



The Francovich Principle as the Basis of State Responsibility for Laborers Loss Due to Company Bankruptcy

Agus Widyantoro¹; Moch. Marsa Taufiqurrohman²; Xavier Nugraha³

Faculty of Law Airlangga University^{1,3}; Faculty of Law Universitas Padjadjaran²

Corresponding author's email: agus.widyantoro@fh.unair.ac.id

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Abstract

The absence of legal certainty in the application of the *pari passu pro rata parte* principle in the distribution of bankrupt accounts in Indonesia has given rise to uncertainty regarding the protection of the rights of laborers whose employers or companies have faced bankruptcy. This article considers that Indonesia requires a set of formulations enabling the state to provide legal protection for the rights of laborers affected by employer or company bankruptcy. The article explores the feasibility of adopting the Francovich Principle in Indonesia, defining it as a principle holding the state accountable for the losses incurred by laborers due to company bankruptcies. The article concludes that several conditions must be met to apply the Francovich Principle, including the establishment of a guarantee institution, the obligation for financial contributions from companies, and the implementation of specific measures to prevent abuse. The state's effort to adopt the Francovich Principle involves establishing a priority scale in drafting laws related to the Francovich Principle into the Priority National Legislation Program. Furthermore, the government needs to revitalize institutions related to the Francovich Principle within the national legal and regulatory system.

I. Introduction

Indonesia Constitutional Court (ICC) Decisions Number 18/PUU-VI/2008 and Number 67/PUU-XI/2013 assert that creditors share a common position in bankruptcy cases; however, the execution process is governed by the ranking or priority of the debt. In these decisions, the ICC emphasized that the purpose of general confiscation in bankruptcy is to enable the debtor to settle the obligations to all creditors based on the creditorium parity principle and the *pari passu pro rata parte* principle. ([Kamahayani & Margono, 2020](#))

Article 156 paragraph (1) of the Indonesia Law Number 13 of 2003 on Labor (Law 13/2003) stated that laborers must be the first recipients to the distribution of bankruptcy debt ([Kurniawan et al., 2020](#)). Given their vital role in company operations, laborers possess a significant standing, and their entitlements are on par with non-governmental creditors, determined by mutual agreement. ([Pradiendi et al., 2015](#)). Laborers' rights have become a priority after settling tax bills and separatist debts in bankruptcy cases. This is referred to as the creditorium parity principle and the *pari passu pro rata parte* principle, which determines that creditors have the same rights to the debtor's assets unless there are valid reasons for them to take precedence ([Putra, 2014](#)).

Despite the existence of the creditorium parity principle and the *pari passu pro rata parte* principle, empirical fact and practical application shows that not all creditors have the same position in the distribution of bankruptcy debt ([Simanjuntak, 2020](#)). This problem gives rise to *quo vadis* related to the meaning of bankruptcy. As time goes by, bankruptcy should be interpreted not only in terms of the assets regime, which is intended as an effort to protect creditors from actions carried out by debtors, which can harm the interests of creditors, especially in relation to debtors' debts which are included in bankruptcy assets ([Kamahayani & Margono, 2020](#)). A new meaning must be attached to the term bankruptcy, which is oriented towards protecting the relationship between parties whose rights are assured and protected by laborers. This shift is necessary as laborers have fulfilled their imposed obligations, entitling them to the promised rights ([Marbun, 2017](#)).

However, Articles 55, 56, 57 and 58 Law Number 37 of 2004 on Bankruptcy and Postponement of Debt Payment Obligations (Law 37/2004) indicates that in the case of a bankrupt company, holders of material security rights (such as pledges, fiduciaries, mortgages and mortgage rights and other material rights) are positioned as separatist creditors. While laborers are legally positioned as preferred creditors for the outstanding bills owed to them by the company, this preferred position as preferred creditors does not provide adequate protection. The position of laborers as preferred creditors remains threatened by (the rights of) other creditors who holds equal priority status but possessing a higher position—specifically, separatist creditors who hold collateral rights in pledges, fiduciaries, mortgages, or mortgage rights.

This meaning stems from the reason that the fact that the term “bankruptcy” is associated with a company, and it underscores the indispensability of laborers as an integral component of the company's working capital for sustaining productivity. ([Shubhan, 2014](#)). This does not deny the importance of other elements of a company for it to operate. This meaning can be termed legal protection for laborers, which is intended to protect the rights of these laborers. The legal objectives underlying this protection consist of benefit, justice, and certainty ([Pratama, 2019](#)). This article considers that this protection cannot be created if the state is not directly present in protecting these rights.

In light of the discussion on this issue, this article contends that Indonesia requires a set of formulations to establish legal protection by the state for the rights of laborers whose employers or companies they work for have gone bankrupt. In practice, several

European Union member countries have implemented state intervention to provide legal protection for the rights of laborers in the event of employer or company bankruptcy. The legal protection provided by the state is known as a principle called the Francovich Principle.

The Francovich Principle is a principle that holds the state accountable for compensating laborers who suffer losses resulting from companies going bankrupt. The Francovich Principle, in its application, is considered capable of providing legal protection for the rights of laborers whose employers or companies where they work have gone bankrupt. Insolvency Protection Directive 80/987 (now 2008/94/EC) requires each European Union member country to implement national regulations that provide minimum guarantees for laborers whose wages have not been paid when their company goes bankrupt. Armed with these norms, Francovich, who worked at SDN Elevation SnC, and Boniface et al., who worked at Gaia Confezioni Sri, filed a lawsuit against the state of Italy. They argue that under Directive 80/987, the state of Italy must pay compensation for the losses suffered by laborers because Italy failed to implement the Directive.

This article seeks to address several questions. Firstly, it explores the issue of liability for laborer losses arising from a company's bankruptcy. Secondly, it examines the feasibility of applying the Francovich Principle as a foundation for attributing state responsibility in cases of laborer losses due to company bankruptcies. Many studies have analyzed the problems of protecting laborers whose employers/companies where they work have gone bankrupt, such as discussions regarding the rights of laborers who have been laid off in connection with bankrupt companies (Putri & Dharmawan, 2018), the problematic position of laborers in bankrupt companies ([Budiyono, 2013](#)), the protection of laborers in terms of paying wages by companies affected by bankruptcy decisions ([Vina, 2016](#)), the company's responsibility for fulfilling laborers' wages in the bankruptcy settlement process ([Sari & Yunus, 2019](#)), as well as discussions regarding legal harmonization as legal protection for laborers in bankrupt companies viewed from the perspective of the fifth Pancasila principle ([Kurniawan, 2015](#)). However, there has yet to be any research that describes substantively and in detail the possibilities and opportunities for the state to be directly present in protecting the rights of laborers whose employers/companies where they work have gone bankrupt (F Yudhi Priyo Amboro, 2022). In particular, there has yet to be any research that discusses and analyzes how formulations can define ways for the state to be able to guarantee the rights of laborers whose employers/companies where they work and go bankrupt can be effectively protected.

In answering these questions, this article is organized into several parts. After the introduction, the second part of this article will discuss the issue of liability for laborer losses resulting from companies going bankrupt. The third part will examine the feasibility of applying the Francovich Principle as a basis for state responsibility for laborer losses resulting from companies going bankrupt. At the end, several conclusions and recommendations will be outlined.

This research employs a doctrinal normative legal research method, complemented by the Reform Oriented Research method, political science, and legislative analysis. Normative legal research includes research on legal products, legal principles, legal systematics, vertical and horizontal legal synchronization, and legal comparisons, including the history of existing law ([Irwansyah, 2020](#)). Doctrinal research examined the probability of implementing the Francovich Principle concept in Indonesia. This research begins by looking at existing law and then by considering the issues that influence it and the legal politics underlying it.

Furthermore, this research also includes a legislative approach. This approach is carried out by reviewing all laws and regulations related to the legal issue discussed. The laws studied in this research include Law 13/2003, Law 37/2004, Indonesia Law Number 6 of 2023 on the Stipulation of Government Regulations in Lieu of Law Number 2 of 2022 concerning Job Creation into Law (Law 6/2023), and Government Regulation Number 35 of 2021 on Specific Time Work Agreements, Outsourcing, Working Time and Rest Time, and Termination of Employment Relations (GR 35/2021).

This research also combines the Reform Oriented Research method as this method is carried out to evaluate the feasibility of existing rules and recommend changes to the existing rules deemed necessary. This model is based on legal reform research methodology to provide advice on changes to existing laws ([Efendi et al., 2019](#)). Ultimately, this model guides the researchers to propose a conceptualization of legal grounds in the law enforcement process.

II. Liability Issues for Worker Losses Due to Companies Going Bankrupt

Etymologically, the term “bankruptcy” originates from the word “bankrupt,” which, in turn, is derived from the French word *Faillite*, which signifies a condition of strike or a payment deadlock. The individual who ceases payment or goes into bankruptcy in French is called *Le Failli* ([Hartini, 2020](#)). The verb *failli* means to fail. In English, it is known as the word to fail, which has the same meaning in Latin, namely failure ([Situmorang, 1994](#)). Countries with English-language pages commonly use the terms “bankrupt” and “bankruptcy” to define insolvency and the state of being insolvent. ([Shubhan, 2015](#)). The term “bankruptcy” in English, referred to as “bankrupt”, comes from a law in Italy called *Banca Rupta*. Medieval Europe saw various types of bankruptcy in the form of banks being destroyed by bankers or merchants who ran away secretly with the assets of their creditors ([Nugroho, 2018](#)).

By looking at the various definitions above, bankruptcy can be interpreted as an action taken by creditors to protect their receivable assets from the actions of debtors who owe them due to their inability to pay according to the promises they have made and the debt that has become due ([Wijayanta, 2018](#)). Indonesia recognizes the word bankruptcy starting from the rules relating to bankruptcy itself as part of the Indonesian

legal system, especially the property law regime ([Silaban et al., 2023](#)). This connection can be seen in how Indonesian law recognizes it with the existence of regulations regarding bankruptcy since the Dutch colonial era, which was regulated through *faillissement verordenening*, *Staatblad* 1905217 jo 1906 348.

Bankruptcy in modern positive law in Indonesia is defined as the general confiscation of a bankrupt debtor's assets to liquidate them and then distribute the proceeds of sale to all creditors based on the principles adopted by a country. Empirically, companies that go bankrupt experience acute financial problems. This is characterized by the ratio of assets to debt. There are 2 (two) main benchmarks for measuring the inability to pay debts, namely the cash flow test and the balance sheet test ([Goode, 2011](#)).

Existing legislation in a country generally regulates the level of creditor positions ([Yatna & Purwanti, 2020](#)). Creditors with a higher position are granted priority in having their debts fulfilled first. Any remaining distribution is then allocated to creditors one position below. This payment model applies to all preferred creditors. Meanwhile, for concurrent (competing) creditors, payments are subject to the principle of proportionality.

Theoretically, the position of creditors in a bankruptcy case can be divided into 2 (two), namely preferred (special) creditors and concurrent (competing) creditors. Fulfillment of preferential (special) creditor receivables is carried out based on levels by statutory regulations. Meanwhile, the fulfillment of concurrent (competing) creditor receivables is subject to the *pro rata pari passu parte* principle. Black's Law Dictionary defines *pari passu* as "proportionality; at an equal pace; without preference." Etymologically, *pro rata* comes from the words *pro* ("according to, for, by") and *rata* ("rate or change"). Meanwhile, *pro rata* means, first, proportionality to some factor that can be precisely calculated; second, to calculate based on the amount of time that has passed out of the total time; third, Proportional Ratio ([Black et al., 1999](#)).

Indonesia has several sources of regulations regarding creditors position. The main regulations are the Indonesia Civil Code, Law 37/2004, and Law 13/2003. Article 1149 of the Civil Code regulates the order of preferred creditors as follows:

"Receivables for all movable and immovable property are generally those mentioned below and are billed in the following order:

1. court costs arising solely from the sale of goods as the implementation of a decision regarding claims regarding ownership or control and saving property; it takes precedence over pledges and mortgages;
2. burial costs, without reducing the Judge's authority to reduce them if the costs are excessive;
3. all final medical expenses;
4. laborers' wages from the previous year and outstanding payment for the current year, as well as the amount of wage increases according to Article 160 q; the amount of laborer expenditure incurred/carried out for the employer; the amount owed by the employer to the laborer based on Article 1602 v fourth paragraph of the Civil

Code or Article 7 paragraph (3) “Labor Regulations in Plantation Companies”; the amount owed by the employer at the end of the employment relationship based on Article 1603 s bis to the labor; the amount owed by the employer to pay to the family of a laborer due to the death of the laborer based on Article 13 paragraph (4) “Labor Regulations in Plantation Companies”; what is due under the “1939 Accident Regulations” or “1940 Ship Crew Accident Regulations” must be paid to the labors or crew members or their heirs along with debt claims based on the “Regulation on the Repatriation of Workers Received or Deployed Abroad”;

5. receivables due to the delivery of food ingredients, which were made to the debtor and his family during the last six months;
6. receivables from boarding school entrepreneurs for the last year;
7. receivables from children who are still minors or under the care of their guardians or custodians regarding their management, as long as they cannot be collected from mortgages or other guarantees which must be made according to Chapter 15 of the First Book of the Civil Code this, as well as allowances for maintenance and education that parents must still pay for their legal children who are still minors.”

Based on the provision above, laborers are preferred creditors to their employers that gone bankrupt for any unpaid laborer rights. However, according to Article 1149 of the Civil Code, the position of laborers as preferred creditors is in fourth place, namely after auction costs, creditors holding material collateral (pawns, fiduciaries, security rights, mortgages, and other material rights), and burial/medical costs.

Law 13/2003 also regulates the level of laborers’ claims for wage payments as receivables, which holds priority in receiving payment. Article 95 paragraph (4) of Law 13/2003 states:

“In the event that a company is declared bankrupt or liquidated based on applicable laws and regulations, wages and other rights of laborers are debts whose payment takes priority.”

This provision aligns with Article 1149 of the Civil Code, which equally positions laborers as preferred creditors. However, Law 13/2003 does not strictly regulate the order in which creditors are privileged.

In Law 37/2004, the responsibility for payment or fulfillment of obligations is absolutely in the hands of the debtor. If the debtor is declared bankrupt, the fulfillment of obligations towards laborers depends on how much of the proceeds from the bankruptcy debt are distributed. Even though there is the principle of creditorium parity and the *pari passu pro rata parte* principle, the fact is that not all creditors have the same position in the distribution of bankruptcy debt ([Sutan Remy Sjahdeini, 2016](#)). In Law 37/2004, the order of preferred creditors is not regulated. However, referring to Articles 55, 56, 57, and 58, it can be concluded that in the case of a bankrupt company, the holders of material security rights (pledges, fiduciaries, mortgages, and mortgage rights as well as other material rights) are positioned as separatist creditors ([Santoso, 2018](#)).

In 2008, the Federation of Indonesian Trade Union Association (FISBI) tried to challenge the provisions on the division of bankruptcy debt through the Indonesian Constitutional Court Decision Number 18/PUU-VI/2008. FISBI argued that laborers' basic wages were among the priority payments when their company was declared bankrupt. The state regulates the bankruptcy provisions, including the curator honorarium rules. However, no phrase nor sentence mentions the state's responsibility if laborers' rights are harmed when their company goes bankrupt. In its legal considerations, the ICC rejected FISBI's application with the following legal arguments:

"The Court gave a legal assessment that Article 29, Article 55 paragraph (1), Article 59 paragraph (1), and Article 138 of the Law 37/2004 have provided legal certainty, have even given creditors the right to claim reasonably, providing guarantees of protection for every separatist creditor, including laborers or employees under Article 28D paragraph (2) of the 1945 Constitution, with the following considerations:

- 1. Whereas the reasons and arguments of the Petitioners state that the provisions of Article 29 of Law 37/2004 do not provide fair legal certainty and equality before the law for laborers in seeking justice as guaranteed by Article 28D paragraph (2) of the 1945 Constitution, according to the Court, Article 29 of the quo law is imperative which requires creditors including labors to comply with a statement or determination of a curator under the supervision of a supervising judge;*
- 2. Whereas according to the Court, the legal reasons and arguments of the Petitioners stating that Article 29 of the Law 37/2004 conflicts with Article 28D paragraph (1) of the 1945 Constitution are not legally correct and have no legal basis because Article 29 of the Law 37/2004 still provides recognition, guarantee, protection, and equality before the law for Petitioners who can still claim their rights to the curator as clearly stated in Article 115 paragraph (1) and paragraph (2) of the Law 37/2004, which states:*

Paragraph (1):

"All creditors are required to submit their respective receivables to the curator accompanied by calculations or other written information indicating the nature and amount of the receivables, accompanied by the proof or copies thereof, and a statement of whether or not the creditor has privilege, lien, fiduciary security, mortgage, hypothec, other collateral rights, or the right to withhold objects."

Paragraph (2):

"For the delivery of receivables as intended in paragraph (1), the creditor has the right to request a receipt from the curator";

- 3. Whereas as long as the legal reasons and arguments of the Petitioners, which state that laborers are seen as preferred creditors with privileges because they take repayment of the proceeds from the sale of all of the debtor's assets are under the legal position of separatist creditors, it needs to be explained that in the development of the global economy in Indonesia - In the case of changes and developments in economic law, including bankruptcy law, which*

is a legacy of the Dutch Colonial Government, the Court does not deny the indication that there is pressure or influence from world bodies such as the International Monetary Fund (IMF) and the World Bank as stated by the Petitioners' expert (Rizal Ramli). and Surya Chandra);

4. Whereas the legal reasons of the Petitioners above, it is necessary to question whether the legal position of labors, which is not expressly (*expressis verbis*) referred to as separatist creditors or preferential creditors in the Law 37/2004, and only in the Law 13/2003, labors has the rights to be paid first, according to the law, their position was equal to that of separatist rights holders;
5. Whereas according to the Court, the provisions of Article 29 of the Law 37/2004 are within the framework of implementing the principles of protection and legal certainty proportionally and fairly for all creditors in bankruptcy so that they do not conflict at all with the provisions of Article 28D paragraph (1) of the 1945 Constitution of the Republic of Indonesia;
6. Whereas regarding the other articles argued by the Petitioners, namely Article 55 paragraph (1), Article 59 paragraph (1), and Article 138 of Law 37/2004, which are considered to conflict with Article 28D paragraph (2) of the 1945 Constitution of the Republic of Indonesia, According to the Court, these provisions are an elaboration of principles in the law of engagement in case the law of guarantees in private law relationships. Article 55 paragraph (1), Article 59 paragraph (1), and Article 138 of Law 37/2004 determine that separatist creditors can exercise their rights as if there was no bankruptcy. This means that liens, mortgages, fiduciaries, and other security rights are not included in the bankruptcy obligations that will be executed. Separatist creditors have the right to execute the collateral within their control themselves. In the event that there is still a shortage after the execution of the collateral under their control, the separatist creditor is entitled to a bankruptcy filing as a concurrent creditor; conversely, in the event that there is an excess of the receivables, the excess must be included as a bankruptcy estate;
7. Whereas the implementation of the rights of the *quo* separatist creditors cannot be said to be unfair and inappropriate treatment in the employment relationship (the relationship between laborers and employers) because in the employment relationship in question, laborers do not lose their rights in bankruptcy, and neither do laborers lose his rights or wages. Thus, according to the Court, Article 55 paragraph (1), Article 59 paragraph (1), and Article 138 of Law 37/2004 do not conflict with the provisions of Article 28D, paragraph (1) and paragraph (2) of the 1945 Constitution of the Republic of Indonesia;
8. Whereas if it turns out that all of the company's assets have been used to pay separatist creditors, then the laborers' wages cannot be paid. Therefore, the state intervention is needed to overcome this situation through various concrete social policies.

Based on these legal considerations, the Indonesian Constitutional Court reached a conclusion that, according to the author, was half-stanced. From theoretical optics (and also a legalistic view), the Court thinks that there is no conflict between Articles 29,

55 paragraph (1), 59 paragraph (1), and Article 138 of the 1945 Constitution. However, empirically and sociologically, the Court views these provisions have the potential to cause losses for laborers. “The Constitutional Court prefers that efforts to overcome weaknesses in protecting laborers’ rights be left to the government, namely by closing legal loopholes by making various concrete social policies.”

The Court further stated:

“Whereas based on the entire description of the considerations above, the Court views that Article 29, Article 55 paragraph (1), Article 59 paragraph (1), and Article 138 of the Law 37/2004 do not conflict with the 1945 Constitution. However, the weak protection factor for the rights of laborers or employees in the event of bankruptcy could result in laborers or employees not getting anything because the debtor’s assets have been used as collateral for separatist creditors that require state intervention. Thus, what must be done is not to declare that the articles in Law 37/2004 that are requested for review are contrary to the 1945 Constitution of the Republic of Indonesia and then give laborers the position of creditors on par with separatist creditors and/or eliminate the status of separatist creditors, which of course will be detrimental. Separatist creditors are guaranteed the right to repay their receivables based on Law 37/2004. However, by closing gaps in legal weaknesses by regulating the relationship between laborers and debtors in Law 13/2003 through various concrete social policies, there is a guarantee of legal certainty regarding the rights of laborers or employees being fulfilled when the debtor is declared bankrupt.”

Thus, it is clear that the Court’s decision positions the Court’s stance as leaving it to the government to close the gaps in legal weaknesses, which were identified by the Court when examining Case Number 18/PUU-VI/2008. In conclusion, the Decision Number 18/PUU-VI/2008 has no juridical impact. This is because what the Court considers is more of an appeal with no binding force.

Laborers are legally positioned as preferred creditors for their bills that are still owed by the company, but the position as preferred creditors does not necessarily provide adequate protection ([Nindyo Pramono & Sularto, 2017](#)). The position of laborers as preferred creditors remains threatened by (the rights of) other creditors who holds equal priority status but possessing a higher position, namely separatist creditors (creditors who hold collateral rights in pledges, fiduciaries, mortgages, or mortgage rights) ([Tri Anggraini et al., 2023](#)).

Provisions for fulfilling the rights of laborers when the employer/company is declared bankrupt are being tested again by the Indonesian Constitutional Court in the Decision number 67/PUU-XI/2013. In the said Decision, the Court emphasized that the purpose of general confiscation in bankruptcy is to make debtors able to pay the bills of all creditors. The state regulates the provisions regarding bankruptcy, including the curator’s honorarium rules ([Santoso, 2018](#)). However, no single phrase or sentence mentions the state’s responsibility if laborers are harmed when their company goes bankrupt.

In the Decision Number 67/PUU-XI/2013, the Court emphasized that the purpose of general confiscation in bankruptcy is to make debtors able to pay the bills of all creditors based on the *pari passu pro rata parte* principle. The position of creditors is the same, but the implementation process is regulated based on the ranking or priority of the debt. Given their vital role in company operations, laborers possess a significant standing, and their entitlements are on par with non-governmental creditors, determined by mutual agreement. ([Rukmono, 2019](#)).

Laborers' rights should be prioritized after resolving separatist tax bills and debts. If withdrawn in the position of creditor, then the sequence includes unpaid basic wages of laborers; state taxes; separatist creditors/holders of material collateral rights; other laborer rights such as giving severance pay, gratuity pay, and compensation money for rights that should be received as stated in Article 156 paragraph (1) of Law 13/2003 ([Nainggolan, 2011](#)).

The problems above give rise to *quo vadis* regarding the meaning of bankruptcy. As time goes by, bankruptcy should be interpreted not only in terms of the assets regime, which is intended as an effort to protect creditors from actions carried out by debtors, which can harm the interests of creditors, especially in relation to debtors' debts which are included in bankruptcy assets ([Sefriani, 2019](#)).

A new meaning must be attached to the term bankruptcy, which is oriented towards protecting the relationship between parties whose rights are assured and protected by laborers. This shift is necessary as laborers have fulfilled their imposed obligations, entitling them to the promised rights ([Kamahayani & Margono, 2020](#)). One of these parties is known as labor. This meaning stems from the reason that the fact that the term "bankruptcy" is associated with a company, and it underscores the indispensability of laborers as an integral component of the company's working capital for sustaining productivity. This does not deny the importance of other elements of a company for it to operate. This meaning can be termed legal protection for laborers, which is intended to protect the rights of these laborers. The legal objectives underlying this protection consist of benefit, justice, and certainty. The equivalent word for legal protection in English is "legal protection," and in Dutch, "*rechtsbecherming*."

These two terms also contain different legal concepts or meanings to provide the true meaning of "legal protection" ([Tedi Sudrajat & Endra Wijaya, 2021](#)). Amid the ambiguity on the meaning of legal protection, Harjono tried to build a concept of legal protection from a legal, scientific perspective; according to him, legal protection has the meaning of protection through through the utilization of legal methods prescribed by the law, with the goal of transforming the specific interests requiring protection into legal rights. ([Taufiqurrohman et al., 2021](#)). This protection can only be created if the state is present directly to provide that protection ([Taufiqurrohman et al., 2022](#)). Based on the explanation above, this article considers that Indonesia needs a series of formulations that enable the State to provide legal protection for the rights of laborers whose employers or companies they work for have gone bankrupt.

III. The Probability of Implementing the Francovich Principle as a Basis for State Responsibility for Workers' Losses Due to Companies Going Bankrupt

A. The Concept of Francovich Principle

In practice, the presence of the State in providing legal protection for the rights of laborers whose employers or companies they work for have gone bankrupt has been carried out in various European Union member countries. The legal protection provided by the State is known as the Francovich Principle. The Francovich Principle is a principle that holds the state accountable for compensating laborers who suffer losses resulting from companies going bankrupt ([Ross, 1993](#)). The Francovich Principle, in its application, is considered capable of providing legal protection for the rights of laborers whose employers or companies where they work have gone bankrupt ([Hervey & Rostant, 1996](#)).

The classical legal postulate "*Ad Recte docendum oportet primum inquirere nomina, quia rerum cognitio a nominibus rerum dependet*" ([Hiariej, 2016](#)) asserts the profound idea that in order to comprehend a legal concept, one must initiate the learning process by examining its names, as the understanding of things relies on the names attributed to them ([Taufiqurrohman, 2022](#)). In this regard, to examine the possibility of implementing the Francovich Principle, we must first understand its definition as well as its existence in statutory regulations.

The Francovich Principle is applied in all European Union member countries. The Francovich Principle first began in the case of *Francovich v. Italy*. Andrea Francovich and Others filed a lawsuit against Italy at the European Court of Justice (Cases C-6/90 and C-9/90 (7997) ECR 1-5357). Workers who suffer losses due to their employer going bankrupt are entitled to compensation under the European Union Directive (Directive 80/987/EEC), which requires European Union member states to protect workers whose employer going bankrupt ([Krümmel & D' Sa, 2009](#)). This became known as the Francovich Principle, taken from the name of the plaintiff, Andrea Francovich. The Decision also marks the European Court of Justice's first rule based on regional law, not national law ([Szyszczyk, 1992](#), and [Van Gerven, 1996](#)).

Francovich's lawsuit as well as the lawsuit of Danila Bonifaci et al. against Italy relates to the interpretation of the third paragraph of Article 789 of the Treaty establishing the European Economic Community (EEC Treaty) and the European Economic Community Directive (EEC Directive) Number 80/987 dated 20 October 1980 ([Coppel, 1993](#)). Article 789 is intended to provide member countries with responsibility for labor losses when a company goes bankrupt. In this case, the Directive will be binding on each Member State to which it is addressed regarding the results to be achieved while leaving it to domestic bodies in each country that have the competence to regulate their forms and methods of accountability ([Póltorak, 2014](#)).

Directive 80/987 regulates the bankruptcy of companies, which is stipulated with aim to guarantee payment of unpaid claims to laborers in the case of employers going bankrupt ([Smith & Woods, 1997](#)). The Directive applies to laborers' claims arising from employment agreements or employment relationships with employers who are in bankruptcy ([Granger, 2007](#)). Member states may exclude claims for some categories of labor.

Francovich is an electronics company laborer in Vicenza, Italy. He only received occasional salary payments in his account ([Haba, 2015](#)). The company where he worked was later declared bankrupt. Francovich filed a lawsuit in court, and it was granted. He claims that, as a member of the EEC, the Italian state must pay him compensation under Directive 80/987. State obligations, as demanded by Francovich, are enforced through national courts, so the ECJ determined that national procedures must determine whether state obligations are enforced. Danila Bonifaci's lawsuit and thirty-three other laborers have similar cases ([Hanft, 1991](#)).

Under Directive 80/987 (also called the Insolvency Protection Directive), each European Union member state is expected to draw up national rules that provide minimum guarantees for laborers whose wages have not been paid when the company they work for goes bankrupt ([Lang, 1992](#)). Armed with these norms, Francovich, who works at SDN Elevation SnC, and Bonifaci et al., who work at Gaia Confezioni Sri, filed a lawsuit against the state of Italy ([Harlow, 1996](#)). They argue that under Directive 80/987, the state of Italy must compensate the losses suffered by laborers because Italy failed to implement the Directive.

The Council Directive of 20 October 1980 (Directive 801987/EEC) requires Member States to accommodate regulations relating to laborer protection, especially when their company or employer is insolvent or declared bankrupt. Directive 801987/EEC applies to laborers' claims arising from employment contracts or employment relationships with employers that has gone bankrupt ([Valladares, 1995](#)). Based on these rules, Member States may, by exception, exclude claims by specific categories of laborers from the scope of this Directive based on the specific nature of the employment contract or employment relationship of the laborer or other forms of laborers' protection guarantees that are equivalent to those resulting from the Directive ([Caranta, 1993](#)).

The challenge of implementing the Francovich Principle became prominent following the Brasserie/Factortame decision in 1996. The European Court of Justice (ECJ) has evolved the legal precedent, associating this accountability with Article 215 of the European Union Treaty concerning a state's responsibility for breaches of community law. The court recognized the *ius commune*, which contains the general principle that the state is responsible for and remedies the harm it causes.

Following the *Brasserie* case, a state is responsible if, firstly, the rule violated was intended to confer rights upon an individual; secondly, there is a clear and severe violation; and thirdly, there must be a causal link between the violation that occurred and the loss suffered by the individual concerned. Those interested in European law can trace the dynamics of these requirements in the case of *Dillenkofer v. Republic of Germany*, which revolves around Germany's failure to timely implement the Package Travel Directive, to the detriment of Erich Dillenkofer.

Conversely, Directive 80/987/EEC imposes restrictions on determining the insolvency of an employer. Firstly, if there is a request to initiate legal proceedings or, in this case, initiate insolvency proceedings involving the employer's assets, as outlined in the regulations and administrative provisions of the relevant Member State. This is done to collectively fulfill the creditors' claims and facilitate their consideration of filing such claims. Secondly, if the authorized official, based on the circumstances, regulations, and administrative provisions, has decided to institute bankruptcy proceedings or concluded that the business, including the employer's operations, has been permanently closed and the existing assets are inadequate to warrant the commencement of proceedings ([Haba, 2014](#)).

B. Indonesian Context

As discussed above, laborers' rights are accorded a special priority in Indonesia, particularly after settling tax obligations and separatist debts. Whereas, the Francovich Principle exclusively applies within European countries and is bound by the regulations of regional organizations with joint courts. Nevertheless, there is a compelling argument for the implementation of this principle in Indonesia. Currently, there is no precedent in Indonesia where the state compensates laborers for losses incurred due to the bankruptcy of the company they work for or the entrepreneur who has been remunerating them.

Given the outlined challenges, the application of the Francovich Principle can offer ideas that are academically capable of answering these problems. Adopting the Francovich Principle in Indonesia certainly raises questions that demand further clarification. One pivotal question is: under what circumstances and based on what criteria are compensation payments authorized? Robert Schütze elucidates that the *Franco v. Italy* decision offers insights into longstanding debates surrounding these questions, providing answers that can guide the resolution of similar issues in the Indonesian context. ([Schütze, 2012](#)).

In the *Franco v. Italy* decision, the judge stated that compensation could be awarded if three conditions were satisfied ([Tallberg, 2000](#)). Firstly, local or domestic regulations must mandate the granting of rights to individuals (the outcome stipulated by the Directive should involve conferring rights to

individuals) ([Pó\ltorak, 2014](#)). Secondly, it should be feasible to identify these rights based on the provisions outlined in the Directive. Thirdly, a causal connection must exist between the violation of the state's obligations and the losses and damages incurred by the injured parties ([Emiliou, 1996](#)).

In other words, if Indonesia is committed to protecting and being responsible for laborers' losses when their employer goes bankrupt, local or domestic regulations must first be enacted to guarantee individual rights, and these rights must be identified. If local or domestic regulations are violated by the state, in the sense that the state cannot guarantee these rights, then any losses that occur will arise to the right for someone, such as the labor, to initiate legal action ([Dogan, 2000](#)).

However, the obligation for the state to compensate laborers in the event of their employer's bankruptcy is not absolute. In the European context, this requirement underwent refinement in the *Brasserie du Pêcheur* case (C 46/93 and C 48/93). In this instance, the European Court emphasized that state responsibility is limited to breaches that are sufficiently serious. Since the *Brasserie/Factortame* decision in 1996, the European Court of Justice (ECJ) has further developed case law principles, associating this responsibility with Article 215 of the European Union Treaty, which addresses state responsibility for violations of community law. The court acknowledged the *ius commune*, encompassing the general principle that the state is accountable for and must remedy the harm it causes. ([Biondi & Farley, 2009](#)).

Reflecting on the *Brasserie* case, the application of the Francovich Principle can be further refined in the Indonesian context. Thus, if Indonesia is committed to implementing the Francovich Principle, several conditions must be met. A state is responsible for compensating laborers when an employer goes bankrupt if three things occur: firstly, the rule violated was intended to confer rights upon an individual; secondly, there is a clear and severe violation; and thirdly, there must be a causal link between the violation that occurred and the loss suffered by the individual concerned.

In addition to the three conditions above, Indonesia needs a guarantee institution as an implementing entity to compensate laborers in the event of their employer's bankruptcy. Reflecting on and looking at the experience of the European Union, Directive 801987/EEC outlines provisions mandating the establishment of an institution responsible for ensuring the fulfillment of the state's responsibilities. Indonesia could consider adopting similar measures to establish an institution that guarantees compensation for claims unsettled by laborers arising from employment contracts or relationships, specifically pertaining to payments for periods preceding a defined time limit.

Guarantor institutions can effectively operate in various scenarios, such as when the employer's bankruptcy proceedings commence, a notice of dismissal

is issued to the employee due to the employer's bankruptcy, the initiation of the employer's bankruptcy occurs, or the employment contract or relationship with the employee is terminated due to the employer's bankruptcy. In addition to establishing a guarantee institution, limitations on the responsibilities of the guarantee institution must be determined. Specifically, these limitations would pertain to the duration of compensation payments. Drawing from the European Union's approach, Directive 80/1987/EEC specifies a period of eight weeks or several shorter periods totaling eight weeks for the guarantee institution to fulfill compensation claims.

In addition to establishing a guarantor institution, Indonesia has the option to implement restrictions to prevent excessive payouts. By setting limits on liability for unpaid workers' claims, the state can ensure that not all losses incurred by laborers are entirely covered by public funds. These limitations would specify conditions under which the state is obligated to compensate for losses. One key restriction involves clarifying that the guarantor institution is not responsible for settling obligations to creditors who file bankruptcy lawsuits unrelated to laborer losses. This aligns with the principles outlined in Article 5, letter (a) of Directive 80/1987/EEC, which stipulates that "Member States must stipulate detailed rules for the organization, financing, and operation of the guarantee institutions, complying with the following principles in particular: (a) the assets of the institutions shall be independent of the employers' operating capital and be inaccessible to proceedings for insolvency."

Secondly, the employer is also obliged to contribute to the financing, the amount of which is determined or discussed with the guarantor institution. This requirement is in line with Article 5, letter (b) of Directive 80/1987/EEC, which states: 'Employers shall contribute to financing unless the public authorities fully cover it.' Furthermore, Articles 6, 7, and 8 of Directive 80/1987/EEC stipulates: Article 6: "The Member States may stipulate that Articles 3, 4, and 5 shall not apply to contributions due under notional statutory socio/security schemes or under supplementary company or inter-company pension schemes outside the national statutory socio/security schemes." Article 7: "Member States shall take the measures necessary to ensure that non-payment of mandatory contributions due from the employer, before the onset of his insolvency, to their insurance institutions under national statutory socio/security schemes does not adversely affect employees' benefit entitlement in respect of these insurance institutions since the employees' contributions were deducted at source from the remuneration paid." Article 8: "Member States shall ensure that the necessary measures or tokens to protect the interests of employees and persons having already left the employer's undertaking or business at the date of the onset of the employer's insolvency in respect of rights conferring on their immediate or prospective entitlement to old-age benefits, including survivors' benefits,

under supplementary company or inter-company pension schemes outside the national statutory social security schemes.”

Third, the guarantor institution is not responsible for due contributions such as health insurance, employment insurance, including other national mandatory guarantee insurance, which is under additional company obligations, including inter-company pension schemes outside the national mandatory social/guarantee scheme. Fourth, specific steps are needed to avoid abuse, such as if it turns out that fulfilling Fourthly, it is crucial to take specific measures to prevent abuse, particularly in cases where the fulfillment of these obligations cannot be substantiated due to the unique relationship between laborers and employers, leading to a potential collusion based on common interests. This consideration aligns with the provisions outlined in Article 10, letters (a) and (b) of Directive 80/1987/ EEC, which state: “This Directive shall not affect the option of Member States: (a) to take the measures necessary to avoid abuses; (b) to refuse or reduce the liability referred to in Article 3 or the guarantee obligation referred to in Article 7 if it appears that fulfillment of the obligation is unjustifiable because of the existence of special links between the employee and the employer and common interests resulting in collusion between them.”

IV. Conclusion

Even though the Indonesian Constitutional Court Decisions Number 18/PUU-VI/2008 and Number 67/PUU-XI/2013 have confirmed the positions of creditors in bankruptcy cases are the same, the practical implementation still witnesses discrepancies in the distribution of bankruptcy debt rights. This problem is related to the uncertainty of applying the *pari passu pro rata parte* principle in the distribution of bankruptcy debts in Indonesia, which still gives rise to *quo vadis*. The adoption of the Francovich Principle in Indonesia emerges as an effective step toward addressing this concern. The Francovich Principle assigns responsibility to the state for losses incurred by laborers due to corporate bankruptcies. However, its application hinges on several conditions, including the establishment of a guarantee institution, mandatory financial contributions from companies, and the formulation of specific measures to prevent abuse. This includes the need to avoid abuse, such as if it turns out that fulfilling these obligations cannot be justified because of the special relationship between the employee and the employer and the existence of common interests, which results in collusion between them.

The absence of legal research on the feasibility of adopting the Francovich Principle in Indonesia has significant implications for the author’s limited perspective in formulating a draft for the incorporation of the Francovich Principle into the national legal and regulatory framework. Nevertheless, this research serves as an initial step in assessing the legal viability of adopting the Francovich Principle. Additionally, establishing

a priority scale is essential in including legislation on the Francovich Principle in the Priority National Legislation Program (*Program Legislasi Nasional*, Prolegnas). The government also needs to revitalize institutions related to the Francovich Principle in the national legal and regulatory system, especially regarding the establishment of a guarantor institutions. This revitalization aims to ensure that these institutions function comprehensively, effectively, and with accountability in their roles and authority.

In addition to incorporating the Francovich Principle into the Prolegnas, laborers can actively advocate for its inclusion in their bankruptcy lawsuits, further emphasizing its relevance and applicability within the Indonesian legal context.

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