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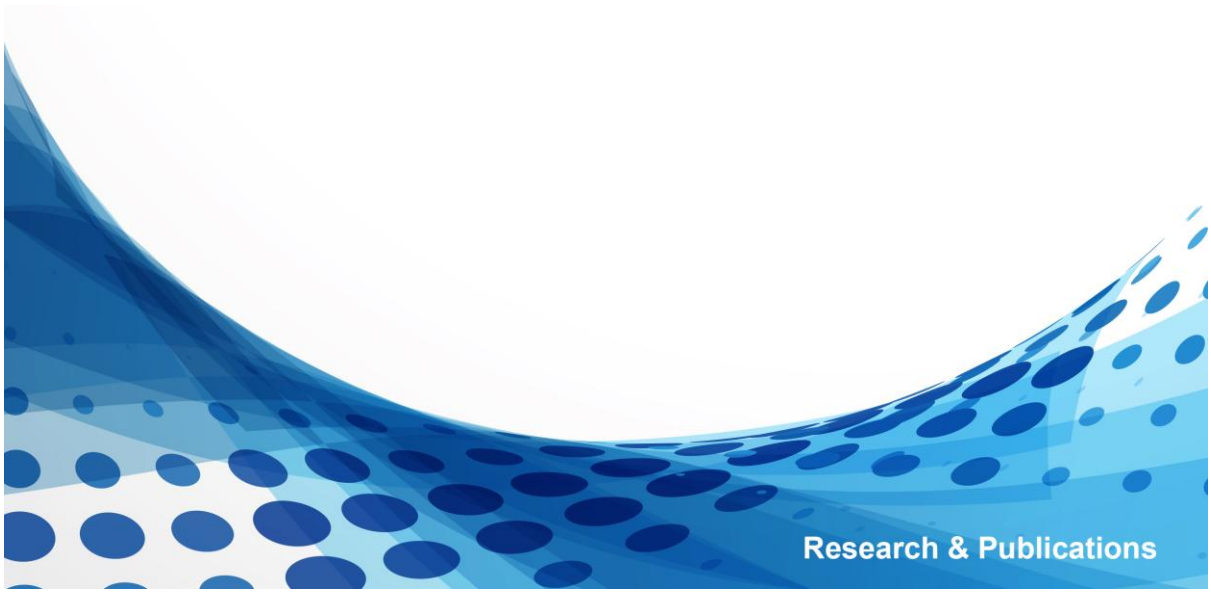

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Insolvency Professionals as Public Servants: Resolving the Judicial Dilemma

M P Ram Mohan* and Rohan Srivastava**

Abstract

Insolvency Professionals are often regarded as the backbone of India's Insolvency regime with wide-ranging powers in running the company, identifying avoidance transactions, monitoring the resolution plan process etc. The Insolvency and Bankruptcy Code provides comprehensive legal and regulatory guidance on the functioning of IPs in the insolvency ecosystem. This study delves into a contentious, yet fundamental legal issue relating to their mandate in India. That is, should IPs be classified as public servants under the purview of the Prevention of Corruption Act? This question, which has sparked judicial debate currently awaits adjudication by the Supreme Court, in light of two conflicting High Court judgments of the Jharkhand and Delhi High Court. The significance of this research stems from the substantial public and economic interests entangled in insolvency proceedings, which are now regarded as proceedings *in rem* open to the public IPs, as key figures in resolving high-profile corporate insolvencies, wield influence that extends beyond creditor claims, impacting public confidence, market integrity, and economic stability. This paper explores both sides of the debate around including IPs as public servants, evaluating the stakes associated with both positions from a policy perspective.

Keywords: Insolvency Professionals, Professional Misconduct, Prevention of Corruption Act, Resolution professionals, Insolvency and Bankruptcy Code.

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1. Introduction

Resolution Professionals ('RPs')[1] are regarded as the backbone of India's Insolvency regime with wide-ranging statutory and delegated powers during the entire corporate insolvency resolution process ('CIRP'). Given their central role which involves dealing with multiple stakeholders involved in the CIRP, RP's conduct needs to be independent and inspire the confidence of all the stakeholders involved. In order to monitor the conduct of RPs, India has adopted a unique regulatory approach involving a two-tier regulatory oversight by the Insolvency Professional Agencies ('IPAs') and the Insolvency and Bankruptcy Board of India ('IBBI'). IPA and IBBI together ensure that their conduct is in adherence to the provisions of the IBC and Regulations enacted under it, and also in line with professional conduct mandated by the IPAs.

On account of the critical role played by RP, recently, a question arose whether RPs should be covered under the ambit of the definition of "public servant" under India's anti-corruption laws. There are two conflicting High Court judgments of the Jharkhand[2] and Delhi High Court[3] which have answered the question differently. The Jharkhand High Court has held that the definition of public servants would cover RPs by virtue of exercising duties which are 'public' in nature. The Delhi High Court has held the opposite, noting that there is a lack of "public character" in the role of the RP. In light of these conflicting interpretations, the issue is currently pending final adjudication at the Supreme Court.[4]

This paper attempts to explore the question of whether RPs are to be included in the definition of Public Servant under the Prevention of Corruption Act ('PoCA') 1988. Specifically, the paper looks at the character of RPs, their role and functions under the IBC through theoretical and doctrinal perspectives and what it means to be included under the definition of "public servant" under the PoCA.

The paper is organised as follows: *First*, we examine the theory and interpretation of the term "public servant" in the context of anti-corruption laws, both domestically and to a limited

[1] 'Resolution Professionals' and 'Insolvency Professionals' are used interchangeably in this paper, unless the context requires otherwise.
[2] *Sanjay Kumar Agarwal* v. *CBI* (2023) SCC OnLine Jhar 394.
[3] *Arun Mohan* v. *CBI* (2023) SCC OnLine Del 8080.
[4] *Sanjay Kumar Agarwal* v. *Central Bureau of Investigation* (2023) SLP(Crl) No. 7029/2023. (Appeal against the *Sanjay Kumar Agarwal* v. *CBI* (2023) SCC OnLine Jhar 394 judgment)

extent, internationally. *Second,* we enquire whether Insolvency processes possess a public element in them and what is the role of the RP under the insolvency regime. *Third,* the current legal approach adopted by India to regulate the conduct of RPs is explored. *Fourth,* we look at what all instances of abuse of power by RPs have arisen before the IBBI and whether the role of the RP is susceptible to corruption. *Fifth*, we analyse the contrasting judgments of the Delhi and Jharkhand High Courts and critique the reasoning used by the Delhi High Court. And *lastly*, the paper delves into and discusses some policy concerns which have been flagged in the existing literature and may arise by including RPs as public servants.

2. "Public Servants" under anti-corruption laws

2.1. Theoretical Background

Corruption has often been viewed as a societal evil which has a deleterious impact on the organisation of societies and the functioning of the nation. It is pervasive across countries and undermines democracy and the rule of law by leading to arbitrariness in policy decisions and enforcement.[5] Corruption in developing countries, is of particular concern due to its profound impact.[6] While existing literature primarily examines corruption as an impediment to the rule of law and democratic governance,[7] this paper analysis focuses on its policy implications on a key economic legislation, that is the Insolvency and Bankruptcy Code (IBC).

There have been attempts to ground the occurrence of corruption using various theoretical models. One such model, which is increasingly preferred is the principal agent model, wherein corruption is viewed as an "*agent violating the interests or preferences of the principal to benefit a third party*".[8] Such a perspective posits that officials are motivated to engage in corruption to gain additional personal benefits when they have sufficient discretionary power when economic rent exceeds salary levels, and when corruption detection and punishment are minimal.[9] The focus here is therefore on the abuse of the "sufficient discretionary power" which is a result of the delegation to the agent. From a policy perspective, the principal variables on which policy choices would turn under such a model therefore are: corruption detection

[5] United Nations Convention Against Corruption, opened for signature 9 December 2003, General Assembly resolution 58/4 of 31 October 2003 (entered into force 14 December 2005), preface.
[6] ibid.
[7] See Jacob Eisler, 'Conceptualising Corruption and the Rule of Law' (2022) 85 Modern Law Review 1071.
[8] M Zhang, H Zhang, L Zhang et al, 'Corruption, Anti-Corruption, and Economic Development' (2023) 10 Humanit Soc Sci Commun 434.
[9] Yin ZD, Nie HH 'Corruption, officials governance and economic development' (2020) 19(2) China Econ 411–432.

mechanisms and the level of discretion exercised by the public servant.

The theoretical model discussed is also relevant when we try to define who is a public servant. Radojičić provides a rich account of how various European public law theorists have approached this question.[10] She provides 6 aspects of a definition of "Public servant" over which there is significant divergence amongst public law theorists:[11]

1. **Functional**: Looks at the content of the functions discharged by the Public Servant- whether the public servant is performing tasks of public importance or not,[12] regardless of the organizational form of work.
2. **Organisational:** Looks at where the public servant is working, and whether it classifies as a public administrative authority. [13]
3. **Merit-Based Employment:** Looks at the level of qualifications required for the public position. Factors such as recruitment and selection based on merit, promotion based on performance and competence; providing opportunities for career development; and competitive levels of salary to ensure staff retention and motivation
4. **Accountability through supervision:** Looks at whether the behaviour of the public servant is testable through judicial review or administrative apparatuses.
5. **Special legal regime ensuring professionalism and accountability:** Looks at whether the public servant is governed by a set of regulations that differs from those governing the operation of the market in the private sector.[14]
6. **Flexible mandate:** Looks at whether the public servant enjoys sufficient autonomy in the decision-making so as to make the problem of rent-seeking and agency a real possibility.

Out of these, the first two aspects: functional and organizational are often deemed as the most debated, reflecting two opposite ends of the spectrum. From the perspective of the principal-

[10] Zorica Radojičić and Aleksandra Rabrenovic, 'Theoretical Understandings of the Concept of a "Public Servant" Towards a Common Definition' (2020) 25(1) Journal of Criminalistics and Law 53-64. Radojičić looks at various European works which discuss the constituents and definitions of public servant. For instance, some of the works discussed include: Patrick Dunleavy 'Is there a Radical Approach to Public Administration' (2007) 60(2) Public Administration 215 – 225; Fletcher P, *Public administration* (London Routledge & Kegan Paul 1967); John Greenwood, Robert Pyper & David Wilson, *Public administration in Britain today* (Routledge 2002).
[11] ibid 61.
[12] See Patrick Dunleavy 'Is there a Radical Approach to Public Administration' (2007) 60(2) Public Administration 215 – 225; John Greenwood, Robert Pyper & David Wilson, *Public administration in Britain today* (Routledge 2002).
[13] See Fletcher P, Public administration (London Routledge & Kegan Paul 1967).
[14] SIGMA/OECD, *European Principles of Public Administration* (Paper No. 27, OECD 1999, Paris).

agent model, some form of linkage to the state through delegation is necessary, which justifies viewing the relationship through an organizational lens. However, the very concept of "delegation" implies that the agent should not be entirely equated with the state. An agent may perform delegated functions without being organizationally integrated with the principal. This distinction underscores the need to consider factors beyond organizational ties, such as the nature of the functions being performed.

Given that there is significant divergence on which aspects demand more attention and are more determinative for the definition of a 'public servant',[15] it would depend significantly on what kind of role public administration plays in a given jurisdiction.[16] Since there cannot be a universalist understanding of who constitutes a 'public servant', the *United Nations Convention Against Corruption, 2003* ('UNCAC') has adopted a flexible approach to allow for member states to adopt the definition to the needs of their respective jurisdictions.[17]

The UNCAC makes reference to some of the six aspects of the definition of 'public servant' highlighted by Radojičić. The following are the various ingredients and the corresponding aspects incorporated in the UNCAC definition:

i) Holding legislative, executive, judicial or administrative office (*Organisational Aspect*) whether appointed or elected (*Employment*)

ii) Any other person who performs a "public function" (*Functional Aspect*) including for a public agency or a public enterprise

iii) Any person so defined under the domestic law.

The UNCAC definition has primarily tried to balance the Functional and Organisational aspects in subclauses (i) and (ii) of the UNCAC definition and made the definition inclusive insofar as fulfilling either of the aspects is sufficient. Such a definition gives the leeway to the member states to choose a definition which accurately reflects the role that public administration plays in the given jurisdiction. Over time, as there is a departure from traditional conceptualizations of the state, the definition of a public servant also needs to keep up by including new actors whose actions may cost the collective welfare of the public.[18]

[15] Zorica Radojičić and Aleksandra Rabrenovic (n 10) 59.
[16] ibid 61-62.
[17] United Nations (n 5) art 2(a).
[18] Radojičić and Rabrenovic (n 10) 62.

2.2. Indian Anti-corruption framework

Indian law on anti-corruption, being mindful of the need to rethink definitions of public servant with changing conceptualizations of the role of the state in public life, has gone through multiple amendments and enactments over the course of time. Before the enactment of the current Prevention of Corruption Act ('PoCA') of 1988 various activities such as taking bribes,[19] influencing public servants through corrupt and illegal means[20] and public servants accepting gifts and valuables[21] were criminalised under the Indian Penal Code, 1860 ('IPC'). This existed along with the PoCA of 1947 which complemented the IPC provisions through evidentiary presumptions for offences under the IPC[22] along with certain additional offences such as criminal misconduct in the discharge of official duty.[23]

The currently applicable PoCA was enacted in 1988 with an aim to consolidate all the existing laws relating to anti-corruption. PoCA repealed the corruption-related provision under the IPC and the PoCA 1947 act in its entirety and also expanded the applicability of the anti-corruption framework by bringing in a new definition of "public servants".[24]

The 1988 Act did away with the previous definition of "Public Servants" given under Section 21 of the IPC[25] and shifted towards a more functional approach by including "*any person who holds an office by virtue of which he is authorised or required to perform any public duty*".[26] This was a move away from the organisational approach discussed in the previous section which can be seen in the Section 21 definition under the IPC. The IPC's definition of 'public servants' mostly included officers with direct links to the government through renumeration etc by way of an exhaustive definition.[27] The IPC definition was also more rigid compared to the more dynamic definition adopted in the PoCA 1988 since the IPC enumerated all the instances where a person is to be considered a public officer in more detail.

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[19] Indian Penal Code 1860, s 161.
[20] Indian Penal Code 1860, s 162.
[21] Indian Penal Code 1860, s 165.
[22] Prevention of Corruption Act 1947, s 4.
[23] Prevention of Corruption Act 1947, s 5.
[24] 'An Overview of Anti- Corruption Laws in India A Legal, Regulatory, Tax and Strategic Perspective' (Nishith Desai and Associates, March 2020) available at <https://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research_Papers/Overview-of-Anti-Corruption-Laws-in-India-Web1.pdf> last accessed 30 October 2024.
[25] While the PoCA 1988 does not remove Section 21 of the IPC, it has repealed the anti-corruption provisions under the IPC and incorporated them under the PoCA. Thereby making the definition given under Section 21 inapplicable for many corruption related offences.
[26] Prevention of Corruption Act 1988, s. 2(c)(viii).
[27] Indian Penal Code 1860, s 21.

The PoCA was further amended in 2018. The amendments, for the first time, criminalized supply-side corruption by penalizing bribe-giving.[28] It also granted the power to prosecute commercial organizations, "*if any person associated with such commercial organizations gives or promises to give any undue advantage to a public servant*".[29] This was in line with a recognition of modern manifestations of corruption wherein commercial organizations may engage in rent-seeking behaviour with respect to the grant of government contracts, auctions etc.[30]

The amendment also provides certain protections to public servants by insulating public servants from enquiries carried out by police officers and by requiring prior approval before conducting an enquiry into any offence committed by incumbent and retired public servants in the discharge of official functions or duties.[31] The approval would have to be sought from the relevant union or state government in whose employment the accused 'public servant' committed the offence in the discharge of his official functions and duties.[32] It is to be noted that this is in addition to the already existing sanction requirements under the PoCA which bars any court from taking cognizance against a public servant in the absence of the prior sanction of the relevant authority.[33] Therefore, public servants have been insulated not only from the cognizance of offences against them but also from the investigation of offences relatable to recommendations made or decisions taken by public servants in the discharge of official functions or duties.[34] The relevant authority is usually the authority which is competent to remove the public servant from his office.[35]

2.3. Judicial Interpretation of "Public servant" and "Public Duty" under the PoCA

In this section we examine the judicial principles determining the classification of "Public Servant". We will specifically focus on the jurisprudence that has been developed under Section 2(c)(viii) of the PoCA 1988, which adopts the functional definition involving "public duty" as discussed in the previous section. The Section reads as follows:

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[28] Prevention of Corruption Act 1988, s 8.
[29] Prevention of Corruption Act 1988, s 9. Section 9(3) defines "commercial organisation" to mean any body, partnership firm or association of persons incorporated in India and carrying on business in India or outside, or any body, partnership firm or association of persons incorporate outside India and carrying on business in India.
[30] Yin ZD and Nie HH (n 9).
[31] Prevention of Corruption Act 1988, s 17A.
[32] ibid.
[33] Prevention of Corruption Act 1988, s. 19.
[34] Prevention of Corruption Act 1988, s. 17A.
[35] ibid, s. 19(1)(c).

(c) "public servant" means—

……

(viii) any person who holds an office by virtue of which he is authorised or required to perform any public duty;

We have already noted how the enactment of the PoCA marked a shift towards a more expansive regime of anti-corruption regulation. The sub-clauses under section 2(c) describe what constitutes a Public Servant by enumeration. The list under section 2(c) is not exhaustive by virtue of section 2(c)(viii) which includes any person who holds an office and is authorized to perform a public duty. Explanation 1 further clarifies that a person falling under section 2(c) need not be appointed by the government in order to be a public servant. This is again reflective of the legislative intent of keeping up with the changes in modern conceptions of the state and the role of public authorities in order to purify public administration.[36]

The courts were mindful of the legislative intent behind widening the definition of "Public Servant". The Supreme Court has observed:

> *It cannot be lost sight of that the 1988 Act, as its predecessor, that is, the repealed Act of 1947 on the same subject, was brought into force with avowed purpose of effective prevention of bribery and corruption. The 1988 Act which repeals and replaces the 1947 Act contains a definition of "public servant" with vide spectrum in clause (c) of Section 2 of the 1988 Act, so as to purify public administration. The Objects and Reasons contained in the Bill leading to passing of the Act can be taken assistance of, which give the background in which the legislation was enacted. When the legislature has introduced such a comprehensive definition of "public servant" to achieve the purpose of punishing and curbing the growing menace of corruption in the society imparting public duty, it would be apposite not to limit the contents of the definition clause by construction which would be against the spirit of the statute.*[37]

This expansive interpretation has been reiterated by the Supreme Court in many cases.[38] In taking note of this departure brought in by the 1988 Act, the Supreme Court has also affirmed

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[36] Prevention of Corruption Bill of 1988, Statement of Objects and Reasons, para 3. Also see *Govt. of A.P.* v. *P. Venku Reddy* (2002) 7 SCC 631 paras 9-12.

[37] *State of Gujarat* v. *Mansukhbhai Kanjibhai Shah* (2020) 20 SCC 360, para 67.

[38] See *State of Punjab* v. *Nirmal Kaur* (2009) 13 SCC 418; *Asian Resurfacing of Road Agency Pvt. Ltd. and Anr. v CBI* (2018) 16 SCC 299; *Manish Trivedi* v. *State of Rajasthan* (2014) 14 SCC 420 para 19.

that the previous definition contained in Section 21 of the IPC and its case laws will no longer have any bearing on the interpretation of the definition under PoCA.[39]

Under section 2(c)(viii), the only two ingredients which are required to be satisfied to include a person as a public servant under the PoCA have been "public duty" and "office". It is pertinent to look at how these have been understood judicially.

Section 2(b) of the PoCA defines public duty as "*a duty in the discharge of which the State, the public or the community at large has an interest*".[40] The cases have often interpreted this definition of "public duty" very broadly. In the *P.V. Narasimha Rao* case, it was held that the Members of Parliament discharge a public duty and are therefore included within the definition of 'public servant' under the PoCA.[41] This was despite the fact that there are no accountability mechanisms or supervision applicable to a MLA's decision-making except through the political process of elections. In *State* v. *C.N. Manjunath,* the Supreme Court noted that licensed surveyors tasked with preparing survey sketches under the Karnataka Land Revenue Act perform a "public duty".[42] Here, the court also read "statutory duties" and "public duties" synonymously indicating that by virtue of a duty being codified in another statute, it would be a public duty.[43] However, none of the cases which have interpreted "public duty" have substantiated the wording given in the PoCA, despite it being a very vague definition under section 2(b) due to the use of the phrase "public or the community at large has an interest".

The interpretation of the second requirement of "holds an office" under section 2(c)(viii), on the other hand, has received more elaboration from the courts. The Supreme Court has shed some light on the definition of "office" by observing:

> *The word "office" is of indefinite connotation and, in the present context, it would mean a position or place to which certain duties are attached and has an existence which is independent of the persons who fill it. Councillors and Members of the Board are positions which exist under the Rajasthan Municipalities Act. It is independent of the person who fills it.*[44]

[39] *State of Maharashtra v Prabhakar Rao* (2002) SCC (Cri) 1831.
[40] Prevention of Corruption Act 1988, s 2(b).
[41] *P.V. Narasimha Rao* v *State* (1998) 4 SCC 626.
[42] *State* v. *C.N. Manjunath* (2017) 11 SCC 361 : (2017) 4 SCC (Cri) 325, paras 5-6.
[43] ibid paras 6-10.
[44] *Manish Trivedi* v. *State of Rajasthan* (2014) 14 SCC 420, para 19.

Here also, the court is indicating that by virtue of being codified in the Rajasthan Act, the members of the board are occupying an "office". The requirement of "independent of the persons who fill it" seems to point towards the existence of the position as a distinct legal and institutional entity, regardless of who currently occupies it. This is mostly the case in positions created by statutes. However, the courts have never limited the definition of public servant exclusively to statutory enactments and provisions and have often even included non-statutory jobs within the ambit of public servants.[45]

Given the broad and vague definitions of "public duty" and "office" under Section 2(c)(viii), the Supreme Court in 2016 expressed concerns that the definition could extend to private occupations meeting the "public duty" criteria. The 2016 landmark case of *CBI* v. *Ramesh Gelli,*[46] was the first Supreme Court judgment which introduced limits on the interpretation of Section 2(c)(viii). While the judgment is often hailed for expanding the scope of the PoCA to also cover employees of a banking company within the ambit of the PoCA as public servants, certain observations with regard to the interpretation of Section 2(c)(viii) have had the opposite effect:

> *"While there can be no manner of doubt that in the Objects and Reasons stated for enactment of the Prevention of Corruption Act, 1988 it has been made more than clear that the Act, inter alia, envisages widening of the scope of the definition of "public servant", nevertheless, the mere performance of public duties by the holder of any office cannot bring the incumbent within the meaning of the expression "public servant" as contained in Section 2(c) of the PC Act. The broad definition of "public duty" contained in Section 2(b) would be capable of encompassing any duty attached to any office inasmuch as in the contemporary scenario there is hardly any office whose duties cannot, in the last resort, be traced to having a bearing on public interest or the interest of the community at large. Such a wide understanding of the definition of "public servant" may have the effect of obliterating all distinctions between the holder of a private office or a public office which, in my considered view, ought to be maintained.* ***Therefore, according to me, it would be more reasonable to understand the expression "public servant" by reference to the office and the duties performed in***

[45] See *Govt. of A.P.* v. *P. Venku Reddy* (2002) 7 SCC 631.
[46] (2016) 3 SCC 788.

***connection therewith to be of a public character**."*[47] *(emphasis added)*

This judgment has since then introduced an additional criterion of "public character" in the interpretation of section 2(c)(viii). Mere discharge of a duty in which the public and community at large will not bring a person under the definition unless the position of the person is one of a "public character". This departs from the functional trajectory brought in by the new definition of public servant under the PoCA as opposed to the definition contained in the IPC.

This criterion of *public character* was further adopted by the Delhi High Court, in holding that RPs are not included in the definition of public servants:

> *Merely because the IP is vested with certain roles, responsibilities and duties which could partake the nature of "public duties", it is not a necessary conclusion or a definite inference that the same are being discharged in the nature of "public character". In the present case, having regard to the law laid down by the Hon'ble Supreme Court in Swiss Ribbons (supra) and Arcelor Mittal (supra) defining the role of the RP as a mere "facilitator", it appear to this Court that even if the roles and duties ascribed to the IP may be bordering or falling within "public duties", the same would still not assume "public character".*[48] *(emphasis added)*

Interestingly, while the Supreme Court's use of the criterion of "public character" *in the Ramesh Gelli case* was to prevent holders of private office from being included as "public servants",[49] the Delhi High Court does not go into the question of private *versus* public offices. The Delhi High Court observed the duties of RP being facilitation and acting on the instructions of the CoC, and thus RP's duties cannot be considered as "public character". The Delhi High Court seems to interpret lack of public character to mean the lack of *sufficient discretion* with the RPs to warrant an inclusion within the definition of public servant. This is discussed in more detail in Section VI of this paper.

After the 2016 Ramesh Gelli judgment, there haven't been any Supreme Court judgments which have gone into this question of "public character" so as to draw any intelligible trend on how "public character" is to be interpreted. The question of how "public character" is to be

[47] ibid para 36.
[48] *Arun Mohan* v. *CBI* (2023) SCC OnLine Del 8080, para 79.
[49] *CBI* v. *Ramesh Gelli* (n 46) para 36.

interpreted is still open to be adjudicated..

The question then is how *should* "public character" be interpreted? It is submitted that the theoretically sound way would be to factor in all the six aspects of a definition of "public servant" discussed in the first section to arrive on a finding whether it constitutes as "public character". Such an exercise was undertaken by the Supreme Court in the case of *State* v. *C.N. Manjunath,*[50] which came shortly after the *Ramesh Gelli* judgment. However, it is to be noted that the *Manjunath* judgment despite coming after the *Ramesh Gelli* judgment does not refer to the criteria of "public character" in its reasoning. In *Manjunath*, the question was whether licensed surveyors who were not directly under government employment could be considered as public servants. The court looked at factors such as: i) that the licensed surveyors had to pass a government examination (*merit-based recruitment*) ii) maintenance and regulation of registered licensed surveyors by Director of Survey Settlement and Land Records (*Accountability though supervision*) iii) statutory prescription of the duties (*special legal regime*). On an appreciation of all these factors, the Supreme Court concluded that the licensed surveyors would be covered within the definition of 'public servants' under the PoCA. We can see how all these factors correspond to one of the six aspects of a definition of public servant discussed under the previous subsection.

3. Public Nature of RP's mandate

Having discussed the scope of applicability of anti-corruption laws and concepts like public duty, office, and public character, this section looks at the theoretical understandings of Insolvency law and its utility to the public, framework of IBC, and the role of RPs and whether RP's role has a public element.

3.1. The Public Element in the Insolvency Process

3.1.1. Public interest in Insolvency

Theorization of the role of Insolvency law has often been divided along the lines of whether insolvency should, and does, give effect to pre-existing property entitlements (such as security rights), or whether it should, and does, allow for a departure from such entitlements in order to prefer other parties.[51] The traditionalist school conforms with the latter views and adopts a

[50] *State* v. *C.N. Manjunath* (2017) 11 SCC 361, para 6.
[51] Alisdair McPherson, 'Insolvency law through the lens of property law and theory' in Emlie Ghio, John M Wood and Jennifer LL Grant (eds) *Re-examining Insolvency Law and Theory* (Edward Elgar Publishing 2023).

more inclusive approach to resolving insolvencies, which takes into account the interests of all the stakeholders and the public at large and not merely the creditors who are seeking to enforce their claims.[52] Such an approach actively seeks to maintain the viability of a business when it is expedient to do so in the larger interests. This is opposed to the more proceduralist school which views insolvency as a process which only allows for effective enforcement of creditors' claims when a business goes bankrupt.[53] It does not envisage or make any active efforts to ensure the rehabilitation of distressed firms, neither does it seek to reorganize or alter the priority of claims that the creditors have in the larger public interest.[54]

Existing literature has often classified India in the "traditionalist" category owing to its more inclusive insolvency law framework which caters to the interests of all the stakeholders and not merely the creditors seeking to enforce their claims.[55] The preamble of the IBC itself mentions the "interests of all stakeholders". The aim of value maximization is not absolute and has also been made subject to other considerations. For instance, in *Binani Industries,* the NCLAT noted that "*One cannot balance interest of all stakeholders, if resolution maximises the value for a or a set of stakeholders such as 'Financial Creditors'. One or a set of stakeholders cannot benefit unduly stakeholder at the cost of another*."[56] A perusal of the amendments made to the Code also reflects that the IBC is often laded with public policy imperatives. For instance, there have been multiple tweaks made to the IBC in the interests of homebuyers who have weak contractual rights, so that they are not left unprotected.[57] Whether this amendment has indeed helped the homebuyers is a different question altogether.[58] Moreover, the Code also statutorily safeguards the interests of workmen and employees out of social interest prerogatives.[59]

Viewed more conceptually, the process of insolvency is different from other forms of debt-recovery such as those under SARFAESI 2002 or the Recovery of Debts and Bankruptcy Act 1993. Insolvency law mandates collectivisation and ensures that all the stakeholders are

[52] Medha Shekar and Anuradha Guru, 'Theoretical Framework of Insolvency Law' in *Insolvency and Bankruptcy Regime in India: A Narrative* (Insolvency and Bankruptcy Board of India 2020).
[53] Ted Janger (2001), "Crystals and Mud in Bankruptcy Law: Judicial Competence and Statutory Design", 43 ARIZ. L. REV., pp. 559-566.
[54] ibid.
[55] Medha Shekar and Anuradha Guru (n 52) 53-54.
[56] *Binani Industries Limited* v *Bank of Baroda & Anr* Company Appeal (AT) (Insolvency) No. 82 of 2018
[57] Uday Khare, 'Insolvency in Real Estate: A Difficult Balancing Act' (2021) JGILS Working Paper No 3/2021
[58] See M P Ram Mohan and Vishakha Raj, 'Apartment Buyers as Financial Creditors: Pushing the Conceptual Limits of the Indian Insolvency Regime' (2020) 33(2) Columbia Journal of Asian Law.
[59] Insolvency and Bankrupcy Code 2016, s 53(1)(b)(i).

brought to the Committee of Creditors. This itself makes the entire process a proceeding in rem and not one in personam. The public "*in rem*" element of Insolvency law has also been recognized judicially. In the *Indus Biotech* case, the Supreme Court has held that insolvency disputes cannot be arbitrated once an application for initiation of insolvency has been admitted by the NCLT as the proceedings acquire an *in rem* character accompanied by the creation of third-party rights.[60]

3.1.2. Ensuring Information asymmetry and legitimacy of the process

Given the creditor-in-control model adopted by India, the insolvency process is often viewed as a solely creditor-driven process where the commercial wisdom of the Committee of Creditors reigns supreme over other legal considerations. While it is true that creditors play a key role in determining an insolvent company's fate, it is easy to overlook the framework under IBC in initiating resolution and forming the creditors' committee. The IBC is designed in a way to ensure that the creditors are able to come together and form a committee of creditors. IBC also regulates the manner in which the committee of creditors convenes and carries out decision-making.[61]

A situation of information asymmetry is likely to occur when the former management of a corporate debtor ("CD"), including promoters and stockholders, has more knowledge about the company's operations than others like creditors and debt holders. In such cases, creditors or resolution applicant may struggle to distinguish between viable and non-viable firms.[62] This information asymmetry between debt and equity holders, without institutional oversight in insolvency, would make creditor consensus such as that of the CoC, nearly impossible.

The Bankruptcy Law Reforms Committee ('BLRC') acknowledged that information asymmetry was a major obstacle to fair discussions or guaranteeing a speedy process.[63] One of the most fundamental benefits of having an insolvency process as opposed to dealing with defaults privately is that it can act as an "information revelation process" between the Corporate Debtor ('CD') and the Creditors.[64] The RP through various information memorandum and

[60] *Indus Biotech (P) Ltd*. v. *Kotak India Venture (Offshore) Fund* (2021) 6 SCC 436.
[61] For instance, the IBBI has recently released 'Guidelines for Committee of Creditors' on 06 August 2024 to ensure integrity and Cooperation in the working of the Committee of Creditors and has been working towards a Code of Conduct for a Code of Conduct for the Committee of Creditors. See IBBI, Discussion Paper dated 27 August 2021.
[62] Medha Shekar and Anuradha Guru (n 52) 47.
[63] Bankruptcy Law Reform Committee, The Report of the Bankruptcy Law Reform Committee: Volume I Rationale and Design (Ministry of Finance 2015), 3.2.2.
[64] Medha Shekar and Anuradha Guru (n 52) 47.

reports, mediates this information revelation process and facilitates creditor-debtor and creditor-resolution applicant negotiations.

The process of reducing asymmetric information starts as soon as the RP takes over control of the CD. In order to ensure that creditors and debtors are equally informed about the entity's operations and viability, the BLRC envisioned the RP's function as the manager of all CD-related information.[65] In order to achieve this, the RP provides the committee of creditors ('CoC') with an information memorandum that contains all pertinent details regarding the assets, finances, activities, and—above all—the value of the CD.[66] This makes it possible for the CoC to assess the financial and economic viability of the CD and evaluate any potential resolution plans. The RP is also required to find any favourable, undervalued, fraudulent, or extortionate transactions[67] by thoroughly examining the CD's financial transactions and by accessing the CD's financial books.[68] Additionally, the RP provides progress updates to the Adjudicating Authority,[69] including detailed disclosures under the CIRP.[70] In order to help the resolution applicants ('RAs') create workable resolution plans based on reliable facts, the RP prepares the Expression of Interest and Request for Resolution Plans under the guidance and oversight of the CoC.[71]

3.1.3. Scope of RP's authority under the scheme of the IBC

One of the key advantages of an insolvency framework over purely private negotiations between creditors, debtors, and resolution applicants is the enhanced information symmetry and procedural legitimacy it provides, ensuring that no stakeholder is excluded.

In this context, RPs, who bear the primary responsibility for administering the process and fulfilling its associated functions, occupy a pivotal role that must instil confidence among all stakeholders. The BLRC report recognized this need by observing the following with reference to the role of IPs:

In an insolvency and bankruptcy resolution process driven by the law there are judicial

[65] BLRC Report (n 63) 4.4.
[66] Insolvency and Bankrupcy Code 2016, s 25(2)(g); IBBI (Insolvency Resolution Process for Corporate Persons) Regulation, regulation 36.
[67] Insolvency and Bankrupcy Code 2016, s. 43.
[68] IBBI (Insolvency Resolution Process for Corporate Persons) Regulation, regulation 4.
[69] IBBI (Insolvency Resolution Process for Corporate Persons) Regulation regulations 17(1) and 39(4).
[70] IBBI (Insolvency Resolution Process for Corporate Persons) Regulation regulation 40B.
[71] IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, Regulation 36A and Regulation 36B.

> *decisions being taken by the adjudicator. But there are also checks and accounting as well as conduct of due process that are carried out by the IPs. Insolvency professionals form a crucial pillar upon which rests the effective, timely functioning as well as credibility of the entire edifice of the insolvency and bankruptcy resolution process*.[72]

The scope of authority of the RP *vis a vis* the Adjudicating Authority which is the primary body responsible for the entire insolvency process, the report states:

> *A well functioning system of resolution driven by IPs enables the adjudicator to delegate more and more powers and duties to the professionals. This creates the positive externality of better utilisation of judicial time. The worse the performance of IPs, the more the adjudicator may need to personally supervise the process, which in turn may cause inordinate delays. Consumers in a well functioning market for IPs are likely to have greater trust in the overall insolvency resolution system. On the other hand, poor quality services, and recurring instances of malpractice and fraud, erode consumer trust*.[73]

Thus, it is clear that from the inception of the Code, the RPs have been visualised as a trusted agent of the Adjudicating Authority. Their role and importance in ensuring continued faith in the insolvency framework is also something that has been recognized from the start; that the RP acts as an officer of the court during the CIRP and any hindrance in the work of the RP will amount to contempt of court.[74]

The RP is the one who opens the entire insolvency process to the world and makes it a proceeding in rem. We have already noted that the mandatory collectivization under the Code happens when all the stakeholders are brought to the table. This happens when the RP makes a public announcement and calls for the submission of claims.[75] Later on, it is the RP who is tasked with verifying and preparing a list of claims and constituting the Committee of Creditors. The identified creditors are the ones who get a decisive say on the conduct of the resolution process and are the major stakeholders.

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[72] BLRC Report (n 63) 4.4.
[73] ibid.
[74] *Asset Reconstruction Company (India) Pvt. Ltd*. Vs. *Shivam Water Treaters Pvt. Ltd*. C.P. No. (IB) 1882 (MB)/2018.
[75] Insolvency and Bankruptcy Code 2016, s 13(2) and s 15; IBBI (Insolvency Resolution Process for Corporate Persons) Regulation, regulation 6.

Once all the major stakeholders have been identified, in order to ensure that the decision-making is fair and compliant with applicable procedures, the RP convenes, attends and makes minutes of all meetings of the Committee of Creditors.[76] The RP also mediates between the CD and the CoC by being responsible for the disclosure of all information pertaining to the financial health of the CD and filing an information memorandum to the CoC. This is because the RP, being the sole manager of the CD during the CIRP is the only one who is privy to all such information. In fact, it is the legal obligation of the RP to make efforts to discern and identify any fraudulent and undervalued transactions which the CD may have undertaken prior to the CIRP.[77]

Once the CoC is constituted and informed about the affairs of the CD, the RP's duty extends to publishing the Invitation for Expressions of Interest from resolution applicants. It is the RP which is responsible for adding all the requirements for an eligible Resolution Plan in the Request for Proposals and sending the plans which conform with the requirements for deliberation. Moreover, the RP also has to supervise the voting procedures resolution plans that are received and ensure a fair procedure. Once a plan is approved it is the RP alone which has to apply to the Adjudicating Authority ('AA') for final approval of the resolution plan.[78]

The Supreme Court discussed the role of the RP and classified it as administrative instead of quasi-judicial in the case of *Swiss Ribbons*:

> *Unlike the liquidator, the resolution professional cannot act in a number of matters without the approval of the Committee of Creditors under Section 28 of the Code, which can, by a two-thirds majority, replace one resolution professional with another, in case they are unhappy with his performance. Thus, the resolution professional is really a facilitator of the resolution process, whose administrative functions are overseen by the Committee of Creditors and by the adjudicating authority.*[79]

The RP's limited decisional autonomy, requiring CoC approval, is often seen as undermining the public aspect of their role in the process..[80] But we have seen in our discussions above that the RP is instrumental in enabling the collectivization of various stakeholders which is an

[76] Insolvency and Bankruptcy Code of India 2016, s 24 and 25(2)(f). IBBI (Insolvency Resolution Process for Corporate Persons) Regulation, regulations 18, 19 and 21.
[77] Insolvency and Bankruptcy Code of India 2016, s 25(2)(j).
[78] ibid, s 31.
[79] *Swiss Ribbons Private limited And Anr*. vs. *Union of India And Ors*. (2019) 4 SCC 17, paras 89-91.
[80] *Arun Mohan* (n 3).

intrinsic characteristic of the insolvency regime. In the absence of the RP there can be no mediation and permeation of necessary information between the CD and the CoC which has to decide on the CD's fate. A finding that the role of the RP is "facilitative" should not be determinative of whether there is a "public element" attached to the office. As we have already discussed earlier, one of the primary purposes of a special insolvency law regime is to facilitate collectivisation and inform the creditors to exercise their commercial wisdom which would not be possible in a purely private setting. It is this collectivisation and balancing of multiple stakeholder positions that makes an efficient and acceptable resolution of insolvent firms possible, with minimum loss of economic value.

4. Regulation of Resolution Professionals

4.1. Legal Framework for Regulation of RPs

In light of the integral role of the RP in administering the CIRP, the question of regulation and/or over-regulation of RPs assumes central importance. The BLRC report was cognizant of these concerns and advocated for a model of "regulated self-regulation" for the IP profession:

> *The Regulator will enable the creation of a competitive market for IP agencies under it. This is unlike the current structure of professional agencies which have a legal monopoly over their respective domains. The IP agencies under the Board will, within the regulatory framework defined, act as self-regulating professional bodies that will focus on developing the IP profession for their role under the Code. They will induct IPs as their members, develop professional standards and code of ethics under the Code, audit the functioning of their members, discipline them and take actions against them if necessary. These actions will be within the standards that the Board will define. The Board will have oversight on the functioning of these agencies and will monitor their performance as regulatory authorities for their members under the Code. If these agencies are found lacking in this role, the Board will take away their registration to act as IP agencies.*[81]

The current regime therefore provides for a two-tiered regulation.[82] The first tier, managed by Insolvency Professional Agencies ("IPAs"), focuses on regulating and developing IPs while

[81] BLRC Report 4.4.3.
[82] Mukulita Vijayawargiya 'Insolvency Professionals and the Code of Conduct' *in Insolvency and Bankrupcy Code: A Miscellany of Perspectives* (Insolvency and Bankruptcy Board of India 2019).

promoting ethical and professional conduct.[83] IPAs prescribe bye-laws which are applicable on all the IPs which are a part of the IPA.[84] The certification of the IPs with the IBBI is also subject to adherence with the bye-laws of the IPA. In cases of violation of the bye-laws, the IPA may also seek to cancel the registration of the IP.[85]

Under the IBBI regulatory framework the harshest consequence that is stipulated under the Code is of suspension or cancellation of registration, apart from fines.[86] In order to ensure greater malleability in the regulation of the IPs, the code itself does not prescribe the specifics of the regulation of IPs but leaves it within the domain of the IBBI to notify through various regulations.

The IBBI's Insolvency Professionals regulations ('IP Regulations') lay out most of the applicable regulations governing the conduct of the RPs in detail. Regulation 7(2)(h) of the IP regulations stipulates that the registration of an IP is subject to adherence to the Code of Conduct laid out in the First Schedule of the Regulations.[87] The Code of Conduct lays down various conditions which are necessary to inspire confidence in the stakeholders such as integrity, independence, correct representation, timeliness etc.[88]

Any violation of the Code of Conduct has to be investigated by the Board[89] in accordance with the Inspection and Investigation Regulations of the IBBI.[90] These regulations provide for an investigation which is followed by a show cause notice issued by the Disciplinary Committee ("DC") of the IBBI.[91] The Disciplinary Committee is then required to endeavour to dispose off the matter within 60 days from due date of receipt of reply to the show cause notice.[92]

In light of the legislative goal of speedy resolution and value maximization, the IBBI has not prescribed any blanket disqualification for IPs from their existing assignments upon filing of a

[83] Currently, in India, there are three recognized IPAs: Indian Institute of Insolvency Professionals of ICAI (Registration No.: IBBI/IPA/16-17/01), ICSI Institute of Insolvency Professionals (Registration No.: IBBI/IPA/16-17/02) and Insolvency Professional Agency of Institute of Cost Accountants of India (Registration no.: IBBI/IPA/16-17/03).
[84] See IBBI (Model Bye-Laws and Governing Board of Insolvency Professional Agencies) Regulations, 2016; IBBI (Insolvency Professionals) Regulations, 2016.
[85] IBBI (Insolvency Professionals) Regulations 2016, regulation7(2)(a).
[86] Insolvency and Bankruptcy Code 2016, s 220(2). This is apart from the general offence of deliberately contravening the provisions of Part II provided under Section 69(2) of the IBC.
[87] IBBI (Insolvency Professionals) Regulations 2016, Regulation 7(2)(h).
[88] IBBI (Insolvency Professionals) Regulations 2016, First Schedule.
[89] Insolvency and Bankruptcy Code 2016, Section 218.
[90] See IBBI (Insolvency Professionals) Regulations 2016.
[91] IBBI (Inspection and Investigation) Regulations, 2017
[92] IBBI (Insolvency Professionals) Regulations 2016, Regulation 13(2).

disciplinary complaint or ongoing investigations against an IP. In fact, the NCLAT has clarified that once an RP is appointed he can only be replaced by the Committee of Creditors by virtue of Section 27. Any violations of the Code of Conduct etc. are immaterial and are to be prayed in front of the IBBI. For a given CIRP, it is the CoC alone which can replace the RP.[93]

However, during the course of a pending disciplinary proceeding,[94] an IP is barred from taking up any new assignment during the pendency of the proceedings. Moreover, a conviction for an offence for a term exceeding six months or an offence of moral turpitude has the effect of cancelling the registration of the IP.[95] Yet, there is no direct provision dealing with the immediate consequences of cancellation of registration on the ongoing CIRPs which are administered by the RP at that time, and it is left with the wisdom of the CoC.[96] Even the IBBI has only merely called upon the CoC to remove the RP and respected that it is the CoC's prerogative to finally decide on whether the RP should be disqualified or not.[97]

4.2. Parallel jurisdictions of the AA and IBBI

The complex nature of the IP regulation framework in India, with multiple players involved has been subject to criticism for being inefficient.[98] Under the framework described above, the appointment of the RP is done based on the recommendation of the CoC and approval of the AA. After which the RP regularly reports to the Adjudicating Authority ("AA") in other words ("NCLT"). The BLRC report as well as multiple judicial precedents have recognized the role of the IP as an agent of the AA which has to ensure compliance with all the orders of the AA. Yet, any infraction by the IP of any duties or obligations prescribed under the code or given by the AA is to be dealt with exclusively by IBBI. The judicial experience as highlighted in the following cases so far indicates that the AA has often maintained the separation stringently and refused to entertain cases which it deems to be within the domain of the IBBI. In *Bank of*

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[93] *Veeral Controls Pvt. Ltd*. v. *Regen Powertech Pvt. Ltd. and Anr*. Company Appeal (AT) (CH) (INS) No. 98 of 2022. Also see: *Partha Sarathy Sarkar* v. *Specified Undertaking of Unit Trust of India Ltd*. Company Appeal (AT) (Insolvency) No. 1340 of 2023.
[94] Insolvency and Bankruptcy Code 2016, s 7(5)(b).
[95] IBBI (Insolvency Professionals) Regulations 2016, Regulation 4(1)(d) read with Regulation 7(2)(b).
[96] While there is no bar against appointment as IP during the pendency of a criminal proceeding under the IBC, IBBI is empowered to initiate disciplinary action against the said IP, thereby making it ineligible if it has reason to believe that the charges have an impact on the integrity and impartiality or brings disprespute to the profession. (See Clause 9 of the Code of Conduct). *In the Matter of Mr. Subrata Monindranath Maity,* upon a registration of a FIR against the RP, the IBBI directed the CoCs of all the CDs he was acting as RP for to replace him as the RP.
[97] *In the matter of Mr. Subrata Monindranath Maity, IP* (IBBI, 09 May, 2022)
[98] Ritima Singh, 'Conduct of Insolvency Professionals: To whom so ever it may concern' (Daksh India 2024) available at <https://www.dakshindia.org/insolvency-professionals-accountability/> last accessed 30 December 2024.

Baroda v Varia Engineering, the liquidator sought directions to the Central Bureau of Investigation to not pursue the criminal case for actions taken in good faith during the CIRP. The NCLT, in this case, while taking note of Section 233 of the IBC, which protects the liquidator, remarked that IBBI is the only appropriate authority to look into any such allegations made against the liquidator.[99] In *Central Bank of India* v *KSM Spinning Mills*, [100] the AA refused to maintain an Interim Application seeking removal of the RP on grounds of an allegation of mala fides and corruption. It noted that:

> *It is also to be seen that when allegations of mala fides or corruption or professional misconduct or any other sort are alleged against a RP, the same are to be adjudicated by the IBBI and basing on the orders passed by the IBBI, appropriate action would be taken by this Adjudicating Authority. Since, admittedly the applicant made complaint against the respondent-RP to the IBBI, at this stage, we are not inclined to adjudicate and give any finding on these IAs.*[101]

In *IBBI* v *Rishi Prakash Vats,* the AA noted that "*Once a disciplinary proceeding is initiated by IBBI on the basis of evidence on record, IBBI has to close the proceeding or pass appropriate orders in accordance with law. The AA cannot quash the proceeding, even if proceeding is initiated at the instance and recommendation made by the AA*"[102]

This separation between the jurisdiction of the AA and the IBBI, though in accordance with the envisioned model under the BLRC can lead to inefficiencies. The NCLT appoints IP, IP reports to the NCLT, and NCLT has the authority to exclude them from the CIRP process. Nonetheless, the IBBI has the authority to discipline an IP. Furthermore, the NCLT has the authority to adjudicate any irregularity pertaining to the CIRP, with the exception of those involving IPs.

Onc concern with this framework lies in the division of responsibilities between the IBBI and the AA. While the IBBI possesses the authority to initiate and adjudicate irregularities related to IPs, it is the AA that holds the relevant information on such matters. As the adjudicating authority, the NCLT is actively involved at every stage of the CIRP, making decisions on all

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[99] (2021) IA/4679 in CP(IB)/149. (NCLT Ahmedabad). Also see *State Bank of India* v *Priknit Retails Ltd.* (2024) IA No.464/20 & 855/20 in CP(IB) No. 398/Chd/pb/2018 (NCLT Chandigarh). While this case deals with Liquidators, Section 233 of the IBC which was referred to by the court in this case, includes both Liquidators and Insolvency Professionals.

[100] *Central Bank of India* v. *KSM Spinning Mills Limited* (2021) IA Nos. 249/2020 and their IAs in CP (IB) No. 250/Chd/Pb/2018.

[101] ibid.

[102] CA (AT) (Ins.) No. 324 of 2019.

other related issues. Moreover, since AA is the only body that can actually remove an RP with the direction of the CoC, the IBBI can merely recommend a removal at best. Even the consequences for violation of IBBI's IP Regulations, if looked closely are more focussed on maintaining the integrity and working of IPs in the long term (cancellation of registration and eligibility to act as IPs).

Some of these questions are arising also because IBBI by its very nature is a unique body and a novel experiment. Not only does it develop and regulate the insolvency profession, it also specifies the regulations to be followed by IPs in the market / for transactions, and regulates the markets where the IPs serve.[103] In cases where questions of illegal gratification and acting in a manner opposed to public interest are raised, which goes beyond the conduct of the Insolvency Profession itself, a case may be made that judicial adjudication of the same would be preferable, as opposed to administrative quasi-judicial enquiry by a regulator.

5. Resolution Professional's Mischief Potential

In the second section of this paper, while discussing the definition of corruption, we noted that the existence of "sufficient discretionary power" is what allows corruption to take place. This was also taken note of in the Delhi High Court judgment which described the role of the RPs as "mere facilitators", insinuating that RPs do not possess sufficient discretion to warrant an inclusion within the ambit of the PoCA as they are subservient to the decisions of the CoC.[104]

In order to evaluate the veracity of this assertion, this section will look at instances of malpractice and abuse of authority by RPs which are recorded in various orders of IBBI's Disciplinary Committee. The objective is not to determine whether actual corruption occurred in the referenced cases or whether the existing framework effectively addresses such issues, but rather to evaluate whether the RP's role and authority provide scope for such possibilities.

As we have noted earlier, the office of the RP has to inspire confidence amongst all the stakeholders, as it mediates between the past management of the CD and the Committee of Creditors. Any allegations of biased conduct etc. has the effect of jeopardizing the entire CIRP process by defeating the trust the Creditors place in the process and come to the table with. As a result, various stakeholders may attempt to influence the RP through undue pressure or

[103] M.S. Sahoo, 'Insolvency and Bankruptcy Board of India: A Regulator Like No Other' in *Quinquennial Of Insolvency and Bankruptcy Code, 2016* (Insolvency and Bankruptcy Board of India 2021) 3.
[104] *Arun Mohan* (n 3) paras 77-79.

improper inducements. Recent experiences have also shown that RPs are prone to violence at the hands of these stakeholders and authors have called for increased security of these professionals.[105] This underscores the significant role, authority and influence that RPs contribute to the outcome of the CIRP.

5.1. Favouritism towards past management

One of the defining features of the Indian insolvency process is the total displacement of the past management of the corporate debtor ("CD") and the handing over of the affairs of the CD to the RP. The early experience in the implementation of the IBC indicates that the past management of the CD often has an incentive to influence the RP. Their aim is to retain some control over the CD's affairs by minimizing their liabilities and prioritizing certain creditors for repayment before the consolidation of all claims during the CIRP. For example, in the matter of *Mr. Mahender Kumar Khandelwal,* the erstwhile RP was charged for allowing the CD to make certain payments to be made to some Operational Creditors who did not file their claims.[106] In the matter of *Anupam Tiwari*, the Disciplinary Committee observed that there was "*concerted action on IP's part with an apparent nexus between him and the suspended director showing intention to modify the category of BVN as OC for some ulterior purpose in the garb of updation of claim."*[107]

Sometimes, the erstwhile management also seeks more direct forms of control and may use the RP to establish such control. For instance, in the matter of *Mr Ajay Gupta*, the RP had handed over charge of the CD back to the erstwhile directors after a stay order dated 29th March, 2019 was passed by the Supreme Court.[108] This led to preferential transactions conducted by the ex-management in the form of payment of interest dues to IIFL, one of the financial creditors of the CD.

In some cases, the erstwhile management may also seek a back entry into the affairs of the CD through the resolution applicant. In the matter of *Mr Vivek Raheja*, a member of suspended management was present at CoC meetings in his capacity as member of suspended management. Suddenly, in subsequent meetings, it was found the said member was also one of the partners in the resolution plan submitted by one of the other prospective applicants. His

[105] Nidhisha Garg, 'Protection of Resolution Professionals in India: The Frontline Workers in a CIRP' (2022) 43(5) Business Law Review 216.
[106] *In the matter of Mr. Mahender Kumar Khandelwal, IP* (IBBI, 13 July 2022).
[107] *In the matter of Anupam Tiwari, IP* (IBBI, 8 July 2021).
[108] *In the matter of Mr Ajay Gupta, IP* (IBBI, 1 December 2020).

presence in CoC meeting as a member of the erstwhile management made him privy to all the information about competing resolution plans, thereby vitiating the entire process.[109]

These examples illustrate how the former management may attempt to retain control over the corporate debtor, potentially leveraging the RP's role.

5.2. Non-Prosecution of PUFE Applications

One of the ways in which the past management of the CD may attempt to defraud the creditors is by entering into dubious transactions with a set of preferred creditors. Under the scheme of the code, it is the responsibility of the RP to unearth and proceed against such transactions.[110] Therefore, the erstwhile management has every incentive to influence the prosecution of these transactions.

In the matter of *Chetan Patel*, despite there being a forensic report indicating the ex-director's involvement in PUFE transaction, it was found that the RP did not include the ex-director in his PUFE applications to the AA.[111] Similarly, in the matter of *Mr. Chakravarthi Srinivasan*, the RP acted under undue influence and unlawfully withdrew the applications for avoidance applications it had filed with the AA.[112]

This category of abuse of duties of the RP are more significant because the Code has vested the entire duty of prosecution of PUFE applications with the RP alone[113] and the RP enjoys more autonomy and less CoC supervision with respect to these decisions. Moreover, after the *Venus Recruiters* judgment of Supreme Court, the RP does not become *functus officio* at the end of CIRP for the purposes of these applications. This means that even after the entire CIRP has ended and the CoC ceases to exist, the RP may continue prosecuting the avoidance applications.[114] The absence of other stakeholders such as the CoC to ensure appropriate checks at such a stage makes RP susceptible to influence in withdrawing these avoidance applications after the CIRP has concluded.

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[109] *In the matter of Mr Vivek Raheja, IP* (IBBI, 12 January 2024)
[110] Insolvency and Bankruptcy Code of India, 2016, s.25(2)(j).
[111] *In the matter of Chetan Patel, IP*, No. IBBI/DC/209/2024 (IBBI, 03 April 2024)
[112] *In the matter of Mr. Chakravarthi Srinivasan, Insolvency Professional,* No. IBBI/DC/63/2022 (IBBI, 06 May 2022).
[113] Insolvency and Bankruptcy Code 2016, s. 43.
[114] *Tata Steel BSL Ltd.* v *Venus Recruiters Ltd.* (2023) SCC Online Del 155.

5.3. Favours to third parties

In carrying out its duties, the RP is empowered to engage third parties for various purposes in order to maintain the CD as a going concern. In the matter of *Kairav Anil Trivedi*, RP entered into an MOU with respect to one of the plants of the CD in a non-independent clandestine manner.[115] The disciplinary committee even observed that it was done in undue haste and done in collaboration with one of the suspended directors of the CD. In the matter of *Mr Sanjay Garg*, the RP had engaged an "Accounts Head" without intimation to the CoC and without filing any relationship disclosure forms. The DC noted that the Accounts Head might have accessed various vital and confidential information with regard to the CD without proper authorization and this may jeopardize the CIRP.[116] The RP may also enter into dubious employment agreements with third parties for the purpose of siphoning off funds from the CD's estate. In the matter of *Mr. C Ramasubramainam*, the RP had appointed a supporting staff who never attended any work of the CD or even visit the CD premises. Even the payments for this engagement were done mostly in cash.[117]

5.4. Inconsistencies in the preparation of list of creditors

The RP is responsible for making the insolvency proceedings a public proceeding *in rem* and bringing all the stakeholders to the table for the insolvency process. Ineligible creditors may attempt to influence the RP to secure participation in the insolvency process.

In the matter of *Mr Gopal Lal Baser*, the RP had acted in a biased manner and admitted the claim of a creditor which was barred by limitation.[118] In the matter of *Mr. Anupam Tiwari*, the RP was charged for allowing one of the creditors to privately settle their claim post the Insolvency Commencement Date in violation of the requirements of collectivisation of settlements contained in Section 12A which allows for withdrawal of the CIRP proceedings. In the same case the Committee states there was concerted action on RP's part with an apparent nexus with the suspended director to reclassify the category of one of the Financial Creditors as Operation Creditor for some ulterior purpose in the garb of updation of claim.[119]

Under the IBC, the constitution of the CoC has to take place only after all the creditor claims have been verified. This ensures that all the stakeholders are able to participate in all the CoC

[115] *In the matter of Kairav Anil Trivedi, IP,* No. IBBI/DC/256/2024 (IBBI, 17 December 2024).
[116] *In the matter of Mr Sanjay Garg, IP,* No. IBBI/DC/255/2024 (IBBI, 16 December 2024).
[117] *In the matter of Mr. C Ramasubramainam, IP,* No. IBBI/DC/221/2024 (IBBI, 18 June 2024).
[118] *In the matter of Mr Gopal Lal Baser, IP,* No. IBBI/DC/237/2024 (IBBI, 06 August 2024).
[119] *In the matter of Mr. Anupam Tiwari, IP,* No. IBBI/DC/72/2021 (IBBI, 08 July 2021).

meetings and are not excluded from the process. In the matter of *Mr. Vijaykumar Subramaniam Varun*, the RP was negligent in verification of claims and accordingly constituted the CoC. RP had held two meetings before all the creditor claims had been verified.[120] A similar situation was also observed in the matter of *Mr. Shashi Agarwal*.[121] Such conduct can have the effect of excluding important stakeholders from the inaugural meetings of the CoC where important decisions are taken.

5.5. Procedural Favouritism

The most subtle way in which a stakeholder or a third party may influence the insolvency process is through seeking minor procedural favouritism from the RP in its regular functioning. This may be in the form of notice requirements, voting procedure and recording on minutes.

In the matter of *Mr Manish Kumar Gupta*, the RP despite having earlier declared one of the resolution plans as ineligible at the time of expression of interests, later suddenly, added the discussion of the plan as an agenda item for one of the CoC meetings.[122] There have also been instances wherein the RP has modified the eligibility criteria discussed in the CoC meeting in the recorded minutes and pleaded it as a typographical error.[123] In other cases, the RP has taken into account votes cast by creditors in class prior to meeting of 6th CoC for declaring a resolution as passed.[124]

Within CoC itself, members may push a particular agenda or seek favourable treatment from the RP. In the matter of *Mr. Muthuiah Thevar Rajapandian*, the RP had committed a delay of 19 months in convening a CoC meeting despite there being a letter from a Financial Creditor holding 73.30% share demanding him to convene the meeting.[125] In the matter of *Mr Sanjeev Ahuja*, the RP failed to give notices to the OCs for the CoC despite them constituting a sizeable share of the claims against the CD.[126] In another case, the disciplinary committee has noted that the RP has brought disrepute to the professions by deliberately misinforming the CoC

[120] *In the matter of Mr. Vijaykumar Subramaniam Varun, IP,* No. IBBI/DC/134/2022 (IBBI, 13 October 2022).
[121] *In the matter of Mr. Shashi Agarwal, IP,* No. IBBI/DC/100/2022 (IBBI, 13 May 2022).
[122] *In the matter of Mr Manish Kumar Gupta, IP,* No. IBBI/DC/130/2022 (IBBI, 23 September 2022).
[123] *In the matter of Mr. Rakesh Kumar Gupta, IP,* No. IBBI/DC/232/2024 (IBBI, 30 July 2024); *In the matter of Mr. Venkataramanarao Nagarajan, IP,* No. IBBI/DC/70/2021 (IBBI, 16 April 2021).
[124] *In the matter of Mr. Gopal Lal Baser, IP,* No. IBBI/DC/140/2022 (15 November 2022).
[125] *In the matter of Mr. Muthuiah Thevar Rajapandian, IP* No. IBBI/DC/219.2024 (IBBI, 05 June 2024).
[126] *In the matter of Mr Sanjeev Ahuja, IP,* No. IBBI/DC/137/2022 (IBBI, 02 November 2022).

about important pieces of information,[127] or deliberately omitted certain discussions which took place at CoC meetings from the minutes of the same.[128]

5.6. Challenges in detecting instances of bribery

It is not suggested that in all the cases pointed out above there was evidence of any undue influence exercised by any of the parties to the process, but illustrates existence of incentives to influence and get influenced on account of the scope of the duties of the RP. In many of the cases discussed above the IBBI order merely imposed a fine on the RP. When the costs and likelihood of detection is less than the monetary gain which such RPs may possibly obtain, it is reasonable to expect that instances of corruption may propagate.

A true estimate of such instances is not possible since the only thing required to be argued before the Disciplinary Committees is non-adherence with the IBC or regulations made thereunder. Although demands for illegal gratification are relevant to violations of the Code of Conduct, they are rarely raised directly. Instead, complainants are more likely to challenge specific actions of the RP that breach the code, potentially influenced by corrupt practices. As of March 2025, there have been only three cases before the Disciplinary Committee where there have been recorded instances of demand of illegal gratification. For instance, In the matter of *Mr. Yogesh Kumar Gupta*, an audio recording of the RP allegedly demanding a payment of Rs 5 Lakhs for favourable treatment was argued before the Committee.[129] Similarly, in the matter of *Mr. Sanjay Kumar Agarwal*, it was alleged that the RP had demanded an illegal favour of Rs. 2 Lakhs per month for showing leniency in the Insolvency Resolution Process and extended the CIRP period from 9 months to 2 years and also demanded one-time bribe of Rs. 20 Lakhs for obtaining favourable Forensic Audit/ Valuation Report from his chosen Forensic Auditor/Valuer and for extending help to the promoter in re-possession of Plant/Company.[130] In the matter of *Mr Venkateswarlu Kari,* there was a complaint that the liquidator had demanded a bribe of Rs 42 lakhs from the H1 bidder during the e-auction process and the liquidator did not grant the letter of award on this account.

[127] *In the matter of Ms. Padmasri Appana, IP,* No. IBBI/DC/117/2022 (IBBI, 26 July 2022).
[128] *In the matter of Mr. Venkataramanarao Nagarajan, IP,* No. IBBI/DC/70/2021 (IBBI, 16 April 2021).
[129] *In the matter of Mr. Yogesh Kumar Gupta, IP,* No. IBBI/DC/246/2024 (IBBI, 30 August 2024).
[130] *In the matter of Mr. Sanjay Kumar Agarwal IP,* No. IBBI/DC/47/2020 (IBBI, 1 December 2020).

6. Reading RPs as Public Servants

We have looked at the theory and jurisprudence on the interpretation of "public servant" under the PoCA, the public function of the insolvency process, and the role and regulation of RPs under the Indian insolvency regime. This section will now attempt to tie together these various discussions and look at the possibility of reading in RPs as public servants under Indian law. To this end, this section will first comment on the reasoning adopted by the Delhi High Court judgment in the *Arun Mohan* case to hold that RPs are not "public servants" under the Prevention of Corruption Act. We contrast this decision with the Jharkhand High Court judgment which included RPs within the definition of 'public servants'.

6.1. Unravelling the Delhi High Court's Reasoning

The Delhi High Court judgment in *Arun Mohan* rested on primarily two reasons to hold that Resolution Professionals should not be included within the definition of "public servants". They are: i) That the duties of an RP lack a "public character" ii) That there is a deliberate legislative omission in the IBC to not include RPs as public servants while members of the IBBI are deemed to be so. In contrast to this, the Jharkhand High Court does not go into the question of "public character" and concludes that their duties are in the nature of "public duties" as defined in Section 2(b) PoCA 1988 in light of the substantial public interest involved. They note that the IP's functions intimately relate to loans extended by banks where investments by the public at large.[131] In addition to this, the Jharkhand High Court also looks at section 2(c)(v) of PoCA 1988 which talks about "Any person authorized by a Court of justice to perform any duty, in connection with the transmission of justice" and also makes a reference to liquidators.[132]

This section will primarily evaluate both the prongs of the Delhi High Court's reasoning as discussed above and contrast with the Jharkhand High Court's views.

6.1.1 Lack of "public character" in the role of the RP

The Delhi High Court citing *CBI* v *Ramesh Gelli* notes that merely because RP's duties may be considered as a "public duty" in the broad sense as defined under the PoCA, it does not mean it also possesses "public character" in order to be included within the definition of public

[131] Sanjay Kumar (n 2), para 26.
[132] Prevention of Corruption Act 1988, s. 2 (c)(v); Sanjay Kumar (n 2) para 17.

servant.[133] Arriving at this conclusion, the High Court referred to the Supreme Court decisions on *Swiss Ribbons* and *Arcelor Mittal.* In both cases, the Supreme Court clearly stated that under the IBC framework, the Resolution Professional (RP) does not hold any decisive powers and functions merely as a "facilitator."

In doing so, the Delhi High Court, however, confuses the term "public character" as requiring sufficient decisional autonomy and discretion. This seems to be based on an incorrect understanding of the context in which the requirement of "public character" was added to section 2(c) by the Supreme Court in the case of *Ramesh Gelli.* As we have noted in Section 2, the requirement of "public character" was read in by the Supreme Court out of a specific concern that the wide framing of Section 2(b) of the PoCA may obliterate the distinction between public and private actors. This is evident from the following extract:

> *The broad definition of "public duty" contained in Section 2(b) would be capable of encompassing any duty attached to any office inasmuch as in the contemporary scenario there is hardly any office whose duties cannot, in the last resort, be traced to having a bearing W.P.(CRL) 544/2020 Page 36 of 53 on public interest or the interest of the community at large. Such a wide understanding of the definition of "public servant" may have the effect of obliterating all distinctions between the holder of a private office or a public office which, in my considered view, ought to be maintained. Therefore, according to me, it would be more reasonable to understand the expression "public servant" by reference to the office and the duties performed in connection therewith to be of a public character."*[134]

It is evident that there is a pre-defined purpose for which the requirement of "public character" was read into Section 2(c) by the Supreme Court. Allowing for "public character" to be used as a disguise for any other rationale would run counter to the intent behind the enactment of PoCA which sought to broaden the definition of Public servant, as noted in Section 2 of this paper. Whether or not the role of the RP is decisive or merely facilitative has no bearing on the application of the requirement of "public character". Even if we go with the interpretation of "public character" given by the Delhi High Court that a facilitative role is integral to the functioning of the Insolvency process, there is a real risk of possible influence in the discharge

[133] *Arun Mohan* (n 3) para 79.
[134] *Ramesh Gelli* (n 46) para 36.

of an RP's duties.

The question then is, whether, on a more accurate interpretation of the requirement of "public character" in line with the ruling in *Ramesh Gelli,* a RP could be considered a public servant. Given that there is not much legislative and judicial guidance on "public character", using Radojičić's six aspects of a definition of public servant, we will find the question answered in the affirmative. The Delhi High Court itself concedes that RPs discharge a "public duty" and therefore meets the functional requirement.[135] The RPs have to clear the Limited Insolvency Examination which is organised by the IBBI and undergo special training, thereby meeting the "merit based employment" criteria.[136] RPs are specifically created as a statutory post and further governed by a special legal regime consisting of IPAs and the IBBI. As professionals, RPs need to follow Code of Conducts and Bye-laws. They are also accountable to and supervised by the CoC, IBBI and the AA in exercise of all of their functions under the IBC. While organisationally, they may not be government employees they are provided with "assignments". The IBBI further regulates the eligibility of IPs to undertake these assignments and supervises the IPAs. In either case, the PoCA has explicitly done away with the requirement of government employment through Explanation 1 of Section 2(c).[137] Therefore, RPs in a manner of broader parameters substantially fulfil all six defining aspects of a public servant as identified by Radojičić.

The Jharkhand High Court avoided addressing any of these questions, since it does not invoke the requirement of "public character" in its analysis but merely makes note that RP's role deals with loans from banks where substantial investments from the public are involved.[138] With reference to past precedents, a clear analogy may be drawn with the case of *State v CN Manjunath* which came after the *Ramesh Gelli* judgment in 2017. In *CN Manjunath*, despite the fact that licensed surveyors were private professionals hired on a temporary contractual basis, the Supreme Court held that it fulfilled the requirements of section 2(c) by relying on similar factors such as examination conducted by Survey Settlement Training Institute, licensing by government, statutory prescription of duties etc.[139]

[135] ibid para 79.
[136] IBBI (Insolvency Professionals) Regulations, 2016, Regulation 5.
[137] Prevention of Corruption Act 1988, Explanation I under Section 2(c).
[138] Sanjay Kumar (n 1), para 26.
[139] *State* v. *C.N. Manjunath* (2017) 11 SCC 361, para 6.

6.1.2 Legislative Omission in Section 232 of the IBC

In *Arun Mohan*, The Delhi High Court also places considerable reliance on the wording of Section 232. Section 232 of the IBC states:

> *The Chairperson, Members, officers and other employees of the Board shall be deemed, when acting or purporting to act in pursuance of any of the provisions of this Code, to be public servants within the meaning of section 21 of the Indian Penal Code*

The Delhi High Court states while the members of IBBI etc are deemed to be public servants, there is a deliberate omission of insolvency professionals.[140] Further, the fact that Section 233 of IBC mentions "insolvency professional or liquidator" for protection of actions done in good faith, the court is further confident that the omission in Section 232 was deliberate.[141]

The reasoning of Delhi HC could be examined on various grounds. While there are a host of judgments which have relied on the deeming clauses to include a person as public servants,[142] the *Arun Mohan* decision of the Delhi High Court is the only judgment which has used the deeming provision to exclude a person from the application of anti-corruption laws. While deeming provisions can be a helpful means to clarify or ensure the inclusion of a position within the definition of public servant, ultimately the decision of whether a position is that of a "public servant" has to be determined with reference to the PoCA. The Jharkhand High Court judgment on the other hand, was cognizant of the fact that that the applicability of the PoCA should not be determined with reference to omissions in the IBC and remarked the following:

> *Insolvency and bankruptcy code is self-contained code but only with respect to the matter provided therein. It does not cover the matters like the present, where a Resolution Professional takes bribes in order to favour a party for which P.C. Act is squarely applicable. Section 232 does not exclude operation of P.C. Act. Therefore, the plea the petitioner was not a public servant and was immune from criminal prosecution under PC Act is not tenable.*[143]

The reasoning of the Delhi High Court also leaves a lot of questions regarding the inclusion of 'liquidators' unresolved. Section 2(c)(v) of the PoCA makes a specific reference to

[140] *Arun Mohan* (n 3) paras 83-86.
[141] ibid.
[142] AK Gautam, *Anti Corruption: Law, Practice and Procedure* (Mohan Law House 2022).
[143] *Sanjay Kumar* (n 2) para 27.

"*liquidators, receivers or commissioner*" as included within the definition of public servants. The Delhi High Court takes note of this provision but still fails to clarify whether it would include the position of liquidators as described under the IBC. This is pertinent because the Delhi High Court's reasoning of role of RP as "facilitator" does not extend to liquidators. This is clear from the following extracts from *Swiss Ribbons* and *Arcelor Mittal* that the liquidator's role is not merely limited to that of a facilitator unlike the RP:

> *It is clear from these sections that when the liquidator "determines" the value of claims admitted under Section 40, such determination is a "decision", which is quasi-judicial in nature, and which can be appealed against to the adjudicating authority under Section 42 of the Code.*[144]

> *91. Unlike the liquidator, the resolution professional cannot act in a number of matters without the approval of the Committee of Creditors under Section 28 of the Code, which can, by a two-thirds majority, replace one resolution professional with another, in case they are unhappy with his performance. Thus, the resolution professional is really a facilitator of the resolution process, whose administrative functions are overseen by the Committee of Creditors and by the adjudicating authority.*[145]

In fact, the Delhi High Court itself notes:

> *it is apparent that individuals such as liquidator, receiver or commissioner, who have been conferred with the power to take decisions in respect of properties and other assets and dispose of the same entailing decisions effecting certain claims etc, could be the ones who are within the ambit of sub-section (v) and since no such role or responsibility is conferred upon the Resolution Professional, therefore, he cannot be stated to fall within the ambit of sub-section (v).*[146]

The Delhi High Court seems to attach more weightage to the legislative inclusions and exclusions within the IBC to decide on a definition contained under the PoCA. It is true that the reference in section 2(c)(v) of PoCA 1988 is probably a reference to liquidators appointed under the erstwhile Companies Act, but this does not obviate the necessity of the High Court to clarify its reasons for excluding liquidators from the definition of public servants especially

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[144] *Swiss Ribbons Private limited And Anr*. vs. *Union of India And Ors.* (2019) 4 SCC 17, para 90.
[145] ibid para 91.
[146] *Arun Mohan (n 3)* para 96.

since the lack of "public character" rationale only applies to RPs. An omission in Section 232 of the IBC alone is not sufficient to exclude a position from the definition of 'public servant' specifically included under the PoCA when the definition is for the purposes of the PoCA and not IBC. This is of further importance given that the Jharkhand High Court also relied on Section 2(c)(v) in holding RPs to be included within the definition of public servant,[147] thereby not even limiting the inclusion to liquidators only. The Delhi High Court judgment does not provide any reasoning on as to why Liquidators or RPs do not form a part of the definition under Section 2(c)(v).

Moreover, the Delhi High Court also overlooks the fact that the reference in Section 232 of the IBC which forms the basis of its reason to exclude RPs is to Section 21 of the Indian penal Code which defines public servant, and not to the PoCA. This is relevant because the Supreme Court has often recognized the legislative aim behind the PoCA to expand the ambit of the definition of public servant.[148] In *State of Maharashtra v Prabhakar Rao,*[149] Supreme Court explicitly held that interpretation of Section 21 and related case laws cannot be used to interpret the scope of the definitions in PoCA. Therefore, it is undoubtable that the Public Servant definition within the PoCA is intended to be more far-reaching. The Jharkhand High Court decision was cognizant of this:

> *It is true that Resolution Professional do not figure among the officers enumerated under Section 232 of I & B Code deemed to be a public servant within the meaning under section 21 of the IPC. Those who are deemed to be a public servant enjoy certain immunities from criminal prosecution for IPC offences under section 197 of Cr. P.C., as the cognizance cannot be taken without the previous sanction of the Central or State Government as the case may be. <u>But this does not refer to, any immunity from criminal prosecution for offences committed under the PC Act</u>.* (emphasis added)

One way therefore to reconcile Section 232 of the IBC would be to limit the deemed inclusion in that section for the purposes of Section 21 of the IPC. This would make sense given that offences under the IPC are more likely to hamper the functioning of an RP. For example, Section 166A of the IPC criminalizes Public Servants disobeying directions under the law.[150]

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[147] *Sanjay Kumar* (n 2) para 24.
[148] See *State of Punjab* v. *Nirmal Kaur* (2009) 13 SCC 418; *Asian Resurfacing of Road Agency Pvt. Ltd. and Anr*. v *CBI* (2018) 16 SCC 299; *Manish Trivedi* v. *State of Rajasthan* (2014) 14 SCC 420 para 19.
[149] (2002) SCC (Cri) 1831.
[150] Indian Penal Code 1862, s. 166A.

This may open RPs to a host of criminal litigation where there is prejudice caused to parties due to non-adherence with the directions of the AA etc. which is currently dealt with under the IBBI regulatory framework. Similarly, it is also an offence for public servants to incorrectly frame documents.[151] This may hinder a lot of the functions which a RP discharges.

Thus, the generous interpretation given to Section 232 by the Delhi High Court may not be the most prudent way to reconcile the operation of the two Acts.

6.2. Addressing Policy concerns with the inclusion of RPs within the ambit of "Public Servant"

Existing literature has been sceptical of the inclusion of RPs as public servants under the PoCA, largely out of concern that it may hamper the discharge of statutory duties and defeat the goals of timely resolution under the IBC. It is also argued that the existing regulations through the two tiers are sufficient and there is no requirement of inclusion of RPs as Public Servants. In this section, we explore three policy-based concerns that are flagged in the existing literature.

6.2.1. Use of threat of prosecution as an arm-twisting tactic

Authors have flagged concerns that creditors, in order to build undue pressure on the RP, may use such complaint tactics to influence the decision of the RP.[152] These authors have pointed out that RPs many times reject the claims of the creditors on the grounds of unsubstantiated documentations, which leaves creditors dissatisfied.[153] Creditors may then use the threat of criminal prosecution to get a favourable outcome on their claims. Similarly, the suspended management of the CD may lay traps by refunding the amount in Cash withdrawn by them earlier in a fraudulent manner in order to make grounds that the RP accepted bribes.[154] In *Arun Mohan*, one of the defences raised by the RP was that a certain amount was accepted as a part refund of Rs. 10 lakhs which was illegally withdrawn by the ex-Director from the current account of CD held with Andhra Bank.[155]

These concerns look at definitional inclusion of within PoCA merely as an added burden, overlooking the scope of protection that it could possibly add to the functioning of the RP.

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[151] ibid, s. 167.
[152] Umesh Goyal and Aditya Gouri, 'Insolvency Professional and the Challenges ahead!' (AAA Insolvency 2020) available at <https://insolvencyandbankruptcy.in/notices/insolvency-professional-and-the-challenges-ahead-by-ip-umesh-goyal-and-adv-aditya-gauri/> last accessed 30 December 2024.
[153] ibid.
[154] ibid.
[155] *In the matter of Arun Mohan, IP* (IBBI, 01 December 2020).

One such protection that is granted is Section 19 of the PoCA which requires that no court can take cognizance of certain offences against a public servant except with the previous sanction of the relevant authority. In the case of *State of Bihar* v *Rajmangal Ram,* the Supreme Court remarked:

> *" The object behind the requirement of grant of sanction to prosecute a public servant need not detain the court save and except to reiterate that the provisions in this regard either under the Code of Criminal Procedure or the Prevention of Corruption Act, 1988 are designed as a check on frivolous, mischievous and unscrupulous attempts to prosecute a honest public servant for acts arising out of due discharge of duty and also to enable him to efficiently perform the wide range of duties cast on him by virtue of his office. The test, therefore, always is—whether the act complained of has a reasonable connection with the discharge of official duties by the government or the public servant. If such connection exists and the discharge or exercise of the governmental function is, prima facie, founded on the bonafide judgment of the public servant, the requirement of sanction will be insisted upon so as to act as a filter to keep at bay any motivated, ill-founded and frivolous prosecution against the public servant."*[156]

The question can be posed – who could be the relevant sanctioning authority for RPs. For cases not explicitly mentioned under the PoCA, it is the authority competent to remove the official from office which is considered as the relevant sanctioning authority.[157] As per the IBC, it is the CoC alone which is competent to remove an official from office. However, since the CoC largely comprises of banks who have entered into financial transactions with the CD in their commercial capacity, they may not be fit to serve as the sanctioning authority. Given that the IBBI has often cancelled registration of RPs based on disciplinary actions and is the primary licensing authority, it may also be argued that IBBI also could be an appropriate authority. IBBI may also better suited to decide on whether a potential compliant is a malicious arm twisting tactic, and filter such complaints accordingly. A detailed discussion on this is outside the ambit of this paper. The sanctioning protection can effectively deal with and filter out cases wherein a creditor or suspended director may seek to arm twist the RP in his discharge of duties.

In addition to section 19, the 2018 amendment to the PoCA has now prescribed that no police officer can undertake an inquiry or investigation against a public servant for offences under the

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[156] *State of Bihar* v. *Rajmangal Ram* (2014) 11 SCC 388 para 4.
[157] Prevention of Corruption Act 1988, s. 19(1)(c).

act in the absence of sanction.[158] This is particularly relevant as it assures that the RPs would be able to carry out their mandate without threat of unnecessary police involvement. Nidhisha Garg, in her article, has highlighted how RPs are increasingly susceptible to illegal arrests and investigations which undermine their authority. For example, in the Jaypee Infratech insolvency, the court appointed IRP Anuj Jain was arrested by the Noida police on vague grounds pursuant to a FIR lodged against him. The Supreme Court remarked that it was appalled by the manner in which the Uttar Pradesh police had proceeded in the case.[159] Inclusion as public servants, far from being an obstacle, may actually allow for RPs to undertake their duties more freely upon being protected from the threat of unnecessary police involvement.[160]

6.2.2. Concerns with respect to time delays

The other major concern that is highlighted is RPs may be trapped into unnecessary judicial proceedings and this may lead to time delays.[161] As we have already noted, in Section IV, there are no applicable regulations or statutory provisions which impose a blanked removal of an RP when a criminal charge is made against them. The existing judicial pronouncements have been mindful of this and have noted that the removal of the RP is exclusively within the domain of the CoC. As of March 2025, there has been only one instance where the IBBI has stepped in and asked the CoC to remove a RP at an interim stage before the conclusion of the proceedings against the RP.[162]

While pending cases may have an impact on the RPs capacity to take up other assignments in light of disqualification under the IBBI regulations, it does not directly impact any ongoing CIRP which the RP is a part of. In light of this, the concern with respect to time delays are slightly overstated.

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[158] ibid. s 17A.
[159] *Jaypee Kenisngton Boulevard Apartments Welfare Association* vs *NBCC* (2021) (T.C NO. 234/2020 in Civil Appeal No. 3395/2020) Order dated 02 March 2021.
[160] Nidhisha Garg (n 105).
[161] Roustan Sanyal and Vineeth Vakiti Reddy, 'Criminal Charges against Insolvency Professionals- the Next Big Impediment under IBC?' (IBC Laws 2021) available at <https://ibclaw.in/criminal-charges-against-insolvency-professionals-the-next-big-impediment-under-ibc-by-ca-roustam-sanyal-and-advocate-vineeth-vakiti-reddy/> last accessed 30 December 2024.
[162] *In the matter of Mr. Subrata Monindranath Maity, IP* (IBBI, 09 May 2022)

Moreover, the 2018 amendment to the PoCA has now added a requirement that special judges are to conduct trials of cases as far as practicable on a day-to-day basis and and endeavour to conclude the trial within a period of two years.[163]

6.2.3. Need for inclusion

While it is true that the existing regulations and the Code of Conduct are aimed at ensuring the integrity and objectivity of the office of the RP, it cannot be said that it obliterates the need for inclusion under the definition of public servants under the PoCA.

As noted in Section V and its subsection (vi) specifically, while there are many orders where there have been observations of undue influence or bias, as very few cases where bribery or illegal gratification is specifically presented before the DC. This may be because the DC's inquiry is limited to looking at adherence to the IBC and applicable regulations. Any background context of bribery etc. while relevant for the inquiry is not directly the question which the DC has to decide upon. Moreover, the nature of penalties that may be imposed under the IBBI regulations are very limited and only extend to cancellation of the registration of a RP or imposition of penalties. Often times, it is possible that there is some illegal gratification provided which has only manifested in certain minor procedural favouritism. Given that the IBBI regulations are limited to penalizing procedural favouritism, the penalty would at best be a fine. When the costs and likelihood of detection are less than the monetary gain that such RPs may possibly obtain, it is reasonable to expect that instances of corruption may propagate.

Upon inclusion under the PoCA, it may be expected that such instances would be more likely to be brought to light as it would become an offence. Today, a mere demand is not actionable under the IBBI regulations in the absence of any influenced conduct which violates the Regulations. The explanation to section 7 of the PoCA says, "*the obtaining, accepting, or the attempting to obtain an undue advantage shall itself constitute an offence even if the performance of a public duty by public servant, is not or has not been improper*." This provision broadens the scope of conduct that may be regulated, including any attempts by any actors to influence the conduct of the IP. This is essential to ensure greater confidence for the stakeholders and the public in the working of the insolvency regime.

[163] Prevention of Corruption Act 1988, s 4(4).

Moreover, on the recommendations of the Law Commission of India, under Section 8 of PoCA, the scope has now been extended to cover those who give or promise to give 'undue advantage' to a person with an intent to induce or reward a public servant to perform their 'public duty' 'improperly'.[164] The immunity granted to bribe givers from prosecution for statements given by them in terms of the erstwhile section 24 has now been deleted. This supply-side regulation is not possible under the IBBI regulations given that they solely apply to the IPs. By opening the conduct of other parties who may try to influence the RP to carry out his duties improperly to scrutiny, any possibilities of undue influence by any parties would be further deterred and minimized to establish greater public confidence in the insolvency process. We noticed in the first section, that one of the principal variables which influence the occurrence of corruption is the ambit of corruption detection mechanisms.

As a caveat, this study has been limited to examining IPs as public servants strictly within the context of the PoCA. The broader question of whether IPs should be classified as public servants in other legal or institutional contexts and whether they should be made available any other privileges attached to the status of 'public servant' is something that is beyond the scope of this paper but can be dealt with in future research.

7. Conclusion

RPs exercise substantial public functions, facilitating creditor-debtor negotiations, overseeing the insolvency process, and ensuring compliance with statutory requirements. Their role is inherently tied to public interest, and their conduct has direct implications for economic stability and stakeholder confidence. The current legal framework governing RPs does not adequately address corruption risks. While the IBBI and IPAs provide regulatory oversight, disciplinary measures remain insufficient as they primarily focus on professional conduct rather than criminal liability. Cases reviewed from IBBI proceedings illustrate the possibility of instances of favoritism, mismanagement, and conflicts of interest, underscoring the potential for abuse. The PoCA, with its stringent provisions against bribery and undue influence, would provide a necessary deterrent against corruption in the insolvency process.

The inclusion of RPs within the definition of public servants under the PoCA is both legally justifiable and necessary for the integrity of the insolvency framework. Judicial interpretations of the term "public servant" support the case for inclusion. The functional approach adopted in

[164] Law Commission of India Report No. 254, February 2015, Chapter III.

the PoCA emphasizes the nature of duties performed over organizational affiliation. RPs, although not government employees, discharge statutory functions with significant public ramifications. The Jharkhand High Court's recognition of this aligns with legislative intent, while the Delhi High Court's restrictive interpretation based on decisional autonomy fails to account for the broader governance role of RPs.

Practical benefits of inclusion extend beyond deterrence. It would also shield RPs from frivolous legal actions by ensuring procedural protections, such as requiring prior sanction for prosecution. Moreover, the 2018 PoCA amendments, which penalize both bribe givers and takers, would prevent undue influence from external parties, reinforcing the neutrality of the insolvency resolution process. Incorporating RPs into the PoCA framework is a necessary step to fortify the credibility of India's insolvency regime. Given the high stakes involved, ensuring that RPs operate with transparency and integrity is paramount. Their inclusion would serve as a critical measure to uphold public trust, deter malpractice, and enhance the effectiveness of the insolvency resolution process.