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SAFEGUARDING OF CREDIT AND BANKRUPTCY: HISTORY AND REGULATING TENDENCIES. THE ITALIAN EXPERIENCE

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Abstract. *The safeguarding of credit represents one of the most important economic and juridical challenges for every complex society. Just by reading the news we can realize how current this topic is for us. By thinking back over the history of ideas and the social, economic, and political reasons that got Law makers to legislate on this subject, we can better understand what's happening today and in which direction our societies are going. An analysis of the Italian juridical system's development on bankruptcy proceedings, starting from the attitude of ancient Roman law on over-indebtedness, can effectively shine light on the current regulation, reformed in 2006. This new bankruptcy law transforms the previous public nature of bankruptcy proceedings into a prevalingly private management of enterprises' financial problems, completely changing the course of credit policy. The "Italian way" is just one result of an international trend, the guiding lines of which can be seen throughout the whole EU and also in the regulation of the USA. This historical-comparative perspective, in all its positive and negative potentiality, is an important paradigm. The final hope is that historians can perhaps give their contribution to more conscious reflections on important topics like this one, offering to other scholars the possibility to have a wider view on this juridical phenomenon.*

Keywords: *bankruptcy, Roman law, over-indebtedness, historical comparison, compromise before bankruptcy, safeguard of credit, bonorum venditio, creditors' committee, Chapter 11.*

Introduction

I would like to introduce my short essay with a remark on why I chose such a subject and what historians can say about it. I think we can all agree that in a time like this, in which the economy is becoming more and more globalized, that the safeguarding of credit is an important topic. Mainly because the wider an economic system is, the more essential it becomes to be sure that we can make exchanges while avoiding trouble—meaning that it's indispensable to protect credit in every way. The absence of such security makes economies collapse and we can find proof of this, if necessary, in history.

Besides, in such a global organization, each system is hopelessly conditioned and influenced by others. We can't, therefore, allow ourselves to neglect the bigger picture by ignoring measures implemented outside of our own country.

From another point of view, the topic of credit relationships represents one of the best mirrors of the structure of a society in its power balance. This is why the representation of how a legal system intervenes on this subject is a very good index of where a society is going.

We all know about, and have sadly learnt, how important it is to be aware of the situation (at a macro and at a micro-level) because of the economic events of the past few years. The situation could have been better if the policies of many governments had been more conscious, more careful, more farsighted.

Talking about the great ideas that govern the topic of the safeguarding of credit is worthwhile and absolutely necessary. However, this kind of "holistic" take on the phenomenon of safeguarding credit, which allows one to be more "mindful" about what's happening, can be only obtained through the comparison of different systems—it gives an exact idea of the general trend and, at the same time, of how a particular system takes root and how it can be influenced by the policies of other countries.

In this sense, I think that historical comparison can offer a crucial aid. When someone is taken ill, we have to bear in mind their medical history. In the same way, we can't set aside the history of juridical thought on the safeguarding of credit and the tendencies it has shown throughout history in connection to social and economic urgency—if we want to be prepared to build the future.

From this point of view, it seems to me that the Italian paradigm can be quite an interesting subject for reflection.

But before starting to take a look at what happened in Italy in the last century, I would like to add just one more reason for my choice of talking about bankruptcy and other proceedings with regards to creditors. I think that, currently, the main instrument which we look at when thinking about the safeguarding of credit (in the sense of credit already gone bad, not from the perspective of prevention), is bankruptcy and similar proceedings. No other tool used to obtain the satisfaction of credit looks as complete and protective as bankruptcy. Besides, bankruptcy is the instrument used against the biggest debtors (entrepreneurs) in situations which involve many creditors. This means that we are interested in the most considerable situations of over-indebtedness and that we must obtain the best index of the attitude of a certain society in relation to this problem.

1. Some Notes on the History of Bankruptcy

My reflections have their starting point in the reform of the Bankruptcy Law¹ carried out in Italy in 2006. I don't hesitate in defining it as a Copernican reform, which has shifted the centre of gravity of bankruptcy proceedings from a completely public nature to a more private one—the process of privatization of the management of enterprise risk has already been discussed in other papers.

But let's go in order.

The situation—by the end of the 19th century—at the beginning of the unitary State of Italy, was governed by the rules of the Trade Code of 1865, revised in the following Trade Code of 1882.²

It's worthwhile to remember that the importance of the subject of bankruptcy to the specific sphere of mercantile law dates back to the Italian towns' Statutes of the 14th-15th centuries³: during the Middle Ages and going back to the Byzantine and even the Roman classical period, the idea of enforcing a writ of execution against the whole estate of a debtor had nothing to do with the commercial quality of the debtor.

We must consider the fact that the idea of the juridical person was unknown by the Roman legal system, for which the same conception of direct representation was not admissible.

In the case of a debtor who didn't pay his debts and had many creditors, during the pre-classical and classical period (the period of the trial *per formulas*, from the 3rd/2nd centuries B.C. to the 3rd century A.D.) the praxis was to enforce the execution proceedings against him through the *bonorum venditio*.

I could and should say a lot of things on this topic, but, because of the nature of this work, I'll just address a few essential ideas concerning this instrument.⁴

It was, in short, a process that put all of the possessions in the hands of the creditors, who obtained the possibility to bunch all the goods of the debtor together, conserving them through the activity of a *magister bonorum*. The *magister bonorum* had to take care of the assets in order to sell them in a block to the one *bonorum emptor*, who offered to pay the highest percentage of credits.

The debtor was completely destroyed, economically and socially (through *infamia*), by this proceeding,⁵ which developed as a way of dealing with a period of great indebtedness in the Roman Republic.⁶ It was the best safeguard for creditors, and, had

1 L.D. January 9th 2006, n. 5 Organic Amendment of the Regulation of Proceedings in Concourse.

2 The Trade Code of 1865 was actually the one of the Kingdom of Sardinia, which had been adopted as a temporary solution for the newborn Kingdom of Italy. In 1882 the new Code was published.

3 See Santarelli, U. *Per la storia del fallimento nelle legislazioni italiane dell'età intermedia*. Padova, 1964.

4 Read for further information, Perez Álvarez, M. P. *La bonorum venditio. Studio sobre el concurso de acreedores en Derecho Romano clásico*. Madrid, 2000.

5 On this topic, see Sitek, B. W. The infamy of the consequences of insolvency of the debtor in Roman law and the consequences of announcing bankruptcy by the insolvent in the modern legal systems. In *Au-delà des frontières. Mélanges W. Wolodkiewicz*. Varsovie, 2000, p. 841.

6 Kroppenberg, I. *Die Insolvenz im klassischen römischen Recht: Tatbestände und Wirkungen ausserhalb des Konkursverfahren (coll. Forschungen zum römischen Recht 48)*. Köln, 2001.

as a second aim, the social elimination⁷ of those who were considered dangerous for the stability of the *civitas*⁸.

It was considered the official writ of execution for the trial *per formulas*, instead of the main writ used in the ancient context of the trial *per legis actiones*, which was an execution on the physical person of the debtor (*legis actio per manus iniunctionem*), with imprisonment and, eventually, murder of the debtor himself.

At the beginning of the imperial age, a different, less drastic form of patrimonial execution began to take place—the *bonorum distractio*, through which only the necessary part of the goods of the debtor were sold. It was born as a privilege for higher class people, in the beginning⁹, but it slowly became more used and, in the post-classical and Byzantine periods, the only form of execution.

Trials were controlled by the magistrate (the *praetor*), who only had the function of control and authorization over grants to the creditors, but never to the debtor. The main actors of these proceedings were the creditors, from whom the *magister bonorum* was chosen.¹⁰ This is evidence of a trial institution with strong contractual elements.

The State seemed to try to stay out of this matter as much as possible, leaving to private parties the following: the autonomy and authority to organize the recovery of the credit; the elimination of the economically bad subject; the conservation of the stability of the *civitas* (being understood from a liberalistic point of view, with a complete absence of any consideration of the protection of civil rights).

Certainly, we should further reflect on creditors and debtors in that period. What were their prevailing identities, what were their roles in the *civitas*? We should remember that a recent trend in historical research is to discharge, for example, Catilina, whose main purpose, with his revolutionary project, was the annulment of the debts for all the debtors who were oppressed by powerful figures.¹¹

But it would take too much space here to talk about all these aspects, so let's leave the ancient Roman situation to the side for a while.

1.1. Recent History

Going back to the Italian Trade Code of 1882, bankruptcy is mentioned, in the 3rd book¹², as a public proceeding with an important recognized role for creditors.

7 Cicero (*pro Quinctio* 15.48ff.) talks, about the debtor who suffers the *bonorum venditio*, as a “living dead” person.

8 “*Interest rei publicae*” is a recurring expression in the language of the law-makers of the Middle Age, writing about bankruptcy and about the safeguard of creditors.

9 And moving from Ulpian, 59 *ad edictum*, D.42.4.7.10, also for guiltless subjects like the *furiosus* (see my *Curare bona. Tutela del credito e custodia del patrimonio tra creditori e debitore. Aspetti generali*. Milano, 2008, p. 182).

10 See, about this topic, D.42.4.8, 42.4.9 pr., 42.5.8.4, 42.7.2 pr., 42.7.2.4, 28.5.23.2-3, 3.5.12.

11 See *Sall Cat.* 21.2.

12 *Codice di Commercio del Regno d'Italia con la correlazione de' suoi articoli tra loro e con quelli degli altri codici e delle leggi speciali; corredato della relazione Zanardelli, della legge transitoria commerciale, del regolamento 27 dicembre 1882, di una tavola di confronto degli articoli del nuovo Codice di commercio con quelli del Codice del 1865, e d'un indice alfabetico analitico*. Roma, 1883, artt. 683ss.

The official receiver had the job of directing the proceedings but a committee of 3–5 creditors controlled the whole development of it. If the liquidator was named by the Court, the creditors' had the right to ask for a substitution of him with another curator, chosen by the creditors themselves, and to substitute the previous draft of the code for a direct designation of the liquidator by the creditors.

I can, therefore, assert that it mainly dealt with safeguarding the interests of the class of creditors—the middle-class—who, in the crisis of nobility that characterized the 19th century, were growing more and more, and who were building a new economy and a new kind of State.

It seemed to be a kind of “internal affair” of the mercantile class, in which the newly born Italian State limited itself in exercising control.

This state of things changed completely in 1930¹³ when the described mechanism for designating the liquidator was abrogated and the designation itself devolved to the Court.

The formal reason was that the former regulation could sound like a subtle blackmail of the liquidator by the Court—a consideration which doesn't seem to be completely wrong, but it has to be tempered by the fact that control of the proceedings was exercised by all of the creditors. In fact, there was a complete subversion of the previous perspective—the Fascist regime was in full development. This meant the strong presence of a totalitarian State, which couldn't allow the private sphere space for autonomy, and which wanted to put the interests of the State, and of those who the State decided to protect, on the first level.

And in this sense, the interest of the State was to severely punish the insolvent trader, with a specific repressive aim.

The Royal Decree of 1942¹⁴ acknowledged, concerning the specific aspect of the secondary rule reserved in the proceedings to the creditors, this point of view and it gave a public role to bankruptcy. This was inspired by the idea that safeguarding credits was a public interest, in which the State was the only and main *dominus* of the matter. The Bankruptcy Court had complete control and had the power to decide on the acts of the proceedings, in which the first protected interest was not that of the creditors, but that of the State.

Nevertheless, this interest ceased being in cancelling the insolvent debtor. The new perspective towards expropriation proceedings was to promote the best outcome for creditors, in such a way as to promote credit.

1.2. The Trend of the Last Seventy Years

From a strictly prescriptive point of view, the previously mentioned rules lasted until 2006.¹⁵ We must remember that the law of 1942 was the law of an interventionist

13 Law July 10th 1930, n. 995 Provisions on bankruptcy, composition before bankruptcy and on small bankruptcies.

14 R.D. March 16th 1942, n. 267 Regulation of bankruptcy, composition before bankruptcy, receivership and compulsory administrative winding-up.

15 Or, better, until 2005: we have already had a partial reform on this topic with the law of May 14th 2005, n.80, especially concerning the composition before bankruptcy, with the introduction of the new art.160 in the Bankruptcy Law.

State, for a country whose economy was closed to foreign markets, before the issuance of the Constitution (in 1947).

In the meantime, things have changed a lot—between 1942 and 2006, case-law and particular laws became the bearers of different attitudes of society and of other necessities in relation to bankruptcy proceedings.

For the last seventy years, in Italy as well as all over Europe, a growing protectionist sense, from a social point of view, has marked the topic of the application of bankruptcy systems.

In other European countries, like Germany or France, this kind of perspective has led to an organic reorganization of the entire system of execution proceedings: let's think about the new law on “Redressement Judiciaire” in France (1994) and the “Insolvenzordnung” of 1999 in Germany.¹⁶

In Italy, this trend has developed in a disjointed way.

Case-law has provided several solutions characterized by their purpose of safeguarding employment levels and encouraging the productive and economic reorganization of enterprises, as well as in supporting out of court settlements for bigger insolvencies. The same movement has also led to fractured and incoherent lawmaking, as in the case of the law on extraordinary administration of big enterprises in crisis of 1979.¹⁷

2. Current Legislation: Lights and Shadows

Nevertheless, a different perspective, more radically liberal, has recently taken hold, based on the model of the USA.

The idea that inside economic enterprises in financial distress there is a “core business” which is worthwhile to protect, is the point of view that suggests reinvesting the assets through liquidation. This means ejecting the failed entrepreneur from the intact business.

This is the main perspective that has inspired the new laws of 2005¹⁸ and 2006 along with the “corrective decree” of 2007¹⁹—to move the focus from a subjective vision (the entrepreneur) to an objective one (the enterprise).

But before entering on the salient points of the actual regulations, let me mention the “alluvial” characteristics of the interventions of Italian legislators. They are: always fragmentary, principally caused by occasional circumstances and necessities, and to find

16 I will only mention the fact that in the same period (exactly in 1999) the International Monetary Fund gave some general directions on the standards to be followed in the lawmaking of insolvency (IMF, 1999, *Orderly and effective insolvency procedures*, Legal Department).

17 The Law of April 3rd 1979, n.95. This law was condemned many times by the EU, until it was finally repealed with the legislative decree n.270/1999, for big enterprises (the case “Cirio”), admitting the possibility of their bankruptcy, and with the legislative decree n. 243/2003 (and following converting laws), concerning very big enterprises (Parmalat and, then, Alitalia), which went back to the idea of the accomplishment of reorganization, based on the fact that they were very big enterprises.

18 Cicero, *supra* note 7.

19 L.D. September 12th 2007, n. 169 Amendments of bankruptcy law.

provisory remedies to concrete occurrences. Why? And what consequences do this kind of legislative attitude have on the economy and on people's lives? I'll come back to these questions later.

The main idea of the new bankruptcy law has been “to cut down bankruptcy proceedings”.

Actually, statistical data says that, in an ordinary bankruptcy proceeding that goes to the end, only 6% of the credit is recovered by creditors with unsecured debt, and only after 8 years on average.²⁰

2.1. Composition before Bankruptcy

So, the best way for safeguarding creditors seems to be to encourage the recourse to alternative instruments, instead of the judicial one. And particularly to composition before bankruptcy, now based on the model of the one previewed in Chapter 11 of the USA Bankruptcy Code.

The central ideas of this tool, taking into account the two guidelines of creditor satisfaction and conservation of the enterprise's activity, are:

- maintenance of the ownership of goods on the debtor's side;
- impossibility for the creditors to attack them;
- arrangement of a plan for a company shake-up, through an agreement with creditors and a partial payment of the debts;
- the possibility of a division of creditors into classes, in order, to eventually pay only some classes.

The targets of this solution are bigger enterprises rather than those who usually accede to bankruptcy proceedings. This is the first critical point of the Italian solution.

Italian economic reality is not defined, as in the United States,²¹ by enormous industrial companies, but mainly by medium/small sized firms.

From 2005 on, composition has boomed, tripling its application. But it's too soon to take stock of this instrument. The only remarks that can be made are that it is necessary to create good conditions for facilitating the granting of loans,²² and it is necessary to coordinate the rules on composition for bankruptcy with the criminal rules concerning the same subject.

2.2. Bankruptcy

Actually, the number of bankruptcy proceedings has been reduced, after the amendments.²³ However, the analysts say that the price we had to pay for this reduction in

20 Data of 2009 from The Italian Institute of Statistics (ISTAT).

21 The two most important cases of Chapter 11 occurred during the last few years in the USA, just to give an idea of what we are talking about. They were the cases of Chrysler and of GM, in June 2009. For the last one, the closing of composition was previewed within 60–90 days, with 14 production facilities closed in 2012 and 21,000 positions cut by the same date. The most important, from an economical point of view, composition case that we've had in Italy (the one of Federconsorzi) hasn't been concluded after 18 years.

22 The actual regulation of this topic is reason for big worry for the banks, which are afraid to be destined, in the situation where both the debtors and the creditors seem to be satisfied, to be the ones who will pay the bill.

23 This aim has been reached through the individuation of some qualifications that a firm should necessarily

bankruptcy proceedings was the loss of certainty of credit recovery and the loss of preservation of *par condicio creditorum*.

First I will look at the data on the diminution of proceedings.

From 2006 this diminution began, peaking in 2007. But by the end of 2008, the utilization of bankruptcy proceedings started growing again, returning to a high level in 2009.

Nevertheless, some studies by Cerved,²⁴ the most important Italian database on enterprises, demonstrate that only a small percentage of this trend comes from the introduction of the new rules, and mainly comes from reasons related to the business situation.

I can say the same thing about composition: it's too soon to value this data and the evaluation of data on new rules concerning bankruptcy.

Going back to our first purpose—to investigate the leading idea which dominates bankruptcy proceedings—the first characteristic of the amendment has been the radical change of the nature of the bankruptcy proceeding itself, from a public one to a prevalently private one.

In former times, all the powers of direction and control on bankruptcy proceedings were referred to the official receiver, as a representative of the bankruptcy court. Nowadays, this representative has been given a secondary role of pure control over the regularity of initiatives, whose actors are the liquidator and the creditors, or, more precisely, the committee of creditors about whom I am going to address in more detail.

2.3. Creditor Committees

In the planning of the law of 2006, a central role was reserved to this new body, which had to be representative of all the concurrent creditors. This last idea looked impossible because the committee's tasks were so complicated and so hard. The responsibility (the same of auditors in stock companies) of those creditors with an internal legal office would concretely allow them to act in the committee—in any case, reluctantly.

This is the reason why many interpreters have spoken totally in favour of the banks amendment. They were practically the only subjects who could enter the committee with the right instruments in cases in which, no other big creditor was involved because the situation in which such creditors would be interested were the ones for which composition before bankruptcy had been thought correct.²⁵

have to be declared in bankruptcy. Actually they turn out to be really too restrictive in the provision of the law of 2006. So, nowadays, after the "correction" of 2007, bankruptcy is impossible for enterprises with:

- a) investments of less than 300,000 Euros;
- b) net proceeds of less than 200,000 Euros;
- c) these two requisites are considered over the average of the last 3 years.

24 *"I fallimenti in Italia e in Europa"*, in *I rapporti Cerved sulle Imprese*, n. 5, maggio 2009.

25 It's curious that the situation created by recent laws concerning executive proceedings in concurrence of creditors has excluded from bankruptcy, small traders, and big enterprises, which are strongly pushed towards composition before bankruptcy. In this way, the opinion of the law-maker seems to be that bankruptcy is a remedy for those medium/small size enterprises which compose the majority of the Italian industrial landscape. Since things are like this, it's clear that, on one hand, if the purpose was to reduce the number

Everybody can, then, imagine how dangerous the reintroduction of the possibility for the creditor committee (it means, mainly, the banks) to choose their own liquidator seemed to be.

The new art. 37 bis of the Bankruptcy Law, dealing with the principle of nomination of the liquidator by the court, introduces the possibility for those creditors who represent the majority of admitted credits, to ask for the substitution of the liquidator after having given a particular reason, with another liquidator whom they indicate.

Luckily, the corrective decree has already mitigated this situation, specifying that the committee is formed when the proceeding is surely rich—when the asset is sufficient as a guarantee. Otherwise all its competences return to the official receiver.

The praxis has completed the process. The institution of the creditor committee has revealed itself as a vanishing reality, which hasn't had any real important application.

In any case, the principle has been affirmed and, from another point of view, the same decree of 2007 has established that, if a creditor committee is formed, its task is to approve the liquidation program.

2.4. Liquidator and Debtor

The main actor of the whole proceeding, in spite of the law, is now the liquidator, who actually represents the engine of bankruptcy—the one who organizes, conducts, and realizes most of necessary acts.²⁶

This role can also be filled by subjects who were strictly connected to the failed company, such as directors and professionals who have been working for the failed entrepreneur. The idea is that this kind of person has the best qualities and knowledge to manage the situation—the same idea that the Romans had, who thought that nobody could act as liquidator better than one of the creditors who had the strongest interest in conserving the assets and making the proceedings go in the best way.

The responsibility of this liquidator in the past, as jurisprudence interpreted it, was partially an extra-contractual one and partially that of an agent. Today, the latter responsibility has prevailed and is exercised through the professional (professional accountants etc.). The amendment of 2006²⁷ has confirmed this last contractual nature, referring it to the diligence of the professional.

And what about the failed debtor?

I have already said that the law of 1942 abandoned the idea that the main aim of bankruptcy was to persecute and eliminate the insolvent trader from the market. Nevertheless, the abandonment of this idea, mixed with the innumerable possibilities offered by the theory of legal person, can lead to dangerous outcomes.

of bankruptcy proceedings, it won't be obtained; on the other hand, it's obvious that such a regulation, in a period of financial crisis, saps the foundations of the economical tissue of our country.

26 Including some strange duties, like the one of putting into the liquidation program a (difficult, of course!) provision dealing with the results of actions like the ones for recovery, damages, revocation.

27 New art. 38.

The discharging of bankruptcy has been abandoned and the registering of failed people has been abolished, so that a business person in bankruptcy can join another enterprises' register as the owner of a new firm.²⁸

3. The Point of View of Historical Comparison. A History of Ideas

I should add a lot of other reflections and information about the actual situation. However, for my purposes, I'd better stop here and take a step back from the whole matter in order to get an overall view on how this topic has developed through history and what significance some decisions, rather than others, can have.

I will go, in this way, back to my first aim to see if it is possible to trace out a history of ideas on the safeguarding of credit and bankruptcy. And see if this historical consciousness can, in some way, be of help to contemporary experience.

In Roman period from 6th to 2nd centuries B.C. there was a trial named *per legis actiones*, in which the execution (*manus iniectio*) was on the body of debtors. Then another kind of trial (*per formulas*) came, in which the "personal execution" was replaced by the one on assets (*bonorum venditio*). This led to the possibility of murdering debtors, and it rose in the context of large growth in the economy (3rd–2nd centuries B.C.), connected to the emergence of a class of new rich (the *equites*), and following a big credit crisis linked to the social and political situation.

This was actually a private system of intervention on private citizens who had become insolvent debtors. The intervention was performed by creditors, who had organized themselves in total autonomy, leaving control of the regular unrolling of proceedings to the magistrate.

The whole of the debtor's assets went into the creditors' possession (*missio in bona*)—the debtor didn't exist anymore. Creditors acted as owners through the *magister bonorum* and *curator bonorum*²⁹ in selling all of the debtor's goods to satisfy their credits.

It was probably a satisfactory instrument for the creditors³⁰ and, from one point of view, it functioned very well in ensuring a safe circulation of goods. But, from another point of view, we could say that the law-makers, here, acted "without gloves": there was absolutely no safeguarding of the debtor's rights. All assets were taken away and could

28 See, about this matter, further, *sub* § 11.

29 Whose acts were probably regulated by the rules on agency's contracts for the *creditores praesentes*, the ones who were present at the moment, and by the rules on *negotiorum gestio*, for those who were absent and entered the proceedings later (see the already mentioned work by Pérez Álvarez, plus *Id.*, *Observaciones sobre D.17.1.22.10 (Paul. L.XXXII ad ed.)*, in *RIDA*. 45 [1998] 355ff., with an interpretation that I share, and Solazzi, S. *Il concorso dei creditori nel diritto romano*, II. Napoli, 1938).

30 Much better than the previous *legis actio per manus iniectioem*. That, being an execution on the physical person, which probably didn't give the creditors any more economic satisfaction than they could expect in a more mature society.

be sold for the sake of only one creditor. The situation was also unfair for those creditors who happened to arrive late.

We can also say that such a regulation could have (and actually had) a sort of negative effect on the economic system, since it slowed exchanges and created a big mass of people stifled by debts. It destroyed people and made them difficult to govern. Obviously, by the end of the 1st century B.C., a certain part of the ruling political class had this in mind. They had a clear will to create a very huge division between the leading group of very rich people and the masses, who were to be “strongly” governed.³¹

All these elements led to a scrapping of these proceedings in favour of different instruments (especially the mentioned *bonorum distractio*), which were able to give more satisfactory solutions, both from an economic and from a social point of view.

We can conclude, being aware that many other things should be said, that the *bonorum venditio*, in the Roman set of rules on the safeguarding of credits, was an “emergency measure”.

It developed from a primitive phase that was just a ritual regulation of physical vengeance against those who didn’t respect their financial obligations, and which ended with a real trial of execution, to satisfy the creditors through the sale of goods. To that measure, it was necessary to satisfy all the creditors.

In the middle of the described development from the primitive phase to today there was an intermediate passage, whose judicial nature we could discuss, and which was certainly functional to specific economic, social, political conditions.

3.1. From the Middle Ages to the “Torsions” of the Pandectistics

The idea of having a kind of “general and official liquidation of the heavily indebted one’s assets in the interest of his creditors”³² came back to Italy, as I have already said, by the end of the Middle Ages, in the period of the rising city-states (14th/15th centuries), when the situation became, in a certain way, again similar to the one we had in Rome by the 4th/3rd centuries B.C.

After centuries of a closed feudal economy,³³ the merchant guilds in the growing cities began to grow powerful. This kind of situation, great economical development, requires the safe protection of relationships between the main actors of economic growth—the merchants—for the construction of a new leading class.

The reappearance of a form of execution of debts through the sale, by creditors, of all of the debtor’s assets, and the specific application of this kind of trial, mainly when dealing with the *mercatores*, definitely attributed to the sphere of the mercantile law, inside which, it remains until present.³⁴

In this context, the institution of bankruptcy makes its first official appearance in the laws of unified Italy, with a precedent in the codification of the Kingdom of Sardinia.

31 Still actual, Alföldy, G. *Römische Sozialgeschichte*. Wiesbaden, 1975.

32 Santarelli, U., *supra* note 3.

33 I am talking about the so-called “economy of the *curtes*”.

34 Just to have an idea, see Cassandro, G. *Storia del diritto commerciale*. Bari, 1955.

The perspective, here, is just the same as always: to protect the creditors' right to be satisfied and to remove the damage that bankruptcy does on the economy.

But something very important, in the meanwhile, changed. The Pandectistic jurisprudence introduced the concept of the juridical person.³⁵

I think we must remember that the introduction of this new subject, which will become, in a short time, the main actor on the scene of bankruptcy, is a very important variant in the history of juridical thought on the safeguarding of credit. And we should also remember how much this juridical category, like many others of those introduced by the Pandectists,³⁶ is currently in crisis.³⁷

And not without good reason.

The evolution of this idea, in jurisprudential reflection, during the second part of the 20th century, was linked to the changes of the nature of commercial activities. It created the possibility of having a complete division between a commercial enterprise and those who created and direct it.

Dealing with this strange phenomenon, the Italian regulation on bankruptcy changed from its original persecutory attitude towards the insolvent debtor, to a sort of schizophrenic attitude—to stop the bad debtor, but to also save the jobs of the enterprise's employees. To prevent the insolvent debtor from harming again, but to save the core business of the firm. And, above all else, to always safeguard creditors' rights.

Today, I think we have reached the lowest level in a trend of badly interpreting the rules dealing with legal persons. Enterprises, like a phoenix, can disappear because of bankruptcy proceedings, and immediately, as I have mentioned before, take a new lease on life, with a new name and with the same persons in the background.³⁸

Conclusions

As we can see, bankruptcy proceedings are not so different in their fundamental elements from the Roman *bonorum venditio*. However, they imply some big pro-

35 For everybody, see for example Milone *Le persone giuridiche considerate nel diritto private romano*, in *FIL*, 1877, p. 212; Brinz, A. *Lehrbuch der Pandekten*. I. Erlangen, 1857, p. 11; Sohm, R. *The Institutes of Roman Law (engl. Transl. J.Crawford)*. Oxford, 1892, p. 102; Ferrara, F. *Teoria delle persone giuridiche, Capo I. § I. Diritto Romano*. Napoli-Torino, 1915, p. 22.

36 Let's just think about the idea of "legal transaction", for example, and even of "contract". Always important on this topic, Calasso, F. *Il negozio giuridico. Lezioni di storia del diritto italiano*. Milano, 1968.

37 Orestano, R. *Il problema delle persone giuridiche, I*. Milano, 1968, p. 7.

38 I don't want to get into a criminal law matter now, but it's interesting to note how far, also in the USA, this situation has gone and to which degree of perversion, I'll take the liberty of saying, the total abstraction of the economic life the companies have led from reality.

In 1993 two economists, George Akerlof and Paul Romer, published an interesting essay (in *NBER Working Paper*, no. R1869 [April 1994]), bearing a meaningful title: "*Looting: The Economic Underworld of Bankruptcy for Profit*". They talked there of deliberately caused bankruptcies to get profit.

Just one week ago (April 2010) Paul Krugman, in *The New York Times*, wrote an article about the accusation by the SEC (*Securities and Exchange Commission*) that Goldman Sachs employees created and marketed stocks which were intentionally conceived to lose value, just to give their bigger clients the opportunity to earn on them.

And, according to *ProPublica*, the investigating journalism website that has just won the Pulitzer, several banks have given contributions to create these kinds of investments.

blems—especially when these proceedings are pushed in the direction of privatization like in Italy during the last few years.

This trend brings unquestionable benefits by providing for the best management of crises and by giving the creditors more power inside the proceedings, in order to better protect their interests. This also frees the Courts from a lot of work, reducing the duration of the proceedings too.

But the costs of these benefits are considerable.

First of all, from the point of view of the best safeguard of creditors.

A reduction in the number of bankruptcy proceedings implies the diminution of certainty about the possibility of recovering credits and respect of the principle of equality between creditors (*par condicio creditorum*).

I'm thinking about the provision, in the regulation of composition before bankruptcy, of the possibility of dividing creditors into classes and of agreeing about the payment to just some of them. It's clear how this rule can lead to the discrimination of the smaller and less powerful creditors, with the risk of transforming the composition to an agreement "*inter amicos*", in which the only ones who pay, at the end, are those weaker creditors.

But I think things haven't become better, from this point of view, in that bankruptcy proceedings are less numerous than they were since the amendment of 2006.

In the Roman *bonorum venditio*, at least, the decisional power was reserved to the creditors (the majority of them).³⁹ In our actual bankruptcy proceedings, most of the decisions regarding the management of the liquidation are reserved to the holders of the majority of credits, setting the small creditors, whose interests' were deliberately forgotten, apart from the rest.

Thinking about Risks and Hopes

This aspect is also reinforced by the trend of increasingly separating the declaratory elements inside bankruptcy proceedings (like the verification of requirements of bankruptcy, of credits, of their nature, etc.), in order to promote the conciseness of the proceedings and, therefore, the shortness of them (a problem which troubles the Italian law-maker because of the costs of justice).

The problem between the declaratory and the executive aspects inside bankruptcy proceedings⁴⁰ is a very big one and I don't intend to explore it here. However, it's quite clear that the trend to totally sacrifice the first demands to the second ones represents a big risk for the equal protection of all the creditors and for the safeguarding of debtor's rights.

As I have already noted, this kind of regulation has the risk of hurting the middle-class of small and medium sized entrepreneurs, who are more exposed to bankruptcy

39 See Ulpian, 65 *ad edictum*, D.42.7.2 pr.

40 That can be expressed, according to the amendment of 2006/2007 as: conciseness, agility of the probatory regulations, and the incidental nature of the declaratory phases.

and are the less protected creditors. They are the ones who actually represent, in Italy, the majority of the economy.

A very important goal for future investigation on this topic would be to develop an advanced way to manage difficulties through prevention systems, in which our regulation is still lacking.

This situation could produce, and perhaps has already started to produce, new kinds of poverty, with which our government will have to measure itself: a few rich people becoming richer from one side, and many poor people becoming poorer from the other side.

Not everything is bad in the actual regulation of bankruptcy in Italy. I have already described some benefits of the amendment and there are many others on which I could enumerate. For example, the growing requests for professionalism from those subjects acting as liquidators in bankruptcy proceedings. But this last element has some bad implications, in that it is transforming the judicial proceeding into a “bookkeeping” one, which is the absolute domain of business consultants.

History teaches us that the type of policy on safeguarding credit, like the one I have described, develops during periods of big economic crisis that follow periods of economic booms (the 80s, the second part of the 90’s, and this last decade until the crisis). These policies usually have the aim (more or less hidden) of giving power to an economically strong class, which is trying to survive, not always to benefit of all the others.

We have also learnt that this kind of situation usually brings radical political and social changes.

These are the things that we are dealing with. These are the challenges of our future.

As a historian, I have a “sore hope” that we can finally and really remember the past in order to construct the future with a real consciousness of what Kevin Robins⁴¹ has so well described: “no change is possible anymore, once the change’s inspiration [the knowledge of one’s own past] has been abjured”.

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KREDITO APSAUGOS IR BANKROTO ISTORIJA BEI REGLAMENTAVIMO TENDENCIJOS: ITALIJOS PATIRTIS

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Santrauka. Kredito apsauga – vienas iš svarbiausių ekonominių ir teisinių aspektų kiekvienoje visuomenėje. Vos paskaitę žinias galime suvokti, kokia aktuali ši tema yra ir mums. Išanalizavus idėjų bei socialinių, ekonominių ir politinių prielaidų, paskatintųjų įstatymų leidėjų šiuo klausimu priimti tam tikrus sprendimus, istoriją galima lengviau suprasti, kokie procesai šiuo metu vyksta ir kokie mūsų visuomenės ekonominiai, politiniai ir socialiniai poslinkiai. Apžvelgus Italijos teisines sistemos raidą reglamentuojant įmonių bankroto procedūras, pradedant nuo antikinės Romos įstatyme įtvirtinto požiūrio į pernelyg

didelį išiskolinimą, galima aiškiai pamatyti 2006 m. reformuoto dabartinio reglamentavimo pranašumus ir trūkumus. Pradėjus veikti naujam bankroto įstatymui, ankstesnis bankroto procedūrų pobūdis tapo labiau panašaus į privatų įmonių finansinio nuosmukio valdymą visiškai pakeičiant kreditų apsaugos tvarką. „Itališkasis būdas“ – tik vienas tarptautinės tendencijos rezultatas, kurio pasekmės pastebimos ne tik visoje Europos Sąjungoje, bet ir Jungtinėse Amerikos Valstijose. Didžiausia viltis, jog istorikai galbūt gali pradėti mokslinius panašių temų svarstymus ir suteikti galimybę kitiems mokslininkams plačiau pažvelgti į minėtus teisinius fenomenus.

Reikšminiai žodžiai: bankrotas, romėnų teisė, pernelyg didelis išiskolinimas, istorinis palyginimas, kredito apsauga, bonorum venditio, kreditorių komitetas, 11 skyrius.

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