The Kekhman Quintessence: What is English Personal Insolvency Law For?

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Preface

*It has been said that insolvency and bankruptcy laws are the poor-laws of the middle classes...that unless the insolvency laws be reformed, the vices of idleness, extravagance, and dishonesty encouraged by them, will destroy the middle classes. (1)

It is a great privilege to contribute to this Festschrift in honour of Professor Ian F. Fletcher, QC. I first met Ian during my master’s work at UCL. Fortune smiled again when I was supervised by him for my doctoral work. His teaching and enthusiasm for the subject of insolvency instilled in the class a great passion for the subject. His classes at UCL were incredibly interesting and thorough, much like his voluminous written output. His kindness and guidance as a doctoral supervisor were of the very highest quality. I will be grateful for the rest of my career for the attention to detail, thoroughness and thoughtfulness that he strove to inculcate into me during that wonderful formative period of reflection and scholarship.

It is no exaggeration to state that Ian’s contribution to the subject is monumental and lasting, both in terms of his written work, but also in terms of the many scholars he has supervised and taught over his long and distinguished career. The elegance of his writing serves as a model for this and future generations of scholars. In a review of Sir Roy Goode’s third edition of Corporate Insolvency Law, Ian

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wrote that Sir Roy has in the context of insolvency, “…been very much a founding father in the modern age of legal publication.” That accolade also applies to Ian. His writing and the many scholars he has inspired serve as a testament to his work, and I am sure I speak for the many others whose path he also set on the road of insolvency scholarship and practice when I express a sincere thank you – we owe him a great debt.

**Introduction**

1 It is an axiom that legislation should be carefully thought through and based on solid and well-developed policy grounds. Any given legislation’s development and eventual promulgation should be based on coherent and thoughtful objectives and clear aims. Certain questions can be asked and should be clearly answerable in relation to the given legislation, i.e. what is the law seeking to achieve? What policy is the legislation seeking to implement? This article seeks to answer these questions in the context of English personal insolvency law. In short, this article questions what English personal insolvency law is for?

2 The answer to this question may appear to be axiomatic, but on close critical examination this is certainly not the case. This is a crucial question, not just for debtors, creditors and other insolvency stakeholders, for as Fletcher observes:

> “The interests of society at large are considered to be implicated in every instance of insolvent failure...”

3 Fletcher’s work on the subject of insolvency has been wide ranging throughout his career. His written work has dealt with the law of insolvency including its domestic, international (cross-border) and comparative aspects on both the personal and corporate sides of the subject. His first major contribution to the discipline was however his 1978 book on the law of bankruptcy (I. Fletcher, The Law of Bankruptcy (1978, Macdonald and Evans, Plymouth) (“Fletcher Bankruptcy”). His first doctorate was awarded on the basis of this work. I have therefore decided to focus this article on personal insolvency to reflect this early interest of Fletcher. It would be a mistake to conclude that Fletcher’s interests are limited solely to insolvency. They range much further, and not just geographically, but also linguistically. See for example: I. Fletcher, “Latin Redaction A of the Law of Hywel” (1986), reviewed by Dafydd Walters (1987) 18 Cambrian Law Review 100-105.

4 Fletcher Juggling, above note 2, at 393.
2 It could be argued that English personal insolvency law has developed piecemeal over time and that the resulting regulation is a hotchpotch of provisions that are no longer the result of a carefully thought through set of rules which are supported by understandable policy objectives. That is to say that the carefully laid down framework in the Insolvency Act 1986 for regulating insolvent estates of natural persons now has coherence problems.\(^5\) The underlying rationale has been lost in the continued, almost feverish tinkering of successive governments and the knee jerk responsive approach to the subject.\(^6\) Insolvency law is like a garden that is constantly being reorganized – new beds, different flowers, various pesticides, compost of different types and too much watering. The result is an over-worked, unruly amalgam of a garden far removed from that which Capability Brown would conceive as aesthetically pleasing.

3 Time and again we have been reactive in our policy making, not proactively seeking to formulate an overarching system that represents clearly thought out policy. Instead we have a plethora of procedures and a vast array of legislative provisions,\(^7\) statutory instruments, practice directions, statements of insolvency practice (SIPs), volumes and volumes of case law\(^8\) and a further bewildering array of secondary sources\(^9\) that could cause even the most avid reader a brain aneurism through the sheer effort of marshalling the materials into an intelligible whole. Our system is not user friendly.\(^10\) But it is fruitful to the extent that it provides the opportunity for the intricacies to give rise to uncertainty, gaming, costly litigation and almost Dickensian length litigation and estate management.\(^11\) These outcomes

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\(^5\) A note on terminology: for the avoidance of doubt the term “bankruptcy” is used in this article to refer to the procedure that affects natural persons in English and Welsh law as regulated by the Insolvency Act 1986, i.e. section 381, Insolvency Act 1986.


\(^8\) On this mass of material see further S. Morgan, N. Smyth, and J. Tribe, Personal Insolvency Law in Practice (2013, Jordans, Bristol) (“Tribe, Morgan and Smyth”).

\(^9\) To which some readers may lament I am regrettably adding with this effort!

\(^10\) Certain readers may of course rebut this point by suggesting that the provisions are sufficiently understandable to attract a legion of foreign debtors to our shores to make use of our liberal discharge provisions. On this interesting point see further J. Tribe, “Bankruptcy Tourism: Myth or Reality?” (2015) Kings College Law Journal (forthcoming) (“Tribe Myth”).

\(^11\) This is particularly true on the corporate side of the subject. See the Lehmans litigation. A cursory search of reputable case law databases brings back voluminous hits just on this long running English and Welsh administration. See the PWC website for further details: <http://www.pwc.co.uk/business-recovery/administrations/lehman/lehmann-joint-administrators-progress-report-140409.jhtml>.
are not legitimately policy objectives. But they are a result of the workings of the current system.

4 As a result of this smörgåsbord of materials and sources personal insolvency regulation no longer resembles a coherent strategic policy driven framework, but an amalgam of historic and current policy resulting from piecemeal and ad hoc additions to the body of rules over time. Manson would surely lament as he did in the realm of company law some 125 years ago. It is the author’s contention that the current position is untenable.

5 Fletcher has himself noted this unhappy state of affairs. In the context of the pre-1986 position of English insolvency law he has commented:

“…the legal provisions relating to insolvency in England and Wales were scattered throughout a plurality of statutes and statutory instruments of widely differing vintages, and the relevant case law was in a similarly fragmented and chaotic state. This unsatisfactory and confusing state of affairs was partly the inevitable consequence of the endemically piecemeal, reactive solutions to concrete problems as and when they are encountered (the so-called “pragmatic” tradition), rather than operating on the basis of a coherent framework of pre-determined principles which have been thought through in a more abstract manner (the “juristic” tradition).”

6 It is argued in this article that the pre-1986 position, as noted by Fletcher, has reasserted itself in the years between 1986 and 2015 through successive pragmatic reforms. Overall this article does not advocate Benthamite abolition; we do not necessarily need to start from the foundations with a clean ground upon which to build an entirely new personal insolvency system. Change for change’s sake is not advocated. Nor is a “cyclical” recycling of previous reform initiatives

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12 In a similar vein but in the realm of company law Manson once observed that, “The English mind, by a curious paradox, is constitutionally distrustful of change while full of reforming energy. The result is superabundance of legislation, but of a tentative and temporising kind, unscientific, crude, confused; the despair of the judges and all who value law as a science.” (E. Manson, “Tinkering Company Law” (1890) 24 Law Quarterly Review 428-429).


14 Baister and Toube have recognized this in a different insolvency context: S. Baister and F. Toube, “All Change is not Growth, as all Movement is not Forward!” (2012) 25(4) Insolvency Intelligence 49-54. In the context of pre-1986 case law, Fletcher has noted that the affect of the 1986 reforms was not necessarily to sweep away that which came before: “It should not be forgotten that the statutory provisions concerning both individual and corporate insolvency do retain a substantial conformity with their immediate predecessors, and that many of the specific reforms implemented by the Insolvency Act 1985, and consolidated into the Act of 1986, were designed to correct particular deficiencies in the established law, rather than to redesign the law in a “root and branch” way. The “new” insolvency code has therefore evolved from its predecessors, and a continuity of tradition is clearly discernible in the midst of the substantial, and much-needed, change.” (See I. Fletcher, “A Defective and Perplexing Statutory Demand: the New Insolvency Code” (1989) (Jul) Journal of Business Law 346-348, at 348).

particularly useful. Instead the first part of this article examines the current personal insolvency landscape to see what policy objectives can be drawn from the body of regulation, if any. In so doing the article critically examines a number of disparate areas in that are potential policy objective fundamentals.

7 The article then goes on to suggest some principles that could usefully be adopted for the development of a sound and well-grounded personal insolvency law. These are referred to as “insolvency axioms”.

8 The analysis of these “insolvency axioms” is undertaken against the backdrop of the recent decision of Chief Registrar Baister in Re Kekhman. The case is considered in the second part of this article. In the case the Chief Registrar makes clear that one use of English personal insolvency law has been to fill lacunae in the law of other jurisdictions. What is it about English personal insolvency law that satisfies these lacunae and why do our provisions provide “utility” for debtors that they do not get elsewhere? Utility is a case law proposition. This article examines whether the Kekhman bankruptcy had utility and for whom. In so doing the article queries whether the judgment reflects or does violence to current policy.

9 With this thesis in mind we can now turn to the “insolvency axioms” which make up the first part of this article.

The Current Policy Position: a Brief Tour through English Personal Insolvency Law

10 A discussion of policy can be undertaken in historical, current, and future gazing perspectives. In this first part of the article, specific aspects of current English personal insolvency law are discussed so as to highlight and examine what the current policy foundations are for our modern personal insolvency law. First, two main points must be made.

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16 Re Kekhman (1) JSC BANK OF MOSCOW (2) ZAO SBERBANK LEASING v. (1) VLADIMIR ABRAMOVICH KEKHMAN, (2) HEATH SINCLAIR (as joint trustee in the bankruptcy of Vladimir Abramovich Kekhman), (3) TIM HEWSON, (as joint trustee in the bankruptcy of Vladimir Abramovich Kekhman) [2014] No: 4893 of 2012. (Hereafter referred to as Re Kekhman.) On Kekhman, see “Re Kekhman, note by 11 Stone Buildings” (2014) 7(3) Corporate Rescue and Insolvency 126. The appeal was heard by Morgan J in January 2015. Judgment is awaited!

11 Enunciation of clear policy formulation must be forthcoming from the relevant policy makers\(^\text{18}\) to be accounted legitimate policy objectives. If the effect of the specific piece of regulation is more happenchance, or an aside of some other piece of regulation that has a consequence that was not expected or desired then that does not stand as a full policy aim that underlies the regulation of English personal insolvency. Such accidents of regulation are discussed in this article, but instead of bolstering the idea of a coherent framework they go some way to demonstrate how the total amalgam is a dysfunctional hotchpotch, not a carefully designed and thoughtful framework of regulation. Key examples of this occurring previously in the context of insolvency are environmental waste licenses and disclaimer of onerous property on the corporate side\(^\text{19}\) and the IVA protocol and bank lending practices on the personal side\(^\text{20}\).

12 A second major point must be made which relates to the stakeholders in English personal insolvency. Policies can exist for the betterment of one specific stakeholder or for numerous stakeholders in any given context. In the context of English personal insolvency law those stakeholders and other factors are, in no particular order, \textit{inter alia}: (1) the debtor; (2) creditors; (3) society at large; (4) those individuals who are connected to the debtor (i.e. the debtor’s family or business associates); (5) the court system that deals with the debtor; (6) policy makers, including regulators; and, (7) the credit system, i.e.:

"the maintenance of public confidence...in the integrity of the credit-based system itself..."\(^\text{21}\).

Each of these stakeholders, and their varying perspectives, needs and position is discussed at the salient point in the treatment below.

13 The insolvency system can be viewed in a pluralistic sense keeping in mind the effect of a given policy on all stakeholders. Alternatively the policy can be viewed as one that has a re-balancing effect regarding the policy as between the respective stakeholders, e.g. creditors gaining and debtors losing from the implementation of a piece of regulation that was borne from a policy initiative that was designed to cause this rebalancing of interest. These species of policy will be respectively

\(^{18}\) Which arguably could be seen as either narrow, i.e. the Insolvency Service and the Government more broadly, or more broadly, i.e. encompassing organisations such as the Recognised Professional Bodies ("RPBs"), trade associations such as the Association of Business Recovery Professionals (R3) and other stakeholders that impact on insolvency.


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referred to as “cumulative stakeholder impact” and “individual stakeholder impact” in the article.

Cork and the IMF

14 Some groundwork has already been undertaken in relation to what an insolvency law is for and what its qualities might be. The most recent reform document on English insolvency law, the Cork Report, details at paragraph 198 the Committee’s ideas of what a paradigm insolvency law would contain. These have been reproduced below in their entirety, as they must provide the start point for any analysis of a consideration of the nature and aims of an insolvency law. To some extent the aims are inter-changeable between the corporate and personal side of the subject:

a) to understand that the world in which we live depend upon a system based on credit and that system has to deal with insolvency procedure’s casualties;
b) to detect and treat an imminent insolvency at an early rather than a late stage;
c) to avoid conflicts between individual creditors;
d) to realise the possessions of the insolvent which should properly be taken to satisfy his debts, with the minimum of delay and expense;
e) to distribute the proceeds of the realisations amongst the creditors in a fair and equitable manner, returning any surplus to the debtor;
f) to ensure that the processes of realisation and distribution are administered honestly and competently;
g) to make certain the effects of the insolvent’s failure and, if and so far as his perform or, in the case of a company, the performance of its officers or agents, merits criticism or punishment, to decide what measures, if any, require to be taken against him or his associates, or such officers or agents;

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h) to recognise that the effects of insolvency are not limited to the private interests of the insolvent, his family, creditors or directors, shareholders and employees, but that other interests of society or other groups in society are vitally affected by the insolvency and its outcome like suppliers of the insolvent, and to ensure that these public interests are recognised and secured;

i) to maintain possible commercial enterprises capable of making a useful contribution to the economic life of the country;

j) to relieve and protect where necessary the insolvent from any harassment and undue demands by his creditors. And also taking into consideration the rights of insolvent and his family at the same time to have regard to the rights of creditors.

k) to offer a framework of insolvency law commanding respect and observance, and still be sufficient to flex for adaptation and deal with the rapidly changing global conditions, and which is also:

a. seen to produce practical solutions to commercial and financial problems
b. simple and easily understood
c. free from anomalies and inconsistencies
d. capable of being administered efficiently and economically.

15 The International Monetary Fund in their *Orderly & Effective Insolvency Procedures*\(^\text{26}\) published in 1999 set out the following eleven qualities for an insolvency regime:

1. the absence of orderly and effective insolvency procedures can exacerbate economic and financial crises;
2. the design of an insolvency law needs to take into consideration the capacity of the judiciary;
3. if the insolvency law affords secured creditors special treatment vis-à-vis unsecured creditors, such treatment protects the value of security;
4. the first overall objective is the allocation of risk among participants in a market economy in a predictable, equitable and transparent manner;
5. predictability;
6. equitable treatment...equitable treatment does not require equal treatment;
7. transparency;
8. the second objective of an insolvency law is to protect and maximize value for the benefit of all interested parties and the economy in general;
9. with respect to the financial sector, an effective insolvency law enables financial institutions to curtail the deterioration of the value of their assets by providing them with a means of enforcing their claims;
10. reduce the public cost of the crisis;
11. mandatory rules, when precisely formulated, give legal certainty to the parties and avoid litigation.

16 These aims are explored below and specifically in the second part below in the context of the *Re Kekhman* judgment and whether or not that judgment satisfies these stated aims of a personal insolvency law.

*The Insolvency Service and Reform*

17 Finally, on setting the agenda for policy and reform it would be a mistake to overlook the impact of the Insolvency Service’s Policy Department on personal

\(^{26}\text{Orderly & Effective Insolvency Procedures (1999, International Monetary Fund, Washington DC).}\)
insolvency law development spearheaded by Mike Norris, Nick Howard and most recently Dean Beale.\footnote{For recent policy ideas, particularly in relation to Insolvency Practitioner fees see: \url{<http://www.jordanpublishing.co.uk/practice-areas/insolvency/news_and_comment/john-tribe-interviews-dean-beale-%23VLaz_147bwI>}.} As befits its constitution and function, the Insolvency Service,\footnote{See further \url{<www.insolvency.gov.uk>}.} an executive agency of the Department for Business, Innovation and Skills (BIS), continually monitors and evaluates insolvency procedures on both the corporate and personal sides of the subject. This activity has occurred since the 1986 Act received Royal assent. This task is undertaken in-house by employees at the Insolvency Service or by the commissioning of external research generally undertaken by academics.\footnote{On the personal side of the subject externally commissioned research includes: J. Tribe, “Bankruptcy Courts Survey: 2005 - Final Report: A Pilot Study”, Kingston Business School Occasional Paper, No. 59 (January 2006), a copy of which is available at: \url{<www.insolvency.gov.uk/insolvencyprofessionandlegislation/research/research.htm>}; J. Tribe and L. Cocks, “Personal Insolvency Law in England and Wales: Debtor Advice, Debtor Education and the Credit Environment” Kingston Business School Occasional Paper, No. 62; M. Green, “Individual Voluntary Arrangements – Over-indebtedness and the Insolvency Regime” Short Form Report, Bangor, University of Wales (2002a) - available at: \url{www.insolvency.gov.uk/whatsnew/whatsnew.htm}; M. Green, “Individual Voluntary Arrangements – Over-indebtedness and the Insolvency Regime”, Full Report, Bangor, University of Wales (2002b); M. Green, “The Regulators Project - New Empirical Data on IVAs – Final Report”, May 2006, Bangor, University of Wales, 2006.} This evaluation work comes on top of the usual law reform activity work, i.e. consultation papers and such like. The result of these evaluation exercises is evidenced by a number of publications spanning the last two decades.\footnote{The documents that relate to personal insolvency are: “Relief for the Indebted – an Alternative to Bankruptcy?” (2005, DTI, London); “In Improving Individual Voluntary Arrangements” (2005, DTI, London); “Characteristics of a Bankrupt” (2005, Insolvency Service, London); “Attitudes to Bankruptcy,” A Report prepared by the Insolvency Service, 2005; “Discharge from Bankruptcy,” A Report prepared by the Insolvency Service, 2006. “Bankruptcy: Proposals for Reform of the Debtor Petition Process” (2007, DTI, London); “Attitudes to Bankruptcy Revisited”, a Report produced by the Insolvency Service, 2007; “A Study of Creditors Petitioning for Bankruptcy”, a Report produced by the Insolvency Service, December 2007; “A Study of Creditors Petitioning for Bankruptcy”, a Report produced by the Insolvency Service, 2009; “Insolvency Proceedings: Review of Debt Relief Orders and the Bankruptcy Petition Limit”, a Report produced by the Insolvency Service, 2014; “Insolvency Proceedings: Debt Relief Orders and the Bankruptcy Petition Limit – Call for Evidence – Analysis of Responses”, Department for Business, Innovation and Skills, Insolvency Service, January 2015.} These have shaped policy and led to reforms. These have in turn been subsequently evaluated. A sample of these documents will now be considered to highlight the themes that the Insolvency Service has focused on.\footnote{Unfortunately space does not allow a thorough exposition of all of the themes enunciated in the documents. As a result only high-level themes and trends are discussed.} In so doing we are able to extrapolate what they consider as policy priorities. In the second part, we will see if Re Kekhman reflects those policy priorities.

18 The first push for reform of the Insolvency Act 1986 started during the mid to late 1990s. Mr. Peter (now Lord) Mandelson MP and Mr. Stephen Byers MP, consecutive Secretaries of State for Trade and Industry at the Department for Trade and Industry (now BIS) had at the time been heavily influe
approaches to entrepreneurship and the notion of fresh start mechanisms, coupled with a fostering, encouraging climate within which businesspersons could operate without fear of social opprobrium if they failed. If entrepreneurs were encouraged then wealth and prosperity would follow. It is from these influences that we can trace the subsequent developments in English law and policy as developed in the following consultation papers.

19 The first consultation paper to mark this change in approach or re-emphasis appeared in 2000. In Bankruptcy: A Fresh Start, the Insolvency Service reviewed possible law reform proposal options to change the personal insolvency laws of England and Wales. The report was far reaching and marked a point in the dividing line between the treatment of different species of debtor. This is because the consultation paper distinguished between consumer and entrepreneurial or business personal debtors as well as “honest” and “fraudulent” or “reckless” debtors. In launching the report Byers, was keen to emphasise a change in emphasis in terms of cultural attitudes to entrepreneurs (again influenced by the American ethos). He lamented the lack of support for entrepreneurs in England and Wales. The culture that pervaded English and Welsh commercial practice at the time was not helping achieve the objectives of wealth creation and prosperity. The insolvency reforms mooted in Bankruptcy: A Fresh Start were designed to remedy these issues. So what was suggested?

20 The first major reform proposed was the introduction of an earlier automatic discharge period for “honest” debtors and for “fraudulent” or “reckless” to be treated in a different manner. There would be a reduction from the three years stipulated in the Insolvency Act 1986. Specifically, Byers noted in his introduction:

“We believe that a distinction can and should be made between the two groups so that the vast majority of honest bankrupts do not continue to be stigmatised through association with the dishonest.”

21 This mooted reduction in the period before automatic discharge, and in particular the idea of an earlier discharge period for honest debtors, is the genesis of what would later be enacted by the Enterprise Act 2002, reforming the Insolvency Act 1986. Some problems arise, however, from this distinction between species of debtor. In particular there are issues in relation to: (1) identification of debtor type; and (2) public perception in relation to the reduction in the automatic discharge period. In relation to the first issue it is very difficult to categorise different types of behaviour as “honest” or “reckless.” There are of

33 Ibid., at 1.
34 Idem.
35 Idem.
course some obvious examples at either end of the spectrum, gambling being one example on the “reckless” end of the scale. However, the time spent by the Official Receiver in determining this culpability (or not) would be extremely costly in terms of time and expense.

22 Bankruptcy: A Fresh Start\(^\text{37}\) also contains lengthy discussion of bankruptcy stigma and the vexed ‘discharge issue’ which has come to dominate discussion on the personal side of the subject. Following an overview of the discharge provisions in a number of countries,\(^\text{38}\) the consultation document sets out justifications for reducing the discharge period in England and Wales from three years to one year. The first justification emanates from the Official Receiver. It is noted:

“However, the experience of the [Official Receiver] is that the vast majority of people who become bankrupt become so from necessity not choice, that they will have made very considerable efforts to avoid becoming bankrupt and that they will have dealt responsibly with creditors.”\(^\text{39}\)

The document goes on:

“For many individuals bankruptcy represents a personal tragedy, the last act in a series of events that have led to financial disaster. For many others there is still an element of shame in being unable to pay their debts.”\(^\text{40}\)

23 The document then attempts to set out two concepts against the backdrop of financial rehabilitation during discharge. It is argued that:

“the circumstances leading up to the insolvency or moral culpability of the bankrupt”\(^\text{41}\)

should play a part in determining the period before discharge. It is noted that the three-year period before discharge is not needed as:

“the public do not require protection in the great majority of cases.”\(^\text{42}\)

24 Then follow the proposals for the reduction in the period before discharge. It is suggested that the issue of discharge should be separated from the bankrupt’s conduct or need. It is suggested that:

“Earlier rehabilitation could be achieved by providing for an automatic discharge for all bankrupts after six months, or sooner if the Official Receiver has completed his enquiries into the bankrupt’s affairs.”\(^\text{43}\)

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\(^\text{37}\) Bankruptcy: A Fresh Start”, above note 32.

\(^\text{38}\) Including Italy, France, Germany, the Netherlands, Ireland, South Africa, New Zealand, Australia, the United States and Canada (see pages 12 and 13 of the document).

\(^\text{39}\) Bankruptcy: A Fresh Start”, above note 32, at paragraph 7.1.

\(^\text{40}\) Idem.

\(^\text{41}\) Ibid., above note 32, at paragraph 7.2.

\(^\text{42}\) Idem.
This change in emphasis it was hoped would cause bankruptcy to be viewed as:

“a period in which the great majority of individuals could sort out their finances and their futures in the expectation of early rehabilitation.”

25 In Productivity and Enterprise: Insolvency – A Second Chance 2001, the idea of fresh start rehabilitation came again to the surface as part of the debates on the Enterprise Bill. There was support for the entrepreneurial focus that lay behind the proposed reduction in the discharge provision reform from a number of different sources in Parliament. Mrs. Angela Browning MP observed:

“On insolvency, the second chance philosophy is something to which I can subscribe.”

26 Mr. Andrew Lansley MP observed however that the balance between risk taking and an enterprise culture was a careful balance that needed to be thought through clearly. He noted:

“I shall not dwell on insolvency. Clearly, if the Bill fosters a sense of responsible risk taking, that will be to the good rather than to the ill. In respect of risk, Lord Hanson, who was—and still is—quite a business man, once told me that his approach was to say, “Look at the downside risk on a deal. If you can live with the downside, start to look at the upside.” We need to think about that. This legislation is based around the idea of the greater the risk, the better, but the matter is not as simple as that. Business men should look for asymmetric risk where there is a limited downside with which they can cope and a greater upside benefit. Those probabilities have to be worked out. It is not a case of simply saying the more risk, the better. We do not want a risky culture, but an enterprise culture, and that means getting the risks right.”

27 Perhaps the most interesting interjection in the EA2002 debates however came from Dr. Ross Cranston MP (now Mr Justice Cranston of the Royal Courts of Justice). He observed:

“I support the changes in the personal insolvency provisions. It was suggested by the hon. Member for Bury St. Edmunds (Mr. Ruffley) that these will lead to a rogues charter, with consumers racking up debt and declaring themselves bankrupt. That is not the reality. People do not consciously incur huge amounts of debt that they cannot pay. They know that if they do so they will not get credit in future. They will have a black mark against them and creditors will take that into account and not lend. A stigma attaches to bankruptcy in this country that does not operate elsewhere, and the proposed change is to be welcomed.”

43 Ibid., at paragraph 7.4. – “An earlier discharge for the honest, responsible majority”.
44 Ibidem.
46 House of Commons Hansard (10 Apr 2002), at Column 93.
47 Ibid., at Column 89.
48 Ibid., at Column 97.
28 There were of course some negative comments. Mr. Jonathan Djanogly MP observed:

“On insolvency provisions relating to individuals, I have serious reservations about the proposal to reduce the period of bankruptcy to a maximum of 12 months. Presumably, some bankrupts, if not most, will be released within the first three to four months of bankruptcy. Not only will unfair discrepancies in release times arise throughout the country, but given that more than half of all current bankruptcies involve consumer credit, rather than business debt, it seems highly unlikely that the provisions will make any difference to improving enterprise. Instead, as other hon. Members have said, they may enhance careless risk-taking and excess credit.

The Government have missed the point. What bankrupts need most is the ability to clear the slate after the set period, and to make a fresh start. Shortening the period of bankruptcy is not the key; what is needed is the ability to declare a bankruptcy spent after a set period. As matters stand, bankrupts will still not get a loan because their record will remain for the rest of their life. It is also worth noting that one of the great successes of the Insolvency Act 1986 was the institution of individual voluntary arrangements. Time and again, IVAs have saved people from bankruptcy and saved creditors from losing their money.

Years of repayment under IVAs will become increasingly unattractive. Instead, why should one not simply go bust for a few months? The maximum 12-month period will apply to those who have failed through no fault of their own. I am still not sure what those provisions—they have been mentioned by other hon. Members—mean. Will the person who makes an illegal but small preference or transaction at an undervalue be at fault, while the sole trader who squanders millions through weak cash controls will not? To my mind, the whole approach reeks of future court cases and human rights claims.”

29 So prompt discharge and rehabilitation have clearly been policy objectives for the Insolvency Service for at least the last fifteen years. This point is particularly important when one considers the Re Kekhman judgment and the main thrust of the Chief Registrar’s “utility” analysis in that case. As has just been shown, and as the judgment demonstrates (discussed in the second part), debtor rehabilitation is now a major factor in informing the exercise of the discretion to make a bankruptcy order and in that case the discretion whether or not to annul.

30 We can now move to a consideration of how these reform initiatives and other influences have created some “insolvency axioms” for English and Welsh personal insolvency law.

**Is Debtor DISCHARGE an Aim of Personal Insolvency?**

31 Your average reader would be correct to observe that legislative discharge has long been a feature of English personal insolvency law. Elsewhere the author has

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49 Ibid., at Column 101.
written about the history, policy and mechanics of discharge over time.\textsuperscript{50} This previous work has shown that whilst discharge has been an aim of English personal insolvency law since 1705, it is just one aspect of English personal insolvency law and not necessarily the main driver of why we regulate the estates of insolvent individuals. The relief that comes with discharge may be a major driving force behind why a debtor seeks to go down the bankruptcy route; however empirical work has shown that bankrupts do not actively consider discharge periods.\textsuperscript{51} It is in fact more often the case than not that a debtor finds that they are going through the bankruptcy procedure because they are hopelessly insolvent, and that an insolvency procedure is their only option. It is currently a truism that insolvency discharge has individual stakeholder impact in policy and effect terms; namely, the debtor is the primary stakeholder who is affected by this policy.

32 Nobody would seriously expect that the creditor as a stakeholder would not consider discharge, in the modern sense anyway, as being an important aspect of bankruptcy law. Historically creditors were responsible for granting discharge with certificates of conformity, however, since the advent of automatic discharge in the 1970s their interest has certainly diminished.\textsuperscript{52} Periods before automatic discharge may be of interest if creditors think that too lenient a period, i.e. one year instead of three years before automatic discharge, may lead to more reckless and extravagant behaviour by debtors. This was one of the key arguments against the changes introduced by the Enterprise Act 2002, i.e. reducing automatic discharge to one year from three. Otherwise the fact of automatic discharge is of remote interest to creditors. It is knowledge of discharge and its consistent application that would appeal most to creditors, i.e. if discharge does exist they need to be sure of its qualities so as to ensure that they can protect themselves on the insolvency of the debtor, or at least readily understand how an estate is managed post insolvency. It is for this reason that bankruptcy tourism is seen as undesirable, i.e. a debtor who seeks discharge in a system that has liberal discharge provisions but incurred debts with creditors in more onerous discharge jurisdictions is seriously undermining the nature and use of credit extension in that original jurisdiction particularly as regards how creditors view debtor behaviour.\textsuperscript{53}

33 In terms of policy formulation what can be concluded on discharge? First, discharge has been subject to recent policy reform by the Insolvency Service and policy comment on this aspect of bankruptcy law is more readily available than in other areas discussed in this article. This could be because of the recent policy changes wrought by the Enterprise Act 2002 on the bankruptcy jurisdiction noted


\textsuperscript{52} See Tribe Discharge, above note 50, on these developments.

\textsuperscript{53} On these tensions, see Tribe Myth, above note 10.
Secondly, future changes to the period of bankruptcy before automatic discharge must pay attention to the interests of all stakeholders – the cumulative stakeholder affect must be acknowledged. Hitherto, negative creditor rhetoric about reduction in the period has not matched debtor behaviour. To ensure a well thought through policy any form of unfounded scaremongering must be avoided. Any movements either way in the automatic discharge period should be made only after careful consideration of the drivers behind why discharge exists in our system.

Is COLLECTIVISATION of Creditor Interests the Aim of Personal Insolvency Law?

Perhaps the key policy aim of English personal insolvency law, particularly from the perspective of the debtor, is the collectivisation of creditor interests and the consequent reduction in race to the bottom creditor activity. Individual execution pursuers are put off from the pursuit of the hapless insolvent as they are forced as creditors to participate in the statutory regime for managing the insolvent debtor’s estate. Collectivisation is therefore cumulative stakeholder impact at its purest, particularly as regards creditor treatment when viewing that species of stakeholder both as a collective body, but also as distinct groupings of different species of creditor.

Creditors’ interests are collectivized. The creditor wolves are no longer baying at the door. The Trustee in Bankruptcy is appointed and the estate of the bankrupt can now be administered in a regulated and orderly fashion for creditors in terms of monetary recovery, and also ultimately the debtor because of their eventual discharge from the legal state of bankruptcy. What starts as collectivisation of creditors’ interests ends with relief of the individual debtor following the statutory compact. The following example shows this:

“Here are all my assets to satisfy the debts that I owe. In exchange for the totality of my assets, save for the statutory exemptions, the legislature has stipulated that I can now be released from the state of bankruptcy. Thank you for complying with this statutory compact.”

Several statements can usefully be made in framing English personal insolvency law in terms of policy formulation and setting the way forward without regard to the ways in which creditors come to participate in the English personal insolvency process. Their needs must be carefully considered. This is for the creditors’ own

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sake but also because of the concomitant effect collectivisation has on the individual debtor.

37 Before we progress it must be stated that English personal insolvency law has two principal regimes, (1) Bankruptcy; and (2) the Individual Voluntary Arrangement (“IVA”) procedure. These procedures have in recent years been joined by a new procedure known as the Debt Relief Order (“DRO”), which some commentators have referred to as BankruptcyLite. How creditors engage with the processes in these various procedures does not vary to a material extent, but what the various procedures are trying to achieve for creditors does. This point is taken up below.

38 Overall and with the above in mind it can be stated that collectivisation of creditors’ interests is an aim and policy of English personal insolvency law. The policy for this fact is less easily drawn from the policy literature, however, the fact that the legislation specifically enunciates provisions for collectivized creditor treatment must place this quality, namely collectivisation, highly in the policy firmament.

Is DISTRIBUTION of the Insolvent’s Remaining Estate Value the Aim of Personal Insolvency Law?

39 There is no doubt that there is substantial evidence in corporate insolvency of creditors trying to escape the bounds of pari passu treatment by asserting security interests and other forms of quasi-security to move themselves up the statutory hierarchy of distribution. Whether it is the 1970s activity surrounding trusts and Romalpa clauses, or the more recent debates about the nature of fixed and floating charges, creditors are perennially trying to get a jump on each other in terms of prioritisation of payment. The Office of Fair Trading’s relatively recent report has shown that this competitive rush on the finite pot is relatively futile, at least for the lower order creditors. However, the game is and will always be afoot on the corporate side of the subject.

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56 On these procedures see Tribe, Morgan and Smyth, above note 8.
40 The above notwithstanding, in the sphere of personal insolvency this priority gaming is less pronounced. The makeup of creditors in terms of type is less complex than in corporate insolvency, which perhaps goes some way to explain why competition for priority treatment is less well discussed in the literature. There certainly is a statutory order of priority. Attempts to circumvent this seem less however on the personal side of the subject.

41 Whilst the personal insolvency creditors may not jostle as much for a place in the hierarchy as their corporate insolvency creditor cousins they certainly do have a place and are interested in what will be distributed to them as a result of being in the procedure as creditor stakeholders.

42 Maintenance of various distribution methods to each creditor is very important when setting policy for the respective type and nature of distribution to creditors in personal insolvency. The more easily facilitated that distribution is, and with higher rates of return, the more interested creditors will be and the more likely they will be to engage in the process.

Is PUNISHMENT an Aim of English Personal Insolvency Law?

43 The subject of punishment in English insolvency law has a long history on both the personal side and arguably on the corporate side of the subject. Whether or not punishment makes up part of the current rationale for policy formulation is a different matter. The Bankruptcy Restrictions Order (“BRO”) and Bankruptcy Restrictions Undertaking (“BRU”) regime certainly restrict bankrupts from undertaking certain activities as a result of their previous behaviour in relation to creditors and the conduct of their affairs but this is not strictly punishment. BROs/BRUs are a check and balance mechanism that were brought in at the same

64 See section 328, Insolvency Act 1986 on priority of debts in bankruptcy.
66 Whilst the directors’ disqualification regime exists as a system of rules which is designed to protect the public it could be argued that punishment flows from the disqualification in the shape of a reduction in remuneration, loss of professional accreditation, etc. See further J. Tribe, “The Disqualification of Company Directors: Background to the Regime and some Recent Reform Activity in the United Kingdom” (2013) 14(3) Insolvency Law Bulletin 47-54. See also: Fletcher Juggling, above note 2, for a discussion of the tensions in this area.
time as the reduction in the discharge period from three years to one year. Their function again is not to punish per se, but to protect the public from bankrupts who have and may again behave in a way that the Legislature finds unacceptable. In this way BROs are a cousin of directors’ disqualification.

44 Punishment does not then make up part of current English personal insolvency policy formulation in any meaningful way. Gone are the days of ear loss, pillorying and hanging when bankrupts did not disclose the whereabouts of their assets to the Commissioners in Bankruptcy. Instead the focus from the 1970s onwards has been on relief, rehabilitation and efficient distribution, as has been highlighted in the first three points above.

45 The closest thing we have had to punishment for bankrupts between 1986 and 2002 were the bankruptcy offences. These are still on the statute book. However, it is no longer an option to prosecute bankrupts except for fraud and theft Act offences. We have in effect replaced offences previously treated as criminal that were rarely used and usually attracted suspended sentences. We have moved from the prosecution of the individual to a protection of the public approach as these issues have become factors to be considered at discharge and not bankruptcy prosecutions.

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67 On BROs, see above note 54.
71 The pertinent statutory provisions that relate to Insolvency Act 1986 offences for bankrupts are: sections 353 (non-disclosure); 354 (concealment of property); 355 (concealment of books and papers; falsification); 356 (false statements); 357 (fraudulent disposal of property); 358 (absconding); 359 (fraudulent dealing with property obtained on credit); 360 (obtaining credit; engaging in business); 361 (failure to keep proper accounts of business (repealed by the Enterprise Act 2002)); and 362 (gambling (repealed by the Enterprise Act 2002)).
ACCESSIBILITY - Do Current Costs of Entry to the English Personal Insolvency Regime Fetter Personal Insolvency Objectives?

46 The cost of entry to the English personal insolvency regime has long been an issue of debate. Whilst not strictly an aim, accessibility to the insolvency system is critically important. Prohibitive costs of entry do apparently put people off from entering into the regime. Recent policy announcements increasing fee levels will only serve to make bankruptcy seem even more out of reach for some debtors. Indeed, some creditors may also baulk at the costs of entry into the procedure.

47 The recent Insolvency Service announcement heralding an increase in the bankruptcy petition debt levels to GBP 5,000 from GBP 750 raises a number of points for consideration. For debtors’ own petitions, this increase forces small debtors into DROs so moving debtors from bankruptcy to DROs. The DRO regime is cheaper and more efficiently administered. This could arguably be the reason behind the level change.

48 For creditors, it removes the opportunity to use the threat of a bankruptcy petition to obtain debts less than GBP 5,000. It could be argued that this was and is an abuse of the process (to petition or threaten to petition) but it is widely used in cases where there is no dispute over the amount of the debt but a reluctance to pay by the debtor. This will result in middling sized debts (GBP 750-GBP 4,999) now falling into the world of debt collection. This is positive news for those that operate in that industry, but problematic for those middling debtors.

49 A consistent and well thought through policy approach to any personal insolvency regime must include careful consideration of the costs of entry to the procedure. If costs are prohibitively high then individuals will not use the system, particularly if they cannot afford to. As Megarry VC observed in Re Field:

“A man may indeed be too poor to be made bankrupt.”

50 If a lack of engagement occurs then the system has lost its very purpose and function. If impecunious people cannot escape their liabilities through a statutory mechanism that is supposedly designed to allow that form of relief and rehabilitation then the system is itself in disrepute.

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72 See further J. Tribe, “The Cleo Conundrum: Financing the Cost of Personal Insolvency Relief with Particular Historical Reference to Bankruptcy Revenue Stamps” in the Society of Legal Scholars (SLS) Annual Conference 2013: Tis 40 Years Since: Britain and Ireland in Europe, Europe in Britain and Ireland; 3-6 Sep 2013, Edinburgh, U.K.
73 Idem.
74 On fees see: <http://www.bis.gov.uk/insolvency/insolvency-profession/Legislation/Insolvency%20law/Insolvency%20fees>.
76 Re Field [1978] 1 Ch 371.
Is STIGMA Still a Problem or Even a Policy Objective?

51 The short answer is yes to the above question, i.e. it is still an issue for modern personal insolvency law. The various *Attitudes to Bankruptcy* reports produced by the Insolvency Service show this clearly as do other sources. But is stigmatising bankrupts a policy objective? The introduction of the DRO regime could indicate one of two themes. First, that the legislature is trying to introduce a new less stigmatising device which therefore leaves the “old” procedure (bankruptcy) on the statute book, but still with its history of stigma and negativity. This means that a policy objective is to keep bankruptcy as a shaming stigmatising device whilst promulgating a new route to relief and rehabilitation for the personal insolvent, namely, DROs. This potential policy approach and rationale is only undermined by the fact that the DRO regime has lower costs of entry and thresholds of indebtedness. In other words, the two procedures (bankruptcy and the DRO) are different in terms of ingredients and potential users. They exist for different policy aims and outcomes. As long as these are clearly enunciated there should be no problem for the debtor or her creditors. However, it should be made clear that exactly the same rules and process applies to both procedures.

52 Alternatively, it could be said that the introduction of the DRO recognises that there is a genuine issue with stigma and engagement in the personal insolvency system, i.e. more people would participate if the term of art involved (i.e. bankruptcy) does not have 500 years of negative history attached to it. Perhaps in that way the introduction of the DRO was a policy objective to reduce bankruptcy use by driving certain debtors down the less stigmatising and less intrusive DRO route.

53 Six policy areas have now been examined that provide fertile soil in which future reform and policy discussions can be grown and developed. These were discharge, collectivization, distribution, punishment, accessibility and stigma. We can now turn to an examination of the future of English personal insolvency law policy through the prism of the recent judgment in *Re Kekhman*.

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77 See further: <http://www.insolvencydirect.bis.gov.uk/insolvencyprofessionandlegislation/policychange/policychange.htm>.

78 See further Tribe, above note 51.
Tribe: The Kekhman Quintessence

Kekhman Considered and Future Policy Directions: Getting to the Essence of What Personal Insolvency Law is For

54 This part of the article suggests a number of policy objectives, and some resulting legislation, that may usefully be adopted as part of the reform of English personal insolvency law. These suggestions flow from the discussion in the first part of what policy English personal insolvency law may be trying to achieve. From these proposed policy objectives we can draw up a list of outcomes that can then be formulated in legislation. This legislation can then in due course be measured against its stated aims and underlying policy rationale and purpose.

55 In addition to our considerations in the first part of this article, a productive starting point for a consideration of the nature and function of a good modern personal insolvency law is the recent judgment of Chief Registrar Baister in Re Kekhman. The case involves a thorough discussion of the utility of personal insolvency in the context of an interesting and “unusual” set of facts. The Kekhman judgment is key to an understanding of modern personal insolvency law and the thesis being examined in this article, namely, does English personal insolvency law fill lacunae in the law of other jurisdictions and provide “utility” for debtors (and others) that they do not get elsewhere because of English personal insolvency laws “insolvency axioms”? This part of the article examines whether the Kekhman bankruptcy had utility and for whom and whether the judgment reflects or does violence to the current policy of English personal insolvency law.

56 The debtor, Vladimir Kekhman (hereafter Kekhman), was a Russian citizen who was resident and domiciled in the Russian Federation. Kekhman had been made bankrupt on 5 October 2012 and the Chief Registrar’s judgment was given on an application to annul the bankruptcy.

57 Kekhman was the founder and initial driving force behind an international fruit business that commenced trading in 1994. By 2011 the group had become insolvent. With debts in excess of GBP 300 million Kekhman, presented his own bankruptcy petition in October 2012. Kekhman was automatically discharged in

79 For more speculative future gazing activity see Tribe, above note 17.
80 A value-testing phrase that has been used by Professor Muir Hunter QC previously in the context of administration and the rescue culture. It will be used here to indicate in the same manner but in the context of personal insolvency law more generally. See further M. Hunter, “The Nature and Functions of a Rescue Culture” (1999) 104 Comparative Law Journal 426-463.
81 Re Kekhman (1) JSC BANK OF MOSCOW (2) ZAO SBERBANK LEASING v. (1) VLADIMIR ABRAMOVICH KEKHMAN, (2) HEATH SINCLAIR (as joint trustee in the bankruptcy of Vladimir Abramovich Kekhman), (3) TIM HEWSON, (as joint trustee in the bankruptcy of Vladimir Abramovich Kekhman) [2014], No: 4893 of 2012.
82 Ibid., at paragraph 111.
83 At Apartment 1, Arts Square, 1 St Petersburg, Russian Federation.
84 Much of Fletcher’s work has focused on insolvency in the international context. For his discussion of “domicile”, see Fletcher International, above note 2, at paragraph 2.17.
October 2013. Kekhman had assets valued at GBP 4,895,533. His liabilities amounted to GBP 316,136,088. The estimated deficiency was therefore GBP 311,240,555.\(^{85}\)

58 The root cause of Kekhman’s indebtedness lay in personal guarantees that he had given for loans that were provided by a number of banks to JFC Group. The business failed in 2011. Restructuring attempts failed\(^ {86}\) and the lending banks enforced their security and called in their personal guarantees.

59 A secondary cause may have been the fact that Kekhman withdrew from the business after taking up appointments as the general director of the St Petersburg Theatre of Opera and Ballet and as a member of the Consultative Council of the Russian Federation Cultural Ministry.

60 It is against this factual background that we come to consider Kekhman’s bankruptcy and the curious question of why a Russian citizen was applying to an English court for relief when he was resident in St Petersburg. Despite these supposed bars to using the English bankruptcy system Kekhman was able to claim jurisdiction on the basis that he was personally present England on the day of presentation of his petition.\(^ {87}\) Kekhman’s interest in the English and Welsh system may also have been influenced by the fact that the Russian Federation does not have a personal bankruptcy law and by the fact that under three personal guarantees and indemnities subject to English law Kekhman owed GBP 86,201,784 to six banks. These factors gave the English court a discretion to make a bankruptcy order. Kekhman’s bankruptcy order was made on 5 October 2012. He was automatically discharged on 5 October 2013.

61 The judge who originally heard the bankruptcy petition (Mr. Registrar Jones) mulled on, \textit{inter alia}, whether an English bankruptcy order would benefit creditors and whether such an order would be recognized in Russia. This idea of the English

\(^{85}\) This is of course a colossal amount of personal indebtedness, certainly too much for any one individual to bear for any duration of time. It is perhaps this sort of extreme business guarantee derived amount of debt that allows the bankruptcy regime to truly deliver relief and rehabilitation in its purest form. Kekhman ranks highly in the league of England and Wales largest bankrupts in terms of monetary value. Mr. Willie Stern became known as Britain’s biggest bankrupt for a period in the early 1970s with a total liability of GBP 118 million (equivalent to GBP 825.2 million today according to I. Fletcher, \textit{R. Ramsden Faces New Money Woes} (Sunday Times, 20 February 2005)). Stern did not hold the title for long. Mr Rajendra Sethia was declared bankrupt in 1979 owing GBP 140 million (equivalent to GBP 475.5 million today). Mr Kevin Maxwell then took the top place in the league when he was declared bankrupt in 1992 owing GBP 406 million (equivalent to GBP 554.4 million today). More recently Patrick Hegarty, a Scottish entrepreneur, went into the sequestration procedure in Scotland. His personal value had previously been placed at GBP 500 million. If his debts were in that region, he would merit a high position in the table of bankrupts.


\(^{87}\) Pursuant to section 264(1)(b) and section 265(1)(b), \textit{Insolvency Act} 1986. See further Fletcher International, above note 2, at paragraph 2.13.
bankruptcy order benefiting creditors is worth pausing to consider as it helps us to identify qualities of a personal insolvency law that might qualify as “insolvency axioms” as mentioned in the introduction to this article. These will now be considered.

**Should Bankruptcy Exist to Benefit Creditors?**

62 Whilst Nietzsche postulated that anything worth having is worth striving for, that might not necessarily be true of an insolvency law – particularly when that set of rules is viewed from the perspective of the creditors. Creditor Apathy

63 The Cork Committee and more recently the Office of Fair Trading (“OFT”) have identified that there is a certain amount of apathy amongst creditors. On this point the Cork Committee noted:

> “...it has been suggested to us that the elaborate structure for creditor control in bankruptcy and compulsory winding up is illusory, largely owing to apathy and indifference on the part of creditors themselves.”

It continued:

> “We consider it unsatisfactory that creditors, whose experience would be invaluable to the liquidator or trustee, are discouraged from participating in the administration of an insolvent estate. We are in no doubt that the machinery should be such as to allow, and indeed encourage, those creditors who have a genuine interest to involve themselves in all types of insolvent administration.”

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89 *Re Kekhman*, at paragraph 81.

90 Not all creditors are of course apathetic. For an example of proactive unsecured creditor behaviour see the Privy Council case of *Cambridge Gas Transport Corp v Official Committee of Unsecured Creditors of Navigator Holdings plc and others* [2006] UKPC 26, [2006] 3 All ER 829.

91 See OFT Report, above note 61.


93 Ibid., at paragraph 917.
64 On creditor apathy, the Cork Committee observed that:

“because of the indifference of creditors towards supervising the administration of insolvent estates…there has also been an increasing measure of judicial control.”

65 The Cork Committee proposed three reasons for this indifference:

“There is a generally held belief that most trustees and liquidators are efficient, reliable and experienced.

There is a lack of interest on the part of business creditors, who allow for the occasional bad debt in fixing their prices and write if off when it occurs, thereby reducing their taxable profits.

Thirdly, and perhaps of greatest significance there is a resigned acceptance of the fact that in most cases the general body of are only likely to receive a small divided.”

66 It could be argued that the position of unsecured creditors has some parallels with shareholders in widely dispersed ownership model companies. The famous Berle and Means thesis showed that shareholders become apathetic within large widely dispersed ownership model companies as they can have little impact on the way in which the company is managed. The separation of ownership and control can lead, and Pettet has called this an axiom in modern times, to the imposition of

94 Ibid., at 916.
95 Ibid., at 914.

6 In the context of corporate insolvency, Professor Vanessa Finch noted in 1991 that unsecured creditors were, “a severely handicapped contestant competing for an uncertain prize.” (V. Finch, “Directors’ Duties: Insolvency and the Unsecured Creditor”, in A. Clarke (ed), Current Issues in Insolvency Law, Current Legal Problems (1991, Stevens & Sons, London), at 89). Further discontent with the unsecured creditors’ lot can be garnered from the law reports. The start point of analysis for this species of creditor invariably starts with a rather low expectation of their expected return or with their status as unsecured creditors generally. For example, in Società Esplosivi Industriali Spa v Ordnance Technologies (UK) Ltd (formerly SEI (UK) Ltd) and others (No 2) [2007] EWHC 2875 (Ch), [2008] 2 All ER 622, at paragraph 3, Lindsay J noted: “I have not seen the statement of affairs in OTL’s liquidation, nor have I been told what sort of dividend, if any, can be expected by its unsecured creditors.” An expectation of zero return comes across in a number of judgments. For example, in Fiorentino Comm Giuseppe Sr1 v Farnesi and another [2005] EWHC 160 (Ch), [2005] 2 All ER 737, at paragraph 10, Mr Nicholas Warren QC (sitting as a Deputy High Court Judge) noted: “I am satisfied—and this is not in any event disputed—that there will be no dividend for unsecured creditors.” In Goel v Pick [2006] EWHC 833 (Ch) , [2007] 1 All ER 982, at paragraph 24, Sir Francis Ferris noted that the claimant: “…would only be an unsecured creditor in respect of any damages that might be awarded” as if unsecured creditor status, perhaps quite rightly, has no real value at all. A similar point was made in Re C L Nye Ltd [1970] 3 All ER 679, at paragraph 5, Rimer J noted how the officeholder’s view of procedures was influenced by the lack of distributable funds for unsecured creditors. After observing that: “There will be nothing for any of the unsecured creditors”, he went on to observe that: “the administrators also consider that it would be uneconomic to prepare a proposal for a voluntary arrangement, circulate it to all creditors, and then hold a meeting to seek approval for the sole purpose of making a distribution to the preferential creditors.”

a self-perpetuating oligarchy. Shareholders feel powerless and disengage from the company. A similar pattern of behaviour may be occurring with unsecured creditors. The Cork Committee stated that unsecured creditors had little, if any, involvement in committees of inspection because they felt confusion over the rules governing the committees of inspection and how these were constituted. They noted that they:

“received evidence of confusion over the interpretation of these provisions and precise nature of the functions to be performed by Committees of Inspection...most unsatisfactory.”

67 Creditors should involve themselves in the insolvency process as:

“the underlying principle is that since the estate is being administered primarily for the benefit of the creditors, they are the persons best calculated to look after their own interests.”

68 One could respond to this unsecured creditor apathy and argue that it is not that complaints mechanisms are defective but that unsecured creditors engagement is problematic. It could be argued that we need to examine why the quantity of unencumbered assets is so small, rather than focusing on participation in the management of distributing such a small fund. Methods of distribution are important, but they do not resolve the question of what is available to be distributed. A more far reaching evaluation of the nature and functions of our corporate insolvency laws is required for that task. For well over 150 years unsecured creditors have experienced numerous incursions into the pot that may

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99 Cork Report, at paragraph 918.

100 Ibid., paragraph 913.


have been available for their satisfaction, but for IP fee claims, security devices, ROT clauses, trust instruments, preferred creditors and such like.

69 At a relatively recent Insolvency Service conference on the use of information technologies, the then Director of Policy at the Insolvency Service, Nick Howard, responded to a question from Professor Sir Roy Goode QC by suggesting that he might like to chair a Cork Mark II. The 2010 OFT report perhaps highlights that this may not have been an entirely unreasonable suggestion. If there is no substantive change then strong creditors will continue to dominate insolvency proceedings. Cork was critiqued by one commentator for not visiting the fundamentals. A similar charge could perhaps be laid on current consultation and reform processes. One could respond however by noting that engaging in Warren like paternalism for unsecured creditors is commendable, but like apathetic shareholders, or missing tutorial undergraduates, there comes a stage when this paternalism is destructive of individual creditor motivation. The systems are there – use them might be the refrain!

70 Reform which truly affects unsecured creditors may involve, inter alia, a consideration of alternatives to pari passu such as paying in order of time of creation of the debt, payment by reference to ethical considerations, according to the size of sum owed, according to the need of each individual creditor and their inability to sustain losses, payment on public policy grounds, etc.

71 If an insolvency system is to function properly for creditors it must have qualities that encourage engagement. Conversely, the chicanery and trickery that a complicated insolvency system might engender for creditors might not be attractive to them as users, but complexity, cost, etc., may be attractive to debtors seeking to avoid bankruptcy and all that it entails. If creditors are put off engaging in the system then this will benefit non-paying debtors in some circumstances. Simplicity and efficiency in regulation must however generally prevail – for creditors at least.

Credits in Re Kekhman

72 In Kekhman, it was seen that an English bankruptcy would allow for the investigation of Kekhman’s affairs and an orderly realisation of assets for the

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105 OFT Report, above note 61, at paragraph 5.3.

106 Milman Priority, above note 101.

benefit of his creditors as opposed to realisation on a first come first served basis, i.e. collectivisation of creditor interests. It was also noted that:

“there is a reasonable probability that there is utility to the bankruptcy and benefit to creditors as a whole.”

73 Benefiting creditors in this collectivized manner has long been a function of insolvency law as has been discussed in the second point under the first part above. This creditor fight is perhaps the essence of Kekhman, i.e. a battle for value between individualized pursuit by creditors in the Russian jurisdiction “to the crack of doom” as compared with collectivization and the equality of treatment that the creditors would receive pursuant to English law. That this creditor focused principle and potential benefit is recognised in international circles is laudable. That the English bankruptcy jurisdiction is viewed as a place to do business, in the Delaware effect sense, is positive for our system. English personal insolvency law is filling the lacunae.

74 Realisation (prior to collectivisation and subsequent distribution) of the debtor’s assets on behalf of creditors is a key function of any insolvency law particularly viewed from the creditors’ perspective. Appropriate tools must be to hand for the Trustee in Bankruptcy to allow them to fulfil this function. However, the usefulness or “utility” of the bankruptcy:

“cannot be equated solely with a return to creditors, desirable though that outcome must always be.”

75 The Kekhman judgment shows that the (largely corporate) case law on utility focuses on utility from the point of view of creditors. However, Kekhman goes further and develops the corporate authorities and policy considerations to reach the conclusion that utility included other factors (i.e. orderly realisation, etc.) but that debtor rehabilitation was now a major factor, and that, together with the other matters considered, had now to inform the exercise of the discretion to make a bankruptcy order and in that case the discretion whether or not to annul.

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108 Re Kekhman, at paragraph 27.
109 Ibid., at paragraph 81.
110 On recent reforms to the Chancery jurisdiction that are aimed at improving this international competitiveness of the bankruptcy and insolvency jurisdiction see Briggs Chancery, above note 7. In relation to international work and standing Lord Justice Briggs noted, “…the Registrars currently provide a national centre of excellence. They are the only judges in the country who work full time in insolvency and company matters. They are recognised as experts, and cases are transferred to the High Court with that in mind. Their judgments are regularly reported in specialist series of insolvency reports. Their work on major company reconstructions and schemes has both national and international importance, and involves assets worth enormous sums.” (at paragraph 11.19).
111 Re Kekhman, at paragraph 140.
112 Although the Chief Registrar does explain that some cases go beyond that.
The following paragraphs go some way to prove this contention looking at the qualities of a bankruptcy jurisdiction from the perspective of other interested parties.

The Need for a Bankruptcy Jurisdiction in the Debtor’s Home Jurisdiction

It is impossible to go bankrupt in the technical legal sense (as opposed to insolvent in a factual sense) if a given jurisdiction does not have a bankruptcy system. This was the position in English law for non-trader insolvents until the year 1869. From 1542 until 1869, only traders could make use of the bankruptcy system. Imprisonment for debt as a parallel and separate system remained the lot for all other insolvents. The coming of general limited liability for commercial purposes via the vehicle of limited companies and the parlous state and inefficiency of debtors’ prisons spelt the death knell for that debtor treatment.113

The lack of a bankruptcy regime (i.e. Japan and Russia), as opposed to an unfavourable one (i.e. Germany and hitherto Ireland),114 could be a motivating factor for a debtor to seek bankruptcy relief in a jurisdiction other than the one he or she is domiciled in. This is clearly highlighted in Kekhman with a Russian and English divergence of approach to personal insolvency that is at its very starkest. The two jurisdictions in question tell a tale of the have and the have-nots in terms of the very existence of a personal insolvency system.

Whether creditor, debtor or State a bankruptcy law is surely an axiom in modern society. With increasing international commercial interests (as Kekhman illustrates) and in any society where credit exists, there must be an answer to the breakdown in credit relationships. As Fletcher notes in his 1978 bankruptcy treatise:

“But closely linked to this need for credit, particularly in our society in which commerce plays such a ubiquitous role, is the need for a law of bankruptcy, to make provision for that state of insolvency which can unfortunately occur as a consequence of credit.”115

If we have credit we must have a bankruptcy law. It is sometimes necessary for individuals and companies whose means are limited, to make use of credit. This credit enables them to conduct an existence that they would not otherwise be able to sustain because of their limited means. Credit is therefore a mechanism for enabling an artificial, temporary extension of an individual’s financial status. The

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115 Fletcher Bankruptcy, above note 3, at 1.
individual is temporarily placed in a financially superior position to that which he would normally be in if he did not have the benefit of credit. Credit could therefore be defined as a tool of assistance (indeed existence in some cases) that enables temporary financial capacity expansion, increasing the borrower’s pecuniary power. As Ziegel has noted, the general and widespread availability of credit (even with the so called “credit crunch” reducing the incidence of credit availability) has become an axiom of modern times. This is not a new phenomenon. Writing in 1972, Ziegel observed:

“...the consumer bankrupt is not the sole author of his own misfortune. As often as not his creditors have substantially contributed to his difficulties by creating an environment in which the buy now, pay later syndrome has created the dominant characteristic of our consumer age.”

81 The main justification promulgated for insolvency law’s existence and its ability to intervene in private contracts is the notion of credit extension protection and the corollary continuance of a credit based society. Such a society normally allows for greater growth than an economic structure not based on credit (e.g. Cuba). For companies and individuals to prosper and grow successfully the argument goes that they must have access to credit, i.e. additional disposable money to that which they possess or have the capacity to earn in the short term. This is a key tenet of capitalism. If this protection from defaulters who have obtained credit, i.e. people who did not pay for credit extended to them, did not exist to enable, inter alia, banks to enforce and recover at least some of their exposure.

The Prospect of the Debtor’s Protection, Financial Rehabilitation and Discharge from Debts

82 This brings us to a consideration of an issue at the very heart of this article. At paragraph 76 of his Kekhman judgment, the Chief Registrar observed:

“...the court should only make a bankruptcy order or grant similar relief in respect of a foreign individual or an overseas corporation if there is utility or some benefit in doing so.”


118 Re Kekhman, at paragraph 76 (author’s stalicized emphasis).
83 This raises perhaps the most important point as regards a debtor’s interest in the bankruptcy jurisdiction – why is the debtor engaging with the bankruptcy process or what is English personal insolvency law for from the debtor’s perspective?

84 Protection from the relentless pursuit of creditors (individually) has long been an aim of insolvency law. This is a truism in modern practice. By collectivising creditor interests the bankruptcy system forestalls individualised pursuit by creditors. This provides a form of relief to the debtor (in addition to the race to the bottom benefits to creditors). In relation to such relief, Fletcher has noted in the context of international bankruptcies that:

“Although English law regards bankruptcy as a legitimate means of enabling a debtor to extricate himself from an inexorable burden of indebtedness, it is resolutely averse to any exploitation of the procedure by cynical or feckless persons.”

85 This relief quality, balanced against misuse, will then lead to the debtor’s rehabilitation which is now a key function of modern personal insolvency. As the Chief Registrar notes in the context of Kekhman:

“Rehabilitation (or the possibility of rehabilitation) of the debtor appears to have been a consideration for some time but is now, I suggest, a major factor to be taken into account. The law of bankruptcy has developed over the years to relieve debtors as well as to give an orderly remedy to creditors.”

86 In a concise exposition of the history of bankruptcy rehabilitation over thirty years, the Chief Registrar continues:

“…The last century saw considerable further liberalisation of the bankruptcy regime with the introduction by the Insolvency Act 1986 of individual voluntary arrangements and automatic discharge from bankruptcy after three years. In the late 1990s the Department of Trade and Industry became interested in American liberal approaches to bankruptcy and published Bankruptcy – A Fresh Start (2000) and a white paper, Productivity and Enterprise: Insolvency – A Second Chance (2001). The three-year discharge period was reduced under the Enterprise Act 2002 to one year or less in certain cases. Emphasis was given to debtor rehabilitation in a way never seen before, so that benefit to the debtor of the various procedures introduced assumed an importance it had not hitherto enjoyed.

Those developments went hand in hand with an increase in consumer debt leading to the use of debtors’ petitions on an unprecedented scale. In the late 1990s in the High Court we rarely saw more than five debtors’ petitions a day at most; by the 2000s we were having to deal with 20-40 a day, almost all of them showing credit card debt of between GBP 30,000 up to GBP 150,000, virtually all of them presented by debtors with no assets whatsoever.

…Rehabilitation of the debtor is, in my view, now a firmly established purpose of our bankruptcy law.”

119 Fletcher International, above note 2, at paragraph 2.39.
120 Re Kekhman, at paragraph 113.
121 Ibid., at paragraphs 113, 114, 116.
87 In counsel’s argument it was noted that:

“What [Kekhman] in fact seeks is his discharge in one year from his English debts (which totaled GBP 316 million, and a substantial amount of which arose pursuant to English law guarantees).”\(^{122}\)

88 This is relief and rehabilitation on a massive scale.\(^{123}\) Without such relief there can be no rehabilitation. Having a tranche of citizens permanently burdened by debt does not help society. This is why Parliament abolished imprisonment for debt in 1869.\(^{124}\) Without a bankruptcy law we would have a similar position now, much as Russia has, and the very reason why Kekhman sought relief in the English and Welsh courts. In that sense the Kekhman bankruptcy certainly had utility. The utility was for the debtor in providing a relief and rehabilitation mechanism. English law personal insolvency law again fills lacunae, this time because of the absence of rehabilitation procedures in the debtor’s domicile country.

89 This social benefit was summarised neatly by Vaughan Williams, J in *Ex parte Painter* when he observed:

“...the interest that the State had in a debtor being relieved from the overwhelming pressure of his debts, and that it was undesirable that a citizen should be so weighed down by his debts as to be incapacitated from performing the ordinary duties of citizenship.”\(^{125}\)

90 In addition to debtor rehabilitation, the Kekhman case also highlights a number of further considerations on the nature and function of a personal insolvency law.

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\(^{122}\) Ibid., at paragraph 28.

\(^{123}\) It could be argued that the greater the relief from indebtedness the larger the petition fee a debtor should have to pay for that relief. For example someone in Kekhman’s circa GBP 316,000 million exposure position ought to pay a petition fee of GBP 30,000. Conversely someone who owes much less, say GBP 9,000, should only pay a GBP 500 petition fee. On this approach see further J. Tribe, “The Cleo Conundrum: financing the cost of personal insolvency relief with particular historical reference to bankruptcy revenue stamps”, in Society of Legal Scholars (SLS) Annual Conference 2013: Tis 40 Years Since: Britain and Ireland in Europe, Europe in Britain and Ireland; 3-6 Sep 2013, Edinburgh, U.K. (Unpublished).


\(^{125}\) *Ex parte Painter* (1895) 1 QB 85, at 88.
Qualities of the Given Jurisdiction, i.e. Exempt Property, Clawback Provisions in Terms of Antecedent Transactions, Realisations and *Pari Passu* Distribution

**Exempt Property**

91 As the *Kekhman* case demonstrates different jurisdictions have different qualities in terms of their personal insolvency regulation. In addition to whether or not a bankruptcy system exists at all, there are also differences in the ingredients of that bankruptcy law, where one exists. It is all in the minutiae of the regulation. So for example in England and Wales one of the interesting features of our law relates to the property exemptions that section 283(2) of the Insolvency Act 1986 provides. The section states:

“…(2) Subsection (1) does not apply to—
(a) such tools, books, vehicles and other items of equipment as are necessary to the bankrupt for use personally by him in his employment, business or vocation;
(b) such clothing, bedding, furniture, household equipment and provisions as are necessary for satisfying the *basic domestic needs of the bankrupt and his family.*”

92 Mr Kekhman had been spending almost GBP 50,000 a month on school fees and support for his wife and children. This is a very large figure and one that would certainly not survive the scrutiny of a Trustee in Bankruptcy. School fees have however been allowed in past cases as something which constitutes the basic domestic needs of a family. That this unusual type of expense would even be considered by an English court talks to a humane approach that is laudable.

**Antecedent Transactions**

93 There were a number of assets purportedly in Kekhman’s estate that highlight antecedent transactions. For the value of such assets to be clawed back into the estate the relevant jurisdiction must contain provisions that allow clawback. English law contains such provisions that ultimately benefit creditors so this quality of an insolvency law could equally fall under the creditor benefit heading above.

94 Orderly distribution of the proceeds of the assets of an estate is an important aspect of a personal insolvency law. This may be by virtue of the long history of *pari passu* distribution, which the Chief Registrar considered as better than “the law of the jungle…”

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126 On this section see Fletcher, above note 55, at paragraph 8-076.
127 Section 285(2), Insolvency Act 1986 (emphasis supplied).
128 See *Scott v Davis* [2003] BPIR 1009.
129 See *Tribe, Morgan and Smyth*, above note 8.
130 *Re Kekhman*, at paragraph 141.
Recognition of the Bankruptcy Proceedings in other Jurisdictions

95 Much of Fletcher’s work has concentrated on this issue, namely, the recognition of insolvency laws in jurisdictions other than those that promulgated them. One of the major issues that arose in the Kekhman case was the potential recognition or non-recognition of the English bankruptcy proceedings in Russia. As the Chief Registrar observed:

“The trustee said that he had not sought recognition of the bankruptcy in Russia since he understood that the proceeds of sale of the arrested assets located in Russia would be distributed to the Russian creditors.”

96 This raises another important creditor focused value, namely, the recognition of a given bankruptcy law in a foreign jurisdiction. Re Thulin is an apposite authority on this point. The case involved an appeal from Mr Registrar Pimm against a bankruptcy order. Mr Jules Sher QC heard the appeal sitting as a deputy High Court judge. The debtor was subject to bankruptcy proceedings in Sweden. He had no assets in England and Wales. In relation to the qualities of the English and Welsh bankruptcy and jurisdiction the deputy judge observed:

“[T]he English bankruptcy may yield benefits by way of reaching assets in a foreign country through recognition of the English bankruptcy by, and assistance of, the courts of that foreign country. Such assets may not be capable of being recovered by the Swedish trustee in bankruptcy in the same way, or at all. Given the international connections of the debtor and the improvement since the days of Ex parte Robinson in international communications, and the capacity to move funds and assets across international boundaries and across the seas at the press of a button, I do not see why the petitioning creditor should be deprived of what would otherwise be its right to a bankruptcy order simply because there are, at the present time, no assets physically located in England, and I have seen nothing in the authorities cited to me to show that in such a case the court’s discretion should be exercised by dismissing the petition.”

97 The ability for a creditor to have both a bankruptcy recognised, but also granted in a given jurisdiction (even where no assets currently reside), are therefore important qualities that must be considered when designing a bankruptcy law.

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131 See for example Fletcher International, above note 2. See also I. Fletcher, “Towards a Next step in Cross-Border Judicial Cooperation” (2014) 27(7) Insolvency Intelligence 100-105; I. Fletcher, “Rowing Back from Rubin: the Court of Appeal Reaffirms the Policy of Modified Universalism in the Granting of Judicial Assistance” (2014) 27(3) Insolvency Intelligence 43-47.
132 Re Kekhman, at paragraph 21.
133 [1995] 1 WLR 165.
134 As cited in Re Kekhman, at paragraph 48 (emphasis supplied).
Proper Investigation and Administration of the Debtor’s Affairs

98 Insolvent estates must be administered. The conduct of the debtor leading up to the insolvency must also be investigated. In the Kekhman context this first quality of a personal insolvency law would be:

“the possibility of an orderly arrangement of [Kekhman’s] affairs as opposed to a disorderly asset grab and the economic rehabilitation of [Kekhman] himself.”

99 In relation to an orderly arrangement of affairs the Chief Registrar noted that:

“...sensible creditors may use his office to create order where otherwise there would be chaos.”

100 Investigation is also a key consideration. As the Chief Registrar notes:

“The cases make plain that investigation of the debtor’s affairs can be an important consideration.”

Conclusion

101 In the first part, six qualities of a personal insolvency law have been examined. These areas were: (1) discharge; (2) collectivization; (3) distribution; (4) punishment; (5) accessibility, and; (6) stigma. Apart from punishment, these qualities currently exist in English and Welsh personal insolvency law. There is a long history of policymaking, and subsequent legislation that touches upon or directly enacts provisions that reflect these qualities. It is not necessarily the case that because of this long held usage these qualities are correct but it is however historical baggage that we have.

102 As noted above, a Benthamite abolition of the current approaches is not advocated in this article. Indeed, the far-reaching reforms of 1986 did not seek wholesale abolition, merely a continuum of existing approaches in a more liberal form. This is not because of some Manson linked malaise or conservative mindset, but perhaps because those qualities do reflect the current best practice and policy in the area. They are in that sense paradigmatic. That said it would be complacent not to think deeply about policy and the subsequent legislation that might spring from those ruminations. Change for change’s sake is not only time consuming and costly, but also sometimes unnecessary because what already exists is appropriate.

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135 Ibid., at paragraph 80.
136 Ibid., at paragraph 142.
137 Ibid., at paragraph 133.
103 In the second part, we examined six further qualities of a personal insolvency law against the backdrop of a recent judgment of the Chief Registrar in Bankruptcy, namely, *Kekhman*. The areas and questions that were examined were: (1) should bankruptcy exist to benefit creditors? (2) The absence of a bankruptcy jurisdiction in the debtor’s home jurisdiction; (3) The prospect of the debtor’s protection, financial rehabilitation and discharge from debts; (4) Qualities of the given jurisdiction, i.e. exempt property, clawback provisions in terms of antecedent transactions, realisations and *pari passu* distribution; (5) Recognition of the bankruptcy proceedings in other jurisdictions, and; (6) Proper investigation and administration of the debtor’s affairs.

104 It was shown that these six areas were ones that were highlighted by the Chief Registrar in *Re Kekhman* and that accordingly are areas that provide a policy starting point for future legislation. They are not exhaustive, but they are a start, particularly when coupled with the insolvency axioms examined in the first part.

105 The recent judgment of the Chief Registrar in *Re Kekhman* perhaps however also sets an agenda for future policy making in that the judgment contains a thorough analysis of the utility of bankruptcy from various stakeholder perspectives. In so doing the Chief Registrar has shown that the balance of for whom utility should be exercised has moved from creditor expectations of the utility of bankruptcy towards debtor expectations of the utility of bankruptcy. In so doing emphasis has moved from creditor realisations and distributions towards debtor rehabilitation as a preeminent function of English personal insolvency law. When answering the question of what English personal insolvency law is for we might respond: largely for rehabilitating the debtor.

106 Does *Kekhman* reflect the aims of a good modern insolvency law promulgated by the Cork Committee and IMF (if these are taken to be exhaustive) that are relevant or the “insolvency axioms” outlined in this article? The *Kekhman* judgment does reflect three of the aims of Cork, namely, the realisation of the possessions of the insolvent the distribution of the proceeds of realisations amongst creditors (both through the granting of a bankruptcy order), but perhaps most clearly:

“to relieve and protect where necessary the insolvent from any... undue demands by his creditors.”

It is this shift towards rehabilitation that is at the crux of *Kekhman* and our current vision of English personal insolvency law.

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139 Cork Report, at paragraph 198(j). It could be argued that the other aims promulgated by Cork are not relevant to personal insolvency.
107 The Kekhman judgment also reflects a number of the insolvency axioms examined in the first part of this article, namely, discharge, collectivisation and distribution (through the granting of the bankruptcy order) as well as the qualities examined in the second part, perhaps most importantly, the prospect of the debtor’s protection, financial rehabilitation and discharge from debts. The fact that the Kekhman judgment emphasises the shift towards rehabilitation and relief as a central utility of bankruptcy is what makes the case a touch point for future policy considerations. The Kekhman judgment does not do violence to current policy as enunciated by the Insolvency Service and the spirit of the Enterprise Act 2002, indeed, the judgment facilitates the legislative intention behind the statute and affords Kekhman much needed relief and rehabilitation. The Chief Registrar achieves this outcome by weighing up case law on utility and policy considerations reaching the correct conclusion that utility included the various factors enunciated in both parts of this article but that debtor rehabilitation is now a major factor to be considered to inform the exercise of the discretion to make a bankruptcy order and in that case the discretion whether or not to annul. This is a reflection of current policy, but also of what a modern credit based economy must surely afford a hopelessly insolvent debtor such as Kekhman.

108 In one of his most recent pieces of writing, noteworthy particularly as a distillation of over forty years of experience dealing with insolvency, Fletcher has observed that there exists one school of thought which would accept as received wisdom that:

“our insolvency laws were the embodiment of rational and humane policies whose aim and effect were to provide relief for the ‘honest but unfortunate’ debtor…”

140 Fletcher Gospel, above note 17, at 525. Fletcher has touched on this humane quality before. See Fletcher Insolvency, at paragraph 1-009.

109 If our personal insolvency laws are to be effective they must as a matter of policy development seek to achieve that which the end user, the debtor, needs as part of relief from personal over-indebtedness. If rhetoric does not match reality and practice, particularly as regards important qualities such as humane treatment of debtors, then we are in a sorry state.

110 It is the close connection between the black letter expression of the law, and its practical use that is perhaps one of Fletcher’s greatest legacies to the law of insolvency. Through decades of work on the subject he has shown that for a thorough understanding and development of policy, leading to legislation, we must test and appreciate how that law might work in practice and how it might impact on the insolvent user and their professional advisers. Law does not exist in a vacuum. Many circumstances dictate how that law might affect debtors. Those factors should be taken into account when formulating policy on a rational, considered and thoughtful basis. It is then that we can formulate:
“constructive proposals for the progressive improvement of law and practice.”

Whatever proposals are formulated in future policy making the above qualities that have been discussed can be distilled into seven broad points. I tentatively propose that the following qualities should be exist in any personal insolvency regime:

1. Debt forgiveness mechanisms.
2. Automatic discharge after a sufficient period.
3. Rehabilitation and relief mechanisms.
4. Measures to ensure individuals do not engage in irresponsible credit use.
5. Fetters on credit use during insolvency procedures.
6. Divesting the bankrupt of control of his estate for a period of time.
7. Procedures to claw back any assets that have been disposed of in fraud of creditors.
8. Fresh Start mechanisms.

Fletcher Gospel, above note 17, at page 526.
