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## ORIGIN OF BANKRUPTCY PROCEDURE IN ROMAN LAW

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***Annotation.** In order to clarify the objectives of bankruptcy, to reveal the true essence of bankruptcy procedure and the origin of legal terms, it is necessary to ascertain the nature of this institute of law, as well as the reasons for its creation and development. This article provides historic analysis of the development of the institute of bankruptcy procedure. For this purpose, a historic comparative research is undertaken in the article, in order to find certain parallels of bankruptcy procedure under Roman law and the modern bankruptcy procedure. Roman law has been chosen as the most phenomenal ancient law for the purposes of undertaking a historic analysis of the development of bankruptcy procedure. In the authors' opinion, it is the best example that reveals the origin of bankruptcy procedure, and the reasons for its formation. Analysis of certain private law institutes of Roman law enables the authors to conclude that the main features (principles) of the bankruptcy procedure formed precisely under Roman law: replacement of personal liability by pecuniary; public auction as a form of realization of debtor's property; transition from selling of debtor's property as a whole to disposal of property in divided property units; creation of subject, who administers auctions of debtor's property under oath not to act in selfish purposes; setting of a term of 30 days, during which a debtor has to cover the debts (claims' dispute resolution); establishment of the institute of informing creditors about initiated procedures of debt retrieval and encouragement to join these procedures; establishment of the ban to recover debts from household items; laying of the foundations of the institute of peace agreement between the debtor and*

*his creditors; establishment of actio Pauliana - a remedy for the protection of creditors rights. The mentioned rules in one way or another eventually have been transferred to legal acts on legal relations in case of bankruptcy of many foreign countries.*

**Keywords:** *development of bankruptcy procedure, Roman law.*

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## Introduction

Not all civil disputes are of social importance and involve numerous complex issues to solve, thus it is not reasonable to apply the same dispute resolution procedure for all types of disputes. It is essential to distinguish features for consideration of different categories of civil cases in accordance with the nature, complexity, and public importance of material relations. Consideration of civil cases is differentiated in accordance with the complexity of cases and the material nature of legal relations. The legislator establishes separate categories of civil cases on the basis of two criteria: the necessity to protect public interest in civil cases related to disputes on legal relations significant to the society, and the complexity of cases, i.e. the legal relations that caused the dispute are considered, and the plausibility to use specific rules on dispute resolution for certain requirements is evaluated. In order to clarify the purposes of the bankruptcy proceedings and to reveal the reasons for appearance of separate terms in bankruptcy, it is necessary to ascertain the nature of this institute of law, the reasons for its origination and development; thus, it is necessary to analyse the development of this institute.

For this purpose, a historic comparative research is discussed in the article in order to establish some parallels of the bankruptcy procedure under Roman law and the modern bankruptcy procedure.

Roman law has been chosen as the most phenomenal ancient law for the purposes of undertaking a historic analysis of the development of bankruptcy procedure. In the authors' opinion, it is the best example to reflect on the origins of bankruptcy procedure and the reasons for its formation. The essential principles of bankruptcy proceedings have formed precisely in Roman law.

*Relevance of the topic.* Due to the foregoing reasons, the scientific analysis of bankruptcy proceedings is very topical and can in principle help the legislator to decide on establishment of a particular model of bankruptcy procedure. Such scientific research helps to reveal the reasons for formation of bankruptcy procedure and its purposes that the established regulation mechanism of bankruptcy legal relations aims to implement.

*Research object.* Analysis of certain institutes of Roman civil law that reveal the essence of bankruptcy procedure.

*Purpose.* Analysis of the historic origin of institutes of the modern bankruptcy procedure.

*Objectives.* 1. To establish the origins of bankruptcy procedure. 2. To analyze separate institutes of Roman private law and clarify, which current institutes of bankruptcy procedure originate from Roman law.

*Description of applied methodology.* With the view of the purpose set for this research, the authors have applied integrated academic and empiric methods of scientific research: analysis of documents and legal phenomena, linguistic, comparative, abstract, logic, and generalising methods.

## 1. Origin of Bankruptcy Procedure

The answer to a question when did the bankruptcy procedure formulate depends on interpretation of the essence of “bankruptcy” itself, i.e. whether relations related with failure to pay debts could be considered as bankruptcy relations or not.

Protection of creditors’ interests from insolvency of a debtor has been an object of legal regulation since time immemorial. Therefore, interpretation and regulation of the modern bankruptcy procedure is the result of a long evolution of customs, and later, the written law.

Analysis of the law of ancient nations would lead to a very thorough search of the traces of this complicated institute in its modern understanding. A debtor himself and his family members (and not a debtor’s property) constituted a debt insurance guarantee in the undeveloped household reality of ancient nations. This rule had been established not only in the strict Laws of Manu, but also in the comparatively soft Law of Moses. This rule was established both under Egyptian and Greek Law.<sup>1</sup> Traces of specific debt relations could be found also in the old Hebrew scripts (11 Book of Kings, 4 section) – complaint of a woman to Elisha: “<...> My husband died and a creditor came, seeking to enslave my two sons...”,<sup>2</sup> and in Hammurabi’s Code, which provides that “If any one fail to meet a claim for debt, and sell himself, his wife, his son, and daughter for money or give them away to forced labor...<sup>3</sup> Recovery from the person of the debtor or his family members was also common to Roman law in its early development.

According to the life conditions of ancient nations, the level of social education and cultural and historic traditions, there is no point to discuss the existence of bankruptcy procedures, because the thoroughly discussed situations reveal the origin of the implementation procedure in more detail.

It is possible to talk about the origins of the modern bankruptcy procedure only from the moment when the debt recovery (which is without a doubt the main source of starting a bankruptcy procedure) have become directed towards personal property rather than the person, and the debt recovery procedure, instead of being the procedure of

1 Pagano, G. *Teorica del Fallimento*. Rome, 1889, p. 9.

2 Gecas, D. *Skolininkų neišsigalėjimas ir bankrotas*. [Gecas, D. Insolvency and Bankruptcy of Debtors]. Kaunas, 1929, p. 2.

3 Tamošaitis, A.; Kairys, J. *Hamurabio įstatymas*. [Tamosaitis, A.; Kairys, J. Hammurabi’s Code]. Kaunas: Vytauto Didžiojo universiteto Teisių fakulteto leidinys, 1938, p. 8.

personal arbitrariness, came into the regulatory field of state authorities. Thus G. Pagano was correct<sup>4</sup> claiming that bankruptcy procedure had not existed in the ancient cultures because it was essentially of private nature, and completely independent from interference of public authority.

## 2. Main Features of Modern Bankruptcy Procedure

Establishment of a specific legal norm is always determined by the objective needs of society. It was necessary for the purposes of the slavery system to create the relatively civilized rules on conflict management, but the form and content of conflict resolution reflected the stage of development of public relations. Thus, primarily personal responsibility, and not material responsibility, was applied to debtors.

The modern bankruptcy procedure is understood as the procedure on negotiating of competition of several requirements of creditors, which is caused by the lack of a debtor's property. In accordance with A. Ch. Golmstein,<sup>5</sup> the bankruptcy procedure can be considered only if these requirements are met:

- A debtor's property is insufficient to satisfy all creditors' claims;
- there is a number of creditors;
- there is a special procedure for satisfying creditors' claims.

G. F. Sersenevich<sup>6</sup> also attributes the special regime of debtor's property management and the formation of competition's mass<sup>7</sup> to these features.

Although these features were also common to the ancient nations' law, the bankruptcy procedure can be considered as such only in case of their co-existence.

Modern laws that regulate bankruptcy legal relations aim to preserve the debtor's possibility to restore solvency, disengage from the burden of debts and start the business anew.<sup>8</sup> Analysis of the experience of foreign countries reveals this tendency of development of bankruptcy legal relations; it shows that laws on bankruptcy legal relations have been softened for decades, and favourable conditions for recovery of company debts have been established by the state, representatives of private capital, and creditors who often acquire shares of insolvent companies, withdraw from a part of debt, and etc. Moreover, in foreign countries, for instance, France or the USA, special organizations for "saving" the insolvent companies are being established. These organizations specialize in normalization of operative and other activities of insolvent companies, restoring of their financial solvency, and etc.

4 Pagano, G., p. 9.

5 Голмстейн, А. Х. *Исторический очерк русского конкурсного процесса*. [Golmstein, A. Ch. *Historic Study of Russian Competitive Procedure*]. Санкт-Петербург, 1888, с. 1.

6 Шершеневич, Г. Ф. *Конкурсный процесс*. [Shershenevich, G. F. *Competitive Procedure*]. Классика Российской цивилистики. Москва, 2000, с. 27-28.

7 Competition's mass is the property that can be distributed for creditors, which includes not only the debtor's things and proprietary rights, but also all other proprietary interests and obligations of the debtor.

8 Степанов, В. В. *Несостоятельность (банкротство) в России, Франции, Англии и Германии*. [Stepanov, V.V. *Insolvency (Bankruptcy) in Russia, France, England and Germany*]. Москва: Статут, 1999, с. 14-15.

Therefore, legal norms on bankruptcy relations help solving one of the main tasks of market economy – elimination of civil relations' parties who cannot fulfil their obligations and work effectively. Nevertheless, the main purpose of the bankruptcy procedure is to restore the capacity and functioning of the debtor, while liquidating only these economic operators who are hopeless. According to most specialists (L.Lo Pucki,<sup>9</sup> D. Garbus,<sup>10</sup> V. V. Stepanov,<sup>11</sup> V. Vitianski<sup>12</sup>), the vindicatory purpose of bankruptcy procedure is the most important for the modern regulation of bankruptcy legal relations. However, some of the most authoritative specialists of the US bankruptcy procedure, D.G. Baird and R.K. Rasmussen<sup>13</sup> have expressed a regret that bankruptcy procedure aimed at saving economic operators experiencing financial hardships is either outdated and in any case, is only surviving its last days.<sup>14</sup>

### 3. Origin of Bankruptcy Procedure in Roman Law

In order to find the answer to questions when bankruptcy procedure formulated and how and for what reasons it has been transformed, it is necessary to analyze in detail certain stages of development of Roman law (the early stage of Roman law development, *manus iniectio* procedure, creation of *venditio bonorum* procedure, *distractio bonorum* and *cessio bonorum* procedures), when separate principles of bankruptcy procedure were formed, which later made a direct effect on the modern bankruptcy procedure. Reception of Roman law has become an important and unique phenomenon of the medieval European legal life. The practically inactive and dead law has managed to overcome the live law, at first even without intervention of the legislator. Considered as irreversible history for five decades, Roman law suddenly achieved what it was unable to do during the time of its peak of flourishing and power.<sup>15</sup> Subsequently, much experience acquired from Roman law had been transferred from generation to generation and received in the modern law due to efforts of medieval Europe lawyers who established specific Roman law dogmas in different legal acts.

It might seem that it is not correct to use terms like “bankruptcy,” “bankruptcy procedure”, “bankruptcy law”, “bankruptcy legal relations” and etc. in the context of

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- 9 LoPucki, L. *Current Development in International and Comparative Corporate Insolvency Law. A System Approach to Comparing US and Canadian Reorganization of Financially Distressed Companies*. Oxford, 1994, p. 115.
- 10 Garbus, D. *Out-of-Court Debt Restructuring Alternatives in the United States*. Boston, 1991, p. 121.
- 11 Stepanov, V.V., p. 17.
- 12 Витянский, В. В. *Особенности банкротства отдельных категорий должников*. [Vitianskij, V.V. Peculiarities of Bankruptcy of Separate Categories of Debtors]. Вестник ВАС РФ. Специальное приложение. 2001, № 3, с. 12.
- 13 Baird, D. G.; Rasmussen, R.K. *The End of Bankruptcy* [interactive]. University of Chicago. [accessed 2009-01-15]. <[http://www.law.uchicago.edu/Lawecon/WkngPprs\\_151-175/173.dgb.bankruptcy.end.pdf](http://www.law.uchicago.edu/Lawecon/WkngPprs_151-175/173.dgb.bankruptcy.end.pdf)> .
- 14 LoPucki, L. M. *Courting Failure: How Competition for Big Cases is Corrupting the Bankruptcy Courts*. London, 2003, p. 28.
- 15 Maksimaitis, M. *Užsienio teisės istorija*. [Maksimaitis, M. Foreign Law Theory]. Vilnius: Justitia, 2002, p. 113.

Roman law, because these terms originate from medieval Italy law, when term “bankruptcy” was used to describe the debtors who escape and hide from creditors. The term “bankruptcy” from Italian is translated as following: the term “*bankus*” in Italian means an *office, kiosk, trading institution* and the term “*roto*” means to *break or to close an office*.<sup>16</sup> However, on the basis of historic analysis of bankruptcy procedure, with the view of drawing some parallels between separate institutes of the modern bankruptcy procedure and its origins, we consider that it is reasonable to use the terms “bankruptcy,” “bankruptcy procedure,” “bankruptcy legal relations” and etc., because the linguistics and style thus applied in the modern bankruptcy law help to reveal the object and the purpose of the article.

Cases of several creditors issuing their claims to one debtor were common under Roman law. The regulation on relations of insolvent debtors initially provided that creditors of an insolvent debtor could recover the debt from the debtor and not his property (XVII Table of laws, III Table).<sup>17</sup> A debtor used to be transferred to creditors who could enslave or simply kill him, i.e. treat the debtor within their discretion, thus satisfying their creditors’ claims.<sup>18</sup> Creditors also had a right to chop the insolvent debtor’s body into as many pieces, as there were creditors - *partes secare*.<sup>19</sup> Despite further development of debt relations, this procedure remained as the last mode of failure to repay the debt, although in reality this was only satisfying the feeling of revenge of undeveloped individual towards insolvent debtor.

The conflict of interests of a debtor and creditors was being solved in a rather drastic way, but in accordance with the social conditions of the time, under-developed credit relations, lack of pecuniary system, and settled moral provisions, this was considered the norm. Obviously, this method of resolution of a conflict between a debtor and creditors cannot be considered as bankruptcy procedure in accordance with the modern bankruptcy procedures. As correctly observed by M. Teliukina,<sup>20</sup> it is possible to speak of the origin of bankruptcy procedure only in case prior the recovery from the person of the debtor, the debtor’s property had been realized and divided between the creditors who had put forward their claims. However, the possibility to review the status of a debtor periodically, i.e. to verify whether there are no circumstances for release of the debtor from slavery (although review of status would usually end to the debtor’s disadvantage) should be considered as progressive phenomenon of debt relations of these times.<sup>21</sup>

16 Ткачев, В. Н. *Несостоятельность (банкротства) в Российской Федерации. Правовое регулирование конкурсных отношений*. [Tkachev, V.N. *Insolvency (Bankruptcy) in the Russian Federation. Legal Regulation of Competitive Relations*]. Москва: Книжный мир, 2002, с. 10.

17 Vėlyvis, S.; Jonaitis, M. *XII lentelių įstatymai ir jų komentaras*. [Velyvis, S.; Jonaitis, M. *XII Tables of Law and their Commentary*]. Vilnius: Teisinės informacijos centras, 2007, p. 41–44; Kipp, T. *Romėnų teisės šaltinių istorija*. [Kipp, T. *History of Roman Law Sources*]. Kaunas: Vytauto Didžiojo universiteto Teisių fakulteto leidinys, 1939, p. 31–37.

18 Tkachev, V. N., p. 8.

19 Sersenevich, G. F., p. 28

20 Телокина, М. В. *Основы конкурсного права*. [Teliukina, M.V. *Basics of Competitive Law*]. Москва: Волтерс Кловер, 2004, с. 2.

21 Малышев, К. И. *Исторический очерк конкурсного процесса*. [Malyshev, K.I. *Historic Study of Competitive Procedure*]. Санкт-Петербург, 1871, с. 6.

The next stage to discuss is *manus iniectio* procedure. *Legis actio per manus iniectio* is a form of procedure, which was used to launch the implementation of any judicial (compulsory) decision. The discussed *legis actio* form (implementation of judicial decision) was set in Table 3 of the XII Tables of law.<sup>22</sup> Upon launching of the recovery procedure, *manus iniectio* as a symbolic expression of seizure powers was first of all needed in order to start personal execution of the debtor.<sup>23</sup> In a broad sense *manus iniectio* is a certain procedure, when the creditor in the presence of the magistrate would take the debtor into his custody and if the creditor's rights were not immediately implemented (i.e. *vindex* – the third person able to preclude further actions of the creditor – did not arrive), he would take the debtor to his home and kept him in detention for sixty days. Upon expiry of this term, the creditor could kill the debtor or sell him to slavery.<sup>24</sup> According to R. A. Miseviciute, *legis actio per manus iniectio* observance retained clear traces of private self-defence, which has been legalized with time, thus *manus iniectio* itself could be interpreted as formalized or stylized expression of the simple self-defence, common to the oldest period, when a city (state) had not yet participated in private disputes of individuals.<sup>25</sup> At that time, a term of thirty days started to apply to debtors admitting the fact of the debt to give them time to cover the debts. Only after the expiry of the set term, the debt recovery procedures could be applied to the debtor: „<...> if a debtor failed to pay a creditor within the set term, he was declared insolvent and then recovery from all property of the debtor and his person was launched...”<sup>26</sup> The period of thirty days was also applicable to persons who were subjects of judicial decisions. In case the debtor failed to satisfy the creditor's claim within the set term, the creditor had a right to apply compulsory process to the debtor or ask the court to adjudge the debtor himself to the creditor (*addictio*). *Manus iniectio* procedure applied not only in case of court decision or acknowledgement of a debt, but also when a debtor at the time of the contract conclusion agreed to ensure the debt by his person. In this case, a court decision on acknowledging the debtor as the creditor's property was not necessary. The debtor held hostage could be freed only if all of the debt was covered at once or if *vindex* joined the procedure, undertaking the obligation to cover the debt. *Vindex* had a right to bring the debtor home after *manus iniectio* procedure was finished. However, the debtor did not become a slave and did not lose his capacity. The debtor was being held for the term of 60 days, during which he was three times brought to a market place and offered for sale in exchange for covering of his debt.

22 Vėlyvis S., Jonaitis, M., p. 41–44.; Kipp, T., p. 34.

23 Wagner, L. *Procedura civile romana*. Milano: Dott. A. Giuffrè, 1938, p. 220.

24 Nekrošius, I.; Nekrošius, V.; Vėlyvis, S. *Romėnų teisė*. [Nekrošius, I.; Nekrošius, V.; Vėlyvis, S. Roman Law]. Vilnius: Justitia, 1999, p. 48.

25 Misevičiūtė, R. A. *Manus iniectio, kaip asmeninės (fizinės) atsakomybės išraiška, romėnų privatinėje teisėje*. Teisė į teisminę gynybą ir jos realizavimo praktiniai aspektai. [Miseviciute, R.A. *Manus Iniectio* as an Expression of Personal (Physical) Responsibility]. Vilnius: Mykolo Romerio universitetas, 2006, p. 96-97

26 Мальшев, К. И. *Исторический очерк конкурсного процесса. Классика Российской цивилистики*. [Malyshhev, K. I. Historic Study of Competitive Procedure]. Москва: Статут, 2000, с. 6.

If no benefactors came forward, *vindex* acquired the right to bring the debtor home as a slave who could be sold behind the borders of Rome or kill him if necessary.<sup>27</sup> Gradually due to poverty of Plebeians in Rome and their frequent running into debts, the need to restrict arbitrary creditors' actions arose, thus allowing them only in case of dishonesty of the debtor. For this purpose, the law known as *lex Poetelia Papiria* was adopted in 326 B.C. in Rome. The law banned arbitrary actions in cases when the debtor took an oath that he does not hide anything from the creditor and agrees to give all of his property. This law also abolished the compulsory guarantee of loans by the person of the debtor, and in addition established the possibility to free the insolvent debtor from slavery, provided he had not committed a crime.<sup>28</sup> The essentially changed approach of the state on debt relations, established when the state started to restrict arbitrary actions of creditors' and slightly improved the position of debtors, facilitated further development of economic-commercial relations. Thus gradually legal norms on recovery from the debtor's property were established in Roman law. Nevertheless, in cases when all property of the debtor was not sufficient to cover debts, the debtor was not excused from recovery from his person.<sup>29</sup> This model of regulation of debtor-creditor relations had been in force for a very long time.

It is not historically known, when precisely the recovery from the person of the debtor has been changed by recovery from the debtor's property. It is obvious that this was a gradual process, likewise all institutes of Roman law that developed gradually. Nevertheless, directing creditors' claims to the debtor's property (*executio realis*) is still the result of the Roman Praetorian law.<sup>30</sup> The Praetorian law precisely eliminated the vindictive nature of the *executio* procedure.

It is interesting that according to Gaius' *Institutiones*,<sup>31</sup> if a debtor is not available or is hiding, when recovery from the person was impossible, a creditor had a right to address a Praetor with a request to permit a disposal of the debtor's property (*missio in possessionem*). The basis of this claim could be either a court decision, a contract, or acknowledgement of debt. A number of creditors could put forward a claim for disposal of the debtor's property. If only one of few creditors presented a request for disposal of debtor's property, the claims of creditors who joined later were also satisfied. Enabling a creditor to dispose of the property of an insolvent debtor, without transferring of title to ownership, provided a possibility to supervise and safeguard the debtor's property (*bonorum servandorum causa*).<sup>32</sup> Initiation of the aforementioned procedures was followed by declaring the transfer of disposal and the prospective sale of property. Such announcement in its essence corresponded to providing information to the possible creditors and

27 Sersenevich, G. F., p. 29.

28 *Ibid.*, p. 30.

29 Ткачев, В. Н., с. 9.

30 Gecas, D., p. 3.

31 *Памятники римского права: Законы XII таблиц. Институции Гая. Дигесты Юстиниана.* [Monuments of Roman Law: Law of the XII Tables. Institutes of Gaius. Digests of Justinianus]. Москва: Зеркало, 1997, с. 608.

32 Sersenevich, G. F., p. 31.

inviting them to join the mentioned procedure. This invitation completely corresponds to the essence of the modern bankruptcy. A debtor was being declared *decoctor* (bankrupt), if creditors' claims were not satisfied, within 30 days, provided the debtor is alive (and in 15 days, in case he is dead).<sup>33</sup> *Magister bonorum vendorum* was elected from creditors to be in charge of sale of the debtor's property. The elected executor of an auction used to take an oath that he will honestly fulfil his functions. He had to find the buyers of the debtor's property and to ensure the conditions of contract on property sale. The property of an insolvent debtor used to be sold as a whole, thus the buyer became the successor of the property rights. The main condition of the property transfer was that the buyer had to provide a certain share of the property value to satisfy creditors' claims. The contract on sale of the property of an insolvent debtor had to be endorsed by the same praetor who adopted the decision to forfeit the debtor's property. The procedure discussed was called *venditio bonorum*. This term is also used to describe the debtor's property auction sale.<sup>34</sup> The mentioned method of selling the debtor's property was detrimental to creditors, because property on sale, as a whole, did not correspond to its real price. Gradually dissatisfaction of creditors resulted in transfer of full price for the debtor's property to the creditors. Thus a new way of selling an insolvent debtor's property appeared, *distractio bonorum*, which involved appointing a coordinator of property sale who was under an obligation to sell the property of a debtor as profitable as possible, and that was only possible through selling divided pieces of property. Thus, already at this stage, it is possible to notice the traces of one of the main subjects of the bankruptcy procedure's implementation – the bankruptcy administrator.

Laws on implementation procedures enforced at the time of Julius Caesar's reign established even more favourable provisions, which facilitated the position of an insolvent debtor, i.e. a possibility to avoid recovery from the debtor's person appeared. Moreover, a possibility to avoid public condemnation (*infamia*) was established, which had always been applied to an insolvent debtor.<sup>35</sup> However, sale of an insolvent debtor's property did not end credit relations. A debtor retained responsibility for the part of creditors' claims, which left unsatisfied after selling the available property. In this way, creditors acquired the right to any property, which a debtor could obtain in the future by his labour or other means.<sup>36</sup> This procedure was called *cessio bonorum*.

It can be considered undoubtedly progressive that creditors acquired the right to some and not all property of a debtor. The law provided the debtor with *beneficium compensatio* right, which meant that the creditor could not forfeit the debtor's things of personal use, which were necessary for basic survival.<sup>37</sup>

33 Бартошек, М. *Римское право. Понятие, термины, определения*. [Bartoshek, M. Roman Law. Understanding, Terms, Definitions]. Москва: Юридическая литература, 1989, с. 102.

34 Girard, P. F. *Romėnų teisė. II tomas*. [Girard, P. F. Roman Law. II Book]. Kaunas: Vytauto Didžiojo universiteto Teisių fakulteto leidinys, 1932, p. 50.

35 Sersenevich, G. F., p. 32.

36 *Ibid.*, p. 31-32.

37 Gecas, D., p. 4.

It would be wrongful to think that as the state increased the regulation on relations of insolvent debtors and creditors, only the position of an insolvent debtor was constantly relieved. As insolvent debtors started to feel the state's kind approach towards them, they started to look for ways to avoid losing of valuable property altogether. For this purpose, various dishonest actions could be taken, such as transfer of property to third persons and so on. As a reaction to frequent frauds, Praetorian practice formed two methods for protection of creditors from dishonest debtors - *interdictum fraudatorum* and *actio Pauliana*. *Actio Pauliana* provided the right to guarantors to contest debtors' actions, which had been taken prior launching of implementation procedure and which had inflicted damage to the creditors (*fraus creditorum*). Nevertheless, the guarantors themselves had to prove that the debtor's actions were detrimental and decreased the property value, and that the debtor undertook these actions realizing that the creditors will suffer some damage. If these facts were proven, it was possible to take the property held by third persons. However, in case the third person who had acquired the property proved that he was an innocent purchaser, restitution was not applicable.<sup>38</sup> *Actio Pauliana* institute has also obtained a suitable place under the modern bankruptcy procedure, where bankruptcy administrator reviews the insolvent company's transactions that had been concluded before the bankruptcy procedure, and haven proven that they had been concluded in violation of creditors' interests, contests them in order to claim the property from dishonest purchasers.

Thereinafter, a possibility to request the emperor for permission to postpone the debt payment was established. The emperors allowed postponing the debt payment even up to five years, in order to ensure the support of their subordinates.<sup>39</sup> The possibility to postpone the debt payment did not facilitate any progress in credit relations by itself. However, as Justinian established that in case most creditors approve of a debtor's request on postponing debt payments, this decision becomes compulsory for the rest of the creditors.<sup>40</sup> This marks the origin of the institute of peace settlement.

The development of Roman law stopped with the collapse of Roman empire in IV century, but it was reborn in Medieval times, when Roman law became a meaningful and unique phenomenon of the Medieval Europe's legal life. The discussed bankruptcy law framework, which formed under Roman law, was later partly transferred to the medieval Italy law, although it resisted blind reception of legal norms of Roman law.

## Conclusions

In conclusion, it can be claimed that analysis of the development of Roman law institutes on debtor-creditor relations and procedures of implementation, reveals not only the first signs of bankruptcy procedure, but also certain settled essential principles of the bankruptcy procedure. Therefore, these principles of bankruptcy procedure, for-

38 Girard, P. F., p. 50-51.

39 Sersenevich, G. F., p. 34.

40 *Ibid.*, p. 34.

med under Roman law, can be distinguished as the main input to the development of the global bankruptcy procedures:

1. Replacement of personal responsibility by financial liability;
  2. Appearance of public auction as a form of realization of the debtor's property;
  3. Transfer from the debtor's property as a whole to realization of property in separate pieces;
  4. Appearance of a subject who under oath not to seek selfish purposes undertakes auctions of the debtor's property;
  5. Establishment of a 30 days term, during which the debtor had to cover the debt (claims dispute resolution procedure);
  6. Formation of an institute on informing of possible creditors on debt recovery procedures launched and inviting to join the mentioned procedure;
  7. Establishment of a ban to recover from the debtor's household appliances;
  8. Appearance of origin of the institute of peace settlement between the debtor and creditors;
  9. Establishment of *Actio Pauliana* – the method of protection of creditors;
- The enlisted provisions in one way or another eventually have been transferred to legislation on legal relations in case of bankruptcy of many foreign countries.

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## BANKROTO PROCESO UŽUOMAZGOS ROMĖNŲ TEISĖJE

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**Santrauka.** *Atsakymas į klausimą, kada atsirado bankroto procesas, priklauso nuo to, kaip traktuojama paties bankroto esmė, t. y. nuo to, ar galima santykius, susijusius su skolų nesumokėjimu, laikyti bankroto santykiais, ar ne. Kreditoriaus interesų apsauga nuo skolininko nemokumo nuo neatmenamų laikų buvo teisinio reguliavimo objektas. Taigi, šiuolaikinis bankroto proceso traktavimas ir reglamentavimas yra ilgos, visų pirma, papročių, o vėliau ir rašytinės teisės evoliucijos rezultatas.*

*Šiame straipsnyje atliekama istorinė bankroto proceso instituto raidos analizė. Atliekant istorinę bankroto proceso raidos analizę, kaip fenomenaliausia senovės teisės atstovė pasirinkta romėnų teisė, kuri, autorių nuomone, geriausiai atspindi bankroto proceso kilmę bei atsiradimo priežastis. Šiuo tikslu straipsnyje atliekamas istorinis lyginamasis tyrimas,*

*siekiant atrasti tam tikras paraleles tarp bankroto proceso instituto užuomazgų romėnų teisėje ir šiuolaikiškai suprantamo bankroto proceso. Siekiant atsakyti į klausimus, kada atsirado bankroto procesas, kaip ir dėl kokių priežasčių vyko jo transformacija, straipsnyje analizuojami kai kurie romėnų privatinės teisės raidos etapai (ankstyvasis romėnų teisės raidos laikotarpis, manus iniectio procesas, venditio bonorum proceso atsiradimas, distractio bonorum bei cessio bonorum procesai), kuriuose susiformavo atskiri bankroto proceso principai, padarę tiesioginę įtaką šiuolaikiniam bankroto procesui. Atlikus atskirų romėnų teisės institutų analizę autoriai daro išvadą, jog būtent romėnų teisėje susiformavo esminiai bankroto proceso principai: asmeninės atsakomybės pakeitimas turtine; viešųjų varžytinių, kaip skolininko turto realizavimo formos, atsiradimas; pereita nuo skolininko turto, kaip visumos, pardavimo prie turto realizavimo dalimis; atsirado subjektas, kuris, davęs priesaiką nesiekti savanaudiškų tikslų, vykdavo skolininko turto varžytines; nustatytas 30 dienų terminas, per kurį skolininkas turėjo padengti skolas; susiformavo galimų kreditorių informavimo apie pradėtas skolų grąžinimo procedūras ir raginimo prisijungti prie minėto proceso institutas; įsigaliojo draudimas nukreipti išieškojimą į skolininko namų apyvokos daiktus; atsirado taikos sutarties instituto tarp skolininko ir jo kreditorių užuomazgos; įtvirtintas kreditorių teisių apsaugos būdas – actio Pauliana. Išvardytos nuostatos vienokia ar kitokia apimtimi buvo perkeltos į daugelio užsienio valstybių bei Lietuvos bankroto teisinius santykius reguliuojančius teisės aktus.*

**Reikšminiai žodžiai:** bankroto proceso raida, romėnų teisė.

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