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## THE CONSTITUTIONAL VALIDITY OF INSOLVENCY AND BANKRUPTCY CODE, 2016, IN PRESENT SCENARIO

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### **ABSTRACT:**

Insolvency and Bankruptcy are not the same, but they are two sides of the same coin. Insolvency is a state of economic distress, whereas Bankruptcy is a court order that decides how an insolvent debtor will deal with unpaid obligations, which usually involves selling assets to pay the creditors and erasing debts that can't be paid. Bankruptcy can severely damage a debtor's credit rating and ability to borrow for years. The Insolvency and Bankruptcy Code, 2016<sup>1</sup>, is the bankruptcy law of India, which seeks to consolidate the existing framework by creating a single law for insolvency and bankruptcy.

### **HISTORY OF IBC, 2016:**

The Insolvency and Bankruptcy Code, 2015, was introduced in the Lok Sabha on 21<sup>st</sup> December, 2015 by the former Finance Minister, Late Arun Jaitley. The Code was referred to a Joint Committee of Parliament on 23<sup>rd</sup> December 2015, and was recommended by the Committee on 28<sup>th</sup> April, 2016.<sup>2</sup> The Code was passed by the Lok Sabha and the Rajya Sabha on 5<sup>th</sup> May and 11<sup>th</sup> May, 2016, respectively. Subsequently, it received assent from President Pranab Mukherjee and was notified in "The Gazette of India" on 28 May 2016. The Code was passed by parliament in May 2016 and became effective in December 2016.

### **WHETHER IBC CODE IS CONSTITUTIONAL OR NOT?**

There was no single law in India that dealt with insolvency and bankruptcy. Provisions relating to insolvency and bankruptcy for companies can be found in the Sick Industrial Companies

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<sup>1</sup> The Insolvency and Bankruptcy Code, No. 31 of 2016, § 8, Act of Parliament, 2016 (India).

<sup>2</sup> IBC, 2016

[https://www.indiacode.nic.in/bitstream/123456789/15479/1/the\\_insolvency\\_and\\_bankruptcy\\_code%2C\\_2016.pdf](https://www.indiacode.nic.in/bitstream/123456789/15479/1/the_insolvency_and_bankruptcy_code%2C_2016.pdf), (last visited on March 20, 2026).

(Special Provisions) Act, 1985.<sup>3</sup> The Recovery of Debt Due to Banks and Financial Institutions Act, 1993, the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002<sup>4</sup>, and the Companies Act, 2013. These statutes provide for the creation of multiple forums, such as the Board of Industrial and Financial Reconstruction (BIFR), Debt Recovery Tribunal (DRT), and National Company Law Tribunal (NCLT), and their respective Appellate Tribunals. Liquidation of companies is handled by the High Courts. It was mainly introduced to put an end to the overwhelming problem of Non-Performing assets in India.

**The presumption of the constitutionality of an enactment introduced by the legislature:**

As an instance of the contrary trend, **Sarkaria, J.**, has cited the judgment of **KrishnaIyer, J.**, in **B. Banerji V. Anita Pan**<sup>5</sup>, which reiterates the ratio in *Ram Krishna Dalmia* to the following effect: " there is always a presumption in favour of the constitutionality of an enactment and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles"; and " that it must be presumed that the legislature understands and correctly appreciates the need of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based on adequate grounds."

**Sections 7 and 8 are not violative when Article 14 deals with the difference between Financial Creditors and Operational Creditors:**

The end goal of procedures under the Code, a refinement has been made between 'Financial Creditors' and 'Operational Creditors'. It is appropriate to take note that the Companies Act, 2013, does not make any such grouping and just uses the term 'lender'. Further, this arrangement under IBC has been utilized to put the loan bosses on various platforms at each phase of the procedures, whether they relate to practicality of utilization, endorsement of the determination design, or dissemination of benefits (if there should arise an occurrence of liquidation). In this manner, with a view to securing their interests, it is basic for banks to be totally mindful of the scope of choices/rights available to them under IBC. Section 5 (7) of The

<sup>3</sup> Indian Code, <https://www.indiacode.nic.in/bitstream/123456789/2114/5/A2013-18.pdf>, (last visited on March 20, 2026).

<sup>4</sup> The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, No. 54 of 2002, Act of Parliament, 2002 (India).

<sup>5</sup> (1975) 1 S.C.C. 166 (India).

Insolvency and Bankruptcy Code, 2016 is as follows: -Financial creditor means any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to.<sup>6</sup> An operational creditor is defined under Section 5(20) of the IBC to mean “any person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred”. “Here, the Code differentiates between financial creditors and operational creditors. The Code also provides for cases where a creditor has both a solely financial transaction as well as an operational transaction with the entity. In such a case, the creditor can be considered a financial creditor to the extent of the financial debt and an operational creditor to the extent of the operational debt.” It is clearly evident that the lawmakers have chalked out distinct definitions of ‘financial creditor’ and ‘operational creditor’ and that they are not to be interpreted as inclusive or exclusive of each other. There have been several contentions against the IBC 2016, saying that it gives more power to financial creditors and the operational creditors are neglected in terms of the liquidation value of the debts owed to them, but this is a reasonable and intelligible difference which has been guaranteed under Article 14 of the Constitution. This difference cannot be held manifestly arbitrary or discriminatory to Operational creditors.<sup>7</sup> There is a reasonable explanation for the majority of power in terms of votes for the financial creditors in the Committee of Creditors (COC) and also for the issue of notice prior to the Corporate Insolvency Process (CIRP). The IBC, 2016, has assured that both financial and operational debtors are given equal rights in all aspects, and the Code made sure that none of the corporate creditors are taken advantage of in the Corporate Insolvency Resolution Process (CIRP).

### **The right to confidentiality guaranteed under Article 21 of the Constitution is not violated by the IBC, 2016:**

The Insolvency and Bankruptcy Board of India (IBBI) has amended the regulations to provide for this confidentiality. “As per the Amendments, it is not necessary to disclose ‘liquidation value’ in the information memorandum,” the government said in a statement.

**Impact:** By way of this significant change, the IBBI has sought to weed out the anomaly whereby prospective bidders, already cognizant of the liquidation value, were basing their bids on such a guiding price and precluding the stressed asset from realizing its maximized value.

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<sup>6</sup> Indian, *Supra Note 3 at 2544*.

<sup>7</sup> Indian Code, <https://www.indiacode.nic.in/bitstream/123456789/2114/5/A2013-18.pdf>, (last visited on March 20, 2026).

The objective is to prevent banks from taking haircuts; an absence of benchmarks will likely force bidders to make their own assessment while submitting a resolution plan. Furthermore, the resolution professional is now mandated to provide members of the COC with the liquidation value of the asset only after having obtained an undertaking from each of the members as to the confidentiality of the information.

**Section 29(2) of the IBC read with section 5(25) does not violate the right to privacy of the debtors:**

These two sections have been said to be controversial based on the fact that the right of privacy and confidentiality of the corporate debtors are being taken advantage of as they must disclose sensitive information on their loan to the Committee of Creditors, but the real truth is that it does violate the privacy of the debtors and is protected by amendments. As stated in section 29(2) of the Code of 2016, while preparing the application for the resolution process, the resolution applicant is required to submit all relevant information to help the corporate debtor to make a sound resolution plan for the corporate debtor. The scope of this provision is wide, as it allows the relevant information to be disclosed only to the Committee of Creditors (COC) to make a decision on the voting in relation to the plan. The committee of creditors is not to disclose this information to any third party or any party even remotely having a financial obligation in the Corporate Insolvency Resolution Process (CIRP). Hence, the right of Confidentiality of all the parties involved in the Corporate Insolvency Resolution Process is protected by the Code.

**Article 323B of the Constitution is not violated:**

Article 323B does not involve the establishment of tribunals for matters like insolvency and bankruptcy, but under the concurrent list item 9 of the Constitution, which reads insolvency and bankruptcy, therefore, the central and state governments both have powers to enact statutes for the matters of insolvency and bankruptcy.<sup>8</sup>

**SIGNIFICANCE OF IBC:**

The advantage of this enactment has been the **time-restricted resolution process**. In addition, the IBC regulations were recently amended to state that promoters are now prohibited from

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<sup>8</sup> Constitution of India.

bidding or participating in the sale process of the assets, making the whole process a lot more **reliable and transparent**. This has raised immense hope of faster recovery, fewer defaults, and a stronger lending and investment sector in India.

### CONCLUSION:

At last, after all my research and deep analysis, the thing which I came to know that the laws addressing insolvency and bankruptcy are not very flexible to handle all kind of problems which occurs nowadays in society. The Insolvency and Bankruptcy Code, 2016, is constitutionally valid as it does not violate any of the fundamental rights enshrined under Part III of the Constitution.

