

FUNDAMENTALS OF INSOLVENCY AND BANKRUPTCY LAWS

DOCTRINE OF FRESH START: A CRITICAL ANALYSIS



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1. ABSTRACT

This paper attempts to analyse the doctrine of fresh start around the world from a comparative approach and resorts to analyse it beginning from the history and evolution of the theory of fresh start. The need for a comparative analysis arises as two parallel positions have developed and continue to persist in the world today, “Fresh start policy” and “No Fresh start policy”. This paper therefore, adopting a qualitative analytical method of research will attempt to understand both these positions to better examine the implications it would have in the Indian scenario. The present paper seeks to closely examine the doctrine with reference to Part III of the Insolvency and Bankruptcy Code, 2016 and the repercussions that would follow.

The paper is structured as follows. The paper begins with a detailed historical analysis of the doctrine and studies its evolution throughout different regimes. Then the paper moves into the next phase which is an inquiry into the two parallels supporting and opposing the Fresh Start policy. Then the paper further proceeds to probe into Part III of the Insolvency and Bankruptcy Code, 2016 and the implications of this doctrine if and when it is notified. The paper concludes with few suggestions to improve the current regime in India regarding the Doctrine in Bankruptcy Laws.

KEYWORDS: *Fresh Start, Bankruptcy, Insolvency, IBC 2016, Defaulter, Clean Slate Theory, Commercial Law, Debtor,*

2. INTRODUCTION

Does a person in debt remain a defaulter his whole life? Does he deserve a second chance? What could be the repercussions of giving him another chance? Would giving him a second chance be worth all the risk of misuse? The Doctrine of Fresh Start believes that a debt-ridden person, after insolvency, deserves a second chance and seeks to provide him with a clean slate so as to enable him to continue his livelihood. The paper seeks to analyse this doctrine from the perspective of a corporate, economy as well as individual capacity. The paper follows a flow of narrative from the history and evolution of the Doctrine of Fresh Start to the current Bankruptcy Regime in Indian Legal Framework. The Details of the paper are as follows:

2.1 RESEARCH OBJECTIVE

The research paper seeks to:

- Study and analyse the Doctrine of Fresh start from historical perspective
- Study the evolution of the doctrine of fresh start in the bankruptcy laws in Indian Legal framework
- Comparatively analyse different legal systems that either apply the doctrine or have chosen not to apply the doctrine of fresh start
- Examine the implications that may result from the doctrine in the present Indian Legal regime.
- Provide for suggestions to improve the current scenario in this matter.

2.2 RESEARCH PROBLEM

This paper attempts to answer the following questions;

- What is the doctrine of fresh start and how has it evolved today?
- What is the position of the Fresh start process around the world?
- If India chooses to notify Part III of the code, what would the implications be due to the Fresh start Process?
- Would it be ideal for India to proceed with the doctrine of fresh start or is it necessary to shift to the European perspective?


2.3 RESEARCH METHODOLOGY

This paper will be adopting a qualitative doctrinal approach to examine the bankruptcy laws to understand the history and evolution of the Doctrine of fresh start mainly in the context of India and engage in a comparative analysis of the applicability of the doctrine in UK, USA and Australian regime. This paper follows a design layout beginning with an analysis of the history and evolution of the doctrine in question, then sets out to compare the same in different regimes. Further it proceeds to examine the implications this doctrine would have in the Indian scenario. The research for this paper has been derived from sources such as the governing laws, articles, reports, commentaries and other repositories.

2.4 SCOPE OF THE RESEARCH

The paper focuses on the critical analysis of the History and Evolution of the doctrine. Therefore, throughout this research paper, references have been made primarily to the current Indian Insolvency regime, and also compares the same with the Insolvency and Bankruptcy regime of the United Kingdom, Australia, and the United States. The paper explores the application of the Doctrine of fresh start in the commercial sense only to the extent of Bankruptcy laws. The Paper restricts itself to the analysis of the current legal framework of these countries, which imbibes the Doctrine of Fresh Start in their governing laws and legal principles.

2.5 STRUCTURE OF THE PAPER

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2.6 LITERATURE REVIEW

1. THE FRESH-START POLICY IN BANKRUPTCY LAW (2007)¹

: Thomas Jackson

The article explores whether limitations on the fresh-start policy are consistent with its normative underpinnings. It distinguishes between the law of discharge and the law relating to creditor-oriented collection in bankruptcy. The right to a fresh start in discharge is not just a matter of bankruptcy law but a requirement to preserve assets for the future. Two justifications for the fresh-start policy are derived from existing regimes. The first justification, based on risk allocation and cost minimization, is inadequate. The second justification is based on the need to protect against impulsive behaviour and incomplete heuristics.

The authors contend that the text discusses the limitations of an expert system in determining the availability and cost of credit, as well as the freedom individuals should have to protect their assets. It suggests that further study is needed to address these questions. This thought is further examined in this research paper to analyse both the justifications from a stricter point.

2. CONSUMER BANKRUPTCY: A FRESH START (2003)²

: Igor Livshits, James MacGee, and Michele Tertilt

This paper analyses the impact of different consumer bankruptcy arrangements for unsecured debt. It considers policy experiments and develops a formal model to analyse bankruptcy rules. The study finds that incorporating expense uncertainty and differential interest rates can lead to different consequences for policy analysis. The paper also examines the effects of bankruptcy rules on labour supply and compares consumer bankruptcy laws between Germany and the United States. The study concludes that the variation in consumer bankruptcy law across countries may be linked to variations in the amount of uncertainty households face.

¹ Thomas H. Jackson, 'The Fresh-Start Policy in Bankruptcy Law' (1985) *Harvard Law Review*, May, 1985, Vol. 98, No. 7 (May, 1985), pp. 1393-1448

² Tertilt, Michèle; Livshits, Igor; MacGee, James, 'Consumer Bankruptcy: A Fresh Start' (2003) <https://www.jstor.org/stable/community.28111820>

The Article is an empirical study mainly based on the German and American markets and portrays through detailed study what bankruptcy, in addition to clean slate theory, has an impact on the debtor as well as the economy as a whole. This article also suggests few changes in the then US legislations to improve the efficacy of the bankruptcy law. This article essentially helps in Chapter 4 to compare the present bankruptcy model dealing with the fresh start process in the US with that of one's around the world, especially India.

3. THE FRESH START GOAL OF THE BANKRUPTCY ACT: GIVING A TEMPORARY REPRIEVE OR FACILITATING DEBTOR REHABILITATION?³

:Nicola Howell

This article titled “The fresh start goal of the bankruptcy act: giving a temporary reprieve or facilitating debtor rehabilitation?” by Nicola Howell examines the fresh start goal of the Australian Bankruptcy Act. The article reviews the key goals of the fresh-start policy and analyses whether rehabilitation should also be a focus of the fresh start in Australian bankruptcy law. The article concludes that the fresh-start policy is still a vital principle of bankruptcy law, but it needs to be reformed to address the challenges of modern bankruptcy practice.

While this article maintains a neutral front and applies only to the Australian Bankruptcy regime, the article is quite successful in drawing out a parallel between the doctrine as a temporary reprieve to the debtor and a way to rehabilitate the debtor. Because of these reasons, this article becomes important for this paper as it adds to the objective of the doctrine itself.

4. FRESH START, FALSE START, OR HEAD START? (2023)⁴

: Douglass Boshkoff

This article discusses the bankruptcy protection available to individuals, known as the debtor's "fresh start." It covers the three primary components of the fresh start: discharge of obligation, protection of exempt assets, and prohibition of discrimination against those who resort to

³ NICOLA HOWELL, ‘THE FRESH START GOAL OF THE BANKRUPTCY ACT: GIVING A TEMPORARY REPRIEVE OR FACILITATING DEBTOR REHABILITATION?’ (2014) QUT Law Review Volume 14, Number 3, 2014 Special Edition: Bankruptcy

⁴ Boshkoff, Douglass (1995) "Fresh Start, False Start, or Head Start?," Indiana Law Journal: Vol. 70: Iss. 2, Article 4.

bankruptcy. The article also examines the history of bankruptcy legislation in the United States and the potential changes that could be made in the future. It highlights the collaboration between the consumer credit lobby and labour unions, which resulted in legislation that favoured creditors.

This Article was helpful in Chapter 3 and 4 of the paper and further explains the question on its functionality. The article gives insight into whether to approach the idea of a fresh start as an opportunity, an advantage or a neutral concept. This research paper includes the thoughts that this article invokes regarding the consumer credit lobby and the implications this doctrine had on the United States from a historical perspective along with the appropriate case studies.. Since this article restricts itself to the United States of America, it fails to explain the common law approach to this doctrine which appears to be fundamental in understanding what the doctrine seeks to do and the reason in doing so.

5. ESTIMATING ELIGIBILITY FOR THE FRESH START MECHANISM UNDER IBC, 2016⁵

:Dwijaraj Bhattacharya

The Insolvency and Bankruptcy Code (IBC) 2016 provisions for insolvency, bankruptcy, and fresh start for natural persons are expected to shift the Indian consumer credit market. This paper aims to capture the impact of the Fresh Start Process by estimating the number of eligible consumers and the debt they hold. The paper also discusses the extant statutory provisions and expected hurdles in the implementation of the remedy. The paper suggests that behavioural impediments, such as strained social ties and dependence on formal credit for consumption smoothing, may also affect the likelihood of qualifying individuals to initiate the Fresh Start process. Despite these factors, it is possible that the number of applicants may be greater than the number of eligible individuals, as individuals may "game" the system.

This paper draws from this the article the analysis on the current regime of Insolvency and Bankruptcy law in the Indian legal framework. As the research developed is quite recent, this

⁵ Dwijaraj Bhattacharya, "Estimating Eligibility for the Fresh Start Mechanism under IBC, 2016" (2020) Dvara Research Working Paper Series No. WP-2020-01 March 2020 Version 1.0

article provides a more up to date account of the implications that one were to observe in case the Part III of the Insolvency and Bankruptcy Code, 2016 regarding Bankruptcy law is notified.

6. THE "FRESH START" POLICY IN CONSUMER BANKRUPTCY: A HISTORICAL INVENTORY AND AN INTERPRETIVE THEORY⁶

:Charles G. Hallinan

This paper aims to describe the "fresh start" bankruptcy policy in the US by examining its historical evolution and current manifestation in the Bankruptcy Code. Historically, debtor relief was not a primary objective of bankruptcy laws. It emerged more prominently in the US over time. Different theories have attempted to explain the purpose of discharge, such as rehabilitation of debtors, distributive preferences, and moral obligations. The Code's "fresh start" policy focuses on limiting externalisation of costs from debt collection activities to the social insurance system. It is based on assumptions about credit market participation and risk. The paper analyses how different considerations like rehabilitation, distributive concerns, and moral norms are now less relevant and not well-represented in the Code's discharge structure

3. HISTORY AND DEVELOPMENT OF DOCTRINE OF FRESH START

To understand the intricacies of the origin and development of bankruptcy laws as a theory, we need to begin with the ancient civilizations as the first antecedents of the same can be found in the Hammurabi Code, considered to be the first detailed account of such bankruptcy laws which also spilled into the domain of providing relief to the bankrupt debtor⁷. Society felt the need to provide for the relief of such insolvent debtors. However, the credit development of bankruptcy laws solely focusing on the objective of debtor relief was later due to the Americans, as in a time when creditor remedy was the primary concern, and they sought to protect the debtor in a certain manner. Insofar as the remedy is concerned, it provided the debtor with some level of protection from other forms of forced collection, that effect was regarded as merely an incidental by-product of a system single-mindedly focused on advancing the interests of creditors⁸. Although this was not the intended

⁶ Charles G. Hallinan, 'The Fresh Start Policy in Consumer Bankruptcy: A Historical Inventory and an Interpretive Theory' (1986) 21 U Rich L Rev 49

⁷ The HAMMURABI CODE AND THE SINAITIC LEGISLATION 36, 40 (C. Edwards trans. 1904)

⁸ Cohen, The History of Imprisonment for Debt and Its Relation to the Discharge in Bankruptcy, 3 J. LEGAL HIST. 153 (1982); Levinthal, The Early History of English Bankruptcy, 67 U. PA. L. REV. 1 (1919).

effect of the bankruptcy legislation at that time, the society allowed such an effect to persist as the debtor now received a vague possibility of relief exclusively. Why is it that such an effect was unintentional? Because the 'Fresh Start' idea was based on the discharge of liability not as a remedy but as a reward for the debtor's effort that strived to maximise the returns of the aggrieved creditors. This idea continued till the beginning of the 21st century as the authorities in place viewed the protection of creditors and payment to the creditors as the access to permit legal relief under bankruptcy laws.

The trend that persisted before this period, i.e., before the 21st century, was concentrated on the "collection" of debt. However, it let the debtors breathe as it had mechanisms to avoid credit obligations. The roots of this idea were embedded in the wish of the people to outlaw or severely restrict the utilisation of 'civil imprisonment' as a tool for debt collection. The usual first step on the path to complete abolition was the legislative creation of a scheme in which an imprisoned debtor could obtain his release from confinement by executing an oath of impoverishment or a conveyance of all his nonexempt property to a trustee or assignee for the benefit of his creditors⁹. Another reason to consider bringing into effect relief for debtors was that the role of credit in the economy and its growth started to be seen in a different light. Because of these sentiments, the legitimization of providing debtors relief from coercive collection activity was realised, and such laws were enacted. These laws were now to be examined in a two-fold manner. Firstly, the 'Fresh Start' concept was not a welcome change but was subjected to extreme debate. The primary argument that supported the fresh start policy was that the debtors were to be viewed with the proposition that bankrupt debtors may be valuable contributors to the country's economic growth, whose economic participation was hindered by the pessimism of their financial circumstances. The argument put forth was that relief measures were an adequate means to deliver the fruits of these debtors' entrepreneurial skills and expertise to the general public while having minimum detrimental impact on the justifiable repayment expectations of their creditors¹⁰. The second limb was a more morality oriented explanation. This approach, which based its argument on the insolvent's default being attributed to misfortune rather than fault, emphasised mercy or forbearance as the ethically acceptable response to financial failure and portrayed collection efforts as an immoral attempt to cause suffering for selfish gain. According to this interpretation, relief

⁹ P. COLEMAN, DEBTORS AND CREDITORS IN AMERICA, passim (1974) 256

¹⁰ CONG. GLOBE, 27th Cong., 1st Sess. 134 (1841)

law represented, if not exactly the state enforcing a creditor's ethically dubious demand for payback, then at least an unwillingness to involve the state in the process¹¹.

The "fresh start" policy in bankruptcy law originated from the idea that relief measures promote public welfare by allowing the overburdened debtor to regain economic productivity. This vision was influenced by the view of debt and insolvency primarily arising from business activities. While non-commercial borrowing existed, its significance needed to be fully recognized. As a result, the early interpretation of the Bankruptcy Act focused on the "typical" insolvent as a commercial actor. In 1898, the American legal regime enacted "The Bankruptcy Act of 1898" which in a way merged the ideas of creditor payment while ensuring debtor relief. This was reflected in the limits on the scope and effect of the discharge, which excluded certain types of debts, such as pure tort claims and family obligations, as they were unlikely to be the product of commercial activity. The courts have opined that the standard labels for the debtor-relief objectives of bankruptcy, the discharge was available to the "honest but unfortunate" debtor due to the "public interest" in affording him "a fresh start in life," a "new opportunity," and "a clear field for future effort"¹². That notion of the correct operation of the discharge was heavily impacted by the belief that debt and insolvency are primarily the results of commercial activity. The productivity argument originated from the widely held belief that taking risks as an entrepreneur will inevitably lead to financial failure. Furthermore, while non-commercial borrowing had been a part of the economy for a long time before the Act's passage, it had typically taken on forms that minimised its importance, particularly in the context of bankruptcy. The consumer bankruptcy introduced into the Indian legal framework was from the UK Insolvency And Bankruptcy Laws. During the colonisation of India by the crown, two acts were enacted to accommodate the INDIVIDUAL DEBTORS. They were namely:

- Presidency Towns Insolvency Act, 1909
- Provincial Insolvency Act, 1920

¹¹ Charles G. Hallinan, 'The Fresh Start Policy in Consumer Bankruptcy: A Historical Inventory and an Interpretive Theory' (1986) 21 U Rich L Rev 49

¹² Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934);

The Fresh start process needs to be understood by understanding the word "fresh start." It means to start something from scratch, and this concept of bankruptcy is similar to its literal meaning in that the debtor can pay all his debts and start over in his business. This process is different from other bankruptcy resolution processes—chapter 2 of Part 3 of the Insolvency and Bankruptcy Code, provides details of the fresh start mechanism. Section 80(2) of the code specifies the conditions for debtors who seek to apply for the fresh start process for debt settlement. According to the statement, everyone whose total yearly income and assets do not exceed 60,000 and 20,000 rupees is eligible to apply for a fresh start. In addition, it limits the total amount of debt that must be paid off in order to qualify for the fresh start process, with a maximum of \$35,000. The history and development has been relatively saturated when it comes to the fresh start doctrine as most of the theory has been well established. India has not yet notified the same due to reasons examined under Chapter 5 and 6 of the paper.

4. DOCTRINE OF FRESH START AROUND THE WORLD

The policy of fresh start as elaborated in the previous chapter has been scrutinised over and over again all around the world. In this chapter we will further dwell into approaches of different countries in dealing with individual bankruptcies with regard to debt relief like fresh start doctrine. We will be examining majorly 3 countries: the United Kingdom, United States of America and India.

4.1 The United Kingdom

The fresh start process materialises in the UK insolvency framework as Debt relief orders (DRO) under Part-7A of the UK Insolvency Act 1986. It seeks to provide a relief possibility to such debtors that are impoverished and thereby unable to repay the debts. To qualify for the same, the Act provides certain conditions to fulfil. And only when said conditions are satisfied, then the debtor can avail this relief. The eligibility criteria is as follows

- Debtor residing in or conducting business in England and wales in last 3 years
- No DRO obtained by applicant debtor in the last 6 years
- Applicant debtor not an undischarged bankrupt, or involved in any formal insolvency proceedings

- The value of non-exempt assets of debtor is below £1000 (Rs. 82,790 approximately);
- The value of the debtor's vehicle is less than £1000 (Rs. 82,790 approximately);
- The value of unsecured debts is less than £20,000 (Rs. 16,55,800 approximately);
- The surplus income of the debtor, after paying taxes, household expenses and national insurance is £50 (Rs. 4,139 approximately);
- Applicant Debtor has not entered into any transactions that undervalue or preferential transactions in the past two years

On application, the official receiver, who receives such applications is to scrutinise and investigate the real position of the debtor and verify whether he successfully satisfies the eligibility criteria and if it does, he reports the same to tribunal and upon the issuance of the order, the debtor is relieved for 12 months. During this period, the debtor is not legally bound to pay his debts. This, however, is not applicable to secured debts which will continue to be enforceable against him. The UK laws also provide for a distinction within the debts accrued and how DRO will only apply to qualifying debts and not excluded debts. Another aspect of Debt Relief Restriction Order (DRRO) where the court imposes restrictions where DRO would not be applicable. They include Student loans, fines for offences, maintenance, rents and bills.

The fresh start policy of the UK differs from one in India in several ways. For instance, The debtor is released from all qualifying debts under the DRO upon the conclusion of the moratorium period. However, in India, upon the conclusion of the moratorium, the AA must issue a discharge order that would release the Individual from all obligations imposed with regard to the qualifying debts. Upon analysing the trends in both the countries, we can see that since Uk has been implementing its fresh start policy since 1856 but India is yet to enter its experimentation phase. But given that the law in India has been close to identical as it was when first enacted, says a lot about its applicability. It could have resulted from only two reasons. One is if it was a perfect law or if it wasn't applied much. Both reasons are not true in the case of India but it can be said that there has not been a dire need to change the existing framework yet.

4.2 The United States of America

The Fresh start process is provided for under the Bankruptcy Code 1979. The Notion of ‘Right of Discharge’ was developed mostly by the American jurists and courts collectively. The idea is that there is an established groundwork for a fresh start policy. Even in light of society's general commitment to individual autonomy, the right of discharge should not be waived because doing so shields the individual from his own reckless or biased decisions that cause him to over consume credit and shields others from the externalities that result from these decisions. The trade-offs that must be made in order to exercise that right and maintain credit availability are clarified by this normative theory of discharge. It would mean if the credit system is to be maintained, using the discharge privilege must come at a cost¹³. In 1979 when the Federal Bankruptcy Code was adopted, typically debts were discharged, absolving the debtor of personal obligation and stopping the creditors from pursuing collection efforts against them under Chapter 7. In the vast majority of chapter 7 cases—that is, cases that are not dismissed or converted—individual debtors are discharged. In most situations, the bankruptcy court will issue a discharge order reasonably early in the case—generally, 60 to 90 days after the date initially established for the meeting of creditors—unless a party in interest submits a complaint opposing to the discharge or a petition to extend the time to object¹⁴.

In a chapter 7 case, there are certain criteria that must be met in order to refuse a debtor's discharge; these criteria are applied against the moving party. The court may refuse to grant the debtor a discharge for a variety of reasons, including the following: the debtor did not maintain or produce necessary books or financial records; failed to provide a satisfactory explanation for any loss of assets; committed a crime related to bankruptcy, such as perjury; disregarded a valid order from the bankruptcy court; transferred, concealed, or destroyed property that would have belonged to the estate through fraud; or did not finish an authorised course on financial management¹⁵. In order to recover a debt that has been discharged, a creditor is no longer permitted to start or maintain any legal action against the debtor. But Chapter 7 does not absolve a person of all obligations. Debts for alimony and child support, certain taxes, overpayments for certain educational benefits,

¹³ The Fresh-Start Policy in Bankruptcy Law, Thomas H. Jackson Harvard Law Review , May, 1985, Vol. 98, No. 7 (May, 1985), pp. 1393-1448

¹⁴ 11 U.S.C. § 727; Fed. R. Bankr. P. 4005.

¹⁵ *Ibid*

loans made or guaranteed by a governmental body, willful and malicious injury by the debtor to another party or its property, death or personal injury caused by the debtor operating a motor vehicle while under the influence of alcohol or other substances, and debts for specific criminal restitution orders are among the debts that are not discharged¹⁶.

4.3 India

Currently, The Presidential Towns Insolvency Act 1909 handles individual insolvency in the presidential cities of Kolkata, Mumbai, and Chennai; The Provincial Insolvency Act 1920 handles insolvency in the remaining Indian provinces. The idea of bankruptcy with respect to individual debtors was grounded only in these two acts and the most interesting thing is that these almost over a century old archaic acts continue to govern the individual debtors even today. These are the antiquated laws from the British era that still apply to specific debtors. It is important to update the legislation often in order to maintain compliance in the fast-paced business environment we live in. Nevertheless, there have been no significant changes to these rules over a century old, which has an impact on how well the insolvency process operates. The adjudicating authority for such debtors has been decided as the Debt Recovery Tribunal essentially after its establishment. The DRT not only deals with fresh start orders but all other matters dealing with individual insolvency processes. Although after 2016, when the Insolvency and Bankruptcy Code was enacted, it provided for individual bankruptcy under Part III of the Code. However it has not been notified completely but in phases. Presently Part III of the Code is applicable to personal guarantors alone. The fresh start process was envisaged by a panel set up by the Insolvency and Bankruptcy Board of India (IBBI) under the leadership of Justice Srikrishna¹⁷. These regulations have a great deal of flaws, and the unusually long waits in bankruptcy proceedings invite even more irregularities. Many people have praised the current bankruptcy and insolvency laws for their ability to resolve and liquidate cases.

One of the key components of the national economy is the individual entrepreneur. Many of these individuals have a tendency to use the lenders' advance credit to run and grow their companies. Due to the erratic nature of their company, individual debtors, like corporate organisations,

¹⁶ 11 U.S.C. § 523(a).

¹⁷ Fresh Start Process And The Plight Of Individual Debtors, Nishant Kumar <https://www.cbflnludelhi.in/post/fresh-start-process-and-the-plight-of-individual-debtors>

occasionally are unable to make their debt payments. As per the Reserve Bank of India report titled "Sectoral Deployment of Bank Credit," the growth rate of the personal loans category in March 2022 was 12.4%, compared to 10.7% in March 2021. The IBC hasn't yet informed these specific debtors of their bankruptcy, though. Under the Insolvency and Bankruptcy Code, individual creditors are recognised as operational creditors; however, individual debtors are not included in the system currently.

5. FRESH START: GOOD OR BAD?

In this chapter, we will look into whether the policy of a fresh start is inherently good or bad based on all the proposed arguments till today. The chapter will be divided into two sections where we will focus on Moral, Philosophical and General arguments and perspectives regarding the doctrine. A "fresh start" in the context of bankruptcy generally refers to the opportunity for a debtor to begin anew financially, unburdened by most of their pre-bankruptcy debts. Whether it is considered "good" or "bad" depends on the individual's circumstances and perspective.

5.1 Moral and Philosophical Arguments

The concept of a "fresh start" in bankruptcy involves providing individuals or entities with an opportunity to rebuild their financial lives after experiencing significant financial distress. Moral arguments surrounding the fresh start principle in bankruptcy often revolve around themes of forgiveness, rehabilitation, and fairness.

- **FORGIVENESS:** The fresh start principle aligns with the concept of forgiveness. It acknowledges that individuals can make mistakes, face unforeseen circumstances, or experience financial misfortune
- **REDEMPTION:** The idea of redemption and personal growth is integral to the human experience. Allowing individuals to overcome past financial mistakes supports the belief in the capacity for positive change
- **HUMAN DIGNITY:** The fresh start principle is often rooted in the belief in the inherent dignity of individuals. It recognizes that financial setbacks should not define a person's worth, and everyone deserves a second chance to recover from financial difficulties.

- **FAIRNESS AND EQUAL TREATMENT:** Providing a fresh start in bankruptcy is seen as a fair and equitable approach. It ensures that individuals facing financial challenges are treated justly and not permanently burdened by their past debts, creating a level playing field for financial recovery. The idea that individuals should not be unfairly disadvantaged by circumstances beyond their control aligns with broader philosophical concepts of justice.
- **SOCIAL WELFARE:** From a societal perspective, the fresh start principle contributes to the welfare of the community by facilitating the economic reintegration of individuals. It prevents the perpetuation of poverty and social inequality.
- **RESPONSIBILITY AND ACCOUNTABILITY:** the belief that individuals can learn and grow from their experiences. Critics may argue that the fresh start principle could undermine personal responsibility, but proponents counter that it is a balance between holding individuals accountable for their actions and recognizing that unforeseen circumstances can lead to financial distress. Philosophically, discussions around personal responsibility often intersect with the acknowledgment that not all financial challenges are solely the result of individual actions. Balancing responsibility with compassion is a key consideration.

5.2 Arguments favouring Fresh Start Policy

- **DEBT DISCHARGE:** In many types of bankruptcy, such as Chapter 7 bankruptcy in the United States, eligible debts are discharged. This means the debtor is no longer legally obligated to repay those debts. The primary benefit of the fresh start process, particularly in bankruptcy, is the discharge of eligible debts. This allows individuals to escape the burden of overwhelming financial obligations.
- **RELIEF FROM CREDITORS:** Upon filing for bankruptcy, an automatic stay is usually put in place. This prevents creditors from pursuing collection activities, giving the debtor some breathing room. The automatic stay that comes with filing for bankruptcy provides immediate protection from creditors, stopping collection activities, lawsuits, and harassment.

- **ELIMINATION OF UNMANAGEABLE DEBT:** For individuals overwhelmed by debt, bankruptcy can provide a structured process for eliminating or restructuring debts, allowing for a more manageable financial situation. Many bankruptcy processes, such as Chapter 7, focus on unsecured debts like credit card balances and medical bills, providing a clean slate for individuals who are struggling with these types of obligations.
- **OPPORTUNITY FOR FINANCIAL REHABILITATION:** A fresh start can provide individuals with the opportunity to learn from past financial mistakes, adopt better financial habits, and rebuild their financial lives over time.
- **ASSET EXEMPTIONS:** In certain bankruptcy chapters, individuals may be able to keep certain exempt assets, such as a primary residence or essential personal property, providing a foundation for a fresh start.

5.3 Arguments against Fresh Start Policy

- **CREDIT IMPACT:** Bankruptcy can have a significant negative impact on credit scores, making it challenging to obtain credit in the short term. However, the impact diminishes over time, and responsible financial behaviour can help rebuild credit. One of the significant drawbacks is the negative impact on credit scores. A bankruptcy filing can remain on a credit report for several years, making it difficult to obtain credit or loans in the short term.
- **ASSET LIQUIDATION:** Upon the application of this policy, non-exempt assets may be liquidated to repay creditors. This could result in the potential loss of valuable assets.
- **PUBLIC RECORD:** Bankruptcy is a matter of public record, and it can be visible on credit reports for a number of years.
- **LIMITED ELIGIBILITY:** Not everyone qualifies for bankruptcy, and eligibility depends on factors such as income, expenses, and the type of debts owed.
- **SOCIAL AND EMOTIONAL IMPACT:** There can be a social stigma associated with bankruptcy, and individuals may experience feelings of failure or shame. Overcoming these emotional challenges is an important aspect of the fresh start process.

Therefore, in conclusion, whether a fresh start through bankruptcy is considered good or bad depends on the specific circumstances of the individual. It can provide relief from overwhelming debt but comes with certain consequences, such as a temporary impact on credit. The decision on whether the fresh start process is favourable depends on individual circumstances, financial goals, and values.

6. IMPLICATIONS ON INDIA

The Doctrine of Fresh Start, like around the world, faced a lot of debate in India. There were two major arguments. However, facilitating a fresh start does not come without a trade-off. The literature suggests that full debt discharge after a limited period of time should be available for debtors, but the ideal length for the time to discharge is less straightforward. On one hand, a lengthy time to discharge can discourage entrepreneurship by making it costlier to start risky businesses. On the other hand, a short time to discharge can affect the behaviour of lenders and increase the cost of credit, which can adversely affect entrepreneurship¹⁸. The exemptions of debtors' assets that are not directly linked to the business (e.g. the family house or a spouse's assets) have also a similar relationship to entrepreneurship and productivity as the time to discharge¹⁹. At the same time, forced sale of assets can decrease their value of the proceeds that goes to the creditor²⁰

India, in its attempt to conceptualise this doctrine and imbibe it into this insolvency framework, significantly resulted from the Bankruptcy Law Reforms Committee (BLRC) in 2014 which in its report did include recommendations for a "fresh start" process for individuals, recognizing the need for a mechanism to provide relief to honest debtors facing financial distress. The report recommended the introduction of a separate bankruptcy process for individuals, which includes a simplified and speedy resolution mechanism. This process was intended to grant a "fresh start" to individuals with limited assets and income. The key recommendations related to the fresh start process for individuals included two major aspects, namely "Threshold Criteria" and "Exclusion". The BLRC suggested that the fresh start process should be available to individuals with unsecured liabilities below a certain threshold. And the report recommended excluding certain types of debts

¹⁸ Berkowitz and White, "Bankruptcy and small firms' access to credit" (2004) *RAND Journal of Economics* Vol.35, No.1, Spring 2004 pp 69-84

¹⁹ *Ibid*

²⁰ Campbell John L. "The US Financial Crisis: lessons for Theories of Institutional Complementarity" *Socio-Economic Review* 9:211-34 et al., 2011

from the fresh start process, such as debts arising out of fraud or other willful misconduct. Other recommendations that were proposed with respect to fresh start policy also include exemption of essential assets, simple and fast process and credit counselling and education:

Since BLRC played the most important role in formulation of the Code for insolvency and bankruptcy in India. Based on these recommendations, the IBC was structured and thus incorporated these concepts as well. While the IBC includes provisions for corporate insolvency as well as personal insolvency (Part III), the detailed operationalization and implementation of specific sections, including the fresh start process for individuals, have evolved over time through amendments and notifications. Presently, Part III is partially notified and thus applicable only to 'Personal Guarantors' and the provisions for fresh start are not available for implementations yet as those are not yet notified. The government is opting for a phased manner of enforcement of the Code. The reasons for that is as follows:

1. **INFRASTRUCTURE AND PREPAREDNESS:** Implementing a comprehensive bankruptcy code involves setting up a robust infrastructure, including the establishment of the National Company Law Tribunal (NCLT), National Company Law Appellate Tribunal (NCLAT), and Insolvency and Bankruptcy Board of India (IBBI). Delays may occur if these entities are not fully prepared to take on their regulatory and adjudicatory roles. And it is very evident, through statistics, that these tribunals are burdened with a load of cases.
2. **STAKEHOLDER CONSULTATION:** Before fully implementing certain provisions, the government may engage in consultations with stakeholders, including legal experts, industry representatives, and other relevant parties. This process is designed to address concerns, gather feedback, and ensure that the law is applied effectively. And the stakeholders would not be in favour of the complete part for several reasons including the potential failure of implementation mechanism.
3. **LEGAL AND PROCEDURAL CLARIFICATIONS:** Delays may also arise due to the need for legal and procedural clarifications. The government may want to address any ambiguities or practical challenges in the law before enforcing certain provisions. IBC with the notified sections had to depend on the judicial dictates and amendments proposed by IBBI as the Code was constantly under scrutiny. To prevent the same thing from repeating the government is cautious in its implementation of the rest of the code.

4. EVOLVING ECONOMIC AND LEGAL LANDSCAPE: Economic and legal landscapes are dynamic, and authorities may adjust the implementation timeline based on changing circumstances, emerging challenges, or evolving policy considerations. So in order to accommodate such changes there is need to be very unambiguous and open to restructure.
5. PHASED IMPLEMENTATION: The government might opt for a phased implementation approach to allow stakeholders to adapt gradually to the new legal framework. This approach can also help in identifying and addressing any unforeseen issues that may arise during the initial stages.
6. POLICY DECISION AND PRIORITISATION: The decision to prioritise certain provisions over others may be influenced by broader policy considerations. The government may choose to focus on specific aspects of the law based on immediate economic needs or other strategic considerations.

Therefore, given these reasons, the complete implementation of the code is not an immediate policy decision pending as there are several strings attached to it and the domino effect that these decisions will result into.

7. CONCLUSION

The implementation of a "fresh start" process in India, particularly in the context of personal insolvency, is a policy decision that involves careful consideration of various factors. From the paper we have analysed the pros and cons of implementing the fresh start policy in India. If the fresh start policy was to be notified from Part III of the Code, it would mean that it guarantees relief to individuals who are genuinely burdened by unmanageable debts, allowing them to make a fresh financial start without the perpetual weight of past obligations. And parallelly, a forgiving bankruptcy process may encourage entrepreneurship by reducing the fear of financial failure. A structured fresh start process can help in the efficient allocation of resources by facilitating the resolution of financial distress and allowing individuals to contribute productively to the economy after overcoming their financial challenges. Propounded on moral and philosophical arguments, it recognises that individuals may face unforeseen financial difficulties due to factors beyond their control, a fresh start process aligns with humanitarian considerations by offering a chance for financial rehabilitation.

However, all these advantages bring along a set of disadvantages that is often the main obstacle to implementation of the fresh start policy in India. It includes the moral hazard, which critics argue, may be created by a lenient bankruptcy process, where individuals might take on excessive risks or incur debts without sufficient responsibility, knowing that they can seek debt discharge through a fresh start. Another strong argument against the policy is that a forgiving bankruptcy process could undermine a responsible credit culture by reducing the consequences for defaulting on obligations, potentially leading to higher default rates. Lenders may express concerns that a fresh start process could result in increased losses for creditors, potentially impacting the availability of credit or leading to higher interest rates to compensate for perceived risks. There's a concern that individuals might abuse the system by filing for bankruptcy strategically, even if they have the capacity to repay their debts, leading to potential misuse of the fresh start process. Administratively, designing and implementing an effective fresh start process involves addressing numerous legal, procedural, and administrative complexities. Ensuring that the process is fair, transparent, and does not lead to unintended consequences is a significant challenge.

Ultimately, whether a fresh start process should be implemented in India depends on a careful analysis of these factors, along with the specific economic, social, and legal considerations of the country. Policymakers would need to strike a balance between providing relief to honest debtors and safeguarding the integrity of the credit system. Any decision in this regard would ideally involve thorough research, stakeholder consultations, and a comprehensive understanding of the potential impacts on the financial ecosystem.

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