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FUNDAMENTALS OF INSOLVENCY AND BANKRUPTCY LAWS

DOCTRINAL RESEARCH PAPER:

HISTORY EVOLUTION OF BANKRUPTCY LAWS

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ABSTRACT

The paper will explain the necessity and various other reasons, as to why and how the Bankruptcy laws came into existence. Thereafter, the paper will discuss the evolution of Bankruptcy laws in primitive society of man. Later, the paper will deep dive into the jurisdiction of England, US, and Italy. After discussion of historical evolution, the paper will look for comparison between different jurisdictions like US, UK, and India. The differences and similarities between the jurisdictions will be looked exclusively for the jurisdictions like India, US, and England.

The global history of the evolution of insolvency bills illustrates the development of public perception of commercial insolvency over time. Throughout history, insolvency has been closely linked to the debtor, with traits like pride, conceit, and an exaggerated inclination to speculate being viewed as causes of insolvency. This led to the Roman concept of falls ergo fraudsters, which refers to someone who is insolvent and therefore dishonest, characterizing all bankrupts as fraudulent. But, as Europe's trade and commercial towns developed, bankruptcy laws gradually took hold, and the idea of insolvency became less personal. Corporal punishments for debtors gave place to financial penalties, and eventually, management gave up control.

Keywords: Bankruptcy Laws, Insolvency regimes, Enforcement obligations, Efficacy of Bankruptcy regimes.

RESEARCH PROBLEM

This paper will look at the following problems:

- What led the origin of Bankruptcy laws in different jurisdictions?
- What are methods of enforcement of obligations in primitive society?
- What are the differences and similarities between jurisdictions on Bankruptcy laws?
- What are the challenges faced by Sweden and how legislation evolved?
- To find out more about the structural differences between different Bankruptcy regimes.

LITERATURE REVIEW

Default and Imprisonment for Debt in Sweden: From the Lost Chances of a Ruined Life to the Lost Capital of a Bankrupt Company[1]

: Karl Gratzer

The paper describes the legal documents, decrees, statistics, jail records, court depositions, and legislative diaries that the author employed as sources and methodology for the study. It also recognizes the study's shortcomings and difficulties, including its lack of systematic attention, information scarcity, diversity of legal cultures, and lack of a thorough theory.

It gives a historical account of the treatment of debtors who were unable or unwilling to pay their obligations by various legal systems, including Roman, Germanic, and Italian. It follows the development of the terms default, insolvency, bankruptcy, and fraud as well as the range of sanctions and rights that were imposed on debtors, including incarceration, death, and property surrender.

The Historical Evolution of Bankruptcy Law in England, the US and Italy up to 1939: Determinants of Institutional Change and Structural Differences[2]

: Paolo Di Martino

The reading talks about historical development of bankruptcy laws in the US, Italy, and England prior to 1939, and the ways in which institutional, cultural, and economic variables impacted these laws.

the structural distinctions between bankruptcy regimes concerning the relative authority between creditors and debtors, as well as the perspectives on business survival or liquidation.

The factors that influence institutional change in bankruptcy law include the impact of financial and economic crises, the gap between the public and legal perspectives on debt and failure, and the degree of interference with contractual agreements.

the inefficiency of various bankruptcy rules and procedures and how they impacted the ability of creditors to be paid back, the encouragement of entrepreneurship, and the identification of financially sound businesses.

[1] Karl Gratzer, Default and Imprisonment for Debt in Sweden: From the Lost Chances of a Ruined Life to the Lost Capital of a Bankrupt Company, 15 - 60, (Södertörns högskola 2008)

[2] Paolo Di Martino, The Historical Evolution of Bankruptcy Law in England, the US and Italy up to 1939: Determinants of Institutional Change and Structural Differences, 263 – 280, (Södertörns högskola 2008)

THE ROLE OF HISTORY AND CULTURE IN DEVELOPING BANKRUPTCY AND INSOLVENCY SYSTEMS: THE PERILS OF LEGAL TRANSPLANTATION[3]

: NATHALIE MARTIN

The document's central thesis is that insolvency and bankruptcy laws are social instruments that capture the legal, political, historical, and cultural backgrounds of the nations that created them.

The two-party political structure, the country's consumerist and capitalist mindset, and the importance of private attorneys in the bankruptcy procedure all have an impact on the peculiar bankruptcy system in the United States.

With varied degrees of success, several nations and regions—such as England, Continental Europe, and East Asia—have adopted or changed bankruptcy laws modeled after those in the United States, despite having diverse cultural attitudes toward debt and debt forgiveness.

The Early History of Bankruptcy Law[4]

: Louis Edward Levinthal

This is an article about the early history of bankruptcy law. It discusses the development of laws related to debt and insolvency. The article explores how different societies dealt with debtors who could not repay their debts.

In early societies, there were no formal laws for bankruptcy. Instead, social norms and religious beliefs encouraged debtors to repay their debts. Over time, as societies became more complex, formal laws were developed to address bankruptcy. These laws aimed to protect creditors from each other and from fraudulent debtors.

One of the earliest examples of bankruptcy law comes from ancient Mesopotamia. The Code of Hammurabi, which was written in the 18th century BC, included provisions for debtors who could not repay their debts. The code allowed debtors to sell themselves or their families into slavery in order to pay off their debts.

[3] Nathalie Martin, The Role of History and Culture in Developing Bankruptcy and Insolvency Systems: The Perils of Legal Transplantation, 28 B. C. INT'l & COMP. L. REV. 1 (2005).

[4] Levinthal, Louis Edward, The Early History of Bankruptcy Law., 223–50, *University of Pennsylvania Law Review and American Law Register* 66, no. 5/6 (1918): https://doi.org/10.2307/3314078.

Bankruptcy law continued to develop in the ancient world. The Greeks and Romans both had laws that addressed bankruptcy. The Roman law of bankruptcy was particularly influential, and it formed the basis for many modern bankruptcy laws.

In the Middle Ages, bankruptcy law was largely controlled by the Church. The Church taught that debtors had a moral obligation to repay their debts. However, the Church also recognized that some debtors were unable to repay their debts due to circumstances beyond their control. As a result, the Church developed a number of rules that allowed debtors to obtain relief from their debts.

In the Renaissance, bankruptcy law began to be secularized. This process was accelerated by the Protestant Reformation. The Protestant reformers rejected the Catholic Church's teachings on debt and bankruptcy. They argued that debtors should not be held responsible for debts that they were unable to repay.

The secularization of bankruptcy law led to the development of modern bankruptcy laws. These laws are based on the principle that debtors should be given a fresh start. Bankruptcy laws allow debtors to discharge their debts and start over.

Bankruptcy law is a complex and ever-evolving area of law. It is important to consult with an attorney if you are considering filing for bankruptcy.

SCOPE

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The necessity of bankruptcy rules and a number of other factors will be covered in this paper's explanation of their creation. After that, the study will examine how bankruptcy laws developed in prehistoric human society. After that, the report will go further into the jurisdiction of Italy, the US, and England. After considering historical evolution, the paper will compare several jurisdictions, including the United States, the United Kingdom, and India. Only the distinctions and commonalities among the jurisdictions—such as those in the US, England, and India—will be examined.

OBJECTIVITY

The paper tries to conclude or state following objectives:

- Study and analyse the origin of Bankruptcy evolution.
- Study methods of enforcement of obligation in the primitive era.

- Study the purpose of initial legislation.
- Study the differences and ambiguities prevalent in earlier legislation.

COMPOSITION OF THE PAPER

Abstract

Introduction

Understanding the primitive mindset

Historical origin of codification of Bankruptcy Laws

Imprisonment on default: Sweden

Structural differences of jurisdictions

Role of past in the Bankruptcy procedures

Difficulties in transplantations across the jurisdictions

Implications of Bankruptcy in primitive modern Europe: 16th-19th century

Efficacy of Bankruptcy regimes

The perspective of closure or survival

Suggestions

Conclusion

References

INTRODUCTION

A single definition of bankruptcy or insolvency that satisfies all requirements for other jurisdictions cannot exist. Debtors were also considered part of the subject in certain jurisdictions in the early primitive age, although merchants were the only ones protected by it. Under this discipline, there were initially three main goals:

1. The just allocation of proprietary among creditors.
2. To stop debtors from acting negatively to deceive creditors.
3. In a conservative society, friendly settlement or debt discharge is offered to save truthful debtors from harm.

The harsh and creditor centric Twelve Tables laws date back to 450 BC and were prevalent in early Rome. A few of the harsh and inhumane clauses stated that creditors would be able to arrest, enslave, and occasionally even kill or sell debtors to foreign nations if they failed to make their payments. An old saying that goes, "He who cannot pay with his purse pays with his skin," inspired these privileges. Not only was reputation at risk, but one's entire existence was dependent on creditors.

UNDERSTANDING THE PRIMITIVE MINDSET

In the prehistoric past, there was no regulation protecting honest debtors or any laws to stop debtor fraud—an organization known as credit operated on the principles of human confidence founded upon kindness and sincerity. According to popular belief, there were two very strong penalties that were in place at the time and forced debtors to do their share of the task.

The first type of punishment was known as "religious sanction," it was primarily used in South Asian nations, including India, Nepal, and medieval Ireland. The creditor(s) used to fast or sit on a dharna in the debtor's doorway until they starved to death while observing religious sanction. Another penalty has to do with "spirituality" in Egypt, where the debtor offers the body of their late parent as collateral for the loan. Deeply ingrained in morality and theology, the mummified body may be removed by creditors if the debtor fails to make payments.

To stop a single creditor from getting more than his claims at the expense of all other creditors, a collective execution technique was eventually adopted. There was no protection if the debtor had sufficient assets to cover all of the creditors' claims. Later, the contribution principle was developed to address the loss suffered by all creditors.

HISTORICAL ORIGIN OF CODIFICATION OF BANKRUPTCY LAWS

Few nations thought over time that bankruptcy rules needed to be regulated because of the harsh way debtors were treated. English, American, and Italian bankruptcy rules were among the first to be controlled. Most regulations, which set forth guidelines for creditors and debtors, date back to the early 19th century, in the great depression of 1930.

Codification in England

The 1930 Great Depression[5] and other economic upheavals prompted the introduction of English law rules in the early 1800s. Debt discharge, a liberal or debtor-centric aspect of bankruptcy law, was introduced due to the swift adjustments and revisions. A few essential clauses were arrangements between the debtor and creditors and the ban on stringent rules and regulations. However, subsequent revisions introduced incarceration as a penalty for default, and the Board of Trade[6] took over management of the procedures from creditors. Lawmakers and the courts upheld and developed bankruptcy legislation, which 1890 acknowledged the floating costs based on credit.

Codification in U.S.

The first laws were copies of English law and were passed[7] in 1800. Legislators made numerous revisions or amendments to the 1800 after it was passed in 1803, 1841, 1867, and 1878. There had never before been a railroad crisis in US history, but it did occur in 1884. How the judiciary addressed the Wabash Railway's failure differed significantly from the legal provisions. As an "equity receivership,"[8] the court-appointed receivers instead of liquidating the Railway. As a result of these ongoing judicial and legislative reforms, the first bankruptcy law was created[9] in 1898.

Codification in Italy

The Napoleonic Code heavily influenced[10] Italy's bankruptcy laws. In 1882, the very first bankruptcy law was passed. At first, the rules were more liberal and encouraged entrepreneurial endeavors. However, later on, the focus shifted from debtors to creditors. The legislation introduced strict liability; subsequent changes did not incorporate the earlier provisions of compromise documents and debt relief for debtors.

Creditors or their agents primarily oversaw Chapter 9 bankruptcy proceedings. However, it was discovered that the representatives were corrupt, incompetent, and involved in collusion. This resulted in significant changes that must be explained after implementing the moratorium. Subsequently, it was

[5] Paolo Di Martino, The Historical Evolution of Bankruptcy Law in England, the US and Italy up to 1939; Determinants of Institutional Change and Structural Differences 265 (Stockholm, August 2005)
[6] Id
[7] Paolo Di Martino, The Historical Evolution of Bankruptcy Law in England, the US and Italy up to 1939; Determinants of Institutional Change and Structural Differences 265 (Stockholm, August 2005)
[8] Supra note 1.
[9] Britannica, https://www.britannica.com/money/topic/Pullman-Strike (last visited Oct. 26, 2008).
[10] 6 Paolo Di Martino, The Historical Evolution of Bankruptcy Law in England, the US and Italy up to 1939; Determinants of Institutional Change and Structural Differences 266 (Stockholm, August 2005)

revoked and then reinstated. Once more, the Great Depression of 1930 brought about significant changes, including the introduction of estate liquidation. The process was overseen by public organizations[11], but debt forgiveness was not included in the revisions.

IMPRISONMENT ON DEFAULT: SWEDEN

This chapter will deal with the historical overview of the treatment of debtors who were unable or unwilling to pay their debts by various legal systems, including Roman, Germanic, and Italian. It follows the development of the terms default, insolvency, bankruptcy, and fraud, as well as the sanctions and rights imposed on debtors, including incarceration, death, and property surrender.

Origin & Development:

Roman law is the source of debtors' jail, when bankrupt debtors endured cruel punishments like servitude, torture, and mutilation. Debtors' prisons were established in Sweden as early as the thirteenth century, and they coexisted with the evolving bankruptcy system until 1879.

In Europe, the shift from debtor's captivity to debtors' jail began in the twelfth century, and in Sweden, it picked up steam in the sixteenth. Debtors' prison served as a tool for obtaining concealed assets from inmates or forcing them to pay off debts.

Legal regulations and practices:

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A number of laws and decrees, including the 1607 Privileges of Carl IX for Gothenburg, the 1734 Enforcement Code of Conduct, the Bjärköarätten (the ancient general urban law code in Sweden), and the Visby stadslag (the general urban law code of Visby), governed debtors' prison. The terms and processes for placing debtors under custody, the rights and responsibilities of both creditors and debtors, the possibility of property surrender on a voluntary basis (cessio bonorum), and the sanctions for dishonest or fraudulent debtors were all outlined in these laws. Usually housed in a private residence or a civic structure, debtors' prisons subjected them to cruel and degrading treatment, like chains, stocks, or shaven hair. The debtor's family life, social standing, and civil rights were all impacted by their incarceration.

[11] Paolo Di Martino, The Historical Evolution of Bankruptcy Law in England, the US and Italy up to 1939; Determinants of Institutional Change and Structural Differences 267 (Stockholm, August 2005)

Abolition and aftermath:

Sweden abolished debtors' prison in 1879 following a protracted and contentious discussion among lawmakers, judges, economists, and social reformers. The system's inefficiency, injustice, and inhumanity were the main justifications for its abolition, along with the shifting perspectives on credit, debt, and insolvency in the industrializing world. Following the abolition, contemporary bankruptcy legislation was introduced in 1880 with the goals of safeguarding creditors and debtors alike and assisting in the rehabilitation of honorable insolvent debtors.

Codification of Debt & Insolvency:

Debtors' prison, the last official institution in Sweden to stigmatize debtors, was abolished in 1879 following a protracted and intricate institutional reform process. It also implies that the transmission of legal concepts from other nations, particularly Germany and Italy, as well as the economic, social, and political circumstances of various eras had an impact on the evolution of the bankruptcy system.

STRUCTURAL DIFFERENCES OF JURISDICTIONS

the development of bankruptcy legislation and practice throughout history in Italy, the US, and England. It examines the structural distinctions between these three nations in terms of two aspects: the equilibrium between creditors and debtors and the mindset surrounding the survival or dissolution of businesses. The following are some significant points:

- Debtors vs. creditors: the US had the most debtor-friendly laws and regulations, England was in the middle, and Italy had the most creditor-oriented policies. It uses the management of procedures, the existence or lack of debt discharge, and the requirements for achieving amicable agreements as examples of how these differ.
- Continuation against interruption: There isn't a direct correlation between the biases of liquidation and continuation and debtor/creditor orientation. Italy does not permit the transfer of all assets to creditors or the remission of debt, indicating a severe interruption bias. claims that because England did not manipulate contracts in order to benefit debtors, and because its debt discharge procedures were more precise and selective than those in the US, it was also more continuation-oriented than the US.

ROLE OF PAST IN THE DEVELOPMENT BANKRUPTCY PROCEDURES:

Systems of bankruptcy and insolvency are social instruments that capture the legal, political, historical, and cultural milieu of the nations that created them.The two-party political structure, the country's consumerist and capitalist mindset, and the importance of private attorneys in the bankruptcy procedure all have an impact on the peculiar bankruptcy system in the United States.

With differing degrees of success, other nations and regions, like East Asia, Continental Europe, and England, have adapted or changed U.S.-style bankruptcy laws in response to cultural differences about debt and debt forgiveness. The development of credit globally presents a dilemma for nations seeking to strike a balance between the preservation of social conventions and cultural values and having to provide for a system of bankruptcy that is forgiving.

DIFFICULTIES IN TRANSPLANTATIONS ACROSS THE JURISDICTIONS

There are few reasons as to why the legal transplantation stacked earlier, few of them are as follows:

Differences in culture:

Each nation's legal, political, historical, and cultural contexts have an impact on its bankruptcy systems. As with social and economic objectives, views regarding debt, risk, and failure vary between nations. A bankruptcy system transplanted from one nation to another might not align with the norms and values of the host society and might be met with opposition or rejection. For example, nations that consider debt to be a moral obligation or a matter of honor may not accept the relatively mild and forgiving bankruptcy system in the United States.

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Credit accessibility:

Each nation's bankruptcy laws are influenced by the quantity and kind of credit available to its citizens. More expanded and liberalized credit markets may necessitate more lenient bankruptcy laws to handle the inevitable financial collapses brought on by increasing lending and borrowing. The need for bankruptcy relief may not be as great in nations with less developed or regulated credit markets. It might not be necessary or effective to transplant a bankruptcy system from a high-credit nation to a low-credit nation, and vice versa.

Legal practices:

Every nation's legal tradition and institution have an impact on its bankruptcy systems. The bankruptcy systems of nations with comparable legal traditions—such as the common law or the civil law—may be more similar than those with distinct legal traditions1. It can be difficult to transplant a bankruptcy system from one legal tradition to another in a way that is coherent, consistent, and compatible. For instance, substantial adjustments and revisions may be necessary to meet the current legal framework when transplanting the common law-based U.S. Chapter 11 reorganization system to a civil law nation.

IMPLICATION OF BANKRUPTCY IN PRIMITIVE MODERN EUROPE: 16TH – 19TH CE

In this chapter I will try to explore what are the economic, social and cultural implications of bankruptcy in early modern Europe, from the 16th to the 19th century.

Bankruptcy and capitalist:

The system of private property, market forces, and legal institutions that underpins capitalism has always included bankruptcy as a fundamental aspect. In addition to reflecting the successes and scams of opportunistic conduct, bankruptcy also represented the dangers and rewards of entrepreneurial innovation. Over time, bankruptcy also led to modifications in the structures and operations of financial institutions, corporate entities, and laws.

Social links and bankruptcy:

Debtors and creditors, who were frequently linked by ties of kinship, friendship, association, or cooperation, engaged in intricate and dynamic exchanges throughout bankruptcy. In addition to highlighting the difficulties with information, communication, and enforcement in a globalizing market, bankruptcy also highlighted the significance of trust, reputation, and honor as the foundation stone of credit and commerce. The social standing and mobility of merchants, their families, and their networks and communities were also impacted by bankruptcy.

Bankruptcy and its cultural connotations:

Bankruptcy gave rise to a variety of dynamic discourses and depictions in a range of media, including plays, novels, artworks, moral treatises, and chronicles. In addition to expressing political and economic goals, bankruptcy also represented moral judgments and ethical standards. In addition, bankruptcy sparked discussions and research in fields including accounting, economic history, and cameralism.

EFFICACY OF BANKRUPTCY REGIMES

In this chapter, I will attempt to assess the three nations' bankruptcy regimes' relative efficacy in handling a variety of problems, including risk-taking, credit intermediation, asset recovery, and company survival. The Italian and American laws were inferior than the English law, which had distinct causes of inefficiency.

The harmony between the rights of creditors and debtors:

Bankruptcy laws had to reconcile the conflicting interests of debtors and creditors. The US had the most debtor-friendly system, Italy had the most creditor-oriented one, and England fell somewhere in the middle. Additionally, bankruptcy rules have to choose between supporting the continuation of financially troubled businesses and their liquidation. The US was in favor of continuity, whereas Italy had a strong inclination against liquidation. England was more lenient and selective, based on the specifics of each case.

Each nation's cultural perspective on bankruptcy was mirrored in the varying levels of protection afforded to creditors and debtors. The Napoleonic code had an oppressive and moralistic viewpoint in Italy. English law served as an inspiration for the US's pragmatist and tolerant legal system. Based on a precise and multi-result process, England held a moderate and fair opinion.

THE PERSPECTIVE OF CLOSURE OR SURVIVAL

In this chapter we will be discussing perspective of debt-discharge or the closure or survival of the business of mainly three jurisdictions, which are as follows:

US:

The report claims that due to political and economic pressure to keep railroads and other businesses from going out of business, the US has the most continuation-oriented and debtor-friendly laws. But this rule also encouraged fraud, risk-taking, and speculating, and it didn't give creditors and debtors enough incentives or screening.

England:

Because there were no significant economic shocks and the common law history, English law was more balanced. This law made it possible for both creditors and debtors to profit from the survival of successful firms by establishing effective screening tools, equitable debt discharge procedures, and widespread use of friendly agreements.

Italy:

Thanks to the Napoleonic code and the legacy of medieval law, Italy has the most creditor-oriented and interruption-biased legal system. This law allowed creditors considerable control over operations, did not provide debt discharge, and placed stringent requirements on amicable arrangements. Nevertheless, this law also shown inefficiency, slowness, and corruption. It was also unable to address the ongoing financial and economic crises, necessitating the use of state interventions and ad hoc solutions.

SUGGESTIONS

The study presents bankruptcy regimes as uniform, unchanging entities, ignoring their diversity and complexity within each nation. For instance, it doesn't take into consideration the distinctions between US federal and state legislation or the regional variances in Italy. The article over-relies on the formal parts of legislation and ignores the influence of informal institutions, social norms, and enforcement mechanisms on the outcomes of bankruptcy procedures.

The paper is deceptive because it claims to compare bankruptcy laws in Italy, the US, and England through 1939, but it only goes up to the middle of the 1930s. In addition to lacking any quantitative analysis or empirical justification for its ranking of the three examples, the report fails to define bankruptcy law's efficiency.

CONCLUSION

The comparison ignores the diversity and complexity of bankruptcy regimes within each country, portraying them as homogeneous, immutable entities. It ignores, for example, the differences between state and federal laws in the United States and the regional variations in Italy. The paper over-depends on the formal aspects of law and undervalues the impact of social norms, informal institutions, and enforcement methods on bankruptcy proceedings.

The article needs to be more accurate because, although it only covers the mid-1930s, it purports to compare bankruptcy rules in Italy, the US, and England until 1939. The paper does not define bankruptcy law's efficiency, nor does it provide any quantitative analysis or empirical explanation for its rating of the three scenarios.

REFRENCES

Books

Levinthal, Louis Edward, The Early History of Bankruptcy Law., 223–50, *University of Pennsylvania Law Review and American Law Register* 66, no. 5/6 (1918): https://doi.org/10.2307/3314078. 4

Paolo Di Martino, The Historical Evolution of Bankruptcy Law in England, the US and Italy up to 1939: Determinants of Institutional Change and Structural Differences, 263 – 280, (Södertörns högskola 2008) 3

Journals

Karl Gratzer, Default and Imprisonment for Debt in Sweden: From the Lost Chances of a Ruined Life to the Lost Capital of a Bankrupt Company, 15 - 60, (Södertörns högskola 2008) 3

Nathalie Martin, The Role of History and Culture in Developing Bankruptcy and Insolvency Systems: The Perils of Legal Transplantation, 28 B. C. INT'l & COMP. L. REV. 1 (2005). 4

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