuing Professional Development (CPD) Policy* (updated November 2008) available at <https://www.saica.co.za/> (last visited at 09-11-30) “CPD” is defined as:

CPD can be defined as the holistic commitment to structured skills enhancement and personal or professional competence and is the means by which members of professional associations maintain, improve and broaden their knowledge and skills and develop the personal qualities required in their professional lives.

¹⁴¹ Regulatory Working Group “Insolvency Law and the Regulatory Framework” Annex A.

Internationally, the various regulatory models available are briefly the following:¹⁴²

- 1 Voluntary accreditation – Under a voluntary accreditation scheme an agency would be empowered by statute to certify that accredited individuals have satisfied particular requirements for demonstrating competence in the field of insolvency law. Other persons may practise as office-holders, but may not use specified titles or imply in any way that they are certified practitioners. Voluntary accreditation would have the benefit of providing information about a person’s skills and qualifications, but since accreditation is done on a voluntary basis, this option would not exclude a person with insufficient skills and experience from the profession.
- 2 Mandatory licensing – Mandatory licensing scheme regimes typically prohibit all but a licensed person from undertaking certain functions. The granting of a licence is usually dependent on a person meeting and maintaining certain prescribed standards. This type of regulation is not a novel idea in South Africa, as the Law Society of South Africa¹⁴³ and the South African Institute of Chartered Accountants¹⁴⁴ have a similar approach. The Law Society of South Africa is entirely self-regulatory, with oversight being provided by the High Court. It should however be noted that both the Law Society of South Africa and the South African Institute of Chartered Accountants consist of thousands of members, which makes the system considerably more cost-effective to operate.¹⁴⁵

The stumbling block associated with such a licence-based system is its lack of flexibility. Such a “one size fits all” scheme would find it very difficult to incorporate the unique South African socio-economic conditions. The substance of the regulatory criteria would have to be very clear on issues regarding minimum qualifications, admission requirements, practical experience and disqualification procedures.

- 3 Competitive licensing – This is a variant on the government-run licensing model described above. In essence, this approach would require all persons carrying out

¹⁴² The models are discussed in “Regulation of Insolvency Practitioners” Cabinet Paper, New Zealand, (2008) (hereafter referred to as Report “Regulation of Insolvency Practitioners”) on file with the author. See also *New Zealand Law Commission Study Paper* 150.

¹⁴³ Hereafter referred to as “LSSA”.

¹⁴⁴ Hereafter referred to as “SAICA”.

¹⁴⁵ Burdette “Reform, Regulation and Transformation” 8.



insolvency processes to be members of an approved professional organisation. An overseeing body would have to be satisfied that a professional body seeking approval has the necessary infrastructure to ensure that regulatory standards and requirements are maintained. The advantage of such a scheme is that it would be less rigid and more cost-effective than the mandatory scheme.

The shortcoming of this scheme is the lack in choice of existing professional associations. The only recognised member organisations are the Association of Insolvency Practitioners of Southern Africa¹⁴⁶ and the Association for the Advancement of Black Insolvency Practitioners.¹⁴⁷ Other professional organisations include the LSSA or the SAICA. However, neither of these bodies has the required insolvency-specific systems in place to deal with such industry-specific challenges.

An inherent risk in both systems, namely the mandatory and competitive licensing schemes, is that such systems would be restricted to persons who comply with certain pre-existing requirements, which could lead to the forced exit of experienced practitioners who do not meet the criteria.

- 4 Negative licensing – Negative licensing involves the exclusions or suspension of some incompetent or delinquent practitioners from operating as insolvency practitioners. To an extent the Master already employs a negative licensing system in that incompetent or delinquent practitioners can be prevented from taking appointments. The Insolvency Act and the Companies Act already contains sophisticated provisions that allow for the removal of insolvency practitioners by the Master and / or the court in defined circumstances.¹⁴⁸

After the design and development of the regulatory body as well as the entry level requirements of those administering insolvencies have been considered, the interaction between these two components would have to be contemplated. There is a very delicate balance between creating a complex, inefficient and unsustainable bureaucracy, and developing an infrastructure in which the public and business communities on a national and

¹⁴⁶ Hereafter referred to as “AIPSA”.

¹⁴⁷ Hereafter referred to as “AABIP”.

¹⁴⁸ Burdette “Reform, Regulation and Transformation” 9.

international and level can have trust and confidence.¹⁴⁹ The call for oversight is likely to escalate where the office-holder is not appropriately qualified and does not have the skills and expertise to undertake the relevant insolvency work. This risk is however very significantly reduced through the existence of an effective system of oversight and regulation.

To summarise, regulatory frameworks in insolvency law have been developed in different ways in different jurisdictions, reflecting the divergence in history, tradition and culture.¹⁵⁰ Internationally, different regulatory and institutional models have emerged in order to provide the necessary checks and balances against the abuse of an insolvency system.¹⁵¹ At first glance some of the policy considerations mentioned seems obvious to the point of triteness, which begs the question why they have not yet been implemented. A closer examination, however, reveals a process constantly hampered by complex institutional relationships.¹⁵² In following a policy-driven approach, it would be possible to identify possible factors that could influence policy outcomes and prepare an appropriate response. In brief, there is no single regulatory model or guideline applicable, but policymakers should nevertheless endeavour to create a policy framework, based on the unique South African socio-economic environment which at the same time will safeguard public interest and foster international and local confidence.¹⁵³

3.4 INSTITUTIONAL FRAMEWORK

South Africa does not have specialised insolvency courts as part of the general court structure. The High Court in general deals with insolvency matters.¹⁵⁴ The role of the courts is mainly limited to the granting of orders which commence insolvency or winding-up proceedings and they are not generally involved in routine matters or the day-to-day administration process.¹⁵⁵ There are also existing provisions providing for certain administrative actions and decisions to be taken on review and appeal and thus further expanding the courts' role of dispute

¹⁴⁹ Keay "Balancing Interests".

¹⁵⁰ Martin "The Role of History and Culture" 1.

¹⁵¹ Cf Wessels *Cross-Border Insolvency Law – International Instruments and Commentary* (2007).

¹⁵² Ball *Security Sector Governance in Africa* ch 4.

¹⁵³ Joyce "The Role of Insolvency Regulators in the Past and in the Future" 4.

¹⁵⁴ The High Court in the main commercial centre, Johannesburg, has a commercial court which deals occasionally with cases involving insolvency. The courts have authority in the case of the winding-up of companies to give directions regarding the administration of the winding-up.

¹⁵⁵ In the case of individuals, the court issues rehabilitation orders (the procedure to discharge the insolvent debtor from insolvency) if the debtor does not wait for "automatic" rehabilitation after ten years.



resolution and the determination of legal issues.¹⁵⁶ Thus apart from its adjudicatory role the courts do not play any active role in the process of administering an insolvent estate.

There has been a clear move in common law countries to transfer functions from the courts to the agency or authority with insolvency responsibility to eliminate the costs and the almost inevitable delay of court proceedings.¹⁵⁷ In England and Wales a good example is the applications for the proposed debt relief orders which have to be submitted to the Insolvency Service's official receivers.¹⁵⁸ Further factors affecting a shift in this area have been the increasing worldwide introduction of some form of registration or licensing of insolvency office-holders, which has removed the perceived need for the court to exercise a detailed control over case management.¹⁵⁹

During the late nineties a high-level Commission of Inquiry, the Hoexter Commission,¹⁶⁰ rejected proposals for specialised insolvency courts in South Africa. The Commission's findings were as follows:

In the opinion of the Commission the principles governing the law of insolvency are neither so inaccessible to the ordinary practitioner or Judge nor so difficult to grasp as to be intelligible only to the initiated. It is not in the view of the Commission the type of work which requires highly specialized training and in litigation insolvency matters do not require an individual treatment insulated from the general body of litigation. Apart from the fact that it regards such treatment as unnecessary the Commission is opposed in principle to the notion that the adjudication of insolvency matters should be the exclusive preserve of a specialist court. The temptation to create specialized niche areas of the law is an unhealthy one and should be resisted.¹⁶¹

In contrast, the World Bank in its *Principles and Guidelines for Effective Insolvency and Creditor Rights System*¹⁶² states the following:

Given the specialized nature of enterprise insolvency and the issues that arise in bankruptcy proceedings there is a significant value in having independent, specialized commercial and bankruptcy courts or specialized insolvency judges within general jurisdiction courts. The insolvency process is highly complex and demands a specific understanding of and familiarity

¹⁵⁶ See part IV above.

¹⁵⁷ Johnson 73.

¹⁵⁸ Debt Relief Orders (hereafter referred to as DROs) were also introduced by the Tribunals, Courts and Enforcement Act 2007 and appear at s 108 of this Act read with schedule 17 onwards.

¹⁵⁹ Johnson 73.

¹⁶⁰ Third and final report of the *Commission of Inquiry into the Rationalization of the Provincial and Local Divisions of the Supreme Court* Report number RP 201/97 Pretoria: Government Printing Works 1997 vol 1 Book 2 Part 3 (hereafter referred to as the *Hoexter Report*).

¹⁶¹ *Hoexter Report* 98.

¹⁶² See (n 48).

with financial and business arrangements and with commerce and finance standards and practices.¹⁶³

From the above statements it is clear that the Hoexter Commission was of the opinion that neither should a specialist insolvency court be established, nor should any specialisation of the judiciary be introduced into the current court system. During the past decade not only has the South African legal as well as commercial landscape changed dramatically, but the conception of a modern insolvency legal regime has changed as well. The Commission's findings are based on a review which occurred in 1997, and the current global emphasis on the strategic importance of institutional design and infrastructure could perhaps in future result in a different outcome. In light of the need to ensure efficiency and the proper exercise of discretion, a number of countries have established specialised courts, in the form of either bankruptcy courts or commercial courts.¹⁶⁴ A well-functioning and effective insolvency system requires that the insolvency law be supported by an effective infrastructure.¹⁶⁵ The policy consideration with regard to the role of the courts in South African insolvency law would entail whether to introduce specialisation in our courts, either by means of specialised insolvency courts, or alternatively *via* a system of judicial specialisation in our law.

When considering the introduction of specialised insolvency courts into our legal system it should be noted that the integration of the insolvency system into the general law is important to ensure that the two complement and reinforce one another.¹⁶⁶ One of the main advantages of having a specialised court of insolvency is the transparency and consistency that this development would bring about, which in turn is a vital element in fostering trust and confidence in the system.¹⁶⁷ The negative aspect to this option would be the costs involved in developing and maintaining such a court and the lack of resources available. It should be mentioned that even in well-established systems such as the English bankruptcy system, there have often been calls for the establishment of a specialist court comprising of both the High Court and county court jurisdictions.¹⁶⁸

The alternative to establishing a specialised insolvency court would be for the court to be structured in such a way that it provides for experience in the area of insolvency law, which would suggest specialisation within the judiciary. The advantage of this option would be that it would encourage efficient and timely adjudication of cases as well as reinforcing the predictability in the system through consistent and uniform interpretation and application of

¹⁶³ *Principles* at par 200.

¹⁶⁴ IMF *Orderly and Effective Insolvency Procedures* par 5.

¹⁶⁵ UNCITRAL *Legislative Guide*.

¹⁶⁶ Johnson 69.

¹⁶⁷ IMF *Orderly and Effective Insolvency Procedures* par 5.

¹⁶⁸ The *Cork Report* paras 1772-1773 recommended this innovation. See also Milman 156.



the law.¹⁶⁹ This option would also be in line with the World Bank's recommendation as indicated in its *Principles*:

The caseload in many countries may not justify the additional expense of creating an independent insolvency court system. Where this is not possible the optimal approach is to have a pool of judges trained in insolvency who are equipped to deal with the real time litigation demands of insolvency proceedings which likewise should be governed by independent rules and procedures designed accommodate the unique needs of insolvency.¹⁷⁰

An important limitation on the success of legal and judicial reform within any developing economy is the simple fact that material and human resources are limited. From a practical point of view the question should be to what extent should judicial reform be prioritised while resources are scarce? It is therefore important to consider the role of judicial reform as well as the necessary institutional reform priorities as part of a larger reform strategy. This argument had been reiterated by the Deputy Minister of Justice in his recent address:

However, bearing in mind that we are also in the midst of rationalising our court structures and the judiciary and bearing in mind our capacity constraints, the possibility of creating bankruptcy courts might be a longer term vision.¹⁷¹

3.5 LEGAL FRAMEWORK

At this point, it is appropriate to repeat the statement that the aim and purpose of this study is to focus on the general principles regarding the development of a regulatory framework within South African insolvency law, and that the practical implementation and drafting of a complete legal framework falls outside the scope of this work. Having said that, it is important to emphasise the need to integrate and harmonise the proposals on law reform with regard to the regulatory aspects of our law, within the broader legal framework of our insolvency law, as well as our general commercial law. The integration of the regulatory principles into general insolvency law is important to assure that they complement and reinforce one other.

Policymakers must make policy choices with respect to a number of *substantive* issues. The policy considerations with regard to the legal framework firstly entail the option to incorporate the suggested regulatory proposals by the strengthening of existing statutory

¹⁶⁹ Johnson 74.

¹⁷⁰ *Principles* at par 201.

¹⁷¹ See Minister's address (n 18).

measures. New provisions and even the introduction of secondary or subordinate legislation could be introduced into the present system. The implementation of this policy design option will be cost-effective and less time-consuming to implement. The challenge would however lie in the integration of any new policy objectives into the existing philosophy entrenched in our insolvency law.

It is submitted that if a complete review of our regulatory regime is to be undertaken, substantive reform of key areas of our insolvency law, which actively address the underlying policy problems, would have to be undertaken. This policy consideration would entail a complete overhaul of our insolvency legislation. This option would provide law- and policymakers with the opportunity to introduce a philosophical change into our system, consistent with and complementary to the legal and social values of the society in which it is rooted, and whose value system it must ultimately sustain.¹⁷² A commitment to introduce a new legal framework would support the need for long-term policy determinations rather than short-term remedies.¹⁷³

Notwithstanding the variety of substantive issues that must be resolved, insolvency laws are highly procedural in nature. The design of the procedural rules plays a critical role, and perhaps the most critical procedural issue relates to the identification of the decision-maker.¹⁷⁴ To the extent that the law confers considerable responsibility upon the institutional infrastructure to make key decisions, it is critical that this infrastructure be sufficiently developed.¹⁷⁵ It is submitted that any resistance to and scepticism about a fresh approach to insolvency law reform highlight the persistent myths and stereotypes which impede the development of effective and responsive legal strategies in the law reform arena.¹⁷⁶ As correctly stated in the literature, “legislation on insolvency is a crossroads where all the elements of the legal system in question meet”.¹⁷⁷

¹⁷² See Evans 1-14.

¹⁷³ Johnson 74.

¹⁷⁴ IMF *Orderly and Effective Insolvency Procedures* par 2.

¹⁷⁵ IMF *Orderly and Effective Insolvency Procedures* par 5.

¹⁷⁶ Hunter *Changing Law: Rights, Regulation and Reconciliation* (2005).

¹⁷⁷ Braun “German Insolvency Act: The Special Provisions of Consumer Insolvency Proceedings and Discharge of Residual Debts” (2006) *German LJ* 59 at 60.



CHAPTER 4: CONCLUSIONS

Any insolvency law reform initiative will have to take cognisance of the fact that insolvency law is a dynamic branch of the law that impacts on a vast variety of interests that need to be regularly re-evaluated in light of changing conditions. In time, within any commercial landscape certain policies and basic principles become absolute and eventually cosmetic measures are no longer sufficient.¹⁷⁸ In order to implement changes to our existing regulatory framework which would best serve the South African society, as well as generate international trust and confidence, certain important policy considerations would have to be critically assessed and analysed.

With regard to the development of a regulatory framework, policymakers will initially have to grapple with the nature of the role of the state in our insolvency law and in particular the progression of the role of the state as protector of the public interest. There is a dual policy consideration involved – namely, whether the state should be involved in any way in the regulation of insolvency law, and, if so, then to what extent it should be involved. The key consideration would be to acknowledge that South Africa as an emerging market has had less exposure to international financial practices, and has a legacy of previously disadvantaged consumers with modest exposure to a free-market economy.¹⁷⁹ This makes it imperative to better understand the role and function of insolvency systems in today's global markets and to develop solutions adapted to the needs of emerging markets.¹⁸⁰ Another consideration would be the following: there is a wider government and public (society) interest in insolvency because it involves financial loss. There is thus an interest in seeing that economic, as well as potential social damage is limited and resources are efficiently re-allocated to more productive use.

A further question that arises in relation to the state as role-player in our insolvency law is the extent of this involvement and the character and nature of such regulatory institution. The current role of the Master has to be evaluated and policy decisions about the future of the Master as supervisory institution in our insolvency law, or the development of a complete

¹⁷⁸ IMF *Orderly and Effective Insolvency Procedures* par 2-5.

¹⁷⁹ Martin "The Role of History and Culture" 8.

¹⁸⁰ Johnson – Comment and Discussion – Brookings-Wharton Papers on Financial Services 2001 Brookings-Wharton Papers on Financial Services 2001 (2001) 330-342.

new regulatory agency or institution, will have to be considered. There is of course no single set of “best practices” applicable to every institutional programme, and each programme should be designed in light of each country’s social, cultural and political characteristics.¹⁸¹

A second aspect to consider as part of the regulatory structure is the regulation of the office-holder responsible for the administration of the insolvent estate. The policy consideration with regard to the regulation of the insolvency industry involves implementing an acceptable regulatory model incorporating both local government policies as well as internationally recognised principles. By embracing accepted international standards and principles the regulation of the industry could considerably reduce the level of government involvement and ensure the credibility of the system both locally and internationally.

With regard to the assessment of economic and commercial issues, it is necessary to ensure that insolvency law is applied with predictability. With regard to our institutional framework, policymakers would have to consider whether to introduce a specialist insolvency court or, alternatively, introduce judicial specialisation in our law. A similar set of hard choices arises when we consider the interdependence of legal rules and institutions. In building an effective and efficient regulatory framework it is crucial that any institutional design should be accompanied by a sound legal framework.¹⁸² Policy-makers and legislatures will have to decide whether the proposed regulatory model agreed on could be implemented either by maintaining the existing legislation accompanied by certain minor adjustments, or by introducing a complete overhaul of the legislation which underpins our insolvency law.¹⁸³ Even if partial reform does have some counterproductive and adverse effects on the practical implementation of a regulatory reform proposal, these problems could be viewed as short-term if the initial reform efforts are followed by more extensive efforts at a later stage.

As discussed above, there are a number of factors which policy- and lawmakers need to consider in order to build an effective and efficient regulatory framework for South African insolvency law. Designing the appropriate model will involve compromises between and among certain competing policy objectives. The challenge facing the architects of a new regulatory framework would be to design a simple and predictable system, which would be an

¹⁸¹ Regulatory Working Group “Insolvency Law and the Regulatory Framework” 4.

¹⁸² Johnson 72.

¹⁸³ Evans 430.



accurate reflection of the present South African economic and social environment while at the same time safeguard public interest and foster international and local confidence. Finally, it is submitted that the reworking of any area of our insolvency law, and more specifically the regulation of insolvency law, should be done against the background of a well-managed policy based process and generally accepted social and economic goals, and not a combination of academic ideology and private advantage.¹⁸⁴

¹⁸⁴ Vestal 829.

*A Reformatory Approach to State Regulation of Insolvency
Law in South Africa*

PART VII

RECOMMENDATIONS AND CONCLUDING SUMMARY

SUMMARY

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CHAPTER 1: INTRODUCTION

Bankruptcy law and regimes are always nested in other institutions. While it is convenient for scholars and norm makers to isolate bankruptcy law as if it were purely technical, policy makers know that its effects can ramify to the most fundamental social and political issues in a country.¹

Based on the most important conclusions resulting from the research conducted in this study, the present chapter puts forward proposals for a new regulatory paradigm and its constituent elements.² Derived from the studies undertaken in the preceding sections, this part of the study would thus be devoted to those practical and material conditions and requirements that are considered to be instrumental to the establishment of the kind of institutional mechanisms which would result in a more effective and better functioning insolvency practice. Using certain policy considerations, this chapter presents a series of intermediate and long-term recommendations that could improve and reform the regulatory structure of South African insolvency law. The recommendations are not intended to be exhaustive, nor do they attempt to set out the entire groundwork for this field of insolvency law. The main objective is to propose and highlight certain vital design features which would complement and hopefully contribute to any future policy design and law reform in this field of law.

Before embarking on a discussion of proposals for the development of a regulatory framework within the South African insolvency regime, it is necessary to make a few remarks regarding the subject of law reform. When standing before a blank canvas with the opportunity to create a new discipline in a specific field of law, anyone will be inspired by the freedom and opportunity, and will probably attempt to create an original masterpiece. Now that the global norms and standards have been clearly articulated by the United Nations Commission on International Trade Law³ and the World Bank, it should become a priority to examine ways of adapting them to a South African context.⁴ In order to achieve these objectives, policy- and lawmakers will have to take account of global norms and standards,

¹ Halliday “Lawmaking and Institution Building in Asian Insolvency Reforms: Between Global Norms and National Circumstances” in the Organisation for Economic Co-operation and Development *Asian Insolvency Systems Closing the Implementation Gap* (2007) 39 (hereafter referred to as Halliday “Lawmaking and Institution Building”).

² This part of the study is based on the conclusions reached throughout the study. However due to the practical nature of the recommendations which follow hereafter, certain original ideas and sources which had not been previously incorporated in the study would occasionally be referred to.

³ Hereafter referred to as “UNCITRAL”.

⁴ See part III ch 5 above.

which would be acceptable on an international level, while also anticipating the difficulties that could arise out of the political and economic realities of a developing country with unique commercial and legal issues. The challenge will lie in striking a balance between, on the one hand, designing a model which will optimise the regulatory outcome, while on the other hand bearing in mind that this should take place within an achievable and sustainable approach.

As mentioned earlier, the South African Law Reform Commission is at present in the final stages of introducing a Unified Insolvency Act aimed at modernising and uniting our insolvency laws.⁵ Although this study has expressed concerns about the relevance of an investigation done in a pre-Constitutional era, it should be anticipated that government could persist in going down this path of law reform. The following chapter goes on to propose the launching of a completely new regulatory regime, but a certain degree of effectiveness may be achieved without simultaneously setting up all the detailed elements.

In a recent keynote address the Deputy Minister of Justice and Constitutional Development acknowledged the importance of regulating the insolvency industry and especially the importance of building institutional capacity. He stated that: “[t]he current economic climate dictates that we have an industry that is regulated properly and regulated soon.”⁶ Although the regulatory aspects of South African insolvency law have not been a dominating theme in the academic literature and textbooks on insolvency law, certain foundations and underpinnings for a regulatory model has over time been identified.⁷ The following proposals on law reform will describe a regime in which some of these identified factors are co-ordinated with new ideas and policy adjustments in order to create a modernised and improved regulatory framework in our insolvency law.

⁵ See part IV above.

⁶ Keynote address by Deputy Minister of Justice and Constitutional Development (hereafter referred to as the Department of Justice), Mr A Nel, MP (hereafter referred to as the Deputy-Minister), at the International Association of Insolvency Regulators (“IAIR”) annual general meeting and conference, Sandton, 2009-10-12 (hereafter referred to as the Minister’s address) available at http://www.justice.gov.za/m_speeches/sp2009.html (last visited at 09-11-30).

⁷ See part VI ch 1 at (n 2).



CHAPTER 2: PROPOSALS FOR LAW REFORM

2.1 INTRODUCTION

It is submitted that in order to create an effective and efficient regulatory model a complete and comprehensive overhaul of the South African insolvency law regime in general should occur.⁸ Although this is ambitious, such a rigorous approach will afford national policy- and lawmakers the opportunity of embarking on a comprehensive policy-based investigation of South African insolvency law in general. A holistic approach to insolvency law reform would not only have the advantage of questioning the degree of harmonisation or convergence with insolvency regimes in other jurisdictions, but also ensure that the implementation of various policy considerations and law reform initiatives will have a firm constitutional footing. If, however, a piecemeal approach is to be adopted, it is submitted that any regulatory law reform objective should be complementary to, and compatible with, the insolvency system as a whole.

2.2 PROPOSED REGULATORY FRAMEWORK FOR THE SOUTH AFRICAN INSOLVENCY REGIME

The World Bank's *Principles and Guidelines for Effective Insolvency and Creditor Rights System* states the following:

Strong institutions and regulations are crucial to an effective insolvency system. The insolvency framework has three main elements: the institutions responsible for insolvency proceedings, the operational system through which cases and decisions are processed and the requirements needed to preserve the integrity of those institutions – recognising that the integrity of the insolvency system is the linchpin for its success. A number of fundamental principles influence the design and maintenance of the institutions and participants with authority over insolvency proceedings.⁹

Insolvency regulation thus consists of two principal components. First, there is the need for independent entry-level qualification standards, education and training for those who are appointed to administer particular insolvency cases. Secondly, there is the design and development of the insolvency regulatory bodies themselves, the techniques and methods they employ and the establishment of criteria to measure the benefits to be obtained from regulated

⁸ See part V; part VII ch 3 above.

⁹ See part III ch 5 above. See *World Bank Revised Principles for Effective Insolvency and Creditor Rights Systems* (2005) 6 (also referred to as *Revised Principles*).

procedures and promote a higher level of specialisation and professionalism.¹⁰ Given the multiplicity of questions raised by substantive proceedings in insolvency law, and the diversity of responses in national laws, this study is necessarily selective.

It had been stated with regard to the development of a regulatory framework that policymakers will initially have to contemplate various policy considerations.¹¹ Notwithstanding the variety of substantive issues that must be resolved, insolvency laws are highly procedural in nature. The design of the procedural rules plays a critical role in determining how risk is to be allocated among the various participants in the proceedings. Perhaps the most critical procedural issue relates to the identification of the decision-maker.¹² Set forth below are several issues that are of relevance when the regulatory authority as well as the regulation of the practitioners responsible for the administration of the insolvent estate in South African insolvency law are considered.

2.2.1 An Independent Regulatory Body

It is submitted that, given the unique South African political, social and economic dispensation, it is inevitable that the state should be involved in the regulatory process. Despite the problems and pitfalls identified in our present regulatory system, it is proposed that the state nevertheless play a significant role in the regulatory framework to the South African insolvency system, albeit in a completely revised form. The public interest has been a vital component of insolvency regulation since the earliest days and continues to occupy a position of prominence.¹³ Apart from protecting certain vulnerable groups within society, the state also has a legitimate interest in ensuring that the institution of credit, the lifeblood of the economy, is not abused.¹⁴ A combination of factors relating to *inter alia* our emerging market economy, as well as the unique socio-political dynamics, contribute to the recognition that the

¹⁰ See part VII par 3.3.1 above. See World Bank – Regulatory Working Group “Insolvency Law and the Regulatory Framework” (1999) (hereafter referred to as World Bank “Insolvency Law and the Regulatory Framework”).

¹¹ See part VII above.

¹² Legal Department – International Monetary Fund (hereafter referred to as “IMF”) *Orderly and Effective Insolvency Procedures* (1999) (hereafter referred to as IMF *Orderly and Effective Insolvency Procedures*).

¹³ The *Cork Report* (see part III ch 3 above) par 1734 concluded that:

Insolvency proceedings have never been treated in English law as an exclusive private law matter between the debtor and his creditors; the community itself has always been recognised as having an important interest in them.

¹⁴ See part IV above.



regulatory aspects of insolvency law represents a considerable social concern that simply cannot be outsourced to the private sector.

If it is accepted that the state has to be engaged in the regulatory regime, the next key issue to be addressed is in which form the state should become involved, and in the South African context this involves the future role of the Master of the High Court¹⁵ in a regulatory landscape. As a result of the challenges identified earlier in this study and especially the lack in public confidence in the current conduct of the Master,¹⁶ it is submitted that the Master should discontinue acting in a supervisory capacity with regard to insolvency law and should disassociate itself from it.¹⁷ It is submitted that the Master should continue to exist as a government institution charged with some of the duties it presently performs, for example the administration of deceased estates, including the acceptance and custodianship of wills; protection of the interests of minors and legally incapacitated persons; controlling the registration and administration of both testamentary and *inter vivos* trusts as well as management of the Guardians Fund. This approach would mark a return for the Master to its roots as the “Master of the Orphan Chamber”.¹⁸ This recommendation would ensure that the Master would be able to focus on the protection of the interests of minors and other vulnerable groups and would thus align its functions more closely with the values entrenched in the Constitution within the current socio-economic circumstances in South Africa.¹⁹

As a substitute for the Master’s current supervisory role it is submitted that a new regulatory agency in insolvency law should be established that would fulfil the role of a complete “insolvency regulator” in insolvency law. The new independent regulatory authority would aim not only to ensure some degree of harmonisation and convergence with insolvency regimes in other jurisdictions, including important trading partners and sources of investment, but also to foster more local and international confidence in our insolvency law system by more closely reflecting the values of the Constitution.²⁰

¹⁵ Hereafter referred to as the Master.

¹⁶ See Loubser “An International Perspective on the Regulation of Insolvency Practitioners” (2007) *SA Merc LJ* 123 (hereafter referred to as Loubser).

¹⁷ See part V ch 5 above.

¹⁸ Also referred to as the “Weesheer”. See part II above.

¹⁹ See part IV ch 2 above.

²⁰ See part IV above.

The new independent office of what we for present purposes could refer to as the “Superintendent in Insolvency” would preferably operate as an independent Business Unit within the Department of Justice and Constitutional Development.²¹ It is recommended that the Superintendent should be a person of high standing with established credentials in insolvency administration and preferably hold the trust and confidence of the national commercial community. The organisational structure and design of the institution could be loosely based on the English system’s Insolvency Service, which at present is constituted as an Executive Agency of the Department of Business, Innovation and Skills.²² South African insolvency legislation is deeply rooted in English law, and this has resulted in South African and English laws reflecting similar legal philosophies and principles.²³ Although the English regulatory framework as encapsulated within the present Insolvency Act 1986²⁴ may not suit the South African economic conditions in a strict sense, there are adequate similarities between the jurisdictions’ historical, legal and cultural elements to constitute a distinct and identifiable practice. It is submitted that the state’s role in the regulatory aspects of the law should be confined to issues which are truly public in nature and which could not be adequately performed by the creation of adequate incentives for private practitioners in the insolvency process. This approach would strike the correct balance between state and private sector interest in a country with a unique legal and socio-economic environment.²⁵

It is proposed that the most prominent feature of the new regulatory agency should be that it would act as a truly independent role-player in insolvency law. The rationale for this is that the enforcement of government policies such as the transformation of the insolvency industry should remain the responsibility of a public administrator rather than the private sector.²⁶ The *World Bank Principles and Guidelines for Effective Insolvency and Creditor Rights Systems* also states the following:

It is essential where a professional body is involved that its independence from its members is clearly demonstrated through its constitution, mechanisms and processes, and through its staff. That may require a legislative framework or statutory oversight – but not necessarily

²¹ Hereafter referred to as the Department of Justice.

²² The key provisions are to be found in the Insolvency Act 1986 ss 399-401 and Part 10 of the *Insolvency Rules* (1986). See also previous discussion of the Insolvency Service in part III above.

²³ See part III par 3.1 above.

²⁴ Insolvency Act of 1986. Hereafter referred to as the Insolvency Act 1986 or the Insolvency Act of 1986. The Act received Royal Assent on 1986-07-25 and was brought into force on 1986-12-29. See part III ch 3 above.

²⁵ “Insolvency Law Reform: Promoting Trust and Confidence” *New Zealand Law Commission Study Paper* 11, Wellington, (2001) 33-35 (hereafter referred to as *New Zealand Law Commission Study Paper*).

²⁶ See part VI above.



involvement in individual matters – by a Government department or agency or separately constituted body.²⁷

International norms and standards suggest that the hallmarks of a regulatory system should be clarity, transparency and fairness, and predictability and accountability.²⁸ This study's research into the role of the regulatory type bodies in other benchmark jurisdictions identified certain key functions performed by such authorities.²⁹ The key bankruptcy functions of the office of the Superintendent are thus recommended to be the following: enquiry and enforcement to deal with the breach of law and abuse of the system as a matter of public interest; the regulation and supervision of all insolvency practitioners; and in future the office could also become involved in the administration of cases where the assets are insufficient to meet the costs of doing so.³⁰ While the precise functions and duties of regulatory agencies vary between jurisdictions, in broad terms their functions consistently fall within the three abovementioned categories. Therefore, the new regulatory authority would more closely simulate other international regulators, specifically those in the benchmark jurisdiction of England and Wales, and provide services more consistent with those typically associated with that of an insolvency regulator.³¹ It is proposed that the office of the Superintendent be divided into three different sections or branches which would operate independently and be responsible for investigations and enforcement, the regulation of practitioners, and the administration of estates where the assets would seemingly be insufficient to cover the administration costs of the estate.

The first branch, which for now we could refer to as the “Insolvency Investigations Branch”, would act as an independent enforcement unit and have responsibility for all public enforcement functions.³² Prosecutions and preventions are routinely seen as the responsibility of the state in

²⁷ See World Bank *Principles for Effective Insolvency and Creditor Rights System* (2001) (also referred to as *Principles*) par 222.

²⁸ *Revised Principles D7*.

²⁹ See part III ch 6 above.

³⁰ The so called “last resort” functions.

³¹ See part III ch 3 above.

³² See Insolvency Act 1986 s 289 – Investigatory duties of official receiver:

- (1) Subject to subsection (5) below, it is the duty of the official receiver to investigate the conduct and affairs of every bankrupt and to make such a report (if any) to the court as he thinks fit.
- (2) Where an application is made by the bankrupt under section 280 for his discharge from bankruptcy, it is the duty of the official receiver to make a report to the court with respect to the prescribed matters; and the court shall consider that report before determining what order (if any) to make under that section.
- (3) A report by the official receiver under this section shall, in any proceedings, be prima facie evidence of the facts stated in it.
- (4) In subsection (1) the reference to the conduct and affairs of a bankrupt includes his conduct and affairs before the making of the order by which he was adjudged bankrupt.

most jurisdictions: however, both activities are dependent on an adequate enquiry taking place to detect offences and abuse.³³ The Cork Committee was a strong advocate of having robust investigation procedures. Once again this initiative was linked to the idea of maintaining public confidence.³⁴ It is recommended that the Superintendent should at the initial stages of the insolvency process possess the powers to perform a basic level of enquiry and investigation into the events that lead to insolvency, whether these relate to an individual debtor or to the investigation of the conduct of a director or other company official. A further stage would include a reporting mechanism in matters requiring further substantive investigation or prosecution.³⁵ The facets of investigation and enforcement are once again directed at securing and assuring public confidence in the system of regulation and the process of insolvency.

The second recommended branch, which we could for now refer to as the “Insolvency Regulation Branch”, would be responsible for regulating and supervising all insolvency practitioners, and would also at a later stage be responsible for the regulation and appointment of official receivers under certain conditions.³⁶ The need for such state oversight tends to increase exponentially where the insolvency practitioner is not appropriately qualified and does not have the necessary skills and expertise to undertake certain complex matters. But the risk, if not entirely removed, is very significantly reduced through the existence of an effective system of regulatory oversight.³⁷ It is submitted that the more the industry accepts responsibility for its own professionalism and ethical behaviour, the less the state would have to intervene in enforcing these principles. It is also envisaged that certain strategic decisions initially taken about the shape of the regulatory framework, along with the location of the authority and responsibility for it, could in time be reviewed. The duties of the Superintendent could become less onerous, as the system devolves into a self-regulatory system, with the role of the state being devoted solely to public interest matters in general.

(5) Where a certificate for the summary administration of the bankrupt's estate is for the time being in force, the official receiver shall carry out an investigation under subsection (1) only if he thinks fit.

³³ Zhang “Developing a Regulatory Framework for Outsourcing of Insolvency Work in Hong Kong China” 193 in *OECD Asian Insolvency Systems – Closing the Implementation Gap* (2007).

³⁴ See *Cork Report* par 238.

³⁵ As a division of the English Insolvency Service, the Companies Investigation Branch (“CIB”) investigates serious corporate abuse using compulsory powers under the Companies Act 1985. See part III ch 3 above.

³⁶ See discussion hereafter.

³⁷ See part VI above.



One of the key elements within a regulatory system is the symbiotic relationship between the regulatory body and the insolvency practitioner. Those who administer insolvencies – whether appointed by the creditors, by the court or by a government agency – are given functions and powers in relation to the debtor’s assets under the authority of legislation: the assets and funds are not those of the practitioner, and he or she has a special duty to protect them. It is submitted that the nature of the appointment is seen as that of, or closely resembling, a trustee undertaking functions and exercising public interest powers for the benefit of the creditors. But these functions and powers should be accompanied by responsibilities and accountabilities, and mechanisms for ensuring the proper discharging of such duties.³⁸

In order to implement the above objectives and ensure that an individual is fit and proper to act as an insolvency practitioner, a two-pillar system is recommended. The system will depend on compulsory membership to a “Recognised Professional Body”³⁹ in addition to a mandatory licensing scheme being implemented. Firstly, in order to practise formally as an insolvency practitioner, an individual will have to gain membership of a Recognised Professional Body, and, secondly, as an additional prerequisite, will also be compelled to apply successfully to the Superintendent for a formal licence to practice. The regulatory branch of the Superintendent will thus firstly be responsible for conferring on certain member organisations official “Recognised Professional Body” status, and by way of a mandatory licensing system will also have the power to directly authorise practitioners to practise as such.⁴⁰ The proposed system would thus represent a hybrid system of government regulation with incorporated elements of self-regulation, as opposed to the English system of self-regulation with government oversight.⁴¹

The third suggested branch of the Superintendent is the “official receiver’s Branch”, which could *inter alia* be responsible for the administration of cases as a last resort where the assets

³⁸ World Bank “Insolvency Law and the Regulatory Framework” 6.

³⁹ Also referred to as a “RPB: or Recognised Professional Body.

⁴⁰ See part VI above.

⁴¹ The Insolvency Act 1986 in the United Kingdom (hereafter referred to as the “UK”) created an insolvency practitioner profession through the medium of delegated regulation. Two methods are provided: membership of and authorisation by a professional body recognised by the Secretary of State (s 391), or direct authorisation by a “competent authority” (for the time being the Secretary of State).

in the estate are insufficient to meet the cost of administration.⁴² This function could also be extended to include cases where no private-sector practitioner has been appointed or cases where an urgent appointment, due to for example the nature of the assets, is required. After the sequestration or winding-up order has been made the conduct of the case will immediately be transferred to the official receiver attached to the court of jurisdiction.⁴³ If the assets are minimal the official receiver will act as the person responsible for the administration, and in cases where the assets are more substantial the Receiver will summons a meeting of creditors. The Superintendent will also be responsible for supervising the official receivers and the status of officer of court will be conferred upon each person appointed as official receiver.⁴⁴ Apart from this status in relation to which an official receiver would exercise his functions, the Superintendent would also be responsible for setting down certain criteria in regard to qualifications and experience in order for a person to be appointed as an official receiver.

The branch of official receivers could also be utilised as a training facility not only for government officials but also to provide technical insolvency training for insolvency practitioners. A scheme where it would be possible for practitioners to register as trainees at the branch of the official receivers could not only assist practitioners in obtaining practical experience but could also make a positive contribution to the resources of such office. It is submitted that the involvement of the branch of the official receiver in the administration of estates could gradually be phased in as part of the overall regulatory structure. This outcome would not only allow for sufficient training of individuals in this specific field of law, but also ensure that the structure and functions of this office are adequately thought through in order to be integrated successfully into the general regulatory scheme.

⁴² Role of the official receiver in England and Wales was brought into existence in the Bankruptcy Act 1883. Today they are civil servants who have their own legal personality and act as officers of the courts to which they are appointed. See part III ch 3 above.

⁴³ See part III ch 3 above.

⁴⁴ See discussion of concept of “officer of the court” in part VI. See also Insolvency Act 1986 s 400 – Functions and status of official receivers:

- (1) In addition to any functions conferred on him by this Act, a person holding the office of official receiver shall carry out such other functions as may from time to time be conferred on him by the Secretary of State.
- (2) In the exercise of the functions of his office a person holding the office of official receiver shall act under the general directions of the Secretary of State and shall also be an officer of the court in relation to which he exercises those functions.
- (3) Any property vested in his official capacity in a person holding the office of official receiver shall, on his dying, ceasing to hold office or being otherwise succeeded in relation to the bankruptcy or winding up in question by another official receiver, vest in his successor without any conveyance, assignment or transfer.



One of the focal points of this study was to examine the current state of affairs of our regulatory regime, and in doing so various problems and challenges were identified. The challenges experienced by the Master can mainly be divided into two categories – namely the lack in specialisation experienced as a result of the fact that the Master has to perform various roles and functions in various fields of our law, as well as the lack of a proper and formal regulatory structure with regard to our insolvency industry.⁴⁵ In recommending a regulatory framework consisting of the establishment of a complete and independent government institution to undertake regulatory and supervisory functions within a statutory framework, in addition to a mandatory licensing system which would prohibit all but licensed individuals from undertaking certain functions, it is suggested that the current problems and challenges could be adequately solved. It is also foreseen that the suggested regulatory mechanisms will significantly reduce fraud and other related dishonest behaviour, as the establishment of a new regulatory authority would also create a further hurdle for unscrupulous and unprofessional behaviour.⁴⁶

2.2.2 Regulation of Insolvency Practitioners

The second component of the regulatory framework deals with the regulatory scheme relating to those responsible for administering insolvencies. Global norms point to three sets of attributes critical to the effective professionalisation of the insolvency practice.⁴⁷ Firstly, professionals must display a level of competency that requires technical sophistication in the relevant field of law, and could include accounting skills, in addition to familiarity with general business practice. Secondly, since insolvency practitioners control moneys and are exposed to opportunities for self-enrichment, they must be socialised in values of integrity and honesty, and be rooted in regulatory structures that reinforce honest behaviour and sanction deviance. Thirdly, both the first and second attributes would depend on the effective functioning of the regulatory mechanisms.⁴⁸

⁴⁵ See part V ch 5 above.

⁴⁶ See part VI above.

⁴⁷ Johnson “Toward International Standards on Insolvency: The Catalytic Role of The World Bank” 2000 *Law in Transition* 69 (hereafter referred to as Johnson).

⁴⁸ Halliday 29. See also UNCITRAL *Legislative Guide on Insolvency Law* (2005) paras 36-41 (hereafter referred to as “UNCITRAL *Legislative Guide*” or “*Legislative Guide*”) and World Bank *Principles for Effective Insolvency and Creditor Rights System* (2001) D8 (also referred to as *Principles*).

Thus, a common theme that has been explored and identified throughout the study regarding the regulation of those responsible for insolvency administration is that such a person should be competent and suitable for the particular work by reference to qualifications and experience.⁴⁹ The English licensing model has at times been criticised as overly complex and fragmentary, and although South Africa is in dire need of a proper regulatory framework, it is probably not necessary for an overregulated environment such as to be found in the England and Wales. Having said that, the focus on professionalism, ethics, qualifications and experience might still provide a suitable benchmark when a balance between the unique South African socio-economic environment and the safeguarding of public interest and fostering of public confidence is attempted.

The aim of the recommendations hereafter is not only to encourage a high standard of competence and professionalism amongst insolvency practitioners, but also to arrive at an equitable balance between certain provisions imitating a self-regulatory scheme of regulation and the overall supervision provided by the state. This study recommends the adoption of a two-pillar approach regarding the regulation of practitioners, consisting of a mandatory licensing scheme based on the compulsory membership of a Recognised Professional Body.⁵⁰

In the proposed regulatory scheme it is suggested that there be two levels of authorisation, namely, compulsory membership of a Registered Professional Bodies and secondly successful application to the office of the Superintendent for a licence to practice.⁵¹ A Registered Professional Body would be approved by the Superintendent in accordance with established criteria, indicating that such body has set standards of competence and professional and ethical conduct, and has developed a proper infrastructure to deal with investigation and discipline.⁵² The Professional Body should also play a role in the supervision and discipline of practitioners through codes of conduct and ethics, investigative and disciplinary committees

⁴⁹ See part III; part VI above.

⁵⁰ As mentioned in the previous chapter the endorsement of “Recognised Professional Bodies” would fall under the Superintendent.

⁵¹ See Insolvency Act 1986 s 391 – Recognised professional bodies:

- (1) The Secretary of State may by order declare a body which appears to him to fall within subsection (2) below to be a recognised professional body for the purposes of this section.
- (2) A body may be recognised if it regulates the practice of a profession and maintains and enforces rules for securing that such of its members as are permitted by or under the rules to act as insolvency practitioners –
 - (a) are fit and proper persons so to act, and
 - (b) meet acceptable requirements as to education and practical training and experience.

⁵² See Insolvency Act 1986 s 391.



and professional development activities.⁵³ In practice the Professional Bodies would thus be responsible for enforcement of standards and norms of fitness, suitability and professional competence. The Superintendent would have the power to withdraw the recognition of any accredited professional body if it has reason to believe that the body no longer complies with the set requirements.

It is submitted that primary legislation would make it an offence for someone to act as an insolvency practitioner without being qualified to do so.⁵⁴ The primary legislation would define the meaning of being “qualified to do so” as being a member of a Registered Professional Body, and being authorised to do so by the Superintendent of Insolvency. The licensing regime will thus prohibit all but licensed individuals from undertaking certain functions, and the granting of licences would depend on a person meeting and maintaining certain prescribed standards relating to education, experience and ongoing competence requirements.⁵⁵ The licensing function would be allocated to the new independent regulator, the Superintendent of Insolvency, who would be issuing licences based on set criteria as determined by the introduction of subordinate legislation. The decisive factor in issuing a practitioner’s licence would be a confirmation, in the form of a certificate, by the Registered Professional Body that:

- a such individual holds valid membership of the organisation;
- b that he or she has fulfilled the necessary requirements regarding experience and education;
- c and to the knowledge of such an organisation would be a fit and proper person to act as a professional insolvency practitioner.

One of the most controversial areas of our present-day insolvency law is the discretionary power of the Master to appoint a provisional insolvency practitioner in certain circumstances.⁵⁶ It is suggested that on the date of the court order of sequestration or winding-up, the estate devolve onto the office of the relevant official receiver, who would be responsible for the calling of a creditors’ meeting in cases where the volume of the assets of the estate would dictate for him to do so. The official receiver would subsequently act as receiver of the property

⁵³ See discussion below.

⁵⁴ See Insolvency Act 1986 s 389 – Acting without qualification an offence:

(1) A person who acts as an insolvency practitioner in relation to a company or an individual at a time when he is not qualified to do so is liable to imprisonment or a fine, or to both.

(2) This section does not apply to the official receiver.

⁵⁵ See part VI above.

⁵⁶ See discussion on appointment of insolvency practitioners in part V above.

and have appropriate powers to protect and safeguard any property and would have limited powers to realise assets if necessary.⁵⁷ It is suggested that the recommended regime would be based on principles which would provide for the general body of creditors to be responsible for the nomination of a final practitioner, and in cases where urgency or the nature of the estate calls for an urgent appointment, a clear set of specified criteria for the making of such an appointment should exist. It is submitted that due to the official receiver acting as receiver from the time of the insolvency order to the time of appointment of final practitioner, the need for an urgent appointment would be greatly reduced.

2.2.2.1 Education and Training

With regard to the educational standard of an insolvency practitioner, it is recommended that a standard examination in insolvency law and practice should be implemented as prerequisite to the successful application for a licence to practise.⁵⁸ The function of developing an examination curriculum, conducting the training and examinations as well the suggested continuing development may be discharged by a recognised independent body. It is submitted that, irrespective of the form of educational requirements and standards laid down, what is essential is that through a legal, accountancy or other qualification or degree or through experience, the practitioner is able to demonstrate that he or she has knowledge and practical understanding of insolvency and other legislation and commercial matters likely to be involved in an insolvency case, in order for him to be able to properly exercise the powers given to him and is able to discharge his or her functions, duties, responsibilities and accountabilities.

⁵⁷ See Insolvency Act 1986 s 287 – Receivership pending appointment of trustee:

- (1) Between the making of a bankruptcy order and the time of which the bankrupt's estate vests in a trustee under Chapter IV of this part, the official receiver is the receiver and (subject to section 370 (special manager)) the manager of the bankrupt's estate and is under a duty to act as such.
- (2) The function of the official receiver while acting as receiver or manager of the bankrupt's estate under this section is to protect the estate; and for this purpose –
 - (a) he has the same powers as if he were a receiver or manager appointed by the High Court, and
 - (b) he is entitled to sell or otherwise dispose of any perishable goods comprised in the estate and any other goods so comprised the value of which is likely to diminish if they are not disposed of.
- (3) The official receiver while acting as receiver or manager of the estate under this section –
 - (a) shall take all such steps as he thinks fit for protecting any property which may be claimed for the estate by the trustee of that estate,
 - (b) is not, except in pursuance of directions given by the Secretary of State, required to do anything that involves his incurring expenditure,
 - (c) may, if he thinks fit (and shall, if so directed by the court) at any time summon a general meeting of the bankrupt's creditors.

⁵⁸ Applicants in the UK now have to pass the Joint Insolvency Examination, set by the Joint Insolvency Examination Board, in addition to a minimum level of experience. See Reg 7 of Insolvency Practitioners Regs 2005.



The training offered to obtain this qualification ought to be sufficient to enable a successful candidate to act in smaller and presumably less complicated cases where the assets are valued at less than a maximum stipulated amount. This requirement regarding an entry-level examination for qualification in a profession is not new to South Africa, as the Law Society of South Africa is managed along similar lines.⁵⁹ The Law Society of South Africa is entirely self-regulatory, with oversight being provided by the High Court. The South African Institute of Chartered Accountants is another example of this kind of system.⁶⁰

A further level with regard to the qualifications and skills requirements is that it is also important to provide for compulsory continuing education for all practitioners in order to ensure sustained high and increased levels of competence. A programme similar to the Continuing Professional Development⁶¹ is recommended. The Continuing Professional Development is the means by which members of professional associations maintain, improve and broaden their knowledge and skills and develop the personal qualities required in their professional lives. In South Africa the current trend with major professional institutes and bodies such as the South African Institute of Chartered Accountants is to require a pre-determined number of hours or points per year spent on a balance of Continuing Professional Development activities, which include activities such as courses, technical meetings or relevant seminars. Monitoring is mostly done by way of members providing record of these activities according to a preset timescale for submission.⁶² It is recommended that a similar programme should be implemented as part of the educational and skills transfer process.

In order to ensure that skills transfer takes place, practical training in the form of assuming professional responsibility for work while under the supervision of a more senior practitioner could also be considered. It is suggested that this form of practical training be included as an activity which would represent a certain number of points within the Continuing Professional Development programme. Thus, in order to ensure that more senior practitioners get involved in practical training and skills transfer a “stick-and-carrot” method could be employed

⁵⁹ See part VI above.

⁶⁰ See *Burdette Reform, Regulation and Transformation: The Problems and Challenges facing South African Insolvency Industry* (2005) unpublished paper presented at the Commonwealth Law Conference, London, (hereafter referred to as Burdette “Reform, Regulation and Transformation”).

⁶¹ Also sometimes referred to as Continuous Education or Training. See discussion on part VI above.

⁶² See also South African Institute of Chartered Accountants “Updated CPD Policy: December 2008” available at <http://www.saica.co.za> (last visited at 09-11-30).

whereby the training of a junior colleague could also qualify as a Continuing Professional Development activity.

Apart from the abovementioned licensing and membership requirements it is recommended that in order to introduce a skills development programme as well as create an infrastructure for inexperienced practitioners to obtain the necessary experience, a two-tier system be introduced into the framework. A constant theme throughout the study has been the need to customise any proposed insolvency law reform project to suit the local legal and political culture.⁶³ An important factor to be considered in a South African context is that historically disadvantaged persons need to have entry into the insolvency profession.⁶⁴ It should, however, also be noted that insolvency law is a highly specialised field of law and an individual who passes a basic entry-level examination will not necessarily possess the extent and depth of technical knowledge and practical experience that is required. As a result he could obtain a licence to practice, but not necessarily have the practical experience required to administer a complicated insolvent estate.

It is proposed that the entry-level examination and training should provide for a minimum level of knowledge to enable any individual to manage the administration of a smaller, less complicated estate, but the administering of a larger and more complex estate would require a higher degree of qualification and experience. For larger or more complicated cases, provision should be made for a higher level of professional competence and a subsequent level as senior or advanced insolvency practitioner would denote a higher level of experience and competence. If a high level of experience is suddenly imposed on all practitioners it will exclude members of the previously disadvantaged groups as well as other members of the Registered Professional Body who have not yet had the opportunity to obtain a certain level of experience. With the two-tier system it would be possible for inexperienced individuals to obtain the necessary experience and at a later stage advance to the senior level.⁶⁵ It could also be considered that a person should advance to a certain level on the proposed Continuing Professional Development programme in order to proceed to a senior practitioner's level as well as maintain a certain level of certification. This approach would act as encouragement to enter the programme and as such increase sustainable levels of competence.

⁶³ See part III; part IV and part VI above.

⁶⁴ Loubser 138.

⁶⁵ Loubser 137.



2.2.3 Joint Insolvency Forum

Within the context of the proposed framework it is proposed that a research and advisory body be created that would be responsible for ongoing research and would act as a forum for discussion and co-ordination not only between the different role-players in the proposed regulatory model but also between the various government departments. It is recommended that the proposed forum – for now we could refer to it as the Joint Insolvency Forum – operate in a similar fashion as the Standing Advisory Committee under the Companies Act.⁶⁶ The idea would be for various stakeholders and interest groups, ranging from the Superintendent, the various Registered Professional Bodies, and the Banking Council, to organised labour, government departments, academics and international consultants, to be represented at this Forum.

It is also critical that the research be co-coordinated, and a mechanism for this purpose should be considered. The promulgation of new laws as is envisaged with the proposed Unified Insolvency Bill⁶⁷ is certainly not the end of the road. New provisions need to be tested and unforeseen eventualities are likely to occur. With this in mind, such a specialised body could be responsible for research and law reform issues on an ongoing basis.⁶⁸ The main objective of this Forum would be to act in an advisory capacity to the Minister as well as the Superintendent. The objectives of this Forum would be to ensure ongoing research on matters of insolvency law, have regard to international developments in the field of insolvency law, and also from time to time the making of recommendations for the review of subordinate-legislation.

2.2.4 Complaints Mechanism

From the outset of this study it has been made clear that one of the key considerations when recommendations on law reform are made would have to be that of public interest within the spirit of the Constitution. In order to develop a system based on accountability which would

⁶⁶ Act 61 of 1973. Hereafter referred to as the Companies Act. According to s 18 of the Companies Act 2008 (Companies Bill 61 of 2008 was signed by the President as Act 71 of 2008 published in *GG no 32121* (2009-04-07)) the Minister may appoint one or more specialist committees to advise the –

(a) Minister on any matter relating to company law or policy; or
(b) Commissioner on the management of the Commission's resources.

⁶⁷ See part III ch 6 above.

⁶⁸ Havenga "Simplification and Unification in Corporate and Insolvency Law – Are we Making any Progress?" (2001) *SA Merc LJ* 408 (hereafter to as Havenga).

satisfy the public interest and create trust and confidence in the system it would be vital that key measures such as the independence of the Superintendent, the mechanisms of accountability for the insolvency practitioners and public servants as well as the procedures to receive and investigate complaints are put in place.

Another important factor is that the process for determining the appointment of a practitioner to an insolvency case takes account of the need for those who have a real interest in who might be appointed having the opportunity to oppose or complain about such appointment. Accordingly the law should enable the review of a decision to appoint an office-holder by providing the grounds upon which an appointment may be reviewed; providing for a process for such a review and if such appointment is set aside, providing for the appointment of another qualified person.

It is submitted that the Superintendent should have a complaints mechanism in place, which would act as a conduit through which complaints could be channelled to the respective Registered Professional Bodies and in some cases the complaints could also be subject to an investigation by the Superintendent itself. The Registered Professional Bodies would be required to have a formal complaints procedure to ensure that these procedures are harmonised across the spectrum. The policy aim would be to have a disciplinary procedure in place that is just and fair to all concerned parties, including the practitioner and the complainant, that is transparent and that will thus create trust and confidence in the insolvency system.⁶⁹

Apart from the internal structures, it is submitted that an “Insolvency Tribunal” should be established. It is submitted that the Tribunal be an independent juristic person, subject only to the Constitution and the law, so as to ensure that it functions impartially and without fear of

⁶⁹ See Insolvency Act 1986 s 287 – Action of Tribunal on reference:

- (1) On a reference under section 396 the Tribunal shall –
 - (a) investigate the case, and
 - (b) make a report to the competent authority stating what would in their opinion be the appropriate decision in the matter and the reasons for that opinion, and is the duty of the competent authority to decide the matter accordingly.
- (2) The Tribunal shall send a copy of the report to the applicant or, as the case may be, the holder of the authorisation; and the competent authority shall serve him with a written notice of the decision made by it in accordance with the report.
- (3) The competent authority may, if he thinks fit, publish the report of the Tribunal.



favour or prejudice. The Tribunal could function in a similar way to the newly introduced Companies Tribunal,⁷⁰ and as an organ of state have a dual mandate –

- a to serve as a forum for the adjudication of disputes as well as voluntary alternative dispute resolution in any matter arising from the Insolvency Act
- b to carry out reviews of administrative decisions made by the Superintendent on an optional basis.⁷¹

The High Court would however remain the primary forum for the resolution of disputes, and the interpretation and enforcement of the proposed Insolvency Act.

2.2.5 Record-keeping and Statistics

In respect of each case in which a practitioner acts it is recommended that a statutory obligation should exist to keep record of prescribed information on matters such as the bonding arrangement, matters relating to the remuneration of the practitioner, and the liquidation and distribution account reflecting aspects of the administration and distribution. These records should be made available for inspection by the Superintendent, the relevant Registered Professional Bodies and in certain instances also the public. Records should also be retained for a prescribed period after the conclusion of the estate.

There is an increasing expectation that policy and practice be evidence-based and subject to post-implementation evaluation and review. Accordingly, an increasing use of statistical information and research into the development of proposals and assessment of the impact of

⁷⁰ See s 195 of Companies Act, 2008. The Companies Tribunal or a member of the Tribunal acting alone in accordance with this Act, may –

- (a) adjudicate in relation to any application that may be made to it in terms of this Act, and make any order provided for in this Act in respect of such an application;
- (b) assist in the resolution of disputes as contemplated in part C of chapter 7; and
- (c) perform any other function assigned to it by or in terms of this Act, or any law mentioned in Schedule 4.

⁷¹ See s 6 of the Promotion of Administrative Action Act 3 of 2000. Hereafter referred to as “PAJA”. Before someone can ask a court to review an administrative action, there is an important rule in the PAJA that must be complied with – the rule of exhaustion of internal remedies. This means that, where the law sets out procedures allowing someone to review or appeal a decision of the administration, these must be used up before an affected person can approach a court. A person can therefore only ask for judicial review as a last resort. This is dealt with in s 7(2) of the PAJA. Internal remedies are ways of correcting, reviewing or appealing administrative decisions using the administration itself. The difference between internal remedies and the remedy of judicial review is that the judicial review is review by a court, which is independent from the administration. See part VI above.

changes is envisaged.⁷² A further regulatory responsibility that the Superintendent could undertake is the collection of statistical information on which to base future policy decisions for insolvency law reform. The Office of the Superintendent could not only continue to act as office of record for documents such as court orders, appointment and bonding documents as well as liquidation and distribution accounts, but would also co-ordinate the collection of raw data.

2.2.6 Transitional Measures

Given that a new regulatory framework for insolvency practitioners will probably entail a plethora of new requirements and entry-level criteria governing the qualification of individuals as insolvency practitioners, the question arises as to what will be required of present practitioners when the new regime comes into operation. Provision will have to be made for an interim period during which existing practitioners would be given the opportunity to obtain the required qualifications without being deprived of their right to earn a livelihood. It is submitted, however, that they should not be exempted from complying with the requirements. This would ensure that all insolvency practitioners possess at least the basic competence to fulfil their duties. The detail of how this can be done should be a topic of debate within the industry.

2.2 INSTITUTIONAL FRAMEWORK

The second building block for developing an effective insolvency system deals with the supporting infrastructure for implementation. This encompasses the governing institutions vested with authority to process cases and administer insolvency proceedings.⁷³ There has been a clear move in common law jurisdictions to transfer functions from the courts to the agency or authority with the insolvency responsibility in order to reduce costs and the inevitable delay in court proceedings. There are however invariably provisions that allow for administrative actions and decisions to be appealed in court, with the court's role increasingly being seen in these jurisdictions to be the resolution of disputes and the determination of legal issues.

⁷² See part III above.

⁷³ Johnson 72.



It has been stated that the successful implementation of an insolvency system depends on the construction of an effective judiciary. According to the global norms a system should guarantee the independence of the judiciary, judicial decisions should be impartial and the judiciary should act in a competent and effective manner.⁷⁴ In this regard South Africa is fortunate in that it has a strong tradition of the rule of law: courts and the court structure are by definition strong and a modern and independent Constitution protects our court's autonomy. Historically, in South African insolvency law, the High Court has in general dealt with insolvency matters.⁷⁵ The role of the courts has mainly been limited to the granting of orders which commence insolvency or winding-up proceedings and the role of dealing with dispute resolution and the development of common law and precedent through the determination of legal issues.

Over the years there have also been a number of scholars in England and Wales who have supported the idea of a specialist insolvency tribunal and notably the Cork Committee in its final commentary also recommended the establishment of a new insolvency court that would have exclusive jurisdiction in all insolvency matters.⁷⁶ The proposal was rejected at the time, however, as a number of judges were opposed to such a development and viewed it as the creation of a court with a specific jurisdiction.⁷⁷ South Africa also does not have specialised insolvency courts and during the late nineties a high-level Commission of Inquiry, the so-called Hoexter Commission, rejected proposals for specialised insolvency courts in South Africa.⁷⁸ It would therefore not be sensible to walk down this path again, given that the most rigorous objections came from the judiciary itself.⁷⁹

Another policy design available to law- and policymakers would be to appoint specialised judges within the courts of general jurisdiction. Given the unique nature of insolvency law proceedings and the regular need for real-time judgements, this option could improve timely and efficient adjudication and judicial decision-making. The introduction of specialised judges would also reinforce predictability and consistent and uniform interpretation and

⁷⁴ *Revised Principles* D1-5.

⁷⁵ See part III above.

⁷⁶ *Cork Report* par 1003.

⁷⁷ Milman *Personal Insolvency Law, Regulation and Policy* (2005) 156 (hereafter referred to as Milman).

⁷⁸ Third and final report of the *Commission of Inquiry into the Rationalization of the Provincial and Local Divisions of the Supreme Court* Report number RP 201/97 Pretoria: Government Printing Works 1997 vol 1 Book 2 Part 3.

⁷⁹ See part VI above.

application of the law.⁸⁰ To this end, court organisation should however take stock of the resources available to the court, including sufficiency and composition of judicial officers and staff as well as adequacy of court facilities.⁸¹

Having reviewed the issues in a critical manner it is submitted that the reform of our judiciary to include a specialist insolvency court would be neither a feasible nor a practical option. The most credible option would be to support calls for the promotion of specialised judicial skills within the field of insolvency law. However, in order to make a truly informed decision on whether it is viable to implement a system of insolvency specialisation within the judiciary, improved empirical data and statistics should be made available and extended research and consultation on this topic should be undertaken.⁸²

2.3 LEGAL FRAMEWORK

The third of the three core building blocks is the legal framework also identified as essential to an effective and efficient insolvency system. This component focuses on the need to integrate and harmonise the insolvency law within a country's broader legal and commercial framework.⁸³ The second aspect of the legal framework is the review of the fundamental design features that should be present in an insolvency law and particularly relevant for this study would be the integration into the present legislative framework of the recommendations made in regard to a regulatory framework.

It has previously been mentioned that the chapter on South African insolvency law reform commenced in the late 1980s and has at the time of writing this thesis not yet culminated in the promulgation of efficient and effective insolvency law legislation.⁸⁴ Lawmaking frequently proceeds in episodes – long cycles of reform that continue until practice is normalised around policy goals set by government. The stabilisation of reforms occurs when the gap between formal law and law in practice is reduced sufficiently for the policy to be implemented in the form intended and acceptable to lawmakers, interest groups and other

⁸⁰ *Revised Principles* D1.1.

⁸¹ Johnson 72.

⁸² See part VI above.

⁸³ Johnson 72.

⁸⁴ See Burdette "Reform, Regulation and Transformation" 8.



stakeholders.⁸⁵ Halliday correctly states that: “[t]his disconnection between the quality of the ‘law on the books’ and the quality of its implementation is often referred to as the ‘implementation gap’ and is one of the most significant issues facing legal reformers and policy-makers today.”⁸⁶

The recommendations included in the previous sections of this chapter will however involve a paradigmatic shift in the perceptions of the public as well as other role-players and would require a reorientation towards all aspects of regulation in insolvency law. As previously submitted, it would be possible to attempt to weave the proposed recommendations into the present suggestions made by the South African Law Reform Commission. This option would however not only represent a superficial approach to the reform of our regulatory regime, but would also prove to be problematic with regard to the implementation of some of the most critical aspects of the proposed regime, namely the introduction of an independent and complete regulator with functions consistent with global norms and international standards.

In this regard the following statement by Halliday, quoted earlier, is worth repeating:

... the implementation and institution building are as important as – indeed arguably more consequential than – formal lawmaking. It is a dangerous illusion that the legal framework and institutions of an effective insolvency system can be done cheaply. Effective bankruptcy systems require the careful design, infrastructural expenditure, and political will comparable to major infrastructural projects in transportation or energy or defence. This is especially so in circumstances where there is rapid economic development and social dislocation in a society that had previously invested little in legal institutions. Failure of government to act boldly and decisively can lead not only to incapacity but instability in society and ultimately the market.⁸⁷

The integration of the insolvency system within the context of the general law is essential to ensure that the two complement and reinforce one another. Any insolvency system should be compatible with the legal system of the society in which it is rooted, and whose value system it should ultimately sustain.⁸⁸ An effective insolvency system requires not only an effective, efficient and modern regulatory and institutional framework, but also a determinate system of lawmaking that produces legitimate institutions. It is thus generally concluded that the South African law- and policymakers should return to the drawing board and engage in further

⁸⁵ Halliday 23.

⁸⁶ Halliday 23.

⁸⁷ Halliday 34.

⁸⁸ Johnson 72.

research and consultation in order to incorporate a modern and sophisticated regulatory framework into our insolvency law. There is a pressing need to introduce a regulatory model which would not only be consistent with global norms but would also be adapted to the singularity of our national situation. This fresh approach will require not only the political will and support of national policymakers, but also technical assistance from international financial institutions and aid agencies of advanced economies.⁸⁹ Although this option will be costly, commercial and consumer insolvencies have become phenomena that are too important legally as well as socially and economically to be shortchanged with nominal budgets.⁹⁰

⁸⁹ Halliday 34.

⁹⁰ Ziegel “Bill-55 and Canada’s Insolvency law Reform Process” (2006) *Canadian Business LJ*.



2.4 CONCLUSION

The objective of this final part of the study was to integrate all the ideas and outcomes presented in this thesis into a single regulatory framework and to present a coherent description of the underlying intricate concepts of this topic. The work embodied in this thesis includes ideas, concepts and methods from international institutions such as the World Bank, and also highlights international best practice where appropriate. By reflecting the convergence of thought across these disciplines, an attempt was made towards an “integrative philosophy” of regulation in insolvency law. The conclusion is that, generally, every insolvency regime has to address several core issues in regard to the regulation of insolvency law, but the further enhancement and modification have to be in accordance with the locally prevailing environment and the unique economic, social and political needs of a particular country or region.

The general investigation into the global norms recognised by international institutions and developed jurisdictions yields the conclusion firstly that regulatory frameworks have been developed in different ways in different countries but at the same time the two key elements of such regulatory models have been the existence of a strong and transparent regulating institution directed at securing public confidence through independence and impartiality. Secondly, the essential proposition of the insolvency practitioners in all systems is the same: that every effective insolvency system requires competent and ethical insolvency practitioners who should have the experience and expertise necessary to deal with the range of business and legal issues which arise in insolvency matters.

The recommendations for an efficient and effective regulatory framework for South African insolvency law are as follows:

- 1 In order to address the core issues evident in global regulatory norms and standards with the aim of implementing a modernised, effective and efficient regulatory system, a complete overhaul of our regulatory regime is proposed.⁹¹
- 2 The implementation and institution-building that are essential for the development of a regulatory framework are as important as lawmaking and thus require careful design and

⁹¹ See part III above.

infrastructural expenditure. As a result it might become evident that the robust approach is neither feasible nor practical and the end result might be better accomplished by initially introducing certain key reforms, followed by a series of corrective adjustments to deal with the gaps and the unanticipated consequences.⁹²

- 3 It is thus submitted that the newly proposed regulatory framework will first and foremost consist of a new regulatory agency in insolvency law that would fulfil the role of a complete insolvency regulator in insolvency law.⁹³
- 4 The new independent office that we for present purposes could call the Superintendent in Insolvency would be responsible for all investigations and enforcement functions, for the regulation and oversight of insolvency practitioners and at a later stage could also become involved in the administration of cases where the assets are insufficient to meet the costs of doing so.⁹⁴
- 5 As part of the framework this study recommends the adoption of a two-pillar system which would consist of a system of mandatory licensing to regulate insolvency practitioners to be based on compulsory membership of a Recognised Professional Body.⁹⁵
- 6 The Registered Professional Body would be approved by the Superintendent in accordance with established criteria, which would indicate that such body has set standards of competence and professional and ethical conduct, and has developed a proper infrastructure to deal with investigation and discipline. As a prerequisite for issuing a licence the Registered Professional Body would have to confirm in writing that a candidate:
 - i holds a valid membership of the organisation;
 - ii has fulfilled the necessary requirements regarding experience and education;

⁹² See part VI above.

⁹³ See part I above.

⁹⁴ See part III ch 6 above.

⁹⁵ See (n 39).



- iii and to the knowledge of such an organisation would be a fit and proper person to act as a professional insolvency practitioner.
- 7 The licensing function would be allocated to the Superintendent and would depend on a person meeting certain prescribed criteria in relation to education, standard of character and ongoing competence requirements, as well as prior membership of a Recognised Professional Body.
- 8 Licensed practitioners would be divided into two levels: an entry level, which would indicate that the person has the necessary qualifications and experience to administer a basic insolvency estate, and a senior level, which would encompass a certain level of professional competence, academic qualifications, and a certain specified level of experience as well as advancement to a certain level of the Continued Professional Development programme.
- 9 In order to ensure sustained high and increased levels of competence, a Continued Professional Development programme is recommended. Apart from improving levels of experience this method could ensure that skills transfer occurs. The proposed method is one in which the training of a junior colleague could also qualify as a Continuing Professional Development activity.
- 10 As to the answer to the question of how extensively involved a court should be in the aspects of insolvency law, it was suggested that the status quo be maintained and the courts govern only the process of entry of the debtor to the insolvency system and act in the role of dispute resolution body and the determination of legal issues. As opposed to a radical reform of our judiciary the prospect of specialised judicial skills within the field of insolvency law has been suggested. It is submitted, however, that much more research based on empirical studies is necessary for an informed decision to be taken.
- 11 A “Joint Insolvency Forum” responsible for co-ordinating insolvency research as well as advising the Minister and the Superintendent on matters relating to policy and insolvency law matters is recommended.

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- 12 It is submitted that an “Insolvency Tribunal” should be established. The Tribunal would be an independent juristic person, subject only to the Constitution and the law, so as to ensure that it functions impartially and without fear of favour or prejudice. The Tribunal would be an organ of state with a dual mandate: to adjudicate disputes as well as serve as forum for voluntary alternative dispute resolution in any matter arising from the Insolvency Act, and to carry out reviews of administrative decisions made by the Superintendent on an optional basis.
- 13 It is recommended that a statutory obligation on the Superintendent should exist to keep record of prescribed information of matters such as the bonding arrangement, matters relating to the remuneration of the practitioner, and the liquidation and distribution account reflecting aspects of the administration and distribution.

Finally, it is concluded that in order to surmount the hurdle of the implementation and inclusion of an effective regulatory system into our insolvency system in general, policy- and lawmakers should return to the drawing board in order to create a modern and sophisticated insolvency law which not only recognises contemporary and constitutionally sound insolvency principles in general, but also includes a strong and effective regulatory framework.



CHAPTER 3: CONCLUDING SUMMARY

Despite the fundamental changes in society and commercial life which have occurred since then, the system for dealing with the problems created by insolvency has been tinkered with, patched and extended by false analogies, so that today it is replete with anomalies, inconsistencies and deficiencies. We are convinced that the systems (for they are numerous) no longer work satisfactorily. They do not accomplish what is required of them; moreover, they no longer accord with what the general public conceive to be the demands of fairness and justice to all in a modern society.⁹⁶

This thesis investigated certain aspects of state regulation in South African insolvency law with the view ultimately to proposing a framework within which the legislator could consider legal reform based on comprehensive policy objectives in this field of law. The study's final recommendations are woven around a series of key findings:

- 1 the current regulatory regime in South African insolvency law has become obsolete and out of sync with general international and local demands;⁹⁷
- 2 in order to foster international and local confidence in our insolvency system, an improved regulatory mechanism should be developed against the background of a comprehensive and well-managed policy based process and generally accepted social and economic objectives.⁹⁸
- 3 it had been established that the challenges relating to the South African regulatory system could be overcome by means of not only reassessing the philosophies and principles underlying our present regulatory regime, but also introducing a holistic and rigorous law reform agenda based on sound constitutional principles.⁹⁹

The aim of this chapter is not to repeat the topic-relevant issues discussed throughout the thesis but to summarise the findings of this study in broad terms. Nonetheless, it might be appropriate to refer to some points, which may also correspond with expectations outlined at the outset of the thesis.¹⁰⁰

⁹⁶ Cork *Report* par 9.

⁹⁷ See part III; part IV and part VI above.

⁹⁸ See part III and VI above.

⁹⁹ See part VI above.

¹⁰⁰ See part I above.

The search for answers began with a study of the historical roots of our insolvency law. An insolvency system profoundly reflects the historical, legal, and cultural context of the country within which it operates. South African insolvency law is neither pure Roman-Dutch law, nor pure English law, but a fusion of influences deriving from periods of Dutch and British colonial domination in the Cape of Good Hope.¹⁰¹ In exploring the historical evolution of regulation in South African insolvency law, this study endeavoured to establish a pattern of state regulation in our law and in the process attempt to explain the unique regulatory system presently in place.¹⁰² Although the development of the concept of state regulation in our insolvency law has not received much attention in our insolvency law literature, nevertheless, drawing from the study of our common law, an outline of state regulation did emerge.

The origins of our present regulatory system can be traced to the period of Roman-Dutch law. The establishment of the *Desolate Boedelkamers* and the 1777 Ordinance, which introduced the practice of the *Desolate Boedelkamers* to Amsterdam, stands out as a significant milestone. This important innovation represented the first acquaintance with the concept of state regulation in the form of a regulatory authority overseeing the insolvency procedure. It is submitted that this development in favour of greater state regulation indicated a significant shift from a creditor-controlled system to a system that had more of an administrative nature.¹⁰³

The historical development of the English law provides a much clearer exposition of state regulation of bankruptcy law. The great expansion of commerce that was a hallmark of the Victorian age led to calls for major reform of English insolvency laws. The Bankruptcy Act 1883 sought to modernise the law and codify it into one regime. It came about as a response to public concerns and in particular dissatisfaction with the administration of bankrupt estates, which were privately run and were haphazard affairs, open to considerable abuse. Significantly, this Act introduced the concept of “officialism” by placing “the administration of the insolvent’s estate under the control of the Board of Trade, which it arms with the powers necessary to protect the interests of the creditors and to vindicate public morality”.¹⁰⁴ The process of administrative oversight established in 1883 was carried over to the present 1986 Act and established what are still the basic parameters of English bankruptcy law today. Of significance is the recognition of

¹⁰¹ See part II par 1.4 above.

¹⁰² See part II ch 3 above.

¹⁰³ See part I par 1.4 above.

¹⁰⁴ Martino “Approaching Disaster: Personal Bankruptcy Legislation in Italy and England 1880-1939” (2005) *Business History* 23-43.



the recurring theme of protecting the public interest through the role of the state in the administration of bankruptcy estates, as illustrated by the strong administrative features of the English regulatory framework and the institutional support of bankruptcy law in general.¹⁰⁵

The foundation of the Master of the High Court, the present regulatory authority in our insolvency law, can be traced back to the founding of the *Desolate Boedelkamers* during the eighteenth century. In 1803 the *Desolate Boedelkamers* was established in the Cape for the administration of abandoned estates and the execution of civil sentences, including the estates of all persons obtaining *cessio bonorum*. The introduction of the *Desolate Boedelkamers* played a significant role in shaping the future character of the regulatory process in South African insolvency law.¹⁰⁶

In the year 1828 a few significant events occurred. The first was when, under the second British occupation, a Charter of Justice was issued in order to revise the judicial system, which made provision for the establishment of an independent “Supreme Court” and also *inter alia* confirmed that the court had to make provision for the post of a “Master of the Supreme Court”.¹⁰⁷ The second noteworthy event occurred with the passing of Ordinance of 1828, which mentioned for the first time that in future all insolvent estates had to be administered by an official referred to as the “Master of the Supreme Court”. Another significant event took place in 1833 when the duties of the Orphan Chamber, which had primarily been responsible for supervising the administration of minors as well as certain deceased estates, were transferred to the newly appointed office of Master of the Supreme Court. In this way the outline of the Master’s office as we know it today was established.¹⁰⁸

The study searched for answers in jurisdictions abroad. In an era of globalisation of law, which will inevitably accompany the globalisation of the economy, it is vital to any law reform effort to keep up with international trends as we enter a phase in history where legal certainty and predictability are definite virtues.¹⁰⁹ Without falling into the trap of a complete legal transplant, the provision of an effective and internationally comparable insolvency system is an essential

¹⁰⁵ See part II par 1.5 above.

¹⁰⁶ See part II par 1.6.1 above.

¹⁰⁷ See part II par 1.6.1 above.

¹⁰⁸ See part I above.

¹⁰⁹ Mistelis “Regulatory Aspects: Globalization, Harmonization, Legal Transplants and Law Reform – Some Fundamental Observations” (2000) *The International Lawyer* 1069 (hereafter referred to as Mistelis).

component in assuring that South Africa maintains its role as a competitive emerging market. It will thus be necessary to keep in mind what the essential ingredients of an international regulatory framework are, in order to ensure that in the context of international investment and international standing our system does not fall behind. By studying the regulatory methodology within the English, American and Dutch bankruptcy systems as well as the principles and guidelines issued by international organisations, this study attempted to establish whether the global norms identified as such could provide domestic policy- and lawmakers with persuasive and digestible solutions and policy considerations.¹¹⁰

The United States¹¹¹ represented one end of the continuum, with a framework consisting of a specialised system of bankruptcy courts not only to reach judgments and make decisions in the event of conflict, but to set the important precedents that provide the detailed interpretations of statutory rules – rules that establish the local legal culture, which are also made by the bankruptcy judge. The US has developed great expertise through its bankruptcy courts which can be attributed to the US federal court system and the increasingly common judicial specialisation in the US.¹¹²

For a variety of reasons, the US Trustee Program was introduced to alleviate the bankruptcy judges of the administrative burden of administering bankrupt estates. In this sense a clear demarcation between the judicial and administrative functions in the administration of a bankrupt estate was brought about. When one compares the present US system to those of emerging nations one notices that the relative health and stability of the US economy seem to give the country the luxury of a bankruptcy system in which the government typically plays a passive role. These characteristics – the generally debtor-friendly approach to bankruptcy, the prominence of lawyers rather than an administrator or government agency, and the judicial-oriented system of bankruptcy courts – distinguishes US bankruptcy law from most other insolvency jurisdictions around the world.

In contrast, the UK adopted an administrative system whereby the Insolvency Service is responsible for virtually all important decisions and the establishment of detailed interpretations of statutory rules. This is a consequence of the English lawmakers having a

¹¹⁰ See part III above.

¹¹¹ Hereafter referred to as the “US”.

¹¹² See part III above.



shared vision that bankruptcy law is not just the concern of creditors but affects the wider society. This led to the acceptance that government has a supervisory role to play and bankruptcy law is also viewed as a public policy measure. The link between the role of the state in protecting the public interest and the administration of bankruptcy estates is illustrated by the strong administrative features of the English regulatory framework and the institutional backing of bankruptcy law in general. The administrative format of the English system also minimises the role of private attorneys in the general bankruptcy process, which distinguishes the English bankruptcy process from the lawyer-oriented US system.¹¹³

The position with regard to state regulation under the Dutch bankruptcy laws is fundamentally different to those of the common law jurisdictions mentioned earlier, and the underlying principles of their Code are only of limited use in a South African context. There are no specific licensing or regulatory systems.¹¹⁴ Insolvencies are administered by private-sector office-holders who are invariably lawyers and are members of the Netherlands Bar and as such subject to the requirements of the Bar, which has public powers to set standards in relation to education, qualification and general experience. Although there is no system of specialised bankruptcy courts in the Netherlands, the Dutch courts play a leading role in the regulation and interpretation of the bankruptcy laws. The Dutch civil law system is so fundamentally different in its basic conception and operation of bankruptcy law, however, that it would be misleading to compare any aspects of this system to other common law jurisdictions. The undesirability of the Dutch system's regulatory experience as a "legal transplant" could serve to further the argument that even when countries share similar legal backgrounds, they may evolve and develop along completely independent paths, resulting in different legal cultures and conceptions of the role of bankruptcy law.¹¹⁵

Drawing from the knowledge obtained from reviewing the different jurisdictions, signs of some convergence between the common law and Continental approaches and even more so between the common law jurisdictions themselves have become clear. It has been established that although the underlying philosophies and principles differ from one jurisdiction to another, the regulation of insolvency law is a major policy objective in all developed jurisdictions. Although the dynamics of the relationship of state agencies to the various actors in the bankruptcy system may vary,

¹¹³ See part III ch 3 above.

¹¹⁴ See part III ch 4 above.

¹¹⁵ See part III ch 4 above.

certain similar influences and key elements can be recognised. The study examined the role performed by regulatory-type bodies in other jurisdictions, and while the precise functions and means of delivery varied between jurisdictions, in broad terms their functions consistently fell within the following three categories:

- a Administration of insolvency cases (so-called cases of “last resort”), where the assets in the estates are insufficient to meet the costs of doing so;
- b Taking on the responsibility of enquiring into the possible reason for insolvency and subsequent enforcement, as a matter of public interest;
- c The regulation and supervision of the practitioners who are appointed to administer particular insolvency cases.¹¹⁶

The recognition and significance of a modern insolvency system as the cornerstone of sustainable economic development is also reflected in the extensive research carried out by international institutions in this area. The World Bank with the assistance of international financial institutions such as UNCITRAL, leading insolvency organisations and international insolvency experts, has developed comprehensive principles and guidelines that underpin sound insolvency and creditors’ rights around the world. These principles distil international best practice in the design of insolvency and creditor rights mechanisms and could be used to benchmark the strengths and weaknesses of our existing system. After analysing the various recommended principles it became apparent that in order to foster local and international commercial confidence and inspire investor confidence, the establishment of a modern and effective institutional and regulatory framework is fundamental to the development of an efficient and effective South African insolvency law system.¹¹⁷

When assessing the value of comparative research, scholars should analyse and emphasise what is actually there. This could be similarities or differences, or apparent convergence or divergence. The comparative enterprise entails both recognition and appreciation of diversity

¹¹⁶ See part III ch 6 above.

¹¹⁷ See part III ch 5 above.



and search for commonality.¹¹⁸ One of the aspects complicating issues is that the law on the books and the law in action often bear little resemblance to each other. Scholars are increasingly recognising the central importance of “local legal culture” in the actual operation and effective implementation of any legal system. Therefore, when the current policies and law reform proposals are reviewed, the choices made in reforming the South African regulatory system must be closely linked to the capacities of existing legal institutions and should be compatible with the insolvency law system in general.¹¹⁹

In South Africa, 181 years after the Master of the Supreme Court was established, the new Constitutional dispensation changed the South African legal landscape dramatically. Legislation may now be tested by the courts in order to establish its constitutionality, and public interest has taken centre stage.¹²⁰ This study argued the Insolvency Act was in place long before the new constitutional dispensation, and that as a result the constitutional values and principles could only artificially be incorporated into the application of the law. While the effect of the Constitution on state regulation in South African insolvency law was examined, it became apparent that not a great deal of research, case law or other sources existed on this topic. In the context of this study the enactment of the Promotion of Administrative Justice Act¹²¹ had certainly the most relevant and significant constitutional development. As a public body and organ of state the Master is henceforth bound by the provisions of PAJA, with the result that every administrative action performed by the Master is made subject to the requirements for valid administrative conduct and the grounds for review specified therein.¹²²

It had thus become important that the aim of any law reform proposal in insolvency law should be to create an environment of accountability and justification and to align the regulatory principles of our law with the values expressed in modern administrative and constitutional law. Concern had also been raised about the impact of the additional procedural constraints brought along by the new constitutional dispensation and other relevant legislation applicable to the Master, in that these could have the effect of impeding the efficient, effective

¹¹⁸ Örtücü “Critical Comparative Law: Considering Paradoxes for Legal Systems in Transition” (2000) *Nederlandse Vereniging voor Rechtsvergelijking*.

¹¹⁹ See part III ch 5 and 6.

¹²⁰ Dlamini “The Right to Administrative Justice in South Africa” (2000) *TSAR* 697 at 701 (hereafter referred to as Dlamini).

¹²¹ Act 3 of 2000. Hereafter referred to as “PAJA”. This Act came into force on 2000-11-30, except ss 4 and 10, which came into force on 2001-07-31.

¹²² See part IV above.

and swift finalisation of an insolvent estate. It has been noted that in redefining the role of the law as well as of any public institution, tension will always exist between the procedural fairness and rationality advocated by the Constitution and PAJA on the one hand, and the need for effective, efficient and expeditious public administration on the other hand.¹²³ With regard to the purpose of this study, namely to make proposals for a professional and effective regulatory framework in South African insolvency law, the principle of constitutional supremacy is critical to the outcome. The positive challenge therefore lies in absorbing the right to administrative justice and the access to information entrenched in the Constitution into the development of a regulatory framework with the aim of securing and assuring public confidence in the insolvency process within the current socio-economic circumstances in South Africa.¹²⁴

In order to determine whether it is attainable, or even desirable, to bring about law reform in the regulatory discipline within our insolvency law, it is necessary to examine the present provisions in our insolvency law as they relate to the regulation of insolvency and identify problem areas within the system.¹²⁵ International principles and guidelines portray the regulatory framework within an insolvency law system as dealing with the qualification and regulation of insolvency practitioners¹²⁶ as well as the establishment and implementation of the regulatory body that has oversight and responsibility for implementing the regulatory procedures.¹²⁷ The problems and pitfalls within the regulatory system in our insolvency law cannot be fully understood without an appreciation of the legal regimes that govern the regulatory structures. In order to justify a change in law, it is as a starting point necessary to have a clear understanding of the present legal environment and subsequent reform recommendations by the South African Law Reform Commission, in an effort to identify possible limitations within the system and to consider potential legal and strategic outcomes and solutions.

From an international perspective it has been established that even in the midst of the diversity of national laws and standards, a global trend of convergence in the key regulatory principles and standards can be observed. The study found that if we align the institution of the Master with international norms and standards, it is particularly difficult to clearly define

¹²³ See part IV above.

¹²⁴ See part IV ch 2 above.

¹²⁵ See part III above.

¹²⁶ See discussion in part I par 1.6 above.

¹²⁷ Johnson 73.



the role of the Master within the context of an international insolvency regulator. As a “creature of statute” the Master has only the powers the statute accord, whether expressly or by necessary implication.¹²⁸ History reflects that the institution of the Master was initially established with the aim of protecting the interests of persons such as widows and orphans, and, in time, minors and incapacitated persons.¹²⁹ The supervisory duty of the Master in relation to insolvency law was only relatively recently incorporated into its general duties and functions. It had also become clear that the courts initially dominated the insolvency process and the Master had only limited functions which were more administrative in nature. In time the Master gradually accumulated powers relating to the daily administration of the insolvency process, and the role of the Master became more prominent and its functions more complex, ranging from judicial to administrative in nature.

The central theme of this thesis is the investigation of the concept of state regulation in insolvency law, and in South African insolvency law this concept entails the Master acting in a supervisory capacity with regard to matters concerning insolvency law. The legal framework of South African insolvency law results in the Master being entangled in various technical issues relating to the administration of insolvent estates. According to its statutory purpose, the priority of the Master lies very much in protecting the interests of creditors through the legislative powers granted to it, in contrast to the more influential role of international regulators, who try to strike a balance between protecting the rights of creditors and protecting the public interest.¹³⁰

After studying the present South African regulatory regime and the powers and duties of the Master, the following specific challenges were identified:

- 1 Within an international context it was discovered that when compared to the role of international institutions such as the UK’s Insolvency Service, the Master lacks the discretion and the authority of an authentic regulator.¹³¹

¹²⁸ *Die Meester v Protea Assuransiematskappy Bpk* 1981 2 SA 685 (T) at 690; *De Lange v Smuts* 1998 3 SA 785 (CC) at 853; *The Master v Talmud* 1960 1 SA 236 (C) at 238.

¹²⁹ See part II par 1.6.1.

¹³⁰ See part VI above.

¹³¹ See part III above.

- 2 The lack of specialisation by the Master's office officials, particularly in the field of insolvency law, creates a level of ineffectiveness and inefficiency due to the inadequate training and experience of staff members.¹³²

- 3 Internationally, the role of the state can be characterised as truly public in nature: therefore its primary purpose would be to act in the public interest. A private practitioner, on the other hand, would tend to use his or her powers to obtain the maximum benefit for creditors.¹³³ It was established that the Master lacks investigative powers relating to the cause of the insolvency and the possible abuse of the law as well as matters of commercial immorality. In most foreign jurisdictions investigation of the cause of insolvency, which also includes the behaviour of the insolvent prior to the sequestration of his or her estate, represents a major objective in the justification of these regulatory institutions.¹³⁴

- 4 Another inconsistency between the Master as regulator and its equivalent in other international jurisdictions is the lack of official control with regard to the South African insolvency profession. Literature on the regulation of insolvency law suggests that in the absence of a sophisticated regulatory framework, the role of the regulatory body becomes more important. Consequently, it was submitted that South Africa lacks an adequate regulatory framework with regard to the regulating and monitoring of insolvency practitioners, and as a result legitimate concerns could be raised about whether there are sufficient regulatory safeguards in place to ensure that only impartial insolvency practitioners with the necessary experience are appointed to act as office-holders. The absence of a proper regulatory framework and a specialised regulator could result in the general ineffectiveness of the South African insolvency system as a whole.¹³⁵

- 5 Finally, although the Master is seen to be the protector of public interest, it plays no active or formal role in the drafting process of insolvency legislation or the development of policy. As the South African commercial environment embodies a rich tapestry of cultures and legal traditions, the design and development of a strong central government

¹³² See part V ch 5 above.

¹³³ See part VI above.

¹³⁴ See part V ch 5 above.

¹³⁵ See part V ch 7 above.



agency responsible for regulating South African insolvency law has therefore become vital in assuring public confidence in the system of regulation and supervision and the process of insolvency law.¹³⁶

Almost two decades ago, policymakers in South Africa engaged in an extensive study of South African insolvency law. The South African Law Reform Commission published its *Report on the Review of the Law of Insolvency* in 2000.¹³⁷ This report contained a Draft Insolvency Bill and an Explanatory Memorandum and included recommendations for what were described as mainly technical reforms to insolvency law in South Africa. Judging by the tenor of the South African Law Reform Commission's Draft Insolvency Bill,¹³⁸ the government at time of issuing its report had evidently not yet been ready to make the paradigm shift to bring about a change to the underlying policy and overall structure of the regulatory framework of South African insolvency law. Although the Draft Insolvency Bill did contain certain changes linked to the regulatory system, it is not clear whether it had been based on any critical comparative studies or policy development process. It is submitted that in order to implement changes to our existing regulatory framework which would best serve the South African society, as well as generate international trust and confidence, certain important policy considerations would have to be critically assessed and analysed. A dual policy consideration has been identified – namely, whether the state should be involved in the regulation of insolvency law in any way, and, if so, then to what extent it should be involved.¹³⁹

A second aspect to consider as part of the regulatory structure is the regulation of the insolvency practitioner responsible for the administration of the insolvent estate. The policy consideration with regard to regulation of the insolvency industry involves implementing an acceptable regulatory model incorporating both local government policies as well as internationally recognised principles.¹⁴⁰ By embracing accepted international standards and principles the regulation of the industry could considerably reduce the level of government involvement and

¹³⁶ See part VI above.

¹³⁷ See South African Law Commission *Review of the Law of Insolvency* Project 63 (2000) Report, vol I Explanatory Memorandum, and vol 2 Draft Bill (hereafter referred to as 2000 Draft Insolvency Bill or Draft Insolvency Bill).

¹³⁸ See *Commission Paper* 582 vol 1 and vol 2.

¹³⁹ See part VI above.

¹⁴⁰ See part III above.

ensure the credibility of the system both locally and internationally. Again it should be reiterated that a regulatory model should be suited to the particular historical development and current institutional matrix of a country and it is submitted that the adaptation of a statutory mandatory licensing system would establish efficient professional standards and the members of such a regulated profession would hopefully act rigorously to rid the profession of its tainted image.

It is submitted that the key concern should be to acknowledge that South Africa as an emerging market has had less exposure to international financial practices, and has a legacy of previously disadvantaged consumers who have had limited exposure to a free-market economy.¹⁴¹ This theme underlines the need to better understand the role and function of insolvency systems in today's global markets and to develop solutions suited to the needs of emerging markets. Another consideration would also be to note that there is a wider government and public (society) interest in insolvency because of the financial loss, and thus an obligation in seeing that economic as well as potential social damage is limited, and resources are effectively re-allocated to more productive use.¹⁴²

The objective of the final part of the study was to integrate all the ideas and work presented in this thesis in a single regulatory framework and to present practical and material conditions and requirements that are considered to be instrumental to the establishment of the kind of institutional mechanisms which would result in a more effective and better-functioning insolvency practice.¹⁴³ The recommendations for an efficient and effective regulatory framework for South African insolvency law are as follows:

- 1 In order to address the core issues evident in global regulatory norms and standards with the aim of implementing a modern, effective and efficient regulatory system, a complete overhaul of our regulatory regime is proposed, consisting of the establishment of a new institution, the Superintendent in Insolvency, who would act a complete regulator in insolvency law.
- 2 The new independent office would be responsible for all investigations and enforcement functions, for the regulation and oversight of insolvency practitioners and at a later stage

¹⁴¹ See part IV above.

¹⁴² See part IV above.

¹⁴³ See ch 1 above.



- could also become involved in the administration of cases where the assets are insufficient to meet the costs of doing so.
- 3 As part of the framework this study recommends the adoption of a two-pillar system which would consist of a system of mandatory licensing to regulate insolvency practitioners based on compulsory membership of a Recognised Professional Body.
 - 4 Licensed practitioners would be divided into two levels: an entry level, which would indicate that the person has the necessary qualifications and experience to administer a basic insolvency estate, and a senior level, which would encompass a certain level of professional competence, academic qualifications, and a certain specified level of experience as well as advancement to a certain level of the Continued Professional Development programme.
 - 5 In order to ensure sustained high and increased levels of competence, a Continued Professional Development programme is recommended.
 - 6 As opposed to a radical reform of our judiciary, the notion of specialised judicial skills within the field of insolvency law has been suggested.
 - 7 A “Joint Insolvency Forum” responsible for co-ordinating insolvency research as well as acting in an advisory capacity to the Minister and the Superintendent on matters relating to policy and insolvency law matters is recommended.
 - 8 An independent “Insolvency Tribunal” responsible for adjudicating disputes to carry out reviews of administrative decisions made by the Superintendent on an optional basis is also recommended.
 - 9 The Superintendent should continue to act as office of record for matters such as the bonding arrangement, matters relating to the remuneration of the practitioner, and the liquidation and distribution account reflecting aspects of the administration and distribution.¹⁴⁴

¹⁴⁴ See ch 2 above.

In conclusion, it is submitted a number of factors exist which policy- and lawmakers should consider when the building of an effective and efficient regulatory framework for South African insolvency law is attempted. In designing the appropriate model it should be noted that institutional and legal reform involves compromises between and among certain competing policy objectives. The challenge facing the architects of a new regulatory framework would be to design a simple and predictable system, which would be an accurate reflection of the present South African economic and social environment while at the same time safeguarding public interest and fostering international and local confidence. It is also submitted that the reworking of any area of our insolvency law, and more specifically the regulation of insolvency law, should be done against the background of a well-managed policy process, generally accepted social and economic goals, rather than a combination of academic ideology and private advantage.

The law of insolvency consists of conflicting interests. Key states:

These rationales clearly suggest that the existence of bankruptcy is tied up with an attempt to arrive at a balance, that is the law is seeking to ensure that there is a balance between the interests of those who, for the want of a better word, are stakeholders in a person's insolvency ... These stakeholders together with the debtor's family which also can be seen as a stakeholder, have conflicting interests which produce tension, and the task of the law is to reconcile these interests.¹⁴⁵

Where a recommended practice may benefit the wider community but at the cost of the individual, the sacrifice can only be rationalised where the feeling of a "greater good" prevails. However, when an individual cannot see the wider benefit, then the individual preference becomes important.¹⁴⁶ It is hoped that the reform of South African insolvency law will continue down the path of transparency and fairness, and will ultimately yield a sound economic outcome.

Everything takes place between sacrifice and non-sacrifice, if this is not all suspended between the sacrifice that cuts and the sacrifice that binds, writes Derrida. "We sacrifice in order not to sacrifice". At issues in the smooth functioning of our economies and the non-ritual bio-politics that inform these economies is therefore not the absence of sacrifice, but the countless instances of invisible, inaudible and therefore unseen, unheard and thus unacknowledged sacrifices.¹⁴⁷

¹⁴⁵ Key "Balancing Interests in Bankruptcy Law" (2001) *Commercial Law World Review* 206 at 208. See also Evans *A Critical Analysis of Problem Areas in Respect of Assets of Insolvent Estates of Individuals* (2009) LLD dissertation University of Pretoria 9.

¹⁴⁶ Ministry of Economic Development, New Zealand *Behavioural analysis for Policy – new lessons from Economics, Philosophy, Psychology, Cognitive Science, and Sociology* (2006) on file with the author.

¹⁴⁷ Van der Walt *Law and Sacrifice* (2005) 135.