

**HUMAN RIGHTS PERSPECTIVES IN BANKRUPTCY  
A CASE STUDY OF UGANDA**

**SUBMITTED BY**

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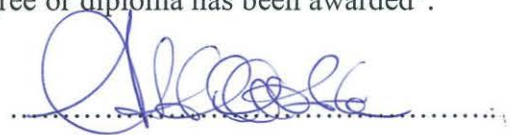
**A DISSERTATION SUBMITTED IN PARTIAL FULFILLMENT  
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### DECLARATION

"I Declare that this thesis is the work of Wanalo Arthur Onono alone, except where due acknowledgement is made in the text. It does not include materials for which any other university degree or diploma has been awarded".

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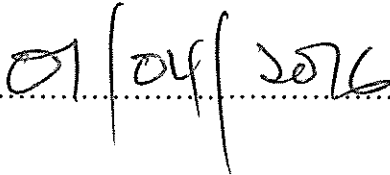
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## **DEDICATION**

I dedicate this work to My Creator, who gave me my two eyes, my limbs, my ears, my tongue, my brain, my health and education amongst many other items which would not fit on this page or in this book, if I attempt to mention them.

## **ACKNOWLEDGMENT**

I hereby offer many thanks to My Creator for guiding and protecting me throughout the course of my bachelor's degree and in this research report. All praise and glory be to Him.

I wish to thank my parents for all their contributions and support through the years and also my supervisor Counsel Muhamud Sewaya who has been patient and humble enough to assist me in perfecting my work on numerous occasions. His guidance and advice helped me a lot.

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Law Development Act Cap 132  
Mortgage Act 2009  
Uganda Communications Act Cap 166

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International Convention on Civil and Political Rights  
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## **ABSTRACT**

Bankruptcy, like many other areas of the common (received) law, is foreign to African cultures and customs since such a process did not exist, as it is presently constituted. Human rights are basic entitlements which each human beings can claim.

However, is there such a thing as human rights in the context of insolvency? Should a debtor be permitted to hide under human rights during the insolvency proceedings thereby defeating the claims of the creditors?

Whose rights should take precedence over the other, between debtors and creditors? These are some of the issues which the researcher has attempted to tackle in this work.

## **SYNOPSIS**

To what extent should human rights of the debtor and the creditor be protected in the bankruptcy process?

## CHAPTER ONE

### 1.1 INTRODUCTION

Suppose you are the driver of a trolley. The trolley rounds a bend, and there come into view ahead five track workmen, who have been repairing the track. The track goes through a bit of a valley at that point, and the sides are steep, so you must stop the trolley if you are to avoid running the five men down.

You step on the brakes but they don't work. Now you suddenly see a spur of track leading off to the right. You can turn the trolley on to it, and thus save the five men (from death) on the straight track ahead.

Unfortunately, Mr. Mugaga (Manager of the Rail Repair Company), has arranged that there is one track workman on that spur of track leading to the right. This workman can no more get off the track in time than the five can, so you will kill him if you turn the trolley on to him.

Is it morally permissible for you to turn the trolley?

Suppose that you are a pilot. At the moment, you are flying an aero plane from Nairobi to Kampala, which has 300 passengers on board. The engines of the aero plane suddenly burst into flames in mid air (at an altitude of 30,000 feet above the ground) and the aero plane starts to rapidly descend.

When you look out of the window, you see about 5000 people on a tea plantation...If you land the aero plane on the 5000 people, you will save the 300 passengers on board...and if you attempt to land the aero plane anywhere else, everyone on board the aero plane will perish.

Should you as the pilot save the 300 passengers on the aero plane or should you save 5000 workers on the ground?<sup>1</sup>

The above scenarios raise questions pertaining to Utility of actions and rights<sup>2</sup> of people. The individual has rights and the community has rights. Groups have rights and societies have rights. The question is, 'which rights take precedence over all other rights?' Are there individuals' rights which are great enough to supersede the rights of the community or society?

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<sup>1</sup> Judith Jarvis Thompson in 'THE TROLLEY PROBLEM', The Yale Law Journal, vol.94,no.6, (May 1985) pages 1395-1415.

<sup>2</sup> As envisaged in the Universal Declaration of Human Rights (1948).

In insolvency proceedings, there are two types of rights; Debtor's rights and Creditors rights. Which of these should be ignored for the other and when can this be fairly done (without prejudice to either party i.e. the creditors or the debtor)?

## 1.2 BACKGROUND OF THE STUDY

Human beings have wants and needs and these tend to outmatch the resources readily available to realize them. When this happens, consumers are forced into debt-financed consumption however the same debts that one incurs, have to be paid but paying, may at times seem like a financial terminal-illness affecting the debtor.

In Uganda today, the legal regime governing insolvency proceedings has far reaching economic, social and political consequences and therefore it seems almost absurd that these very effects have not been adequately examined vis a vis the fundamental rights of the individual (within the local context).

It has been claimed<sup>3</sup> that *ignorantia juris non excusat* (ignorance of the law excuses no one). This maxim presumes that everyone knows the law and this can be true for the United Kingdom but not true for Uganda where English is studied as a second language and the efforts of the government in terms of dissemination of legal information is poor thus there is pervasive ignorance of the law in Uganda.

Insolvency is a process geared towards ensuring that a debtor honours obligations they owe to the creditors. It comes with the issue of individual rights verses community rights; Creditors have to be paid; however does it mean that the debtor, in so doing, has to be economically and socially constrained by the law? If at all, they have to be constrained, to what extent can it be deemed reasonable?

The individual, at times, may not be guilty of fraudulent or negligent conduct leading to individual insolvency therefore is it fair for such an individual to have their character or reputation assassinated?

Upon the reception of English law, under the Buganda Agreement 1900 and the Uganda Order In Council, things began to change (the justice system that existed was seen as repugnant to the English law) thus, it was replaced with the adversarial justice system that exists today "where

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<sup>3</sup> See Blacks Law Dictionary page 672,673;

every man (or woman) is for himself/herself and our creator, for all of us” as per the former president of Tanzania, Julius Nyerere when he claimed that Kenya is a man eat man society.

The effect of insolvency upon individual rights has not been adequately examined (if at all examined) in the context of Uganda therefore the researcher aims to highlight the consequences of being declared bankrupt in Uganda.

### 1.3 SCOPE OF THE STUDY

The study shall consider issues relating to human rights in the context of bankruptcy such as consumer protection, debt financed consumption and debt recovery and the enforcement of creditors and debtors rights since these are directly related to the study and to achieve this, the researcher will therefore focus on

- a)Kampala(as the geographical scope), since it is the political and economic center of the country and where most of the trading occurs and
- b)The laws of Uganda (as the academic scope), since the researcher will put the study in the local context.

The study will focus on individual insolvency (**since persons at law<sup>4</sup> such as companies are not affected in the same way as individuals. Persons at law who are assessed as unable to pay may undergo receivership and probably subsequent liquidation which is a form of corporate bankruptcy**) because the researcher intends to highlight how individuals are affected as a result of being declared bankrupt.

### 1.4 STATEMENT OF THE PROBLEM

Uganda is a signatory to the African Charter on Human and Peoples Rights which grants the right to freedom of assembly and association, the right to property, work and education<sup>5</sup>.

Uganda is also a signatory to the ICCPR<sup>6</sup> which advocates for the politico-economic rights of an individual yet once an individual is declared insolvent<sup>7</sup>, he/she is excluded from participating in very many activities<sup>8</sup> and these restrictions upon the individuals’ freedom are contained in

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<sup>4</sup> Solomon v Solomon (1897) A.C. 22.

<sup>5</sup> 10,11,14 ,15 and 17 ibid (Banjul Charter).

<sup>6</sup> International Convention On Civil And Political Rights.

<sup>7</sup> section20 of the Insolvency Act 2011.

<sup>8</sup> Chapters. 6 and 8 of the Constitution of the Republic of Uganda 1995 (as amended).



various laws of Uganda<sup>9</sup> to the extent that it seems as if the individual has been quarantined as a result of a contagious and dangerous disease.

The stigma associated with being declared insolvent is a manifestation of the negative effects of this isolation of an individual declared insolvent. The constitution has guaranteed the freedom of association but this particular freedom cannot be satisfactorily exercised when the whole society knows the financial troubles that the bankrupt is facing. Is this reasonable?<sup>10</sup>

How about an individual who despite being declared bankrupt, still wants to engage in economic activities (such as being a company director, or a member of parliament, or the president of the country or being an advocate of the high court or an insolvency practitioner or even being a business person)<sup>11</sup>, should that person be treated in the same way with another person who doesn't wish to engage in any economic activity?

People today are presumed to be literate in terms of knowledge of the law however, not every single Ugandan can be presumed so, therefore, when the law operates in this kind of environment, it is bound to cause misunderstandings.

The law is aimed at providing certainty, avoiding absurdity and preventing mischief<sup>12</sup> and a law which gives individuals, rights on one hand, then purports to take away the same rights (technically) on the other hand, is only a recipe for disaster and anarchy<sup>13</sup> since this was part of the reason why the Bolsheviks rose up against their own leaders in 1917<sup>14</sup>.

Therefore why does the law<sup>15</sup>, in pursuit of creditors' rights, seem to be unfair to a debtor by way of crippling the debtor economically and socially?<sup>16</sup> If (A) owes (B) money, should (B) be allowed to cripple (A) economically and socially (given the economic and social restrictions that are inherent in bankruptcy proceedings).

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<sup>9</sup> Note 8 chapter 6/7

<sup>10</sup> Note 8 Article 29

<sup>11</sup> Companies Act 2012,

<sup>12</sup> As per the Mischief Rule of Statutory Interpretation.

<sup>13</sup> As seen during the Bolshevik Revolution in Russia (1917).

<sup>14</sup> Bolshevik Revolution 1917.

<sup>15</sup> Note 11

<sup>16</sup> As per the effects of being declared Bankrupt.

## **1.5 OBJECTIVES OF THE STUDY**

The general objective of the study is to review the existing legal framework of insolvency so as to understand the full effect that it has on the individual, if declared insolvent since equity will not permit a wrong to be without a remedy<sup>17</sup>. The researcher aims

1. To identify loopholes and lacunae in the insolvency legal regime of Uganda,
2. To examine the effect of insolvency rules on individual human rights,
3. To contribute towards the local jurisprudence of Insolvency,
4. To analyze the enforcement of individual rights during Insolvency proceedings so as to minimize the negative effects of being declared bankrupt.

## **1.6 RATIONALE OF THE STUDY**

The study is aimed at influencing reform of the legal regime pertaining Insolvency (so as to ensure that creditors and debtors rights are treated fairly<sup>18</sup>) since all laws in Uganda have to be consistent with the Constitution and any law or part thereof which is inconsistent with the constitution or part thereof, shall, to the extent of the inconsistency, be null and void<sup>19</sup>.

The researcher also wants to show the society how being declared bankrupt, affects an individual in Uganda, in addition to this, the researcher wants to contribute towards reformation of the legal regime governing Insolvency in Uganda.

The researcher hopes to build upon the work of previous researchers, regional and international organizations and to consider whether the rights of all parties to an insolvency proceeding, have been adequately catered for.

## **1.7 SIGNIFICANCE OF THE STUDY**

The study will identify the various ways in which insolvency interacts with human rights and the effect upon the person declared bankrupt.

The study will also be an addition to the human rights and insolvency jurisprudence of Uganda thereby developing the law of this jurisdiction<sup>20</sup>. The study is also geared towards raising

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<sup>17</sup> Maxims of Equity.

<sup>18</sup> Ford and Ford V John Alexander (Trustee in Bankruptcy)(2012) EWCH 266 CCH.

<sup>19</sup> Article 2(2) of the Constitution of the Republic of Uganda 1995, as amended.

<sup>20</sup> i.e. Uganda.

awareness of the society regarding the law and also to influence reform of government economic policies and also reform of the law.

The study is also geared towards enabling the researcher to satisfy the minimum requirements of the LLB course at undergraduate level.

## **1.8 RESEARCH METHODOLOGY**

The research analyses secondary data (from published sources) therefore the researcher will employ the doctrinal method of research given that the majority of the data required for the study is contained in various Publications.

The researcher intends to engage in a review of published material related to the study from various sources such as the Constitution<sup>21</sup>, Acts of parliament, journals, textbooks and articles among others.

Internet resources will also be utilized in addition to the analysis of the views of scholars from other jurisdictions.

The researcher intends to follow up this review with an analysis of the information that will be obtained so as to illustrate both the point of convergence and of divergence between bankruptcy and Human rights

## **1.9 LITERATURE REVIEW**

The relationship between human rights and bankruptcy, at first glance, seems odd, however upon close examination, one would be able to see the implications.

The purpose of insolvency, according to *Thomas Jackson*<sup>22</sup>, is primarily to effect the orderly distribution of the debtor assets to its creditors, and to avoid the inefficiencies of letting creditor individually collect the unpaid debts from the insolvent (which is in line with the idea of creditor

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<sup>21</sup> note 8 .

<sup>22</sup> Thomas Jackson, '*Bankruptcy, Non Bankruptcy Entitlements and the Creditors Bargain*', 91 Yale L.J. 857 (1982).

rights). Orderly distribution prevents unnecessary suffering to the debtor since the distribution is usually supervised by law<sup>23</sup> hence it prevents unlawful infringement of the rights of the creditor.

**Elizabeth Warren**<sup>24</sup> stated that the Bankruptcy law should be Inclusive and should take into account non-creditor interests and parties such as employees and communities, and that the best way to give effect to such interests is to postpone the immediate sale of the insolvents estate through a workable reorganization.

**Karen Gross**<sup>25</sup> thinks that the community at large has an interest that should be considered in insolvency and that the law and economics approach to insolvency is flawed because it does not consider the communitarian legal theory that sees individuals as not only concerned about their well being but that of the community as well (thus the proper scope of insolvency should include community interests since according to **Doron Teichman**<sup>26</sup>, 'Law does not operate in a vacuum and that different acts which are governed by legal rules are at the same time governed by social norms').

This seems to be an attempt to widen the scope of persons whose rights should be considered and subsequently protected during insolvency proceedings, however, in as much as it is a socially viable idea, can this be said to be a commercially viable idea? Wouldn't it discourage investment and simultaneously serve as an impediment to the war against poverty which is waged by many countries including Uganda?

**Barry Schermer**<sup>27</sup>, dismissed Karen Gross(above) by saying that judges will have a difficulty in considering the community into the equation because their interest cannot be valued and that if asked to decide between a bid for an insolvent company, fixed in monetary terms and a bid that promise employment or promises to clean up the environmental problems caused by the insolvent debtor, he would chose the former, since the latter choice is based on policy which should not burden judges (judges can consider policy when deciding a case, but it shouldn't be the only yardstick according to him).

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<sup>23</sup> Note 7

<sup>24</sup> Elizabeth Warren, 'Bankruptcy Policymaking in an Imperfect World', 92 Mich.L. Rev. 336,340 (1993).

<sup>25</sup> Karen Gross, 'Taking Community Interests into Account In Bankruptcy ;An Essay, Washington University Law Quartely, Vol.72, Issue 3 (Fall 1994) pages 1031-1048.

<sup>26</sup> Doron Teichman, 'Non-Legal Sanctions and Damages; An Economic Analysis'.

<sup>27</sup> Barry Schermer J., 'Response to Professor Gross; Taking the Interests Of The Community Into Account In Bankruptcy – A Modern Day Tale of Belling The Cat' .

In terms of payment of debts, a debtor who has many assets and a lot of money, should be allowed to pay in the way that is most efficient for the parties, as was discussed in *Milhau v France*<sup>28</sup> where Bernard Milhau French national, married a woman in 1970 and on 4<sup>th</sup> September 2001, the woman filed for divorce, asking to be awarded various properties belonging to Mr. Milhau.

Divorce was granted, and the court held that it was justified to award compensatory financial provision to the former wife and to cover its payment, it ordered the transfer of a villa located in Vallbone (to the woman despite the fact that Mr. Milhau wanted to pay the divorce settlement in terms of cash rather than forfeit his property rights in favour of the woman), which had been the marital home and which, as the sole owner, the applicant had been permitted to use during divorce proceedings.

Mr. Milhau, the applicant to the European Court of Human Rights, complained of the fact of the judge pronouncing the divorce required him, in order to pay the compensatory financial provision awarded to his ex-wife, to renounce his property rights over real estate which he owned separately and wished to keep, without giving him the opportunity to pay the debt by another means available to him in light of his assets.

The court decided that the fair balance which had to be struck between the demands of the general interest of the community and the requirements of the protection of the individuals fundamental rights had not been struck and that Mr. Milhau had borne an individual and excessive burden which could have been rendered legitimate only if he had the possibility of paying his debt by another means available to him under the law, namely the payment of a sum of money or the transfer of his property rights over one or several other properties.

According to *Danillo Ventajar*<sup>29</sup>, if human rights are parents of law, then they are also available as normative arguments in the formation of policy for corporate behavior in both its going – forward status and its insolvency status and that the universal and indivisible nature of human rights also implies that it can be invoked by all other stakeholders in their relationship with the corporation and with all other stakeholders of the corporation (perhaps the same can be claimed for individuals).

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<sup>28</sup> Application No. 4944/11 (European Court of Human Rights).

<sup>29</sup> Danilo Penetrante Ventajar, 'Human Rights Perspectives in Insolvency' pg 20.

According to Village of *Willowbrook V Olech*<sup>30</sup>, the avowed purpose which is the guarantee to equal protection is “to secure every person within a states jurisdiction against intentional and arbitrary discrimination, whether occasioned by the express terms of a statute or by its proper execution through duly constituted agents”.

This requires a state to govern impartially and it may not draw distinctions based solely on differences that are irrelevant to a legitimate governmental objective, thus for example, it may not subject men and women to disparate treatment when there is no substantial relation between the disparity and any important state purpose<sup>31</sup>.

According to the *ICCCPR*<sup>32</sup>, all persons are equal before the law and are entitled without any discrimination, to the equal protection of the law and in this respect, the law shall prohibit any discrimination and shall guarantee to all persons, equal and effective protection against discrimination on any basis.

Since the right to equal protection of the law allows reasonable distinctions between individuals, it could be submitted that a secured creditor’s lien over specific assets places it on a class that is different from an ordinary creditor<sup>33</sup>.

The most common way to resolve conflicts involving human rights is usually termed as ‘balancing of human rights’, but it would definitely lead to the preference of one human right over another. Therefore the process may be more accurately described as ‘reconciling of rights’. Such an endeavor is a difficult one but decision makers (such as judges and legislators e.t.c.) could easily find guidance in communitarian thinking that the prevailing policy should be that which supports or furthers the objectives of the society.

Such a slant in favour of societal interest or the common good however, should not be used to discard the liberal rights of people. Respect for individual autonomy dictates that any decision that affects that autonomy should comply with the principle of proportionality. Absent such a qualification, a balancing decision would be unacceptable.<sup>34</sup>

In *Barca V Mears*<sup>35</sup>, court stated that the ‘almost universal rule’ which prefers the interests of the creditors at the expense of the personal or property rights of 3<sup>rd</sup> parties (family members)

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<sup>30</sup> 528 U.S. 562, 120 S.Ct. 1073, 145 L.Ed 2d 1060 (2000).

<sup>31</sup> *Lehr v Robertson*, 463 US 248, 1035 CT 2985, 77 L.Ed 2d 614 (1983).

<sup>32</sup> International Convention On Civil and Political Rights, Article 20.

<sup>33</sup> *Supra* no. 31 page 30.

<sup>34</sup> *Supra* no. 31 page 38.

<sup>35</sup> (2004) EWHC 2170 (ch) as quoted by Martin Dixon in ‘*Trusts of Land, Bankruptcy and Human Rights*’ page 3.

who owe the creditors nothing at all, at best looks cavalier in light of the European Convention on Human Rights<sup>36</sup> therefore it meant that the immediate sale of the property of the bankrupt could not be effected so as to cater for the needs of innocent 3<sup>rd</sup> parties who may be negatively affected as a result of immediate sale.

In *Claughton V Charalambous*<sup>37</sup>, the immediate sale of the bankrupts property was postponed because his wife was terminally ill and the house had been specially adapted to cater for her needs and further, as was seen in *Re Bremner*<sup>38</sup>, sale was postponed until three months after the anticipated death of the terminally ill bankrupt, not because this created exceptional circumstances, but because it impacted on the situation of his wife, who was the only person taking care of him.

Should personal bankruptcy operate as a death sentence or should it allow the debtor a new lease of life after satisfying all debt obligations? Should the debtor be kept in perpetual debt or should he/she be rehabilitated?

In very primitive society, there were no laws preventing fraud of debtors or regulating the distribution of a debtors estate among his several creditors, for the reason that, generally speaking, debtors and creditors are unknown in the early stages of social evolution therefore, since credit is an institution that lives by virtue of man's confidence in his fellow man's good faith, good faith and primitive man are strangers<sup>39</sup> and this means that rehabilitation was nonexistent. Today, rehabilitation has been championed by scholars due to the socio-economic sense that rehabilitation of debtors makes.

The conventional rule in bankruptcy is that it is a tool, to help the creditors seize the assets of the debtor and satisfy their claims. According to **Charles Tabb**, it was a creditors' collection tool<sup>40</sup> and debtors were not the concern of legislators (as witnessed from bankruptcy laws that restricted bankruptcy only for business and its only later when it was realized that this creditor centered approach had to be reformed).

Individuals were admitted to bankruptcy long after its first use for the sole purpose of protecting creditors<sup>41</sup>. Bankruptcy law started from the philosophy that stigmatized and severely treated

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<sup>36</sup> 1950 Article 8; Protocol 1 article 1.

<sup>37</sup> (1999) 1 F.L.R. 740.

<sup>38</sup> (1999) B.P.I.R. 185.

<sup>39</sup> Maine, 'Ancient Law' page 303.

<sup>40</sup> Charles J Tabb, 'the History Of Bankruptcy Laws In the United States, 3Am,Bankr, Inst.L.Rev 5 (1995), pg 14-15.

<sup>41</sup> Ibid no.42 page 14.

debtors (thus infringing on debtors personal rights) to the situation where they are released or discharged thus start a new life. Therefore, the invention of the concept of discharge resulted in the release of 'honest but unfortunate debtors' from their pre-petition debt<sup>42</sup>.

According to **Margaret Howard**, discharge is an exception to the conventional norm of repaying ones debt and as such, it needs proper justifications<sup>43</sup>. **Seun - Hyun and Mike Peng**<sup>44</sup>, justify discharge from bankruptcy as a debt collection device.

Discharge from bankruptcy has been justified severally as an incentive of debtor cooperation in the debt collection process<sup>45</sup>, an incentive towards entrepreneurship and risk taking<sup>46</sup>, social insurance<sup>47</sup>, development policy<sup>48</sup>, debtors rehabilitation tool to keep him/her as a productive member of the society<sup>49</sup>, relief for honest but unfortunate debtors<sup>50</sup>, societal act of forgiveness<sup>51</sup>, corrective of human weakness<sup>52</sup>, reduce moral hazard in connection with lending<sup>53</sup>, and consumer protection<sup>54</sup>.

## 1.10 CHAPTERIZATION

Chapter 1 introduces the reader to the study and it provides key highlights such as the challenges necessitating the research, the objectives, rationale and the procedure to be adopted in data collection, Chapter2 provides a detailed account of human rights including the history, development of human rights, the types of human rights, protection and enforcement mechanisms available, in addition to highlighting their current condition in Uganda. Chapter 3

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<sup>42</sup> Ibid no. 42 page 333.

<sup>43</sup> Margaret Howard, 'A Theory of Discharge In Consumer Bankruptcy', 48 Ohio St. L.J. 1047 (1987) page 1047-1048.

<sup>44</sup> Seung -Hyun Lee and Mike W. Peng, 'Bankruptcy Law and Entrepreneurship Development; A Real Option Perspective', 32 Academy Management Review, 257(2007) 257-272.

<sup>45</sup> John M. Czarnecky, 'The Individual and Failure; A Theory of Bankruptcy Discharge' 32 Ariz.St.L.J. 393 (2000) pages 395-96.

<sup>46</sup> Ibid no.46 pg 257-272.

<sup>47</sup> Adam Feibelman, 'Defining the Social Insurance Function Of Bankruptcy' 13 Am.Bnkr.Inst. J.Rev129(2005) page 129-186.

<sup>48</sup> Ibid page 96.

<sup>49</sup> Douglas J. Baird, 'A World Without Bankruptcy', 50 Law And Contemporary Problems173 (1987) page 176.

<sup>50</sup> Todd J. Zywick, 'An Economic Analysis of Consumer Bankruptcy Crisis', 99 Northwestern University Law Review 1463 (2005), page 1471.

<sup>51</sup> Supra note 47 page 395 -396.

<sup>52</sup> Ibid note 53 page 395-396.

<sup>53</sup> Barry Adler et al, 'Regulating Consumer Bankruptcy ; A Theoretical Inquiry', 29 Jour. Of Legal Studies 585 (2000) page 608.

<sup>54</sup> Ramsay, Lain D.C., 'Comparative Consumer Bankruptcy', University Of Illinois Law Review, page 262- 263.



will contain a brief account of bankruptcy including the historical aspect, the cultural-religious aspect, the process and the effects of being declared bankrupt, and Chapter 4 will highlight the point of convergence between human rights and bankruptcy thus showing the findings. Chapter 5 will contain the conclusion and the recommendations.

## **1.11 CONCLUSION**

At first glance, there seems to be no relation whatsoever between insolvency and human rights. This chapter introduces the study, its scope and relevance and the methodology and the researcher hopes to highlight the point of meeting between these two areas of the law.

## CHAPTER 2

### HISTORY HUMAN RIGHTS AND BANKRUPTCY

#### 2.1 RIGHTS

A right is defined as just actions that individuals have to discharge in order to maintain harmonious relationships between themselves<sup>55</sup>. A right is a thing which is morally or socially correct/acceptable or agreeing with the facts or truth; accurate or correct; speaking, acting or judging in a way that agrees with the facts or truth<sup>56</sup>.

A right is a justified, recognized and protected claim (violation of which is unlawful) on or inherent in specific tangible or intangible property or, a right can also be freedom, power or privilege due to a person by agreement<sup>57</sup>, by birth<sup>58</sup>, by claim, by guarantee<sup>59</sup>, or by the application of legal, moral or cultural principles<sup>60</sup>.

A right has two parts, the form (the internal structure of the right) and the function (what rights do for those who possess them) therefore a right is a combination of a claim and a duty i.e. a right confers certain liberties or privileges and imposes duties upon individuals to exercise while claiming their rights<sup>61</sup>. Therefore, for every right claimed by an individual, there is a corresponding duty.

#### 2.2 HUMAN RIGHTS

Human rights are the freedoms, immunities and benefits which, according to modern values, (at an international level) all human beings should be able to claim as a matter of right in the society they live<sup>62</sup>. All human beings are born free and equal in dignity and in rights and they are endowed with reason and conscience and should act toward one another in a spirit of brotherhood<sup>63</sup>.

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<sup>55</sup> Dr.T.S.N. Sastry, *'Introduction To Human Rights And Duties'*, page 12.

<sup>56</sup> Merriam Webster (online) Dictionary.

<sup>57</sup> Such as a contract as governed by the Contracts Act 2010.

<sup>58</sup> Such as the right of beneficiaries in succession as per the Succession Act Cap 162.

<sup>59</sup> As seen in the Hire Purchase Act 2009.

<sup>60</sup> Business Dictionary.Com.

<sup>61</sup> Ibid note 57 pages 12-13.

<sup>62</sup> Blacks Law Dictionary 8<sup>th</sup> edition, page 2167.

<sup>63</sup> Universal Declaration of Human Rights article 1.

The natural law concept of natural individual rights is relevant to the African continent given its adoption in many African countries including Uganda as per chapter 4 (Bill Of Rights) of the Constitution of the Republic Of Uganda 1995 as amended. Natural Law assumes equality of people regardless of any demographic indicators<sup>64</sup>.

The key prepositions of the natural law theorists are that there are absolute values against which the validity of the law should be tested, that there exists an order which is rational and can be known by man, and that man can become aware of universal, eternal and comprehensible values if he observes nature and understands it correctly, and that anything which is good is in accordance with nature and anything which is bad is contrary to nature and that a law which lacks moral validity is wrong and unjust<sup>65</sup>.

### **2.3 HUMAN RIGHTS AND CULTURAL RELATIVISM**

Are human rights universal in the sense that they are the same everywhere in the world? Or are there human rights according to different regions of the world?

The nature and substance of a human right might vary according to the political social and cultural orientation of the state or group of states in which it exists and this is cultural relativism. According to Jack Donnelly, cultural relativism is an undeniable fact; moral rules and social institutions evidence an astonishing cultural and historical variability and that cultural relativism is a doctrine that holds that such variations of culture are exempt from legitimate criticism by outsiders (and it is supported by notions of communal autonomy and self determination<sup>66</sup>).

A cultural relativist account of human rights, however, seems to be guilty of logical contradiction since if human rights are based on human nature, due to one being a human being, and if human nature is universal, then how can human rights be relative in any fundamental way? The simple answer is that human nature is itself in some measure culturally relative<sup>67</sup>.

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<sup>64</sup> Omony J. Paul , '*Key Issues In Jurisprudence*' page31-32.

<sup>65</sup> Ibid page 33.

<sup>66</sup> Jack Donnelly, '*Cultural Relativism and Universal Human Rights*' page 400.

<sup>67</sup> Ibid page 403.

### 2.3.1 EQUALITY

All humans are entitled to the rights set forth in the UDHR<sup>68</sup> without discrimination of any kind such as race, color, sex, religion, language, political or other opinion, national or social origin, property, birth or status and that no distinction shall be made on the basis of the political, jurisdictional, or international status of the country or territory to which a person belongs whether it be independent, trust, non-self governing or under any limitations of sovereignty.

In **Attorney General V Mommoddon Jobe**<sup>69</sup>, the court stated that the constitution should be given a generous and purposive construction, especially the part which protects the entrenched fundamental rights and freedoms in **Paul K. Ssemogerere V AG**<sup>70</sup>, court stated that where human rights provisions conflict with other constitutional provisions, human rights provisions take precedence and interpretation should favour enjoyment of the human rights and freedoms.

According to **George Orwell**, all animals are equal but some animals are more equal than others<sup>71</sup> and this is seen in the treatment of different categories of creditors, secured creditors are given a preferential treatment.

### 2.4 HISTORICAL DEVELOPMENT OF HUMAN RIGHTS

Human rights have been originated by the natural law doctrine, starting from the idea that, humans, by their own nature, anywhere and anytime have rights that are previous and primary to the one assigned by the society and admitted by the natural law<sup>72</sup>.

According to **Giorgio Del Vecchio**<sup>73</sup>, the idea according to which the human being by its nature has certain reasons, valid even if they do not correspond or they correspond partly to the dispositions of positive laws, has appeared in the human mind since very old times and has been defined in bright words, due to the antique philosophy or to the Roman case laws in the same way as during the different epochs, sometimes inspiring itself from the doctrines of Christian religion and other times, only from the reason light.

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<sup>68</sup> Ibid note 65 article 2.

<sup>69</sup> (1984) LRC 689.

<sup>70</sup> Constitutional Petition No.5/2002.

<sup>71</sup> As he discussed this issue in *'The Animal Farm (1984)'*.

<sup>72</sup> Ciobota Eugen, *'Evolution Of The Human Rights Concept'* page 416.

<sup>73</sup> In *'Natural Rights In Europe'*, page 195.

**Plato**<sup>74</sup> in 'Politics', stated that a person becomes a slave or free only by law and that human beings don't differ at all by the nature of mankind. If a civilized nation "lacks in its eyes and in the eyes of other, a universal and universally valid embodiment of laws, it fail to secure recognition from others"<sup>75</sup>. At the close of the fifteenth century, three rivals, India, China and the Islamic World could not only claim to match or exceed western accomplishments, but could not then be ruled out as formidable contenders for global power.

India under Muslim Moghul Rule, reached a level of civilization marked by respect for learning and growing religious tolerance. Under the leadership of Akabar (1542- 1605), religious minorities were granted legal status and Indian practices such as immolation of widows and enslavement were condemned<sup>76</sup>.

The Chinese Civilization, under the influence of Confucianism, possessed an advanced ethical and political system presided over by a scholarly bureaucracy, which not only maintained great administrative continuity but made possible the centralized management of a vast state<sup>77</sup>.

## **2.5 APPEARANCE AND EVOLUTION OF THE FIRST LEGAL INSTRUMENTS FOR HUMAN RIGHTS PROTECTION**

The first text known in history is *Magna Carta Libertatum* proclaimed in England by King John of England in 1215 and it had absolute priority over all other documents in time in this field so important for human beings<sup>78</sup>. According to **Cornelieu Barsan**<sup>79</sup>, the Magna Carta declared that no free man could be arrested, imprisoned or disposed of his goods, against the law, exiled or injured in any matter inter alia.

Other important enactments include the 'The Petition Of Rights, 13<sup>th</sup> February 1628, Habeas Corpus Act 2<sup>th</sup> may 1679, and the Bill Of Rights 13<sup>th</sup> February 1689 which according to **I. Demeter**<sup>80</sup>, founded the right to free elections, the freedom of word, the right of release on bail,

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<sup>74</sup> Ibid note 75 page 416.

<sup>75</sup> Friedrich Hegel (1770-1831)(German Philosopher) as reported by Micheline R. Ishay, ' *The History of Human Rights*' page 64.

<sup>76</sup> Note 78 page 66.

<sup>77</sup> Note 78 page 67.

<sup>78</sup> Note 75 page 417.

<sup>79</sup> European Convention on Human Rights page 21.

<sup>80</sup> In Declaration of Human Rights, Historical Draft page 27.



the prohibition of cruel punishments and the right to be judged by an independent court in Britain.

In America, the Declaration of the Independence of the United States of America was adopted<sup>81</sup> and it provided the basic idea that all governments have been established by the people in order to guarantee the appointed rights.

## **2.6 THE MODERN CONTEXT**

On December 10<sup>th</sup> 1948, the Universal Declaration of Human Rights was adopted and it settled a series of fundamental rights. It lacks legal power since it is not an international treaty but its provision have been included in the constitutions and internal laws of states thus helping it to gain special importance.

In terms of insolvency, the Universal Declaration Of Human Rights helps to ensure individual debtors rights are protected given that in the Ugandan context, the constitution of the Republic of Uganda 1995 (as amended) contains a Bill Of Rights section (in chapter 4 of the same document)

### **2.6.1 KEY HUMAN RIGHTS PROVISIONS**

All humans are born free and equal<sup>82</sup> (but this is not relevant in bankruptcy where creditors who hold preferential debts such as mortgages<sup>83</sup> are treated differently from ordinary creditors) and are endowed with reason and conscience to act towards one another in the spirit of brotherhood. Everyone is entitled to rights and freedoms set forth in the universal declaration of human rights without distinction based on any demographic indicators<sup>84</sup>. Everyone has a right to life, liberty<sup>85</sup> and security and no one shall be held in slavery or servitude<sup>86</sup> and no one shall be subjected to torture or to cruel, inhumane and degrading treatment<sup>87</sup>. Everyone has a right to be recognized as

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<sup>81</sup> On the 14<sup>th</sup> of June 1776 in Philadelphia.

<sup>82</sup> Note 63, article 1.

<sup>83</sup> As per the Mortgage Act, 2009 Laws of Uganda.

<sup>84</sup> Note 63, article 2.

<sup>85</sup> Note 63, article 3.

<sup>86</sup> Note 63, article 4.

<sup>87</sup> Note 63, article 5.

a person before the law<sup>88</sup> and all are equal before the law and are entitled to equal protection by the law<sup>89</sup>.

Everyone has the right to an effective remedy by the competent national tribunal for acts violating the fundamental rights granted to him by law<sup>90</sup> and no one shall be subjected to arbitrary arrest, detention or exile<sup>91</sup>.

Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal in the determination of his rights and obligations<sup>92</sup>. Everyone has the right to be presumed innocent until proven guilty, if charged with an offence<sup>93</sup> and no one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, or to attacks upon his honor and reputation<sup>94</sup>.

Everyone has the right to freedom of movement and residence within the borders of each state<sup>95</sup> and everyone has the right to leave any country, including his own, and to return to his country<sup>96</sup>. Everyone has the right to seek and enjoy asylum in other countries from persecution<sup>97</sup> and everyone has the right to a nationality and no one shall be arbitrarily deprived of his or her nationality nor denied the right to change his nationality<sup>98</sup>.

Everyone who is mature has a right to marry and found a family and are entitled to equal rights at marriage, during marriage and at its dissolution and marriage shall be entered into with free and full consent of the intending spouses<sup>99</sup>.

Everyone has the right own property (and this right is usually extinguished as a result of being declared bankrupt) alone as well as in association with others and no one shall be arbitrarily deprived of his or her property<sup>100</sup>. Everyone has the freedom of thought, conscience and

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<sup>88</sup> Note 63, article 6.

<sup>89</sup> Note 63, article 7.

<sup>90</sup> Note 63, article 8.

<sup>91</sup> Note 63, article 9.

<sup>92</sup> Note 63, article 10.

<sup>93</sup> Note 63, article 11.

<sup>94</sup> Note 63, article 12.

<sup>95</sup> Note 63, article 12.

<sup>96</sup> Note 63, article 13.

<sup>97</sup> Note 63, article 14.

<sup>98</sup> Note 63, article 15.

<sup>99</sup> Note 63, article 16.

<sup>100</sup> Note 63, article 17.



religion<sup>101</sup> and everyone has the freedom of opinion and expression and it includes the right to hold an opinion<sup>102</sup>.

Everyone has the right to freedom of peaceful assembly and association and no one can be forced to join an association<sup>103</sup>. Everyone has a right to take part in the governance of his country and of equal access to public service in his country and that the peoples will shall be the basis of the authority of governments<sup>104</sup>.

Everyone has the right to social security<sup>105</sup> and everyone has the right to work, free choice of employment, to just and favourable conditions of work and to protection against unemployment<sup>106</sup> (and this is usually not considered once a person is declared bankrupt).

Everyone has the right to equal pay for equal work done and everyone has the right to just and favourable remuneration and everyone has the right to join or form trade unions for the protection of their interests<sup>107</sup>.

Everyone has the right to standard living (but standard living is a thing culturally relative and when a person is declared bankrupt, what is adequate for him will be dictated by the trustee in bankruptcy) adequate for the health and well being of himself and of his family and motherhood and childhood are entitled to special care and assistance<sup>108</sup>. Everyone has the right to education and education shall be directed to the full development of the human personality<sup>109</sup>.

Everyone has the right to participate in the cultural life of the community<sup>110</sup> (but the stigma of bankruptcy may prevent them to freely participate) given that the affairs of the bankrupt are made public due to their public examination.

All the rights stated above are usually to a significant extent, affected by the bankruptcy legal process since the legal condition of the debtor changes after the declaration of bankruptcy.

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<sup>101</sup> Note 63, article 18.

<sup>102</sup> Note 63, article 19.

<sup>103</sup> Note 63, article 20.

<sup>104</sup> Note 63, article 21.

<sup>105</sup> Note 63, article 22.

<sup>106</sup> Note 63, article 23.

<sup>107</sup> Note 63, article 24.

<sup>108</sup> Note 63, article 25.

<sup>109</sup> Note 63, article 26.

<sup>110</sup> Supra Universal Declaration 64, article 27.

## 2.7 A HISTORICAL ACCOUNT OF BANKRUPTCY

The origin of the idea of bankruptcy can be found in the collective approach to creditors of an insolvent debtor in **Table III of the XII Tables of Roman Law**.

### 2.7.1 EARLY ROMAN REPUBLIC: TABLE III AND THE ORIGINS OF BANKRUPTCY

Table III of the XII Tables enabled multiple creditors to divide the debtor's person or property proportionately amongst themselves<sup>111</sup>. The laws of the XII Tables were introduced in 449 BCE to preserve order in an environment where plebeian agitation was a threat to patrician rule. The new citizen assemblies that had arisen in the early Republic strengthened the plebeian position<sup>112</sup> and by the middle of the 5th century BCE the scene was set for change.

Livy underlines the disorder existing in Rome at the time by referring to the plebeians as 'a rabble of vagrants ... quarrelling for power with the governing class of a city which did not even belong to them'<sup>113</sup>.

The outcome of this class struggle was the first codification of Roman law, and even though patrician self-interest may have been the motivation<sup>114</sup>, the laws of the XII Tables proved to be of lasting significance to all Romans. Prior to the XII Tables, the relationship between multiple creditors and a single debtor was unclear. Ad hoc and inconsistent solutions would have arisen

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<sup>111</sup> There are a number of interpretations of the effect of the capital aspect in Table III. The most common is that it warrants physically cutting up the debtor. However there is also support for the proposition that the Law was either never actually implemented or that it concerns the division of property only. In relation to the use of Table III Law X, see William W Buckland and Peter Stein, *A Text-Book of Roman Law from Augustus to Justinian* (Cambridge University Press, 3rd revised ed, (1963) 620.

Buckland favours a division of property and believed that the sensibilities of Republican Romans would not sanction the physical violence of dismemberment. See also M Radin, 'Secare Partis: The Early Roman Law of Execution against a Debtor' (1922) 43 American Journal of Philology 32. Radin believed that *partis secanto* in Law X should in fact be translated as 'retail' or 'cut' in the sense of a division of the debtor's property between creditors by the *sectores*, who act as 'public agents': at 47. His understanding of *partis secanto* is framed in opposition to an alternative view that it referred only to the division of the debtor's physical body or person, that is, the familiar 'pound of flesh' scenario: at 34–7, 47–8.

<sup>112</sup> These were the *comitia tributa*, *comitia centuriata* and *concilium plebis*. The *comitia centuriata* was the political and legislative assembly that ratified Tables I–X of the XII Tables in 451 BCE and Tables XI and XII in 449 BCE: P R Coleman-Norton, 'Cicero's Contribution to the Text of the Twelve Tables' (Pt 1) (1950) 46 Classical Journal 51, 51.

<sup>113</sup> Livy, *The Early History of Rome: Books I–V of the History of Rome from its Foundation* (Aubrey De Sélincourt trans, Penguin Books, first published 1960, 2002 ed) bk 2.1, 105 [trans of: *Ab Urbe Condita* (first published 27–25 BCE)]

<sup>114</sup> Alan Watson, 'Two Early Codes, the Ten Commandments and the Twelve Tables: Causes and Consequences' (2004) 25 Journal of Legal History 129, 130–1:

and predictability was absent. Table III however provided for the collective treatment of creditors and it did so by way of an ordered and regulated procedure.

Table III importantly required that, prior to any collective action, all steps to execute judgment by individual creditors must have been exhausted<sup>115</sup> (Initially there was a period of 30 days for the debtor to satisfy the judgment or to seek assistance to dispute it. Thereafter if the judgment remained unsatisfied, the debtor was transferred to the custody of his creditor. If no agreement or compromise was reached with the creditor, the debtor remained in chains for sixty days to be brought into the comitium in the Forum for three consecutive market days, and the amount of his judgment was publicly proclaimed. If at the end of this period judgment was still not satisfied, or a compromise reached, the debtor was arrested by his creditor and enslaved, or possibly sold 'across the Tiber', that is, sold to Rome's enemies).

Only then (when it was obvious that the debtor was insolvent) did the Table address the vexing question of how to deal with the competing claims of multiple creditors. Table III accordingly contained not only a procedure for execution of a judgment debt, but it also set out in express terms that where execution failed, creditors, as a group, were entitled to their share of whatever was left. In the case of Table III, this could mean their share of the debtor's person (body).

The focus on the collective rights of creditors where a debtor is insolvent is an essential characteristic of bankruptcy<sup>116</sup>; in fact some commentators argue that the priority of creditors

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<sup>115</sup> Where specific laws of the XII Tables are referred to, the footnoted reference will include three citations: M H Crawford (ed), *Roman Statutes* (Bulletin of the Institute of Classical Studies, Supplement 64, 1996) vol II; Allan Chester Johnson, Paul Robinson Coleman-Norton and Frank Card Bourne, *Ancient Roman Statutes: A Translation* (University of Texas Press, 1961) 10; S P Scott, *The Civil Law* (AMS Press, first published 1932, 1973 ed) vol I. Although editions of the XII Tables are similar, editors have not universally agreed upon the placement or translation of the various Tables. There is agreement that they existed as tablets, that they were destroyed, and that they were nonetheless salvaged to a sufficient extent for reproduction. There is no certainty that even the earliest reproduction was exact, however there is an acceptance of authenticity. Crawford's translation is the most pared back and adopts the fewest amount of assumptions. For a discussion of the uncertainties involved in the documenting of the history of the Republic, see T P Wiseman, *Roman Studies: Literary and Historical* (Francis Cairns, 1987). See particularly the chapter 'Practice and Theory in Roman Historiography': at 244-62. For the text of Table III, see Crawford, above n 5, Table III.1-7, 627-8; Johnson, Coleman-Norton and Bourne, above n 5, Table III.1-6, 10;

Scott, above n 5, Table III.I-X, 62-4.

<sup>116</sup> In H H Shelton, '*Bankruptcy Law, Its History and Purpose*' (1910) 44 *American Law Review* 394, Shelton sets out that 'if there is a fixed, permanent and fundamental principle underlying [bankruptcy] laws, it is that where a person's property is insufficient to pay all of his creditors in full, it shall be ratably divided among them': at 397. This is the *pari passu* principle.

should continue to underpin bankruptcy even today and that ‘bankruptcy systems exist only to increase efficiency by solving the creditors’ coordination problem’<sup>117</sup>.

The XII Tables represented a common interest in establishing order and opened the door for the majority of the population to engage with the law for the first time. This was a significant step and it ensured that their influence was longstanding, as is illustrated by the inclusion of the laws of the XII Tables in Roman life and literature not only during the Republic, but well beyond it<sup>118</sup>. Not only are they ‘the best evidence we have for life, and for moral and social values, in early Rome’<sup>119</sup>, but as the origins of Roman law they ‘sink into the collective history of the Roman people’<sup>120</sup>. Livy’s account of the introduction of the XII Tables suggests an auspicious occasion. The impression is of a turning point as Livy describes the form of government changing for only the second time since Rome’s foundation<sup>121</sup> and he distinguishes the XII Tables from all other law, referring to them as ‘the fountainhead of public and private law, running clear under the immense and complicated superstructure of modern legislation’.

The XII Tables, as the will of the people, were valued at several levels. They were first and foremost an explicit and accessible legal code, Scott comments on how ‘the inscriptions upon the bronze tablets posted in the Forum, enabled every citizen to become acquainted with the laws of his country’<sup>122</sup>. Secondly, they played an important political role by establishing order between patricians and plebeians, and thirdly, they achieved desirable social goals because they set standards, guided and framed behaviour, and represented equality before the law<sup>123</sup>.

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<sup>117</sup> Alan Schwartz, ‘A Contract Theory Approach to Business Bankruptcy’ (1998) 107 Yale Law Journal 1807, 1809

<sup>118</sup> Paetus Catus reproduced them in 204 BCE with explanatory commentary and guidance as to their causes of action. It has been suggested that Paetus’ Tripertita was the foundation of all later study of the XII Tables: J B Rives, ‘*Magic in the XII Tables Revisited*’ (2002) 52 Classical Quarterly 270, 272

<sup>119</sup> Alan Watson, ‘*Rome of the XII Tables: Persons and Property*’ (Princeton University Press, (1975) 3.

<sup>120</sup> Michael Steinberg, ‘*The Twelve Tables and Their Origins: An Eighteenth-Century Debate*’ (1982) 43 Journal of the History of Ideas 379, 395.

<sup>121</sup> Livy, above n 125, bk 3,35

<sup>122</sup> Scott, above n 127, vol I, 10–11

<sup>123</sup> The agreement (or consent) of all individuals subject to collectively enforced social arrangements shows that those arrangements have some normative property’: Fred D’Agostino, Gerald Gaus and John Thrasher, ‘*Contemporary Approaches to the Social Contract*’ in Edward N Zalta (ed), Stanford Encyclopedia of Philosophy (Metaphysics Research Lab, Centre for the Study of Language and Information, Stanford University, Winter 2012) [1.1] <<http://plato.stanford.edu/archives/win2012/entries/contractarianism-contemporary/>

Throughout the history of the Republic there was little change to the XII Tables. They stood 'above the other laws of the state'<sup>124</sup>, representing order manifested in the law; they exerted a superior, constitutional force<sup>125</sup>. Change was tolerated as long as integrity remained<sup>126</sup>.

Walton observes that 'this devotion to the letter is because the Tables were looked upon as of the nature of a constitutional compact between the patricians and the plebeians'. Table III, which regulated debt and insolvent debtors, and introduced the idea of the creditors as a collective was not amended even when more detailed processes of bankruptcy became available in the late Republic (In part via *bonorum venditio* (about 105 BCE).

This process was initiated by a creditor and involved the creditor establishing an act of bankruptcy. An order was then made seizing the debtor's whole estate which was sold to the bidder who offered the creditors the best return on their debt. The debtor was only discharged if debts were paid in full. A more sophisticated bankruptcy process was introduced via *cessio bonorum* (about 45 BCE).

### 2.7.2 CAESAR AND THE USE OF BANKRUPTCY TO QUELL TURMOIL IN THE LATE REPUBLIC

The triumph over Gaul in 52BCE and the disorder of the civil war of 49BCE that followed Caesar's return were turning points in Roman history. Real property lost value and fear of an uncertain market meant that the hoarding of money became common.

Credit arrangements were unpredictable and loans increasingly defaulted upon. The centre of Rome was subject to 'almost continuous outbreaks of bloody scuffling'<sup>127</sup> as debt grew.

Financial and civil unrest were a danger to commercial and political order and more importantly to Caesar's political ambitions. In these circumstances, control needed to be restored. There was

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<sup>124</sup> Clinton Walker Keyes, '*Original Elements in Cicero's Ideal Constitution*' (1921) 42 *American Journal of Philology* 309, 309.

<sup>125</sup> A constitution can be comprised in one document, for example in the USA and Australia, or it can be an aggregate mix including components such as legislation, judicial decisions and treaties. Both the English and the Roman constitutions are of this second type. The XII Tables and the laws they contained were the means by which 'the rude customary law of a primitive pastoral people was shaped and moulded to fit the needs of a great imperial nation whose mission it was to civilise the western world': Frederick Parker Walton, '*Historical Introduction to the Roman Law*' (WM W Gaunt & Sons, 3rd revised ed, (1916) 12–13

<sup>126</sup> See Giambattista Vico, *The First New Science* (Leon Pompa trans, Cambridge University Press, (2002) [trans of: *Scienza Nuova Prima* (first published 1725)]

<sup>127</sup> Michael Grant, *The Roman Forum* (Michael Grant Publications, (1970) 15. See also Christopher Howgego, '*The Supply and Use of Money in the Roman World. 200 BC to AD 300*' (1992) 82 *Journal of Roman Studies* 1

also the dire situation of many of Caesar's soldiers, who were unpaid after carrying their leader to success in Gaul and now at the will of the moneylenders.

Order could not be restored if Caesar's soldiers did not remain loyal and their support was critical to his further campaigns. By the late Republic, bankruptcy process in Rome had advanced from the simple creditor remedies of the XII Tables.

As Frederiksen observed, it was not only the political and financial crises that needed a solution but also 'the savage operation of the laws of bankruptcy and debt'<sup>128</sup>. Caesar's problem was not only disorder itself on a large scale, but also political oblivion unless a solution to this disorder was found. Infamy meant that certain rights and entitlements were lost, including the right to hold political office. This specifically had an impact on Caesar's political allies, many of whom, through excessive borrowing to support their political careers, had succumbed to insolvency.

Clearly, without senatorial support, Caesar's career was doomed. Cicero was of the view that the solution to the crisis, as noted by Frederiksen, 'must come from within the Roman state itself' that is, to be able to restore order, predictability, and confidence, Rome needed a mechanism that restructured commercial relations, and quickly. The process introduced, *cessio bonorum*, was the first bankruptcy process to enable a voluntary surrender, and this characteristic proved invaluable in staving off the crippling effects of insolvency and financial failure in the late Republic.

There was both protection for bankrupts and certainty for creditors in *cessio bonorum*. Surrendering to *cessio bonorum* did not result in infamy. This resulted in a level of order and predictability that had been missing from the largely punitive procedures associated with the XII Tables and, to a lesser extent, *bonorum venditio*.

Accordingly, bankruptcy had played a part in restoring order in the late Republic. Credit and debt had become entwined with the turmoil of politics, status and power, and Rome's stability was threatened. Caesar could not draw on unlimited funds to cure the problems faced by his senators, soldiers and other insolvents.

The political, commercial and social pressures could only be released by restoring financial order and the only means of doing this was by encouraging insolvents to surrender to bankruptcy. Bankruptcy is an important commercial regulator. It is the only branch of the law that is able to sweep up the debris from the laws of debt, property, credit, and finance, and manage the

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<sup>128</sup> M W Frederiksen, 'Caesar, Cicero and the Problem of Debt' (1966) 56 *Journal of Roman Studies* 128, 133.

outcomes. Jackson comments that 'bankruptcy law inevitably touches other bodies of law. But none reflects bankruptcy law's historical function'<sup>129</sup>

### 2.7.3 EARLY ENGLISH BANKRUPTCY (Difficulties with Debtors and the First English Bankruptcy Act)

English bankruptcy owes its immediate origins to the legislation in place in the medieval Italian towns<sup>130</sup> however, in England the introduction of a system of bankruptcy was delayed due in large part to the singular focus of the law on imprisonment as a coercive debt recovery mechanism. It was only when problems arose with this narrow approach in the early 16th century, primarily as debtors discovered an increasing number of ways to avoid imprisonment<sup>131</sup> that bankruptcy as a means of stemming creditor frustration and restoring some order to the management of outstanding debt was seen as a way forward.

Parliament increasingly saw trade, and the protection of the trading classes, as crucial to the growth and stability of English commerce, and a solution was needed to curb the evasive, delaying and often fraudulent practices of debtors. In this respect bankruptcy played an important role. The first English bankruptcy statute was introduced in 1542 during the reign of Henry VIII. This Act targeted the two most common debt avoidance practices of the 16th century: fleeing the jurisdiction and keeping house<sup>132</sup>.

**Martin** says: 'Throughout history, culture has taken the leading role by informing society of what laws are necessary and appropriate'<sup>133</sup>. In the 1530s, the monarchy had become sufficiently consolidated to be able to withstand and address change and disruption. This was fortunate as 'this was a decade full of danger and disaffection'<sup>134</sup>, surviving the crisis and strengthened by its success, the royal government responded by introducing more legislation designed to ensure

<sup>129</sup> Thomas H Jackson, 'The Logic and Limits of Bankruptcy Law' (Harvard University Press), (1986) 2.

<sup>130</sup> Paolo Di Martino, 'Approaching Disaster: Personal Bankruptcy Legislation in Italy and England, c 1880–1939' (2005) 47 Business History 23, 25

<sup>131</sup> Jay Cohen, 'The History of Imprisonment for Debt and its Relation to the Development of Discharge in Bankruptcy' (1982) 3 Journal of Legal History 153. Cohen sets out that 'debtors' ability to circumvent imprisonment gave rise to the earliest bankruptcy law': at 155.

<sup>132</sup> Bankruptcy Act of 1542 preamble: 'Where divers and sundry persons craftily obtaining into their hands great substance of other men's goods do suddenly flee to parts unknown, or keep their houses'.

<sup>133</sup> Nathalie Martin, 'The Role of History and Culture in Developing Bankruptcy and Insolvency Systems: The Perils of Legal Transplantation' (2005) 28 Boston College International and Comparative Law Review 1, 1–2.

<sup>134</sup> D M Loades, 'Politics and the Nation 1450–1660: Obedience, Resistance and Public Order' (Fontana, 1974) 13.

order. **Loades** argues that ‘the legislative programme of the Parliament from 1533 to 1539 was the heaviest which had ever been seen and remained unsurpassed until the nineteenth century’<sup>135</sup>. Accordingly, an increased propensity to govern through the legislature together with the failure of the existing law to control debtors heralded the introduction of bankruptcy into English law.

### **The Need to Create Stability in Trading Relations**

The next significant step in the development of bankruptcy in England arose in 1571 when the legislation was redrawn to apply only to traders. The Act Touching Orders for Bankrupts (‘Bankruptcy Act of 1571’) applied to ‘any merchant or other person using or exercising the trade of merchandize by way of bargaining, exchange, recharge, bartry, cheviance, or otherwise, in gross or by retail, or seeking his or her trade of living by buying and selling’<sup>136</sup>.

**Levinthal** suggests that ‘bankruptcy was confined to tradesmen only because merchants were regarded as having peculiar facilities for delaying and defrauding creditors’<sup>137</sup> and clearly the focus of the Act was upon the commercial uncertainty resulting from a lack of trust.

The factors relevant to categorizing a person as a trader were to undergo change due to that restriction remaining in the legislation, particularly so in the widening of the concept to include persons whose income was not wholly from trade. Nonetheless, trade, in its most obvious meaning of the word, remained the focus, and at its heart the legislation was ‘directed at a definite occupational class i.e., the merchants’<sup>138</sup>.

**Christian** explains that ‘the articles bought must either be sold again in the same state, or improved and manufactured by the labour and art of man, not changed by the operations of nature’<sup>139</sup>. His analysis of the numerous times that the courts were to be called upon to reinterpret the meaning of the concept of trade is evidence of the importance of the application of the bankruptcy legislation in ensuring order in trading relations.

The preamble to the Bankruptcy Act of 1571 reinforced the widespread nature of the ‘fraudulent’ activities of bankrupts. In the 30 years that had elapsed since the Bankruptcy Act of 1542, it was

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<sup>135</sup> Ibid 173.

<sup>136</sup> Bankruptcy Act of 1571 (U.K.) sections 2–3.

<sup>137</sup> Louis Edward Levinthal, ‘*The Early History of English Bankruptcy*’ (1919) 67 University of Pennsylvania Law Review 1, 16 n 59.

<sup>138</sup> Lawrence M Friedman and Thadeus F Niemira, ‘*The Concept of the Trader in Early Bankruptcy Law*’ (1958) Saint Louis University Law Journal 223, 236.

<sup>139</sup> Edward Christian, ‘*The Origin, Progress and Present Practice of the Bankrupt Law Both in England and in Ireland*’ (W Clarke and Sons, 1 st ed, 1812) vol I, 328.



highlighted in the preamble that ‘those kind of persons have and do still increase into great and excessive numbers, and are like more to do, if some better provision be not made for the repression of them<sup>140</sup>.

Regulation of trade required a delicate balance between encouragement and restriction. Parliament may have been able to achieve this balance but not where the confidence of traders was shaken from within their own ranks. Bankruptcy legislation had to deal with this uncertainty. In the second half of the 18th century, Blackstone justified the restriction to traders in the legislation on broad grounds of mutuality: Trade cannot be carried on without mutual credit on both sides: the contracting of debts is therefore here not only justifiable, but necessary. And if by accidental calamities, as by loss of a ship in a tempest, the failure of brother traders, or by the non-payment of persons out of trade, a merchant or tradesman becomes incapable of discharging his own debts, it is his misfortune and not his fault<sup>141</sup>.

This view, however, was conditioned by the fact that in Blackstone’s time the bankruptcy legislation had been improved by successive alterations and the introduction of discharge.

### **Bankruptcy as a Response to Risk**

Although the restriction of bankruptcy to traders in 1571 was evidence of the concern for stability in commerce, the history of the 17th century highlights once again the problems caused by galloping enterprise. England’s economy was maturing quickly and becoming more complex. The best example of the growing confidence was the expansion of trade, particularly overseas trade.

However, more options for entrepreneurs meant more decisions and in turn more decisions that could go wrong. Wealth seemed more attainable in a market economy than in the earlier, largely rural, face-to-face economy. But it was not the goals of traders and entrepreneurs that created the need for effective insolvency measures, it was the risk of failure and its effect on the delicate order developing in commerce. **Appleby** says: ‘the seventeenth-century commercial order of England was exposed to a new battery of dislocating forces: international competition, monetary

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<sup>140</sup> Bankruptcy Act of 1571 preamble.

<sup>141</sup> William Blackstone, Commentaries on the Laws of England (Clarendon Press, first published 1765-69,(1966 ed) vol 2, 474

fluctuations, and discontinuities in the levels of supply and demand. No longer visible and tangible, the economy became generally incomprehensible'<sup>142</sup>

The upside to the freer availability of credit was the expansion of England's economy. The downside was financial failure and its effects across the trading classes' generally as commercial relationships became more complex, the need for the law to shore up business confidence grew. By the late 17th century, security and order had become obvious goals.

The power to examine the bankrupt and his affairs was created in the Bankruptcy Act of 1604. This improvement to the provisions of the Bankruptcy Act of 1571 was necessary because although that Act enabled examination of the bankrupt's associates, it ignored the bankrupt himself<sup>143</sup> (thereby prejudicing the creditors). The power to examine is closely connected to the imposition of order for it is only when the bankruptcy commissioners had the ability to undertake a full process of collection and distribution that the law was able to hold out to creditors that it could deliver results. Insolvency is the result of many factors, but all are certainly multiplied by uncertainty and unpredictability in commercial relations.

The fact that when disputes arose the courts could consider who was or was not a trader on a case-by-case basis allowed for judicial control over the application of the legislation. In some cases Parliament saw fit to widen the category itself. In the Bankruptcy Act of 1623 the definition of a trader was amended to include a scrivener<sup>144</sup>.

Managing the economy involved instilling confidence in trading relations, and this required satisfying commercial expectations in relation to an ordered and equitable bankruptcy process. A significant part of England's economic growth was tied to overseas expansion. Accordingly, there was a need to protect that part of the economy that underwrote this expansion. To this effect the Bankruptcy Act of 1662 excluded from the definition of a trade those 'who have adventured or put in' money in the East India Company, the Guiney Company or The Royal Fishing Trade<sup>145</sup>.

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<sup>142</sup> Joyce Oldham Appleby, *Economic Thought and Ideology in Seventeenth-Century England* (Princeton University Press, 1978) 25–6.

<sup>143</sup> Bankruptcy Act of 1604 s 6

<sup>144</sup> Christian, above n 152, vol II. Christian describes a scrivener as 'a country attorney or counsel' but not necessarily 'a regular professional man': at 21. He also confirms that regardless of the bankruptcy Acts introduced during the 17th century the Bankruptcy Act of 1571 remained as the basis of the law until the significant changes brought about at the beginning of the 18th century: at vol I, 10.

<sup>145</sup> Bankruptcy Act of 1662 preamble

It did so specifically to ensure that 'such persons may not be discouraged in those honorable endeavors for promoting 'publique' undertakings'<sup>146</sup>. Bankruptcy would not be able to deliver on its promise of order without efficient and structured administrative mechanisms.

The office of the bankruptcy commissioner was first created by the Bankruptcy Act of 1571. Predominantly, commissioners were drawn from the ranks of the legal profession. Citizens or merchants were also included and generally a creditor could be appointed as the treasurer of any fund received<sup>147</sup>. The ability of the commissioners to appoint an assignee was introduced in the Bankruptcy Act of 1604.

In **Smith v Mills** ('Case of Bankrupts')<sup>148</sup>, Wray CJ affirmed the judicial view of bankruptcy commissioners in the late 16th century. He set out that the Bankruptcy Act of 1571 'hath appointed certain commissioners, of indifferency and credit, to make the distribution'<sup>149</sup>. Gradually with the improvement of the commissioners' powers and particularly the introduction of discharge in the bankruptcy legislation of the early 18th century, the administration of bankrupt estates became more efficient.

#### **The Introduction of Bankruptcy Discharge as a Means of Maintaining Order**

The introduction of discharge in 1706 brought with it an overhaul of the bankruptcy law<sup>150</sup> yet the restriction to traders was to remain until later in the century when it was finally removed<sup>151</sup>.

Just as it was with the Bankruptcy Act of 1542 and the restriction to traders in the Bankruptcy Act of 1571, the introduction of discharge in the early 18th century reflected the close relationship between the bankruptcy law and commercial order. The need to modify and refine this relationship became particularly important as trade took on increasing significance as a mainstay of economic growth.

All bankruptcy legislation deals with the realignment of debtor-creditor relations; however it is obvious that during the early history of bankruptcy this realignment favored the position of creditors. As such, while the introduction of discharge was clearly a watershed in the

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<sup>146</sup> Ibid

<sup>147</sup> Gerard Malynes, *'Consuetudo, Vel, Lex Mercatoria: Or, the Ancient Law-Merchant'* (London Professional Books, first published 1686, (1981 ed) 158

<sup>148</sup> (1584) 2 Co Rep 25; 76 ER 441.

<sup>149</sup> Case of Bankrupts (1584) 2 Co Rep 25, 26; 76 ER 441, 474

<sup>150</sup> An Act to Prevent Frauds Frequently Committed by Bankrupts, 4 & 5 Anne, c 17, s 18 ('Bankruptcy Act of 1705')

<sup>151</sup> Bankruptcy Act 1861, 24 & 25 Vic 1, c 134; Bankruptcy Act 1869, 32 & 33 Vic 1, c 71

development of bankruptcy law, the reality of the bankrupt securing four-fifths of the creditors' agreement for the purposes of discharge was a high bar.

It meant that the introduction of discharge did little to unhinge creditor dominance of bankruptcy. **Schur** states: 'It can hardly be denied that in a general sense the legal order establishes (or at least recognizes and legitimates) the broad patterns of power relationships in a society'<sup>152</sup>.

Better regulating the supply of credit and reversing the growing lack of confidence between traders was on the Parliament's agenda when in March 1705 the House of Lords ordered that the Judges draw 'a Bill, to prevent frauds frequently committed by Bankrupts'<sup>153</sup>.

The direction from the House of Lords to the Judges followed immediately on from the House resolving to pass an Act concerning Thomas Pitkyn. He was a London linen draper and bankrupt whose fraudulent conduct and massive debt created much concern and anger throughout the commercial community<sup>154</sup>. Duffy has referred to the Bankruptcy Act of 1705 as the 'initial meliorating statute' from the bankrupt's perspective, yet it was 'introduced into parliament, in response to the notorious frauds of Thomas Pitkyn in 1704'<sup>155</sup>.

While it is unlikely that the clause introducing discharge into the Bankruptcy Act of 1705 was solely the result of the reaction to the Pitkyn affair, clearly the various representations to the House of Commons during 1705 highlighted that, regardless of the penalties that existed in relation to fraudulent bankrupts, some means of preventing impecunious debtors from falling deeper into debt, in Pitkin's case the amount was some £7,000,066 was essential if the bankruptcy legislation was to engender financial restraint and at the same time provide a predictable and ordered financial climate. As **Kadens** observed, 'in the sordid detail of its cheats, bribery, blackmail, and betrayal of trust, the Pitkin Affair provides a rich study of bankruptcy crime and the reactions to it'<sup>156</sup>.

In **Daniel Defoe's** newspaper Review of the State of the English Nation, the extent of the fallout from Pitkyn's bankruptcy is potently described as having 'so many ill Consequences in Trade

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<sup>152</sup> Edwin Schur, 'Law and Society: A Sociological View' (Random House, 1968) 87.

<sup>153</sup> United Kingdom, Journal of the House of Lords, vol 17 (1701-5), 3 March 1705, 687. This became the Bankruptcy Act of 1705

<sup>154</sup> An Act for the Relief of the Creditors of Thomas Pitkin, a Bankrupt, and for the Apprehending of Him and the Discovery of the Effects of the Said Thomas Pitkin, and His Accomplices 1704, 3 & 4 Anne, c 12.

<sup>155</sup> Ian P H Duffy, 'English Bankrupts 1571-1861' (1980) 24 American Journal of Legal History 283, 286.

<sup>156</sup> Emily Kadens, 'The Pitkin Affair: A Study of Fraud in Early English Bankruptcy' (2010) 84 American Bankruptcy Law Journal 483, 487

that few had more'<sup>157</sup>. Earlier, in his essay 'Of Bankrupts' in *An Essay upon Projects*, Defoe had recognized the uncertainty caused by ineffective bankruptcy laws. He comments on the bankruptcy law in place at the end of the 17th century: 'All people know, who remember anything of the times when [the Bankruptcy Act of 1571] was made, that the evil it was pointed at was grown very rank, and breaking to defraud creditors so much a trade, that the parliament had good reason to set up a fury to deal with it'<sup>158</sup>.

#### 2.7.4. UNDER GERMANIC LAW<sup>159</sup>

Germanic law is originally a common law (a product of people's customs) which for a long time, were only retained in the oral tradition in the minds of those learned in the law. According to old Germanic law, an insolvent debtor was subjected to just as severe a treatment as in old Rome. Default was in itself seen as a crime. A freeman could be exiled or sentenced to become a slave for a debt not properly paid.

Slavery for debt seems to have been the more common of the two. Slavery began when the creditor could not satisfy his claim in the debtor's property and no third person came to the debtors rescue. The German view that the inability to pay a debt equaled theft from the creditor thus played an important role.

If the debtor had no assets, he would be sentenced to become the creditor's bondsman. Prison and even torture were used as a means for extracting property. Surrendering ones property was often followed by degrading ceremonies, where the debtor wore a special gown and forced to walk barefoot and so on.

In contrast to Roman law, Germanic Law did not distinguish between honest and dishonest debtors. The distraint was first aimed at the debtor's fortune, but if this was not sufficient, he was handed over to the creditor as a bondsman and could be sold or killed. Besides the debtor's servitude, he could also be subject to a feud or become an outlaw. Debtor's servitude was not limited in time or defined as to its contents.

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<sup>157</sup> Daniel Defoe (1706) 3(24) *Review of the State of the English Nation* [published from 1704 to 1713] (23 February 1706) 94.

<sup>158</sup> Daniel Defoe, 'Of Bankrupts' in Henry Morley (ed), *The Earlier Life and Chief Earlier Works of Daniel Defoe* (Burt Franklin, first published 1697, 1970 ed) 111.

<sup>159</sup> *Supra* note 115 page 21

The debtor's responsibility could also be regulated in a contract of responsibility. Pledges and hostages also appear in these contracts. If a hostage was held as a pledge, the personal responsibility for the debt was taken over by a 3<sup>rd</sup> party. Like other material pledges, hostages were handed over to the creditor who was to keep them in custody. If the debtor did not satisfy the creditor in time, the hostage became the creditor's property.

The hostage then lost his freedom and the collective responsibility of the family required them to become hostages for the sake of a family member in need. Debtors could put up even wives and children as hostages<sup>160</sup>

A developed bankruptcy system did not exist in German Law before the mid sixteenth century. The main principle in German law was the creditors focus on the debtor as a person and this might be one of the reasons why the severity against the debtor was maintained for such a long time. A default debtor should, after the application of a creditor, according to old customs, be clapped in irons and after three days be transferred to a debtor's prison where he was to be kept until he paid is due.

Eventually, the Roman system of *Cessio Bonorum* was incorporated into German law in a reform of criminal law therefore the possibility to surrender ones property voluntarily was immediately seized by debtors to avoid the debtors prison.<sup>161</sup>

#### **2.7.5.UNDER SWEDISH LAW<sup>162</sup>**

Within the Swedish peoples, knowledge of the law was inherited among district judges through oral tradition. The oldest remaining urban law code of Sweden is the *Bjarkoaratten* which comes from the Icelandic word *Bjaerk* which means 'trade'. At the time of the law-rolls of the Swedish provinces, the barter economy was the predominant system and the credit system was poorly developed in the country side.

According to most of the law rolls of the Swedish provinces, a debtor might be taken into servitude if a procedure of distraint (*maet*) was without result. Both *maet* and the debtor's servitude were decreed in the case when a creditor required payment. In the twelfth century, the Swedish law began to use imprisonment as a means of coercing borrowers into paying their

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<sup>160</sup> Note 124.

<sup>161</sup> Supra page 23.

<sup>162</sup> note 115 page 25

debts. The oldest court procedure depended on the injured party finding out who was the criminal.

Then he would take him to the court or to the judge where he would complete his claim. Instead of public custody, private housing was used for a long period. The medieval view of punishment as a kind of redress for the injured party was based on primitive feelings of revenge. Prison was still compulsory for all debtors and various kinds of disgraceful punishments were added to the punishment of being deprived of one's freedom.

The debtor was reduced to the state of a slave; his hair was cut and strap or collar was pressed around his neck. The debtor was also stigmatized by having to walk at the very end at weddings or in funeral processions or by having to sit with the women in church. Debtor's children who were born after bankruptcy were not allowed to wear jewelry, a rapier or a dagger.

The creditor could, with the aid of the bailiff, have the debtor put in a debtor's prison and the debtor could only deny the debt by the aid of three or six sworn witnesses. The debtor is deprived of his freedom due to his debt

#### **2.7.6 CONCLUSION**

Human rights have come a long way from the days when there were basically no individualism or the idea of individual rights to the current set of recognized rights and their underlying enforcement procedures.

One of the areas that manifests this development of human rights is Insolvency as seen from the change from the brutality visited upon bankrupts during the Roman empire, to the current status where upon a declaration of bankruptcy, all executions and proceedings against the bankrupt are stayed.

## CHAPTER 3

### BANKRUPTCY PROCESS

#### 3.1 BANKRUPTCY

The term '**default**' means that a debtor has not paid his debt. Default may occur when the debtor is either unable or unwilling to pay a debt. Bankruptcy is a legal finding that imposes court supervision over the financial affairs of those who are insolvent or in default<sup>163</sup>

A '**bankrupt**' is an individual in respect of whom a bankruptcy order has been made<sup>164</sup> and a '**bankruptcy debt**' means a debt or liability to which the bankrupt is subject after the commencement of bankruptcy or a debt or liability to which the bankrupt may become subject after the commencement of the bankruptcy by reason of any obligation incurred before the commencement of the bankruptcy and includes after discharge of bankruptcy or any interest that may be claimed in the bankruptcy<sup>165</sup>.

Bankruptcy solves problems by bringing order to the financial and legal disorder that would otherwise exist between insolvent debtors and multiple creditors. In addition to being a commercial regulator, bankruptcy's influence is broad and, together with its economic role, it has an effect on both social and political order.

The bankruptcy system developed in a tentative way and its main aim was to achieve equality among the creditors i.e. equality as concerns loss when the debtor becomes insolvent. This can only happen through general agreement and if there was no bankruptcy system but only regulations on distraint, every possibility of obtaining payment upon debtors insolvency would be entirely dependent on who first required the distraint. Upon a threat of insolvency, there would be a race between creditors about the debtor's assets<sup>166</sup>.

Any credit transaction can be considered as an insecure situation since one of the main problems in the estimation of risk is information. The borrower has better information about his economic position than the lender therefore there have always been many chances for fraud, deceit and misjudgment by the debtor.

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<sup>163</sup> Karl Gratzner and Dieter Stiefel, '*History of Insolvency and Bankruptcy from an International Perspective*' page 15.

<sup>164</sup> note 9 Insolvency act 2011.

<sup>165</sup> note 9 section 2.

<sup>166</sup> *Ibid* note 115, 16.



Many cultures introduced drastic measures with the aim of protecting credit and private property and for long periods, debtors unable to pay their debts were subjected to severe treatment since default, insolvency and bankruptcy were often equaled to theft or robbery from the creditors, who usually had the right to the debtors' property and body.<sup>167</sup>

The question therefore is, should a creditor be allowed to assume control of the entire life of a debtor, in perpetuity, just because of the latter's bankruptcy? Should the debtor be suffocated financially, politically, socially and economically by the creditors?

## **THE BANKRUPTCY PROCESS**

### **3.2. INABILITY TO PAY**

A debtor is presumed unable to pay (unless the contrary is proved) their debts if the debtor has failed to comply with a statutory demand, as seen in as discussed in **Re Medipharm Publication (Nig) Ltd**<sup>168</sup> where the debtor lacked both money and assets or if the execution issued against the debtor in respect of a judgment debt has been returned unsatisfied in whole or in part or all or substantially all of the property of the debtor is in the possession or control of the receiver or some other person enforcing a charge over that property<sup>169</sup>.

In **Re;Mujuni Kenneth,A Debtor**<sup>170</sup>,the petitioner was trading as Kabs Steel Works at Namugogongo Kyaliwajjala and was the sole proprietor of the business. He had a total debt of 215,694,588 Ugandan shillings and he claimed that he had tried his best to discharge the debts but with no success thus he was "unable to pay" however, the order for stay of proceedings or execution was denied since the petitioner did not attach evidence of a pending suit or execution against himself.

In the matter of **Hellen Kakyo (A debtor)**<sup>171</sup>, court stated that if a petitioner wants to be declared bankrupt, they must prove that they are unable to pay their debts.

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<sup>167</sup> Ibid note 115, 17.

<sup>168</sup> (1971) UILR 421

<sup>169</sup> Note 9 Insolvency Act Section 3.

<sup>170</sup> Bankruptcy Petition No.5/2012

<sup>171</sup> 2015 UG COMMC 167

### 3.3 STATUTORY DEMAND

A creditor who demands money from a debtor has to prepare a demand notice as discussed in **Epaineti Mubiru V Uganda Credit and Saving Bank**<sup>172</sup> and it shall constitute a statutory demand and the same shall be made in respect of a debt that is not less than the prescribed amount, the same statutory demand shall be, in the prescribed form, be verified by a statutory declaration attached to the demand, be served on the debtor and it shall require the debtor to pay the debt or compound with the creditor or give a charge over property to secure payment of the debt to the reasonable satisfaction of the creditor within twenty working days after the date of service or a longer period as the court may order<sup>173</sup>.

A statutory demand has to be served on the debtor (as per **BNP Paribas V Jurong Shipyard Pte LTD**<sup>174</sup> or their agent and, according to **Valery Alia V Alionzi John**<sup>175</sup>, where the plaintiffs claim against the defendant was for payment or recovery of 38,100,000 as amount due under a lease contract, the court stated that a statutory demand for the payment of a total debt is a liquidated demand i.e. the amount is well defined.

In cases where a plaintiffs action includes a liquidated demand and a claim for pecuniary damages and the defendant does not file a defense to the action, the plaintiff would be entitled to final judgment under Order 9 Rule 6 of the Civil Procedure Rules according to **NSSF V Kisubi High School Ltd**<sup>176</sup>.

### 3.4 PETITION FOR BANKRUPTCY/RECEIVING ORDER

A debtor may petition court for bankruptcy alleging that the debtor is unable to pay his or her debts and the court may, make a bankruptcy order in respect of the debtor as stated in **Re Jackson, Exparte Jackson**<sup>177</sup> and **In Re; A Petition For a Receiving Order by Abdi Noor Ukash**<sup>178</sup>, where the petitioner alleged that he had tried all he could do to settle his debts but he did not succeed in paying for them.

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<sup>172</sup> (1978) HCB 109

<sup>173</sup> Ibid section 4.

<sup>174</sup> (2009) 2 SLR 949

<sup>175</sup> HCCS NO.157/2010

<sup>176</sup> Civil suit No. 440/2011;(2012) UG COMMC 24

<sup>177</sup> (1989) 91 ALR 145

<sup>178</sup> Bankruptcy Petition No.2 of 2008; (2008) UGHC 49

Upon failure by the debtor to satisfy the statutory demand, a petition for bankruptcy shall be presented by a creditor (as seen in **Re Miller**<sup>179</sup>) or a debtor and the court may make a bankruptcy order in respect of the debtor and the bankruptcy order once made shall declare the debtor bankrupt and shall appoint the official receiver as the interim receiver of the estate, for its preservation and the official receiver shall have the power to sell or otherwise dispose of any perishable and any other goods, the value of which is likely to diminish if they are not disposed of unless court limits the powers or places conditions on the exercise<sup>180</sup>.

A receiving order can only be granted after the debtor has complied with all prescribed conditions as stated in **Kahel Mohammed Abdel Magid Nagy, Re Bankruptcy Petition**<sup>181</sup>, and in **Thomas I. Kato (A Debtor)**<sup>182</sup>, explained that for a receiving order to be made, the debtor has to 1) prove their indebtedness and 2) have committed an act of bankruptcy and the petitioner in this case failed to commit an act of bankruptcy when he did not file a statement of affairs with the official receiver,

### 3.5 STATEMENT OF AFFAIRS

The petition for bankruptcy by a bankrupt has to be supported by an affidavit deposed by the debtor together with a statement of affairs, according to **Re; In the matter of a Petition for A receiving Order by Thomas I. Katto**<sup>183</sup> and if the statement of affairs accompanying the petition does not bear the stamp of the official receiver, then the petition for a receiving order will be refused as stated by M.S, Arach-Amoko J, in **Re; A Petition by Mohammed Amer Abdel Kaher**<sup>184</sup>

The court shall require a debtor in respect of whom a petition has been presented to file a statement of his or her affairs verified by an affidavit. The statement of affairs shall include particulars of the debtor's creditors, debts and assets and such other information as may be

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<sup>179</sup> (1901) 1 QB 51

<sup>180</sup> Ibid section 20.

<sup>181</sup> Number 8/2002

<sup>182</sup> Bankruptcy Petition No.13/2002

<sup>183</sup> note 189

<sup>184</sup> Supra 188

prescribed<sup>185</sup> and it is admissible in evidence against the debtor in judicial proceedings according to **R V Pike**<sup>186</sup>.

### 3.6 PUBLIC EXAMINATION OF THE DEBTOR

Where a petition for a bankruptcy order is presented to the court, the court shall direct that a public examination be held on a day appointed by the court and the debtor shall attend on that day and be publically examined on his or her affairs, dealings and property.

According to **Re; Anderson; Exparte Official Receiver**<sup>187</sup>, "it is of the utmost importance that a trustee should have the power to investigate all matters relating to the estate which he is called upon to administer.

The court may put such questions to the debtor as it thinks fit and the debtor shall, be examined upon oath, and it shall be his or her duty to answer all such questions as the court may put or allow to be put on him or her<sup>188</sup> as seen **In the matter of Hellen Kakyo**<sup>189</sup>

### 3.7 INQUIRY INTO DEBTORS DEALINGS AND PROPERTY

The court may require any person to submit an affidavit to the court containing an account of his or her dealings with the debtor or to produce any documents in his or her possession or under his or her control relating to the debtor or the debtors dealings, affairs or property<sup>190</sup>.

In **Bishopgate Investments Management Ltd V Maxwell**<sup>191</sup>, A company liquidator applied for an order under sections 235 and 236 of the Insolvency Act 1986 that a director should disclose information to that liquidator. The director objected by claiming that to do so would infringe on his privilege against self incrimination. The court held inter alia that the privilege against self incrimination is entrenched, and it can only be removed by clear words in a statute (thus showing that the right to privacy is not absolute).

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<sup>185</sup> Supra section 21.

<sup>186</sup> (1902) 1 KB 552

<sup>187</sup> (1937) 10 ABC 284.288

<sup>188</sup> Supra section 22.

<sup>189</sup> note 178

<sup>190</sup> Note 9 Insolvency Act section 23.

<sup>191</sup> (1992) 2 All ER 856

### 3.8 EFFECTS OF BEING DECLARED BANKRUPT

Upon the making of a bankruptcy order, the bankrupts estate shall, vest first in the official receiver and then in the trustee, without any conveyance, assignment or transfer and except with the trustees written consent, or with leave of the court and in accordance with such terms as the court may impose, no proceedings, execution or other legal process may be levied against the bankrupt or the bankrupts estate<sup>192</sup>.

Whenever the bankrupt is an advocate, and he is adjudged bankrupt, the official receiver shall notify the registrar, and that such adjudication shall suspend the advocates practicing certificate and the advocate shall return the certificate to the registrar<sup>193</sup>.

No person shall be registered under this Act if he or she is adjudged bankrupt, insolvent or of unsound mind<sup>194</sup>. A member of the board shall cease to hold office if he or she becomes bankrupt or suspends payments or compounds with his or her creditors<sup>195</sup>. Any member appointed shall cease to hold office if he or she is adjudged bankrupt or enters into a composition scheme or an arrangement with creditors<sup>196</sup>. The minister may terminate the appointment of a member if the member becomes bankrupt<sup>197</sup>. No person shall be appointed to the commission who is an undischarged bankrupt or has made any arrangement with creditors<sup>198</sup>.

A person is not qualified for election as a member of parliament if that person has been adjudged bankrupt or otherwise declared bankrupt under any law in force in Uganda and has not been discharged<sup>199</sup>. No person shall become a director in a financial institution unless he or she is not an undischarged bankrupt<sup>200</sup>. No person shall be appointed a member of the committee who is an insolvent or a bankrupt person<sup>201</sup>.

Where a debtor is adjudged bankrupt, he or she shall be disqualified from being appointed or acting as a judge of any court in Uganda and also from being elected to or holding or exercising

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<sup>192</sup> Supra note 9 section 27.

<sup>193</sup> Section 14(3), Advocates Act, Cap 267 (laws of Uganda).

<sup>194</sup> Section 13(1)(b), Architects Registration Act cap 269 (laws of Uganda).

<sup>195</sup> Section 9(2)(b), Bank of Uganda Act Cap 51 (Laws of Uganda).

<sup>196</sup> Section 4(9)(d), Capital Markets Authority Act Cap 84.

<sup>197</sup> Section 10(1)(b), Civil Aviation Authority Act Cap 384.

<sup>198</sup> Section 7(c), Uganda Communications Act Cap 106.

<sup>199</sup> Article 80(2), constitution of the Republic of Uganda 1995 (as amended).

<sup>200</sup> Section 53, Financial Institutions Act 2004.

<sup>201</sup> Section-9(1)(b), Law Development Center Act Cap 132.

the office of the president, a member of parliament, minister, a member of a local government, council, board, authority or any other government body<sup>202</sup>.

### 3.9 CONCLUSION

The bankruptcy process helps to ensure orderly collection of debts by creditors as opposed to scrambling by creditors to file petitions for recovery of debts owed. However, the process is not perfect since some human rights may be challenged in the absence of clear constitutional provisions allowing the same.

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<sup>202</sup> note 9 Insolvency Act section 45 (a) and (b)

## CHAPTER 4

### THE CONSEQUENCE OF BANKRUPTCY AND THE CONVERGENCE BETWEEN HUMAN RIGHTS AND BANKRUPTCY

#### 4.1 PROPERTY

Property is defined as to include money, goods, things in action, proceeds, land and includes every description of property wherever situated, obligations, interest whether present, future, vested or contingent, arising out of or incidental to property<sup>203</sup>.

In relation to business, the traditional exemption regarding property which does not vest in the trustee upon appointment has been their tools of trade as per **Re Sherman**<sup>204</sup> and in **Rowe V Sanders**<sup>205</sup>, annuity income was held to be part the bankrupts estate thus vests in the trustee upon a declaration of bankruptcy.

In **Re Lamacchia** (a New Zealand Case)<sup>206</sup>, a debtor was declared bankrupt by court and the issue was whether his fishing boat formed part of his estate so that it vests in the official receiver and the court considered it a tool of trade. Barbers chairs and combs were also considered as tools of trade in **Re Douglas**<sup>207</sup> when the court was called upon to decide a similar issue (of whether an article owned by the debtor was a tool of trade), however in **Pennel v Egin**<sup>208</sup>, a lawyers library was not considered as a tool of trade.

In **Griffiths V Civil Aviation Authority**<sup>209</sup>, the official receiver claimed that the bankrupts license to fly vested in him after the declaration of bankruptcy but the bankrupt challenged it and court decided that a pilot's license is personal property thus does not vest in the official receiver.

Lord Atkinson in **Hollinshead V Hazleton**<sup>210</sup>, stated that in bankruptcy, the entire property of the bankrupt, of whatever kind or nature it be, whether alienable or inalienable, subject to be taken in execution legal or equitable, or not so subject, shall, with the exception of some

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<sup>203</sup> Note 8 section 2.

<sup>204</sup> (1916) WN 26.

<sup>205</sup> (2002) 2 All ER 800; (2002) EWCA Civ 242.

<sup>206</sup> (1933) NZLR 616.

<sup>207</sup> (1959) NZLR 1214.

<sup>208</sup> (1926) S.C. 9,12.

<sup>209</sup> (1997) BPIR 50.

<sup>210</sup> (1916) 1 AC 428,436.

compassionate allowances for his maintenance, be appropriated and made available for the payment of his creditors (however the decision is about 100 years old).

According to **Ayerst V C and K Construction Ltd**<sup>211</sup>, from the start of bankruptcy, all property of the debtor vests automatically in the trustee and the bankrupt does not retain ownership interest in the property comprised within the estate and this is in contrast to the position with regards to companies, where there is no vesting of the company property in the liquidator.

Every person has a right to own property regardless of their religion or their gender or any other demographic marker<sup>212</sup> and in **Rowe V Sanders**<sup>213</sup>, annuity income was held to be part the bankrupts estate thus vests in the trustee upon a declaration of bankruptcy.

The bankrupt's personal communication, however valuable, does not form part of his or her estate as stated in **Haig V Aitken**<sup>214</sup>, where the court was called upon to decide if such communication can be included and Rattee J. said that personal correspondence whatever its subject matter does not form part of the bankrupts estate and while some of it may relate to other assets within the bankrupts estate or to his affairs properly regarded as limited to the affairs relevant to the administration of the bankrupts estate, that does not bring it within the

In **Performing Right Society Ltd. V Rowland and another**<sup>215</sup>, the first defendant was a musician and a songwriter and was a member of the applicant society. He was declared bankrupt in 1991 and following his discharge from the same, the society applied to the court for a declaration as to whether the second defendant, his trustee in bankruptcy, was entitled to distributions of royalties failing to be made by the society after the start of the bankruptcy in respect of works written prior to the bankruptcy.

The court held that the right to distributions from the society in respect of works completed prior to a written members bankruptcy was not a mere expectancy or a possibility but a transmissible property right not depending on the performance of further obligations on the part of the writer member, which vested in the trustee in bankruptcy upon his appointment.

In **Cork (as trustee in bankruptcy for Rawlins) v Rawlins**<sup>216</sup>, the appellant, R, obtained two loans to fund the building of a bungalow. In order to ensure that the loans would be repaid, R

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<sup>211</sup> (1976) AC 167

<sup>212</sup> note 10 constitution article 26

<sup>213</sup> (2002) 2 All ER 800; (2002) EWCA Civ 242

<sup>214</sup> (2002) 3 All ER 80,89

<sup>215</sup> (1997) 3 All ER 336

<sup>216</sup> (2001) 4 All ER 50



took out two assurance policies both of which provided for earlier payment, on receipt of proof that R was permanently disabled, of the sum which would otherwise have been payable on his death or on the expiry of the contractual term. R sustained a serious injury that prevented him from working, and he duly made a claim under the policies. He had no claim against anyone else in relation to the accident.

Subsequently, R was made bankrupt. Shortly afterwards, R's claim for permanent disablement benefit under both policies was accepted and since the loans had been repaid, the policy monies were no longer required to discharge them. R's trustees claimed that he was entitled to the money under the policies.

The court held, on appeal that the common law exception from the bankrupts estate did not include an asset whose only connection with the pain and suffering of the bankrupt was the fact that his disablement was the contractual contingency on which the monies assured had become payable (therefore the bankrupt lost the right to retain the money since the money was as a result of an assurance contract, which falls under the meaning of the term "property" as a chose in action).

In **Re Garret**<sup>217</sup>, section 14(1) of the Police Pensions Act of 1921 (U.K.) provided not only that any assignment of the pension payable under the act should be void, but that, on the pensioners bankruptcy, the pension should not pass to 'any trustee or any other person', which would mean that the bankrupt's pension would be protected in the event of their bankruptcy as per the Act (and a similar provision exists in section 17 of the **Pensions Act**<sup>218</sup> (of Uganda)).

In **Re Landau**<sup>219</sup>, at the date of bankruptcy, the bankrupt was entitled to a pension, payable in the future on his attaining the age of 65 years under a policy which had been approved as an annuity contract. The bankrupt, a former solicitor, was aged 61 years when the bankruptcy order was made in 1990. He was discharged in 1993. The annuity became payable when he reached 65 years the following year. He claimed the annuity payments. The trustee, after some equivocation, claimed to be entitled to elect under the policy to commute part of the annuity for a tax free lump sum; and to take that lump sum and the reduced annuity as part of the bankrupt's estate.

The policy contained a restriction against alienation. One of the issues for determination was, whether the statutory restrictions (which restrict assignment of pension policies), prevent such

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<sup>217</sup> (1930) 2 Ch 137; (1930) ALL ER Rep 139

<sup>218</sup> Cap 286

<sup>219</sup> (1997) 3 ALL ER 322, 327

policies from vesting in the trustee in bankruptcy as part of the bankrupt's estate. Ferris J. stated that an attempt to provide, by contract, that the benefits will be inalienable on a bankruptcy must fail on grounds of public policy since an agreement between two people cannot be allowed to defeat public policy, as reiterated by the court in **British Eagle International Airlines Ltd V Cie Nationale Air France**<sup>220</sup>, where the court stated that it is contrary to public interest to allow a party to contract out of the operation of the bankruptcy code.

The bankrupt's estate comprises of all property belonging to or vested in the bankrupt at the commencement of the bankruptcy,<sup>221</sup> and upon the making of a bankruptcy order, the bankrupt's estate shall, vest first in the official receiver and then in the trustee, without any conveyance, assignment or transfer<sup>222</sup>.

The constitution guaranteed the right to own property subject to the limitations there in but the bankruptcy legal regime has gone a step further by introducing the concept of property acquired after the declaration of Bankruptcy<sup>223</sup>. This represents a severe curtailing of the bankrupt's economic or financial endeavors.

The constitution is the supreme law of the land and any other law that is inconsistent to the constitution shall, to the extent of the inconsistency, be null and void<sup>224</sup>. The same law has not provided for the extension of restraint of economic activities which includes property acquired after declaration of bankruptcy. Therefore which one should take precedence over the other between the constitution and the Insolvency Act?

A bankrupt person may at times attempt to engage in economic activity out of concern for his or her financial condition, should this kind of behavior be discouraged? Does it make economic sense to take all the property acquired by the bankrupt after the declaration of bankruptcy or wouldn't it be better to only take a reasonable portion of the said property?

## 4.2 STATEMENT OF AFFAIRS

The court shall require a debtor in respect of whom a petition has been presented under section 20, to file a statement of his or her affairs verified by an affidavit. The statement shall include

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<sup>220</sup> (1975) 2 ALL ER 390; (1975) 1 WLR 758

<sup>221</sup> note 9 insolvency Act 2011 section 31(1) (a),(b),(c)

<sup>222</sup> note 9 insolvency Act 2011 section 26

<sup>223</sup> note 9 Insolvency Act 2011 section 32

<sup>224</sup> note 10 constitution article 2(2)

particulars of the debtor's creditors, debts, assets and such other information as may be prescribed<sup>225</sup>. If the bankrupt fails to file a statement of affairs, then their petition will be rejected as seen in **Re; A Petition by Mohammed Amer Abdel Kaher**<sup>226</sup>.

The constitution of the republic of Uganda 1995 (as amended) guarantees a right to privacy of an individual<sup>227</sup> and the constitution is also the supreme law of the land yet the insolvency Act requires an individual to disclose all their financial dealings.

### 4.3 PUBLIC EXAMINATION

Where a petition for a bankruptcy order is presented to the court under section 20, the court shall direct that a public examination be held on a day appointed by court and the debtor shall attend on that day and be publically examined on his or her affairs, dealings and property.

The court may put such questions to the debtor as it may think fit and the debtor shall, be examined upon oath, and it shall be his or her duty to answer all such questions as the court may put or allow to be put to him or her<sup>228</sup>. Therefore public examination is an exception to the right to privacy of individuals.

In **Re Paget, Ex Parte Official Receiver**<sup>229</sup>, Lord Hansworth MR stated that in the course of public examination of a debtor, the debtor is not entitled to refuse to answer questions put to him on the ground that the answers thereto might incriminate him

The constitution of the republic of Uganda guarantees freedom from inhumane or degrading treatment<sup>230</sup>. If the debtor has a vice or a habit which the society thinks is bad, and the same habit is part of the reason for his insolvency, it may cause great embarrassment. For example, a debtor who wasted his money on prostitutes from Kabalagala, when being publically examined regarding his expenditures may be defamed as a result of answering the mandatory questions put to him by the court or the creditors which is necessarily "degrading".

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<sup>225</sup> note 9 insolvency Act section 21

<sup>226</sup> Note 189

<sup>227</sup> note 10 Article 27

<sup>228</sup> note 9 insolvency Act section 22

<sup>229</sup> (1927) 2 Ch 85

<sup>230</sup> note 10 article 25

with creditors (**Bank of Uganda Act Cap 51**)<sup>236</sup> thus the bankrupt cannot be a member of the Bank of Uganda. The minister may terminate the appointment of a member if the member becomes bankrupt (**Capital Markets Authority Act Cap 84**)<sup>237</sup>. No person shall be appointed to the commission who is an undischarged bankrupt or has made any arrangement with creditors (**Civil Aviation Authority Act Cap 385**)<sup>238</sup>.

A person is not qualified for election as a member of parliament if that person has been adjudged bankrupt or otherwise declared bankrupt under any law in force in Uganda and has not been discharged (**Uganda Communications Authority Act Cap 166**)<sup>239</sup>. No person shall become a director in a financial institution unless he or she is not an undischarged bankrupt<sup>240</sup>. No person shall be appointed a member of the committee who is an insolvent or a bankrupt person<sup>241</sup>.

Where a debtor is adjudged bankrupt, he or she shall be disqualified from being appointed or acting as a judge of any court in Uganda and also from being elected to or holding or exercising the office of the president, a member of parliament, minister, a member of a local government, council, board, authority or any other government body<sup>242</sup>.

Therefore a person, who has been declared bankrupt, cannot be a member of parliament, a president, a judge, a member of a local council, a director, or even a board member of any institution or hold any other public office or exercise powers related to a public office yet the constitution of the republic of Uganda gives every Ugandan citizen the right to participate in the affairs of government, individually or through his or her representatives in accordance with the law<sup>243</sup> and the constitution is the supreme law of the land.

The constitution of the republic of Uganda also gives 'every person in Uganda the right to practice his or her profession and to carry on any lawful occupation, trade or business yet the various Acts of parliament outlined above on this page disqualify bankrupts from carrying on "lawful trades, businesses or professions" yet the constitution is the supreme law of Uganda.

Therefore as per the summary of my findings, the Constitution of the Republic of Uganda guarantees rights and the various Acts of parliament serve as claw back legislations to the rights

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<sup>236</sup> note 197.

<sup>237</sup> note 198.

<sup>238</sup> note 199.

<sup>239</sup> note 200.

<sup>240</sup> note 201.

<sup>241</sup> note 202.

<sup>242</sup> note 9 Insolvency Act section 45 (a) and (b)

<sup>243</sup> note 10 article 38(1)

given. Is it “constitutional” to restrict the economic development of a bankrupt who is trying to get back on their feet financially, socially and politically?

#### **4.6 CONCLUSION**

The individual human right are affected in five areas namely, in terms of the freedom of association,~ property vesting in the trustee, public examination and the reduction of the bankrupts employment opportunities.

## CHAPTER 5

### CONCLUSION AND RECCOMENDATION

#### 5.1 INTRODUCTION

The concept of bankruptcy is generally foreign to African cultures and customs and this explains why the majority of Africans don't understand it. This lack of understanding can lead to suffering but the sufferer may not know what afflicts him/her.

The lack of adequate scholarship and research means that the jurisprudence of Uganda in terms of insolvency and human rights is at the best shallow when compared to other jurisdictions.

#### 5.2 CONCLUSION

The right to property is not absolute and the only "property" which cannot be alienated as a result of a bankruptcy order is "pension" as per the **Pensions Act**<sup>244</sup> and all other property whether tangible or intangible, past, present or future, vested or contingent, vests in the official receiver upon the declaration of bankruptcy.

Such alienation of bankrupts property is a step forward in protecting the creditors rights to own property, the failure of which would lead to a collapse of the global trading system.

The debtors right to privacy cannot be upheld since doing so would serves as a challenge to the creditors right to own property where a debtor seems to hide money.

The only way by which creditors can realize their interests is by first of all, establishing the nature of the debtors transactions and this can't be done when the debtor still has the right to privacy.

The right to information of the debtor may not be upheld if doing so threatens the investigations of the official receiver as where the debtor, his wife and his solicitors refused to cooperate with the official receiver. This helps to protect the creditors interests.

The creditors and the official receiver have a right to information relating to the financial affairs of the bankrupt and this is in line with the idea of protecting the commercial rights of the creditors.

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<sup>244</sup> Cap 286

The procedure of public examination is designed to establish what assets the bankrupt had, what has happened to those assets, and whether action should be begun or continued to recover them. This would involve a considerable amount of disclosure of information by the debtor seeing that answering questions is mandatory during public examinations.

Public examination of the debtor is not merely for identification and collection of assets, but also for the purpose of protection of the public by full and searching examination to be carried out as to the conduct of the debtor in order that a full report may be made ( and this can be said to be contrary to the right to privacy however it is necessary to prevent unscrupulous debtors from defeating the interests of creditors.

A bankrupt cannot freely associate with other people since his character and financial standing, after public examination, will have become public knowledge and this inadvertently serves to limit the bankrupts enjoyment of the scope of freedom of association.

Public examination has the effect of warning unsuspecting members of the public regarding the condition of the bankrupt thereby protecting their property rights.

A bankrupt cannot avoid questions put to them during public examination on the basis that answering such questions would incriminate them. The questions help creditors to establish the financial transactions of the debtor so as to enable tracing of assets, uncovering hidden assets and also to enable the public to be careful when dealing with the debtor.

Questions put to the bankrupt may also be useful to Uganda Revenue Authority in terms of assessing their tax liability and also to the National Social Security Fund when assessing the contributions due from the debtor.

## **5.2 RECOMMENDATIONS**

### **a) ON CAUSES OF BANKRUPTCY**

The bankruptcy law should be amended to ensure that honest but unfortunate debtors are treated differently from fraudulent debtor. Some of the debtors may have become bankrupt due to circumstances outside their control such as natural disasters. The said amendment should also provide for acts which show what amounts to fraudulent conduct of a bankrupt.

#### b) ASSOCIATION

To ensure freedom of association is maintained, the examination of the debtor should be restricted to the creditors only since they are the only persons affected by the debtor.

Therefore the public need not know everything and the only people who should get to know everything are the creditors and this will also protect the privacy of the debtor while at the same time it will protect creditors rights. The public display of the debtors affairs should be substituted (by amendment of the bankruptcy law) with a restriction as to engaging in transactions.

There is no useful association which a person can have with others when their reputation has been damaged as a result of the public examination. The bankruptcy law should be amended to prevent the destruction of the reputation of an honest but unfortunate debtor.

#### c) PROPERTY

The insolvency law should be changed to ensure that the property which vests in the official receiver, is only that which is enough to settle the debt, and not everything. An individual has a right to own property within a democratic system therefore, paying debts should not become an opportunity to confiscate all of the debtors property, rather the confiscation should be based on what can easily satisfy the demands of creditors.

A debtor may owe another 10 million and he may have assets worth 200 million. The creditors petition in this case would do more harm to the debtor since he has much more to lose than the creditor and the damage done by the immediate vesting of property in the official receiver may not be satisfied by subsequent compensation.

Therefore the complete confiscation of debtors property should be subject to warnings before execution and not abruptly as is the case currently.

#### d) EMPLOYMENT

If a person is declared bankrupt, it does not mean that their intellect is deficient therefore, the insolvency law should be amended to ensure that the bankrupt is allowed to hold positions in society subject to notices detailing the bankruptcy of the applicant (bankrupt) since they may be looking for a way through employment, to settle the debts.

This would ensure that a bankrupt would be able to become a member of parliament, president, company director, board chairman etc subject to a court order allowing the bankrupt to work while at the same time detailing the financial condition of the bankrupt so that it can become his



or her choice regarding whether to expose themselves by applying for a job or not. The right to life should also include a right to earn a livelihood in a chosen field if one is qualified.

The debtors employment to public positions helps creditors since the debtors salary or part of it can be appropriated towards settling the debt and this is in line with the idea of protecting creditors interests.

#### e) CIVIC EDUCATION

Most Ugandans, just as other Africans, reside in the countryside and this puts them at a disadvantage when it comes to accessing information. The government should try to educate the villagers regarding their rights, including those tied to use and possession of property.

Increased knowledge may mean increased understanding of the consequences of bankruptcy thus ensuring decreased abuse of debtors by creditors or vice versa. The said civic education can be administered in secondary schools and universities so that future generations can be better at utilizing available credit.

Increased understanding may lead to more litigation and this can contribute to the jurisprudence of human rights and insolvency in Uganda.

#### f) CREDIT CONTROL

The government through the Bank of Uganda should try to control the availability of credit so as to reduce the likelihood of default which may otherwise lead to economic troubles for the country.

The government can also offer financial management training to members of the public so as to ensure efficiency and prudence in the usage of resources.

#### e) SOCIAL REALITIES

The bankruptcy law should be amended to cater for the economic and social realities of Uganda such as the poor access to courts, prohibitive legal fees, the position of women in the society, corruption etc since law does not function in a vacuum.

f) BALANCE OF CONVENIENCE

In **Re Citro**<sup>245</sup>, the bankrupts were Domenico and Carmine Citro and they had a debts which exceeded their assets. Hoffman J, made orders for the possession and sale of the family home but considering the age of the children amongst other factors, the sale was postponed until the youngest child reaches 16 years.

On appeal, the court allowed the lenders to immediately possess the house, stating that financial hardship was not an exceptional circumstance and that exceptional means beyond the normal “melancholy consequences” of bankruptcy.

Therefore the law should be amended to ensure that the hardship caused to the debtor in case of immediate possession and sale of their property is measured as against the hardship caused to the creditors in case sale is ordered but postponed since a human has the right to their dignity.

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<sup>245</sup> (1991) Ch 142

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