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Consumer Finance and Insolvency Law in India: A Case Study

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CONSUMER FINANCE AND INSOLVENCY LAW IN INDIA: A CASE STUDY

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In February 2007, justices of the Supreme Court of India issued two remarkable opinions in the case of *ICICI Bank v. Kaur*.[1] Prakash Kaur, the complainant in that case, had borrowed money from ICICI to purchase a truck. When Kaur failed to pay installments on the loan, agents hired by the bank took possession of the truck "by use of force."[2] Approving a settlement of the parties' claims,[3] Justice Altamas Kabir wrote for the Court:

> [W]e wish to make it clear that we do not appreciate the procedure adopted by the Bank in removing the vehicle from the possession of the writ petitioner. The practice of hiring recovery agents, who are musclemen, is deprecated and needs to be discouraged. The Bank should resort to procedure recognised by law to take possession of vehicles in cases where the borrower may have committed default in payment of the instalments instead of taking resort to strong-arm tactics.[4]

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1. ICICI Bank v. Kaur, (2007) 2 S.C.C. 711. ICICI Bank is one of the largest financial institutions in India. *See* ECONOMIST INTELLIGENCE UNIT, INDIA COUNTRY FINANCE 2006 at 6 (2006) [hereinafter INDIA COUNTRY FINANCE 2006]; ICICI BANK, http://www.icicibank.com/aboutus/about-us.html (last visited Nov. 1, 2010).

2. ICICI Bank v. Kaur, (2007) 2 S.C.C. 711, 712. The opinion does not explain exactly what the agents did.

3. It appears that the court only approved the settlement reached by the parties and did not address the legal issues asserted by Kaur. A lower court found that Kaur's initial petition alleged cognizable criminal offences by the Bank and its agents and that the police had violated the Indian Penal Code and the country's Prevention of Corruption Act by failing to pursue the allegations. *Id*. at 712–14 (citing Kumari v. State (N.C.T. of Delhi) and Ors., (2006) 2 S.C.C. 677).

4. *Id.* at 714.

Justice A.R. Lakshmanan's concurring opinion is even more pointed, describing recovery agents as "independent contractors hired by the banks both to trace the defaulters and to . . . physically, mentally and emotionally torture and force them into submitting their dues."[5]

> Here the bank gets away with everything. Young and old members of the family are threatened on streets, [at] institutions and also at home at godforsaken hours by these agents who have the full support of their contractor bank . . . . [T]he method usually adopted by these institutions is to engage [a] thug/hooligan/gangster for recovery of the two-wheelers or four-wheelers. Many times even notice is not given to them. They seize the vehicles even in public places deliberately to cause embarrassment . . . . A recent incident has taken place when the recovery agent had gone and threatened a school-going child for the money due by the father.[6]

These statements provide a dramatic window into broad economic and social transformations that have been taking place in India in recent decades. In particular, they reflect the rapid expansion of consumer financial markets in that country, the potential benefits of that expansion, and some of the regulatory challenges it has engendered. Like other countries, especially other emerging market countries, India is currently attempting a daunting regulatory balancing act: to promote the continued deepening of consumer financial markets while limiting the various social and economic costs of increased consumer indebtedness. The current global economic crisis may have slowed the growth in consumer finance in India,[7] but it also underscores the growing importance of striking the right balance with respect to regulation of consumer finance in both developed and developing economies.

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5. *Id.* at 715 (Lakshmanan, J., supplementing).

6. *Id.* at 715–17 (Lakshmanan, J., supplementing). Justice Lakshmanan's opinion does not provide the bases for these factual assertions about banks' collection practices. It is not clear whether they are based on evidence presented to the court by the parties or based on judicial notice of personal, anecdotal knowledge. There is some evidence, however, that such activity does take place with some frequency in India, and that it is not as rare as one might hope. In addition to the experience of Ms. Kaur, there have been various news reports of abusive and/or harassing behavior by collection agents of ICICI and other banks. *See, e.g.*, Ravi Bakshi, *ICICI Personal Loan Customer Commits Suicide After Alleged Harassment by Recovery Agents*, PARINDA, Sept. 19, 2007, *available at* http://www.parinda.com/news/crime/20070918/2025/icici-personal-loan-customer-commits-suicide-after-alleged-harassment-recov (noting other stories). Justice Lakshmanan's opinion refers to "the enormous amount of litigation pending and being filed against the banks" arising from the action of their collection agents. ICICI Bank v. Kaur, (2007) 2 S.C.C. 711, 716 (Lakshmanan, J., supplementing).

7. *See infra* note 16.

Unfortunately for policymakers in India and in other emerging economies, legal scholars, social scientists, and development theorists have little guidance to provide in this regard. The otherwise voluminous literature on law, finance, and development has paid relatively little attention to the relationship between law, consumer finance, and development policy.[8]

Despite this relative lack of attention, there are good reasons to believe that the expansion of consumer financial markets can promote growth and development.[9] It is less likely to do so, however, in the absence of a regulatory framework that effectively facilitates an increase in consumer lending while also limiting the associated costs of over-indebtedness.[10] Such a framework is generally drawn from a wide variety of regimes, including banking law, general contract law, consumer protection, bankruptcy law, regulation of credit reporting, regulation of debt collection, property exemptions, and laws affecting foreign investment. Determining the possible combinations of legal regimes that can promote efficient expansion of consumer lending in emerging economies is a crucial if relatively unexplored project for scholars of law, finance, and development. In previous work, I have argued that an effective consumer bankruptcy system can be an especially effective component of a regulatory framework that promotes growth and development in emerging economies.[11]

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8. *See* Adam Feibelman, *Consumer Bankruptcy as Development Policy*, 39 SETON HALL L. REV. 63, 74 (2009); *see also* Iain D.C. Ramsay, *Functionalism and Political Economy in the Comparative Study of Consumer Insolvency: An Unfinished Story From England and Wales*, 7 THEOR. INQS. L. 625, 642–43 (2006) [hereinafter Ramsay, *Functionalism and Political Economy in the Comparative Study of Consumer Insolvency*]. Thus, for example, while it has been established that financial deepening in general promotes economic growth, it remains uncertain what contribution the deepening of consumer financial markets makes to this dynamic. *See* Feibelman, *supra* note 8, at 74.

9. Expanding access to consumer finance can enable individuals to increase basic consumption of goods and services (potentially expanding consumption of domestic goods and services), to obtain and accumulate household assets, to make investments in personal capital (especially health and education), and to fund nascent profit-making ventures. Furthermore, it may broaden popular support for development policies. *See* Feibelman, *supra* note 8, at 75–79.

10. *See id.* at 79–81.

11. *See generally* Feibelman, *supra* note 8. *See also* John Armour & Douglas Cumming, *Bankruptcy Law and Entrepreneurship*, 10 AM. L. ECON. REV. 303 (2008) (finding that a relatively forgiving consumer bankruptcy regime can enhance entrepreneurship). Furthermore, the current global crisis has brought increased attention to consumer insolvency law as a potential tool for crisis resolution. *See, e.g.*, Int'l Monetary Fund [IMF], *United States: 2008 Article IV Consultation—Staff Report*, para. 32, IMF Country Report No. 08/255 (July 2008), *available at* http://www.imf.org/external/pubs/ft/scr/2008/cr08255.pdf (proposing that policymakers in the United States consider reforming consumer bankruptcy law to allow for "cram-

This Article provides a case study of consumer finance and of the potential role for consumer bankruptcy or insolvency[12] law in the context of contemporary India. In particular, it explores whether and how that country might benefit from reforming its existing consumer insolvency laws. As Part I describes, formal consumer financial markets in India have been growing at dramatic rates in recent years.[13] It is not surprising that the expansion of these markets has coincided with impressive growth in the Indian economy, which averaged over 7% growth in gross domestic product per year between 1997 and the onset of the recent global economic crisis.[14] In the years just before the crisis, that growth exceeded 9%.[15] While the global crisis has adversely affected the country's economy,[16] India has suffered less than most countries and has been among the first to begin to regain stability.[17] Barring an unexpected reversal, the country appears poised to enjoy growth rates of nearly 7% and 8% in the next two years, respectively.[18]

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downs" of home mortgages). *Cf.* Luc Laeven & Thomas Laryea, *Principles of Household Debt Restructuring*, IMF Staff Position Note, SPN/09/15, June 26, 2009, *available at* http://www.imf.org/external/pubs/ft/spn/2009/spn0915.pdf (arguing that government intervention may be necessary in many countries to address high levels of household debt, but also arguing that such intervention may not be achievable through domestic bankruptcy systems).

12. Usage of the terms "bankruptcy" and "insolvency" creates much conceptual confusion. There is a tendency to use "bankruptcy" to refer to the financial affairs of individuals and "insolvency" to those of corporations. It is probably more accurate to distinguish "bankruptcy" as a legal process or procedure and "insolvency" as a financial state of affairs (for individuals as well as commercial entities). These distinctions are not important for present purposes, and the terms bankruptcy and insolvency are used interchangeably in this Article.

13. *See infra* notes 25–48 and accompanying text.

14. *See* CENTRAL INTELLIGENCE AGENCY, THE WORLD FACT BOOK: INDIA, *available at* https://www.cia.gov/library/publications/the-world-factbook/geos/in.html.

15. *See, e.g.*, Asian Development Bank, *Asian Development Outlook 2007*, at 170–75 (2007) [hereinafter *Asian Development Outlook 2007*], *available at* http://www.adb.org/Documents/Books/ADO/2007/IND.pdf.

16. *See, e.g.*, Asian Development Bank, *Asian Development Outlook 2009: Rebalancing Asia's Growth*, at 197–201, *available at* http://www.adb.org/Documents/Books/ADO/2009/IND.pdf ("The Indian economy is facing major macroeconomic management challenges stemming from the global financial crisis. Declining private investment, dwindling capital inflows, shrinking foreign exchange reserves, weakening exports, and a depreciating rupee are some of the factors constraining high growth.") India's GDP grew by just over 5% in 2008. *See id.* at 197.

17. IMF, *IMF Executive Board Concludes 2009 Article IV Consultation With India*, IMF Public Information Notice, Feb. 4, 2010, *available at* http://www.imf.org/external/np/sec/pn/2010/pn1018.htm ("India's economy is one of the first in the world to recover after the global crisis.").

18. *See id.*

If the growth in India's broader economy caused consumer financial markets in that country to expand, there are reasons to believe that causation flows in the other direction as well—that growth in consumer financial markets has contributed to broader growth in the Indian economy. In any event, policymakers in India have done much in recent years to support formal domestic markets for consumer finance. Part II describes some of these efforts and the main pillars of the legal and regulatory framework that currently applies to consumer financial markets in India.

As the *Kaur* opinion suggests, however, the country has done less to adopt reforms or policies designed to limit the costs of expanding consumer finance. As a result, there are signs that the Indian economy is currently experiencing, or is becoming increasingly vulnerable to, a variety of costs related to expanding consumer finance, especially consumer over-indebtedness. Limited available data suggest, for example, that loan default rates are increasing, that aggressive debt collection has become ubiquitous, and that debt-related imprisonment[19] and debt bondage[20] continue to plague Indian citizens. Among other things, these circumstances may dissuade some households from productive borrowing in the first place and may undermine popular support for broader development policies.[21]

Against this background, Part III examines the current and potential role of consumer insolvency law in India. Unlike other major emerging economies—most notably, Brazil and China—India has had a formally comprehensive consumer insolvency regime in place throughout its independent legal existence.[22] India's existing insolvency laws were enacted during its colonial era and, at least on paper, provide a significant measure of protection and debt relief to individual debtors. They give courts relatively broad powers to stay enforcement and collection actions against debtors and allow for the discharge of an insolvent's unsecured debts.

Yet the scope of consumer insolvency laws in India is subject to many formal and practical limitations. The requirements for protection under the laws are rather cumbersome and require a series of judicial determinations. Many of these determinations are subject to significant judicial discretion, which appear to make application of the laws unpredictable.

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19. *See infra* notes 124–25 and accompanying text.

20. *See id*.

21. *See, e.g.*, Feibelman, *supra* note 8, at 94–95 (arguing that the availability of debt relief may encourage consumers to borrow and may limit popular dissatisfaction with development policies).

22. *See, e.g.*, Rafael Efrat, *The Evolution of Bankruptcy Stigma*, 7 THEOR. INQ. L. 365, 372 (2006).

As a practical matter, like most litigation in that country, insolvency cases in India proceed extremely slowly through the judicial system, a pace that is exacerbated by the number of judicial actions required to trigger protections and relief under the laws.

Despite these limitations, it appears that some debtors and creditors in India do employ the country's insolvency laws. While there are no available systemic data on consumer and household insolvency proceedings in India, and while most insolvency proceedings are unreported, some consumer insolvency cases are decided by the country's high courts each year and published.[23] These decisions alone do not support reliable conclusions about the insolvency system in India, but they do provide an intriguing glimpse into that system. They indicate that India's insolvency regime is, at least, a functioning part of that country's legal system. They also suggest that consumer insolvencies may be more common than observers outside the system might anticipate.[24] Nonetheless, beyond these relatively few reported decisions, there is little available evidence that India's consumer insolvency laws are currently an important legal institution in that society. Thus, assuming that consumer insolvency or bankruptcy law can, in theory, promote the deepening consumer financial markets, it seems doubtful that it currently plays this role in India.

With effective reforms, however, consumer insolvency law may have the potential to play a more beneficial role in India. Part III proposes that even modest reforms to India's insolvency laws could increase their role in regulating debt collection and providing consumer debt relief. While increasing the general capacity of the country's legal system would likely improve the functioning of its insolvency laws, such improvements may not be necessary to meaningfully alter the role that consumer insolvency law plays in the Indian economy. Policymakers could, for example, streamline aspects of the insolvency regime to make some provisions—such as discharge and the stay on other proceedings—more automatic and to reduce the judicial functions required at each step of an insolvency case. Such improvements could, in theory, increase the insolvency returns to creditors, provide additional social insurance for consumers and households, and increase the demand for consumer finance.

To be clear, however, this Article does not advocate any particular reforms, nor does it suggest that Indian policymakers simply transplant rules or doctrines from other jurisdictions. Rather, this Article argues that India may provide an example of an emerging economy that could benefit from expanding and improving the role of its consumer insolvency

23. *See infra* notes 216–19 and accompanying text.
24. *See infra* notes 219–21 and accompanying text.

law. Thus, the primary goal of this Article is to help spur further study of India's consumer financial markets and of the operation of its insolvency system to confirm or refute that hypothesis. If confirmed, that information might increase the demand for effective consumer insolvency law in India (and elsewhere). To be effective, India's insolvency law must be sensitive to its particular context, including unique practical, cultural, sociological, and economic aspects of Indian society. In that regard, the fact that India already has a functioning, perhaps familiar, consumer insolvency system provides some reason for optimism that policymakers could transform the existing system into one that contributes more to social welfare in that country.

I. CONSUMER FINANCE IN INDIA

The concerns of Justice Kabir and Justice Lakshmanan in *ICICI Bank v. Kaur*[25] should be read against a background of dramatic increases in consumer financial transactions in India over the past two decades. Before the 1980's, non-agriculture-related consumer credit was available from some formal lenders, but it was relatively scarce. During that period, the overall amount of capital in the economy was modest, and credit allocation by financial institutions was largely directed by the state.[26] Individuals and households could borrow from state-controlled lenders, but most borrowed from informal sources, especially from largely unregulated professional and informal moneylenders.[27] Overall borrowing for non-agricultural purposes was quite modest, and much of it was used to fund lifecycle events, such as weddings, births, and deaths.

A formal market for consumer finance began emerging in India in the 1980's, and it has expanded rapidly during the past decade.[28] While information about consumer credit in India is far from comprehensive, there are two important sources of such data, both of which are illuminating. One of these, India's National Sample Survey Organization ("NSSO"), conducts a survey of household assets and indebtedness every ten years.[29] The last survey was conducted in 2002 to 2003. From these

25. *See* ICICI Bank v. Kaur, (2007) 2 S.C.C. 711.

26. *See infra* notes 54 & 63 and accompanying text.

27. *See infra* notes 41 & 102–06 and accompanying text.

28. *See infra* note 32 and accompanying text.

29. The NSSO, in the Ministry of Statistics and Programme Implementation, Government of India, conducts the All-India Debt and Investment Survey ("AIDIS"). This is a series of surveys, the most recent of which was conducted during January to December 2003. It is apparently the only information available about Indian household assets, liabilities and expenditures nationwide. Government of India National Sample Survey Organi-

surveys, we know that between 1981 and 2002, household indebtedness (existing and new borrowing combined) increased nearly 2000%, from Rs. 9,100 crore (approximately $2 billion) to Rs. 176,700 crore (approximately $40 billion).[30] According to the NSSO survey, new borrowing, rural and urban, for the year 2002 to 2003 was Rs. 89,300 crore (approximately $20 billion).[31]

The other important source of data on consumer finance in India, the Reserve Bank of India, tracks yearly changes in household assets and liabilities for which formal institutions are counter-parties. According to Reserve Bank's Handbook of Statistics, the yearly net increase in total financial liabilities of households in India grew nearly six-fold between 2000 and 2007.[32] These figures suggest that total indebtedness was continuing to increase at a dramatic rate before the current economic crisis, as most borrowing in India is for the medium to long term.[33] Not surprisingly, there are significant differences in the financial profiles of rural and urban households in India. As a general matter, rural households—both cultivators and non-cultivators—are more likely to have financial liabilities than urban households, and urban households with liabilities owe more than their rural counterparts.[34] The percentage of urban households reporting indebtedness remained steady between 1981 and 2002, but the amount of those households' indebtedness increased significant-

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zation [NSSO], *Household Capital Expenditure in India* (2006), *available at* http://www.mospi.nic.in/nss_press_note_504.htm (household data).

30. NSSO, *Household Assets and Liabilities in India as on 30.06.2002*, Report No. 500 (Nov. 2005) [hereinafter *Household Assets and Liabilities in India*].

31. NSSO, *Household Borrowings and Repayments in India from 1.7.2002 to 30.6.2003*, at 16, Report No. 502 (Jan. 2006).

32. Reserve Bank of India, Handbook of Statistics on Indian Economy, Handbook of Statistics on Indian Economy, Sept. 15, 2009, *available at* http://www.rbi.org.in/scripts/AnnualPublications.aspx?head=Handbook%20of%20Statistics%20on%20Indian%20Economy (follow "Table 11: Changes in Financial Assets/Liabilities of the Household Sector (At Current Prices)" hyperlink). Changes in household liabilities in 2000–01 were Rs. 31,779 crore; in 2005–06, they were Rs. 183,424 crore. *See id.* Since 2006, this figure has been dropping slightly, likely due in part to the global credit crisis. It is projected to be Rs. 165,656 crore for 2008–09. *See id.*

33. NSSO, *Household Indebtedness in India as on 30.06.2002*, Report No. 501, 59th Round (Dec. 2005) [hereinafter *Household Indebtedness in India*].

34. As of 2002, 26.5% of rural households were indebted, and these indebted households had an average amount of debt of Rs. 28,449. *Household Assets and Liabilities in India*, *supra* note 30, at 30. In rural areas, cultivator households were more likely to be indebted than non-cultivators (29.7% to 21.8%) and they had more debt on average (Rs. 9,300 to Rs. 5,000, per all rural households). *Id*.

ly.[35] As a result of these factors, the urban share of the nation's consumer borrowing has increased in recent years.[36] While these figures include business-related borrowing by households, [37] it appears that increasing numbers of Indians are currently using credit to finance housing[38] and to obtain a growing variety of services and goods. As the case of Prakash Kaur reflects, a significant portion of the increase in consumer lending has been used to purchase durable goods, especially automobiles and motorcycles.[39] There is also evidence that the high average yearly growth in non-food credit in India between 2002 and 2006 (28.8%) was fueled by increases in retail credit.[40]

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35. In 1981, 17.4% of urban households were indebted and the average amount of debt per all urban households was Rs. 1,000. In 2002, 17.8% of urban households were indebted and the average amount of debt per all urban households was Rs. 11,771. *Id*. at 35. Urban indebted households had a higher average debt (Rs. 66,129) than rural households (Rs. 28,449). *Id*. at 30. In urban areas, self-employed and nonself-employed urban households were equally likely to be indebted and had roughly the same amount of average debt per urban household (Rs. 12,100 to Rs. 11,600, per all urban households). *Id*.

36. *Household Indebtedness in India, supra* note 33. As of 2002, rural households represented 73% of national population and held 63% of total household debt; urban households represented 27% of the population and held 37% of overall household debt. *Id.*

37. As of 2002, approximately 60% of rural households are cultivators—*i.e.*, farmers—and another 5% are artisans; approximately 36% of urban households are designated as "self-employed." *Household Assets and Liabilities in India*, *supra* note 30, at 13. Approximately 25% of debt incurred by urban households and 53% of debt incurred by rural households is used for a business purpose. *Household Indebtedness in India*, *supra* note 33, at 39.

38. These figures include consumer debt used for housing finance, although it is impossible to determine precisely how much is borrowed for this purpose. As of 2002, 35% of debt incurred by rural households and 58% of debt incurred by urban households was used for "household expenditure," a category which includes housing finance among many other things. *Household Indebtedness in India*, *supra* note 33. There are reasons to believe that much of this expenditure was related to housing finance. Roughly 22% of all outstanding debt in 2002 was secured by a first mortgage on immovable property and nearly the same amount of outstanding debt was secured by other mortgages on immovable property. *Id.* at 39.

39. *See, e.g,* Akash Gupta & Rahul Agarwal, *The Consumer Financing Business in India: Building Blocks for the Future*, (Dec. 2003) (unpublished article), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=619721 (reporting that 70% of auto sales in India were being financed as of 2003).

40. Rakesh Mohan, Deputy Governor of the Reserve Bank of India, Address at the Annual Bankers' Conference, Hyderbad, Economic Growth, Financial Deepening and Financial Inclusion, at 1–2 (Nov. 3, 2006), *available at* http://www.bis.org/review/r061121e.pdf. From 2002 to 2006, retail credit grew by 46%; retail credit share of all bank credit increased from 6% in 1991 to 25.5% in 2006. *Id.* at 3. Mohan suggests that the expansion of credit in recent years has been funded by banks "unwinding their surplus investments in government securities." *Id.*

As discussed below, professional and informal moneylenders continue to play a significant role in the nation's economy.[41] Yet much of the increase in consumer lending has been from banks and other non-bank financial institutions. The percentage of the debt of urban households held by institutional lenders increased consistently since 1981—totaling 60% of household indebtedness in 1981, 72% in 1991, and 75% in 2002.[42] It appears that revolving consumer credit facilities, especially the use of credit cards, are helping to fuel this trend.[43] International credit card companies like Visa and Mastercard and their related lenders have identified India as one of the most promising of emerging markets. Before the recent global economic crisis, there were 28 million credit cards in the

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41. *See infra* notes 102–06 and accompanying text. When last measured, these lenders were responsible for 29.6% of credit extended to rural households and 14.1% of credit extended to urban households. The most common of these relatively informal lenders are pawnbrokers, followed in significance by input suppliers, "commission agents," "kirana shopkeepers," and "lenders against land." RBI, *Report of the Technical Group*, *infra* note 98. They tend to lend for short terms, and the proceeds of their loans are often used for consumption, farming, and social obligations (e.g., weddings, births, deaths). *See Household Indebtedness in India*, *supra* note 33, at 32. Most of their loans are secured by jewelry and interests in land (including cultivation rights), but many are effectively unsecured. *See id*.

42. *Household Indebtedness in India*, *supra* note 33, at 25. The share of lending to rural households remained steady over this period and actually decreased in 2002 (61%, 64%, and 57% in 1981, 1991, 2002, respectively). *Id.* The most active lenders to Indian households include cooperative societies and cooperative banks (who hold 27.3% of debt owed by rural households and 20.5% of debt owed by urban households); commercial banks (24.5% and 29.7%); government entities (2.3% and 7.6%); non-bank financial institutions (1.1% and 7%); "agricultural money lenders" (10% and .9%); professional money lenders (19.6% and 13.2%); traders (2.6% and 1%); and relatives & friends (7.1% and 7.6%). *Id.* at 29. Poorer households tend to borrow from non-institutional lenders; richer ones tend to borrow from institutional lenders. *Id.* at 18–19. The rates that households pay for credit vary significantly, depending upon their demographic characteristics, income, and the type of creditor they borrow from. Most rural borrowers pay rates between 12% and 25%, and most urban borrowers pay less than that—between 6% and 20%. *Id.* at 34. Non-institutional lenders charge significantly higher rates—40% of non-institutional lenders charge 30% plus; 32% of non-institutional urban lenders charge rates in that range. *Id.*

43. As the McKinsey Group notes, "There has been a four-fold increase in credit-card penetration in India, from 2.5% in 2001 to 8.1% in 2005." JONATHAN ABLETT ET AL., MCKINSEY GLOBAL INST., THE 'BIRD OF GOLD': THE RISE OF INDIA'S CONSUMER MARKET 55 (2007), *available at* http://www.mckinsey.com/mgi/publications/india_consumer_market/index.asp.

country; after a sharp drop in cards in the Indian economy, the number of cards began to rise again, reaching 19.3 million.[44]

Despite these large numbers, however, credit card penetration rates are relatively low in India compared to other comparable developing economies, especially others in its region.[45] This reflects the broader fact that while the overall amount of consumer borrowing has increased dramatically in recent years, the incidence of indebtedness among Indian households—the percentage of households that are indebted—is still relatively low.[46] Furthermore, while debt-to-asset ratios for Indian households that report borrowing money are rising for all Indian households except self-employed urban households,[47] they are also relatively low.[48] The facts suggest that there is potential for significant expansion of consumer borrowing in India in the future, especially as the number of households at poverty level in that country decreases.

II. The Regulatory Framework

A variety of legal and regulatory reforms, especially reforms made over the last decade or so, appear to have helped facilitate India's general economic expansion and the growth of consumer finance in that country. This Part notes some of the most important policies and legal developments that have helped spur the expansion of consumer finance in that country. It also describes some of the policies and legal regimes that India has adopted to limit the costs of increasing availability of consumer finance, especially over-indebtedness. This Part concludes that Indian policymakers have thus far been more attentive to expanding consumer financial markets than to limiting the resulting costs of that expansion.

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44. Sudeep Jain, *Credit Card Base Base UP After 18 Months*, BUS. STAND., June 14, 2010, *available at* http://www.business-standard.com/india/news/credit-card-baseafter-18-months/398102/.

45. Gaurie Mishra, *Credit Card Use In India Lowest In World*, THE ECONOMIC TIMES, May 31, 2007, *available at* http://economictimes.indiatimes.com/articleshow/2088097.cms (noting that fewer affluent individuals have credit cards in India than in other countries in that region); Victoria Conroy, *Country Survey—India: India's Card Growth Set to Soar*, CARDS INT'L (2007).

46. *See supra* notes 34–35 and accompanying text.

47. *See Household Assets and Liabilities in India*, *supra* note 30, at 40.

48. These ratios are 2.5% and 4.6% for cultivator and non-cultivator rural households, respectively; 2.2% and 3.4% for self-employed and non-self-employed urban households, respectively. *Id.* at 37. But broken down by asset class, this ratio gets much higher for poorer borrowers. *Id.* Not surprisingly, households with the most assets owe most of the country's consumer debt. *Id.*

A. Liberalization of the Indian Financial Sector

As a number of writers have commented, India has followed a somewhat idiosyncratic path of economic development,[49] and that country's experience over the last few decades has indeed been uncommon in many respects. Unlike most other large post-colonial states, India emerged from British control with many institutions that development economists have identified as preconditions for economic growth.[50] It

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49. *See, e.g.*, Kalpana Kochhar, Utsav Kumar, Raghuram Rajan, Arvind Subramanian, & Ioannia Tokatlidis, *India's Pattern of Development: What Happened, What Follows?*, 36 (IMF, Working Paper WP/06/22, Jan. 2006); Ablett et al., *supra* note 43, at 23. While India has enjoyed growth in manufacturing, trade, and foreign investment, it is lagging behind other developing economies in each of these categories. The service sector (which includes information technology services) appears to be driving growth in the country's gross domestic product. *See* Raghbendra Jha, *The Political Economy of Recent Economic Growth in India*, 4 (Austral. South Asia Research Ctr., Working Paper 2004/12, 2004) [hereinafter Jha, *FDI Flows*], *available at* http://rspas.anu.edu.au/papers/asarc/2004_12.pdf; Ablett et al., *supra* note 43, at 24. *See also* Reserve Bank of India, *Annual Policy Statement for the Year 2007–2008*, at 3 (2007) [hereinafter RBI, *Annual Policy Statement 2007–2008*], *available at* http://www.rbi.org.in/SCRIPTs/NotificationUser.aspx?Id=3445&Mode=0; *Asian Development Outlook 2007*, *supra* note 15, at 170. Growth in services is not just, or even primarily, a result of the country's growing information technology sector. *See* James Gordon & Poonam Gupta, *Understanding India's Services Revolution*, 9 (2003), *available at* http://www.imf.org/external/np/apd/seminars/2003/newdelhi/gordon.pdf. In fact, the banking sector is one of the fastest growing sectors. *Id*. According to conventional theories of development economics, economic development requires structural transformations that generally unfold in a predictable sequence—services are conventionally supposed to comprise a relatively small part of the economy of a developing state and then a larger part as the state's economy grows. *See id.* at 4–6. *See also* JAMES M. CYPHER & JAMES L. DIETZ, THE PROCESS OF ECONOMIC DEVELOPMENT 299 (2d ed. 2004) (citing Gustav Ranis, *Challenges and Opportunities Posed by Asia's Superexporters: Implications for Manufactured Exports from Latin America*, Q. REV. ECON. & BUS. 21 (1981)); World Bank, *The East Asian Miracle*, World Development Report (1993)). India's stronger states are arguably "skipping a stage" by fostering high growth in the service sector. Kochhar et al., *supra* note 49, at 26; Gordon & Gupta, *supra* note 49, at 7–8.

50. *See* Kochhar et al., *supra* note 49, at 27; John Williamson & R. Zagha, *From Hindu Rate of Growth to the Hindu Rate of Reform,* 2 (Stanford Univ. Ctr. for Research on Econ. Dev. & Policy Reform, Working Paper No. 144, 2002). The importance of human and social institutions is a major theme in contemporary development theory. Early theorists in this vein include Clarence Ayres and Gunnar Myrdal. CYPHER & DIETZ, *supra* note 49, at 171–77. More recently, the work of Douglass North has made enormous contributions in this direction. *See, e.g.*, DOUGLASS C. NORTH, THE ECONOMIC GROWTH OF THE UNITED STATES 1790 TO 1860 (W.W. Norton & Company, Inc., 1961); DOUGLASS C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE (1990). *See also* Douglass C. North, Economic Performance Through Time, Nobel Prize Lecture (Dec. 9, 1993), *available at* http://nobelprize.org/nobel_prizes/economics/laureates/1993/north-lecture.html. Official

was an advanced democracy with a relatively effective education system, experienced civil servants, a nationwide railroad system, and a functioning judiciary.[51] Despite its enviable array of relatively advanced institutions, India did not enjoy strong economic growth in the decades after its independence.[52] In this period, through the 1970's, India's rate of growth was not only disappointing given its institutional endowments, it underperformed compared to other developing countries with weaker institutions.[53] The conventional explanation for this economic performance is that, post-independence, economic growth in India was hampered by rigid government controls over the economy.[54]

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development organizations have largely adopted this focus. *See, e.g.*, World Bank, *The State in a Changing World*, World Development Report (1997) (articulating an institutional approach to economic development).

51. Today, India is the world's most populous democracy. With a population of just over one billion citizens, it has a constitutional, federal system of government. THE WORLD FACT BOOK: INDIA, *supra* note 14. India's constitution provides for a federal government with separation of powers between legislative, judicial, and executive branches. *Id.* The nation is comprised of twenty-eight states and seven territories, governed by a bicameral legislative body at the national level, and the separate states also have legislative bodies of their own. *Id.* Like other legal systems based on the English model, India has a common law legal system, but also has extensive legislative schemes at the national and state levels. *Id.* There is a national supreme court and each state has its own high court as well. *Id.*

52. Dani Rodrik & Arvind Subramanium, *From "Hindu Growth" to Productivity Surge: The Mystery of the Indian Growth Transition*, 3 (IMF, Working Paper No. 04/77, 2004) [hereinafter Rodrik & Subramanium, *Hindu Growth*], *available at* http://www.imf.org/external/pubs/cat/longres.cfm?sk=17313.0; Williamson & Zagha, *supra* note 50, at 2; Dani Rodrik & Arvind Subramaniam, *Why India Can Grow at Seven Percent a Year or More: Projections and Reflections*, 39 ECON. & POL. WKLY., 1591 (2004).

53. Kochhar et al., *supra* note 49, at 17 (noting that in the early 1980's India did not use enough available labor and employed capital inefficiently). As an aside, India is often said to have experienced a "Hindu" rate of growth in this period. This phrase seems ill-chosen, and hopefully it will lose its currency.

54. Under the leadership of Jawaharlal Nehru and Indira Gandhi, India became a quasi-communist/socialist state. In 1954, India's legislature explicitly committed the nation to socialism. *See* Williamson & Zagha, *supra* note 50, at 3. For an excellent general history of the country since independence, see RAMACHANDRA GUHA, INDIA AFTER GANDHI: THE HISTORY OF THE WORLD'S LARGEST DEMOCRACY (2007). India's policies in this era have been characterized as combining Soviet-style industrialism, British-style trade unionism and welfare-statism, and colonial socio-economic stratification. *See generally* Ramgopal Agarwala & Zafar Dad Khan, *Labor Market and Social Insurance Policy in India: A Case of Losing on Both Competitiveness and Caring*, World Bank (1997), *available at* http://siteresources.worldbank.org/WBI/Resources/wbi37168.pdf. Others have described India's socialism as similar to Fabian socialism, in contrast to Marxism, it "aimed not to destroy capitalism but merely to mitigate the social ills it caused." Tarun Khanna & Yasheng Huang, *Can India Overtake China?*, FOREIGN POLICY, July-Aug.,

In the 1980's, India began a transformative period of liberalization. The initial round of reforms instituted by Indian policy-makers in the 1980's was designed to make it easier to conduct business in the country by loosening at least some of the government's controls on economic activity.[55] The major reforms of that period allowed more imports and foreign investment; increased the number of goods that were subject to open licensing; liberalized access to credit; improved tax incentives for export ventures; relaxed licensing requirements for domestic industrial activities; and removed some price controls for commercial inputs (like cement and aluminum).[56] This initial round of reforms was thus largely internally focused and was arguably the product of domestic political pressures.[57] These seemingly modest reforms are often overlooked,[58] but they appear to have been consequential—both in economic effect and in building political support within the polity for liberalization in general.[59]

India experienced another important, and much more prominent, round of legal reforms in the 1990's that further loosened government control of the economy.[60] If the earlier reforms were pro-business, the reforms of

2003, at 76. Most sectors of the economy, including the banking sector, were nationalized to some extent; prices and production policies were centrally determined; financial firms enjoyed little operational discretion, and foreign investment was largely excluded from the economy. Williamson & Zagha, *supra* note 50, at 3 (noting that banks were nationalized in the 1960's and 1970's).

55. Kochhar et al., *supra* note 49, at 18–19 (discussing India's economic reforms of the 1980's); Williamson & Zagha, *supra* note 50, at 1, 7 (noting that contemporary Indian growth started in the 1980's—additional growth in the 1990's was modest). For a discussion of the conditions that led to the India reforms of the 1980's, see Williamson & Zagha, *supra* note 50, at 6–7 (noting that these reforms were made in the wake of a sizeable IMF loan and were the product of self-imposed conditionality for the IMF loan). *See also* Praveen Chaudry, Vijay Kelkar & Vikash Yadav, *The Evolution of 'Home-Grown Conditionality' in India: IMF Relations*, 40 J. DEV. STUD. 59, 59–81 (2004).

56. Kochhar et al., *supra* note 49, at 18–19; Williamson & Zagha, *supra* note 50, at 7. In the late 1980's the transport/trucking industry was largely liberalized, which had far-reaching effects on the Indian economy. *See id*.

57. *See* Rodrik & Subramanium, *Hindu Growth*, *supra* note 52, at 25 (describing these reforms as "internal liberalization").

58. *See* Williamson & Zagha, *supra* note 50, at 7 (observing that the growth normally associated with the reforms of the 1990's actually began in the 1980's).

59. *See id*.

60. *See* John Armour & Priya Lele, *Law, Finance, and Politics: The Case of India*, LAW & SOC'Y. REV. 491, 492 (2009); Kochhar et al., *supra* note 49, at 18–19; Khanna & Huang, *supra* note 54, at 77–78. These reforms were largely spurred by a near-financial crisis and a looming default on external obligations. This near-crisis of the early 1990's was arguably the product of flaws in the development and reform policies of the 1980's discussed above. *See* Williamson & Zagha, *supra* note 50, at 8.

the 1990's were more generally pro-market.[61] These reforms further dismantled industrial licensing requirements; eliminated public sector monopolies in certain industries; allowed for an increase in foreign direct investment and foreign portfolio investments; liberalized the terms of India's trade abroad, including the lowering of tariffs and the elimination of import-licensing requirements; and, as discussed below, altered the regulation of financial services in various ways.[62]

Liberalizing the country's financial services involved reversing the nationalization of the banking sector. In 1991, domestic public sector banks controlled nearly all of the country's deposits, the government set interest rates, and banks' use of funds was largely predetermined.[63] In recent years, the market share of private banks has increased,[64] and the state-controlled banks are now at least partly open to private investors.[65] Banks also enjoy significantly more operational freedom than they did twenty years ago,[66] and rates that banks can charge for credit have been largely deregulated.[67]

The process of liberalization also included a set of reforms to allow more foreign participation in the financial sector. The Reserve Bank of India, which has regulatory authority over banks and other non-bank in-

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61. *See* Kochhar et al., *supra* note 49, at 5–7, 18–19 (making the pro-business/pro-market distinction). Before 1991, "India had one of the world's most controlled investment regimes." Williamson & Zagha, *supra* note 50, at 3. Before 1991, only the government could invest in certain sectors, including coal, power, telecommunications, insurance, mining, and oil. Government approval was required for investment in industrial firms. Nearly 1,000 goods could only be produced by "small-scale" companies. Foreign investment "was banned from some sectors," and foreign-owned firms were only allowed domestic financing. *Id.* at 3–4.

62. *See* Kochhar et al., *supra* note 49, at 18–19; Williamson & Zagha, *supra* note 50, at 8–9. Foreign direct investment involves ownership of assets in another country, and foreign portfolio investment involves investment in or lending to a foreign venture. CYPHER & DIETZ, *supra* note 49, at 410. The reforms included currency devaluation and reduction in public expenditures, and also included significant reforms of the tax system. *See* Williamson & Zagha, *supra* note 50, at 8.

63. *See* Williamson & Zagha, *supra* note 50, at 4–6; Christian Roland, *Banking Sector Liberalization in India*, 3–4 (2006) (unpublished article), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=877811.

64. *See* Roland, *supra* note 63, at 10.

65. INDIA COUNTRY FINANCE 2006, *supra* note 1, at 11 (noting that private investment cannot exceed 49% of the state controlled banks' capital).

66. *Id*.

67. Loans for over Rs. 200,000 can be made at market rates; loans for less than that amount cannot exceed banks' "prime lending rate," but are otherwise unregulated. *See* ECONOMIST INTELLIGENCE UNIT, INDIA COUNTRY FINANCE 2009, at 9 (2009) [hereinafter INDIA COUNTRY FINANCE 2009]; Roland, *supra* note 63, at 5.

stitutions, began to allow foreign bank branches in the early 1990's.[68] Under pressure from abroad, it has committed to allow a handful of new foreign bank branches per year. As of 2009, thirty foreign banks were operating 273 branches in India, and thirty-four other foreign banks were operating representative offices in the country.[69] Foreign banks are now allowed to hold some modest ownership stakes in private and state-owned domestic banks.[70]

While these actions reflect meaningful changes in the architecture of the country's financial sector,[71] that sector is still subject to significant government controls,[72] it is still dominated by state controlled institutions,[73] and foreign participation in the sector remains relatively modest.[74] For example, foreign banks with domestic branches are prohibited

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68. *See* INDIA COUNTRY FINANCE 2006, *supra* note 1, at 17.

69. INDIA COUNTRY FINANCE 2009, *supra* note 67, at 15.

70. *See infra* notes 75–76 and accompanying text.

71. *See* Khanna & Huang, *supra* note 54, at 78 (arguing that capital markets and legal systems are more advanced in India than in China).

72. INDIA COUNTRY FINANCE 2009, *supra* note 67, at 9 ("Domestic banks must devote at least 40% of their loan portfolio to designated priority sectors . . . and 12% to export financing . . . . Foreign banks are required to lend 32% of net credit to priority sectors . . . . "); Roland, *supra* note 63, at 5.

73. INDIA COUNTRY FINANCE 2009, *supra* note 67, at 12 (noting that "[India's] 28 state-owned banks . . . controlled 69.9% of assets in the [financial] sector . . . . ").

74. These limitations on foreign investment in India's financial sector reflect the relatively low rate of foreign investment in India in general. Although there was a flurry of increased foreign investment in the Indian economy in the 1990's, *see* INDIA COUNTRY FINANCE 2006, *supra* note 1, at 5–6, the country still attracts relatively little foreign investment compared to other developing countries. *See* Raghbendra Jha, *Recent Trends in FDI Flows and Prospects for India*, 1–2 (Austl. Nat'l Univ. Working Paper, Aug. 2003), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=431927; Rohit Sachdev, Note, *Comparing the Legal Foundations of Foreign Direct Investment in India and China: Law and the Rule of Law in the Indian Foreign Direct Investment Context*, 2006 COLUM. BUS. L. REV. 167, 168 (2006) (noting that China does better with FDI). *See also* Ablett et al., *supra* note 43, at 23. For a good summary of "incoming direct investment," see INDIA COUNTRY FINANCE 2009, *supra* note 67, at 45. The United States is the largest investor in India. *See* Jha, *FDI Flows*, *supra* note 49, at 5. This relatively low rate of foreign investment is due in large part to direct legal constraints. India's regulation of foreign investment continues to be robust and complex. Sachdev, *supra* note 74, at 169, 187–90. *See also* INDIA COUNTRY FINANCE 2009, *supra* note 67, at 45. For a good discussion of the regulatory role of the RBI and the Ministry of Finance, see INDIA COUNTRY FINANCE 2006, *supra* note 1, at 6–9. In fact, recent legislative acts in India appear to tighten some restraints on foreign investment, Sachdev, *supra* note 74, at 195–96, and the Congress Party appears to be slowing down some recent efforts to attract foreign investment. *See* INDIA COUNTRY FINANCE 2006, *supra* note 1, at 5. It is worth noting, however, that India's relative insulation from international capital markets is credited for helping

from owning more than 5% of the equity of another bank.[75] Foreign direct investment in domestic private banks is limited to 10% per investor (or related group) and total foreign direct investment in any domestic bank cannot exceed 74% of ownership.[76] Largely due to these various limitations and strong competition from new private domestic banks,[77] some foreign banks actually began leaving the market for financial services in India in the period before the current crisis.[78] And, responding to the global economic crisis, the Reserve Bank of India stated in 2009 that it would temporarily halt efforts to increase foreign banks' presence in the country.[79]

India has also liberalized its financial sector by adopting a set of reforms that enable lenders in India to enforce their obligations more quickly and predictably.[80] A growing body of scholarship supports the basic claim that effective legal protections for lenders and investors tend to promote economic growth.[81] In the absence of such mechanisms, returns on investment are more uncertain, which increases the cost of capital or makes it altogether unavailable. Thus, legal regimes like bankrupt-

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the country weather the recent global crisis. INDIA COUNTRY FINANCE 2009, *supra* note 67, at 3.

75. INDIA COUNTRY FINANCE 2006, *supra* note 1, at 14.

76. *Id*.

77. *See* INDIA COUNTRY FINANCE 2006, *supra* note 1, at 16. Twelve new private domestic banks have been licensed by the Reserve Bank since 1993. *Id.*

78. *See id.* at 15 (including chart of top 10 foreign banks).

79. INDIA COUNTRY FINANCE 2009, *supra* note 67, at 15.

80. *See* INDIA COUNTRY FINANCE 2006, *supra* note 1, at 12; V. Gopalakrishna & S. Ravi, *Legal Framework for Housing Finance: An Appraisal*, 5 ICFAI J. BANKING L. 9 (2007); Anshu S. K. Pasricha, Comment, *On Financial Sector Reform in Emerging Markets: Enhancing Creditors' Rights and Securitizing Non-performing Loans in the Indian Banking Sector—An Elephant's Tale*, 55 BUFF. L. REV. 325 (2007); Sumant Batra, *Insolvency Laws In South Asia: Recent Trends and Developments*, OECD (2006) [hereinafter Batra, *Insolvency Laws In South Asia*], *available at* http://www.oecd.org/dataoecd/42/14/38184124.pdf (summarizing recent developments in India); SUMANT BATRA, THE INDIAN INSOLVENCY REGIME, NORTON ANNUAL SURVEY OF BANKRUPTCY LAW (2004) [hereinafter BATRA, THE INDIAN INSOLVENCY REGIME].

81. For an excellent recent treatment of this general topic, see KENNETH W. DAM, THE LAW-GROWTH NEXUS: THE RULE OF LAW AND ECONOMIC DEVELOPMENT (2006). *See also* Raphael La Porta, Florencio Lopez-de-Silanes, Andrei Shleifer & Robert W. Vishny, *Legal Determinants of External Finance*, 52 J. FIN. 1131 (1997), *available at* http://www.edhec-mba.com/mailing/drd/flds/legaldeterminantsofexternalfinance.pdf; Raphael La Porta, Florencio Lopez-de-Silanes, Andrei Shleifer & Robert W. Vishny, *Law and Finance*, 106 J. POL. ECON. 1113 (1998) [hereinafter LaPorta et al., *Law and Finance*], *available at* http://www.economics.harvard.edu/faculty/shleifer/files/law_finance.pdf.

cy law[82] and related doctrines that protect, or at least clarify, lenders' interests when their borrowers default or suffer financial distress, are considered particularly important for promoting lending and investment in a developing economy. But simply adopting a scheme of formal rules is not sufficient for this purpose, and a functioning judicial or administrative system is a basic precondition for enforcement of formal rules.[83]

In 1993, the Indian parliament passed the Recovery of Debts Due to Banks and Financial Institutions Act, which created a system of debt recovery tribunals.[84] Pursuant to that Act, domestic banks and non-bank financial institutions[85] can file applications with one of the debt recovery tribunals to recover debts greater than one million rupees (approximately

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82. *See generally* DAM, *supra* note 81; LaPorta et al., *Law and Finance*, *supra* note 81. A bankruptcy regime can help lenders, especially commercial lenders, in part by solving a collective action problem. By staying a race to collect assets from a troubled debtor, bankruptcy law can help avoid the liquidation of firms that have a relatively high going-concern value. *See, e.g.*, THOMAS H. JACKSON, THE LOGIC AND LIMITS OF BANKRUPTCY LAW 7-19 (Harvard University Press 1986). It can also hasten the resolution of a debtor's liquidation, when necessary, so that assets are not wasted by a failing enterprise. Effective protection of creditors is widely thought to be particularly important for countries making a transition away from a planned economy. *See, e.g.*, Alexander Biryukov, *Ukrainian Bankruptcy Law in the Context of Regional and International Developments*, 13 ANN. SURV. INT'L & COMP. L. 13 (2007); Charles Booth, *Drafting Bankruptcy Laws in Socialist Market Economies: Recent Developments in China and Vietnam*, 18 COLUM. J. ASIAN L. 93 (2004) [hereinafter Booth, *Drafting Bankruptcy Laws*]; Rupinder Singh Suri, *The New Insolvency Regime: J.J. Irani Expert Committee Report with Special Emphasis on Reconstruction & Winding-up*, at 67 (2005), *available at* http://www.insolindia.com/papers.htm.

83. *See, e.g.*, Mathieu Chemin, *Decoding the Code of Civil Procedure: Do Judiciaries Matter for Growth?* (Centre Interuniversitaire sur le Risque, les Politiques Economiques et l'Emploi, Working Paper No. 07-26, 2007), *available at* http://www.cirpee.org/fileadmin/documents/Cahiers_2007/CIRPEE07-26.pdf.

84. There are twenty-nine debt-recovery tribunals and five appellate tribunals for bank and non-bank financial institution cases across the country. INDIA COUNTRY FINANCE 2006, *supra* note 1, at 12.

85. The designation of non-bank financial institutions is a bit confusing, because it seems to be used to refer to two different categories of institutions. The first category includes a handful of large institutions (the Financial Institutions), that provide a relatively large amount of credit to development projects across the country. These are generally state development banks. The Reserve Bank of India has apparently been trying to merge these institutions with existing banks. Another category includes many, much smaller, private companies that provide a wide range of financial activities other than taking deposits. These are most often described as non-bank financial companies. Both appear to be subject to regulation by the Reserve Board of India. The Reserve Bank of India recently required the NBFC's to register with it.

$22,000).[86] While these tribunals appear to represent an improvement in the enforceability of obligations, they are still apparently quite slow and unpredictable.[87] Responding in part to frustration with these newly created debt recovery tribunals, the Indian parliament adopted the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Act of 2002 to enable banks and financial institutions to enforce security interests without court intervention in some circumstances.[88] This Act applies to obligations greater than Rs.100,000 (approximately $2,200) for which over 20% of the obligation is unpaid.[89]

The Indian legislature also recently reformed the country's laws dealing with corporate liquidations and reorganizations by amending the country's Companies Act and repealing the Sick Industrial Companies Act ("SICA").[90] The SICA had created a Board for Industrial and Financial Reconstruction to oversee reorganization of corporations facing financial distress.[91] Despite that earlier reform, it was recently estimated that the average corporate insolvency process in India takes a decade.[92] The new legislation, which has not yet taken effect, will replace the Board with a National Company Law Tribunal that will have authority to resolve both liquidations and reorganizations.[93] Indian banks and the Reserve Bank of India have also created a voluntary corporate debt restructuring scheme.[94]

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86. BATRA, THE INDIAN INSOLVENCY REGIME, *supra* note 80, pt. II. The Tribunal adjudicates claims and then executes judgments by selling a debtor's assets pursuant to broad powers of attachment and injunction. *Id.*

87. *Id*.; Batra, *Insolvency Laws In South Asia*, *supra* note 80.

88. Pursuant to the Act, a secured bank or financial institution must give a defaulting debtor sixty days to satisfy its obligation; thereafter, the lender can, among other things, take over the asset, take over the borrower's business, or appoint a manager for the assets. *See* Securitisation and Reconstruction of Financial Assets and Enforcement of Security Act of 2002, ch. 3, § 13, *available at* http://www.drat.tn.nic.in/Docu/Securitisation-Act.pdf. In such a case, the debtor can appeal to a debt recovery tribunal. *See* Gopalakrishna & Ravi, *supra* note 83.

89. *See* Karan Singh, *India: The Need for Reform*, INT'L FIN. L. REV., Mar. 1, 2009, *available* at http://www.iflr.com/Article/2166570/India-The-need-for-reform.html.

90. BATRA, THE INDIAN INSOLVENCY REGIME, *supra* note 80, pt. II; Batra, *Insolvency Laws In South Asia*, *supra* note 80, § 1, at 4.

91. Batra, *Insolvency Laws In South Asia*, *supra* note 80, § 1, at 4. This Board effectively shares jurisdiction for corporate reorganizations with the national court. *Id*.

92. *See* Sachdev, *supra* note 74, at 199; Batra, *Insolvency Laws In South Asia*, *supra* note 80, at § 3; World Bank, *Doing Business in 2005, Removing Obstacles to Growth*, *A Report from the World Bank*, at 69 (2005) [hereinafter World Bank, *Doing Business*], *available at* http://www.doingbusiness.org/documents/DoingBusiness2005.PDF.

93. *See* World Bank, *Doing Business*, *supra* note 92, at 70. The Tribunal will sit in ten locations across the country.

94. *See* Singh, *supra* note 89.

While these various reforms should further improve the enforceability of obligations and thus promote lending, they have significant structural limitations. For example, banks and financial institutions with relatively small claims are not covered by the 1993 Recovery of Debts Act; they must still sue in the civil courts under the Civil Code to enforce their security interests.[95] And creditors that are not banks or financial institutions must also resort to the civil courts of more general jurisdiction.[96] Although the Civil Code was amended in 2002 to improve its efficiency,[97] it appears that there is a serious backlog of cases in the civil courts, causing significant delays.[98]

B. Effect of Liberalization on Consumer Finance

The broader liberalization of financial markets in India has presumably supported the recent growth in that country's consumer financial markets. As an initial matter, some consumer transactions in India fall within the scope of the general reforms described above.[99] In addition, policymakers in that country have adopted a variety of policies more directly designed to expand formal consumer financial markets. Perhaps most significantly, the Indian government recently established the nation's

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95. *See* BATRA, THE INDIAN INSOLVENCY REGIME, *supra* note 80, pt. II. These courts have many of the same powers as the debt recovery tribunals; it appears that they have larger caseloads than the tribunals, however, and may lack expertise in debt recovery or enforcement.

96. *See* BATRA, THE INDIAN INSOLVENCY REGIME, *supra* note 80, pt. II.

97. *See* Mathieu Chemin, *Does Judicial Quality Shape Economic Activity? Evidence from a Judicial Reform in India* (Centre Interuniversitaire sur le Risque, les Politiques Economiques et l'Emploi, Working Paper No. 07-25, 2007), *available at* http://www.cirpee.org/fileadmin/documents/Cahiers_2007/CIRPEE07-25.pdf.

98. Mathieu Chemin, *Decoding the Code of Civil Procedure: Do Judiciaries Matter for Growth?*, 3 (Centre Interuniversitaire sur le Risque, les Politiques Economiques et l'Emploi, Working Paper No. 07-26, 2007) ("The speed of the judiciary has been identified as a key problem in India."). *See also* Reserve Bank of India, *Report of the Technical Group To Review Legislation On Money Lending*, at 45 (2007) [hereinafter RBI, *Report of the Technical Group*], *available at* http://rbidocs.rbi.org.in/rdocs/PublicationReport/pdfs/78893.pdf; World Bank, *Doing Business*, *supra* note 92, at 65.

99. Empirical data about these reforms is not available, but there are reasons to believe that they have improved the enforceability of consumer obligations. Although they appear to have been directed at commercial lenders, both sets of reforms reach at least some consumer transactions. The debt recovery tribunals should be available for consumer loans greater than one million rupees. Banks and financial institutions that lend to consumers can enforce their security agreements without court intervention.

first credit bureau, the Credit Information Bureau of India ("CIBIL").[100] After a few years of operations, CIBIL has over 144 million records.[101]

Policymakers have also made various efforts to draw consumers and households into the formal economy and away from informal, largely unregulated sources of finance. A wide variety of "indigenous" lenders and informal financial institutions have long played a major role in the consumer economy.[102] There is some evidence that, compared to more formal institutions, moneylenders are better able to serve certain borrowers and to recover obligations from these borrowers; as a result, they often have relatively lower costs of conducting business.[103] Interestingly, moneylenders continue to thrive in India in part because they will lend for consumption purposes when formal lenders are less willing to do so.[104] Some policymakers continue to be concerned, however, that borrowing from moneylenders is inefficient, that many moneylenders are unscrupulous, and that consumer lending should be conducted by entities subject to more rigorous regulation.[105]

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100. INDIA COUNTRY FINANCE 2006, *supra* note 1, at 9. CIBIL was incorporated in 2001 and was restructured in 2005; its ownership is currently divided between the State Bank of India, various other domestic and foreign banks, Dun & Bradstreet, and Trans Union International. *Id.* As reflected by the Credit Information Companies (Regulation) Act of 2005, India is trying to spur the development of additional credit reporting entities. *See* RBI, *Annual Policy Statement 2007–2008*, *supra* note 49, at 59; INDIA COUNTRY FINANCE 2006, *supra* note 1, at 9.

101. *See News & Events, Updates*, CIBIL, http://www.cibil.com/updates.htm (last visited Nov. 1, 2010).

102. *See* INDIA COUNTRY FINANCE 2006, at 4–5.

103. *See id.* at 25.

104. *See id.* at 34.

105. *See, e.g.*, Mihir Shah, *The Crowning of the Moneylender*, THE HINDU, Sept. 1, 2007, *available at* http://www.thehindu.com/2007/09/01/stories/2007090155971000.htm. Unlike banks and other formal non-bank financial companies, moneylenders are generally not regulated by the Reserve Bank of India. In 2006, the Reserve Bank of India formed a "Technical Group" to review the economic function and the regulation of this group of lenders. *See* RBI, *Report of the Technical Group*, *supra* note 98, at 1. As described below, regulation of moneylending is primarily vested in the state governments. The Group discovered significant variation in the regulations that different states have adopted, but noted certain common regulatory approaches. These commonalities include licensing requirements for moneylending; accounting duties to borrowers; penalities for aggressive debt collection activities; and rate regulations. *Id.* at 17. Not all states impose rate ceilings, however. *Id.* at 19 n.46. Many moneylenders refuse to register or become licensed and therefore are truly part of the informal economy. *See id.* at 35–36. The Group proposed model legislation of moneylending for state governments to consider adopting. The model legislation includes, among other things, provisions to promote registration of lenders; rate regulations (in the form of adjustable ceilings set by the state governments); use of alternative dispute resolution processes (like Lok Adalat and Nyaya Panchayat) or

As a result of this ambivalence, policymakers have adopted various strategies toward moneylenders in recent decades, some designed to "mainstream" moneylenders and others apparently designed to drive them out of business.[106] A primary strategy policymakers have employed to remove moneylenders from the market is to promote and subsidize more formal credit services to low-income households. Thus, for example, the Indian government has subsidized commercial banks to enable some institutions lending to rural households to offer credit at a relatively low rate of interest.[107] Another example of this effort is the introduction of Kisan credit cards by state-controlled banks. These cards enable farmers to borrow for production on relatively generous terms.[108]

Policymakers have also promoted the development and formalization of microfinance institutions[109] to draw consumers away from money-

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"fast-track" judicial procedures; and promotion of links between moneylenders and banks (by creating a category of "accredited loan providers"). *Id.* at 41–57. Some commentators argue that policy-makers should promote links between moneylenders and the formal banking sector by encouraging banks to finance the lenders or use them as "loan providers." *Id.* at 25–29 (discussing, among others, R. Vaidyanathan, *Why the Financial System Must Legitimise Moneylenders*, THE HINDU, Oct. 19, 2006, *available at* http://www.thehindubusinessline.com/2006/10/19/stories/2006101900041000.htm). These proposals lean in the direction of drawing moneylenders into the formal financial sector, i.e., into the mainstream. *See* Shah, *supra* note 105 (criticizing the Group's report).

106. *See* RBI, *Report of the Technical Group*, *supra* note 98, at 4 (quoting Dr. Manmohan Singh, Prime Minister of India, Address at the Second Agricultural Summit (Oct. 18, 2006)).

107. *Id.* at 9 (quoting Dr. Y.V. Reddy, Governor of the Reserve Bank of India, Lecture at the Center for Economic and Social Studies, Ameerpet, Hyderbad (Dec. 16, 2006)).

108. *Id.* at 8.

109. This Article distinguishes microfinance from formal consumer finance, which is generally provided to individuals who are already earning some income and/or already have some assets to pledge as security. This distinction is admittedly somewhat arbitrary and imperfect, and it is made here to delineate a particularly important phenomenon: the emergence of formal consumer financial markets in India and elsewhere. To be clear, however, most microfinance institutions are formal legal entities. Some in India are quite large; some of the largest are non-bank financial companies subject to regulation by the Reserve Bank of India while smaller microfinance institutions may be organized as trusts or cooperative societies. *See* RBI, *Report of the Technical Group, supra* note 98, at 9. Because of India's controls on ownership and investment in the financial sector, *see supra* notes 72–76 and accompanying text, and because non-banks are not allowed to mobilize deposits, most Indian microfinance institutions are funded by loans from larger commercial banks or from development banks. *See* Microfinance Information Exchange, *Benchmarking Asian Microfinance 2005*, at 6 (Nov. 2006), *available at* http://www.themix.org/sites/default/files/MIX_2005_Asia_Benchmarking_Report_EN.pdf. "[I]ndian microfinance providers [are] some of the most highly leveraged institutions globally." *Id.* at 4. The National Bank for Agriculture and Rural Development is an im-

lenders. The government has sought to bring these institutions within the banking sector by linking them to formal institutions.[110] The Reserve Bank of India, for example, increasingly encouraged banks and non-bank financial institutions to link with microfinance institutions and self-help groups to promote "financial inclusion."[111] Information about the actual scale and scope of microfinance in the country is incomplete at best.[112] Many of these institutions do not reliably report their activities.[113] According to one estimate, there were approximately 150,000 active borrowers in 2006, with nearly 110% growth in borrowers over the previous year.[114]

Although they still represent a relatively small portion of the consumer credit market, there is evidence that where microfinance institutions operate, the relative amount of moneylending has dropped, though rates have not.[115] This suggests that these entities may be acquiring some of the clients of moneylenders. If microfinance institutions are, in turn, linked with banks, their expansion represents a gain for the formal financial sector, one that banks might not be able to obtain through branch-

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portant entity in the microfinance sector. It was created by the National Bank for Agriculture and Rural Development Act of 1981 to be a leading development bank. It serves as a financial resource and supervisory body for other public and private rural financial institutions, including many microfinance institutions, self-help groups, and non-governmental organizations that provide small-scale development financing. *See About NABARD,* NAT'L BANK FOR AGRIC. & RURAL DEV. (2007), http://www.nabard.org/majoractivities.asp.

110. *See* RBI, *Report of the Technical Group*, *supra* note 98, at 9.

111. *See* RBI, *Annual Policy Statement 2007-2008*, *supra* note 49, at 55 (citing a study of microfinance). *See also* Mohan, *supra* note 40, at 15 (noting that microfinance can help expand rural credit). *See also* Smt. Usha Thorat, Speech at Pune, Financial Inclusion and Millennium Development Goals, (Jan. 2006), *available at* http://www.bis.org/review/r060126f.pdf (noting the growth of NGO's, SHG's and MFI's and their increased links with banks). Historically, a predominant proportion of consumers of microfinance have been women in rural areas.

112. *See* Microfinance Information Exchange, *Transparency and Performance in Indian Microfinance*, at 1 (2006) [hereinafter *Transparency and Performance in Indian Microfinance*], *available at* http://www.themix.org/sites/default/files/2005%20India%20Microfinance%20Performance%20and%20Transparency%20Report%20-%20English.pdf.

113. Thus, for example, a leading clearinghouse of information about microfinance in India disqualified survey responses by nearly 25% of respondent institutions to its 2004–05 survey. *See Transparency and Performance in Indian Microfinance*, *supra* note 112.

114. *See id.*

115. RBI, *Report of the Technical Group*, *supra* note 98, at 38. Interest rates charged to borrowers from self-help groups range from 18–24%; borrowers from microfinance institutions tend to pay 20–24%. *Id.* at 10.

ing.[116] Furthermore, it appears that major Indian microfinance institutions are sustainable—approximately 80% of microfinance borrowers in the country are borrowing from arguably sustainable institutions.[117]

C. Liberalization and Consumer Protection

If deepening of consumer financial markets can promote growth and development, there are also various costs associated with consumer credit—especially costs of over-indebtedness—that can undermine the benefits of expanding access to credit.[118] As consumer financial markets continue to expand in India, such costs will likely become a more significant concern for policy-makers in that country. There is likely to be a significant amount of class mobility out of poverty in that country in coming years.[119] If so, India's consumer borrowers will increasingly be drawn from populations that had previously been quite poor and unaccustomed to consumer finance and discretionary consumption. These individuals may be particularly susceptible to taking on relatively high levels of debt. In fact, although relevant data is scarce, default rates in the country have increased in recent years.[120] Additionally, there appears to be a significant psychological dimension to financial distress in India, as elsewhere.[121] Most dramatically, many thousands of heavily indebted farmers, especially in the Indian states of Andhra Pradesh, Maharashtra, Karnataka, and Kerala, have committed suicide in recent years.[122] Farmer suicides are not a new phenomenon in India, but they may reflect a general stigma associated with debt and default in India. Debt bondage[123]

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116. V. Leeladhar, *Taking Banking Services to the Common Man—Financial Inclusion*, RBI Bulletin, (Jan. 2006), *available at* http://rbidocs.rbi.org.in/rdocs/Bulletin/PDFs/68236.pdf. The country's branching policy is designed to get more services to rural areas. *See* RBI, *Annual Policy Statement 2007–2008*, *supra* note 49, at 51–52.

117. *See* RBI, *Annual Policy Statement 2007–2008*, *supra* note 49, at 6.

118. *See* Feibelman, *supra* note 8, at 79–81.

119. *See* Ablett et al., *supra* note 43.

120. *See* RBI, *Annual Policy Statement 2007–2008*, *supra* note 49, at 26.

121. *See supra* note 22 and accompanying text.

122. *See, e.g.*, Somini Sengupta, *On India's Despairing Farms, a Plague of Suicide*, N.Y. TIMES, Sept. 19, 2006, at A1 (noting that over 17,000 farmers committed suicide in 2003, the most recent official comprehensive statistic available). These farmers had borrowed to finance small-scale farming operations; slumping prices or unexpected crop losses had left them heavily, hopelessly indebted. *See also* Ablett et al., *supra* note 43, at 88.

123. *See, e.g.*, KEVIN BALES, DISPOSABLE PEOPLE: NEW SLAVERY IN THE GLOBAL ECONOMY 19–20 (University of California Press 1999); Karen E. Bravo, *Exploring the Analogy Between Modern Trafficking in Humans and the Trans-Atlantic Slave Trade*, 25 B.U. INT'L L.J. 207, 275 n.304 (2007).

and imprisonment for debt[124] also appear to be continuing phenomena in India.[125] At the very least, these continuing phenomena—debt-related suicide, bondage, and imprisonment—indicate the need for serious regulatory attention to the social and economic consequences of consumer indebtedness in India.

Although policymakers in India appear to have begun to address some of the consequences of increased consumer indebtedness, the regulatory framework remains much the same as it was before the current era of liberalization. This is especially true at the national level. There is a national usury act in India, the Usurious Loans Act of 1918 ("ULA"), which empowers courts to determine whether an interest rate is excessive "having regard to the risk incurred as it appeared . . . to the creditor at the date of the loan."[126] As discussed below, many Indian states have adopted rate regulations as well.[127] These rate ceilings, in turn, provide a benchmark for claims of excessive interest rates under the ULA.[128] But, as with the difficulties creditors face in enforcing obligations, debtors may face hurdles in asserting rights under the ULA or under state law, which must be done in the civil courts.[129]

Under the Banking Regulation Act of 1949, banks and some other financial institutions are exempt from the ULA and are subject instead to any rate regulations imposed by the Reserve Bank of India.[130] Although the Reserve Bank no longer sets rate ceilings,[131] it has explicitly stated

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124. In 1980, the Supreme Court of India found that imprisonment for debt was unconstitutional. *See* Jolly George Varghese v. Bank of Cochin, A.I.R. 1980 S.C. 470, 475. But this case only extends to cases in which a debtor acts innocently. Thus, if a debtor is found to act in bad faith with respect to a financial obligation, he or she may still be subject to imprisonment.

125. Statistical information on debt bondage and imprisonment for debt are scarce, and it is difficult to determine whether they have been significantly affected—either positively or negatively—by expanding formal markets for consumer finance or regulation thereof. Both are largely rural phenomena, so it is possible that they have not significantly increased as overall household indebtedness has grown. It is also possible that regulatory concerns about over-indebtedness have drawn attention to the underlying factors of debt-related suicides and bondage, leading to reductions in severity of both.

126. Usurious Loans Act, No. 10 of 1918, § 3(2), INDIA CODE, *available at* http://indiacode.nic.in/fullact1.asp?tfnm=191810. The act gives state governments the power to exempt classes of transactions from the act. RBI, *Report of the Technical Group*, *supra* note 98, at 23.

127. *See infra* notes 135–39 and accompanying text.

128. RBI, *Report of the Technical Group*, *supra* note 98, at 19.

129. *See supra* notes 97–98 and accompanying text.

130. RBI, *Report of the Technical Group*, *supra* note 98, at 23.

131. *See supra* note 67 and accompanying text.

that rates can still be usurious or imprudent.[132] And the Reserve Bank has recently issued statements expressing concern that some lenders are charging rates that are too high.[133] This may suggest that there is serious potential for re-regulation of rates for at least some Indian financial institutions. In addition, the Bank recently has issued guidelines for credit card lenders that regulate the process by which credit card lenders set their interest rates.[134]

In addition to this federal regulation, many states have adopted specific interest rate ceilings for moneylenders pursuant to their constitutional authority.[135] At least five states effectively impose the Hindu rule of "damdupat," which provides that "the amount of interest recoverable at any one time cannot exceed the principal."[136] Furthermore, states have adopted broader regulatory schemes affecting particular types of transactions. For example, Tamil Nadu (which includes Chennai, formerly Madras) has adopted a specific regime covering pawnbrokers[137] and one regulating moneylenders that are not within the jurisdiction of the Reserve Bank.[138] That state also recently adopted laws that made it a crime

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132. RBI, *Annual Policy Statement 2007–2008*, *supra* note 49, at 56.

133. *See* Reserve Bank of India, *Complaints about Excessive Interest Charged by Banks*, RBI Notification (2007), *available at* http://rbidocs.rbi.org.in/rdocs/notification/PDFs/77163.pdf; Reserve Bank of India, *Annual Policy Statement 2007-2008*, *supra* note 49, at 56; Reserve Bank of India, *Report of the Working Group to Formulate a Scheme for Ensuring Reasonableness of Bank Charges*, at 18 (Sept. 2006) [hereinafter RBI, *Report of the Working Group*], *available at* http://rbidocs.rbi.org.in/rdocs/Publication Report/Pdfs/72575.pdf (noting that RBI has received complaints of high interest charges).

134. Among other things, the new guidelines require banks to adopt rate ceilings. *See* Reserve Bank of India, *Credit Card Operations of Banks*, RBI Notification (2010) [hereinafter RBI, *Credit Card Operations of Banks*], *available at* http://rbidocs.rbi.org.in/rdocs/notification/PDFs/CCOB090710.pdf.

135. The Constitution of India explicitly grants authority for regulating moneylending to the country's state governments, most of which have adopted specific regulations. RBI, *Report of the Technical Group, supra* note 98, at 16.

136. *Id.* at 23.

137. Tamil Nadu Pawnbrokers Act, 1943, Tamil Nadu Act 23 of 1943. This Act requires, among other things, that pawnbrokers in the state be licensed, *id.* § 3; keep books and give receipts, *id.* § 10; and provide pawn tickets to pawners, *id.* § 7. It also set limits on the interest and fees that they can charge. *Id.* § 6. *See also* Tamil Nadu Pawnbrokers Rules, 1943, § 5.

138. Tamil Nadu Money-Lenders Act, 1957, Act No. 26 of 1957. Among other things, this Act creates a licensing scheme, *id.* § 4; requires that money-lenders keep books and records, *id.* § 9; authorizes the appointment of inspectors, *id.* § 10; and regulates rates that money-lenders can charge, *id.* § 7. The State of Tamil Nadu subsequently extended those regulations with the Tamil Nadu Prohibition of Charging Exorbitant Interest Act, 2003, Act No. 38 of 2003. That Act applies to all persons. Under the Money-Lenders Act, a

for managers of a financial institution not regulated by the Reserve Bank of India to fail to return deposits to depositors.[139]

Until recently, there have been few mandatory disclosure regimes under Indian law. The country has not adopted anything like the Truth In Lending Act, which applies to consumer credit transactions in the United States.[140] In 1986, India did adopt the Consumer Protection Act. The Act does not impose disclosure requirements, but prohibits various types of misrepresentations.[141] More recently, however, Indian policymakers have become more attentive to the benefits of disclosure, and they apparently believe that some disclosures must be mandated. The Reserve Bank of India has required the banking industry to adopt and promulgate a code of fair lending for banks and other financial institutions.[142] The code requires the institutions to disclose the terms of their various services.[143] The Bank has also issued guidelines for credit card lenders that include some disclosure requirements, including a requirement that banks dis-

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moneylender is defined as "a person whose main or subsidiary occupation is the business of advancing and realizing loans." Tamil Nadu Money-Lenders Act § 2(8).

139. *See* Tamil Nadu Protection of Interests of Depositors (in Financial Establishments) Act, 1997, Act No. 44 of 1997. Indicating the growing need for regulation of consumer financial transactions, the Act's introductory statement recites:

> There is a mushroom growth of Financial Establishments not covered by the Reserve Bank of India Act . . . in the State in the recent past with the sole object of grabbing money received as deposits from the public, mostly middle class and poor, on the promise of unprecedented high rates of interest and without any obligation to refund the deposits to the investors on maturity. Many of the Financial Establishments have defaulted to return the deposits on maturity to the public running to crores of rupees and there by inviting public resentment, which created law and order problems in the state.

Id.

140. 15 U.S.C. § 1601 et seq. (2006).

141. *See generally* V.K. AGARWAL, LAW OF CONSUMER PROTECTION (2009). The Act also creates liability for deficiency in consumer goods and services, including financial services. *See id*. at 80–83, 104–05. Thus, deficiency in banking service—e.g., violating a banking regulation or a contractual obligations—can trigger liability under the Act, though the Reserve Bank can presumably override that by providing that a particular action does not violate a bank's obligations. GURJEET SINGH, THE LAW OF CONSUMER PROTECTION IN INDIA 112–13 (1996).

142. This arrangement is arguably an example of industry self-regulation, which became increasingly popular in Indian law in the late 1980's. *See* SINGH, *supra* note 141, at 308–13.

143. *See, e.g.*, Reserve Bank of India, *Guidelines on Fair Practices Code for Lenders*, RBI Notification (2003) [hereinafter RBI, *Guidelines on Fair Practices Code for Lenders*], *available at* http://rbidocs.rbi.org.in/rdocs/notification/PDFs/36102.pdf; Reserve Bank of India, *Guidelines on Fair Practices Code for Non-Banking Financial Companies*, RBI Notification (2006), *available at* http://rbidocs.rbi.org.in/rdocs/Notification/PDFs/73029.pdf.

close the annual percentage rate on credit card facilities.[144] It is worth noting, however, that written disclosures face additional limitations where a significant number of potential consumers cannot read. The adult literacy rate in India was 64% in 2004.[145]

Perhaps it is not surprising, then, that policymakers in India have made attempts to improve financial education for consumers. Although scholars and commentators increasingly question the effectiveness and the benefits of financial education in general,[146] it is possible that such efforts can be especially valuable in a developing economy like India's. If significant numbers of Indians will move from poverty into the lower-middle or middle-class in coming years, increased financial education may prove beneficial. In any event, the Reserve Bank of India appears to be strongly interested in promoting financial education. In particular, the Bank has explicitly adopted a policy in favor of expanding credit counseling.[147] More generally, financial education is an important component of the Bank's policies aimed at financial inclusion, as noted above,[148] especially its efforts to encourage relationships between banks, microfinance institutions, and non-governmental organizations.[149] At this point, however, it appears that the scale of financial education and financial literacy initiatives in India is still very modest.[150] While increased financial education seems to pose few risks, the potential benefits may ultimately be limited. To be effective on any meaningful scale in India, it would need to be a rather massive, and potentially costly, program.

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144. *See* RBI, *Credit Card Operations of Banks*, *supra* note 134.

145. *See* NSSO, *Status of Education and Vocational Training in India 2004–05*, Report No. 517, at i (Dec. 2006).

146. *See, e.g.*, Lauren Willis, *Against Financial Literacy Education*, 94 IOWA L. REV. 197 (2008); Karen Gross, *Financial Literacy Education: Panacea, Palliative, or Something Worse?*, 24 ST. LOUIS U. PUB. L. REV. 307 (2005); Karen Gross & Susan Block-Lieb, *Empty Mandate or Opportunity for Innovation? Pre-petition Credit Counseling and Post-petition Financial Management Education*, 13 AM. BANKR. INST. L. REV. 549 (2005); A. Michele Dickerson, *Can Shame, Guilt, or Stigma Be Taught? Why Credit Focused Debtor Education May Not Work*, 32 LOY. L.A. L. REV. 945 (1999).

147. *See* RBI, *Annual Policy Statement 2007–2008*, *supra* note 49, at 54–55; RBI, *Report of the Working Group*, *supra* note 133, at 44–45. *See also* Mohan, *supra* note 40, at 17.

148. *See supra* notes 102–17 and accompanying text.

149. *See, e.g.*, Reserve Bank of India, *Financial Literacy and Credit Counselling Centres* (2008), *available at* http://www.rbi.org.in/scripts/PublicationDraftReports.aspx?ID=526.

150. *See id.*; Dr. Y.V. Reddy, Governor of the Reserve Bank of India, Lecture at the Center for Economic and Social Studies, Ameerpet, Hyderbad (Dec. 16, 2006), *available at* http://www.bis.org/review/r060921b.pdf.

Given the limitations of policies aimed at the transactional stage of consumer finance, policies that regulate the subsequent relationships between debtors and creditors—regulation of debt-collection and debt-relief—arguably take on more importance. Indian policymakers have adopted some regulation of debt-collection outside of the bankruptcy context. For example, many Indian states apparently recognize the crime of molestation, which includes aggressive acts in the collection of debt.[151] The Tamil Nadu Moneylenders Act, noted above, also provides: "Whoever molests or abets the molestation of any debtor for the recovery of any loan shall be punished with imprisonment" and, if the court chooses, with a fine as well.[152] It is noteworthy that this provision is not limited to moneylenders. The Reserve Bank of India has also begun to exert some pressure on banks to avoid overly-aggressive collection activities. The fair practices code for lenders, noted above,[153] includes this provision: "In the matter of recovery of loans, the lenders should not resort to undue harassment viz. persistently bothering the borrowers at odd hours, use of muscle power for recovery of loans, etc."[154] Similarly, the Bank's guidelines for credit card lenders prohibit overly aggressive debt collection tactics.[155] Finally, as the *Kaur* opinions indicate,[156] courts in India may be increasingly inclined to find a basis for policing debt collectors who engage in egregious behavior.

It also appears that there are some limited forms of non-bankruptcy debt relief available in India. For example, the Federal Code of Civil Procedure provides that some forms of property are exempt from creditors' enforcement of obligations.[157] Perhaps more significant, the Reserve Bank of India recently instituted a settlement program for small non-performing loans;[158] this is a form of debt-relief, and the stated goal

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151. *See* Tamil Nadu Money-Lenders Act, 1957.

152. *See id*. § 13. This section was added by amendment in 1979. *See* Tamil Nadu Money-Lenders (Amendment) Act, Act 41, 1979, § 9.

153. *See supra* note 143 and accompanying text.

154. RBI, *Guidelines on Fair Practices Code for Lenders*, *supra* note 143, at (V)(c). It is not clear, however, whether the Reserve Bank has taken any regulatory action against any institution for violating this provision of the code.

155. *See* Reserve Bank of India, *Credit Card Operations of Banks*, *supra* note 134.

156. *See supra* notes 1–6 and accompanying text.

157. *See* INDIA CODE CIV. PROC., No. 5 of 1908; INDIA CODE (1986) 18, 19. These exemptions are incorporated and expanded under India's insolvency laws. *See infra* note 197 and accompanying text.

158. *See* Reserve Bank of India, *One-Time Settlement Scheme for Small Borrowal Accounts and Eligibility for Fresh Loans*, RBI Notification (2005), *available at* http://rbidocs.rbi.org.in/rdocs/notification/PDFs/67937.pdf. *See also* Reserve Bank of India, *Guidelines for Compromise Settlement of Chronic Non-Performing Assets (NPAs)*

of the program is to make consumers eligible for fresh finance. The program applies to loans under Rs. 25,000 (approximately $625) and does not "cover cases of fraud or malfeasance."[159] In addition to these measures, it appears that Indian states have occasionally enacted temporary debt-relief measures in times of general financial and economic stress.[160]

D. Summary

In sum, the market for consumer finance in India has been expanding dramatically over the last twenty years. This growth in consumer lending appears to have been spurred, at least in part, by reforms that have liberalized the country's financial sector. More importantly, there are good reasons to believe that this consumer lending has contributed to the country's economic growth and development. Yet various costs associated with consumer lending probably serve as a drag on these beneficial effects and may even outweigh them. If so, they should be constrained. Consumer lending will likely continue to expand in India, even without additional reforms to further liberalize the financial sector. But moderating the negative effects of consumer lending will likely require more affirmative efforts. For a country in India's position—perhaps facing a dramatic surge in domestic consumption and consumer borrowing—it would be encouraging to see an emerging regulatory commitment to aggressively addressing the potential costs of consumer finance, especially over-indebtedness. Doing so may dampen the expansion of consumer credit to some extent, but it would likely help ensure that any further expansion would be more efficient and productive.

III. THE ROLE FOR CONSUMER BANKRUPTCY LAW

As noted above, there are good reasons to believe that an effective consumer bankruptcy or insolvency[161] regime can promote the efficient deepening of consumer financial markets in emerging economies like India.[162] This Part notes some of the potential benefits of a consumer

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of Public Sector Banks, RBI Notification (2003), *available at* http://rbidocs.rbi.org.in/rdocs/notification/PDFs/34117.pdf.

159. *See* Reserve Bank of India, *One-Time Settlement Scheme for Small Borrowal Accounts*, *supra* note 158.

160. *See, e.g.*, Tamil Nadu Debt Relief Act, 1972; Tamil Nadu Indebted Agriculturalists (Temporary Relief) Act, 1976; Tamil Nadu Indebted Persons (Temporary Relief) Act, 1976; Tamil Nadu Debt Relief Act, 1976, No. 31, President's Acts, 1976; Tamil Nadu Debt Relief Act, 1978.

161. On the interchangeability of the terms bankruptcy and insolvency, see *supra* note 12.

162. *See supra* notes 21–22 and accompanying text.

bankruptcy or insolvency law. It then describes India's insolvency regime as it applies to consumers, noting some of the formal and practical limitations of the current regime and proposing that, with even modest reforms, it might contribute more meaningfully to efficient expansion of consumer financial markets in India.

A. Bankruptcy Basics

While there is much variation in bankruptcy laws around the globe, there are some basic components of these regimes that arguably define the category. Most fundamentally, bankruptcy regimes provide a mechanism by which an insolvent debtor, or one experiencing some form of financial distress, can stay the collection efforts of its creditors and seek an orderly resolution or restructuring of its obligations. In the absence of an effective bankruptcy mechanism, creditors may face a collective action problem and race to collect from a struggling debtor, making insolvency returns unpredictable and, in some circumstances, reducing the creditors' overall recovery.[163] Bankruptcy law can also provide a timely resolution of claims and disputes to reduce the erstwhile wasting of assets. In theory, these aspects of bankruptcy law provide an ex ante benefit to borrowers by reducing the cost of credit.

The functions of bankruptcy law are somewhat different in the consumer and corporate context. Generally, consumer bankruptcy serves to stay collection of an individual's obligations and then provide for a scheme of repayment and/or discharge of obligations. As with corporate bankruptcy, consumer bankruptcy ideally increases the insolvency-state return of creditors by enforcing security arrangements, providing for the orderly distribution of available assets to unsecured creditors, and by enforcing other inter-creditor obligations.[164] Unlike business associations, consumers obviously cannot be liquidated.[165] Thus, in addition to improving creditors' insolvency returns, a primary goal of consumer bankruptcy law is to enable debtors to return to productivity and to reduce various collateral costs of the debtor's insolvency. The availability of debt-relief in bankruptcy, which varies significantly across jurisdic-

163. *See supra* note 82 and accompanying text.

164. Thus, while such a regime may seem as if it is simply designed to protect insolvent consumers, it offers considerable potential benefits to creditors as well. In fact, consumer bankruptcy was historically understood to be a tool for creditors of insolvent consumer debtors. *See, e.g.*, BRUCE MANN, REPUBLIC OF DEBTORS: BANKRUPTCY IN THE AGE OF AMERICAN INDEPENDENCE 78 (2002).

165. A primary function of corporate bankruptcy law is to provide a procedural mechanism for choosing between liquidation and restructuring insolvent corporate debtors.

tions,[166] is generally the most important tool for reducing the social costs of consumer finance. By providing a meaningful opportunity for debt-relief, a bankruptcy regime can effectively insure debtors against some of the effects of financial distress or insolvency.[167] Borrowers presumably pay for this insurance in the form of higher interest rates, though it may also reduce the availability of credit to some borrowers. In addition to providing debtors with a "fresh start," and supporting the smoothing function of credit, this insurance may also make individuals more inclined to borrow for productive purposes in the first place. For entrepreneurs, the availability of debt relief in bankruptcy can serve as a form of business-failure insurance.[168]

The staying of creditors' collection efforts under bankruptcy law can also reduce various costs of individuals' financial distress. Most important, it gives debtors a tool to escape, at least momentarily,[169] from collection efforts by their creditors. The benefit of the stay derives both from the fact that debtors can actually employ it by filing for bankruptcy and from the fact that they know they can do so if necessary. If consumers are susceptible to psychological stress caused by indebtedness and collection efforts, the ability to stay collection may save costs associated with such stress. Reducing some of the psychological and emotional burdens associated with financial distress may, in turn, make it easier for debtors return to productivity.

B. Consumer Insolvency in India

1. The Formal Scheme. India's insolvency regime is approximately 100 years old, though it has even older antecedents.[170] Although India modernized the framework for liquidating and reorganizing companies in recent years,[171] the country's consumer insolvency regime has not been

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166. *See generally* Rafael Efrat, *Global Trends in Personal Bankruptcy*, 76 AM. BANKR. L.J. 81 (2002).

167. To the extent that the right to discharge is mandatory, it effectively forces borrowers to insure against default, making it a form of social insurance. The increased cost of credit and potential rationing may push some high risk borrowers to illegal sources or to costly secured lending (or equivalents like pawnbrokers).

168. *See, e.g.*, John Armour & Douglas Cumming, *Bankruptcy Law and Entrepreneurshipm*, at 2–6 (Eur. Corp. Governance Inst., Working Paper No. 105/2008, 2008), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=762144.

169. To be clear, however, any stay will presumably enable secured creditors to enforce their security without significant delay or have the right to compensation or protection for the delay. *See, e.g.*, 11 U.S.C. §§ 361, 362(d)(1) (2006).

170. *See* NEERA BHARIHOKE & SUDHIR TALWAR, LAW OF INSOLVENCY 2 (DELHI LAW HOUSE, 2007); AVTAR SINGH, LAW OF INSOLVENCY (4th ed. 2004).

171. *See supra* notes 90–94 and accompanying text.

meaningfully altered since it was adopted at the beginning of the last century.[172] The formal sources of this regime are two laws adopted in the early twentieth century—the Presidency Towns Insolvency Act and the Provincial Insolvency Act.[173] The Presidency Towns Insolvency Act applies in what were formerly the Presidency Towns under the British Raj—Mumbai (formerly Bombay), Chennai (formerly Madras), and Kolkata (formerly Calcutta).[174] The Provincial Insolvency Act applies in most of the rest of the country.[175] For the most part, the basic substantive provisions of the acts are similar. For example, under both acts, an individual must be determined to be insolvent before the other substantive provisions of the acts apply.[176] To be deemed an insolvent, one must be a "debtor," a category that includes judgment debtors.[177] The insolvency acts apply to both individual (i.e., consumer) and commercial debtors, but corporate debtors cannot be subject to involuntary petitions.[178]

Both acts provide that creditors as well as debtors can petition to have a consumer debtor deemed an insolvent if a debtor owes at least 500 Rupees (approximately $11) and commits "an act of insolvency."[179] Acts of

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172. This is not an uncommon pattern for emerging economies. China and Vietnam, for example, recently overhauled their corporate bankruptcy regimes but decided against reforming their consumer bankruptcy systems. Booth, *Drafting Bankruptcy Laws*, *supra* note 82, at 111–16. This is probably a reflection of the fact that it is more important to develop commercial lending. But circumstances will probably make it necessary to address consumer bankruptcy law in these countries as well as in India. Until recently, China and Vietnam did not have much consumer finance, but today there is an emerging middle class in both countries. *Id.* at 115.

173. *See* BHARIHOKE & TALWAR, *supra* note 170, at 1. *See also* S.K. AIYAR, LAW OF PROVINCIAL INSOLVENCY (1988). For the acts themselves, see INDIA CODE, http://indiacode.nic.in/ (last visited Nov. 1, 2010).

174. *See* BHARIHOKE & TALWAR, *supra* note 170, at 2.

175. *See id.* at 2.

176. *See id.* at 4.

177. *See id.* at 4–5.

178. *See id.* at 36–37 (discussing Provincial Insolvency Act § 79(2)(c), No. 5 of 1920, INDIA CODE (1920), vol. 5, *available at* http://indiacode.nic.in/fullact1.asp?tfnm=192005; Presidency-Towns Insolvency Act § 99, No. 3 of 1909, INDIA CODE (1920), vol. 5, *available at* http://indiacode.nic.in/fullact1.asp?tfnm=190903). *See also* In re Sulthan Pillai v. Municipal Commissioner, A.I.R. 2002 Ker. 230; Garre Venkata Lakshminarayana v. Medarametla Sarada and Ors., A.I.R. 2007 A.P. 54 (concerning a debtor who incurred business-related debts). Partners and partnerships cannot be subject to insolvency petitions unless, apparently, all of the partners or the firm have committed an act of insolvency. *See* BHARIHOKE & TALWAR, *supra* note 170, at 37–39. *See also* Firm Mukandlal Veerkumer v. Purushottam Singh, (1968) 2 S.C.R. 862.

179. *See* BHARIHOKE & TALWAR, *supra* note 170, at 5; Provincial Insolvency Act § 7; Presidency-Towns Insolvency Act § 12. A debtor filing voluntarily must have at least 500 rupees (slightly more than $10) in debts or have been imprisoned in order to execute a

insolvency include transferring all or most of one's assets, taking action to "defeat or delay" one's creditors, filing a petition of insolvency, giving creditors notice that one is not going to pay an obligation, having property sold in execution of a court decree, or failing to respond to a creditor's notice of insolvency.[180] A petition cannot be withdrawn without permission of the court,[181] and the court has authority to dismiss petitions filed by debtors or creditors that do not conform to the statutory requirements.[182] Before being adjudged an insolvent, the debtor must provide the court with a full account of the debtor's property, assets, and obligations.[183] The court is generally required to dismiss the petition if it determines that the debtor has the ability to pay his or her obligations.[184] It will also dismiss a petition if it finds that a creditor filed the petition to harass or intimidate the debtor.[185]

Once a debtor is adjudged to be an insolvent, he or she effectively ceases to have competency to conduct his or her financial affairs, among other disabilities.[186] A determination that a debtor is an insolvent can be annulled.[187] An annulment may benefit the debtor by removing some of the disabilities of being an insolvent. It may also benefit one or more of

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court decree. *See* BHARIHOKE & TALWAR, *supra* note 170, at 6; Dhirendra Bhanu Sanghvi v. ICDS Ltd., 2003 C.R. 5 (Bom.) 161 (holding that an arbitral award is a decree that can be the basis for a creditor's insolvency petition); Kishor K. Mehta v. HDFC Bank Ltd., 2008 MhLj 1 (Bom.) 451; In re Siddharth Srivastava, A.I.R. 2002 (Bom.) 494 (finding that a contempt order is not an order for purpose of Section 9).

180. *See* Provincial Insolvency Act § 6; Presidency-Towns Insolvency Act § 9. *See also* BHARIHOKE & TALWAR, *supra* note 170, at 5. Both insolvency acts employ the "relation back" doctrine, which provides that the effective date of insolvency is the date of the debtor's act of insolvency. *Id*. at 75–76. A creditor must file such a petition within three months of a debtor's act of insolvency. *Id.* at 6.

181. *See* BHARIHOKE & TALWAR, *supra* note 170, at 7; Presidency-Towns Insolvency Act § 15; Provincial Insolvency Act § 14.

182. *See* BHARIHOKE & TALWAR, *supra* note 170, at 9–10; Provincial Insolvency Act §§ 22, 25; Presidency-Towns Insolvency Act §§ 13(8), 15(2).

183. *See* BHARIHOKE & TALWAR, *supra* note 170, at 53; Presidency-Towns Insolvency Act § 15; Provincial Insolvency Act § 22.

184. *See* BHARIHOKE & TALWAR, *supra* note 170, at 49–50.

185. *Seeid.* at 57–58. The debtor can be awarded compensation from the creditor in such a circumstance. *See id.* at 58.

186. *See* Provincial Insolvency Act § 73; Presidency-Towns Insolvency Act § 103(A).

187. *See* BHARIHOKE & TALWAR, *supra* note 170, at 110–17; Venkatachalam Chetty v. K. Poova Gounder and Ors., 2000 (2) C.T.C. 288 (Mad.) (annulling an adjudication of insolvency).

the debtor's creditors by removing obstacles to enforcing the debtor's obligations.[188]

Indian insolvency laws allow courts to stay other related proceedings affecting an insolvent's property and efforts to collect obligations of the insolvent. But the stay is not automatic upon filing of a petition.[189] Under both acts, suits affecting the property of the insolvent are generally subject to stay only after the debtor has been adjudged an insolvent, though courts can authorize such suits thereafter.[190] Courts also have authority to protect the insolvent from imprisonment for obligations within its jurisdiction.[191] Once a petition is filed, however, courts do appear to have some discretion to enjoin efforts to move against a debtor or the debtor's property, to appoint an interim receiver for the debtor's property, and to order that the debtor be released from imprisonment.[192]

The Presidency Towns Act provides that the presiding court must hold a public examination of the insolvent debtor that "the insolvent shall attend thereat, and shall be examined as to his conduct, dealings and property."[193] Such an examination is not required under the Provincial Insolvency Act.[194] Under both acts, creditors submit claims against the debtor,[195] and the presiding court is given broad authority to determine the assets of the debtor that are available to creditors.[196] The insolvency acts provide, however, that some property is exempt from recovery by creditors.[197]

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188. *See* BHARIHOKE & TALWAR, *supra* note 170, at 111–14. Upon annulment, however, a court may provide that the debtor's property does not revert to the debtor. *See id.* at 114.

189. *See, e.g.*, Sudhandiran v. S. Krishnan, A.I.R. 2006 (Mad.) 10 (holding that filing an insolvency petition does not stay enforcement of an execution order "in the absence of an order or adjudication by said [insolvency] court").

190. *See* BHARIHOKE & TALWAR, *supra* note 170, at 12; Provincial Insolvency Act § 28; Presidency-Towns Insolvency Act § 18. These provisions apparently do not apply to proceedings that were already pending. *See* BHARIHOKE & TALWAR, *supra* note 170, at 60; In re Official Receiver, Jhansi v. Jugal Kishor Lachhi Ram Jaina, Hyderabad and Ors., A.I.R. 1963 All. 459.

191. *See* BHARIHOKE & TALWAR, *supra* note 170, at 12.

192. *See id* at 9, 58. The court can subsequently rescind such an order and order imprisonment, however. *See id.* at 59.

193. Presidency-Towns Insolvency Act § 27.

194. *See* BHARIHOKE & TALWAR, *supra* note 170, at 64.

195. *See* Provincial Insolvency Act §§ 33, 34; Presidency Towns Insolvency Act § 46.

196. *See* Presidency-Towns Insolvency Act §§ 26, 36.

197. For the most part, these exemptions incorporate those under the Code of Civil Procedure. *See* BHARIHOKE & TALWAR, *supra* note 170, at 81, 86–87. *See also* Provincial Insolvency Act § 28(5); Presidency-Towns Insolvency Act § 52(1). Both Acts incorporate the general exemptions of Section 60 of the Code of Civil Procedure, 1908. *See*

If a debtor is adjudged to be an insolvent, his or her unsecured property vests in the court or an official receiver/assignee.[198] Similar to other bankruptcy regimes, the receiver/assignee often plays an extremely important role in the Indian regime.[199] To protect creditors, a court can issue orders requiring security from an insolvent debtor or attaching the debtor's property.[200] In general, secured creditor's rights are unaffected by a debtor's being adjudged an insolvent.[201] The debtor is given the opportunity to make a proposal of composition to his or her creditors;[202] if accepted by the creditors, the debtor's proposal must be approved by the court or by the receiver.[203] Priority is given to government claims, certain administrative costs, and obligations owed to landlords.[204] The insolvency acts provide for avoidance of fraudulent transfers and preferential payments.[205]

India's insolvency laws also provide for discharge of debts under some circumstances. Where the debtor's assets cannot satisfy his or her obligations, the debtor can apply for a discharge of the remaining obligations.[206] Discharge is not available under various circumstances.[207] Some

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BHARIHOKE & TALWAR, *supra* note 170, at 91. For a discussion of the Code of Civil Procedure exemptions, see *supra* note 157.

198. *See* BHARIHOKE & TALWAR, *supra* note 170, at 11, 81. This includes most after-acquired property. *See id.* at 84–86.

199. *See id.* at 68–70, 72–75, 98–99. For an extended discussion of the importance of the official receiver in the Indian insolvency regime, see Mohammed Abbas Ali v. Masood Bin Mohammed Al-Khaili and Anr., 2007 A.L.D. 1 (A.P.) 60.

200. *See* BHARIHOKE & TALWAR, *supra* note 170, at 70–71.

201. *See id.* at 91–93; Padala Bulli Bhami Reddy v. Sura Nagabhushan Rao and Anr., 2006 A.L.D. 4 (A.P.) 30 (holding that attachment before judgment does not establish plaintiff as a secured creditor); Gannamanthi Pedda Subbaiah v. Chittepu Narayana Reddy, A.I.R. 2006 (A.P.) 89 (holding that a secured creditor did not need to give notice to official receiver before executing order).

202. *See* Provincial Insolvency Act § 38; Presidency-Towns Insolvency Act § 28.

203. Presidency-Towns Insolvency Act § 29.

204. Presidency-Towns Insolvency Act § 49.

205. Presidency-Towns Insolvency Act §§ 55, 56; Provincial Insolvency Act §§ 53, 54. *See also* BHARIHOKE & TALWAR, *supra* note 170, at 121–24 (preferences), 23, 124–29 (fraudulent transfers); Pinnamshetty Kavitha v. Gajelli Gangadhar, A.I.R. 2007 (A.P.) 239 (fraudulent transfers). Fraudulent transfers are also voidable under the Transfer of Property Act. *See* BHARIHOKE & TALWAR, *supra* note 170, at 23; Transfer of Property Act, § 54, No. 4 of 1882, INDIA CODE (1920), vol. 6, *available at* http://indiacode.nic.in/fullact1.asp?tfnm=188204.

206. *See* Provincial Insolvency Act § 41; Presidency-Towns Insolvency Act § 38.

> The application shall be heard in open Court. (2) On the hearing of the application, the Court shall take into consideration any report of the official assignee as to the insolvent's conduct and affairs, and, subject to the provisions of section 39, may (a) grant or refuse an absolute order of dis-

of these circumstances are relatively objective, including cases in which a debtor previously received a discharge. But others involve considerable judgment. For example, a debtor will not receive a discharge if the presiding court determines that the debtor "has brought on or contributed to his insolvency by rash or hazardous speculations or by unjustifiable extravagance in living or by gambling, or by culpable neglect of his business affairs."[208] Furthermore, there are a variety of non-dischargeable obligations, including debts to the government, debts incurred through fraud, or debts arising from criminal penalties.[209] The presiding court generally holds a hearing on the question of discharge.[210] The terms of discharge are subject to considerable judicial discretion, and courts have the ability to grant conditional discharges.[211] The debtor is allowed to apply for a discharge within a stipulated period of time after being adjudged an insolvent. Such a discharge will be granted only if the debtor fully satisfies any requirements set by the court and/or the official receiver/trustee.[212]

2. <u>In Practice.</u> If India has a long-standing formal scheme for consumer insolvency with an established body of case law, it is nonetheless extremely difficult to discern even the most general aspects of the operation of this scheme. There are no available data about insolvency cases in India—for example, no state-wide or country-wide data exists concerning how many cases are filed, who files these cases, how long these cases take, how many debtors are deemed insolvent, how many of these debtors receive a discharge of debts, and how much debt is discharged. In addition, the practical effects of a discharge in India are unclear. It is not clear if individuals who receive a discharge can effectively obtain credit thereafter. It does not appear that there is any regulation of reaffirmation

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> charge, or (b) suspend the operation of the order for a specified time, or (c) grant an order of discharge subject to any conditions with respect to any earnings or income which may afterwards become due to the insolvent, or with respect to his after-acquired property.

Presidency-Towns Insolvency Act § 38.

207. *See* BHARIHOKE & TALWAR, *supra* note 170, at 106–08; Provincial Insolvency Act § 42; Presidency-Towns Insolvency Act § 39.

208. *See* Provincial Insolvency Act §§ 41, 42(f); Presidency-Towns Insolvency Act § 39.

209. *See* BHARIHOKE & TALWAR, *supra* note 170, at 105; Provincial Insolvency Act § 44; Presidency-Towns Insolvency Act § 45.

210. Presidency-Towns Insolvency Act § 40.

211. *See* BHARIHOKE & TALWAR, *supra* note 170, at 14, 101–05; Provincial Insolvency Act § 41; Presidency-Towns Insolvency Act § 45.

212. *See* BHARIHOKE & TALWAR, *supra* note 170, at 101.

of discharged debts, a common phenomenon elsewhere,[213] and there is no available data on whether debtors in India do frequently reaffirm discharged obligations or not.

Furthermore, beyond a handful of authorities that describe the formal regime and a few selected important cases decided under the insolvency acts, there is basically no secondary literature on consumer or household insolvency in India. Consumer bankruptcy is not mentioned at all in the various reports of the Reserve Bank of India or the National Statistical Survey. This general silence creates a strong impression that commentators, scholars, and policymakers in India do not believe that the regime is a significant aspect of Indian society or of its economy. In fact, there are reasons to doubt that many debtors are inclined to utilize the regime or that they have reason to believe that it would be useful to do so. The consequences of being deemed an insolvent can be severe while the regime's potential benefits to debtors and creditors appear uncertain and may be slight in many instances. As a threshold matter, it is conventionally understood that insolvency cases move extremely slowly through the judicial system. Furthermore, the substance of India's insolvency law suggests that debt-relief or stays-of-collection are not readily available and that judicial outcomes under the laws are unpredictable.

The India Law Commission recently convened a committee with INSOL India to propose reforms to the consumer insolvency system. The committee was charged with "examin[ing] the existing laws relating to personal bankruptcy in India and the desirability of changes in existing laws in the backdrop of fast increasing and easy availability of credit from banks, financial institutions and other lenders to individuals for private, family or household purposes."[214] That committee concluded its work without making any recommendations. Yet the creation of this committee may provide evidence that India's existing consumer bankruptcy system is dysfunctional and marginal in its contemporary context, failing to provide benefits to consumers or to the broader society. It also presumably indicates, however, that policymakers believed—at least initially—that there is something worth salvaging and reforming in the existing regime. It may also provide some indication that consumer insolvency law, however dysfunctional it may or may not be, is more salient in contemporary Indian society than the lack of commentary about it would indicate.

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213. *See, e.g.*, Marianne B. Culhane & Michaela M. White, *Debt after Discharge: An Empirical Study of Reaffirmation*, 73 AM. BANKR. L.J. 709 (1999).

214. *Committee to Review Personal and Consumer Insolvency*, INSOL INDIA, http://www.insolindia.com/activities.htm#4 (last visited Nov. 1, 2010).

In fact, there are reasons to believe that the role of consumer insolvency in India's society and economy is underestimated. Based on an informal review of the few dozen reported consumer insolvency-related opinions from the last decade available in Manupatra,[215] a commercial legal database, it appears that a surprising number of consumer insolvency petitions are filed each year in India. Many of the published and reported insolvency cases involved involuntary petitions, i.e., those filed by creditors,[216] but many also involve voluntary petitions.[217] It is notable that many of the voluntary petitions appear to have been filed to protect the debtor from incarceration or otherwise aggressive debt collection.[218] It also appears that many cases do take a shockingly long time to work their way through the judicial process.[219] Yet there are some indications

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215. MANUPATRA, http://www.manupatra.com (last visited Nov. 1, 2010).

216. *See, e.g.*, Ram Singh v. VII Additional District Judge and Ors., 2007 A.I.R. 102 (All.); Samar Ghosh v. Rambaran Singh, 1 CAL. L.T. 502 (2006); R. Subramaniam v. Canara Bank and Anr., (2006) 134 Comp. Cas. 363 (Mad.); T.T.V. Dhinakaran v. Dy. Director, Enforcement Directorate, 2003 A.I.R. 59 (Mad.); Nawratam Purohit v. Arvind Agarwal, 2008 A.I.R. 70 (Cal.); Deepak Cochhar and Anr. v. Indusind Bank Ltd., (2006) 3 Bom. C.R. 520; Kanakasubbu and Anr. v. Suryanarayana Shastri and Ors., 2002 A.I.R. 252 (Mad.); Sadasivam v. M. Muthuswamy and Ors., 1998 (2) C.T.C. 238 (Mad.); Dhirendra, 2003 C.R. 5 (Bom.) 161; Sicom Limited, 2007 A.I.R. 70 (Cal.); Kishor K. Mehta, 2008 MhLj 1 (Bom.) 451.

217. *See, e.g.*, Pinnamshetty Kavitha, A.I.R. 2007 (A.P.) 239; Mohammed Abbas Ali, 2007 A.L.D. 1 (A.P.) 60; Garre Venkata Lakshminarayana, A.I.R. 2007 A.P. 54; Padala Bulli Bhami Reddy, 2006 A.L.D. 4 (A.P.) 30; Elluri Venkata Sai Surya Prakasa Rao v. Guttikonda Srirama Murthy and Ors., A.L.D. 152 (2007); T. Chandrasekharaiah v. D. Sreeramulu Chetty and Ors., 2005 A.I.R. 195 (A.P.); Anna Venkata Subbaiah v. Official Receiver, 6 A.L.D. 619 (2004); Navin Jhunjhunwala v. Vijay Kumar Sharma, 1 CAL. L.T. 511 (2005); Sure Venkateshwarlu v. More Goverdhan and Ors., 2001 A.I.R. 473 (A.P.); Dasari Srihari Rao v. Talluri Harinadha Babu, 3 A.L.D. 456 (2002); G. Subba Rao v. Food Corporation of India and Ors., 2004 A.I.R. 16 (A.P.); Kasa Venkata Reddy v. Syed Basha and Ors., 4 A.L.D. 210 (2004); Papuri Daveedu v. Banavath Lokhya and Anr., 4 A.L.D. 559 (2005); Kajal Gan v. Smt. Hazara Khatun and Ors., 2006 A.I.R. 157 (Ass.); Shah Bakuleshbhai Hasmukulal v. Kaushikkumar Kantilal Modi and Ors., 2008 A.I.R. 133 (Guj.); B. Venkata Nagaraju v. P. Ramadasu and Ors., 3 A.L.D. 556 (2004); Ram Singh Jaiswal v. Central Bank of India and Anr., 2 JCR 39 (2003); Sudhandiran, A.I.R. 2006 (Mad.) 10; D.P. Karthikeyan v. Canara Bank Thirunagar Branch, (2003) 116 Comp. Cas. 582 (Mad.); Venkatachalam Chetty, 2000 (2) C.T.C. (Mad.) 288.

218. *See, e.g.*, Elluri Venkata Sai Surya Prakasa Rao, A.L.D. 152 (2007); Navin Jhunjhunwala, 1 CAL. L.T. 511 (2005); Sure Venkateshwarlu, 2001 A.I.R. 473 (A.P.); Munaswami v. K. Mallikarjuna, MANU/AP/1308/2001; Kasa Venkata Reddy, 4 A.L.D. 210 (2004); Papuri Daveedu, 4 A.L.D. 559 (2005).

219. *See, e.g.*, Yogini Chandrakant Mehta v. The Official Assignee, (1999) 2 Bom. CR. 719 (petition filed in 1977); Dasari Srihari Rao, 3 A.L.D. 456 (2002) (petition filed in 1984); P. Lakshmipathi Chetty v. P. Janardhana Chetty and Ors., 5 A.L.D. 723 (2007) (petition filed in 1997); Ram Singh, 2007 A.I.R. 102 (All.) (petition filed in 1967); Mo-

that cases filed recently may be more likely to be resolved quicker than older cases, sometimes within a year or two.[220]

Because most insolvency proceedings do not result in published opinions, it is impossible to deduce reliable information about filing rates from these reported decisions, nearly all of which are appellate decisions. Yet these decisions provide an intriguing glimpse into the insolvency system. In one notable case from the state of Andhra Pradesh, *Mohammed Abbas Ali v. Masood Bin Mohammed Al-Khaili*,[221] the high court requested clerks in every district of that state to report on the number of insolvency petitions pending at the time. The court stated that the district court clerks reported a total of 6,113 petitions pending. Andhra Pradesh, India's fourth largest state, had a population of 75.7 million in 2001, so six thousand insolvency petitions is a small number per capita.

Nonetheless, this figure suggests that a non-trivial number of individuals—debtors as well as creditors—view it to be in their interest to employ the regime. It may also reveal that the existing legal regime plays a more significant role in Indian society than is currently understood. Assuming that a legal regime can have meaningful impact beyond the dis-

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hammed Abbas Ali, 2007 A.L.D. 1 (A.P.) 60 (petition filed in 1998); Padala Bulli Bhami Reddy, 2006 A.L.D. 4 (A.P.) 30 (petition filed in 1998); Hemant M. Nabar v. Farohar and Co., (2005) 5 Bom. CR. 234 (petition filed in 1999); T. Chandrasekharaiah, 2005 A.I.R. 195 (A.P.) (petition filed in 1994); Anna Venkata Subbaiah, 6 A.L.D. 619 (2004) (petition filed prior to 1980); Nawratam Purohit, 2008 A.I.R. 70 (Cal.) (petition filed in 1995); Kanakasubbu and Anr., 2002 A.I.R. 252 (Mad.) (petition filed in 1994); Sadasivam, 1998 (2) C.T.C. 238 (Mad.) (petition filed in 1984); Kajal Gan, 2006 A.I.R. 157 (Ass.) (petition filed in 1986); B. Venkata Nagaraju, 3 A.L.D. 556 (2004) (petition filed in 1992); Ram Singh Jaiswal, 2 JCR 39 (2003) (petition filed in 1987); Venkatachalam Chetty, 2000 (2) C.T.C. 288 (Mad.) (petition filed in 1989).

220. *See, e.g.*, Sure Venkateshwarlu, 2001 A.I.R. 473 (A.P.) (petition filed in 1999); Pinnamshetty Kavitha, A.I.R. 2007 (A.P.) 239 (debtor filed petition in 2005); Garre Venkata Lakshminarayana, A.I.R. 2007 A.P. 54 (petition filed in 2004); Samar Ghosh, 1 CAL. L.T. 502 (2006) (petition filed in 2005); Elluri Venkata Sai Surya Prakasa Rao, A.L.D. 152 (2007) (petition filed in 2003); P.S.K. Finance and Chit Funds v. R. Govindhan, (2004) 5 C.T.C. 330 (petition filed in 2002); Navin Jhunjhunwala, 1 CAL. L.T. 511 (2005) (petition filed in 2003); Kasa Venkata Reddy, 4 A.L.D. 210 (2004) (petition filed in 1998); T.T.V. Dhinakaran, 2003 A.I.R. 59 (Mad.) (petition filed in 2001); Papuri Daveedu, 4 A.L.D. 559 (2005) (petition filed in 2004); Deepak Cochhar and Anr., (2006) 3 Bom. C.R. 520 (petition filed in 2003); Shah Bakuleshbhai Hasmukulal v. Kaushikkumar Kantilal Modi and Ors., 2008 A.I.R. 133 (Guj.) (petition filed in 2007); Sudhandiran, A.I.R. 2006 (Mad.) 10 (petition filed in 2000); D.P. Karthikeyan, (2003) 116 Comp. Cas. 582 (Mad.) (petition filed in 2000); Sicom Limited v. Bajranglal and Suresh Jain, 2007 A.I.R. 70 (Cal.) (petition filed in 2003); Kishor K. Mehta, 2008 MhLj 1 (Bom.) 451 (petition filed in 2005).

221. Mohammed Abbas Ali v. Masood Bin Mohammed Al-Khaili and Anr., 2007 A.L.D. 1 (A.P.) 60

putes and cases that are decided under it, India's insolvency regime likely has a broader impact on that country's consumer financial markets than is generally appreciated. Perhaps most significantly, it suggests that consumer insolvency may be salient enough in Indian society that effective reforms could have a meaningful impact.

C. Potential Reform

As the India Law Commission's decision to convene a committee on consumer insolvency may reflect, India appears to be experiencing many of the factors that have influenced other countries to adopt or modernize their insolvency laws. These factors include rising incomes, general policies promoting entrepreneurship, deregulation of consumer financial transactions, increased consumer indebtedness, and weaknesses in other social insurance programs.[222] As discussed above, India has liberalized and deregulated its credit markets in recent decades.[223] Consumer borrowing in that country has grown dramatically,[224] and there are various signs of growing household over-indebtedness.[225] While India has a wide array of social insurance programs,[226] these programs have many shortcomings,[227] and they are arguably not keeping pace with the demands of a developing economy.[228] Finally, there appears to be a growing commitment among Indian policy-makers to support innovative entrepreneurial activity.

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222. *See generally* Efrat, *supra* note 166; Feibelman, *supra* note 8, at 95–97 & nn.128–30.

223. *See supra* notes 63–71 and accompanying text.

224. *See supra* notes 25–44 and accompanying text.

225. *See supra* note 121 and accompanying text.

226. In light of government policies of India in the first few decades of its independence, it should not be surprising that the country has a wide array of social insurance programs. It appears that most of these programs are based on national laws and are administered by the national government and, in some cases, state governments. The primary laws in this area include the Workmen's Compensation Act, 1923 ("WCA"); the Employee's State Insurance Act, 1948 ("ESIA"); the Employees' Provident Funds Act, 1952 ("EPFA"); Maternity Benefit Act, 1961 ("MBA"); and the Payment of Gratuity Act, 1972 ("PGA"). Together, these major programs provide covered and eligible individuals in the labor force with death and disability benefits, retirement benefits, maternity benefits, and unemployment benefits. It appears that these programs are financed with public support, employer contributions, and, in some cases, direct employee contributions. Despite the broad scope of these programs, they are far from comprehensive. The coverage and eligibility requirements of these programs exclude large segments of the population. For an excellent discussion of social insurance programs in India, see Agarwala & Khan, *supra* note 54.

227. *Id.*

228. *Id*.

Assuming that India's consumer insolvency regime is operational yet dysfunctional in many crucial respects, it is entirely possible that the regime could be markedly improved with carefully designed reforms. This Part does not argue that Indian policymakers should adopt any particular reform. Rather, it assumes that the role of consumer insolvency law in India can be enhanced, and it discusses some general approaches to reforming the regime that might help achieve this result. By posing possible avenues for reform, it aims to spur additional research into the threshold question of whether India's insolvency regime can in fact play a more beneficial role in Indian society.

1. <u>Procedural Reforms</u>. For any consumer insolvency regime to meaningfully help address the costs of over-indebtedness and promote efficient expansion of consumer financial markets, it should be viable enough to influence consumer financial transactions ex ante and to affect the relationships between creditors and debtors ex post, especially their motivations to renegotiate. Assuming that timeliness and predictability could make India's insolvency regime more appealing to at least some subset of creditors and debtors, such reforms could prove valuable even if the substantive rules of the regimes are otherwise suboptimal. One obvious way to make India's insolvency system timelier is to make general improvements in the capacity of the Indian judicial system.[229] But such an ambitious undertaking may be an unreasonable near-term goal. If so, policymakers in India might consider adopting an altogether new institutional mechanism. They could, for example, adopt a distinct and separate set of tribunals for consumer insolvency cases, perhaps making much of the consumer insolvency process more administrative in nature. Yet, previous efforts to create new debt and insolvency-related tribunals in India may provide reasons to be skeptical of such an approach.[230]

More modestly, policymakers might be able to make meaningful improvements in the administration of consumer insolvency cases by addressing aspects of the existing regime that tend to slow cases down and make their resolution relatively unpredictable. At least some of these aspects of the existing regime could be replaced with rules that apply automatically or that require less judicial energy. For example, such reforms might eliminate the requirement that courts determine that a debtor

229. *See, e.g.*, Marc Galanter & Jayanth Krishnan, *"Bread for the Poor": Access to Justice and the Rights of the Needy in India*, 55 HAST. L.J. 789 (2004) (discussing systemic problems with India's formal legal system).

230. *See supra* note 92 and accompanying text. *Cf.* Galanter & Krishnan, *supra* note 229 (describing one innovative legal mechanism adopted in India in recent decades, the Lok Adalat, and expressing some skepticism about the success of this institution).

is insolvent before applying any other substantive rules. Instead, a debtor in bankruptcy (either voluntarily or involuntarily) could be considered presumptively insolvent unless a party proved otherwise. Similarly, rules allowing courts to stay other proceedings or to grant discharge of debts currently give presiding judges significant discretion. If these rules were reformed to allow less judicial discretion, this might increase the speed and the predictability of the insolvency regime.

Such reforms to consumer insolvency law in India would be consistent with some broad trends in consumer insolvency and bankruptcy regimes across the globe in recent decades. Consumer insolvency and bankruptcy laws have arguably been tending toward the more automatic and less discretionary, especially in the Anglo-American contexts.[231] Long-term developments in United Kingdom ("UK") insolvency law, the initial model for India's regime, may provide a particularly useful point of comparison. The UK's insolvency regime was meaningfully reformed, beginning in the 1970's, to streamline the process of granting a discharge of debts.[232] Before these reforms, judges had significant discretion in granting a discharge to debtors in bankruptcy.[233] The process of obtaining a discharge generally involved a public hearing to determine whether the debtor was entitled to discharge.[234] The reforms provided that first-time bankruptcy filers could obtain a more automatic discharge of debts after three years by turning over their non-exempt assets.[235] That discharge process was subsequently reformed,[236] enabling most debtors who file

231. In the U.S. context, recent bankruptcy reforms were designed in large part to reduce the discretion of bankruptcy judges in deciding whether debtors should be able to file under Chapter 7 and how much debtors should be required to repay under Chapter 13. *See, e.g.*, Lauren E. Tribble, *Judicial Discretion and the Bankruptcy Abuse Prevention Act*, 57 DUKE L.J. 789 (2007). *But see* Hamilton v. Lanning, 130 S.Ct. 2464 (2010) (rejecting a rigid mechanical approach to these determinations under the recent reforms).

232. *See, e.g.*, Efrat, *supra* note 166, at 86–89. *See generally* IAN F. FLETCHER, THE LAW OF INSOLVENCY (1990); Douglass G. Boshkoff, *Limited, Conditional, and Suspended Discharges in Anglo-American Bankruptcy Proceedings*, 131 U. PA. L. REV. 69 (1982).

233. Boshkoff, *supra* note 232.

234. *Id.*

235. *Id.* at 88–89. During that period, at least some of the debtor's post-petition income is available to creditors, and the debtor is subject to numerous disabilities. *Id.*

236. *See* JASON J. KILBORN, COMPARATIVE CONSUMER BANKRUPTCY 88 (2007); Iain Ramsay, *Bankruptcy in Transition: The Case of England and Wales—The Neo-Liberal Cuckoo in the European Bankruptcy Nest?*, *in* CONSUMER BANKRUPTCY IN GLOBAL PERSPECTIVE 212, 218–22 (Johanna Niemi-Kiesiläinen, Iain Ramsay & William Whitford, eds., 2003) [hereinafter Ramsay, *Bankruptcy in Transition: The Case of England and Wales*].

for bankruptcy to obtain a discharge within a year of filing.[237] The foregoing points are merely illustrative—the experience in England may indicate that strategic reforms of India's insolvency law can yield appreciable results. It is not meant to suggest that India should simply adopt the various reforms made to the English regime in recent decades.

If coupled with procedural reforms to improve the administration of insolvency cases, policymakers in India might also expand the role and functioning of the regime by making it easier for consumers to voluntarily file for bankruptcy and harder (perhaps impossible) for them to be forced into bankruptcy involuntarily. Again, if more consumers are willing and able to file a petition of insolvency, insolvency law will be more likely to affect consumer financial transactions ex ante and ex post.

Eliminating involuntary petitions might reduce the stigma associated with the regime. It may also help convey to debtors that insolvency law can serve their interests and that it is not simply a form of punishment or purely a debt-collection tool. Allowing for involuntary filing presumably protects creditors from debtors' inclinations to waste assets or to transfer those assets to other parties. But creditors can effectively push debtors into bankruptcy by acting to enforce their obligations; and, ideally, they should be able to recover fraudulent transfers under insolvency and/or non-insolvency law. Reducing some of the formal disabilities associated with being an insolvent and reducing the occasions for public insolvency hearings might also reduce the stigma associated with insolvency. Finally, it is worth noting that completely eliminating imprisonment for debt may also help reduce the stigma associated with insolvency law; debtors would no longer have reason to be concerned that filing for insolvency would indicate that they were otherwise facing imprisonment.

Making insolvency more attractive may run the risk of giving debtors bad incentives to become over-indebted or to seek a discharge when they could actually repay. However, given the direct costs of bankruptcy, including legal fees and the impact on a debtor's credit rating, as well as the strong likelihood that some degree of stigma will continue to be associated with insolvency, it is entirely possible that the opposite problem will occur—people who *should* file for bankruptcy will not do so. This is arguably the case in the United States, for example.[238] And it is worth noting that, while there was a substantial increase in filings after the lat-

237. Ramsay, *Functionalism and Political Economy in the Comparative Study of Consumer Insolvency*, *supra* note 8, at 646; KILBORN, *supra* note 236, at 88–89.

238. *See, e.g.*, Michelle White, *Why Don't More Households File for Bankruptcy?*, 14 J. L. ECON. & ORG. 205 (1998).

est round of reforms of bankruptcy law in England,[239] filing rates are still relatively low in England compared to other countries with advanced economies.[240]

2. Expanding Debt-Relief. Expanding the availability of substantive protections and the scope of potential discharge of debts might also increase the beneficial impact of insolvency law on economic growth and development in India. Like the procedural reforms discussed above, it would presumably make the regime more appealing to consumers in financial distress, potentially expanding the relevance of the regime in Indian society. Beyond that, however, it could have a more direct effect on consumer financial markets by influencing credit-granting decisions and reducing the costs of over-indebtedness. If utilized, a regime with more generous debt-relief could obviously reduce some of the direct ex post costs of over-indebtedness. Assuming that India's social safety net is shrinking relative to the expanding economy,[241] the social insurance function of consumer insolvency law might serve a vital role in reducing the numbers of individuals who fall back into poverty, thereby taxing the broader economy. It might also help build popular support for development policies more generally. Finally, it might promote entrepreneurship and other productive economic risk-taking within Indian society.

Less intuitively, broader measures of debt-relief might also prove especially beneficial in a context like India by disciplining the extension of credit to borrowers in that country ex ante. Increasing the scope and availability of discharge or increasing the amount of property exemptions would presumably encourage creditors to make efforts to lend to consumers who are more likely to be able to repay their obligations. It is important to note that this might prove disadvantageous to some consumers who are marginally creditworthy or who cannot establish their creditworthiness. It might also prove disadvantageous to lenders who do not have access to good information about their borrowers and might benefit moneylenders, who may have some informational advantages over formal lenders.[242] If so, formal lenders would then have incentives to invest in more sophisticated credit reporting and credit scoring. The country's new

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239. *See* Ramsay, *Functionalism and Political Economy in the Comparative Study of Consumer Insolvency*, *supra* note 8, at 651.

240. *See id.* at 626. Ramsay argues that these reforms were aimed to help expand consumer financial markets more than to address consumer over-indebtedness. *See id.* at 646–47.

241. *See supra* note 226 and accompanying text.

242. *See supra* note 103 and accompanying text.

national credit bureau[243] should prove especially valuable in this context. As conditions for the dissemination and evaluation of information improve in India, any advantage that moneylenders might currently have should diminish. Thus, for better or worse, one of the long-term effects of introducing a broader and more effective discharge provision might be to push some informal lenders out of the market.

3. Whither Demand for Reform? If reforming the procedural and/or substantive aspects of the Indian consumer insolvency regime is a good idea, it is fair to ask why Indian policymakers have not already implemented such reforms. The fact that the India Law Commission's committee on consumer insolvency reform did not recommend any reforms may indicate that such reforms are actually not needed. Or it may reflect that such reforms, though needed, are not practically or politically feasible. Assuming that expanding the discharge is desirable in theory, implementing the reform would inevitably face significant practical challenges. It is probably not a coincidence that many countries with developing economies like India have resisted adopting or liberalizing bankruptcy relief.[244] Creditors, always a powerful political force, are presumably wary of such reforms, policymakers might be conservative in their concerns about the effects of reform, or policymakers might have reasonable concerns about the administerability of a higher-energy bankruptcy regime.[245] It is possible that Indian society is simply not prepared to embrace a different kind of consumer insolvency law. Finally, it is possible that regulatory actions by the Reserve Bank of India, including the new codes for lenders and the program for settlements of small loans, approximate some aspects of an effective consumer insolvency regime, lessening the need for bankruptcy reform.

Yet there are good reasons to believe that India might prove relatively fertile ground for an expanded consumer insolvency or bankruptcy regime. As noted above,[246] Indian society and its economy are experiencing many of the factors—like increasing consumer credit—that can make

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243. *See supra* note 100 and accompanying text.

244. *See* Jose Reinaldo De Lima Lopes, *Consumer Bankruptcy and Over-indebtedness in Brazil*, *in* CONSUMER BANKRUPTCY IN GLOBAL PERSPECTIVE, *supra* note 236, at 85, 86; Xian Chu Zhang, *Development of Consumer Credit in China and Concerns About the Underlying Legal Infrastructure*, *in* CONSUMER BANKRUPTCY IN GLOBAL PERSPECTIVE, *supra* note 236.

245. *See* Feibelman, *supra* note 8. For an excellent study of the complex process of introducing and reforming corporate bankruptcy law in emerging economies, see TERENCE HALLIDAY & BRUCE CARRUTHERS, BANKRUPT: GLOBAL LAWMAKING AND SYSTEMIC FINANCIAL CRISIS (2009).

246. *See supra* notes 224–29 and accompanying text.

consumer insolvency law more beneficial. Furthermore, the country has had a formal insolvency regime—one including a discharge provision—for nearly 100 years. The widely-perceived pitfalls of efforts to "transplant" legal regimes,[247] including bankruptcy laws,[248] from one context to another largely reflects that unique domestic social and cultural factors are crucial to the success of legal development in any setting. In many instances, debt relief is simply an uncomfortable concept or institution for a society to embrace. Increasing the scope and role of consumer insolvency in India would not require introducing Indian society to the concept of debt-relief. Rather, it would require the society to make a shift in its conception of an existing institution. Finally, as the recent insolvency case law from India suggests, there is already some demand for consumer insolvency law in India among Indian citizens, and reforming that legal regime may release some additional pent-up demand. Such demand is likely a prerequisite for the success of any reform.[249]

Indian policymakers appear to have some latitude, then, to strategically make important but modest reforms to that country's insolvency regime and to do so in ways that respond to distinct characteristics of Indian society. Doing so might make individuals in financial distress more willing to employ the regime and might make the regime more effective when employed, promoting the long-term growth and development in that country. The more immediate question is whether there is sufficient concern among India's consumers, its policymakers, or international actors with leverage in that country to more systematically explore the potential benefits of reforming that country's consumer insolvency law.

IV. CONCLUSION

There are reasons to believe that improvements in the regulation of consumer financial markets in India can promote broader economic growth in that country. But the extent of that potential benefit depends on the ability of Indian policymakers to address and limit the costs associated with consumer over-indebtedness. A higher-energy consumer insolvency law regime may prove to be a valuable component of policies in India that are designed to facilitate expansion of consumer finance and to reduce the costs of consumer indebtedness. Although it appears that India's consumer insolvency law regime is employed by tens of thou-

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247. *See, e.g.*, Daniel Berkowitz, Katharina Pistor & Jean-Francois Richard, *The Transplant Effect*, 51 AM. J. COMP. L. 163, 167 (2003).

248. *See, e.g.*, Nathalie Martin, *The Role of History and Culture in Developing Bankruptcy and Insolvency Systems: The Perils of Legal Transplantation*, 28 B.C. INT'L & COMP. L. REV. 1, 77 (2005).

249. *See* Berkowitz et al., *supra* note 247.

sands of debtors and creditors each year, it also appears that the regime is dysfunctional in many respects. For the regime to better serve its potential functions, it may need to become more expeditious and predictable; it may also need to provide somewhat more generous relief to insolvent consumer debtors. These reforms need not be fundamental. Reforming a handful of provisions to reduce the judicial acts and decisions required by the current regime might significantly improve the role it plays in Indian society. If Indian policymakers succeed in making the country's consumer insolvency regime at least somewhat speedier and more predictable, then the regime may not only help reduce the ex post costs of over-indebtedness, it may also improve the ex ante efficiency of consumer financial markets. Either effect might promote the continued deepening of consumer financial markets and, in turn, contribute to broader measures of growth and development in India.