LOST IN TRANSLATION: LEGISLATIVE DRAFTING AND JUDICIAL DISCRETION

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ABSTRACT

This paper studies ambiguous drafting and the exercise of judicial discretion in the context of the Supreme Court decision in Vidarbha Industries Power Ltd. v. Axis Bank Ltd. The Bankruptcy Law Reforms Commission (BLRC) had clearly recommended that the judiciary should not have any discretion in accepting an insolvency petition once certain objective criteria were met. The legislation, however, provides no rationale for why it ignored the BLRC and allowed judicial discretion. The Court also does not provide tests for exercising this discretion. Since this decision, thirteen petitions under Section 7 of the Insolvency and Bankruptcy Code, 2016 (IBC) have been dismissed. Consequent litigation and delayed timelines will result in erosion of the value of the Corporate Debtor's assets and make financial creditors wary of extending credit. The paper underscores the need to improve the quality of drafting and tempering judicial decisions with a practical understanding of commercial realities.

Keywords: *Vidarbha – discretion – legislative intent – commercial and economic realities – may – shall – statutory interpretation*

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I. INTRODUCTION

Precisely drafted legislation that reflects its objective and boundaries for its applicability, and judicial discretion that confines itself to legislative intent are critical pillars of a rule of law economy. There are concerns that both of these are broken in India. There have been numerous instances of mistakes in drafting.[1] Some of these are minor, such as poor referencing within a legal document,[2] while others are more substantive, such as creating an offence which can impact genuine transactions.[3] Courts are seen to interpret laws in a purely legalistic, technical manner, either ignoring legislative intent or without taking the necessary assistance from experts, or principles of other disciplines.[4] This paper points out the issues with poor drafting and subsequent judicial discretion in the context of the recent decision of the Supreme Court in Vidarbha Industries Power Ltd. v. Axis Bank Ltd.,[5] *('Vidarbha')* pertaining to the Insolvency and Bankruptcy Code, 2016 ('IBC' or 'the Code').[6]

The IBC envisaged a list of objective criteria for admitting an insolvency petition. If a financial creditor initiates an insolvency under Section 7 of the Code, then as long as the objective criteria of 'debt' and 'default' set out in Section 7 are established, the National Company Law Tribunal ('NCLT') is expected to admit the petition and initiate the corporate insolvency resolution process ('CIRP'). The legislative intent was to not allow for discretion in the decision to accept an insolvency petition. The Bankruptcy Law Reforms Commission ('BLRC') adopted this approach in response to the experience of delays owing to continuous litigation in previous legislations such as the Sick Industrial Companies Act, 1985.[7] It was felt that entities with relevant expertise

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1 Deepak Patel, 'Dealing with poorly drafted laws' (Business Standard, 11 October 2015) <https://www.business-standard.com/article/opinion/dealing-with-poorly-drafted-laws-115101100810_1.html> accessed March 24, 2023.

2 Aditya Singh Rajput and Shubho Roy, 'Drafting hall of shame: A mistake in the Reserve Bank of India Act, 1934' (The Leap Blog, 30 March 2017) <https://blog.theleapjournal.org/2017/03/drafting-hall-of-shame-mistake-in.html> accessed March 24, 2023.

3 Pratik Datta, 'Drafting hall of shame #1: Criminal sanctions for a new concept of exchange control violations' (The Leap Blog, 11 December 2015) <https://blog.theleapjournal.org/2015/12/drafting-hall-of-shame-1-criminal.html> accessed March 24, 2023.

4 Pradeep S. Mehta, 'How Can India's Judiciary be More Economically Responsible?' (The Wire, 26 February 2021) <https://thewire.in/economy/india-judiciary-economically-responsible-environment> accessed March 24, 2023.

5 *Axis Bank Ltd v Vidarbha Industries Power Ltd* (2023) 7 SCC 321.

6 Insolvency and Bankruptcy Code 2016.

7 Bankruptcy Law Reforms Committee, 'The Report of the Bankruptcy Law Reforms Committee' (November 4, 2015) <https://ibbi.gov.in/BLRCReportVol1_04112015.pdf> accessed March 24, 2023.

should be responsible for making commercial decisions rather than the judiciary. Until 2022, Supreme Court judgments had respected this intent of the law. In Innoventive Industries Limited v. ICICI Bank,[8] *('Innoventive')* as well as in Swiss Ribbons Private Limited v. Union of India,[9] *('Swiss Ribbons')* when the Supreme Court was laying down the foundational jurisprudence around the IBC, it alluded to the mandatory nature of Section 7 and the fact that the NCLT has to admit a petition under Section 7 if the criteria specified therein have been satisfied. While neither of these decisions directly dealt with this specific issue, both clearly laid out that the Supreme Court viewed admission of an application under Section 7 of the Code as a mandatory outcome subject to the specified criteria being met. In 2022, however, the Supreme Court in its decision in Vidarbha,[10] conferred discretion on the NCLT to not accept an insolvency petition filed by a financial creditor and upended this thought process. It interpreted the use of the word 'may' in the phrase, "may admit the petition", to imply that the NCLT had the discretion not to admit the application even after it was satisfied of the existence of debt and subsequent default. Not only has this caused significant controversy with regard to how the Supreme Court interprets commercial statutes and the downstream effect of this judgment,[11] but has opened the gates to increased discretion in the admission of IBC petitions, potentially derailing the entire reform process.

This paper points out how imprecise drafting can waylay the intent of the law. The BLRC's recommendation on lack of discretion to the judiciary was clear. The legislation, however, provided no rationale for why it chose to ignore the BLRC report and allowed for the possibility of discretion with the NCLT while adjudicating applications under Section 7 by using the word "may" in the said provision. This is particularly relevant as it chose to not do the same for applications by operational creditors under Section 9. Precise and reasoned legislation could have averted the possibility of such an interpretation by the Courts. Not only did the Court ignore the tests laid down in the legislation, but also did not provide guidelines for the exercise of this

8 I*nnoventive Industries Ltd v ICICI Bank* (2018) 1 SCC 407.

9 *Swiss Ribbons (P) Ltd v Union of India* (2019) 4 SCC 17.

10 *Vidarbha* (n 5).

11 See, for example, Amay Bahri, 'Analysis of the Supreme Court's decision in Vidarbha Industries' (Bar & Bench, August 13, 2022) <https://www.barandbench.com/law-firms/view-point/analysis-of-decision-in-vidarbha-industries> accessed July 23, 2024; Shalin Ghosh, 'Vidarbha Industries'- A Problematic Interpretation' (NLIU CBCL Blog, September 26, 2022) <https://cbcl.nliu.ac.in/insolvency-law/vidarbha-industries-a-problematic-interpretation/> accessed July 23, 2024; Rajat Sethi & Robin Goyal, '*Vidarbha Industries v. Axis Bank*: An Unsettling Literal Interpretation' (Mondaq, November 28, 2022) <https://www.mondaq.com/india/insolvencybankruptcy/1255254/vidarbha-industries-v-axis-bank-an-unsettling-literal-interpretation> accessed July 23, 2024; Jahnvi Pandey, 'Aftermath of Vidarbha Judgment: An Insight' (IBC Laws, May 11, 2023) <https://ibclaw.in/aftermath-of-vidarbha-judgment-an-insight-by-jahnvi-pandey/> accessed July 23, 2024.

discretion or for the determination of insolvency. The discretion granted to the NCLT is thus susceptible to expansion in scope and abuse. Since the decision, the NCLT and the Hon'ble National Company Law Appellate Tribunal ('NCLAT' or 'the Tribunal') have dismissed thirteen petitions under Section 7. Litigation and delayed timelines will result in erosion of the economic value of the Corporate Debtor's assets, reducing the chances of the Corporate Debtor being brought back to life. Uncertainty in the likelihood of resolution will also make financial creditors more wary of extending credit, thus reducing the capacity to undertake risks and investments.

In fact, the decision had caused such concerns with the regulators that in January 2023 when the Ministry of Company Affairs proposed a series of amendments to the IBC,[12] two of the proposed amendments to the IBC directly impacted the question of initiation of insolvency by financial creditors. The first sought to make a clarification in the law that the Adjudicating Authority 'shall' (instead of may) admit applications for initiation of CIRP by the Financial Creditors once it is satisfied that there has been a debt and subsequent default, and the procedural requirements are met. The second sought to increase the reliance on the record submitted with the Information Utilities ('IU') while considering applications for initiation of CIRP by Financial Creditors. This was an attempt by the Government to undo some of the impact of Vidarbha.[13] While the first does fix the obvious mistake in the initial drafting, it does not guarantee that the judiciary will take cognizance of legislative intent. There is a need for deeper reform, both of legislative drafting and of the way the judiciary interprets economic and commercial laws.

The paper proceeds as follows. Section II presents the Vidarbha[14] decision and the downstream judgements that have relied on this decision to not admit insolvency petitions. Section III discusses the importance of drafting in the context of Vidarbha,[15] while Section IV discusses the problems of providing discretion without relevant tests that can assist Courts in exercising that discretion. Section V lays out the consequences of Vidarbha,[16] on the way IBC will get implemented, and ultimately on the flow of credit in the economy. Section VI concludes.

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12 Ministry of Corporate Affairs, 'Invitation of comments from the public on changes being considered to the Insolvency and Bankruptcy Code, 2016' (January 18, 2023) <https://www.mca.gov.in/content/dam/mca/pdf/IBC-2016-20230118.pdf> accessed March 23, 2023

16 *Vidarbha* (n 5).

14 ibid.

15 ibid.

16 ibid.

II. THE VIDARBHA DECISION AND DOWNSTREAM JUDGMENTS

The Vidarbha[17] decision, is an ideal case study to highlight how improper drafting and conferral of unguided discretion on Courts in economic disputes can completely derail an economic statute from achieving its objectives. The decision was based on a peculiar set of facts where a judicial award of a large sum of money owed to the Corporate Debtor (much larger than the debt owed by it to the applicant financial creditor) was stuck at the stage of execution. The Court was of the opinion that it would be unjust to initiate the CIRP of the Corporate Debtor for its inability to pay its debts given these circumstances. The prevailing jurisprudence at the time was that irrespective of the circumstances surrounding the initiation of the petition under Section 7 of the Code, so long as the existence of 'debt' and 'default' was established, the NCLT did not have the discretion to not admit the petition.[18] The Court, however, overturned that jurisprudence in Vidarbha.

Section 7(5)(a) of the IBC says,

> *"Where the Adjudicating Authority is satisfied that — a default has occurred and the application under sub-section (2) is complete, and there is no disciplinary proceedings pending against the proposed resolution professional, it may, by order, admit such application."*

The Court interpreted the word ‘may’ to imply that the law confers upon the NCLT the discretion to not admit the application even after it is satisfied of the existence of debt and default on part of the corporate debtor. The Court held that NCLTs ought to examine whether the corporate debtor is truly insolvent and unable to service its debts, and not simply admit the debtor into the CIRP for temporarily defaulting in repayment of its financial debts. It also held that the NCLT ought to apply its mind to the defence put forth by the debtor, and also explore the feasibility and desirability of initiating the CIRP, notwithstanding such default.

When delivering the verdict, the Supreme Court sounded a warning that discretion should be sparingly used, i.e., the discretion conferred by Vidarbha ought to be used only in absolutely similar cases. The fact that this warning has gone unnoticed by the Tribunals shows precisely why we need carefully drafted laws that sufficiently spell out the legislative intent of the Parliament. The NCLAT/NCLT has relied upon Vidarbha in 13 different instances to dismiss the CIRP initiated by a Financial Creditor in a wide variety of circumstances. The details of each case are presented in Table 1 in the Appendix.

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17 ibid.

18 *Innoventive* (n 8).

There are, however, 10 instances,[19] besides those mentioned in Table 1, where the NCLT/NCLAT has taken note of the fact that Vidarbha confers upon it the discretion to not admit applications under Section 7 of the Code for initiation of CIRP, but has chosen to not exercise that said discretion and gone ahead with admitting such applications. This goes to show that in a majority (56%) of the reported cases,[20] each with its unique factual matrix, the NCLT has chosen to exercise its discretion and not admit the application for initiation of CIRP.

These range from instances where the corporate debtor is owed money, to where the Court suspects the intention of the creditor to file for insolvency. For example, in the case of GTL Infrastructure,[21] ('GTL'), the Corporate Debtor had monthly revenues of Rs.120 crores and had repaid Rs. 16,915 Crore between 2011 and 2018. The NCLT used these facts to determine that the Corporate Debtor was reasonably healthy and, in a position to repay the sustainable debt. In addition, GTL had claims aggregating to Rs. 13,393.83 Crore against Aircel entities and had yet to recover Rs. 49.84 Crore from Tata Teleservices Limited, Rs. 20.38 Crore from ATC, and Rs. 351 Crore from BSNL in pending arbitration proceedings. The NCLT was of the view that the amounts owed to it would be sufficient to satisfy its debt obligations towards its Financial Creditors. It held that the ratio of Vidarbha[22] was applicable, and consequently dismissed Canara Bank's application for initiation of CIRP. The NCLAT dismissed an appeal filed by the Insolvency and Bankruptcy Board of India ('IBBI')[23] against the NCLT order on GTL.

Another example is that of Jag Mohan Daga v.Bimal Kanti Chowdhary, Interim Resolution Professional of M/s Vindhya Industries Pvt. Ltd. & Anr,.[24] *('Jag Mohan Daga')*, where the NCLAT noted that while there was a default on part of the Corporate

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19 *Bibhuti Bhushan Biswas & Ors. v Ansal Properties and Infrastructure Limited* MANU/NC/5286/2022; *Induslnd Bank Limited v Hacienda Projects Private Limited* MANU/NC/5231/2022; *Union Bank of India v Goenka Diamond and Jewels Limited* MANU/NC/6009/2022; TV Sandeep Kumar Reddy, Suspended Director, Gayatri Projects *Limited v State Bank of India & Ors* MANU/NL/0026/2023; *SBM Bank (India) Limited v Feedback Energy Distribution Company Limited* MANU/NC/5901/2022; *State Bank of India v Shri Tradco Deesan Private Limited* MANU/NC/0798/2023; *IL and FS Infrastructure Debt Fund v McLeod Russel India Limited* MANU/NC/0706/2023; *Bank of India Limited v Frost International Limited* MANU/NC/0644/2023; *ES Krishnamurthy v Bharath Hi-Tecch Builders Pvt Ltd* MANU/NC/1109/2023; *Chandrakant Khemka v. UCO Bank & Anr Company Appeal* (AT) (Insolvency) No. 1261 of 2022.

20 It is possible that there are more cases where Vidarbha was considered by the NCLAT/NCLT, but the authors were able to find only the ones being discussed in this article.

21 *Canara Bank v GTL Infrastructure Limited* CP (IB) No. 4541(MB)/2019.

22 *Vidarbha* (n 5).

23 *Insolvency & Bankruptcy Board of India v GTL Infrastructure & Ors. Company Appeal* (AT) (Insolvency) No. 103/2023.

24 *Jag Mohan Daga v Bimal Kanti Chowdhary Company Appeal* (AT)(Insolvency) No. 848/2022.

Debtor, the Financial Creditor had not filed the application for initiating the CIRP for the purposes of insolvency resolution of the Corporate Debtor, but for some other ulterior motives, including resolution of family disputes in running the business of the Corporate Debtor. In light of this, the NCLAT was of the view that it was not a fit case for the initiation of CIRP solely because the motivation in filing the CIRP initiation application was not limited to seeking resolution. Consequently, it allowed the appeal and set aside the order of the NCLT initiating the CIRP of the Corporate Debtor.

Furthermore, there are two instances where the NCLT/NCLAT has exercised the discretion conferred by Vidarbha,[25] in respect of applications by operational creditors under Section 9 of the Code.[26] This is despite the fact that the statutory language of Section 9 as well as the decision in Vidarbha,[27] nowhere confers such discretionary powers upon the NCLT/NCLAT. In fact, in Vidarbha,[28] the Supreme Court specifically observed that once the material requirements of Section 9 are satisfied, then the NCLT/NCLAT shall admit the application, and not take into consideration factors such as motive, the financial health of the Corporate Debtor, etc. It was the difference in the phrase "may accept" in Section 7 and "shall accept" in Section 9 that was used to justify discretion in the former and not the latter. And yet, NCLT/NCLAT in these two instances, relied upon Vidarbha,[29] to note that it has the discretion to not admit applications under Section 9 as well. Admittedly, the applications in these two cases had certain other defects as a consequence of which the NCLT/NCLAT were inclined to dismiss the application and not initiate the CIRP of the Corporate Debtor therein. However, if that were the case, then the NCLT/NCLAT could have simply dismissed those applications on those grounds alone, and any reference to Vidarbha[30] and the discretion conferred thereunder was unnecessary. By referring to Vidarbha,[31] in the context of applications under Section 9 of the Code, the NCLT/NCLAT has potentially opened the door to further expansion of the scope of discretion conferred by Vidarbha[32] to extend to applications under Section 9 as well, an outcome that will be fraught with its own issues.

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25 *Vidarbha* (n 5).

26 *M/s Agarwal Veneers v Fundtonic Service Pvt Ltd Company Appeal* (AT) (Ins) No. 968 of 2020, *Delia Adventure and Resorts Private Limited v VDOIT4U Event Management Private Limited* CP (IB) No. 160(ND)/2020

27 *Vidarbha* (n 5).

28 ibid.

29 ibid.

30 ibid.

31 ibid.

32 ibid.

III. THE IMPORTANCE OF DRAFTING AND LEGISLATIVE INTENT

As stated above, Vidarbha,[33] is a prime example showing how India's legislative drafting process needs to be made more robust to avoid decisions that are wholly contradictory to a particular statute's objectives. This mismatch between the actual underlying intent and the language used becomes clear once we delve into the history of drafting the IBC, more particularly, Section 7 of the Code. The IBC treats default on financial repayment obligations as sufficient evidence of insolvency in order to initiate the CIRP of a Corporate Debtor. The Bankruptcy Legislative Reforms Commission in its first report,[34] had clearly stated the rationale for such an approach. 'Determination of default' is an objective fact that is easy to determine, as opposed to insolvency which does not have any standardized, objective tests. It would reduce the time taken to decide whether CIRP has to be initiated, and would also lead to greater consistency and clarity of law. Section 3.4.2 of the BLRC Report, Volume 1[35] states:

> *"The law must explicitly state that the viability of the enterprise is a matter of business, and that matters of business can only be negotiated between creditors and debtor. ...*
>
> *The legislature and the courts must control the process of resolution, but not be burdened to make business decisions."*

Furthermore, in Section 3.4.3, the BLRC Report[36] also states that

> *"The Committee recommends that both the debtor and creditors must have the ability to trigger insolvency. In either case, the key principle driving the form of the trigger is for least cost of determination on the bankruptcy and insolvency Adjudicator. The Committee recommends that the debtor can trigger the process after default using detailed disclosure about the state of the entity, accompanied by a Statement of Truth. The creditor can trigger using evidence of a default."*

The BLRC was clear in its intention of providing no discretion in the admission of an insolvency petition.

A. Drafting of law

The draft introduced in Parliament chose to use the word "may" instead of "shall". The Parliament may have good reason for making this choice and going against the recommendations of the Bankruptcy Legislative Reforms Commission, an expert body constituted precisely to provide expert inputs into the structuring of the IBC. However,

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33 ibid.

34 Report of the Bankruptcy Law Reforms Committee (n 7).

35 ibid.

36 ibid.

there is no explanation for why this material change was introduced. Was it intentional, or was this an inadvertent error? This is wholly unclear. For if it was deliberate, then this should have ideally been accompanied with reasons. If this was the latter, then it highlights the need to make the legislative drafting process more robust. In any case, both these eventualities clearly show that there is a missing link in the legislative drafting process in India. Such errors have far-reaching consequences and cannot be allowed to creep into the drafting process. It is absolutely critical that mechanisms are drawn out to eliminate such errors. On the other hand, if the Parliament is making a deliberate decision to deviate from the well-documented recommendations of expert bodies expressly constituted to assist it in the lawmaking process, then the reasons for doing so should also be freely available so that Courts can examine the drafting history to better understand legislative intent.

The fact that the Parliament's reasoning for deviating from the recommendations of the Bankruptcy Legislative Reforms Commission is not publicly available is harmful for two main reasons. First, it goes against the fundamental tenet of the rule of law that material decisions ought to be accompanied with reasons. Second, equally importantly, the lack of reasoning has led to uncertainty in the law by virtue of faulty decisions which then require the expenditure of substantial public resources to fix. For example, in this case, the Government itself was pushing for a review of the decision in Vidarbha[37] by arguing that it effaces the substratum of the Code, and is now planning to amend the law to reflect the BLRC's intent of removing judicial discretion in adjudicating applications under Section 7.[38] The entire situation is not only undesirable but could have been avoided if the legislative drafting processes were more robust, more transparent, and accompanied with reasons.

B. Interpreting legislative intent

This brings us to the issue of legislative intent. As highlighted above, the lack of publicly available reasoning of the Parliament to ignore the express recommendations of the Bankruptcy Legislative Reforms Commission has led to uncertainty in the mind of various Courts (as is evident from the contrast in the pre-Vidarbha jurisprudence,[39] and the jurisprudence in Vidarbha)[40] that have dealt with the issue as to whether admission of petitions under Section 7 of the IBC (if all conditions spelt out therein are met) is mandatory or not.

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37 Report of the Bankruptcy Law Reforms Committee (n 7).

38 ibid.

39 ibid.

40 *Vidarbha* (n 5).

This being the background, it is important to note that the jurisprudence on the treatment of the words "may" and "shall" qua judicial discretion has been fairly fluid. The rule of thumb is that the former implies a conferral of discretion, while the latter implies a mandatory obligation. However, the rule can be dispensed in certain cases,[41] and the courts can interpret "may" as "shall" and "shall" as "may".[42] These are cases when an analysis of the real intention of the legislature done through a careful examination of the whole scope of the statute, the purpose it seeks to serve and the consequences that would flow from the construction to be placed thereon, points to dispensing with the rule of thumb. There are numerous instances where the Courts have interpreted the usage of the term "may" in the statute to mean that there is a mandatory obligation on the concerned authority to act in the manner set out in the statute and that the said statute does not confer any discretion on the concerned authority.[43] In these instances, the Courts have gone beyond the statutory language and treated the legislative intent as its north star in interpreting the words "may" and "shall" while deciding if the concerned authority has discretion under the provision in question. That approach was clearly missing in Vidarbha,[44] due (in part) to the absence of a clear discernible legislative intent. Due to conflicts between the BLRC Report[45] and the statutory language employed in the IBC (the latter, as highlighted above, due to poor drafting processes in India), it was difficult for the Court to assess the legislative intent. Consequently, the Supreme Court, adopted the textual rule of interpretation of statutes, and relied on the use of the word "may" in Section 7(5)(a) of the IBC to hold that the Courts had discretion while deciding whether or not to admit such petitions. Ideally, the Court ought to have adopted a law and economics approach to assess the true legislative intent behind the design of the Code, the objectives it was trying to achieve as well as the BLRC Report,[46] to conclude that Section 7 of the IBC too was an instance of poor drafting and that the legislative intent lay not in the language of the statute but in its inherent design and the history of its drafting. Had it done so, the Court would have reached a different conclusion by interpreting "may" as "shall" much like the previous cases that had interpreted the IBC as it was intended by the Parliament. Unless the Courts start interpreting commercial laws using a law and economics lens, these problems will continue to plague the judicial system.

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41 *State of Haryana v Raghubir Dayal* (1995) 1 SCC 133.

42 *Sharif-ud-Din v Abdul Gani Lone* (1980) 1 SCC 403; *Mansukhlal Vithaldas Chauhan v State of Gujarat* (1997) 7 SCC 622.

43 *See, for example, AC Aggarwal v Ram Kali* (1968) 1 SCR 205; *Mohan Singh v International Airport Authority of India* (1997) 9 SCC 132; *Sarla Goel v Kishan Chand* (2009) 7 SCC 658.

44 *Vidarbha* (n 5).

45 Report of the Bankruptcy Law Reforms Committee (n 7).

46 ibid.

IV. THE LACK OF TESTS WHEN PROVIDING DISCRETION

When the statute does not spell out these tests or guidelines, the Courts typically fill that gap. While this is a routine phenomenon, it is also a well-established principle of administrative law that unchecked discretion eventually leads to abuse of power and can derail the entire statute from achieving its key objectives. This is even more so when it comes to economic laws since the real expert of economic policy is the legislature and not the judiciary. When the judiciary is given large, unchecked and unguided discretion in economic matters, it often applies that discretion in a strictly "judicial, legal manner" without paying any heed to the economics behind the law. This leads to the law being abused by unscrupulous market actors and reduces the efficacy of the concerned statute. In the case of the IBC, not only did the Court ignore the tests laid down in the legislation, but also failed to provide tests itself for the exercise of this discretion or for the determination of insolvency. This will lead to greater uncertainty in the interpretation and application of the law.

Courts are not expert bodies that can carry out complex financial analysis to assess the financial health of a Corporate Debtor. Furthermore, there are no standardized, indisputable methods or tests to ascertain insolvency. Consequently, the NCLTs will devise their own methods to assess whether a Corporate Debtor is actually insolvent. These methods will vary from member to member, bench to bench. All this will lead to greater uncertainty and reduced consistency and clarity in the application of the law. Very basic empirical analysis shows that these concerns are real - the fact that the NCLT/NCLAT has exercised discretion in 13 different cases to dismiss the CIRP initiation applications,[47] for myriad reasons, whereas there are at least 10 other cases where the NCLT/NCLAT has expressly declined to exercise the discretion.[48] There may also be the possibility of this power being expanded beyond what was envisaged by the Supreme Court. Discretion is not only being exercised in applications under Section 7 of the Code but surprisingly, has been exercised in cases under Section 9 as well.[49] This is clear, cogent evidence that the power conferred upon the NCLT by Vidarbha,[50] is already being expanded disproportionately.

Even if tests had been framed, once the NCLT starts to evaluate the contrasting stories of the debtor and creditor on merit, then admission of a CIRP initiation application will itself become a full-fledged trial. The conferral of discretion will also give rise to appeals, thus destroying the timelines envisaged by the Code. Decisions of

47 See Table 1.

48 supra note 19.

49 *Jag Mohan Daga* (n 24).

50 *Vidarbha* (n 5).

the NCLT will be appealed before the NCLAT,[51] in the hope that the appellate forum will exercise the discretion in favour of the party preferring the appeal. Furthermore, since the IBC provides a statutory appeal to the Apex Court,[52] decisions of the NCLAT will then be appealed in the hope that the Apex Court will favour the side that lost in the Courts below. All this will lead to further delays in the insolvency resolution process, an outcome the Code seeks to expressly avoid. For example, the law and guidelines around bail have been crystallized for decades now. Despite that, bail matters are litigated till the Supreme Court, unless the jailed party runs out of money (which is unlikely here because insolvency litigation is happening amongst businesses willing to spend money).

This clearly points to the fact that judicial discretion ought to be limited in commercial issues as the conferral of discretions has the tendency to induce unnecessary delays and uncertainty in the law, which is most detrimental to the efficient functioning of commercial legal frameworks. Furthermore, in situations where it is necessary to confer judicial discretion, there must be clear and precisely framed guidelines that specifically incorporate law and economics principles and force the Courts to take economic considerations into account while deciding how to exercise their discretionary powers.

V. Economic Impact

The consequences of the Vidarbha[53] on judicial decisions is already evident. As seen in Table 1 in the Appendix, discretion is being exercised to dismiss CIRP initiation applications in cases where the Corporate Debtor is expecting a huge inflow of money which can be used to service its debt repayment obligations. The NCLT/NCLAT is adopting the view that this is enough evidence that the Corporate Debtor is otherwise financially healthy and solvent, and hence should not have to go through the insolvency process.

This logic ignores basic economic logic and key commercial and economic realities. By choosing to ignore economics and its fundamental principles while interpreting commercial statutes, the Courts are preventing commercial legal frameworks from functioning efficiently. This case is no different. Any business runs several risks - risk of delayed payments, risk of disputes, risk of business partners not fulfilling their obligations, etc. The reward for entrepreneurs taking such a risk is the phenomenal return on their investment. Financial creditors do not partake in the risk and the reward

51 Insolvency and Bankruptcy Code 2016, s 61.

52 ibid, s 62.

53 *Vidarbha* (n 5).

of running the business, choosing instead to provide capital for an assured return with a fixed repayment schedule. An insolvency regime only resolves those companies where the risk does not pay off and the company becomes financially unhealthy or unviable. By dismissing CIRP initiation applications on account of certain facts and circumstances that relate solely to the Corporate Debtor, Vidarbha,[54] and downstream decisions force financial creditors to bear part of the brunt of the risk undertaken by the debtor. This fundamentally alters the nature of the bargain struck by and between creditors and debtors and alters the risk dynamic in favour of the management of the debtor.

If one were to extend the logic of these judgements of the NCLT/NCLAT, CIRP will be initiated only in situations where 'fault' is proved on the part of the management of the Corporate Debtor (which will be extremely difficult) or if it can be proved that the Corporate Debtor is a wilful defaulter.[55] Restricting the initiation of CIRP to only such cases is against all settled principles of insolvency economics, for insolvency frameworks are put in place to resolve any and all insolvent companies, not just those that have reached that stage as a consequence of factors within the company's control. This has the potential to affect the nature of credit contracts thus affecting the very flow of credit that gives the economy the capacity to undertake risk and investment.

Increased discretion may also result in increased litigation and delays in the time taken to admit a CIRP application. This implies that the sick, insolvent Corporate Debtor's current management continues to manage its affairs, which was precisely the problem that plagued the previous insolvency regimes.[56] As a consequence, there is a greater erosion of the economic value of its assets, which ultimately has adverse consequences during the resolution process. With lesser value left in the assets of the Corporate Debtor, the chances of the Corporate Debtor being brought back to life through a resolution plan that satisfies the claims of all creditors satisfactorily also reduces significantly. Ultimately, the creditors have to take a greater haircut on their recoveries, thus negatively impacting their financial health. In fact, with lesser value left in the assets of the Corporate Debtor, there is a high chance that the Committee of Creditors does not receive a "good enough" resolution plan, and the Corporate Debtor is condemned to liquidation, which may not be in the interest of the Corporate Debtor's creditors, especially its workmen.[57]

54 *Vidarbha* (n 5).

55 Reserve Bank of India, 'Master Circular on Wilful Defaulters' (1 July , 2015) <https://www.rbi.org.in/Scripts/BS_ViewMasCirculardetails.aspx?id=9907> accessed March 22, 2023.

56 *Justice V. Balakrishna Eradi Committee*, 'Law Relating to Insolvency and Winding Up of Companies Report' (July 31, 2000) <https://ibbi.gov.in/uploads/resources/July%202000,%20Eradi%20Committee%20Report%20on%20Law%20relating%20to%20Insolvency%20and%20winding%20up%20of%20Companies.pdf> accessed March 24, 2023.

57 *Swiss Ribbons* (n 9).

VI. CONCLUSION

One of the key issues with the previous bankruptcy regimes was that it took a tediously long time to resolve sick companies. Part of the reason for that was the long-drawn court proceedings and the inability to determine sick industrial units in time, such that quick remedial action could not be taken. In fact, a key objective of the Insolvency and Bankruptcy Code was to lay down a transparent and certain commencement standard for initiating insolvency proceedings.[58] The Code was carefully designed in a manner that there is a regulatory hands-off approach from the executive as well as the judiciary, and greater deference is given to commercial actors involved in the CIRP of the Corporate Debtor. This has been undone by the Vidarbha[59] decision.

The Vidarbha case underscores the importance of legislative drafting. The drafting process should ensure that the usage of crucial words and phrases, such as "may" and "shall", is done after considerable due diligence that ensures the desirable impact. Reasons for the usage of certain phrases should be provided as notes to the law so as to help the Courts ascertain the true intention of the legislature. In cases where the legislature is clear about achieving a particular outcome, there should be greater and clearer use of legislative devices such as explanations and provisos. Where the legislature does not want to confer discretion on the concerned authority, it can employ the word "must" instead of "shall", for the interpretation of the latter has, over time, become shrouded in uncertainty. However, none of this will make any difference so long as courts do not consider key economic, business and financial principles while interpreting the law. For example, in the case of motor accident matters, for example, the Courts applied well-established rules that have been shown to be efficient in the economic analysis of liability rules in a manner that has led to inefficiencies and uncertainties.[60] In another example, the decisions of the Supreme Court effectively brought Delhi's functional bus system to a grinding halt, thus increasing pollution levels in the city.[61] Judicial training at every level will play a key role in bringing an economic perspective into judicial decision-making. So long as this 'Law and Economics' training is missing from judicial decision-making qua commercial and economic laws, continued attempts by the legislature and the executive to reform the business regulatory framework of the country will continue to falter.

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58 *Mobilox Innovations (P) Ltd v Kirusa Software* (P) Ltd (2018) 1 SCC 353.

59 *Vidarbha* (n 5).

60 R. Singh, 'Economics of Judicial Decision-Making in Indian Tort Law: Motor Accident Cases' (2004) 39 (25) Economic and Political Weekly, 2613.

61 Shruti Rajagopalan, 'Altruism and development - it's complicated' (Get Down and Shruti, 12 December 2022) <https://srajagopalan.substack.com/p/altruism-and-development-its-complicated> accessed 23 March, 2023.

This issue prompts a deeper analysis of a new trend - legislative policy in India is increasingly shifting towards the reduction or removal of discretion in economic legislation. There can be numerous reasons for this - judicial delays leading to the destruction of economic value, lack of requisite knowledge/expertise/experience amongst judicial members, the tendency to distinguish precedent thus giving rise to uncertainty of the law, the broader lack of economic perspective in judicial decision-making, etc. Vidarbha and the critique that has ensued necessitates thinking about these broader questions. It is important to analyse why similar legislations in foreign jurisdictions have flourished despite the conferral of judicial discretion, whilst they have failed to deliver results in India.