BALANCING VALUE MAXIMIZATION OF ASSETS WITH ENVIRONMENTAL CONCERNS UNDER THE INDIAN INSOLVENCY REGIME

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"A civilization can be judged by the way it treats its minorities."

-Mahatma Gandhi

ABSTRACT

The Insolvency and the Bankruptcy Code, 2016 is a milestone enactment which has the promise to transform the Indian insolvency regime and inspire confidence in the market for stressed assets. To achieve these goals, the long title of the Code sets value maximization of assets as one of its key objectives and contains provisions that seek to revive the corporate debtor in a manner which balances the interest of all stakeholders. At the core of the scheme of value maximization of assets, lie three principles of insolvency law which have been adopted in the Code. These are- the imposition of the moratorium, the running of the corporate debtor as a going concern and the discharge of liabilities after the approval of the resolution plan. While these principles may produce the desired effect of value maximization of assets, the application of these principles tends to clash with environmental concerns, often resulting in the neglect of the latter. The moratorium may be used as a shield to escape enforcement action for violation of environmental norms, the discharge of liabilities may be used to escape liabilities imposed for environmental harm and provisions enabling the corporate debtor to run as a going concern may be used as justification for non-compliance with environmental laws. The risk of such instances taking place is even more pronounced in India due to the overriding effect of the Code. Section 238 of the Code stipulates that the Code shall override inconsistent laws, thereby evincing an inherent preference for value maximization of assets over redressal of environmental concerns. In this context, the article analyses the application of the aforementioned principles of Insolvency Law as adopted in the Code and argues that a higher priority for payment of environmental dues can adequately address environmental concerns within the Code.

Keywords - insolvency, environmental law, value maximization of assets, priority of payment, environmental protection

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INTRODUCTION

The Insolvency and Bankruptcy Code 2016 (hereinafter, 'Code') consolidates the law relating to insolvency in India.[1] The structure and provisions of the Code give importance to the resolution of a corporate debtor in a manner that achieves the goal of value maximization of assets. In the scheme of the Code, value maximization of assets refers to the realization of better or maximum value of assets of the corporate debtor in an insolvency proceeding.[2] This is achieved through actions such as the imposition of the moratorium[3], discharge of liabilities after the approval of the resolution plan[4] and the running of the corporate debtor as a going concern.[5] All of these are provisions that primarily focus on shielding the corporate debtor and its property from additional charges and liabilities.

This aim of the Code to achieve value maximization of assets by protecting the corporate debtor and its assets from additional liabilities can lead to conflicts with Environmental Law. This is because of the difference in the nature of Insolvency Law and Environmental Law. While the former attempts to shield the corporate debtor from incurring liabilities additional to its pre-existing debts, the latter attempts to impose liabilities on such corporate entities for environmental harm.[6] Notably, Insolvency Law does not inquire into the reason for insolvency and therefore, does not distinguish between a financial obligation imposed under environmental law and any other financial obligation.[7] This may enable a polluting corporate debtor to escape liability imposed under an environmental legislation if it is undergoing insolvency proceedings,[8] which shows the inherent tension between Insolvency Law and Environmental Law.[9]

Thus, the objective of value maximization of a corporate debtor's assets has to be carefully balanced with the redressal of environmental concerns. In India, the Code was enacted as a result of an immediate need for providing an effective mechanism

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[1] Samvad Partners, 'India: Insolvency and Bankruptcy Code' (*Mondaq*, 12 September 2017) <https://mondaq.com/india/insolvencybankruptcy/627706/insolvency-and-bankruptcy-code> accessed 21 June 2020.

[2] Shardul S Shroff and Misha, 'Decoding Value Maximization under the Code's Mandate' (Asia Business Law Journal, 15 July 2019) <https://vantageasia.com/maximization-value-insolvency-code> accessed 17 September 2020.

[3] Insolvency and Bankruptcy Code 2016, s 14 (Insolvency Code).

[4] ibid s 31(1) and 32A.

[5] ibid s 20.

[6] Laura M Dalton and Dennis F Kerringan Jr, 'Analysis of the Conflicts Between Environmental Law and Bankruptcy Law' (1990) 15 William & Mary Environmental Law and Policy Review 1.

[7] Van Patten and Puetz, 'Bankruptcy and Environmental Obligations: The Clash Between Private Relief and Public Policy' (1990) 35 South Dakota Law Review 220, 222.

[8] Jill Thompson Losch, 'Bankruptcy v. Environmental Obligations: Clash of the Titans' (1991) 52 Louisiana Law Review 137, 144.

[9] ibid.

for credit recovery.[10] Section 238 of the Code is reflective of the intent of the legislature to make the Code an overarching insolvency resolution mechanism which would override all inconsistent laws, thereby giving precedence to value maximization of assets over the objectives of all competing legislations.[11]

While the subject of balancing value maximization of assets with the need to comply with environmental obligations is vast, this article analyses the provisions relating to the moratorium, discharge of liabilities and the obligation to run the corporate debtor as a going concern to evaluate the extent of redressal of environmental concerns under the Code. Based on the same evaluation, this article suggests improvements to the redressal mechanism.

LEGAL FRAMEWORK FOR ENVIRONMENTAL PROTECTION IN INDIA

The subject of protection of forests and wildlife in India falls within the concurrent list of the Seventh Schedule of the Constitution, and can be legislated upon by both Union and State legislatures.[12] While 'environmental protection' is not referred to in any list under the Schedule, both Union and State governments have passed legislations regarding environment protection.[13] Notably, the Environment (Protection) Act, 1986 (*hereinafter* EPA) is an umbrella legislation that establishes a framework for cooperation of state and central authorities established under other enactments on environmental protection.[14]

The legislations such as the Water (Prevention and Control of Pollution) Act, 1974 (*hereinafter* Water Act) and the Air (Prevention and Control of Pollution) Act, 1981 (*hereinafter* Air Act) establish pollution control boards at the Central and State level, which define environmental norms and grant clearances to the environmentally sensitive projects in their jurisdiction.[15] A clearance under these legislations may take the form of consent to establish (*hereinafter* CTE), which has to be acquired before the commencement of the activities, and the consent to operate (*hereinafter* CTO), which

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[10] Chandni Bhatia and Ayush Chaturvedi, 'Challenges in the Implementation of Insolvency Code and the Insolvency Amendment Ordinance' (2018) 5 RGNUL Financial and Mercantile Law Review 326, 328.

[11] Vardaan Ahluwalia and Varsha Yogish, 'Overriding the IBC's Over-Rider?' (*India Corporate Blog*, 14 May 2020) <https://corporate.cyrilamarchandblogs.com/2020/05/overriding-the-ibcs-over-rider/#_ftn1> accessed 3 December 2020.

[12] Constitution of India 1950, sch 7, entry 17A and 17B.

[13] Sohini Chatterjee and others, 'Cleaning Constitutional Cobwebs: Reforming the Seventh Schedule' (2019) 53 Vidhi Centre for Legal Policy <https://fincomindia.nic.in/ writereaddata/ html_en_files/fincom15/StudyReports/ Cleaning%20constitutional% 20cobwebs_Reforming%20the%20Seventh%20schedule.pdf > accessed 20 June 2020.

[14] Vinay Vaish and Hitender Mehta, 'Environment Laws in India' (*Mondaq*, 31 August 2017) <www.mondaq.com/india/waste-management/624836/environment-laws-in-india> accessed 20 June 2020.

[15] Water (Prevention and Control of Pollution) Act 1974, ch III.

has to be acquired after the set-up phase.[16]

In case a person does not comply with an environmental norm set by the Pollution Control Board (*hereinafter* Board), the Board would have the authority to withdraw the CTO or CTE granted to such person.[17] Apart from withdrawing the CTO or the CTE, the Board may choose to apply to a Magistrate for the issuance of an order to restrain a person from causing pollution.[18] Additionally, the Central Government or the Board may issue directions such as the closure orders, regulation orders or cleanup orders.[19]

The non-compliance with environmental norms or the directions issued under the environmental protection framework would attract penal provisions imposing punishment in the form of fines and imprisonment.[20] When the contravening entity is a company, it would be held liable along with the persons in charge of the company at the time of the contravention, which would be held vicariously liable.[21] Courts can take cognizance of such contraventions on an application made by the Central Government.[22] A private person can also make such an application, however, with a prior notice of not less than 60 days to the Central Government.[23] Private persons can also initiate *in personam* actions against persons causing environmental damage through common law remedies such as tortious remedies. The Supreme Court has even allowed for an affected party to bypass the civil process and directly file a petition to the Supreme Court.[24] These developments have gone hand in hand with the broadening of Article 21 of the Constitution, which has been interpreted to include inter alia, the right to protection of a person's environment and the right to an ecological balance free from air and water pollution.[25] This has further resulted in the

[16] Air (Prevention and Control of Pollution) Act 1981, s 21; Water (Prevention and Control of Pollution) Act 1974, s 25.

[17] Water (Prevention and Control of Pollution) Act 1974, s 27.

[18] Air (Prevention and Control of Pollution) Act 1981, s 22A; Water (Prevention and Control of Pollution) Act 1974, s 33.

[19] Water (Prevention and Control of Pollution) Act 1974, s 33A; Air (Prevention and Control of Pollution) Act 1981, s 31A.

[20] Air (Prevention and Control of Pollution) Act 1981, s 37; Water (Prevention and Control of Pollution) Act 1974, s 41.

[21] Environment (Protection) Act 1986, s 16.

[22] Water (Prevention and Control of Pollution) Act 1974, s 15; Air (Prevention and Control of Pollution) Act 1981, s 18.

[23] Environment (Protection) Act 1986, s 18.

[24] Madhuri Parikh, 'Tortious Liability for Environmental Harm: A Tale of Judicial Craftsmanship' (2013) 2 Nirma University Law Journal 75, 84-85.

[25] *Subhash Kumar v State of Bihar* (1991) 1 SCC 598; Fasih Raghib Gauhar and Mirza Juned Beg, 'Judicial Activism to Judicial Adventurism for the Protection of Environment: An Analysis in the Context of Expansive Meaning of Article 21 of Indian Constitution' (2016) 24 Aligarh Law Journal 226, 227.

Courts developing the concept of Constitutional Torts, under which Courts have interpreted the power to issue writs for violation of Fundamental Rights to private persons, if such persons are acting under a license issued under a statute.[26] To enable this, the Supreme Court has broadened the scope of Article 32 of the Constitution to not just confer power on the Court to enforce Fundamental Rights, but also as a general obligation to safeguard Fundamental Rights everywhere.[27] Thus, the broad interpretation of both Article 21 and Article 32 has become a potential tool for the Supreme Court to play an active role in environmental protection.

After the enactment of the National Green Tribunal (*hereinafter* NGT) Act, 2010, the role of environmental protection has concurrently been assumed by the NGT. The NGT is empowered to take cognizance of civil cases related to the environment, as well as entertain applications concerning the implementation of environmental protection legislations.[28] Further, the NGT can order compensation and interim measures, including restitution.[29] In fact, the NGT has even ordered the cancellation of environmental clearances to companies.[30]

In summation, the environmental protection framework in India allows for five types of actions against corporate debtors, which are:

1. the withdrawal or cancellation of environmental clearances by pollution control boards,
2. the issuance of directions to the polluter by either the pollution control board, the Central Government or a judicial authority,
3. the issuance of orders to make compensation for environmental damage,
4. the initiation of criminal proceedings against a person violating directions or environmental norms and
5. the issuance of a writ against a person committing constitutional torts which damage the environment.

ENVIRONMENTAL CONCERNS UNDER THE MORATORIUM

At the time of initiation of the Corporate Insolvency Resolution Process (*hereinafter* CIRP), the adjudicating authority, which is the National Company Law Tribunal (*hereinafter* NCLT), is required to impose a moratorium on all proceedings and suits

[26] *Consumer Education and Research Center (CERC) v Union of India* AIR 1995 SC 922.

[27] *Bandhua Mukti Morcha v Union of India* (1984) 3 SCC 161; Madhuri Parikh, 'Tortious Liability for Environmental Harm: A Tale of Judicial Craftsmanship' (2013) 2 Nirma University Law Journal 75, 84-85.

[28] National Green Tribunal Act 2010, s 14; Vinod Shankar Mishra, 'National Green Tribunal: Alternative Environment Dispute Resolution Mechanism' (2010) 52 Journal of Indian Law Institute 522, 539-540.

[29] ibid 544-546.

[30] *Jeet Singh Kanwar v Union of India* 2013 SCC OnLine NGT 1.

against the corporate debtor.[31] The purpose of the moratorium is to keep together the assets of the corporate debtor and to protect the corporate debtor from any individual actions by stakeholders which may frustrate the resolution process. The imposition of the moratorium provides breathing space for the corporate debtor by ensuring that the corporate debtor is not burdened by any additional stress during the resolution process.[32] At the same time, the moratorium is beneficial to the creditors, as it allows the corporate debtor to function as a going concern which leads to the value maximization of assets.[33]Thus, the moratorium under Section 14 of the Code serves as a broad provision that seeks to protect the interests of both the corporate debtor and its creditors. However, this application of the moratorium leaves the status of proceedings involving environmental claims uncertain. Section 14 does not contain any explicit exception which allows for the continuation of regulatory proceedings against the corporate debtor by an environmental authority. Even though Section 14(3) allows the Central Government to exclude certain transactions, agreements or arrangements from the scope of the moratorium, no automatic exceptions to the moratorium for the initiation or continuation of environmental claims exist.

However, the Courts, while interpreting Section 14 of the Code, have carved out certain broad exceptions that could potentially allow for the initiation or continuation of environmental claims. By explaining these exceptions, this part analyzes the treatment of pecuniary claims and non-pecuniary claims while the moratorium is in operation. This part further argues that there is some room for non-pecuniary regulatory proceedings, including some environmental actions, to continue during the moratorium, as opposed to pecuniary claims, which are generally barred. Further, this part also draws attention to the status of remedies in public law under the moratorium.

TREATMENT OF PECUNIARY CLAIMS

Since the purpose of the moratorium is to protect the assets of the corporate debtor, any private action, including tortious claims seeking damages or restitution, would be covered under the moratorium and thus discontinued.[34] The United Nations Commission on International Trade Law Legislative Guide (*hereinafter* UNCITRAL Guide) also suggests that it is desirable to keep mass tort claims within the scope of the

[31] Insolvency Code (n 3) s 14.

[32] Bankruptcy Law Reforms Committee, *The Report of the Bankruptcy Law Reforms Committee Volume I: Rationale and Design* (Insolvency and Bankruptcy Board of India November 2015) para 5.3.1. <https://ibbi.gov.in/uploads/resources/BLRCReportVol1_04112015.pdf> accessed 21 June 2020.

[33] ibid.

[34] Kunal Godhwani, 'Moratorium Under Insolvency and Bankruptcy Code, 2016 - Impact on Pending Proceeding' (*Mondaq*, 8 November 2017) <www.mondaq.com/india/insolvencybankruptcy/644310/moratorium-under-insolvency-and-bankruptcy-code-2016—impact-on-pending-proceeding> accessed 22 June 2020.

moratorium.[35] However, it must be noted that a person who already holds a decree in a private action in his favour, would be able to submit the damages awarded in the decree as a claim to the resolution professional, which would be treated as an operational debt in the CIRP.[36]

While the moratorium would stay mass tort litigation, this may jeopardize public interest by denying relief to affected persons. To remedy such a situation, courts in the United States have adopted approaches to resolve the insolvency of mass tortfeasors. For instance, to avoid the continuation of litigation in various courts, the bankruptcy court in R*e AH Robins Co* directed the establishment of a post-resolution trust to satisfy all valid tortious claims.[37] A post-resolution trust is created by earmarking a sum of money in a resolution plan for satisfying disputed or contingent claims.[38] These trusts have also been held to be valid under the Code.[39] Thus, the creation of a post-resolution trust can provide the mechanism for redressal of environmental claims, while at the same time ensuring that the corporate debtor is not burdened by additional stress during the CIRP.

Alternatively, instead of the creation of a post-resolution trust, mass tort claims can be dealt with by estimating their value or empowering the adjudicating authority to summarily determine their validity. The power to estimate the value of claims has been used in asbestos-related mass torts in the United States, particularly in *Re Dow Corning Corp*.[40] However, this power does not currently exist with the adjudicating authority.[41] As for summarily determining the validity of claims, the NCLT has consistently held that it lacks the jurisdiction to do so.[42] Thus, while estimation of claims and summary judgements by the adjudicating authority may be useful to effectively deal with mass tort claims, the absence of these powers under the Code creates a lacuna[43] and leaves only the creation of post-resolution trusts as a viable

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[35] United Nations Commission on International Trade Law, *Legislative Guide on Insolvency Law* (United Nations 2005) 87 <https://ibbi.gov.in/uploads/ resources/99f642bdaa 2d689e0305be17e66774de.pdf> accessed 17 September 2020.

[36] Insolvency Code (n 3) s 3(10).

[37] *Re AH Robins Co* 862 F2d 1092 (4th Cir 1988).

[38] Douglas G Smith, 'Resolution of Mass Tort Claims in the Bankruptcy System' (2008) 41 UC Davis Law Review, 1613, 1648-1649.

[39] Anchit Jasuja, 'Post-Resolution Determination of Claims: A Dilemma for Creditor Rights' (*India Corporate Law*, 11 August 2020) <https://indiacorplaw.in/2020/08/post-resolution-determination-of-claims-a-dilemma-for-creditor-rights.html> accessed 2 December 2020.

[40] *Re Dow Corning Corp* 211 BR 545 (Bankr ED Mich 1997).

[41] Preksha Mehndiratta and Anchit Jasuja, 'The Adjudication of Disputed Claims Under the IBC: A Lacuna Left Unattended?' (*India Corporate Law*, 23 July 2020) <https://indiacorplaw.in/2020/07/the-adjudication-of-disputed-claims-under-the-ibc-a-lacuna-left-unattended.html> accessed 2 December 2020.

[42] ibid.

[43] ibid.

solution to deal with mass tort claims.

Apart from civil damages, the framework of environmental protection in India relies heavily on the imposition of penalties on persons contravening environmental norms.[44] In this regard, Courts have held that the recovery of a penalty by a regulatory body would be barred during the imposition of the moratorium.[45] However, the National Company Law Appellate Tribunal (*hereinafter* NCLAT) has clarified that the moratorium would not affect the recovery of a penalty from a director in his personal capacity.[46] Therefore, in context of environmental law, while the moratorium would bar the imposition of penalties on a defaulting corporate debtor, proceedings against persons in charge of that corporate debtor would continue, since the EPA enables vicarious liability for persons in charge of the company at the time of the contravention of environmental norms.[47]

If a pecuniary claim against the corporate debtor arises due to the violation of an environmental norm after the initiation of the CIRP, then the corporate debtor would be shielded from the liability due to the moratorium, barring all pecuniary claims, even if they are regulatory in nature.[48] Although, in such a circumstance, the resolution professional may be made liable under Section 17(2)(e) of the Code, which obliges the resolution professional to comply with the law in force. Further, Section 17(2)(e) states that the resolution professional would be in charge of the management of the corporate debtor and be vested with powers of the board of directors of the corporate debtor.[49] Thus, the resolution professional may qualify as a person in charge of the corporate debtor, thus making him/her vicariously liable for a penalty imposed on the corporate debtor for an environmental crime committed during the CIRP.

TREATMENT OF NON-PECUNIARY CLAIMS

Even though the moratorium seeks to protect the corporate debtor from the imposition of pecuniary liabilities during the moratorium, the courts have carved out exceptions to the moratorium in respect of non-pecuniary claims to balance regulatory interests. The Bombay High Court in *Tayal Cotton Pvt Ltd v The State of Maharashtra*[50] held that the moratorium does not cover criminal proceedings. This was further developed in *Shah Brothers Ispat Pvt Ltd v P Mohanraj*,[51] where the NCLAT held

[44] Pollution Act (n 20).

[45] *Ms Anju Agarwal v Bombay Stock Exchange Company* 2019 SCC OnLine NCLAT 789 Appeal (AT) (Insolvency) No 734 of 2018.

[46] *Mr Bohar Singh Dhillon v Mr Rohit Sehgal (Interim Resolution Professional)* 2019 SCC OnLine NCLAT 233.

[47] CM Jariwala, 'Corporate Environmental Criminal Liability in India: Reality or Myth' (2015) 3-5 RMLNLUJ 98, 106.

[48] *Ms Anju Agarwal* (n 45).

[49] Insolvency Code (n 3) s 17(1).

[50] *Tayal Cotton Pvt Ltd v The State of Maharashtra* 2018 SCC OnLine Bom 2069.

[51] *Shah Brothers Ispat Pvt Ltd v P Mohanraj* 2018 SCC OnLine NCLAT 415.

that the imposition of a fine under a penal provision is not barred by the moratorium. Thus, this exception would allow environmental authorities and private persons to initiate criminal proceedings against the corporate debtor, even when the moratorium is in operation.

However, the Calcutta High Court in *India Infoline Finance Limited v The State of West Bengal*,[52] observed that the criminal proceedings which would require an investigation on transactions forming the subject matter of the CIRP would be barred by the moratorium. The Court observed that such an investigation would require the Police to acquire and examine documents that are to remain in the possession of the resolution professional during the CIRP. The Court reasoned that allowing an investigation of those documents would hinder the CIRP. Thus, the Court narrowed down the scope of the continuation of criminal proceedings only to the extent that the ongoing investigation does not hinder the CIRP. The effect of such a holding is that environmental authorities would be prevented from taking actions such as the inspection of any asset of the corporate debtor, if the investigation may hinder the CIRP.

As for non-pecuniary claims of a civil nature, the Courts have carved out an exception from the moratorium for proceedings that do not endanger or impact the assets of the corporate debtor. In *Power Grid Corporation of India Ltd v Jyoti Structures Ltd.*,[53] the Delhi High Court reasoned that the purpose of the moratorium is to protect the assets of the corporate debtor and thus allowed for the continuation of a proceeding which did not affect the assets of the corporate debtor.

Further, the Delhi High Court in *SSMP Industries Ltd v Perkan Food Processors Pvt Ltd*[54] also acknowledged that a counterclaim in an arbitration proceeding would fall under the ambit of the moratorium, but still allowed for the continuation of the proceedings by reasoning that the proceedings itself would not endanger the assets of the corporate debtor. It is only when the execution proceedings are initiated that Section 14 would come into effect. The reasoning behind the decision of the tribunal was that if the dispute in the said case were not solved, the resolution professional would be required to determine the value of the claim which is outside the scope of the duties of the resolution professional. Thus, the tribunal allowed for the continuation of a proceeding for ascertainment of liability where the discontinuation of the suit would put the burden to ascertain the liability upon the resolution professional.

The holding of the tribunal suggests that environmental actions that merely assess the liability of corporate debtors would be able to continue even after the imposition of the moratorium, as long as the authority ascertaining the liability does not order for

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[52] *India Infoline Finance Limited v The State of West Bengal* 2020 SCC OnLine Cal 148.
[53] *Power Grid Corporation of India Ltd* v Jyoti Structures Ltd 2017 SCC OnLine Del 12729.
[54] *SSMP Industries Ltd* v Perkan Food Processors Pvt Ltd 2019 SCC OnLine Del 9339.

the collection of dues. After the ascertainment of liability, the proper action would be to submit the ascertained liability as a claim to the resolution professional.[55] Such an ascertainment of liability would not be in contravention to the moratorium, since the moratorium only prevents the additional imposition of liability on the corporate debtor during the CIRP and not the mere ascertainment of a previous liability.[56] While the tribunal has taken a practical approach in interpreting the ambit of the moratorium, its decision does not suggest that new proceedings could be initiated after the imposition of the moratorium.

REMEDIES IN PUBLIC LAW

With the establishment of the NGT and the broad interpretation given to Article 21 of the Constitution, Courts have increasingly relied on public law to effectuate the environment protection framework in India.[57] It was held in *Canara Bank v. Deccan Chronicle Holdings Ltd.*[58] that the powers under Article 32 and Article 226 of the Constitution could be exercised by the courts even after the imposition of the moratorium. This position was further expanded in *Embassy Property Developments Pvt Ltd v State of Karnataka,*[59] (*hereinafter* Embassy Property) where the Supreme Court had to decide on the maintainability of a writ petition before the Karnataka High Court, where the rejection of the extension of a mining lease was challenged. The Supreme Court held that since the regulation of mining is a public interest function of the government, the adjudicating authority being a commercial tribunal would not have jurisdiction in the matter. Thus, the Court allowed for the continuation of the proceeding in the High Court. The Court recognised that when a dispute arises during the CIRP, which is essentially a question of public law, the moratorium would not be a bar to the initiation or the continuation of that proceeding. Thus, the Court has opened the door for the effectuation of public law remedies even during the moratorium is in operation.

Notably, the court also illustrated an example where the income tax appellate traibunal would have jurisdiction due to the matter of income tax being in the realm of public law. Thus, *Embassy property* does not restrict the effectuation of public law remedies to only writ jurisdiction and suggests that Courts without writ jurisdiction may also take cognizance of matters during the CIRP if such matters are in the domain of public law.

The Insolvency Law Committee Report, 2020 (*hereinafter* ILC Report) strengthens this assumption by quoting a paragraph from the UNCITRAL Guide which states that regulatory proceedings which are vital to address public interest concerns, such as

[55] Insolvency Code (n 3) s 18.
[56] *Jyoti Structures Ltd* (n 53).
[57] *Consumer Education and Research Center* (n 26).
[58] *Canara Bank v Deccan Chronicle Holdings Limited* 2017 SCC OnLine NCLAT 255.
[59] *Embassy Property Developments Pvt Ltd v State of Karnataka* 2019 SCC OnLine SC 1542.

proceedings seeking to prevent environmental damage, can continue in some jurisdictions.[60] Thus, the judgement of *Embassy Property* along with the ILC Report seems to suggest that public law actions that include non-pecuniary regulatory proceedings would continue not just under the writ jurisdiction of Courts, but under any type of jurisdiction of a Court. Such a position of law enables regulatory authorities, such as the Pollution Control Boards, to apply to Courts[61] under the Air Act or the Water Act, or to the NGT to restrain a corporate debtor from causing environmental damage even while the moratorium is in operation.

ENVIRONMENTAL CONCERNS IN RUNNING THE CORPORATE DEBTOR AS A GOING CONCERN

After the initiation of the CIRP, the powers of the board of directors are vested in the resolution professional who is entrusted with the management of the corporate debtor as a going concern.[62] The purpose of the obligation to run the corporate debtor as a going concern under Section 20 of the Code is to preserve the value of the assets of the corporate debtor. In the exercise of powers under Section 20, the resolution professional may take all necessary actions to fulfil this obligation[63] and at the same time has to act in compliance with the law in force.[64]

The obligation of running the corporate debtor as a going concern can often clash with environmental obligations, especially in situations where the operations of the corporate debtor are environmentally sensitive. This conflict might also arise when an environmental grant such as a license or a permit expires during the CIRP and thereby hinders the corporate debtor from running as a going concern. In a case before the Kolkata bench of the NCLT, a CTO issued by the director of mines expired during the CIRP. The CTO was not subsequently extended by the director of mines. The resolution professional made an application to the NCLT to allow the corporate debtor to continue operations despite the expiry of the CTO. The resolution professional argued that Section 20 of the Code provides the corporate debtor with 'deemed consent' to continue its operations even if the CTO had expired. The NCLT held that since the Code is an overriding statute under Section 238, and Section 20 of the Code provides for running of the corporate debtor as a going concern, the refusal by the director of mines to extend a CTO, after its expiry, would contravene Section 20 of the Code. and thus, would be set aside.[65]

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[60] Ministry of Corporate Affairs, *Report of the Insolvency Law Committee* (Insolvency and Bankruptcy Board of India 2020) [8.11] <https://ibbi.gov.in/uploads/resources/ c6cb71c9f69f66858830 630da08e45b4.pdf> accessed 21 June 2020.

[61] Environment (Protection) Act (n 18).

[62] Insolvency Code (n 3) s 20(1).

[63] Insolvency Code (n 3) s 20(2)(e).

[64] ibid.

[65] *Dhaivat Anjaria, Pricewaterhouse Coopers Pvt Ltd v Director of Mines, State of Odisha* 2018 SCC OnLine NCLT 12034.

This shows a clash between environmental concerns and the obligation to run a corporate debtor as a going concern. While running the corporate debtor as a going concern is instrumental for the value maximization of assets, Section 20 of the Code diminishes the power of environmental authorities to reject or withdraw an environmental grant.

In balancing environmental concerns with the value maximization of assets, the courts have largely favoured the latter. In *Sumit Binani v Director of Mines*,[66] the director of mines had issued an order to the corporate debtor instructing to stop the mining work. Deciding on the validity of such an order, the NCLT reasoned that the obligation of running the corporate debtor as a going concern would also pose an obligation on the director of mines to allow the corporate debtor to be run as a going concern. In line with this reasoning, the NCLT held that the order of the director of mines was invalid and illegal. Such decisions show a disposition to favour value maximization of assets due to the overriding effect of the Code,[67] and treat environmental concerns as subordinate to the obligation to run a corporate debtor as a going concern. However, it must be noted that the environmental authorities in these cases did not argue that certain environmental damage would be caused by running the corporate debtor as a going concern. Thus, it is uncertain whether in the face of imminent environmental damage, a tribunal would prioritise value maximization of assets of the debtor over environmental concerns.

The issue of reading 'deemed consent' under the Code came upon the Supreme Court in *Embassy Property*. In this case, the resolution professional had filed a writ petition in the Karnataka High Court arguing that the termination of a mining lease issued to the corporate debtor for the violation of statutory rules was in contravention to Section 14 and Section 20 of the Code. The Supreme Court rejected the argument of the resolution professional by stating that:

> *"A lot of stress was made on the effect of Section 14 of IBC, 2016 on the deemed extension of lease. But we do not think that the moratorium provided for in Section 14 could have any impact upon the right of the Government to refuse the extension of lease. The purpose of moratorium is only to preserve the status quo and not to create a new right."*[68]

Thus, the court rejected the idea that the Code can create deemed consent in terms of legislations seeking to govern grants such as licenses. Such a view ensures that regulatory bodies can discharge their regulatory functions by terminating grants when necessary. Thus, this judgement is a course correction as it rejects a view which purely favors value maximization of assets over environmental concerns and therefore, paves the way for equitable treatment of environmental concerns while

[66] 2018 SCC OnLine NCLT 11920.
[67] Insolvency Code (n 3) s 238.
[68] Embassy (n 59) [44].

balancing it with the value maximization of assets.

Recognizing the need to clarify the scope of the moratorium with respect to termination of grants, the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2019 inserted an explanation to Section 14(1) of the Code which provides that the grants could not be suspended or terminated on the grounds of insolvency, but allowed for such termination when the termination is a result of non-payment of dues necessary for maintaining the grant.[69] The ILC Report noted that the moratorium bars the termination of grants, however, this would not mean that a corporate debtor would face no consequences for violation of health and safety standards during the CIRP as the resolution professional could be held liable for non-compliance with the applicable laws.[70]

The ILC Report also hinted that since grants may constitute 'property' under Section 3(27) of the Code, the termination of grants would be prohibited by Section 14(1)(d) of the Code.[71] The definition of 'property' in the British Insolvency Act, 1986[72] is similar to the definition of 'property' under the Code.[73] Since the definition in the British Insolvency Act, 1986 has been broadly interpreted,[74] it is probable that similar broad interpretation can be adopted in the interpretation of 'property' under the Code. This is relevant in light of the observation of the ILC Report that certain grants may embody property rights due to grants being permits to use a property[75] and thus may fall within the definition of 'property.'[76] Thus, the termination of a grant may constitute an enforcement action against the property of the corporate debtor which would be barred by Section 14(1)(d).[77]

However, the Supreme Court in *Embassy Property* rejected this notion by observing that:

> "*Section 14(1)(d), of IBC, 2016, which prohibits, during the period of moratorium, the recovery of any property by an owner or lessor where such property is occupied by or is in the possession of the corporate debtor, will not go to the rescue of the corporate debtor, since what is prohibited therein, is only the right not to be dispossessed, and not the right to have renewal of the lease of such property.*"[78]

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[69] Insolvency Code (n 3) s 14(1).
[70] Ministry (n 60) [8.9].
[71] ibid [8.5].
[72] Insolvency Act 1986, s 436.
[73] Ministry (n 60) [8.5].
[74] *Bristol Airport PLC v Powdrill* [1990] Ch 744.
[75] Dinshaw Fardunji Mulla, *The Transfer of Property Act* (11th edn, LexisNexis 2013) [94-804.
[76] MB Singh and UV Shah, *Commentary on Law of Mines & Minerals* (Whytes & Co 2016) [1.5.9.C].
[77] *Punit Garg v Ericsson India Pvt Ltd* 2019 SCC OnLine NCLAT 143.
[78] Embassy (n 59) [44].

Thus, the court has given a narrow interpretation to Section 14(1)(d), which does not read a right against the termination of a grant as opposed to the wider interpretation made by the ILC Report which suggested that a right against termination of a grant could exist in 'certain circumstances.'[79]

Given the precedential value of Supreme Court judgments,[80] the law would prefer the interpretation of the Supreme Court over the ILC report. Therefore, the law, as it stands, appears to be that the termination of a grant would not be prohibited by the provisions of the Code unless such a grant is terminated due to the non-payment of dues necessary to maintain the grant. In cases where grants are terminated due to public interest considerations such as environmental concerns, there would be a strong presumption in favour of the validity of such a termination. Thus, an environmental authority would have the power to take cognizance of a violation of an environmental norm and subsequently terminate or withdraw an environmental grant in response.

ENVIRONMENTAL CONCERNS IN THE DISCHARGE OF LIABILITIES

The insolvency resolution process in India prioritises the discharge of liabilities of the corporate debtor, which ensures that the corporate debtor can come out of the CIRP as a viable business.[8181] Rushab Aggarwal, 'Doctrine of Clean Slate: Headway in Insolvency Law? ' (*Livelaw*, 31 May 2020). To enable this, the scheme of discharge of liabilities under Section 31(1) and Section 32A of the Code generally wipes off the existing civil and criminal liabilities of the corporate debtor.[82] This is to ensure that a corporate debtor obtains a clean slate when it emerges out of the CIRP. This discharge of liabilities also enables confidence in resolution applicants to take over stressed assets, which they would be reluctant to do, if the liabilities of the corporate debtor were not discharged. Thus, the discharge of the liabilities of the corporate debtor is one of the key tools in the code to achieve its goal of value maximization of assets.

At the same time, the discharge of liabilities creates an inherent conflict with environmental considerations as the discharge of all liabilities would also mean that liabilities attached to the corporate debtor under environmental statutes would also be discharged. Thus, there may arise situations where a corporate debtor might escape liability by taking shelter under provisions which enable the discharge of liabilities such as Section 31(1) and Section 32A of the Code. This is especially relevant in countries such as the United States where it has been found that while the frequency of use of Insolvency Law provisions to escape environmental liability is

[79] Ministry (n 60) [8.5].

[80] Constitution of India 1950, art 141.

[81] Rushab Aggarwal, 'Doctrine of Clean Slate: Headway in Insolvency Law?' (*Livelaw*, 31 May 2020) <https://livelaw.in/columns/doctrine-of-clean-state-headway-in-insolvency-law-157606> accessed 22 June 2020.

[82] ibid.

low, when such provisions are used for escaping liability, the debt discharged is considerable.[83] This might be concerning, as corporate debtors may use discharge of liability provisions to become unaccountable for the damage they have caused to the environment, which would then have to be rectified by the taxpayers. Thus, the discharge of liabilities is a concept which has to be applied carefully to balance the interests of all stakeholders, including the public.

TREATMENT OF CRIMINAL LIABILITY IN DISCHARGE

The moratorium does not discontinue the criminal proceedings against the corporate debtor.[84] However, the Code contains Section 32A which provides for the discharge of criminal liabilities in certain cases as soon as the resolution plan is approved under Section 31 of the Code.

Section 32A attempts to balance the interest of the state in prosecuting crimes with the need to inspire market confidence.[85] The provision only discharges the criminal liabilities of the corporate debtor if the approval of the resolution plan has led to a change in the management of the corporate debtor. In such a case, it is open for proceedings to continue against the erstwhile management of the corporate debtor.[86] Thus, a person in charge of a company who may have been held vicariously liable under legislations such as the EPA would still remain liable for contravention of the environmental norms after the liabilities of the corporate debtor have been discharged.[87]

Section 32A adds another layer of protection, especially to the assets of the corporate debtor, by providing that no action against the property of the corporate debtor can be initiated after the approval of the resolution plan, if its approval leads to a change in management of the corporate debtor.[88] It is also relevant to note that Section 32A begins with a non-obstante clause which would make it overriding over all the provisions of the Code, which in turn is overriding over all other legislations.[89] Thus, Section 32A is a powerful provision which would discharge the criminal liability of a corporate debtor under all environmental legislations. Focussing on the environmental legislations to affix liability on the persons in charge of a company,

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[83] Anne M Lawton and Lynda J Oswald, 'Scary Stories and the Limited Liability Polluter in Chapter 11' [2008] 65 Washington and Lee Law Review 451, 525.

[84] *Shah Brothers Ispat Pvt Ltd v P Mohanraj* 2018 SCC OnLine NCLAT 415.

[85] Ajay Shaw, Ashish Pahariya and Soham Mookherjee, 'The Viewpoint: Government of India Announces Key Amendments to the Insolvency and Bankruptcy Code, 2016' (*Bar and Bench*, 23 April 2020) <https://barandbench.com/view-point/the-viewpoint-government-of-india-announces-key-amendments-to-the-insolvency-and-bankruptcy-code-2016> accessed 22 June 2020.

[86] Insolvency Code (n 3) s 32A.

[87] *Tata Steel BSL Limited v Union of India* Writ Petition (Criminal) 3037 of 2019 (Del HC).

[88] Insolvency Code (n 3) s 32A.

[89] Insolvency Code (n 3) s 238.

rather than the company itself,[90] Section 32A does not pose problems in prosecuting environmental crimes. However, the additional layer of protection which prohibits any action against the assets of the corporate debtor may result in a situation where, on the change in management of the corporate debtor, the environmental authorities would be able to recover penalties only from the erstwhile management. The erstwhile management, however, may not have the capacity, or the assets to pay the penalties.[91]

TREATMENT OF CIVIL LIABILITY IN DISCHARGE

The amount of civil liability owed by a corporate debtor is submitted as a claim to the resolution professional under the Code.[92] The claims are collated when the resolution plan is being prepared, which, if approved by the adjudicating authority, becomes binding on all the creditors, governmental authorities and other stakeholders. Since Section 31(1) of the Code states that a resolution plan is binding on all the stakeholders, the stakeholders are barred from demanding repayment of debts from the corporate debtor, which have been addressed in the resolution plan.[93] Consequently, the corporate debtor stands discharged of all his/her liabilities.[94] After the resolution plan has been approved, it gains finality and cannot be modified. [95] However, the binding nature of the resolution plan conflicts with environmental considerations in two ways. Firstly, if the disputed liabilities are discharged by the approval of the resolution plan, the environmental damage would be left unremedied. Secondly, there may be situations where proceedings against an environmentally damaging act of the corporate debtor have not been initiated which may be left unremedied due to the discharge of liabilities.

In dealing with situations where the claims remain disputed, the approach of the adjudicating authority initially was to let the proceedings initiated to recover dues continue even after the approval of the resolution plan by relying on Section 60(6) of the Code, which states that the moratorium period shall be excluded in calculating the limitation period for a suit or an application.[96] A similar approach was adopted for

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[90] Jariwala (n 47) 98, 105.

[91] Renuka Sane, 'Till Debt Do Borrowers Apart' *The Economic Times* (New Delhi, 9 March 2019) <https://economictimes.indiatimes.com/blogs/et-commentary/till-debt-do-borrowers-apart> accessed 17 September 2020; Mayur Shetty, 'Most Dues Paid, But Essar Steel's Promoters Not Off the Hook Yet' *Times of India* (Mumbai, 16 December 2019) <https://timesofindia.indiatimes.com/business/india-business/most-dues-paid-but-essar-steels-promoters-not-off-the-hook-yet/articleshow/72702328.cms> accessed 17 September 2020.

[92] Insolvency (n 55).

[93] Aggarwal (n 81).

[94] Insolvency Code (n 3) s 31(1).

[95] *Rahul Jain v Rave Scans* (P) Ltd (2019) 10 SCC 548.

[96] *Encote Energy (India) Pvt Ltd v V Venkatachalam* 2019 SCC OnLine NCLAT 1336.

dealing with claims which had not been crystallised, or where the proceedings had not been initiated.[97] However, for the continuation of proceedings to recover dues after the approval of the resolution plan, it was necessary that the claim had not been acknowledged in the resolution plan.[98] Finally, the Supreme Court in *Committee of Creditors of Essar Steel India Ltd v Satish Kumar Gupta*[99] (*hereinafter* Essar Steel) propounded the doctrine of 'clean slate' and held that a successful resolution applicant cannot be faced with undecided claims once the resolution plan has been approved. The court explicitly held that Section 60(6) cannot be seen as an enabling provision to allow proceedings to continue after the resolution plan has been approved.[100] Further, the court held that interpreting Section 60(6) to allow proceedings to continue after the approval of the resolution plan militates against the rationale of Section 31 of the Code, as the latter intends that the proceedings against the corporate debtor to recover prior claims cease to exist after the resolution plan has been approved.[101] The doctrine of clean slate was the basis of the Rajasthan High Court's decision in *Ultra Tech Nathdwara Cement Ltd v Union of India*[102] where the court held that the claims of a governmental authority which were not submitted to the resolution professional would be extinguished after the approval of the resolution plan. However, the Jharkhand High Court in *Electrosteel Steels Limited v The State of Jharkhand*[103] took the view that the resolution plan would only be binding on the stakeholders 'involved' in the resolution process. The court was of the view that a creditor who did not file his/her claims before the resolution professional could not be said to be involved in the resolution process.

However, the view of the Jharkhand High Court has been criticised[104] Abhishek Garg and Sudipta Bhattacharjee,

'Jharkhand HC Overturns Rajasthan HC's "Clean Slate" Doctrine Apropos IBC & Tax Demands?' (*Law Street India*, 6 May 2020) because it runs contrary to the

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[97] *Prasad Gempex v Star Agro Marine Exports Pvt Ltd* 2019 SCC OnLine NCLAT 368.

[98] *Kotak Mahindra Prime Ltd v Mr Bijay Murmuria* 2019 SCC OnLine NCLAT 1509.

[99] *Committee of Creditors of Essar Steel India Ltd v Satish Kumar Gupta* 2019 SCC OnLine SC 1478.

[100] *Satish Kumar* (n 99) [67].

[101] ibid.

[102] *Ultra Tech Nathdwara Cement Ltd v Union of India* 2020 SCC OnLine Raj 1097.

[103] *Electrosteel Steels Limited v The State of Jharkhand* 2020 SCC OnLine Jhar 454.

[104] Abhishek Garg and Sudipta Bhattacharjee, 'Jharkhand HC Overturns Rajasthan HC's "Clean Slate" Doctrine Apropos IBC & Tax Demands?' (*Law Street India*, 6 May 2020) <http://lawstreetindia.com/experts/column?sid=372> accessed 17 September 2020; Ritik Khatri, 'Fresh Slate Theory under the Insolvency & Bankruptcy Code, 2016' [2010] GNLU Journal of Law and Economics <http://gjle.in/2020/07/16/fresh-slate-theory-under-the-insolvency-bankruptcy-code-2016> accessed 9 August 2020; Akshita Totla and Nikunj Maheshwari, 'Electrosteel Steels Ltd. v State of Jharkhand: The Unsettling Doctrine of Clean Slate' (*The CBCL Blog*, 13 July 2020) <https://cbcl.nliu.ac.in/insolvency-law/electrosteel-steels-ltd-v-state-of-jharkhand-the-unsettling-doctrine-of-clean-slate/> accessed 17 September 2020.

characterisation of the doctrine of clean slate as explained in *Essar Steel*. Since the doctrine of clean slate has been supported by the Supreme Court in *Essar Steel*, the prospects of an environmental authority or a private person pursuing environmental claims against the corporate debtor after the resolution plan has been approved seem bleak. Further, the doctrine of clean slate would exclude environmental claims which are either disputed or have not crystallised. Considering the fact that the response of environmental authorities and courts in India has been marred by delay,[105] a discharge under the doctrine of clean slate would leave many environmental wrongs unremedied.

ENABLING REDRESSAL OF ENVIRONMENTAL CONCERNS

The conflict between Insolvency Law and the Environmental Protection Framework need not be viewed as mutually antagonistic to each other.[106] The environmental concerns can be addressed by, inter alia, carving additional exceptions to the moratorium and making environmental claims dischargeable in insolvency. However, such measures can be detrimental to the objective of value maximization of assets under the Code. Thus, any attempt at enabling redressal of environmental concerns with Insolvency Law must necessarily not impede the application of the core principles of Insolvency Law.

Thus, a solution may lie in the inclusion of environmental claims and dues within the meaning of CIRP costs under the Code. Under Section 30(2)(a) of the Code, 'each resolution plan has to provide for the payment of CIRP costs in a manner specified by the Board in priority to the payment of other debts of the corporate debtor.'[107] Thus, the inclusion of environmental claims within the meaning of CIRP costs would require all resolution plans to provide for the payment of the environmental claims in priority, before the payment of other claims.

The priority of payments provided in an insolvency legislation is often based on public interest considerations.[108] While the collection of CIRP costs reflects the public interests of enabling effective conduct of insolvency proceedings,[109] the public interest involved in the repayment of environmental claims is much higher. This is because of the reason that while the effective conduct of insolvency proceedings is beneficial to the users of the insolvency framework, the payment of environmental claims is beneficial to the entire public.[110] Such a solution is not novel since policymakers have

[105] Priyanka Priyadarshini, 'Fortifying the National Green Tribunal' (2017) 6 NLIU Law Review 55, 64.

[106] Jeffrey S Theuer, 'Aligning Environmental Policy and Bankruptcy Protection: Who Pays for Environmental Claims under the Bankruptcy Code' (1996) 13 Thomas M Cooley Law Review 465, 523-524.

[107] Insolvency Code (n 3) s 30(2)(a).

[108] Legislative Guide (n 35).

[109] ibid.

[110] Nicolas Chaput, 'Environmental Clean-up in Bankruptcy and Insolvency: What Priority for the Environment?' (LLM thesis, University of Toronto 2012) 40-41.

sought to include other types of dues within the meaning of CIRP costs based on public interest considerations.[111] Further, similar solutions have been proposed in foreign jurisdictions such as the United States of America and Canada.[112]

Currently, the environmental claims levied under the statutes comprise operational debt under the Code.[113] Thus, the only safeguard for the repayment of such environmental claims is that they would receive at least the amount that would have been paid in case the corporate debtor had liquidated.[114] Further, since environmental claims would generally constitute an operational debt, the environmental authorities who would be owed these debts would be unable to vote in the Committee of Creditors.[115] Since the Committee of Creditors approves the resolution plan,[116] an environmental authority would have no voting power to oppose a resolution plan which does not satisfactorily repay environmental claims.

While the non-payment of claims to a private creditor is prejudicial to that particular creditor, non-payment of environmental claims is prejudicial to the entire public. Further, it has to be noted that a financial creditor would have undertaken risk in lending to a corporate debtor,[117] while an operational creditor conducting business

[111] FE Online, 'Parliamentary Panel Seeks Priority Clearance of MSME Dues During Resolution Process; Suggests This Step' *Financial Express* (5 March 2020) <www.financialexpress.com/industry/sme/msme-eodb-parliamentary-panel-seeks-priority-clearance-of-msme-dues-during-resolution-process-suggests-this-step/1889975> accessed 17 September 2020; Parul, 'FISME to Nirmala Sitharaman: Include MSME Dues under IBC in CIRP costs' (*SME Futures*, 7 January 2020) <https://smefutures.com/fisme-to-nirmala-sitharaman-include-msme-dues-under-ibc-in-cirp-costs/> accessed 17 September 2020.

[112] David H Topol, 'Hazardous Waste and Bankruptcy Law: Confronting the Unasked Questions' (1994) 13 Virginia Environmental Law Journal 185, 227-230; Brian A Cahalane, 'CERCLA and the Fresh Start: Quelling the Eternal Conflict' (1996) 4 American Bankruptcy Institute Law Review 265; Dolly Hoffman and Jeffrey R Seaman, 'A Pragmatic Solution to a Complex Dilemma: A Fundamental Approach to Resolving the Conflict between CERCLA and the Bankruptcy Code' (1996) 4 American Bankruptcy Institute Law Review 243, 256-260; Jonathan Remy Nash, 'Environmental Superliens and the Problem of Mortgage-Backed Securitization' (2002) 59 Washington & Lee Law Review 127, 146-147; Nicolas Chaput, 'Environmental Clean-up in Bankruptcy and Insolvency: What Priority for the Environment?' (LLM thesis, University of Toronto 2012).

[113] *Pr Director General of Income Tax v Synergies Dooray Automotive Ltd* 2019 SCC OnLine NCLAT 691.

[114] Insolvency Code (n 3) s 30(2)(b).

[115] Insolvency Code (n 3) s 21; Sudip Mahapatra, Misha Chandna and Pooja Singhania, 'India: Operational Creditors In Insolvency: A Tale of Disenfranchisement' (*Mondaq*, 3 August 2020) <https://mondaq.com/india/insolvencybankruptcy/971940/operational-creditors-in-insolvency-a-tale-of-disenfranchisement> accessed 1 September 2020.

[116] Insolvency Code (n 3) s 30(4).

[117] Swati Singh, 'Distinction Between Operational and Financial Creditors and Position of the Former in View of the Swiss Ribbons Judgment' (*The Indian Review of Corporate and Commercial Laws*, 25 June 2019) <https://irccl.in/post/distinction-b-w-operational-financial-creditors-position-of-the-former-in-view-of-swiss-ribbons> accessed 17 September 2020.

with the corporate debtor would have earned profits from thetransactions.[118] However, the general public neither lends to the corporate debtor nor does it make any profit from the transactions with the corporate debtor. Thus, the prejudice caused to the public due to the non-payment of environment claims is unfair and must be avoided.

The inclusion of environmental claims in the meaning of CIRP costs will also impact the credit market. The higher priority accorded to environmental claims would naturally result in lower amounts being repaid to other creditors. This may increase the cost of credit since financial creditors would be disincentivised from lending to corporate debtors indulging in environmentally sensitive businesses.[119] However, it has to be noted that the cost of credit would only increase for corporate debtors who are susceptible to environmental claims due to violation of environmental norms.[120] Since the inclusion of environmental claims within the meaning of CIRP costs would increase the risk of non-payment of dues for other creditors, those creditors would be incentivised to conduct environmental surveillance of the corporate debtor before the grant of credit.[121] Further, this would discourage the corporate debtor from contravening environmental norms due to the fear of losing potential creditors. In fact, in foreign jurisdictions, such environmental surveillance is already undertaken by credit institutions such as banks.[122]

Thus, the inclusion of environmental claims within CIRP costs would ensure better repayment of environmental claims, minimize unfair prejudice to the public as well as encourage environmentally responsible behaviour.

CONCLUSION

The conflict between value maximization of assets and redressal of environmental concerns is ineluctable in the present insolvency regime. However, due to Section 238 of the Code, the objectives of the Code such as value maximization of assets are generally given precedence over environmental concerns.

While the judgment of the Supreme Court in *Embassy Property* has provided a mechanism to strike a balance between value maximization of assets and redressal of environmental concerns, the remedies available to address environmental concerns in the present insolvency regime remain overwhelmingly judicial. In most cases, where an environmental concern arises before the initiation of the CIRP and has to be

[118] Nicolas Chaput, 'Environmental Clean-up in Bankruptcy and Insolvency: What Priority for the Environment?' (LLM thesis, University of Toronto 2012) 42-44.
[119] ibid.
[120] ibid.
[121] ibid.
[122] ibid.
[123] Insolvency Code (n 3) s 5(13).
[124] US Code Title 11 2005, s 362(b)(4).

dealt with during the CIRP, the moratorium and the obligation to run a corporate debtor as a going concern would restrict the environmental authorities' power to take corrective action. Even when an action could be taken, the liability likely to be imposed pursuant to such an action would be discharged as soon as a resolution applicant takes charge of the corporate debtor. The only remedy then available for redressal of environmental concerns is to approach courts, mostly under their writ jurisdiction, thus reducing the power of an environmental authority to take quick action on its own.

This reliance on judicial remedies for the redressal of environmental concerns can be reduced by including environmental claims within the meaning of CIRP costs. Such a solution would only require a short amendment to Section 5(13) of the Code which defines 'insolvency resolution process costs.'[123] The substance of such an amendment could be the inclusion of an explanation to Section 5(13) to provide that dues arising for contravention of certain environmental norms would be included within the meaning of 'insolvency resolution process costs.' However, such an amendment would require a high amount of political capital, especially since there are other competing interests which demand a higher priority of payment.

Thus, as of now, incremental reforms can be made. These may start with clearer legislative drafting. For instance, the Bankruptcy Code of the United States provides a clear list of exceptions to the scope of the moratorium.[124] However, in absence of such clear legislative drafting, the exceptions to the moratorium have only been carved out in India via judicial interpretation.

The conflict between the principles of Insolvency Law and Environmental Law would only gain more prominence when provisions of the Code are applied in cases which need a careful balancing of environmental concerns. Thus, the Code must adapt to accommodate the redressal of environmental concerns. Until then, the Courts are the primary forums who have to carefully weigh environmental concerns with the goal of value maximization of assets in each case to achieve a balance between the interests of all stakeholders.