

Social Ramifications of Bankruptcy Law

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But at present the laws of bankruptcy are considered as laws . . . founded on the principles of humanity as well as justice: and to that end they confer some privileges, not only on the creditors, but also on the bankrupt or debtor himself.²

Bankruptcy law has generally emerged as a purely economic legislation. For personal bankruptcy law, however, it is also, if not primarily, a social legislation.³ Bankruptcy law is not just economic legislation, but social legislation that establishes ‘*how far individuals should be expected to go on carrying responsibilities that have grown onerous.*’⁴ When individuals file for bankruptcy, they obtain relief from debts incurred or have their debts entirely forgiven. Essentially, this process creates a system of legalised post-contractual opportunism,⁵ which is justified in large part by the moral judgment that an honest but unfortunate debtor should be entitled to a discharge of debts.⁶

Although some scholars have examined the social foundations of individual bankruptcy law, these discussions focus almost exclusively on the moral foundations of the fresh start and ignore the larger moral and social issues raised by bankruptcy law.⁷

The article studies the role of social faiths and beliefs in evolution of personal bankruptcy law, the social stigma attached with ancient bankruptcy norms and the evolution of the law from a law aiming for recovery from body of the debtor to recovery from the property of the debtor. It also provides an insight into the individual insolvency provisions of the Insolvency and Bankruptcy Code, 2016 (Code/IBC) highlighting the unique features of the new personal bankruptcy regime.

EMERGENCE OF BANKRUPTCY LAW: EARLY PRACTICES AND SOCIAL STIGMA

Individual bankruptcy has been condemned throughout most of human history. Debtors’ prisons remained the dominant response to bankruptcy through history. The austerity of the moral and legal condemnation, traditionally associated with bankruptcy, reflects the social thinking about the gravity of the act. In part, societal and moral extremities reflect the datum that for most of human history, and during the formative period of both psychological makeup of the society and most major religious codes, individuals lived in static economies.⁸ Borrowing was a short-term transfer from the lender to the borrower and the borrower was expected to repay it. A debtor therefore had no good explanation for why he might later be unable to repay the loan. The failure to do so was therefore traditionally considered a form of fraud or theft, punishable by similarly severe sanctions.⁹ A legal discharge of debts through bankruptcy did not exist.

Person of the Debtor

The practice of recovery of debt from the person of the debtor was the most common practice since the inception of bankruptcy law. Though the law in every region had its own mode of evolution, this practice of recovery can be found in most of the depicts of law. It was the debtor himself and his family members (not debtor's property) that formed the debt insurance guarantee. This rule can be found in the strict laws of Manu and in the law of Moses. It was also established practice in Egyptian and Greek Laws.

Under Hindu law the creditor could seize the person of his debtor and compel him to labour for him. Actual violence might also be resorted to by the creditor; he could kill or maim the debtor, confine his wife, sons or cattle, or besiege him in his home.¹⁰ This is typical of primitive law in general.¹¹ A number of Biblical references, to prove that slavery for debt, did exist. The Egyptians regarded the claim of the state to the debtor's person as superior to that of the creditor, for the state might at any time require the debtor's service, in peace as an official or laborer, in war as a soldier. In the Code of Hammurabi¹², the insolvent debtor was regularly sold into slavery. It also frequently happened that the debtor's kinsmen would be sold into bondage in order to pay off his obligations.

The shift from recovery of debt from debtor's person to debtor's property can be said to be the real point of evolution of bankruptcy law as before that it was more of a private venture free from intervention of any State authority. But the arbitrary nature of the recovery procedure still continued even after involvement of State authorities as the legal position remained biased towards the debtor.

Interest on the debt

It is only when the concept of economic progress and the understanding of investment and capital growth became established, that the idea of charging interest became morally acceptable.¹³ Given the modern appreciation of investment as the source of economic growth, it is understandable why bankruptcy is taken for granted in the context of business investment. Although bankruptcy may now be acceptable in the business context, bankruptcy remains suspect in many countries and legal systems as a remedy for individuals.¹⁴

In bankruptcy law literature, many scholars have opined on the phenomenon, mainly arguing whether the stigma associated with bankruptcy still exists or has declined over time. To date, the legal literature has generally treated bankruptcy stigma as an 'all or nothing' issue; that is, arguing over whether a stigma exists (or not), or exploring whether the stigma has declined (or not) over the past several decades. In this regard, legal scholars addressing bankruptcy stigma have fallen into two general camps. On one side of the divide are Professors Teresa Sullivan, Elizabeth Warren and Jay Westbrook, who argue that not only is bankruptcy stigma alive and well, but that this social phenomenon may have increased in the past several decades (Sullivan, Warren and Westbrook, 2006¹⁵). Conversely, Professors Todd Zywicki and Rafael Efrat contend that the stigma associated with filing for bankruptcy relief has declined over time¹⁶ (Zywicki, 2005; Efrat, 2006a¹⁷). Each camp has in the past criticised the other regarding the merits of their respective claims over the continued vitality of bankruptcy stigma.¹⁸

BANKRUPTCY: A SOCIAL LEGISLATION OR ECONOMIC LEGISLATION?

The term 'society' means relationships social beings, express by creating and re-creating an organisation which guides and controls their behavior in myriad ways. Society liberates and limits the activities of men and it is a necessary condition of every human being and need to fulfillment of life.¹⁹ Society is a system of usages and procedures of authority and mutual aid many divisions of controls of human

behavior and of liberties. Society exists only where social beings 'behave' toward one another in ways determined by their recognition of one another.

Within any given society, there is a generally acceptable range of permissible individual behaviors that is culturally determined and relevant. *'Standards or rules about what is acceptable behavior are referred to by social scientists as norms. The importance of a norm usually can be judged by how members of a society respond when the norm is violated.'*²⁰ More specifically, prevailing cultural norms are *'shared rules or guidelines that define how people [in a society] 'ought' to behave under certain circumstances.'*²¹

The vilification of bankruptcy is easy to understand with respect to societal bondages. Incurring a debt creates a contractual and moral obligation to repay that debt. The failure to do so usually exposes the debtor to severe legal sanctions as well as moral obligations, whether self-imposed or enforced by society.²² The debtor, for example, has a moral, as well as legal, obligation to allocate his property to the payment of his debts and generally cannot convey his property without reasonable consideration in return.²³ Thus, when Mr. X borrows some amount from Mr. Y and fails to repay it, X is not simply out of money, but also suffers moral outrage independent of the amount borrowed. The breach of the promise and the failure to recognise and reciprocate the good deed by adhering to the terms of contract triggers a sense of moral resentment related to the breach of trust itself, regardless of the amount borrowed. The emergence of this moral resentment is *'aroused by the perception of injustice; as such, it is part of the emotional underpinning of human morality.'*²⁴

In the world of easy bankruptcy laws, individual debt is no longer a disciplining device but an opportunity for profligate spenders to live beyond their means and to impose the costs of doing so on those who live responsibly. As Lynn LoPucki, a professor at UCLA Law School, observes:

Consumer bankruptcy contradicts the morality of Aesop's fable [of the grasshopper and the ant]. Today's ants eat beans at home, don't buy the kids new sneakers, and don't try to buy the new house until they have stable jobs and down payments. They hang onto the jobs, even when the going gets tough, particularly if the jobs come with health insurance. The grasshoppers eat at the pizza parlor on Friday night and buy the new sneakers and the houses. They quit their jobs when the going gets tough. The fallout lands on their credit cards. When winter comes, they discharge the credit card debt in bankruptcy. The ant played by the rules, the grasshopper did not. In the end, consumer bankruptcy made them equals.²⁵

TRANSITION OF BANKRUPTCY LAW: FROM PERSON TO PROPERTY

All bankruptcy laws aim to secure an equitable division of the insolvent debtor's property among all his creditors, and, in the second place, to prevent on the part of the insolvent debtor conduct detrimental to the interests of his creditors. In other words, bankruptcy law seeks to protect the creditors, first, from one another and, secondly, from their debtor. A third object, the protection of the honest debtor from his creditors, by means of the discharge, is sought to be attained in some of the systems of bankruptcy, but this is by no means a fundamental feature of the law.

In course of time, execution for debt came to be directed against the property of the debtor rather than his person. It is hardly likely that this transition indicates that the religious sanction had lost its pristine potency or that execution against the person had come to be regarded as barbaric. The change from the one form of execution to the other, slow and gradual as it was, is an instance of the general evolution of legal process from the stage where retaliation is the end in view to the stage where compensation is the chief desideratum.

In most systems of jurisprudence, the development of proprietary execution was a natural one. The ancient Jewish and Germanic notion, for instance, of the execution against the person was that the body of the debtor was a pledge or security for the payment of the debt. It is perfectly natural that in course of time the Jewish and Germanic people should come to look upon each portion of the debtor's property as a pledge or security for the debt. Here the transition was from execution against the person to execution against a particular portion of the debtor's property seized by an individual creditor for the benefit of himself alone.

Many would be loath to accept the simple assessment that *'bankruptcy is merely a legal consequence of economic facts,'* and would respond that the consequences (and anticipation) of social stigma, of a stain on one's reputation and one's 'good name', are factors that cannot be overlooked in attempting to come to an understanding of the decision to declare bankruptcy. But in this increasingly depersonalized society, how important is a good name? Apparently, it is still especially important. People still fight to protect their good names.²⁶ Indeed, people's willingness to take such fights to court has created what some have called a 'libel crisis'.²⁷ And, in an age where the presumption is that litigation is in large part prompted by avarice, research suggests that the libel suit represents a clear exception; people do not sue *'to obtain monetary relief for financial harm. Instead, the major motivating factors are restoring reputation, correcting what plaintiffs view as falsity, and vengeance.'*²⁸ Stigma must be viewed as more than simply a residual category (or error term) in a cost-benefit analysis of the decision to declare bankruptcy.²⁹ Today, default entitles a lender to seize the debtor's nonexempt property in satisfaction of the debt.³⁰ In a world in which social assessment of personal worth is grounded (or so many believe) in the belief that 'bad things happen to bad people,'³¹ the emotional and social consequences of bankruptcy cannot be ignored.

THE INDIAN CONTEXT

The law of insolvency in India, like most other laws, owes its origin to English Law. Before the British came to India there was no indigenous law of insolvency in the country. Earlier statute, dating back to the 16th century and subsequent years, contained only rudimentary provisions as to bankruptcy.

The important statutes on the subject are the Bankruptcy Act passed by British Parliament in 1849, 1869, 1883 and 1914.³² The need for insolvency law was first felt in the three Presidency Towns of Bombay, Calcutta and Madras where Britishers were carrying on their trade and commercial activities. The Government of India Act, 1800 has section 23 and section 24 conferring insolvency jurisdiction on Supreme Court at Fort Williams and Madras and the Recorder's Court at Bombay. Power was given to these courts to make rules and orders for granting relief to the insolvent debtors on the lines intended by the Lord's Act passed by British parliament in 1759.

In 1828, the beginning of insolvency law in India was made with the passing of Statute 9. By this, first insolvency Courts to grant relief to the insolvent debtors were established in Presidency Towns. The Courts were called 'Courts for the Relief of Insolvent Debtors'. Separate and distinct status was given to the Insolvency Courts which can sit and dispose the insolvency matter as and when necessary. They were court of records. Any person aggrieved by an order of the Court had a right to make a petition to Supreme Court.

Though the Act of 1828 was supposed to be in force for a period of four years only, the same was extended till 1848 by making various amendments as was considered necessary. It was in 1848 that Indian Insolvency Act was passed which differentiated between traders and non-traders in certain

aspects (similar to the Bankruptcy Law in England). By this Act the Courts for the Relief of Insolvent Debtors established by the Act of 1828 were continued, but the Court was to be held before a judge of the Supreme Court.³³

The insolvency jurisdiction of the Supreme Court in Presidency Towns was transferred to the High Courts by the passing of Indian High Courts Act, 1861. The Insolvency Courts still continued to be separate tribunals and were not affected by the Act of 1861 except that a judge of the High Court was to preside over such court.³⁴

The main features of the Indian Insolvency Act, 1848, were that the Act was more for the benefit of the debtors than for the benefit of the creditors. The provisions for the discovery of the insolvent's property were very basic and the burden of proving misconduct on an application by the insolvent for his discharge rested entirely on the creditors. The power of the official assignee was very limited. He merely collected assets and he had no power to intervene in any proceedings. Under section 7 of the Act of 1848, on the making of a vesting order the property of the insolvent wherever situated vested in the Official Assignee. The vesting order operated as a statutory transfer of immovable property situated not only within India but also within the British Empire outside India.

To overcome the existing lacunas in the Insolvency Act, 1848, Sir James Fitzjames Stephen, proposed an Insolvency Bill modelled for whole of the India (based on English Bankruptcy Law) in the 70s, but the proposal was dropped as the conditions of that time were not suitable for a new legislation. Thus, the Act of 1848 was in force in the Presidency Towns until the enactment of present Presidency-towns Insolvency Act, 1909. Subsequently, in 1920 after various attempts, Provincial Insolvency Act, 1920 was passed for the provinces (mofussil). Since then, personal bankruptcy was adjudicated by these two archaic laws – The Presidency-towns Insolvency Act, 1909 and The Provincial Insolvency Act, 1920. The former relating to individuals residing in the erstwhile presidency towns of Calcutta, Bombay and Madras. The latter covers all individuals residing in other parts of the country. The Provincial Insolvency Act, 1920, abolished the debtor's right to be released from prison, if he was in prison at the date of the order of adjudication. The Acts failed to evolve with the changing needs of the society and also the strict provisions of imprisonment continued to stigmatise the honest failures.

During the enactment of the present Presidency-towns Insolvency Act, 1909 it was observed by the Hon'ble Sir H. Erle Richards,³⁵

The difference in the conditions between Presidency Towns and mofussil makes it inexpedient to have one uniform act for whole of India at the present time but there will be little difficulty in bringing the two act into complete agreement if it be thought to do wise in the future.

Asiya Siddiqi documents the conduct of laws in India to deal with bankruptcies in her book 'Bombay's People, 1860-98: Insolvents in the City'. Her research informs that in the Indian society, imprisonment for debt has not generally been used as a means of enforcing payments. However, various customary methods were used to induce debt payment which included influence of elders and personal moral pressure. By 19th century, the practice of confinement of debtors in state prisons for non-payment of debts, became a practice in Bombay. However, this was seen as a burden by the colonial government. Hence, the Act of 1828, which laid down initial procedure and infrastructure for the adjudication of bankruptcy petitions, aimed as not booking debtors but providing them with relief. It is known that 85 per cent of the 20,980 petitioners who filed for bankruptcy in Mumbai over the period 1860 to 1898, got protection from arrest or detention.

Need for Single Bankruptcy Law

India is predominantly a rural country with a two-third population and 70 per cent workforce residing in rural areas. The rural economy constitutes 46 per cent of national income. Despite the rise of urbanisation more than half of India's population is projected to be rural by 2050.³⁶

Rural development focuses on increasing economic activities in rural areas. To realise higher productivity, capital needs to be infused in the rural economy from time to time. Credit plays an important role in rural development as it is needed by farmers to meet the initial investment on seeds, fertilisers, implements, etc. till the crop is ready. Credit is also required for other family expenses of marriage, death, religious ceremonies, etc. so that the farmers are saved from the exploitation of moneylenders and traders (it is a common practice of charging high-interest rates and manipulating the accounts) whose ultimate goal is to keep them in a debt-trap. In the case of deficit monsoon, crop yield is low and farmers need to be shielded against this loss by providing credit and insurance.

Previously, funds were predominantly borrowed from village-level moneylenders and other informal agents who charged hefty interest rates. This led to a multitude of travails for the farm sector since high-interest rates left little income for farmers and during periods of crop failure, farmers often found themselves unable to repay their dues. To ameliorate the problem of farmer distress, the Government of India has made strides in expanding the formal banking network into rural areas following bank nationalisation. Additionally, to further attract farmers seeking short-term funds for cropping to the formal sector, the government introduced an Interest Subvention Schemes which are announced from time to time.

The dependence of the Indian economy on agriculture is an unquestioned fact, but when referring to the credit market as a whole, other sources responsible for maintaining the credit flow in the rural society also gain importance. These sources are mostly small businesses set up in households, self-help groups, local handicraft workers etc.

Natural Calamities: There are 12 types of natural calamities covered by the National Disaster Management Framework of the Government of India viz., cyclone, drought, earthquake, fire, flood, tsunami, hailstorm, landslide, avalanche, cloud burst, pest attack, and cold wave/frost. The damage caused by these unpredictable and unavoidable circumstances leads to a financial crisis in society. Though, the Reserve Bank of India (RBI) has mandated banks to provide relief measures, where the crop loss assessed was 33 per cent or more, in the areas affected by natural calamities,³⁷ the root cause of the problem continues with every such misfortune. The relief measures by banks, *inter-alia*, include restructuring/ rescheduling existing loans and sanctioning fresh loans as per the emerging requirement of the borrowers.

Existing Societal norms: Though there is a shift in the society with regards to availing credit facilities offered by the financial institutions yet, a large portion of the society is still trapped in the bubble of moral obligations and is threatened by the thought of default and state of bankruptcy. There are various examples where, initially an individual is forced to take credit in the name of religious ceremonies like marriage and eventually when he is unable to repay, he is tagged bankrupt by the society.

In an attempt to curb such practices, various tribal activists have highlighted one such practice in the area of Madhya Pradesh, wherein the name of marriage expenses and dowry, innocent individuals are forced into bankruptcy. Tribal right activist Shankar Tadvavla, observes:

Earlier, the amount was small, and no one used to mind, but over the years due to the influence of non-tribal and tendency to show-off, the amount has now increased. The reverse dowry has increased to

Rs. 3.5 lakh, liquor served in marriages costs around Rs. 1 lakh. This is apart from the other marriage expenses which cost anywhere between Rs. 50,000 to Rs. 1 lakh. Most tribal families do not have this kind of money and are forced to sell their land, migrate to other places to earn or borrow from money lenders at exorbitant interest rates and thus fall into a debt trap. We are planning to change all of this.³⁸

In many other similar societies, declaring oneself bankrupt is looked down upon and condemned by society. The tag of bankruptcy brings with itself the tag of fraud and cheat.³⁹

Managing agrarian crisis and bankruptcy is a huge challenge in the way forward. The RBI has taken several steps to encourage banks to lend to non-banking financial companies and retail borrowers. In a bid to combat sluggish demand, the government and the central bank have taken several measures to help keep credit flowing to the real economy. Averting a significant slowdown would help borrowers and, therefore, the stability of the financial system, but the measures could push up banking-sector risk if they lead banks to accept higher credit risk than they previously had an appetite for. Incentivising the economy and minting credit flow is an established practice but what is not established is the approach of acceptance towards bankruptcy.

IBC: A MODERN LAW FOR INDIVIDUAL BANKRUPTCY

The insolvency law needs to be particularly sensitive to the cultural context of shame and stigma in the context of admission of financial failure, as these notions can prevent the effective participation of debtors. Providing relief to 'honest but unfortunate' debtors has long been a primary purpose of insolvency regimes for individuals. Unmanageable debt burdens cause a host of problems for debtors. Constant anxiety arising from inability to pay or from harassment by creditors can cause serious emotional and other problems for debtors, including depression and social withdrawal. Ironically, overwhelming debt burdens might cause debtors to be unable to concentrate on work and other responsibilities, thus preventing them from responsibly managing their own financial distress and plunging debtors into a descending spiral of failure.

Considering the sheer size, diversity, unique social fabric, and the vulnerable sections of the society in dealing with situations where an individual is in the state of insolvency, India has adopted an approach to treat its honest but unfortunate citizens with sensitivity in the insolvency process of the Individuals. The IBC is an innovation in individual insolvency regime in India and influences a large section of the society.

The Code encourages an 'earned start' for the debtor, incentivising him to restructure his debts or business or both on the basis of a repayment plan, and obtains a discharge as per the Code, to resume life afresh. A process for coordinating and humanising the individual insolvency resolution process can put debtors on a healthier path to supporting themselves, addressing their obligations in a more measured and regular way, and participating in society rather than viewing themselves as victims of it.

The IBC consolidates the existing framework by creating a single law for insolvency and bankruptcy. In this spirit, Part III of the Code provides for three processes for individuals: the fresh start process, insolvency resolution process and bankruptcy process. This framework of personal insolvency under Code pursues the objectives enshrined in the legislation. It prevents creditors from aiming to be the first to recover their dues, and thereby facilitates collective proceedings to resolve insolvency. It envisages a new beginning for over-indebted individuals by allowing them to avail a discharge from their debts. In doing so, it relieves the debtor of the burden of debt and isolates minimum assets for his subsistence,

while improving the prospects of realisation for creditors, thereby ensuring fairness and equity. In the Indian context, personal insolvency plays a significant role – not just for the debtors and creditors involved- but also for the economy.

The Code establishes a milestone in the evolution of insolvency law equivalent to the transition from debtor's person to debtor's property in the history of insolvency law. The provisions for the arrest of the debtor in the instance of default are omitted; instead, the property of the debtor is vested in the Bankruptcy Trustee⁴⁰, who manages the property of the debtor. The approach adopted for the procedures under Part III of the Code is based on the rationale that addressing the concerns of individual insolvency is a sensitive affair as it attracts social, political, and cultural attributes of the society and is mostly based on the rationale of humanitarian empathy. Suicide by farmers sunk deep into the debt is a live illustration that highlights the need of the insolvency law which aims at providing a dignified exit for such over-burdened and vulnerable strata of society.⁴¹

The Code aims at protecting the rights of both debtor and creditors and provides equal opportunity of representation. The relationship between the debtor and creditor is preserved and the basic necessities are provided to the debtor to live a dignified life allowing a fresh start post-bankruptcy.

It is undisputed that the Code is recognised as an economic legislation, but the social perspective attached to the individual insolvency cannot be ignored. The Code aims to overcome the mental bondages of stigma associated with the bankruptcy norms and emerge as a legislation for the people. Thus, before notifying the personal insolvency provisions of the Code there is a need for aggressive and persistent systemic campaign of public information to educate citizens about the objective of the insolvency and bankruptcy law to overcome the potential problem of stigma. The citizens need to be sensitised and educated about the rescue mechanism provided for them in the Code. Another dimension closely related to treatment of insolvency is 'prevention' of insolvency. The provisions of the Code incorporate elements that aim to address insolvency by avoiding it altogether through financial literacy programmes. Financial literacy is crucial not only for treating existing insolvency; its primary purpose is to prevent its recurrence as well.

CONCLUSION

With the change in social norms and beliefs, the bankruptcy and insolvency laws for individuals have evolved through centuries across the world. India too has seen such evolution with the enactment of the modern law in the form of the IBC. The law has brought an impartial, efficient and expeditious framework in the Indian insolvency regime with an objective of economic reform. The modern law in form of the Code encourages both debtors and creditors to come forward and take responsibility of failure and move on with it without any stigma attached. The social stigma associated with bankruptcy law is the result of the archaic penal procedures that the debtor had to undergo in addition to the failure of his business. The Code in its current form not only removes the stigma associated with the status of bankrupt but also provides a dignified exit to the debtor with possibilities of dignified survival. The provisions of the Code have been drafted considering all the related aspects of trauma and social stigma associated with the state of being bankrupt. They provide modern solution to such issues by focusing on fresh start for cases where chances of recovery are very low and resolution where there is scope for revival of the honest debtor. The Code being a modern law, also considers the issue of agrarian crisis and financial illiteracy particularly, in rural India and provides mandatory provisions for managing smooth implementation of the new procedures. Though unnotified, the Code in its current form has given a ray of hope to all such individuals who have been victim of honest failure and past draconian laws.

NOTES

¹ The authors are grateful to Dr. Anuradha Guru, Executive Director, IBBI, for her guidance.

² Sir William Blackstone (1753), *Commentaries on the Laws of England in Four Books*, Volume 1.

³ Discharge may be viewed as a form of limited liability for individuals—a legal construct that stems from the same desires and serves the same purposes as does limited liability for corporations.

⁴ David Frum (2000), “Bankruptcy Reform is a Moral Issue”, Wall St. J., 11 February.

⁵ Lawrence H. White (1977), “Bankruptcy as an Economic Intervention”, J. Libertarian Stud., pp. 281, 283-84 (discussing loans as contracts giving the creditor a right to payment from the debtor or a lien on his property—a contract that bankruptcy provisions interfere with and debtors take advantage of by “resorting to bankruptcy rather than tightening their belts to meet obligations”).

⁶ Peter C. Alexander (2000), “With Apologies to C.S. Lewis: An Essay on Discharge and Forgiveness”, J. Bankr. L. & Prac. pp. 601-02 (stating that the “central purpose” of bankruptcy is to “forgive the indebtedness of the honest but unfortunate individuals who seek protection from their creditors”).

⁷ Karen Gross (1997), *Failure And Forgiveness: Rebalancing The Bankruptcy System*, Yale University Press (providing “justification for the fresh start for individual and business debtors, based on notions of forgiveness and rehabilitation”); Richard E. Flint (1991), “Bankruptcy Policy: Toward a Moral Justification for Financial Rehabilitation of the Consumer Debtor”, Washington and Lee Law Review. pp. 529 (1991) (discussing the granting of ‘financial relief, the fresh start and moral response’ to the inability to pay debt).

⁸ Michael Novak (1982), *The Spirit of Democratic Capitalism*, Simon & Schuster, pp. 306 (describing all economies existing prior to the Industrial Revolution as “relatively” static).

⁹ In England, for example, debtors could be imprisoned

for failure to pay a debt; the debtor was regarded as a thief. This state of affairs continued until the 19th century. See Supra Note 4, pp. 281-82.

¹⁰ Sacred Texts of Manu VIII, 48 ff. By whatever means a creditor may be able to obtain possession of his property, even by those means may he force the debtor and make him pay. By moral suasion, a suit at law, by artful management, or by the customary proceeding’ (U. e., by killing the debtor’s wife, children, or cattle, or by the creditor’s fasting, sitting at the debtor’s door), ‘a creditor may receive property loaned; and, fifthly, by force.’

¹¹ Herman Post, *Grundriss der ethnologischen Jurisprudenz*, Vol. ii, Sec. 162, pp. 576-57.

¹² See S. ii5, x6. The wording of the latter section indicates that probably in -Hammurabi’s day the right of enslavement among the Babylonians was limited to merchant debtors only.

¹³ Supra note 8, at 306 (Once capital became creative and its utility in economic progress became clear, moral interpretation was obliged to shift ground.). The changing attitude toward ‘commercial’ debtors was evidenced by such practices as separate bankruptcy statutes for commercial and non-commercial debtors. In England, a non-commercial debtor was viewed as a thief as late as the 19th century.

¹⁴ For instance, Israel experienced a ‘massive increase’ in the number of debtors being imprisoned as recently as the early 1990s. Rafael Efrat (1999), “The Evolution Of The Fresh-Start Policy In Israeli Bankruptcy Law”, American Bankruptcy Institute Law Review, pp. 555-600. A bankruptcy reform law passed in 1996 was “the first ideological shift in Israeli history from a relatively conservative view to a more liberal view of the fresh start policy.

¹⁵ T. Sullivan, E. Warren & J. Vestbroic (1989), “As We Forgive Our Debtors”, as referred in, Lisa J. McIntyre, (1989) “A Sociological Perspective on Bankruptcy,” Indiana Law Journal, <https://www.repository.law.indiana.edu/ilj/vol65/iss1/6>.

¹⁶ Todd J. Zywicki (2005), “Institutions, Incentives, and Consumer Bankruptcy Reform”, *Washington & Lee Law Review*, pp. 1071 - 1138.

¹⁷ Efrat, Rafael (2006), “Bankruptcy Stigma: Plausible Causes For Shifting Norms”, *Emory Bankruptcy Developments Journal* pp. 481-520.

¹⁸ Michael D. Sousa (2014), “Bankruptcy Stigma: A Socio-Legal Study”, *Electronic Theses and Dissertations*, <https://digitalcommons.du.edu/etd/619>.

¹⁹ F. M. Anayet Hossain, Md. Korban Ali (2014), “Relation between Individual and Society”, *Open Journal of Social Sciences*, pp.130 - 137.

²⁰ Carol R. Ember, Melvin R. Ember & Peter N. Peregrine (1999), *Anthropology*, Pearson, p. 24.

²¹ Raymond Scupin (2006), *Peoples and Cultures of Asia*, Pearson Prentice Hall, p. 54.

²² David Gray Carlson (1995), “Debt Collection as Rent Seeking”, *Minnesota Law Review*, p. 842 (“It is sometimes thought that debtors are weak and creditors powerful. This may be so at the time a loan agreement is negotiated, but quite the opposite is true when the debtor is broke and has nothing to gain from prudent management of assets.”).

²³ Todd J. Zywicki (1998), “Bankruptcy Law as Social Legislation”, https://www.law.gmu.edu/assets/files/publications/working_papers/01-18.pdf.

²⁴ *Ibid.*

²⁵ Lynn M. LoPucki (1997), “Common Sense Consumer Bankruptcy”, *The American Bankruptcy Law Journal*, p.p. 464. Actually, current law makes the grasshopper better off than the ant, as the grasshopper has already consumed many of the goods and services purchased and will be able to retain most of the other goods purchased. Amazingly, among the recommendations of the National Bankruptcy Review Commission was to allow bankrupts to keep even more of the property purchased prior to bankruptcy, such as by allowing the avoidance of all security interests (including purchase money) for household goods under \$500.

²⁶ The fact that it costs money to file bankruptcy

may seem “functional” (to the very cold-hearted, at least) in as much as this puts bankruptcy out of the reach of the most poor who may also have the least reputational stake in avoiding bankruptcy. Still, evidence suggests that having the ‘least reputational stake’ in avoiding bankruptcy does not mean having no stake. Although H. Jacob (1969), “Debtors In Court”, pp. 122 - 24, reported that education was positively related to the degree of stigmatisation felt by bankrupts. D. Caplovitz, *Consumers in Trouble: A Study of Debtors in Default* (1974) noted that, when ‘the OEO-sponsored legal services program in Washington, D.C., made a concerted effort to assist overextended debtors declare bankruptcy’ in the 1960’s, ‘[o]f those eligible, less than one fourth of those approached opted for this remedy.’

²⁷ David A. Barrett (1986), “Declaratory Judgments for Libel: A Better Alternative”, *California Law Review*, p.847.

²⁸ Randall P. Bezanson (1986), “The Libel Suit in Retrospect: What Plaintiffs Want and What Plaintiffs Get”, *California Law Review*, p. 789.

²⁹ Philip Shuchman (1977), “Theory and Reality in Bankruptcy the Spherical Chicken”, *Law and Contemporary Problems*, p. 72, <https://scholarship.law.duke.edu/lcp/vol41/iss4/5>.

³⁰ A debtor seeking relief has two options under the Bankruptcy Reform Act. He may liquidate under chapter 7 of the Code, and his non-exempt assets will be sold in a liquidation sale. After the sale, he will be relieved of the vast majority of his debts, even those that remain unpaid. See 11 U.S.C. s.s. 701-766 (1994 & Supp. V 1999). Alternatively, an individual can file for reorganization, usually under chapter 13. Reorganization allows him to keep his assets, but he must pay his creditors at least as much as they would have received under a chapter 7 proceeding. s.s. 1301-1330.

³¹ M. Lerner (1976), *The Belief In A Just World*. This belief, in many respects, is similar to the “blaming the victim” syndrome discussed by Sullivan, Warren and Westbrook.

³² Law Commission Report, 1964.

³³ Act 28 of the 1865 provided for the speedy liquidation of the estates of insolvent traders in Bombay. Power was given under that Act to the creditors to resolve in certain events that the estate of an insolvent trader ought to be wound up under the management of trustees. Upon such resolution being passed an application was made to the court for winding up the estate in the terms of the resolution, and an order was made by the Court vesting the estate of the insolvent in trustees appointed by the creditors. This Act was repealed by Act 8 of 1868.

³⁴ Sir Dinshaw Fardunji Mulla (2013), *The Law of Insolvency in India*, p. 9.

³⁵ *Ibid.*

³⁶ Ramesh Chand, S. K. Srivastava and Jaspal Singh (2017), "Changing Structure of Rural Economy of India Implications for Employment and Growth", National Institution for Transforming India, November.

³⁷ Credit Delivery and Financial Inclusion, Reserve Bank of India, <https://rbidocs.rbi.org.in/rdocs/AnnualReport/PDFs/4C>

REDITDELIVERYCD7058D23F5A410EACCEDDDD0ACF5C457.PDF.

³⁸ Punya Priya Mitra (2017), 'In Madhya Pradesh, a campaign to save tribals from bankruptcy over marriage', *Hindustantimes*, <https://www.hindustantimes.com/india-news/in-madhya-pradesh-a-campaign-to-save-tribals-from-bankruptcy-over-marriage/story-GYuryyDDiEJCyBGH6Up4VM.html>.

³⁹ During the seventeenth century in France, the term 'bankrupts' referred only to fraudulent debtors. See George J. Bell (1868), *Commentaries on the Law of Scotland and on the Principles of Mercantile Jurisprudence*, p. 471. Similarly, certain segments of the commercial society in medieval Italy formally referred to bankrupts as deceivers and frauds. See Bolkmars Gessner et al. (1978), Three Functions of Bankruptcy Law: The West German Case, 12 L. & Soc'y Rev. 499, p. 531.

⁴⁰ A neutral third person appointed u/s 125 of Insolvency and Bankruptcy Code, 2016.

⁴¹ Report of the Working Group on Individual Insolvency, p. 9.