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The Historical Foundation of Bankruptcy European Law: Restructuring and Second Chance Policy

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This paper focuses on the historical affirmation of a distinguished treatment between the unfortunate entrepreneur and the fraudulent one and of the legal tools for resolving entrepreneurs' crisis, reconciling restructuring and second chance with the rights of creditors. Here are some suggestions, which will be deepened in a future monographic work. The idea behind this study is that in Roman sources and in the thought of Benvenuto Stracca (as in other relevant treatise authors) there are - unlike what has been thought in doctrine for a long time [1] - the roots of the desirable overcoming of the idea and presumption that the insolvent entrepreneur is always a defrauder.

The Economic crisis has made a new approach to insolvency law a priority in all countries. This approach has been adopted and recommended by the EU, through the *Directive (EU) 2019/1023*. Its primary objective is to save honest entrepreneurs in economic difficulty, through restructuring and discharge of debt, and to give them a second chance. [2] A functioning system of restructuring rules is nowadays essential to have a healthy business market. It supports trade and investment, helps to create and maintain jobs and helps economies to withstand shocks. [3] It is imperative, now more than ever, that Europe faces a new global

[1] See C. PECORELLA, U. GUALAZZINI, voce *Fallimento (storia)*, *Enc. dir.*, XVI, Milano, 1967; U. SANTARELLI, voce *Fallimento (storia del)*, *DDP*, *Sez. Comm.*, 5, Torino, 1990; A. BARBAGLI, *Profili giuridici del fallimento nel pensiero dei commentatori*, Torino, 2019.

[2] Directive EU 2019/1023, w. 1-2, 4-6, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019L1023&from=IT and see P. WYMENGA, J. GLOSER, E. BEZEGOVA, C. BESSELING, *Bankruptcy and second chance for honest bankrupt entrepreneurs. Final Report*, Rotterdam, 2014.

[3] G. MCCORMACK, A. KEAY, S. BROW, *European Insolvency Law: Reform and Harmonization*, Cheltenham, 2016; B. WESSELS, S. MADAUS, *Rescue of Business in Insolvency Law*, Vienna, 2017, https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/Instrument_INSOLVENCY.pdf.

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economic crisis after the covid-19 emergency.

The lack of rapid restructuring and debt relief instruments negatively effects the economic growth of negligent states, in which wealth is destroyed as entrepreneur is liquidated due to insolvency. [4] Each year more than 200.000 EU businesses are facing insolvency; evidence shows that honest/non-fraudulent bankrupts are 96% of bankruptcy cases. However, they are treated by most bankruptcy laws in the Member States as strictly as fraudulent ones. Furthermore, after a discharge, also they face difficulties and discrimination in starting a new venture. This is a significant problem for the European economy, because, as a consequence of existing bankruptcy laws and business discrimination, a potential source of growth is being wasted. [5]

Regarding insolvency law, many European countries share a common tradition that has its roots in Roman law and in the elaboration of medieval legal science. However, also for those countries that have not shared this tradition, the knowledge of rational legal solutions in Roman law and medieval trade law can be, in the field of insolvency law, an important reference to pursue consciously on the path of legislative harmonization.

An historical approach, in search of the most reasonable solutions, using Roman, medieval and modern sources, is very profitable, because the solutions implemented by Stracca and founded on Roman law represent (also today) a concentrate of legal rationality. The experience of a country far from European legal tradition, such as China, that is adopting Roman law as a legal model, [6] shows that Roman law can be a source of inspiration even in countries whose legal history does not include its direct application. [7]

Nowadays, in times of economic crisis, it is fundamental to support honest entrepreneurs by reserving them advantageous tools for its restructuring and discharge from debts. Honest entrepreneurs need to access early to pre-insolvency restructuring proceedings that can lead to voluntary agreement with creditors or attested plan for restructuring. In an historical investigation perspective, it will be first of all important to start from the distinction set by Benvenuto Stacca in his treatise *De conturbatoribus sive decoctoribus*, in which he distinguishes three categories of insolvents in contrast with Baldo degli Ubaldi's previous thought.

Baldo's belief was that insolvents are all defrauders (*fallitus ergo fraudator*), while Stracca in his treatise distinguished who was insolvent due to bad luck (*fortunae vitio*), who deserved

[4] Regulation EU 2015/848, w. 9-10, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32015R0848&from=IT and Directive EU 2019/1023, w. 1-17, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019L1023&from=IT

[5] https://ec.europa.eu/growth/smes/promoting-entrepreneurship/action-plan_es.

[6] O. DILIBERTO, *La lunga marcia. Il diritto romano nella Repubblica Popolare Cinese*, L. Canfora - U. Cardinale, *Disegnare il futuro con intelligenza antica. L'insegnamento del latino e del greco antico in Italia e nel mondo*, Bologna, 2012.

[7] F. SERRAO, *Diritto privato economia e società nella storia di Roma*, Napoli, 2006, XIII (Prefazione).

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pity (*genus hominum miserabile*), from those who were bankrupt for his inclination to delapidate assets (*vitio suo*). Between these two categories there was also a twilight zone, in which it was difficult to distinguish the merchant's responsibilities from bad luck (*partim fortunae, partim suo vitio decoxere*). [8]

According to Stracca, only the fraudulent position of the insolvent affected the possibility of obtaining the discharge of the debts after the *pactum concordiae*. [9] So, there is an important innovation in Stracca's opinion regarding the general rule foreseen by Roman law: setting the same distinction *Cicero* says that it is irrelevant. [10] With regard to the merchants' law of the XIII-XVII centuries, not only the legal elaboration of Stracca and other sources of the Roman legal tradition, but also *ius proprium* and e.g. the particular experience of the Venetian legal system could help us. In fact, in Venice there was a collective body of the Republic appointed to stimulate and favor agreements between debtors and creditors. The *Collegio dei Sopraconsoli* had the task of doing all in their power to get non-fraudulent debtors to agree with their creditors as it was considered ethically correct to provide assistance to these unfortunate entrepreneurs (*quia pium est dare subventionem istis talibus*). [11]

On the other hand, it is fundamental to focus on other significant Roman sources that have not been studied in a diachronic perspective. In particular, it is relevant to underline the fact that the Roman bankruptcy arrangement (*pactum ut minus solvantur* = D. 2.14.7.17 ss.) provided for the automatic discharge of debts - as stipulated by the heir of the insolvent, who, in fact, is not in *dolus* with respect to the insolvency of *de cuius*. At the same time, in the same direction goes Gaius' assertion, *Inst.* 2.155, that *heres necessarius*, which is certainly not responsible for having caused the insolvency of the *de cuius*, will always be discharged, thus, he can limit liability for debts to the asset side of the balance sheet.

The common opinion believed that restructuring procedures always benefit the debtor who avoids to pay part of his debts, while insolvency proceedings better preserve the rights of creditors: this idea is misleading. [12] It will be possible to highlight how, even in a historical perspective, the early collaboration between creditors and debtors implied the best satisfaction for all the interests involved. *Lex duodecim Tabularum* has already suggested so, as it seems to attest *Noct. Att.* 20.1.46, and the same was true in relation with *pactum ut minus solvantur*, as

[8] BENVENUTI STRACCHAE, *De conturbatoribus sive decoctoribus tractatus*, *De mercatura seu mercatore tractatus*, Venetiis, 1553, Pars II, n. 2.

[9] BENVENUTI STRACCHAE, *De conturbatoribus*, cit., Pars VI, nn. 1, 5.

[10] *Phil.* II, 44.

[11] G.I. CASSANDRO, *Le rappresaglie e il fallimento a Venezia nei secoli XIII-XVI*, Torino, 1938.

[12] In this sense, see L. STANGHELLINI, *Le crisi di impresa fra diritto ed economia. Le procedure di insolvenza*, Bologna, 2007.

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I said in a recent article on the base of previous doctrine. [13] Already in Roman Law negotiated solutions were preferred, because they were advantageous for everyone. [14]

Nowadays, EU suggests to privilege restructuring procedures based on agreements. Nevertheless, debtors and creditors do not follow spontaneously this way. Entrepreneurs' mentality leads them to delay these procedures, when the restructuring of debts is precluded. [15] This situation evidences the need of an entrepreneurship's re-education: entrepreneurs should no longer be worried about crisis and insolvency management and as soon as possible they should try the path of reconciliation with their creditors. [16] Creditors, from their point of view, should also understand that, in relation to the time and costs of insolvency proceedings, the restructuring is the fastest and most profitable way to obtain satisfaction. In this perspective, the thought of Benvenuto Stracca, who in his treatise had thoroughly analyzed the advantages of the debtors and creditors when they reached an agreement, will still be profitable to avoid the preconceived idea that the liquidation of assets is more favorable for the creditors than the agreed solutions. If also Roman Law considered the agreement with creditors the best way to solve insolvency, a deeper study of this cultural heritage will be very useful in building a new harmonized European restructuring and second chance law system.

[13] *Sulle tracce dei fondamenti degli accordi di ristrutturazione dei debiti nella compilazione giustinianea*, *TSDP*, 12, 2019, on the base of S. SOLAZZI, *Diritto ereditario romano*, II, Napoli, 1933.

[14] A. GUARINO, *«Pactum quo minus solvaur»*, *Pagine di diritto romano*, VII, Napoli, 1995; A. CALZADA GONZÁLEZ, *Reflexiones en torno al pactum quo minus solvatur*, *La responsabilidad civil. De Roma al derecho moderno (IV Congreso internacional y VII Congreso iberoamericano de derecho romano)*, Burgos, 2001 and M. CAMACHO DE LOS RÍOS, *Estudio crítico sobre las formas convencionales de limitacíon de la responsabilidad hereditaria,* in *RGDR*, 19, 2012.

[15] S. DE MATTEIS, *L'emersione anticipata della crisi d'impresa. Modelli attuali e prospettive di sviluppo*, Milano, 2017.

[16] https://www.eea.gr/system/uploads/asset/data/9042/Bankruptcy_and_second_chance_for_honest_bankrupt_entrepreneurs_FINAL_REPC
pdf.

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