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EDITORIAL NOTE

Inheritances are tricky. They restrict as much as they enrich.

This issue of the Journal is a landmark, in that it represents the triumph of academic spirit and curiosity in an uncertain moment in modern history. In the 15th year of its publication, the Editorial Board has had to rely entirely on the mores of the internet, unlike previous incarnations of the Board. The processes which we inherited, of which we were very proud, were no longer effective in a virtual workspace. Faced with hard choices at every turn, we chose to reaffirm our commitment to academic inquiry rather than choosing convenience. Thus, in the face of adversity, perseverance and the determination to persevere became our beacons. In many ways, these principles were also guiding forces for mankind during these tumultuous times. In the end, we realised that these values were the true legacy that our predecessors meant to leave us – a bridge that connected our past with the present.

This Board was also fortunate to have been presented with the opportunity to revisit its roots. To revise, refine and bequeath a system that ensures compliance to dual values: the promotion and pursuit of inquiry into the academic truth. All other pursuits are merely consequential and momentous.

Our new initiative, TeLawgram, is the first step in the realisation of this pursuit. This Issue of the Journal, as always, is representative of our efforts in this regard and it is my utmost pleasure to present to you the 1st Issue of the 15th Volume. My sincere thanks to the University, the Board, the professors and the Authors who have been constant pillars of support. I hope that we pass on a legacy that our successors feel fit to inherit.

On behalf of the Board of Editors,

December 2020

ANTONY MOSES C.
EDITOR-IN-CHIEF

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CRYONICS & THE LAW: ASCERTAINING LEGAL IMPLICATIONS ON THE FUTURE OF LIFE-AFTER-DEATH

Athith Pradeep* & Adithya Praveen**

Ever since Sir Carl Ludwig arrived at a method to preserve animal organs in 1856, biotechnology has made substantial progress, especially over the last few decades. New and diverse forms of biotechnology have been introduced and constantly progress as a result of extensive advancement in research and an appreciable availability of resources. Today, biotechnologists experiment and contemplate the possibilities of preserving human bodies for an eclectic array of motives, ranging from prolonged space travel to preserving bodies with hopes that future technology will resuscitate and return them to life and health. In this paper, we will comprehensively deal with the latter motive, also known as cryonics. The paper engages in an in-depth study of cryonics and examines the ethical and medical overtones with an emphasis on potential legal implications associated with cryonics. These potential legal implications encompass global as well as Indian legal perspectives. This holds potential for the legal profession, with a generous scope for advocacy around human cryopreservation and its procedures. Cryonics or human cryopreservation is still in its early stages with a scope for immense research and development.

* Junior Advocate, High Court of Karnataka. BBA., LL.B. (Hons.), Alliance University. Email: atheeth.pradeep@ymail.com.

** B.A., LL.B. (Hons.), Alliance University. Email: adithya77@gmail.com.

INTRODUCTION

The world-famous business magnate, billionaire and philanthropist namely, Sir William Henry Gates III eminently known as Bill Gates once said, "*The pace of progress in biology creates a foundation that naturally gets picked up by the biotech and pharmaceutical industry to solve rich-world diseases. This is attractive science. It's science that people want to work on.*"[1] This statement, in its entirety, is not disputed; however, it could be more fittingly understood that parts of the aforementioned assertion, concerning the degree of access to millions world-wide would be strictly limited to today's day and age. As technology and medicines advance to better serve the people's needs, eclectic and extensive research and development would also result in cost-effectiveness as one such measure to further support humans irrespective of their societal echelon. The numerous theories of biotechnology backed by research and study has etched a feeling of confidence, mostly among the unconventional groups of people hoping for a far better, healthier and substantially advanced future generation. Conversely, a feeling of unreliability, mostly among the truly conventional groups of people who believe in a directly proportional effect on the increase in health issues and the concomitantly increasing need for its cure in the name of advanced biotechnology. The bare hopes of a medically advanced future with the capabilities of transcending human lives coupled with man's constant desire to live longer or to live once again is an exceedingly important reason for the birth of a derived, well-researched, and greatly enhanced concept like cryonics or human cryopreservation.

A. CRYONICS PROCEDURE

Before comprehensively dealing with this fairly new concept of cryonics and its sundry legalities, it is imperative to familiarise our minds with the established understanding of cryonics and the processes and procedures followed. What is Cryonics?[2] Cryonic suspension, or low temperature anabiosis, refers to the preservation of a "*legally*" dead human body by freezing or super-cooling through the employment of a biotechnological practise known as vitrification[3] which takes place in piercing subzero temperatures of around -196°C. Now, the authors will elucidate the customarily established step-by-step procedure[4] for cryonic preservation. The procedures commence within a delicate window of opportunity immediately after the patient has been pronounced legally dead ensuring the cessation of the patient's heart while some brain activity still persists, and before the patient is pronounced totally dead. The initial step is to cool down the

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[1] Bloomberg, *Biology and Bill Gates*, BLOOMBERG BUSINESSWEEK (May 5, 2003, 9:30 PM); *see also Bill Gates Quotes,* CITATIS, https://citatis.com/a6624/26c636/ (last visited June 5, 2020).

[2] *See* Cron, *infra* note 53, at 4.

[3] *See* Benjamin P. Best, *Scientific Justification of Cryonics Practice*, 11 REJUVENATION RESEARCH 493, 496 (Mary Ann Liebert Inc., 2008) [hereinafter Best].

[4] *See generally id.* at 493-503, for a detailed and explicated understanding of the scientific procedures for cryonics through a calculated and methodical approach; *see generally* ALCOR, TRANSPORT PROTOCOL FOR CRYONIC SUSPENSION OF HUMANS (4th ed. 1990).

patient's body by immersing the body into a considerably cold storage like an ice-bath. As the patient's body lies in this ice-cold state, HLR or heart-lung resuscitation machine[5] is carefully positioned on the patient's chest. The resuscitation machine then proceeds to compress the patient's chest in an attempt to promote the flow and circulation of both blood and oxygen to the brain in order to encourage brain function. The next step in the cryonics procedure is the utilisation of cryoprotectant solution[6] during the process of vitrification in order to help prevent the cells and tissues from forming fractures and tearing due to crystallisation.[7] This cryoprotectant solution is supplied throughout the patient's body by using fluid transmitting tubes. Subsequently, a lower concentration of this cryoprotectant solution is made to circulate throughout the body for another minute or two in an attempt to remove and clear-off the remaining blood in the patient's body. Later the cryoprotectant solution is passed into the patient's body at a slow and controlled rate until full concentration of the solution has been achieved. 50% and 100% concentrated cryoprotectant solutions are passed throughout the patient's body for a duration of 2 hours and 1 hour respectively. The body is later sent into further cooling for many hours by employing nitrogen gas cooling techniques[8] and the patient's body is frozen at -124°C. Subsequently, an aluminium container is utilised to contain the vitrified body for long term storage. The aluminum container is placed in a liquid nitrogen tank that is monitored electronically. Finally, over a prolonged vitrification period of over 15 days, the patient's body reaches its final storage temperature of -196°C. This step is still the second last step in the process of cryonics. After the patient's body has been satisfactorily cryopreserved, we await the emergence of an advanced technology and better medication that is capable of successful resuscitation of the cryopreserved patient back to life and to full health.

B. CRYONICS, LAW AND THE LACUNA

As the process of cryonics and cryopreservation of living organisms advance and gain substantial popularity[9] among lawyers, biotechnologists, cryonicists, doctors and their patients, its full-fledged application on a commercial scale is not a distant concept and calls for further development with

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[5] *See* ALCOR, *Chapter 6: The Heart Lung Resuscitator (HLR)*, TRANSPORT PROTOCOL FOR CRYONIC SUSPENSION OF HUMANS 6[1 – 15] (4th ed. 1990); *see also* ALCOR, *Chapter 6A: The Michigan Instruments Heart-Lung Resuscitator (HLR),* TRANSPORT PROTOCOL FOR CRYONIC SUSPENSION OF HUMANS 6A[1 – 21] (4th ed. 1990).

[6] Best, *supra* note 3, at 496-498.

[7] *See* Doyong Gao & J.K. Critser, *Mechanisms of Cryoinjury in Living Cells*, 41 ILAR JOURNAL 187, 187-96 (2000) [hereinafter Gao & Critser].

[8] *See* Ronal G. Ross, *Refrigeration Systems for Achieving Cryogenic Temperatures*, LOW TEMPERATURE MATERIALS AND MECHANISMS 109, 112 (1st ed. Yoseph Bar-Cohen ed., Aug. 19, 2016).

[9] *See generally* FRANCESCA MINERVA, THE ETHICS OF CRYONICS: IS IT IMMORAL TO BE IMMORTAL? (Palgrave Pivot, May 31, 2018) [hereinafter Minerva]; *see also* Ryan Sullivan, *Pre-Mortem Cryopreservation: Recognizing a Patient's Right to Die in Order to Live*, 14 QUINNIPIAC HEALTH L. J. 49, 49-84 (2010); *see also* Patrick Lin, *Cryonics: Medicine or the Modern Mummy?*, FORBES (July 8, 2019, 9:01 AM), https://www.forbes.com/sites/patricklin/2019/07/08/cryonics-medicine-or-the-modern-mummy/#66135ce71f2c (last visited June 6, 2020).

regards to adopting rules, regulation and governance. The whole concept might seem like science-fiction, but in reality, it is to a great extent, based out of modern science with the backing of substantial scientific theories and a plethora of successful experiments carried out in cells, microbes and other organisms (*infra* note 11). Attempts at ensuing resuscitation of a human being from cryonic suspension to full health is still a farfetched concept with concerns to existing technologies and medical practices. Nevertheless, research and development in the field of cryopreservation and the future resuscitation of a human being is promising. Besides, we cannot ignore the fact that cell tissues and even vital organs of many living organisms[10] have been cryogenically preserved and resuscitated after undergoing cryopreservation.[11] Considering the exponential growth and development of science and technology, the possibility of successful resuscitation of human beings from cryonic suspension is only a matter of time before it transpires in reality.

Concerns have been raised with regards to the rights instilled in a patient who is cryonically suspended or in cryonic interment. There is a need for the recognition of a patient's identity through an enduring power of attorney or other such continuing, perpetual or medical power of attorneys in order to safeguard the interests of the patient while undergoing cryonic interment. A legal definition has not yet been provided for a person who is undergoing cryonic preservation. In other words, a "*cryon*" (i.e. a person undergoing cryonic suspension) is deemed legally dead and there is scope for a new definition to determine the status of a "*cryon*". Dr. Daniel R. Spector, in his article "*Legal Implications of Cryonics*"[12] explicates theories concerned with the sundry legalities entailed by the process of cryonics and cryopreservation. Numerous journals books and articles have by far dealt with the concept of cryonics and its likelihood of related legal implications.[13] Also, numerous legal scholars have tried to propose a legal framework for cryopreservation and activities related to it. There are several authoritative sources on a global level that claim to comprehensively and intricately deal with the governance of cryonics and its procedures. These sources include the Uniform Anatomical Gift Act and The Uniform Determination of Death Act of USA and The Euthanasia Laws Act of Australia.

Along with the introduction of this awe-striking concept of cryonics, comes the numerous legal nuances that the current laws lack for the most part. Hence, judicial systems need to prepare for this approaching biotechnological wave of legalities by understanding the various legal implications that might need to be addressed with the intent to govern human cryopreservation.

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[10] *See generally* Gao & Critser, *supra* note 7.

[11] *See generally* Michael Taylor et al., *New Approaches to Cryopreservation of Cells, Tissues, and Organs*, 46(3) TRANSFUS. MED. HEMOTHERAPY 197, 197-215 (June, 2019) [hereinafter Taylor et al.].

[12] Spector Daniel, *Legal Implications of Cryonics*, 18 CLEV. MARSHALL L. REV. 341 (1969).

[13] *E.g.,* Richard Huxtable, *Cryonics in the Courtroom: Which Interests? Whose Interests?*, 26 MED. L. REV. 476-499 (Oxford University Press, Oct. 25, 2017); Colleen M. Browne & Brian J. Hynes, *Legal Status of Frozen Embryos: Analysis and Proposed Guidelines for a Uniform Law, The;Note*, 17 JOURNAL OF LEGISLATION 97-122 (1991); *see also* DANIEL SPERLING, POSTHUMOUS INTERESTS: LEGAL AND ETHICAL PERSPECTIVES (Cambridge University Press, 2008) [hereinafter Sperling].

It is hypothesised that the considerable insufficiency in the laws dealing with various legalities of human cryopreservation demands for the establishment of an authority to recognise and govern the interests of individuals undergoing the process of cryonics and other prospective cryons in accordance with their rights and obligations.

I. RIGHTS OF A DEAD PERSON: BIRTH OF LEGAL RIGHTS AFTER DEATH

In this chapter we will focus on one of the most significant reasons for the introduction of cryonics as well as the greatest weakness in human beings, the concept of 'Death.' It is rightly assumed by many, that a biotechnological concept like cryonics has been established to encourage the human desire to transcend the maximum and finite human lifespan. Furthermore, it may also be considered as a practise to give the terminally ill or the ill-fated a sense of hope for another chance to live a healthy life at an uncertain time in the future. This attempt to transcend human lives by postponing death calls for numerous legal implications.

For a patient to appropriately undergo a process of cryonics, the patient has to be pronounced legally dead.[14] This controversially deemed medical process has raised many eyebrows across the globe due to its perverse effects on many religions.[15] Cryonicists however, believe in instilling rights in the individuals themselves in order to succour and help them decide whether they intend on being cryonically preserved with hopes of a healthier future or whether they prefer undergoing natural pyre or burial in accordance with their respective religions.

A. JS v. M AND F

On the 10th of November 2016, a landmark judgment was declared by the Royal British Court of Justice in *JS* v. *M and F*.[16] In this case, the High Court of Justice extensively dealt with the process of cryonics. The question before the court was whether a 14-year-old suffering from terminal cancer would be allowed to cryonically preserve her body after her death. The intentions of the individual were writ large and apparent to the court upon perusal of her writing, which was scribed as follows:

> 10. JS has written this: 'I have been asked to explain why I want this unusual thing done. I'm only 14 years old and I don't want to die, but I know I am going to. I think being cryo-preserved gives me a chance to be cured and woken up, even in hundreds of years' time. I don't want to be buried underground. I want to live and live longer, and I

[14] *See* Dr. Sanjeev Kumar Jain et al., *Cryonics: A Step Towards Immortality*, 29 J. INDIAN ACAD. FORENSIC MED. 10, 11 (2010) [hereinafter Jain et al.].
[15] *See generally* Sarah Bertocchi, *Cryonics: A Chance to Live Longer?*, TRENTO BIOLAW 16-24 (2019).
[16] JS v. M & F, [2016] E.W.H.C. 2859 (Fam).

> think that in the future they might find a cure for my cancer and wake me up. I want to have this chance. This is my wish.'[17]

Upon long, extensive and in-depth scrutiny of all case related matter, Mr. Justice Peter Jackson declared a judgement in favour of the 14-year-old patient's desire to be cryonically preserved.[18] However, many queries arise from the essence of this case in particular.[19]

The above-mentioned landmark judgement serves as a beacon of hope for cryonicists and other terminally ill patients who intend on being cryonically preserved with hopes for the future. There are needs and concerns that are raised for other legal implications which arise after an individual is cryonically suspended. These legal implications are essential for determining the rights of a cryonically suspended patient or, in layperson terminology, "a dead person".

B. JUXTAPOSING "LEGALLY DEAD" & "TOTALLY DEAD"

Before we proceed any further, it must be understood that there is a salient difference between an individual who is naturally or totally dead[20] and an individual who is legally dead with the sole intention of donating one's remains for the process of cryonic preservation. The clear distinction between legal and total death chiefly rests on the initial process of cryonics. The initial steps in the process are extremely crucial as cryonics procedures must commence immediately and within the first few minutes of the patient being declared legally dead.[21] The interesting scheme behind the strict execution of the initial stage is to cryonically preserve the body within a six to eight-minute

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[17] *Id*. at 3.

[18] JS, *supra* note 16, The Hon'ble Justice in his judgement *inter alia* stated as follows:

23. It is no surprise that this application is the only one of its kind to have come before the courts in this country, and probably anywhere else. It is an example of the new questions that science poses to the law, perhaps most of all to family law. Faced with such a tragic combination of childhood illness and family conflict, the court must remember that hard cases make bad law, and that natural sympathy does not alter the need for the application to be decided in accordance with established principle, or with principle correctly established.

30. Lastly, I cannot emphasize enough what this case is not about. It is not about whether cryonic preservation has any scientific basis or whether it is right or wrong. The court is not approving or encouraging cryonics, still less ordering that JS's body should be cryonically preserved.

[19] Firstly, whether these laws can be encompassed under juvenile laws with the sole intention to render juvenile justice in similar cases of cryonic interment? Secondly, if JS is resuscitated from cryonic suspension in future, who would act as the girl's guardian or parent? Thirdly, whether this practice of cryonics and exercising the rights to cryopreservation was well within the capacity and competency of the 14-year-old girl given the decision-specific nature of competency and capacity? *See* Emma Cave, *Goodbye Gillick? Identifying and Resolving Problems with the Concept of Child Competence*, 34 LEGAL STUDIES 103, 104-105 (2014).

[20] *See e.g.,* Ben Sarbey, *Definitions of death: brain death and what matters in a person*, 3(3) J. LAW BIOSCI. 743, 743-52 (2016).

[21] Best, *supra* note 3, at 493-494.

mark.[22] The time limit is perceived as the brief moment after being pronounced legally dead, when the body is still capable of some brain activity.[23] Furthermore, a chest compressor or HLR[24] is used in most cases to help continue blood circulation to the brain.[25] Hence, cryonics is only possible if it is immediately conducted after legal death and before the patient is pronounced brain dead. It is only after the pronouncement of both, legal death as well as brain death, can the patient be considered as "totally dead".[26] This state of complete death would be deemed as inconsequential for conducting cryonics.

We now proceed towards understanding the emergence of certain legal implications that apply to the legally dead and cryonically suspended patients. The immediate legal death of a cryonics patient gives birth to other legal rights engendered in that cryon who goes into cryonic interment. The need for awakening such legal rights lie deep within the understanding of the goal cryonicists aspire to achieve. This goal is to successfully resuscitate the patient who has been sent into cryonic interment; by that same token, to prove the efficacy and benefit of employing this biotechnological process and to instil hope in terminally-ill individuals for another chance at living a healthy life.[27] In today's legal world, it means, irrespective of whether or not future technology has the potential to bring cryonic patients back to life, the legal implications must be arrived at, with an optimistic supposition and the likelihood of a far-better medically advanced future in mind, while also prioritising the cryonic patient's rights and interests alongside. These interests *inter alia* include the Power of Attorney (PoA), right to beneficiary of trust property, or the right to euthanasia. Among these, the dire need for a perpetual PoA to safeguard the interests of cryonically suspended individuals throughout the entire perpetuation of the patient's interment period will be discussed subsequently.

C. The Legal Rights of a Patient in Cryonic Interment

The discretionary rights of an individual to choose whether he would prefer donating his body for cryonic preservation after his legal death is in accordance with every respective state's anatomical act. This impugned topic has also been a widely controversial debate[28] predominantly among the religious masses and logical experts who find it redundant to stockpile human bodies in cryonic

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[22] Ryan Sullivan, *Pre-Mortem Cryopreservation: Recognizing a Patient's Right to Die in Order to Live*, 14 Quinnipiac Health L. J. 49, 69 (2010); Minerva, *supra* note 9.

[23] Minerva, *supra* note 9, at 8.

[24] *See* Alcor, *supra* note 5.

[25] *See generally* Aschwin de Wolf & Charles Platt, *Cardiopulmonary Support: Circulation*, *in* Human Cryopreservation Procedures 9[1-38] (last revised Nov. 14, 2019).

[26] *See* Tim Gosden, *Cryogenics or Cryonics?*, Actuarial Post, http://www.actuarialpost.co.uk/article/life-in-the-freezer-5866.htm (last visited June 10, 2020) (distinguishing between "actually deceased" and "legally deceased").

[27] *See generally* Cron, *infra* note 53.

[28] *See e.g.,* Aharon W. Zorea, Finding the Fountain of Youth: The Science and Controversy Behind Extending Life and Cheating Death (2017).

suspension with hopes of advanced technologies and medicines for an uncertain time in an uncertain future. Cryonics, as a concept, is believed to disrupt the circle of life by attempting to transcend the natural extent of human life. Contrary to religious beliefs, fundamental human rights such as the right to life that is inherent in an individual, may now draw a wider interpretation as a right for attempting to live again at some time in the future.[29]

i. ALCOR LIFE V. RICHARDSON

The authors will attempt to emphasise on the significance of rights instilled in a patient who intends to be cryonically preserved, through a case namely, *Alcor Life* v. *Richardson*[30]. In this case, an individual known as "Orville" had intended to cryonically preserve his remains after his legal death at Alcor Life Extension Foundation (i.e., Plaintiff). His intentions faced strict disagreement by his brother and sister (i.e., Defendants) and upon his death in 2009, they followed the customary burial of his body without any notification to the Plaintiff. The Plaintiff filed a case for seeking compelled permission from the relatives of the deceased to exhume the patient's body for cryonic preservation. On account of extensive investigation and in-depth explication of the case matter, the Iowa Court of Appeals pronounced a judgement in favour of the Plaintiff compelling the defendants to attest and approve the application to exhume the patient's body for cryonic preservation. After an elaborate elucidation of all points, the final order and decree were declared as follows:

> Based on the foregoing considerations, and the specific facts of this case, we conclude that Alcor was entitled to its requested mandatory injunction directing David and Darlene to execute the application for a disinterment permit, with Alcor bearing all the burden and expense of disinterment. Despite the novelty of cryogenics, and the statutory complexity involved in this case, we believe this outcome is largely dictated by two longstanding and relatively straightforward traditions: first, our historic deference to the testators' wishes regarding the method and location of burial; and, second, the ability of courts of equity to fashion a suitable remedy when one party has violated another's rights.[31]

In the above case, we can agree with the decision of the Court of Appeals as far as the United States' – Uniform Anatomical Gift's Act (UAGA) is concerned. The UAGA permits the use of unclaimed bodies and the voluntary donation of all or part of the individual's remains upon death.[32] However, the court did not bother diving deeper into the intricacies and essential requirements for cryonic

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[29] Sperling, *supra* note 13.

[30] Alcor Life v. Richardson, [2010] Iowa Ct. App. 785 N.W.2d 717.

[31] *Id*. at 27-28.

[32] Traci McKee, *Resurrecting the Rights of the Unclaimed Dead: A Case for Regulating the New Phenomenon of Cadaver Trafficking*, 36 STETSON L. REV. 843, 851-53 (2007).

preservation and was solely determined to satisfy the legal obligations. Orville intended to cryonically preserve his remains. The procedures commence within a delicate window of opportunity while some brain activity still persists.[33] After this window had passed, the human's remains were inconsequential to cryonics. It can also be argued that the remains would still be useful for research and development purposes. The merits of this case are left for the readers to contemplate.

ii. Legalities Ensuing the "Successful Middle-aged Man" Scenario

Now, let us consider a scenario where a middle-aged man plans on applying for cryonic preservation of his body after his death. Unlike the 14-year-old girl in the aforementioned case,[34] he is appreciably wealthy while also owning several properties. He has successfully managed to establish a renowned business and significant repute in society. Hence, he would be a person with a great deal of responsibility towards the masses who depend on him for securing their livelihood. Furthermore, unless a wealthy prospective cryon is a staunch philanthropist, he would seize any opportunity to secure all his 'wealth' and 'business for acquiring wealth' throughout the entire perpetuation of his cryonic interment. This would be possible either through a trusted entity acting as a medical guardian,[35] or assigning the task of conducting all business operations and handling all finances of the individual to a conceptualised *Perpetual or Continuing Power of Attorney*.

As far as care for the cryonically preserved patient is in question, it would be appropriate to appoint a medical guardian to look after and care for the patient's *medical needs* and to further declare a *living will*[36] or an *advance directive*[37] – "An advance directive or an advance medical directive is a

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[33] Minerva, *supra* note 9, at 8.

[34] JS, *supra* note 16.

[35] *See* Rebecca K. Lively, *Medical Power of Attorney for Cryonics*, Alcor Life Extension Foundation (2017), https://alcor.org/Library/html/medical-power-of-attorney-for-cryonics.html (last visited June 5, 2020) [hereinafter Lively].

[36] *See* Luis Kutner, *Due Process of Euthanasia: The Living Will, A Proposal*, 44(4) Indiana Law. J. 539, 539-54 (1969); *see generally* Paul Malley, *National Interest in Living Wills Surges as America Responds to COVID-19*, Aging with Dignity (Mar. 25, 2020), https://2020dev.agingwithdignity.org/blog/ (last visited June 5, 2020).

[37] *See e.g., Advance Directive and Medical Power of Attorney*, ALCOR, this is an essential legal document which helps an individual to communicate her wishes and interests while concerning the future medical treatment that will eventually result in the patient's inability to give consent or make any medical decisions due to injury or illness. The document further promotes the patient's option to nominate or appoint a trusted individual to make medical decisions in the best interests of the patient during times of the patient's incapacitation to make decisions for oneself. This document in particular, is drafted and prepared mainly for individuals who intend on being cryonically suspended after their legal death. The document is available at https://www.alcor.org/cryonics-medical-power-of-attorney.pdf (last visited Mar. 25, 2020). However, this form only complies with and is limited to the requirements of the District of *Columbia* & the ensuing US states of *Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia,*

legal document executed by a person explaining that person's wishes about medical treatment if that person becomes incompetent or unable to communicate." [38] To arrive at a conclusive and a substantially well drafted document that satisfactorily adheres to the requirements of all state and national laws and regulations, is an elaborate and an overwhelming task to fulfil. One such recognised attempt, known as "Five Wishes"[39], was asseverated by an american non-profit organisation "Aging with Dignity" along with much-needed help from the American Bar Association. It affirms to substantially meet the requirements of almost all the 50 states in the U.S (42 states to be exact).[40] Prior to the aforementioned attempt, there was another version that had been explicated by Charles P. Sabatino who had addressed the legal requisites of all the 50 united states in his paper, "National Advance Directive".[41]

D. Envisaging a Cryonic Patient's Perpetual Power of Attorney

Notwithstanding the above-mentioned, cryonics is still in its nascent stage; hence, we are yet to come across a cryon who has been resuscitated from cryonic suspension to full health. Today's technologies and medical advancements have not been able to claim the successful resuscitation of a suspended cryonic patient since 1967, the year when the first human being namely, *James Hiram Bedford* was cryopreserved after his legal death due to terminal kidney cancer at the cryonics organisation – "Alcor Life Extension Foundation"[42]. Hence, even the approximate date and time for resuscitating and bringing back a cryonically preserved individual from cryonic interment is unknown. The patient might even be preserved for another hundred decades until humans have

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Hawaii, Idaho, Illinois, Iowa, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Jersey, New Mexico, New York, North Carolina, North Dakota, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Vermont, Virginia, Washington, West Virginia & Wyoming.

[38] Krishna Hariani, *Advance Directives and Living Wills - The Way Forward*, ManupatraFast (Hariani & Co., Trupti Daphatary ed., Mar., 2018).

[39] *See generally* Five Wishes (Aging with Dignity, 2020), https://fivewishes.org/five-wishes/who-we-are/about-us (last visited June 5, 2020).

[40] *See* Lively, *supra* note 35; *see also* Rebecca K. Lively, *How to Protect your Cryonics Arrangements from Interference by Third Party*, Alcor Life Extension Foundation (2010-2011), https://www.alcor.org/BecomeMember/toprotectarrangements.html (last visited June 5, 2020).

[41] Charles P. Sabatino, *National Advance Directives: One Attempt to Scale the Barriers,* 1 NAELA J. 131-164 (Spring, 2005); *see also* Charles P. Sabatino, *Can my Advanced Directives Travel Across State Lines*, 38 Bifocal 3-6 (Oct., 2016); *see generally* Charles P. Sabatino, *Advanced Directives and Advance Care Planning: Legal and Policy Issues*, American Bar Association (Oct., 2007).

[42] *See generally* Mike Darwin, *Dear Dr. Bedford (and those who will care for you after I do)*, Alcor Life Extension Foundation (May 10, 1991), an open letter from Mike Darwin to the first cryonically preserved man, James Bedford, available at https://www.alcor.org/Library/html/BedfordLetter.htm (last visited Apr. 5, 2020); *see also* Ralph Whelan, *Dr. Bedford Gets a New Suit,* Alcor Life Extension Foundation (Aug., 1991), https://www.alcor.org/Library/html/BedfordTransfer.html (last visited Apr. 5, 2020).

arrived at a reliable medical or technological solution. Thus, with regards to the scenario of a middle-aged man described in the previous topic, we have to address a much more prodigious concern; one which would involve prolonged and exhaustive acts of conducting business operations and securing the finances in favour of the cryonically preserved patient throughout the duration of the patient's cryonic interment. This concern could be addressed by way of representing the patient as an ostensible owner of the property, business or any other legal entity. Hence, this would call for the institution of a *Perpetual or Continuing Power of Attorney*.

First and foremost, the patient could only rely on a well-established legal entity to exist throughout the entire perpetuity of the patient's cryonic interment which could run into many decades or even centuries. Hence, the patient could not rely on an individual acting under the patient's Power of Attorney as the PoA holder.[43] Furthermore, the conspicuous incapacitation and inability of the debilitated patient could result in the PoA holder to not be answerable to any third person and could take *Suo Moto* decisions in bad faith.[44] Contrary to the aforesaid, when there is a well-established legal entity acting under the patient's Power of Attorney, there is very little scope for *Suo Moto* decisions to be taken in bad faith by the PoA holder. This is because all the operations of the legal entity would rely on strict accountability and on the working of many individuals as employers and employees. Furthermore, operations will be closely scrutinised and audited by authoritative bodies. Due to the unpredictable nature of the cryonic patient's perpetuation period in cryonic suspension, the patient should have the option to exercise his right to appoint a surrogate to act as the PoA holder. This would be a feasible option in a case where the instant legal entity acting under the patient's power of attorney, *inter alia*, ceases to exist or is relieved of its duty towards the suspended cryonic patient for any reason.

The perpetually established legal person would be required to, and responsible for, securing the finances, properties, necessary documents and significant government related information belonging to the suspended patient. To put all the aforementioned legalities on paper would be an exhaustive and overwhelming task which would run into hundreds and thousands of pages' worth of paperwork. Therefore, it can be rightly asserted that the inception and establishment of cryonics has showered the legal field with many significant opportunities and a great deal of responsibilities that come with it.

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[43] *E.g.,* Yashwant Singh v. State of Rajasthan & Anr., (2010) Raj 31, the petitioners were liable for offence under Sections 420, 467, 468 and 471 IPC *in re.* allegations were levelled against the petitioners for preparing and forging a Power of Attorney by taking advantage of the patient's (i.e. Maharaja Sawai Tej Singh) medical condition and inability to provide kosher consent.

[44] *SEE, E.G.*, Gini Scott, The Science of Living Longer: Developments in Life Extension Technology 77-85 (1st ed. 2017).

II. CRYONIC SUSPENSION: THE LAW AND ITS CHALLENGES

The concept and thought of deep-freezing a person with the intention of a complete and successful resuscitation, came to light with the publication of Sir Robert Ettinger's famous book "*The Prospect of Immortality*".[45] However, the notion of cryonics or cryopreservation goes back to the medieval ages. The occurrence of what we now applaud as "*suspended animation*"[46] was first observed in 1663 by an English scientist, Henry Power. He conducted his experiment by mixing salt and ice followed by immersing a jar of eels in it which eventually froze them. This jar of frozen eels was left uninterrupted for a night and they were later revived.[47] Hence, the concept of 'suspended animation' was propounded.[48] The practise of suspended animation has since been extensively scrutinised and developed to provide hope to patients suffering from terminal diseases in the 21st century. An established legal regime for cryonics is pertinent as science develops at an exponential rate. Nanotechnology[49] and artificial intelligence[50] could take cryonics to new heights and is expanding at an unprecedented rate. This chapter focuses on the issues that have arisen as a result of cryonics as well as other concerns pertinent to its legality and medical ethics.

A. GOVERNANCE AND REGULATION OF CRYONICS

The field of cryonics has not received a great deal of attention from mainstream medical practitioners. Through substantial cooperation between cryonicists and mainstream practitioners, the ethical questions raised by critics could be addressed and potentially pave the way for medical science to employ the practice of cryonic suspension in human beings. There is hope, based on scientific findings, that the entire process involved in cryonics and its applicability on human beings will one day be a part of medical standards and protocols.

Ettinger opined that a frozen person is not a corpse and ought to be considered as a person awaiting treatment.[51] This is also due to the fact that medical science has been trying to address the grey-area between life and death by coming to grips with cryonics and its procedures. This gives rise to

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[45] Ettinger, *infra* note 51.

[46] *See* Smith, *infra* note 47, at 13; *see also* MARY E. CLUTTER, DORMANCY AND DEVELOPMENTAL ARREST: EXPERIMENTAL ANALYSIS IN PLANTS AND ANIMALS X-XI (2013).

[47] *See* GEORGE P. SMITH II, THE CHRISTIAN RELIGION AND BIOTECHNOLOGY: A SEARCH FOR PRINCIPLED DECISION-MAKING 13 (1st ed., 2010).

[48] *Id.*; *See also* George P. Smith, *Intimations of Immortality: Clones, Cyrons and the Law,* 6 UNSW L. J. 119, 125 (1983).

[49] *See* ERIC DREXLER, ENGINES OF CREATION: THE COMING ERA OF NANOTECHNOLOGY (Fourth Estate, May, 1990); Jain et al., *supra* note 14, at 12.

[50] Tiffany Romain, *Extreme Life Extension: Investing in Cryonics for the Long, Long Term*, 29(2) MEDICAL ANTHROPOLOGY 194, 197 (Routledge, 2010).

[51] *See* ROBERT C.W. ETTINGER, THE PROSPECT OF IMMORTALITY (Ria University Press, Charles Tandy ed., May 1, 2005).

a question of law – What will be the status of a cryon in the eyes of law? If the biotechnology advances to such an extent that cryonics and its procedures are perfected, in the near future, issues such as the medical, enduring, continuing or perpetual power of attorney would prove to be a task for lawmakers. Furthermore, questions of law relating to succession, inheritance, and the rights & obligations of a cryon after being resuscitated would need to be addressed while adequately precluding the exploitation of any potential grey-areas in the law. It is vital for lawmakers to ensure that the legal, medical and ethical issues associated with cryonics are identified and addressed by establishing a legal regime that can govern this controversial practice with efficacy.

i. LEGAL ISSUES

It has been expounded that a medical, enduring or perpetual power of attorney is the foundational legal requirement that ought to be exercised by a cryon before entering cryonic suspension. This is a significant legal prerequisite to safeguard the patient's interests and matters concerning their assets, rights, liabilities, succession and inheritance.

1. THE NEED TO REVISE CONJUGAL RIGHTS IN LIGHT OF CRYONICS

In a case of conjugal rights, what would happen to the legal status of a marriage between the cryon and the cryon's spouse? Should there be a clause under the perpetual power of attorney which addresses the status of their marriage upon the commencement of cryonic suspension? Such issues would eventually exacerbate if it is not addressed at the early stages of cryonics. Under Indian evidence law, the onus of proving that a person who has not been heard of for seven years is alive vests on the person who affirms that they have heard from him in that span of seven years.[52]

The idea of remarriage is in order to fulfil a person's right to live a life with dignity. Keeping that in mind, the existing family laws governing the conjugal rights such as the Special Marriage Act, Muslim Marriage Act and the Hindu Marriage act could widen their scope to accommodate a provision that would potentially address a situation whereby the validity of the marriage is further explained in case either or both the spouses could undergo cryonic interment. Upon resuscitation, whether their marital status remains as is prior to the cryonic interment or would the same take away their marital status remains a question that the lawmakers ought to deliberate upon in the distant, if not the near future.

A similar concept could be applied in a case where a cryon is not resuscitated from cryonic suspension after a certain number of years. By reason of such an event, the spouse of the cryon

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[52] Indian Evidence Act, 1872, § 108.

should have the option for a remarriage.[53] Hence, conjugal rights, *inter alia,* is a subject matter of utmost importance and needs to be addressed under the legal regime that governs cryonics along with the rights, duties and obligations of a cryon.

2. ESTABLISHING FUNDING: A PREREQUISITE FOR CRYONIC SUSPENSION

While dealing with the legal nuances and the intricacies involved in cryonics, another important factor that ought to be considered is the funding required for the cryon to be sent into cryonic suspension. What could happen if the assets of the cryon replenish? Will the programme still go ahead? Cryonics facilities like *Alcor* in the United States of America, have set up patient care trust funds in order to ensure that the process of cryonic suspension does not come to a halt due to the insufficiency of funds. In the case of Alcor, a method to establish funding is achieved through a dual-system of separate yet interconnected trusts. Among the two systems, the Patient Care Trust was initially established and the Alcor Care Trust Supporting Organization was introduced later on. Alcor's Board of Directors set up the Patient Care Trust (PCT)[54] as a separate legal entity in 1997 which was initially a part of Alcor's internal accounting system. The title of beneficiary of the PCT is entrusted to Alcor, because a dead person holds no right as a beneficiary. The PCT follows a conservative funding mechanism that is originally used to deposit a sizable share of the cryon's funding.[55] This amount is invested and the Return on Investment (ROI) is used to financially support the continuation of the cryon's storage and preservation. Owing to an exponential growth of funds in the PCT, a separate legal entity called the Alcor Care Trust Supporting Organization (ACT) was established in 2016. The interrelation between the PCT, ACT and Alcor is detailed in the "ACT Operating Agreement".[56] Through this arrangement, costs for storage and preservation can be secured and guaranteed for an indefinite period.

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[53] *See generally* Rebekah Cron, *Is Cryonics an Ethical Means of Life Extension?*, UNIVERSITY OF EXETER 17-19 (2014); *see also* Kerry Howley, *Until Cryonics Do Us Part,* N.Y. TIMES (July 7, 2010), https://www.nytimes.com/2010/07/11/magazine/11cryonics-t.html?_r=3&=&%2359;pagewanted=all&pagewanted=all (last visited Dec. 21, 2020).

[54] *See* Alcor Patient Care Trust Agreement, https://www.alcor.org/library/alcor-patient-care-trust-agreement/ (last visited Dec. 23, 2020).

[55] *See* Schedule A (Required Costs and Cryopreservation Fund Minimums), https://www.alcor.org/docs/alcor-form-schedule-a-required-costs-and-cryopreservation-fund-minimums.pdf (last visited Dec. 23, 2020).

[56] *See* Alcor Care Trust Supporting Organization (ACT) Operating Agreement, https://www.alcor.org/library/alcor-care-trust-supporting-organization-operating-agreement/ (last visited Dec. 23, 2020).

3. THE NEED TO SUBSERVE THE PRACTICE OF CRYONICS

The lawmakers deliberate issues related to the governance of cryonics in order to apply it as a viable option for individuals to transcend their lives. The question posed is how to strike the perfect balance between the patient's individual needs and the collective good of society. The very existence of cryonics as a potential extension of life is to ensure that the *right to life* is an inalienable right inherent in every individual. Having said that, if there is even the slightest possibility to restore a life with dignity, it ought to be done. For instance, doctors ought to do everything in their capacity to ensure that a person does not die. The chances of revival of a human being exists in theory, but the prevailing modes of technology and the limited knowledge of science inhibits us from achieving the same. However, the moment human understanding of science and technology expands beyond the horizons that we imagine currently, it would be unjust to try not to instil hope among terminally ill patients. It would be a sin to refuse life extension technology to patients and could also be analogous to suicide.[57] If "Dolly" the sheep was never cloned,[58] then that would've been the "barren ages" for science and technology. Cloning was once beyond the understanding of humans. Similarly, cryonics is in its budding stages; though visionaries like Robert Ettinger were well ahead of their time with their contributions to cryonics.

The real challenge lies in addressing the list of problems while drawing attention to the rights and obligations of a person undergoing cryonic interment. Matters concerning the will written by the cryon and execution by the legal heirs; whether, upon resuscitation the cryon would have all the rights that he or she enjoyed prior to cryonic suspension, *inter alia*, are issues that law would have to address. If these issues aren't dealt with while the technology is still in its early phases of development, it could be too late to set-right the anomalies which will surface in the future. Therefore, the legal professionals are at an advantageous position to grapple with cryonics and the legal issues discussed so far. There is a dire need for considerable participation by legal professionals and the lawmakers in developing a legal regime to govern and regulate cryonics.

ii. MEDICAL & ETHICAL ISSUES

While drawing attention to medical issues, unless a patient's body has surpassed the point of repair and recovery, it is almost redundant to try and convince a cryonicist that a patient is dead.[59] This *total death* is recognised after the patient has undergone "*information death*" which means the complete loss or disappearance of all information constituting the patient's personality and physical

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[57] Jain et al., *supra* note 14, at 11.

[58] *See* Jamie Love & Alan Petersen, *Cloning (The Story of Dolly the Sheep)*, VAN NOSTRAND'S SCI. ENCYCLOPEDIA (John Wiley & Sons Inc., Aug. 15, 2007); *see also* Dolly: The Science Behind the World's Most Famous Sheep, Explanation by Dr. H.D. Griffin, Assistant Director, Roslin Institute (Edinburgh), https://cds.cern.ch/record/454177/files/p443.pdf (last visited Dec. 21, 2020)

[59] *See* Cron, *supra* note 53, at 12.

characteristics.[60] Any other state that is short of the aforementioned would merely be considered as a temporarily debilitated state or a result of a serious illness until better and advanced technology steps in to repair and resuscitate. For instance, in a more straightforward and uncomplicated case of electrocution or drowning, the individual is a victim who can be salvaged by attempting CPR (Cardiopulmonary Resuscitation).[61] According to the science fiction author, aerospace engineer and cryonicist namely, Rand Simberg, the following has been stated with regards to cryonic suspension and why medical professionals have a hard time accepting and incorporating cryonic suspension into mainstream medical science;

> Accepting it would mean, in turn, that they have two choices. They must suspend all patients who are beyond their ability to heal, using the best available techniques, in hopes that their successors will be more capable. Alternately, they must accept the fact that they are (now deliberately) euthanizing people by the masses. Ignorance, hubris or both now prompt them to believe that no one in the future will be capable of doing what they cannot.[62]

Challenges are posed by several actors who raise questions regarding its ethics, namely in the field of medical science, religion as well as from the legal profession.[63] Most ideal and primary cases of cryonics would normally concern terminally ill patients who also suffer from the awareness of a future consequence. Religious hardliners are of the view that life cannot be extended beyond what has been lived by a person and that science cannot play god. However, that does not mean that its potential issues need to be nipped in the bud and precluded from being addressed. Ethical issues with respect to cryonics are concerned with pre-trial procedures, that is, before a technique could be employed for human beings, it ought to be tested successfully on animals. Testing on animals itself draws a plethora of ethical issues. However, in the case of cryogenics, only cell tissues and certain organs have been vitrified and have achieved a well-developed single-cell system.[64] In the case of cryonic suspension of human beings, there has been a great deal of unanswered questions ensuing criticism and a skeptical attitude among the masses.[65]

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[60] *See* Rand Simberg, *The Ends of Life?,* ALCOR LIFE EXTENSION FOUNDATION (July 30, 2002), https://alcor.org/Library/html/EndsOfLife.html (last visited May 29, 2020).

[61] *Id.*

[62] *Id*. at ¶ 14. *See also* ¶ 15 ("It is ironic that the very medical establishment that has done so much throughout human history to push back and extend the limits of life is not only unwilling to put patients in a possible ambulance to the future, but to even engage in serious discussion of the issue, instead falling back on trite and inapplicable soundbites about "*turning a hamburger back into a cow*.")

[63] *See generally* Jain et al., *supra* note 14, at 11.

[64] *See* Taylor et al., *supra* note 11, at 198-199.

[65] *See* Philippa Roxby, *What are the ethics of cryonic preservation?,* BBC NEWS (Nov. 18, 2016), https://www.bbc.com/news/health-38031428 (last visited Mar. 23, 2020).

Nevertheless, in addition to all the sundry ethical, medical, and legal implications explicated in this paper, it is indeed too soon to identify all the issues and provide sufficient legal backing. This is primarily due to the limitations faced in the early stages of the technology which is available at our disposal. Moreover, there are more questions posed than the answers we have about the cryonic suspension of human beings. Only time will tell how these legal, ethical and medical issues need to be approached and satisfactorily resolved.

III. THE FUTURE OF CRYONICS IN INDIA: A LEGAL PERSPECTIVE

A. CRYONICS & INDIA

India has shown remarkable progress in the fields of science and technology. However, when we consider cryonics and its development in India, there aren't any notable facilities dedicated to the same. There are four well-known and full-fledged institutes that deal with cryonics; three in the United States of America[66] and one in Russia.[67] The first organisation to acknowledge cryonics in India has come up in Kolkata, in 2018. The *Cryonics Research Institute Private Limited* is the only institute dedicated to cryonics and they believe that within fifty years or so, through the use of nanotechnology, human beings can be resuscitated.[68] There is appreciable research being conducted in India dedicated to cryonics, but most of it is newfangled and recently discovered. However, the law could take a step well in advance and try to answer the queries concerning medical issues, ethics and the law per se. When it comes to the question of the *right to life*, cryonics poses a serious challenge to our Constitution. How would *Article 21* be interpreted if cryonics becomes a reality? How can the legal system further subserve its application in matters of euthanasia and passive euthanasia?[69] Would it apply to cryons? These are questions that would be posed when the cryonics movement takes shape and becomes a topic of discussion.

B. CONSTRUING ARTICLE 21 IN VIEW OF CRYONICS

The approach taken by the Indian Judiciary with respect to the interpretation of *Article 21* has been liberal. The expression "*Right to life or personal liberty*" under *Article 21* is construed by the Courts as a life with human dignity.[70] Human dignity is subject to interpretation in the case of patients

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[66] *E.g.,* Alcor Life Extension Foundation, American Cryonics Society & Cryonics Institute.

[67] *E.g.,* KrioRus is the first cryonics company in Russia. *It was founded in 2005 as one of the projects of the Russian Transhumanist Movement (RTM), a public organization, engaged in promoting transhumanism and immoralism, investigating the prospects of advanced technological development and the popularization of science.* Further information on KrioRus is available at http://kriorus.ru/en/about-us (last visited June 8, 2020).

[68] *See* Achintyarup Ray, *Freeze-preserve firm, kms from Behala cold tomb*, TIMES OF INDIA (Apr. 10, 2018).

[69] *See E.g.*, Common Cause v. U.O.I., (2018) 1 SCC 87; *see also, e.g., in re.* Aruna Shanbaug, *infra* note 75.

[70] *See* Francis Coralie Mullin v. Administrator, Union Territory of Delhi, (1981) 1 SCC 608; *in re.* Common Cause, *supra* note 69,

who would want to undergo cryonic suspension. Justice P.N Bhagwati has observed the following regarding the right to life;

> We think that the right to life includes the right to live with human dignity and all that goes with it, namely the bare necessities of life such as, adequate nutrition, clothing and shelter over the head and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and missing and coming along with fellow human beings.[71]

Cryons would argue that they wish to live a life of dignity, and being cryonically suspended would only mean that they want to have a second chance at life. Moreover, since the technology has not reached its intended stages, it would be a herculean task to proceed with deliberating upon what could be the potential issues that could arise. It is still an open question of interpretation whether Article 21's protections could apply to a cryon.[72]

In the present day, the only way in which cryonic suspension could be employed would be through arguing the practicality of either resorting to "*cryonic suspension*" or resorting to "*passive euthanasia*"[73]. In other words, instead of allowing a terminally ill patient to die, they could instead, by means of a living will or an advance directive, obtain speedy justice by opting for cryonic suspension as an alternative to euthanasia.[74] That way, the patient would be rid of his pain. Moreover, there is hope that once their ailment can be cured and concomitantly, cryonic

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in the context of a dying man who is terminally ill or in a persistent vegetative state that he may be permitted to terminate it by a premature extinction of his life in those circumstances. This category of cases may fall within the ambit of the right to die with dignity as a part of right to live with dignity, when death due to termination of natural life is certain and imminent and the process of natural death has commenced.

[71] Francis Coralie Mullin v. Administrator, Union Territory of Delhi, (1981) 1 SCC 608.

[72] *See generally* TNN, *'Article 21 in the Heart of the Constitution'*, TIMES OF INDIA (Dec. 22, 2019, 05:09 AM), In this press release, Justice Ramasubramaniam stated, "A new concept called cryonics has given an extended meaning to Article 21", https://timesofindia.indiatimes.com/city/visakhapatnam/article-21-is-the-heart-of-the-constitution/articleshow/72920100.cms (last visited June 8, 2020).

[73] *E.g., potential for* cryonics application *in re.* Aruna Shanbaug, the concept of passive euthanasia was comprehensively dealt with, where the Hon'ble Supreme Court of India declared, "Passive euthanasia entails withholding of medical treatment for continuance of life, e.g. withholding of antibiotics where without giving it a patient is likely to die, or removing the heart lung machine, from a patient in coma." *See case cited, infra* note 75.

[74] *E.g., in re.* Common Cause, *supra* note 69, Hon'ble Justice A.K. Sikri discussed:
whether passive euthanasia, voluntary or even, in certain circumstances, involuntary, is legally permissible and if so, under what circumstances Whether a living will or advance directive should be legally recognized and can be enforced and if so, under what circumstances and what precautions are required while permitting it Held, when it comes to medical treatment, general common law principle is that any medical treatment constitutes trespass to person which must be justified by reference either to patient s consent or to necessity of saving life in circumstances where the patient is unable to decide whether or not to consent Rights with regard to medical treatment.

suspension becomes a perfected technology and ready to be employed into mainstream medical sciences; we can then attempt to save patients by cryonically suspending them to resuscitate. Hence, instead of opting for passive euthanasia, the patient would be given a second chance to live their life with dignity. Since there is no legislation on euthanasia per se and as it requires strict monitoring by the court, cryonics would come into the picture as an alternative. This is because there is clearly no mention of a state where a person is neither *alive* nor *dead*. We can draw a meaningful connection to the *Aruna Shanbaug case*. The sexual assault victim suffered for 37 years in a vegetative state before the Supreme Court of India could arrive at a conclusive landmark judgement permitting passive euthanasia.[75] In similar cases where a prolonged and delayed decision of the overburdened judicial system is in question resulting in further debilitation of the patient, cryonics would be a suitable alternative and a much more plausible option compared to passive euthanasia. Hence, cryonic suspension could be employed in the cases of patients who are in a vegetative state. Therefore, it is pertinent that *Article 21* of the Indian Constitution ought to be construed and read along with the likelihood of a person's life after their "*legal death*" but not "*clinical*" or "*total*" death. Also, *Article 21* should be applied to patients undergoing cryonic suspension for the reasons mentioned above.

C. INDIAN ACTS DEALING WITH THE HUMAN ANATOMY

Though India has not yet taken a conspicuous stand on human cryopreservation,[76] it acknowledges the Transplantation of Human Organs and Tissues Act (THOA), 1994 under central acts, along with every respective state's Anatomy Act (i.e. The Karnataka Anatomy Act 1957, The Jammu and Kashmir Anatomy Act 1959, The Kerala Anatomy Act 1957, so on and so forth). The THOA is concerned with regulating the process and practise of donating, removal and storage of human organs and tissues. The act also addresses subsequent transplantations for reasons concerned with therapeutics or healing and also prevents the dealing of human organs and tissues for commercial purposes.[77]

First and foremost, it is pertinent to mention that the motive behind the concept of cryonics is for both, research and development purposes, as well as for the probable benefit of the patient in the future. Hence, the employment of cryonics is justifiably expensive.[78] Therefore, until and unless the legislature and the judiciary have substantially understood this process in all its intricacies and decides to amend the THOA in order to achieve a wider meaning for "Prevention of Commercial

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[75] Aruna Ramchandra Shanbaug v. Union of India & Ors., (2011) 4 SCC 454.

[76] *See generally* Justice Bhanwar Singh & Dr. N.K. Bhal, *Dead, Yet Alive!*, INDIA LEGAL (Feb. 10, 2018, 5:28 PM), https://www.indialegallive.com/special-story/cryogenic-preservation-dead-yet-alive-43878 (last visited June 6, 2020).

[77] Transplantation of Human Organs and Tissues Act, 1994, No. 42, Acts of Parliament, 1994.

[78] *See generally* Vagish Kumar, *Assessment of Ethical Aspects of Cryonics: An Emerging Technology*, 44 J. SCI. SOC'Y. 63, 65 (2017).

Dealings" mentioned in the objective of the Act,[79] cryonics would carry negligible significance. Furthermore, the act is required to address the process of donating, removing and storing human organs for indispensable research and development purposes and not merely for therapeutics.[80] The THOA does not entirely deal with matters that govern cryonics and does not address the various legalities involved in the process. However, there are certain mainstream procedural concerns that are identified and addressed in the act. Ergo, there is scope to amend the THOA to regulate human cryopreservation. Some of the sections of the THOA are provided hereon:

The definition of "donor" under Section 2(f) may be redefined and definitions for "cadaver"[81] and "cryonics institute" may be inserted to address the concept of cryonics as follows:

- "cryonics institute" shall mean an organisation which is authorised and administered by the Government of India as well as the concerned state government to conduct the practise of human cryopreservation subject to the provisions of this act.
- "cadaver" shall mean the dead body of a legally or clinically or totally dead human.
- (f) "donor" means any person, not less than eighteen years of age, who voluntarily authorises the removal or storage or both, of his cadaver or any of his human organs for therapeutic purposes or human cryopreservation under sub-section (1) or sub-section (2) of section 3;

Section 3 of the THOA establishes the authority for removal of human tissues or organs. Sub-sections 1 and 2 of Section 3 may be amended to address human cryopreservation as follows:

> Authority for the removal or preservation of [human organs or tissues or both or cadaver]. — (1) Any donor may, in such manner and subject to such conditions as may be prescribed, authorise the removal or storage or both, before his legal or clinical death, of his cadaver or any [human organ or tissue or both] of his body for therapeutic purposes or human cryopreservation. (2) If any donor had, in writing and in the presence of two or more witnesses (at least one of whom is a near relative of such person), unequivocally authorised at any time before his legal or clinical death, the removal or storage or both, of his cadaver or any human organ of his body, after his legal or clinical death, for therapeutic purposes or human cryopreservation, the person lawfully in possession of the dead body of the donor shall, unless he has any reason to believe that the donor had subsequently revoked the authority aforesaid, grant to a

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[79] Transplantation of Human Organs and Tissues Act, 1994, No. 42, Acts of Parliament, 1994.
[80] *Id.* §2(o).
[81] Transplantation of Human Organs and Tissues Rules, 2014, Rule 2(b).

> registered medical practitioner or authorise a cryonics institute all reasonable facilities for the removal or storage or both, for therapeutic purposes or human cryopreservation, of the cadaver or that [human organ or tissue or both] from the cadaver of the donor.

Section 4(1) and (2) of the THOA deals with the unauthorised removal of human organs or tissues. The same may be amended as follows:

> Removal of [human organs or tissues or both or cadaver] not to be authorised in certain cases. — (1) No facilities shall be granted under sub-section (2) of section 3 and no authority shall be given under sub-section (3) of that section for the removal of the cadaver or any [human organ or tissue or both] from the cadaver, if the person required to grant such facilities, or empowered to give such authority, has reason to believe that an inquest may be required to be held in relation to such body in pursuance of the provisions of any law for the time being in force. (2) No authority for the removal of the cadaver or any [human organ or tissue or both] from the cadaver shall be given by a person to whom such body has been entrusted solely for the purpose of interment, cremation or other disposal.

Section 7 of the THOA concerns the preservation of human tissues or organs. This section may be altered to encourage human cryopreservation as follows:

> Preservation of [human organs or tissues or both or cadaver]. — After the removal of the cadaver or of any [human organ or tissue or both] from the body of any person, the registered medical practitioner or the authorised cryonics institute shall take such steps for the preservation of the cadaver or the [human organ or tissue or both] so removed as may be prescribed.

Section 18 and 19 under Chapter VI of the THOA deals with sanctions and punishments for the unauthorised removal of human organs and commercial dealings in human organs. These provisions may be explicated to include cadavers. Other similar or related provisions may also be amended accordingly.

The study of cryonics involves an interdisciplinary array of legal, ethical and medical subjects. It requires an exhaustive and prolonged scrutiny before we conclusively render an established and well-drafted legislative act to this medical field of biotechnology. Hence, while the legislative and administrative functions would be discharged by the centre as a Central Act, state authorities would be required to merely regulate and monitor its operations. Intricate and state-specific issues and their respective state legislations like the state-specific anatomy acts' and their amendments would eventually effectuate subject to Articles 249, 250, 251, 252 and 254 of the constitution once *cryonics law* has been established in India.

CONCLUSION

The concept of cryonics will trigger legal and ethical debates concerning the right to life, right to euthanasia and the rights of patients suffering from a terminal disease or in a vegetative state. Human life extension through heart bypass surgery has gained compatibility with moral tenets and religion.[82] Similarly, ethical debates will eventually subside as the developments in cryonics continue under a more robust establishment for better and more promising techniques.

Cryonics waits a time in the future that would guarantee far more advanced technologies coupled with appreciable research and development in the medical and legal fields. It is imperative to keep oneself updated on the current affairs concerning cryonics.

However, there are several establishments and authorities that express their disdain and even loathe the practice of cryonics. They assert that cryonics is a redundant practice of engendering the patients' minds with false hopes and benefiting from it.

It must also be noted that man's desire to live longer than what the fate has decided should not be taken advantage of by the ill-willed. Therefore, one must also be extremely cautious of con-artists who spread misleading and inappropriate information to profit from it.

Nevertheless, after sufficient research and developments rendered by drawing upon different perspectives on this unsettled and overwhelming yet intriguing case of cryonics, the light finally sheds upon the members and contributors of the legal field to educate and be educated to administer, adjudge and advocate in favour of, or against this seemingly new wave of biotechnology. Be that as it may, whatever be the outcome, it would predominantly benefit the legal fraternity.

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[82] Jain et al., *supra* note 14, at 11.

ADVOCATING CONTRACT ADAPTATION IN INTERNATIONAL ARBITRATION: A NECESSITY IN THE COVID-19 ERA?

Rashika Bajpai* & Mrinal Pandey**

The unforeseen and unexpected events in the recent times, such as COVID-19, have caused great economic upheaval, delaying the performance of contracts in some circumstances, if not altogether making them impossible. The existing remedies have failed to maintain the economic equilibrium of the parties, causing premature termination or forced continuation of contracts. The article proposes contract adaptation through international arbitration as a suitable remedy in such circumstances. Though it has been around for some time, contract adaptation has been side-lined by both arbitral tribunals and national courts due to its perceived problems with the existing legal system and its inherent nature to interfere with the principle of sanctity of contract. The article points out that the remedy of contract adaptation though effective individually, becomes more accessible when integrated with arbitration. However, there exists doubts regarding the enforceability of a clause allowing for contract adaptation through arbitration and arbitrators power to rightfully adapt a contract. While dealing with these issues the article explores questions relating to synchronised competence of arbitrators and judges, conflict of contract adaptation with the "dispute" based approach of arbitration, interaction of contract adaptation with applicable arbitration laws, enforcement of the adapted contracts as arbitral awards and the standard for contract adaptation. The article also consolidates a list of prerequisites for contract adaptation that help to manage these concerns and affirm the faith of the parties and legal system in this remedy. The alternate remedy of re-negotiation of contract has also been analysed.

* B.A., LL.B. (Hons.), RMLNLU. Email: rashika.bajpai@yahoo.com.
** B.A., LL.B. (Hons.) Student, RMLNLU. Email: mrinalamanpandey@gmail.com.

INTRODUCTION

The world is currently in the midst of a pandemic. Apart from its morbid effect on human health, COVID-19 has also brought the world economy to a jarring halt as nations impose country-wise lockdowns to contain the spread of the deadly virus. This has made performance of contracts highly uncertain, if not altogether impossible. Unfortunately, this has not been a stand-alone event in the recent period. Contracts, especially trans-national contracts, have become increasingly susceptible to unforeseen and unexpected developments that have destroyed the fundamental equilibrium of these contracts. For instance, frequent internet shutdowns,[1] the increasingly protectionist behaviour of the governments,[2] climate change, and rapid technological development have remained a significant threat to the stability of contracts.[3]

When faced with unforeseen developments, the parties usually have the option to terminate the contract or continue with the contract under these altered circumstances. However, neither situation is ideal for business transactions. Premature termination of the contract invalidates the efforts of the parties. On the other hand, continuation risks the economic efficiency of the transaction as a whole whereby the effect of unforeseen and unexpected developments is borne by one party when neither party could contemplate the turn of events and its effect on the contract. Instead, continued commercial relationship and re-establishment of equilibrium between the parties is desirable in changed circumstances.[4]

The authors propose that adaptation of contract by means of arbitration would be an appropriate remedy in such circumstances. Contract adaptation, as the term suggests, is the modification of the terms of the contract by a third party, usually an arbitrator or the court, to restore its equilibrium that has been disturbed due to the happening of a contingency.[5] It would ensure that the contract stays alive while maintaining the economic equilibrium between the parties. The remedy of contract adaptation, though controversial, has been around for some time. The idea was discussed intensively

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[1] *Policy Brief: Internet Shutdowns,* INTERNET SOCIETY, (Sept. 16, 2020, 08:26 PM), https://www.internetsociety.org/policybriefs/internet-shutdowns#_edn20.

[2] *India's New Protectionism Threatens Gains from Economic Reforms*, CATO INSTITUTE, (Sept. 16, 2020, 09:06 PM), https://www.cato.org/publications/policy-analysis/indias-new-protectionism-threatens-gains-economic-reform.

[3] Heinz Strohbach, *Filling Gaps in Contracts*, 27 [2/3] A.J.C.L. 479 (1979).

[4] Elena Christine Zaccaria. *The effects of changed circumstances in International Commercial Trade* 6 INT. T. B. LAW RW. 135, 137 (2004).

[5] Abba Kolo & Thomas Walde, *Renegotiation and Contract Adaptation in International Investment Projects*, 1 J.W.I.T. 5, 43 (2000).

at various forums in the 1970s, only to be eventually dropped as it was thought to be too radical since it did not conform to the traditional dispute-oriented approach of courts or arbitrators.[6]

Though a complete remedy in itself, when combined with international arbitration, the remedy of contract adaptation becomes readily accessible. With the advent of globalisation and increase in trans-national contracts, arbitration has become the preferred mode of dispute resolution. The popularity of international arbitration lies in the fact that it provides a neutral forum, free from the influence of domestic courts to parties entering into international contracts and provides timely and efficient remedies. Contract adaptation through arbitration was heavily debated during the preparation of UNCITRAL Model Law on arbitration in the 1970s.[7] However, it was felt that the arbitration regime at the time was at an infantile stage and that it would be inappropriate to introduce contract adaptation along with arbitration. There were some other fundamental problems in integrating contract adaptation and international arbitration as well. However, these could not be reconciled.

However, at present the circumstances have changed. The arbitration regime across the world has become dynamic and versatile enough to bring contract adaptation into its fold and the present circumstances provide a fertile ground for bringing it into the mainstream. The central theme of the article revolves around two substantial issues i.e. whether contract adaptation through arbitration is an effective remedy in the present circumstances and whether the arbitrator has the power to adapt contracts. In furtherance of this, Part II of the article makes a comparative analysis of the existing remedies and argues that contract adaptation in arbitration is the need of the hour. Part III analyses renegotiation as an alternate remedy and concludes that it needs to be coupled with contract adaptation for it to be effective. Part IV of the article analyses the problems associated with contract adaptation by an arbitrator, provides a solution and argues that the problems do not out-weigh the advantages that the system has to offer. Part V of the article recommends certain conditions under which contract adaptation should take place. Part VI provides an overview of the existing laws in India and makes an argument for introducing contract adaptation by means of arbitration.

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[6] Klaus Peter Berger, *Renegotiation and Adaptation of International Investment Contracts: The Role of Contract Drafters and Arbitrators*, 36 VAND. & J. TRANSNAT'L. L. 1347, 1376 (2003); *See infra* text accompanying note 69.

[7] Klaus Peter Berger, *Power of Arbitrators to Fill Gaps and Revise Contracts to Make Sense*, 17 ARBITR. INT. 1, 4 (2001).

I. CONTRACT ADAPTATION THROUGH ARBITRATION: AN EFFICACIOUS REMEDY?

To underscore the importance of contract adaptation through arbitration, this segment first discusses the existing legal remedies and their shortcomings, and then proceeds to the necessity for contract adaptation and its increased effectiveness when coupled with arbitration.

A. COMPARATIVE ANALYSIS

Unforeseen and unexpected developments pose a significant problem in performance of contracts. Different legal regimes have come up with different solutions to the problems posed by unforeseen developments.[8] *Force majeure*[9] forms a common remedy in every jurisdiction.[10] The common law regime has developed the concept of frustration of contract.[11] Under this concept, parties are exempted from performance if there is such a change in circumstances that the underlying purpose of the original contract is frustrated and cannot be achieved.[12] The doctrine suffers from several shortages. The standard for frustration is too high, i.e. nothing short of impossibility of contract exempts the party from performance of contract. Hence, the parties have to continue with the contract which, although possible, has become economically unviable. Common law does not recognize adaptation of contract in such circumstances.[13] This rigid approach of common law has been criticised.[14]

United States of America, though a common law jurisdiction, under its doctrine of commercial impracticability[15] allows for renegotiation or an equitable adjustment of the contract where termination or strict adherence would not serve the purpose of justice.[16] However, the courts have been extremely reluctant to interfere in the bargain struck between the parties. There has been only

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[8] Ingeborg Schwenzer & Edward Munoz, *Duty to renegotiate and contract adaptation in case of hardship*, 24 UNIF. L. REV. 149, 150 (2019).

[9] *Force majeure*, French for 'superior force', is a contractual clause that contemplates events that can result in deferment of performance of contract or a discharge from contractual obligations; *Force Majeure Clause,* Black's Law Dictionary (9th ed. 2009).

[10] Schwenzer & Munoz, *supra* note 8, at 150.

[11] Zaccaria, *supra* note 4, at 139.

[12] Davis Contractors Ltd v. Fareham Urban District Council, [1956] A.C. 729; Elena Christine Zaccaria. *The effects of changed circumstances in International Commercial Trade*, 6 INT. T. B. LAW RW. 135, 140 (2004);

[13] Zaccaria, *supra* note 4, at 141.

[14] Fredderick R. Fucci, *Hardship and Changed Circumstances as Grounds for Adjustment or Non-Performance of Contracts. Practical Considerations in International Infrastructure Investment and Finance*', PACE LAW SCHOOL (Aug. 20, 2020, 10:04 AM), https://www.cisg.law.pace.edu/cisg/biblio/fucci.html.

[15] Restatement (First) of Contracts § 454 (1932); U.C.C. § 2 – 615, Comment 4.

[16] U.C.C. § 2 – 615, Comment 6.

one significant case, where the judge adapted the contract[17], however, the decision was severely criticised.[18] Hence, it can be concluded that though American jurisprudence is more flexible than English jurisprudence, the common law tradition exhibits a rigidity which is not conducive to the current circumstances.

Civil law has developed the concept of hardship, whereby it recognizes situations where due to unforeseen circumstances, the performance of contract though objectively possible, has become excessively burdensome to one of the parties.[19] In situations of hardship, the parties are allowed to either claim discharge, renegotiate the terms of the contract or adapt the existing contract.[20] The courts, however, have shown severe reluctance to intervene and adapt the contract for the parties.[21]

i. Necessity of Contract Adaptation through Arbitration

It needs to be understood that the contracts in the present commercial world have become increasingly complex and prolonged.[22] Rather than entering into a one-off transaction,[23] parties enter into a relationship with the aim of sharing mutual benefits from the project.[24] These contracts need to be seen through to the end for the parties to maximise their benefits and herein lies the relevance of contract adaptation as a remedy. It keeps the contract alive.[25] The parties can simply amend the terms of the contract to reflect the new economic realities and move ahead with the contract. Further, it also ensures that the consequences of unforeseen events on the contract is not borne by a single party. It would be against the principle of fairness as well as economic efficiency if one party is made to bear the consequences of an event that was not contemplated by either of the parties.[26]

As mentioned above, contract adaptation involves determination by a third party. This third party could either be an arbitrator or the courts.[27] Contract adaptation should be done by arbitrators as it holds certain advantages over adaptation by courts. Arbitration is the preferred method of dispute

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[17] Aluminium Company of America (ALCOA) v. Essex Group Inc, 499 F. Supp. 53 (1980).
[18] Zaccaria, *supra* note 4, at 145.
[19] Fucci, *supra* note 14.
[20] Schwenzer & Munoz, *supra* note 8, at 154.
[21] Zaccaria, *supra* note 18.
[22] K M Sharma, *From Sanctity to Fairness: An Uneasy Transition in the Law of Contracts*, 18 NYL Sch. J. Int'l & Comp. L. 95, 122 (1999).
[23] *Id.* at 121.
[24] *Id.* at 123.
[25] Zaccaria, *supra* note 4, at 138.
[26] Sharma, *supra* note 22, at 146.
[27] Kolo & Walde, *supra* note 5, at 43; Schwenzer & Munoz, *supra* note 8, at 151.

resolution in trans-national contracts and is therefore, a better forum for contract adaptation. Arbitration provides a neutral forum for dispute resolution[28] and levels the playing field between both the parties by avoiding the national courts of the other party. This becomes particularly relevant in Public Private Partnership (PPP) contracts where the courts are almost certain to take into consideration national interest.[29] In addition to this, due to the delocalised nature of arbitration, the parties can determine the laws that govern arbitration and can therefore evade national laws of countries that bar contract adaptation.[30] Apart from the national laws, the parties may also choose '*lex mercatoria*', 'customs and usage of international trade', and 'general principles of law'.[31] In segment IV, it will be argued that an arbitrator's power is wider than that of a judge.[32]

Adaptation by a court creates certain public policy concerns especially in jurisdictions where a lot emphasis is placed on the sanctity of contracts, such as England or the United States.[33] These public policy concerns are mitigated when adaptation is done in arbitration. This is also related to the fact that arbitrators, unlike national courts, are not bound by the national laws of the country.[34] Additionally, as a creature of consent of the parties, arbitrators can also decide on the basis of equity if expressly authorised by the parties, which makes adaptation of contract effortless.[35] There are some practical considerations as well for allowing the arbitrator to adapt a contract. An important consideration while appointing arbitrators is the arbitrator's expertise on the subject matter of the contract. The arbitrator, equipped with the appropriate knowledge of the field and its technicalities, is better suited to understand the peculiar situation of the parties and adapt the contract expediently.[36] In addition to this, it should also be noted that courts are already overburdened with cases.

Although contract adaptation by arbitration is an effective remedy, there are certain problems that arise when arbitration is involved. As mentioned before, the remedy of contract adaptation by means of an arbitrator has been around for some time. A number of international instruments, such as the 2016 UNIDROIT Principles on International Commercial Contract and the 1999 Principles on

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[28] NIGEL BLACKABY ET. AL., REDFERN AND HUNTER ON INTERNATIONAL COMMERCIAL ARBITRATION STUDENT VERSION 4 (6th ed. 2015).
[29] William W Park, *Gaps and Changed Circumstances in Energy Contracts: The devil in the detail*, 8 J.W.E.L.B. 89, 98 (2015).
[30] Pippa Read, *Delocalization of International Commercial Arbitration: Its Relevance in the New Millennium*, 10 AM. REV. INTL. ARB. 177, 179 (1999).
[31] Sharma, *supra* note 22, at 128.
[32] *See infra* text accompanying note 63.
[33] Zaccaria, *supra* note 4, at 139, 141, 144; Berger, *supra* note 7, at 4.
[34] Sharma, *supra* note 22, at 127.
[35] *Id.*
[36] Jean Baker, *Arbitrators Provide Technical Expertise, Confidentiality,* IN HOUSE OPS (Sept. 16, 2020, 11:00 AM) https://www.inhouseops.com/2020/02/arbitrators-provide-technical-expertise-confidentiality/.

European Contract Law have incorporated it into their provisions.[37] The International Chamber of Commerce (ICC) even circulated its rules for adaptation of contract in 1978.[38] However, they had to withdraw it after twenty years as the rules were not used.[39] A major reason as to why the remedy has fallen into disuse is due to the belief that such clauses would be unenforceable, or that the tribunal's decision rendered pursuant to such clauses would be prone to being set aside.[40] These problems have been discussed in the subsequent sections.

It may be argued that renegotiation of contract by the parties achieves the same results as contract adaptation without the involvement of a third party. It is argued that though renegotiation has its advantages, it must be accompanied with contract adaptation for the remedy to be effective.

II. RE-NEGOTIATION OF CONTRACT

The first step to restore equilibrium is re-negotiation of the contract to align it with changed circumstances. Generally, long term contracts such as concession agreements and PPP contracts contain a re-negotiation clause which might be optional or mandatory.[41] Under this clause, the parties through mutual understanding can alter the terms of the contract in a situation of fundamental and unforeseeable change that affects contractual performance. The re-negotiated terms will have the force of the contract.

A. ACTIVATION OF RE-NEGOTIATION CLAUSE

A widely discussed issue is the determination of the trigger event for invoking the renegotiation clause and if the conditions for re-negotiations have been met, in case of a failure of the parties to clarify the same. In several instances, parties provide for open-ended re-negotiation clauses stating that re-negotiations should take place if "unfairness to either parties is anticipated"[42] or where "profound change in circumstance"[43] has occurred. These open-ended clauses can be subjected to varied interpretations and can lead to a conflict between the parties where the parties do not agree on the existence of the conditions for re-negotiation.[44] This conflict gives rise to legal disputes on the rights

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[37] Schwenzer & Munoz, *supra* note 8, at 151.
[38] International Chamber of Commerce, *Adaptation of Contract*, ICC Publication No. 326, 1978.
[39] John Y Gotanda, *Renegotiation and Adaptation Clauses in International Investment Contracts, Revisited*, 36 VAND. J. TRANSNAT'L. L. 1461, 1464 (2003).
[40] *Id*.
[41] Kolo & Walde, *supra* note 5.
[42] PETER WOLFGANG, ARBITRATION AND RENEGOTIATION OF INTERNATIONAL INVESTMENT AGREEMENTS 242 (2nd ed. 1995).
[43] *Id.*
[44] Berger, *supra* note 6, at 1371.

and obligations of the parties under the contract that can be resolved by a court or an arbitrator.[45] If the court or arbitrator decides that the conditions for re-negotiation of contract have been met, the parties will have to initiate negotiation. If not, the contract will continue as it is. It is recommended that the parties make the trigger event as clear as possible.

In the case of *Associated British Ports v. Tata Steel UK Ltd*.[46] (*hereinafter*, "*ABP case*"), it was argued that the re-negotiation clause was void due to uncertainty as the trigger event was ambiguous. The court differentiated between an 'agreement to agree' which results into an uncertain agreement not capable of creating binding obligations and a clause, in a binding contract partially performed by the parties, which is merely broad and difficult to have defined limits in advance.[47] The latter is binding and can be enforced by an arbitrator after a reasonable enquiry into the same. On this line, the court held that the clause was not uncertain and that the arbitrator could decide if the conditions for re-negotiation were met by a reasonable enquiry into the intent of the parties and the facts and circumstances that affected the contract.[48]

An arbitrator may analyse the trigger event to ensure that a fundamental change has taken place which could not be foreseen or avoided by the parties.[49] This analysis may be done by taking into account the legal principles of hardship, *force majeure*, frustration or impracticability.[50] The arbitrator is also required to analyse if the equilibrium can be restored in changed circumstances by re-negotiation of the contract.[51]

B. DUTY TO NEGOTIATE OR DUTY TO AGREE?

Once the negotiation clause is activated the parties are obliged to renegotiate the terms of the contract. If they do not, it will be a breach of contract.[52] The parties are under a duty to negotiate in good faith[53] by actively taking part in the process in order to reach an agreement.[54] Duty to re-negotiate only entails a duty to make the best efforts to reach an agreement under the contract and does not include

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[45] Piero Bernardini, *The Renegotiation of the Investment Contract*, 13 I.C.S.I.D. F.I.L.J. 411, 420 (1998).
[46] Associated British Ports v. Tata Steel UK Ltd [2017] E.W.H.C. 694 (Ch).
[47] *Id.*
[48] *See Tata* Steel, [2017] E.W.H.C 694 (Ch).
[49] WOLFGANG, *supra* note 42, at 244.
[50] *Id.*
[51] WOLFGANG, *supra* note 42, at 246.
[52] *Id.* at 247; C.M. Schmitthoff, *Hardship and Intervener Clauses*, JOURNAL OF BUSINESS LAWS 82, 87 (MAR. 1980).
[53] WOLFGANG, *supra* note 42, at 247.
[54] Aminoil case 21 ILM (1982) 1004 s 25; ICC award No. 2540 (1976) 104 JDI (1977); ICC award No. 2508 (1976) 104 JDI (1977) 943.

a duty to reach an agreement.[55] If the parties reach a settlement, the re-negotiated terms will be binding on the parties.

C. UNSUCCESSFUL RE-NEGOTIATION

In the event that the parties do not reach an agreement, the original terms of the contracts will be performed or the contract may be terminated. This brings us to the same problem that re-negotiation aimed to solve, rendering the re-negotiation clause useless.

In these circumstances, the re-negotiation clause should be clubbed with a contract adaptation clause, as was the case in the contract between Associated British Ports and Tata Steel in the *ABP case*[56] and some others contracts[57], where an arbitrator is permitted to adapt a contract in case the parties fail to reach a negotiated solution. In the *ABP case*, it was argued that the contract adaptation clause was void for uncertainty as it was in the nature of an 'agreement to agree'[58] since there were no standards on the basis of which the contract could be adapted. This argument was rejected by the court and it was stated that the clause is not uncertain as the arbitrator can be guided by the contract and its setting and is not required to adapt the contract in a vacuum. Such contract adaptation clauses can be strengthened by the parties by providing for concrete standards on the basis of which the arbitrator would adapt the contract. There is a high probability for a re-negotiation or 'mutual agreement' clause to be declared an 'agreement to agree' if the parties abstained from providing an alternative to unsuccessful re-negotiation.[59] Parties' authorisation of adapting a contract in the event of failed re-negotiation can prevent the re-negotiation clause from being declared void on the grounds of it being an 'agreement to agree'.

The decision in *ABP Case* shows the progressive approach of the courts in upholding broad renegotiation and adaptation clauses binding, especially when a substantial portion of the contract has been performed by the parties. Even though the approach has been endorsed by the courts in some instances[60], contract adaptation is still not well accepted in the legal systems due to certain perceived problems in the mechanism. The next segment discusses these issues and the plausible solutions, concluding that contract adaptation by arbitrators is the way forward in the modern economy.

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[55] Berger, *supra* note 44.
[56] Associated British Ports v. Tata Steel UK Ltd., [2017] EWHC 694 (Ch).
[57] Bernardini, *supra* note 45, at 416.
[58] USLegal (Dec. 22, 2020, 12:43 AM), https://definitions.uslegal.com/a/agreement-to-agree/#:~:text=An%20agreement%20to%20agree%20is,be%20bound%20until%20the%20final
[59] Teekay Tankers v. STX Offshore, [2017] EWHC 253 (Comm).
[60] *Id.*

III. ISSUES IN CONTRACT ADAPTATION THROUGH ARBITRATION

A. SYNCHRONISED COMPETENCE

The arbitrators, except having powers to decide matters *in rem*, have the same decision-making powers as the courts at the seat of arbitration. This is known as the principle of "synchronised competence"[61] where the arbitrator can rule on all issues as the judge of a court. Although the principle tries to promote arbitration by aligning the powers of a State Court judge and an arbitrator, it curtails the power of an arbitrator to adapt contracts. The power of a judge to adapt contracts is uncertain and judges themselves are reluctant to use this tool.[62] Under several jurisdictions, contract adaptation by the judiciary is prohibited.[63] It is said that judges can only interpret contracts but cannot make them for the parties (*iudex non substituit*).[64] According to this view, powers of gap-filling and contract adaptation are prohibited unless they are a means to interpret the parties' intent.[65] Pro-arbitration authors have argued that synchronised competence cannot limit an arbitrator's power to adapt contracts. In fact, an arbitrator's power can be wider in scope than a judge's power.[66] The central reason is that the arbitrator's power is determined by the will of the parties. While there might be certain policy considerations in allowing judges to create new contractual obligations, they do not stand in the way of the arbitrator's power to adapt contracts as arbitrators administer the will of the parties.[67] The parties can expressly authorise the arbitrator to adapt their contract provided the applicable law approves of such adaptation.[68] The parties may also permit the arbitrator to act as *amiable compositeur* or decide *ex aequo et bono,* as long as it does not conflict with the applicable law.

While acting as an *amiable compositeur*, an arbitrator is allowed to alter non-mandatory legal rules.[69] Deciding *ex aequo et bono*, implies that the arbitrator can bypass all mandatory and non-mandatory

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[61] Charles H. Brower II, *Mind the Gap*, 2016 B.Y.U. L. REV. 1, 18 (2016).
[62] Churchill Falls (Labrador) Corporation Limited v Hydro-Québec, 2018 S.C.C. 461.
[63] Zaccaria, *supra* note 4, at 138-139.
[64] Lisa Barbara Beisteiner, *Adjusting Contracts in Arbitration,* SCHONHERR ROADMAP14 (Aug. 25, 2020, 12:05 PM), http://roadmap2014.schoenherr.eu/adjusting-contracts-arbitration.
[65] R Doak Bishop, *A Practical Guide for Drafting International Arbitration Clauses*, 1 INT'L ENERGY L. & TAX'N REV. 16 (2000).
[66] Lisa Barbara Beisteiner, *Adjusting Contracts in Arbitration,* SCHONHERR ROADMAP14 (Aug. 25, 2020, 12:05 PM), http://roadmap2014.schoenherr.eu/adjusting-contracts-arbitration.
[67] *Note by the Secretariat: Model Law on International Commercial Arbitration: Possible further features and Draft Articles of a model law*, A/CN.9WG/II/WP.41(Jan. 12, 1983).
[68] *See infra* text accompanying note 89.
[69] Jana Herboczkova, *Amiable Composition in the International Commercial Arbitration*, FACULTY OF LAW OF UNIVERSITY OF MASARYK (Aug. 20, 2020, 2:00 PM), https://www.law.muni.cz/sborniky/cofola2008/files/pdf/mps/herboczkova_jana.pdf.

legal rules and decide on the basis of equity, provided the arbitrator abides by international public policy.[70] State court judges, however, cannot decide on the basis of equity and have to abide by the black letter law.

It has to be noted that even if arbitrators, unlike the State Courts, have been allowed by the parties to decide *ex aequo et bono*, they cannot alter or evade the contractual terms of the parties and have to decide according to them under normal circumstances. However, an exception to this rule can be provided under certain conditions.[71] In these conditions, the arbitrator while deciding *ex aequo et bono* or acting as *amiable compositeur* can adapt the contract to changed circumstances.[72]

B. Is Contract Adaptation Arbitrable?

Arbitration is traditionally understood to be "dispute oriented"[73] and is reserved to resolve "disputes", disagreements and the like.[74] According to both UNCITRAL[75] and ICSID[76], only legal disputes, where there is a conflict of a right and not just a mere conflict of interest, are arbitrable. An arbitrator applies substantive legal rules to give a 'yes or no' decision[77] on a claim arising from non-performance or breach of contractual obligation or legal duties. This procedural character of arbitration is a feature of a judicial act. Conversely, in cases of contract adaptation or supplementation, no breach of legal duty or non-performance is alleged. In events like these, "creative competence"[78] of an arbitrator is required as no legal rule or guideline indicates the scope and extent of contract adaptation. This creativity is a part of the contractual character of arbitration. The procedural and creative character of arbitration clashes during contract adaptation.[79] Accordingly, under the traditional approach, contract adaptation is not arbitration as it requires an arbitrator to remedy a conflict of interest rather than a conflict of legal right. An arbitrator acting in a judicial capacity cannot adapt or rectify a contract. This means that a contract adapted by an arbitrator cannot be recognised or enforced as an arbitral award.[80]

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[70] Sharma, *supra* note 22, at 127; Christian Bühring-Uhle, Arbitration and Mediation in International Business 40 (2nd ed. 2006).
[71] *See infra* text accompanying note 86.
[72] Herboczkova, *supra* note 69.
[73] Berger, *supra* note 6, at 1374.
[74] Strohbach, *supra* note 3, at 481.
[75] *Model Law on International Commercial Arbitration 1985* U.N. Doc A/40/17, Annex I Art 7(1).
[76] Bernardini, *supra* note 45, at 423.
[77] Berger, *supra* note 7, at 2.
[78] *Id.* at 8.
[79] Berger, *supra* note 77.
[80] Wolfgang, *supra* note 42, at 253.

To counter this problem, some authors have created a strict distinction between judicial arbitration and economic arbitration or contractual arbitration.[81] Judicial arbitration is said to be a substitute to State sponsored justice where a decision is made on the claimed pre-existing and violated rights.[82] Economic arbitration is a substitute for missing contractual terms and regulates contractual relations in the future. Here, the arbitration agreement is an integral part of the contract and is not severable from the main contract, unlike an arbitration agreement in judicial arbitration. This implies that under economic arbitration a contract adaptation clause in the arbitration agreement cannot be used to adapt a void contract as the arbitration agreement, being a fundamental part of the contract, would itself be void. The award in economic arbitration is a substitute for contractual terms and thus, needs to be enforced like the terms of the contract and not like a judicial arbitration award. The law of the arbitration agreement and also of the arbitral award in economic arbitration is the proper law of the contract.[83]

This distinction, however, is artificial , unsubstantiated and does not resolve the problems in contract adaptation.[84] Several authors have urged that arbitration or the term legal dispute should not be interpreted strictly in the context of the needs of international trade and modern contracts.[85] A legal dispute can be both, a conflict of legal rights or a conflict of interests between the parties.[86] A union in the dispute resolution and regulatory character of arbitration is required as both use the same techniques and rules to reach the same result.[87] Hence, there is a shift from the traditional dispute oriented approach of arbitration by reconciling the formal character and creative character of an arbitrator's power, making contract adaptation arbitrable.

Usual arbitration clauses contain phrases like, "all disputes arising out of or in connection with this contract will be subject to arbitration." Such arbitration agreements can be made even broader by replacing the terms "this contract" with "this contract and any adaptation of this contract" to allow

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[81] Zhivko Stalev, *Arbitration to adapt long-term international economic contracts to changed circumstances*, *in* 1 NEW TRENDS IN THE DEVELOPMENT OF INTERNATIONAL COMMERCIAL ARBITRATION AND THE ROLE OF ARBITRAL AND OTHER INSTITUTIONS, ICCA CONGRESS SERIES 198, 203 (ICCA & Kluwer Law International, 1983).

[82] *Id.*

[83] *Id.*

[84] RENE DAVID, ARBITRATION IN INTERNATIONAL TRADE 409 (Kluwer Law and Taxation Publishers 1985); EMMANUEL GAILLARD AND ORS., FOUCHARD, GAILLARD, GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION 28 (Kluwer Law International 1999); *See infra* text accompanying the title "Issues with Enforcement".

[85] Gaillard, *supra* note 84.

[86] WOLFGANG, *supra* note 42, at 322.

[87] DAVID, *supra* note 84.

disputes arising from the adapted contract to also come under the ambit of the arbitration agreement.[88] In addition to such arbitration clauses, it is essential for the parties to expressly authorise contract adaptation in their contract.[89] By stating that the adapted contract will be an expression of their intention, the contract so adapted would be binding on the parties and can thus be enforced under the New York Convention (*hereinafter* 'NYC').[90] Parties' conferral of the power of adaptation on the arbitrator will be considered proper as long as it is under the ambit of the applicable laws.[91] This power of arbitrator is limited to filling supervening gaps through adaptation.[92] Supervening gaps are unforeseeable and occur after the contract is concluded.[93]

Practically, the arbitrators give effect to the contract adaptation clause by deeming there to be a dispute and interpreting the adaptation clause in light of the contract accordingly. Thus, an arbitrator would only be performing the judicial function of interpretation to render an enforceable award.[94]

C. INTERACTION OF CONTRACT ADAPTATION WITH APPLICABLE LAWS

An international arbitration is governed by a complex system of tightly interwoven laws operating together. These are the laws of the seat of arbitration, proper law of contract, law of the arbitration agreement, law of the place of enforcement and other rules.[95] Under some national laws, permitting an arbitrator to adapt a contract might put the validity of the arbitrator's decision at great risk.[96] It is likely that contract adaptation is permitted under the law of the seat, but not under the proper law of the contract of arbitration or *vice versa*. Hence, a holistic assessment of the interaction of contract adaptation with these laws is pertinent.[97] A combined authorisation by all these laws is essential for supplementation of contract. In the event that any one of these laws is silent on contract adaptation or

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[88] ICC (Partial) Award No. 7544 (1996), 11 ICC INT'L ARB. BULL. 56, 60 (2000), (cited in 4 J. DROIT INT'L. (CLUNET) 1062, 1063 (1999)).
[89] *See infra* text accompanying note 149.
[90] Bernardini, *supra* note 45, at 425.
[91] Gaillard, *supra* note 84, at 55.
[92] *See infra* part V of foreseeability; Berger, *supra* note 7, at 3.
[93] WOLFGANG, *supra* note 42, at 256.
[94] WOLFGANG, *supra* note 42, at 257; C.M. Schmitthoff, *Hardship and Intervener Clauses* JOURNAL OF BUSINESS LAWS, MAR. 1980, at 82, 90-91 (1980).
[95] BLACKABY N ET AL., REDFERN AND HUNTER ON INTERNATIONAL COMMERCIAL ARBITRATION STUDENT VERSION 157 (6th ed. Oxford University Press 2015).
[96] WOLFGANG *supra* note 42, at 234.
[97] Berger, *supra* note 7, at 8.

does not provide a basis for the same, a contract adapted by the arbitrator would be at peril and it is advisable to not to adapt contracts in such situations.[98]

The law of the arbitration agreement provides the basic framework for authorisation to the arbitrator to adapt a contract. As indicated previously, express permission by the parties is enough to allow the arbitrator to rewrite the contract.[99] An arbitrator without such express authorisation might be reluctant to adapt a contract ignoring the rule of *pacta sunt servanda*.[100]

The *lex arbitri* or the law of the seat of arbitration gives procedural authority to the arbitrator to supplement a contract. Enforceability of the adapted contract or the award to adapt contract under the NYC depends upon the *lex arbitri*.[101] If arbitration law of the seat is silent on the issue of contract adaptation, guidance can be taken from the domestic procedural law of the jurisdiction which serves as the seat of arbitration and in case the procedural law is also silent, the substantive law of the jurisdiction can be relied upon.[102]

The proper law of contract deals with both the substantive requirements that need to be fulfilled for a contract to be adapted as well as the manner of adaptation in case the substantive requirements are met.[103] It also determines the validity of the adaptation clause and the adapted contract. The modified terms should not exceed the scope of the proper law of the contract.[104]

While German and Italian laws allow for contract adaptation upon certain conditions being met, British jurisprudence does not allow for the same. Therefore, the parties need to be wary while choosing the law that governs their arbitration agreement.

Countries can legitimize contract adaptation, firstly, by incorporating specific provisions for contract adaptation in their laws. This can also be done by allowing incorporation of hardship, indexation, re-negotiation or price revision clauses in contracts. Secondly, laws can be suitably amended to empower

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[98] JEFFREY MAURICE WAINCYMER, PROCEDURE AND EVIDENCE IN INTERNATIONAL ARBITRATION 1055-1056 (Kluwer Law International 2012).
[99] *See supra* text accompanying note 89.
[100] Berger, *supra* note 7, at 9.
[101] ALBERT VAN DEN BERG, THE NEW YORK ARBITRATION CONVENTION OF 1958 46 (Kluwer Law International 1981).
[102] P Sanders, *Arbitration* in MAURO CAPPELLETI (eds), INTERNATIONAL ENCYCLOPAEDIA OF COMPARATIVE LAW (Martinus Nijhoff Publishers, Leiden 1987); Klaus Peter Berger, *Power of Arbitrators to Fill Gaps and Revise Contracts to Make Sense*, 17 ARBITR. INT. 1, 10 (2001).
[103] Berger, *supra* note 7, at 11.
[104] *Id.*

arbitrators, if the parties are willing, to give a decision on the basis of equity by acting as *amiable compositeur* or deciding *ex aequo et bono.*[105]

It should be kept in mind that arbitration is a creature of the contract and only decides rights *in personam.* In contract adaptation, the parties agree to delegate the power to adapt the contract to an arbitrator.[106] The courts should be conscious of this fact while dealing with such clauses.

The black letter laws of most countries neither permit nor prohibit contract adaptation. This silence of the law should not be treated as an impediment to contract modification. In fact, the authors believe that there is no requirement to bring an amendment to this effect, unless specifically prohibited by the law of the country. It is a simple matter of giving effect to the contractual clause agreed to by the parties[107] which can be incorporated through a conscious change in the general practice of the legal system or by way of a judgment, as has happened in the United Kingdom. Common law courts have been reluctant to adapt contracts. They have restricted their roles to interpreting and giving effect to them.[108] However, in the aforementioned *ABP case*,[109] the courts gave effect to a clause that allowed for adaptation of contract by an arbitrator if the parties were not able to reach an agreement during the process of renegotiation initiated by a major financial change. The court held that the clause was sufficiently determined and not void for uncertainty and thus the arbitrator could adapt the contract.

D. ISSUES WITH ENFORCEMENT

The most important consideration for an arbitrator is to give an enforceable award. While the *lex arbitri* decides if the award is an enforceable award or not, the law at the place of enforcement decides whether it will be enforced in that country. Under the NYC, an award will not be enforced if it is contrary to the public policy of the place of enforcement.[110] Authors of contract adaptation are divided between two approaches to enforce the adapted contract.

The first approach is to treat the adapted contract as an integral part of the contract itself and enforce it in the same manner as the terms of the contract.[111] However, the question of enforcement will only arise when there is a breach or non-performance of the new terms of the contract. This approach is

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[105] Norbert Horn, *Procedures of Contract Adaptation and Renegotiation in International Commerce, in* ADAPTATION AND RENEGOTIATION OF CONTRACTS IN INTERNATIONAL TRADE AND FINANCE 173, 178 (1985).
[106] WAINCYMER, *supra* note 98.
[107] Berger, *supra* note 7, at 8.
[108] Kolo & Walde, *supra* note 5, at 8.
[109] Associated British Ports v. Tata Steel UK Ltd., [2017] E.W.H.C. 694 (Ch).
[110] Convention on Recognition of Foreign Arbitral Awards art.5, June 10, 1958, 330 U.N.T.S. 38.
[111] Stalev, *supra* note 81.

mainly suggested by proponents of economic arbitration. The notion is that if contract adaptation is not arbitrable, the adapted contract will not be enforceable under NYC.[112]

The second approach treats the adapted contract like an award given by the arbitrator.[113] This is a more liberal approach which defines arbitration broadly and does not limit it to judicial arbitration.[114] If the re-negotiation between the parties does not reach a conclusion and the parties have allowed the arbitrator to adapt the contract in such situations, the adapted terms by the arbitrator in this situation cannot be questioned and should be dealt with as any other final award.[115] The State Courts of the seat and also of the place of enforcement will be able to set aside or not enforce such award if it does not follow due process.[116] This supervision can be helpful to evade the issue of abuse of power by an arbitrator while adapting a contract. It has to be noted that this power of the state courts does not entail an analysis on the merits of the award.[117]

The second approach provides a more feasible solution to the issue of enforcement of adapted contracts. There are two reasons for this. Firstly, it is in consonance with the emerging broad definition of arbitration and the current need of international trade.[118] Secondly, the first approach suffers from certain deficiencies. Here, the question of enforcement will only arise when there is a breach or non-performance of the new terms of the contract as it is said that the adapted contract creates new obligations for the parties. In practice, a dispute on the new terms of the contract is inevitable as contract adaptation usually is a consequence of parties' failure to renegotiate. The dispute will become more complex as it would involve both the question of breach/non-performance as well as enforcement of the adapted contract. On the other hand, in the second approach the adapted contract is treated as an award where the party can directly approach the court for enforcement of the award. This also gives the other party an opportunity to resist enforcement of the award by providing its reasons directly to the court and the dispute will not become unnecessarily complex.

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[112] Convention on Recognition of Foreign Arbitral Awards art.5, June 10, 1958, 330 U.N.T.S. 38.
[113] *Note by the Secretariat: Model Law on International Commercial Arbitration: Possible further features and Draft Articles of a model law* A/CN.9WG/II/WP.41, ¶ 9.
[114] *See supra* text accompanying note 88.
[115] T. Szurski, *Arbitration Agreement and Competence of the Arbitral Tribunal, in* UNCITRAL'S PROJECT FOR A MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION (P. Sanders ed. Deventer, 1984).
[116] Convention on Recognition of Foreign Arbitral Awards art.5, June 10, 1958, 330 U.N.T.S. 38.
[117] Convention on Recognition of Foreign Arbitral Awards art.5, June 10, 1958, 330 U.N.T.S. 38; South East Asia Marine Engineering and Constructions Ltd. (SEAMEC LTD) v. Oil India Limited, Civil Appeal No. 673 of 2012.
[118] *See supra* text accompanying note 88.

E. OTHER ISSUES WITH CONTRACT ADAPTATION BY ARBITRATORS

Professor Schwenzer and Professor Munoz have pointed out certain flaws in contract adaptation. They state that the existing remedies of exemption from damages and avoidance of contract is preferable in all situations.[119] These flaws have been discussed below and possible solutions to these have been suggested. It is reiterated that contract adaptation upholds the principle of *pacta sunt servanda* and is more suitable than traditional remedies in cases involving long term contracts where the investment made by parties in terms of efforts, duration and costs make avoidance of contract an unattractive option.[120] Contract adaptation makes implementing the contract easier and is beneficial for both the parties in the longer run.

Lengthy nature of the Proceedings- Professor Schwenzer and Professor Munoz have pointed out that proceedings related to contract adaptation are lengthy in nature, the decision often coming in too late.[121] This is in conflict with interest of businesses who look for prompt solutions to their problems.[122] However, it must be noted that time taken in adaptation is substantially reduced if an arbitrator adapts a contract instead of a court.[123] This is because of the nature of arbitration as a mode of speedy dispute resolution as well as the fact that the arbitrator appointed in such cases would be a person equipped with the knowledge of the subject matter of the contract, who would take less time to understand the technicalities of the disputes and deliver a solution. Keeping in mind the long-term nature of the contract, a weighing and balancing would show that it is more advantageous to have a dispute resolved by a contract adaptation in a couple of years rather than to have a long-term contract be terminated.

Uncertainty in contract adaptation- Uncertainty is the most prominent flaw that has been discussed by various authors.[124] It has been stated that the extent or standard of contract adaptation is unknown. However, this flaw is not pertinent enough to undermine contract adaptation itself. It has to be understood that contract adaptation is an instrument of corrective justice.[125] The arbitrator or the parties cannot use it to reallocate the risks and benefits flowing from a contract. The parties can also provide concrete standards to adapt contracts.[126] As has been pointed out in the ABP *case*, the arbitrator

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[119] Schwenzer & Munoz, *supra* note 8, at 170.
[120] Sharma, *supra* note 22, at 133.
[121] Schwenzer & Munoz, *supra* note 8, at 168.
[122] Schwenzer & Munoz, *supra* note 8, at 162.
[123] Schwenzer & Munoz, *supra* note 8, at 168.
[124] Berger, *supra* note 7, at 3; WOLFGANG, *supra* note 42, at 200.
[125] Churchill Falls (Labrador) Corporation Limited v. Hydro-Québec, 2018 S.C.C. 461.
[126] Berger, *supra* note 7, at 13.

herself, on the grounds of reasonableness, will decide the extent of adaptation after an analysis of the parties' situation.[127]

Abuse of power- The unpredictable and uncertain nature of contract adaptation brings with it the associated risk of arbitrators exceeding their power. Issue of abuse of power needs to be addressed as a matter of priority for cementing the confidence of businesses as well as legal systems in contract adaptation by arbitrators as a method of dispute resolution. To avoid such abuse, parties can lay down strict criteria to be followed by the arbitrator. These criteria can deal with both the minimum threshold that must be reached for adaptation to take place as well as the extent to which an arbitrator can adapt a contract. It needs to be emphasised that contract adaptation can only be corrective and should restore the status that existed before the changed circumstances and in order to do that the arbitrator needs to adapt the contract with reasonability.

As previously mentioned,[128] the abuse of power by an arbitrator can be evaded by the supervisions of state courts. Additionally, to avoid such abuse, the authors have culled out a list of conditions that need to be fulfilled for a contract to be adapted.

IV. PREREQUISITES FOR CONTRACT ADAPTATION BY ARBITRATORS

In order to overcome the flaws of contract adaptation, there is a need to use the mechanism with caution only in situations where the benefit will be greater than the damage. The authors have culled out certain conditions which need to be fulfilled in order to proceed with contract adaptation.

A. LONG TERM CONTRACTS

Contract adaptation becomes necessary in long-term contracts. The parties while negotiating the terms of the contract are unable to foresee and therefore, exhaustively deal with all the contingencies that might arise during the long period of the contract.[129] Parties make several assumptions on uncertainties such as the cost and the situation at the time of contract performance. Even the issues that can be predicted are not, as a rule, dealt with in detail as contract negotiations take considerable time and cost.[130] Thus a long-term contract is always incomplete and needs to be re-evaluated in future. Consequently, most long-term contracts have a re-negotiation clause. Although, after a dispute arises and the initial bargaining power of the parties change, it becomes difficult for the parties to reach a

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[127] Associated British Ports v. Tata Steel UK Ltd., [2017] E.W.H.C. 694 (Ch).
[128] *See supra* text accompanying note 117.
[129] Kolo & Walde, *supra* note 5, at 17.
[130] *Id*. at 21.

conclusion on re-negotiations. Contract adaptation by an arbitrator is an inevitable solution to this problem.

The parties generally, are unwilling to terminate a contract due to an unforeseeable event. This is because the parties invest in the contract in large amounts only to benefit from it once the contract is completed.[131] In case of termination the parties are unable to recover such costs. Hence, contract adaptation is more beneficial to the parties.

It is clear that long term concession contracts are not accurately defined and cannot be swiftly concluded, unlike most other agreements for sale of goods.[132] Long term contracts can barely survive their duration of existence without modification.[133] Gap-filling is vital for long term commercial dealings.[134]

Even in the *ABP case*, the long-term nature of the contract was highlighted and adaptation was deemed to be an appropriate remedy given the parties had considerably performed the contract and had put substantial investment into the project.[135] Therefore, one of the presence of contract adaptation should be a long-term contract.

B. EXPRESS AUTHORISATION BY PARTIES TO ADAPT CONTRACT

Parties have a vested interest in the contract. A third party cannot intervene in the contract and re-write the rights and obligations of the parties. Any supplementation will be invalid if done without the authorisation of the parties.[136] Therefore, it is necessary for them to expressly state their intent to get their contract adapted by an arbitrator.[137] In such instances, the principle of *pacta sunt servanda* is not contrary to adaptation but supports it. [138] However, if the parties do not give an express authorisation, the status of adaptation would depend on applicable laws which are also chosen by the parties.[139] It has to be noted that no express authorisation is required by the arbitrator to decide if the

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[131] *Id*. at 11.
[132] Berger, *supra* note 6, at 1378.
[133] Kolo & Walde, *supra* note 5, at 16; R. Dunbar, *International Renegotiations: Tltc Case of Dominican Republic and Falconbridge*, NATURAL RESOURCES FORUM 258, 263 (1991).
[134] Berger, *supra* note 7, at 1; WAINCYMER, *supra* note 98, at 1055-1057.
[135] Associated British Ports v. Tata Steel UK Ltd., [2017] EWHC 694 (Ch).
[136] Kuwait v. The American Independent Oil Company *(AMINOIL)* ILM 1982, 976, 1015.
[137] *Note by the Secretariat: Model Law on International Commercial Arbitration: Possible further features and Draft Articles of a model law* A/CN.9WG/II/WP.41.
[138] RALPH LAKE ET AL., BREACH AND ADAPTATION OF INTERNATIONAL CONTRACTS 202 (Butterworth Legal Publishers 1992) 202.
[139] WAINCYMER, *supra* note 98, at 1057-1058.

threshold for adaptation or re-negotiation is reached as this will be already covered in the arbitration agreement.

As outlined above,[140] the parties need to modify the arbitration agreement and bring both contract adaptation as well as disputes arising out of the adapted contract under the ambit of arbitration. The parties can draft a tailor-made provision according to their needs. Along with providing certain standards for contract adaptation[141], the parties may also specify if the contract performance should be suspended during the period adaptation is pending[142] and if the arbitrator is authorised to act *ex aequo et bono*.[143] The parties can also specify if the adapted contract will have prospective or retrospective application.[144]

C. AUTHORISATION FROM APPLICABLE LAWS

As pointed out earlier[145] contract adaptation depends on the laws applicable to arbitration. Parties should meticulously choose laws that allow contract adaptation resulting in a binding re-written contract. All the applicable laws should simultaneously allow this practice. In situations where the laws do not allow the adaptation, the arbitrator may be reluctant to adapt the contract even if the parties have expressly provided for it.[146]

It is reiterated that the countries should not prohibit contract adaption keeping in line with the changing needs of the commercial world. The practice should not be termed derogatory to public policy while setting aside or enforcing the award.[147]

In another approach, it has been pointed out that in the interest of international commerce, strict adherence to the concepts of domestic laws is derogatory and practical solutions to modern commercial problems can only be reached through a trans-nationalisation of substantive laws.[148]

D. ARBITRATORS TO FILL SUPERVENING GAPS ONLY

The arbitrators are only allowed to fulfil supervening gaps through contract adaptation i.e. gaps which occur after the conclusion of the contract and are unforeseen at that point of time.[149] This requirement

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[140] *See supra* text accompanying note 89.
[141] Berger, *supra* note 7, at 13.
[142] Bernardini, *supra* note 45, at 424.
[143] Zaccaria, *supra* note 4, at 161.
[144] Stalev, *supra* note 81.
[145] *See supra* text accompanying note 94.
[146] WAINCYMER, *supra* note 98.
[147] Convention on Recognition of Foreign Arbitral Awards art.5, June 10, 1958, 330 U.N.T.S. 38.
[148] DAVID, *supra* note 84, at 409; Berger, *supra* note 7, at 14.
[149] Berger, *supra* note 7, at 3.

of unforeseeability[150] arises from the presumption of the "professional competence of the parties", i.e. parties are aware of the general pitfalls of the business transaction that they are entering.[151] Hence, if they fail to include a clause with respect to the foreseeable risk, it is understood that they have taken the risk/accepted the risk.[152] Given the nature of the contract adaptation clauses and the impact that they have on the original agreement of the parties, unforeseeability has been recognized as a prerequisite for application of contract adaptation clauses by a number of jurisdictions and international instruments.[153]

On its own, as suggested by Professor Fontaine, the term unforeseeable is quite uncertain and may limit the application of clauses to particular instances.[154] To avoid this, the parties expand the scope of the term by defining instances that may constitute 'unforeseen events' in the clause itself. The parties may provide for specific instances such as introduction of new laws, price drop or rise beyond a certain amount or general instances such as major political, economic or financial change.[155] A clause that is too specific can be problematic as well, as although it gives definite instructions to the arbitrator as to how the contract adaptation clause would be triggered, it restricts the scope of application of the clause. Hence, the parties usually adopt general instances in their adaptation clause to protect against any eventuality. A better practice would be to have a general clause with some specific instances as illustrations as this would serve as guidance for clause interpretation and would also restrict the arbitrator from applying the clause too loosely.

E. EXCESSIVELY ONEROUS

The extraordinary nature of the remedy of contract adaptation warrants that it should only be used in situations where the performance of contract by the disadvantaged party would elicit a great financial sacrifice on its part.[156] Hence, adaptation of contract as a remedy should only be available when the performance of the contract becomes excessively onerous and not merely onerous[157]. The UNIDROIT principles have recognized this distinction between performance becoming merely 'more onerous'

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[150] Hannes Rosler, *Hardship in German Codified Private Law – In Comparative Perspective to English, French and International Contract Law*, 15 E.R.P.L. 485, 486 (2007).
[151] Berger, *supra* note 7, at 9; Berger, *supra* note 6, 1378.
[152] Zaccharia, *supra* note 4, at 144.
[153] Zaccharia, *supra* note 4, at 138.
[154] M Fontaine, 'Les clauses de hardship', (1976) Dir Prat Comm Int 257; Zaccharia, *supra* note 4, at 150.
[155] Zaccharia, *supra* note 4, at 136.
[156] *Id*. at 158.
[157] Schwenzer & Munoz, *supra* note 8, at 154.

rather than becoming 'excessively onerous'. It is only in the case of latter that modification or excuse from performance is allowed[158] otherwise the principle of *pacta sunt servanda* will be greatly diluted.

A question arises as to what would constitute as 'excessively onerous'. The UNIDROIT principles qualify excessively onerous as an event that fundamentally alters the equilibrium of the contract.[159] The commentary accompanying the article provides a number of illustrations as to what may constitute as situations necessitating contract adaptation including "limits of sacrifice", undue hardship, risk of ruination due to continued performance etc.[160] Whatever may be the terminology in the contract or the applicable law, it is suffice to say that though, objectively, the performance may still be possible, it has become economically unviable.[161]

It is certain that the standard for assessing 'excessively onerous' is a subjective standard contingent upon a number of factors such as terms of the contract as well as the surrounding circumstances. A party in the contract may have assumed or excluded the risk of fundamental change in the premise of the contract.[162] Similarly, surrounding circumstances, such as financial capacities of the disadvantaged party, market sector in which the business transaction is taking place can also play an important role in determining what may constitute as excessively onerous. For instance, in a market sector subject to extreme price fluctuation over short periods of time, an increase or decrease of over 200-300% would not be considered as excessively onerous.[163] Similarly, the standard for excessively onerous for a small company would differ from that of a financially stable multi-national corporation.[164] Hence, the parties should take into consideration the terms of the contract and the practices and customs of the market while drafting requirements of excessively onerous.

V. INDIAN PERSPECTIVE TO CONTRACT ADAPTATION BY ARBITRATORS

In India, contracts that cannot be performed as originally anticipated by the parties are covered either under the statutory remedy provided under S.56 of the Indian Contract Act, 1872 (*hereinafter*, "Contract Act") or the contractual provision of *force majeure*. *Force majeure* in contracts is treated as a contingent contract under S. 32 of the contract act. Though, S. 32 does not provide any particulars for such clauses, it recognises the rights of the parties to include the provisions in their contracts. The

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[158] Fucci, *supra* note 14.
[159] Saloni Khanderia, *Commercial Impracticability under the Indian Law of Contract: The UNIDROIT Principles as the Way Forward*, 7 U.C.L.J.L.J. 52, 60 (2018).
[160] Fucci, *supra* note 14.
[161] Schwenzer & Munoz, *supra* note 8, at 154.
[162] Schwenzer & Munoz, *supra* note 8, at 156.
[163] Zaccharia, *supra* note 4, at 148; Schwenzer & Munoz, *supra* note 8, at 156.
[164] Fucci, *supra* note 14.

scope of *force majeure* clause is defined in the contracts and sometimes a mere interruption may be enough to invoke the clause. It guides the course of the contract once *force majeure* event or the 'interruption' occurs.

S. 56 is invoked in the absence of a specific *force majeure* clause. It deals with frustration of contracts akin to the English law on impossibility, where a contract would be terminated or would become void if its performance becomes impossible or becomes substantially different from what was contemplated by the parties.[165] The law cannot be invoked for a mere commercial impracticability or a situation of economic change, such as a rise or fall in prices, which only makes the performance of contract onerous. In *Alopi Parshad & Sons Ltd. v. Union of India*[166], the contact was not frustrated on the abnormal increase in price of *ghee* due to the situation caused by World War II. It was held that changed circumstances did not strike at the root of the contract and the performance has been merely altered and has not become impossible. The parties could not be absolved of their obligations just because the performance became onerous. This strict stance of the Supreme Court was followed in several other cases.[167]

The parties, in order to get relief in situations where performance of the contract would become more onerous, started including such circumstances in their force majeure clauses. However, according to English law of contracts which has influenced the Indian law on the same issue, such clauses cannot shield the performance as long as the event does not frustrate the purpose of the contract.[168] The parties can only control *force majeure* events but cannot expand the ambit of relief to non-supervening events.[169] A broad construction of the *force majeure* clause to incorporate non-supervening events where the price escalated to 150% was not allowed since the change in circumstances did not prevent the performance of the contract.[170] Such compulsion on the parties to perform subsequent onerous contractual obligations might not always serve to fulfil the intentions of the parties. However, compensation could be claimed for loss incurred due to such change in circumstances.[171] The manner in which such compensation can be provided, either through renegotiation or contract adaptation, has not been dealt with in any case. S. 62 of the contract act dealing with alteration of contracts also remains silent on contract adaptation due to changed circumstances. Without a specific provision in

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[165] Satyabrata Ghose v. Mugneeram Bangur & Co., (1954) S.C.R. 310.
[166] Alopi Parshad & Sons Ltd. v. Union of India, A.I.R. 1960 SC 588.
[167] Continental Construction Co Ltd. v. State of MP, A.I.R. 1988 SC 1166; Travancore Devaswom Board v. Thanath International, (2004) 13 SCC 44; Bharti Cellular Limited v. Union of India, (2010) 10 SCC 174.
[168] Khanderia, *supra* note 159.
[169] *Id.*
[170] Coastal Andhra Power Limited v. Andhra Pradesh Central Power Distribution Co. Ltd. & Ors., O.M.P. No. 267 of 2012 (Delhi High Court).
[171] *Id.*

law on re-negotiation and contract adaptation, the courts have been unable to give a clear picture on the issue.

A Madras High Court decision, however, has held that the parties could not be allowed by the courts to overcome express provisions of the contract to renegotiate certain terms on occurrence of the changed circumstances not contemplated by the parties during the conclusion of the contract.[172] This decision does not hold water in the current economic scenario and is detrimental to the parties.

It can be concluded that a contract cannot be frustrated on the grounds of it becoming onerous unless it becomes impossible too under S. 56 of the contract act. Thus, the Indian law on changed circumstances has two extremes- require parties to perform the original contract irrespective of the deviations or to terminate the contract. It is silent on situations in which the contract can be preserved while remedying onerous performances due to changed circumstances. This widely affects India's stand in commercial contracts deterring parties to choose Indian law as the substantive law of the contract.[173]

Along with the Contract Act, the Arbitration and Conciliation Act, 1996 (*hereinafter*, "Arbitration Act") is also silent on the aspect of contract adaptation by the arbitrators. While the Arbitration Act does contain a provision on arbitrators acting as *amiable compositeur* or deciding *ex aequo et bono*, it is only limited to the arbitrators decision on rules applicable to the substance of the dispute.[174] Given the current jurisprudence on frustration, there is a high probability that a contract adapted by an arbitrator would either be set-aside[175] or would become unenforceable[176] due to violation of the public policy of India.[177] This might affect India's pro-arbitration stance. Arbitration in India can benefit and would become a preferred mode of dispute resolution if contract adaptation by arbitrators in changed circumstances becomes a norm. While the Indian courts have prohibited arbitrators to rewrite contract,[178] there has been no case where the court dealt with an express authorisation by the parties to adapt a contract. Therefore, there is no Indian jurisprudence, either in statutes or in a case law, that deals with contract adaptation by arbitration as defined in this article.

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[172] Sree Kamatchi Amman Constructions v. The Divisional Railway Manager-Works, Palghat Division, OSA Nos 109 & 247 of 2005 p. 38.
[173] Khanderia, *supra* note 159.
[174] Arbitration and Conciliation Act, 1996, § 28.
[175] Arbitration and Conciliation Act, 1996, § 34.
[176] Arbitration and Conciliation Act, 1996, § 48.
[177] Renusagar Power Co. Ltd. v. General Electric Co., A.I.R. 1994 SC 860; NAFED v. Alimenta, SA Civil Appeal No. 667 of 2012.
[178] Hotel Leela Venture Limited v. Airports Authority of India, 2016 (6) A.R.B.L.R. 289 (Delhi).

Indian courts need to take a liberal outlook to contract adaptation akin to the UK court in *ABP case*. In instances, the parties to long-term contracts expressly provide a contract adaptation clause, the courts cannot deny contract adaptation on the grounds of it being an 'agreement to agree' and should enforce such contract adaptations by the arbitrators rejecting all claims of violation of public policy. This can either take place through specific amendments in the Contract Act and the Arbitration Act or through court decisions as in the UK. It is known that the Indian government has entered into several PPP contracts containing re-negotiation clauses[179] thereby acknowledging the need to revise long term contracts on occurrence of certain changed circumstances. However, a re-negotiation clause would only serve as a paper tiger unless it is coupled with a contract adaptation clause in situations the parties do not reach a negotiated solution. The failure to reach such agreement during re-negotiation is unlikely as the parties are already in dispute. Contract adaptation serves in strengthening these contracts and would definitely make India a preferred location for foreign investments and commercial activities.

CONCLUSION

Contract re-negotiation and adaptation by an international arbitrator is the need of the hour as it serves as an aid to preserve contracts and commercial relationships from uncertainties at a time when nations are dealing with immense economic downfall in the COVID-19 era. An express provision of contract adaptation by the parties, providing the arbitrator the power to revise contracts, can never be disregarded and domestic laws should not hold back an arbitrator from exercising these powers. Instead of creating an artificial distinction between formal (adjudication) and creative character (contract adaptation) of an arbitration, a move towards "oneness of arbitration" conforms to the changes in commerce.[180] The mechanism is in line with international arbitration and the changing dimensions of the international contract laws which emphasise on flexibility and co-operation on the basis of good faith instead of rigid and empty compliance with the contract in the name of sanctity of contracts. Contract re-negotiation and adaptation upholds the principle of *pacta sunt servanda* in the truest sense. Recognising the benefits of contract adaptation through arbitration, legal systems should welcome the mechanism, especially in long term contracts. Doubts regarding the mechanism can only be tackled by a progressive approach of the state courts.

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[179] Department of Economic Affairs: Ministry of Finance, *Developing a Framework for Renegotiation of PPP Contracts*, PPP IN INDIA (Sept. 16, 2020 3:17 PM), https://www.pppinindia.gov.in/documents/20181/33749/Developing+a+Framework+for+Renegotiation+of+PPP+Contracts/d556cf0d-ffcf-4a3b-a8cc-322f9c9111e8.

[180] DAVID, *supra* note 84, at 409.

THE INCORPORATION OF THE TAI AHOM COMMUNITY INTO THE SCHEDULED TRIBES: A CRITIQUE

Sonika Sekhar* & Arunabha Barua**

Communities which suffer from social, economic and educational backwardness are qualified for reservation schemes in India. However, giving such benefits to communities which are better-off than the rest will lead to injustice and inequality. The Constitution (Scheduled Tribes) Order (Amendment) Bill, 2019, which proposes the inclusion of the Tai Ahom and five other communities in the list of Scheduled Tribes in Assam, was passed by Rajya Sabha on February 13, 2019. The inclusion of the Tai Ahom community in the state Scheduled Tribes list can be criticized on various grounds. It will dilute the rights of other communities who already possess special status since the Tai Ahoms are comparatively more advanced and populous. The paper aims to critically analyse the position of the Tai Ahom community's demand, in the historical and present social context.

Keywords: Backwardness, Reservation, Scheduled Tribes, Tai Ahom, Inequality.

* B.A., LL.B. (Hons.), NLUJAA. Email: sonika@nluassam.ac.in.
** B.A., LL.B. (Hons.), NLUJAA. Email: arunava@nluassam.ac.in.

INTRODUCTION

In recent times it has been observed that the demand for the Scheduled Tribe ('ST') status has gained considerable traction in the media, civil society discourse and debates in the academic and legal circle. The demand for ST status is found among many groups for various constitutional safeguards with regard to the acquisition of resources, claims for the recognition of cultural differences, geographical isolation, primitive traits, backwardness and shyness of contact with the community at large.[1] The Tai Ahom community of Assam is one of these groups which have been pressing for this demand and one which is in the process of reconstruction of their identity as a tribe. Their demand for the status of ST has become stronger over the past few years. The agitations to demand ST status for six communities, including the Tai Ahom community, erupted in bandhs in 2016.[2]

Historically, the Ahoms have been a ruling class in Assam. However, the advent of the British empire in Assam resulted in the reduction and consequent disintegration of the powers of the Ahoms. This has resulted in their demand for ST status on the ground that they were reduced to a minority by the colonial empire. The beginning of British rule in Assam had triggered sweeping changes in the polity and economy of the region, eventually transforming the socio-cultural atmosphere in Assam.

The demand for ST status by the Ahoms has caused dissatisfaction amongst many other communities in Assam. An immediate hurdle in their way is the opposition from the existing tribes[3] and the state's failure to provide a permanent solution to the same.

Although the Constitution (Scheduled Tribes) Order (Amendment) Bill, 2019 has passed in the Rajya Sabha in February 2019, the addition of Ahoms in the ST category involves many issues and problems. It cannot be forgotten that they were the ruling class for a considerable period of Assam's history, just before the entry of the British in the state. Comparison with other ruling communities in India brings out the possibility of these communities creating a monopoly on the benefits of the ST status. Another ground for criticism is that it will further perpetuate inequality as the other ST groups may feel

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[1] PIB Delhi, *Change in Criteria for inclusion in ST List,* Ministry of Tribal Affairs (Dec. 28, 2017), https://pib.gov.in/PressReleaseIframePage.aspx?PRID=1514486#:~:text=The%20criteria%20presently%20followed%20for,%2C%20and%20(v)%20backwardness (last visited on December 11, 2020).

[2] Samudra Gupta Kashyap, *Simply Put: Demand for Tribal Status Becomes Louder in Assam,* Indian Express (Oct. 24, 2016), https://indianexpress.com/article/explained/demand-for-tribal-status-assam-3099402/ (last visited on December 10, 2020).

[3] Express News Service, *Tribals Call Assam Bandh on Friday Against Centre's Move to Grant ST Status to Six Communities,* New Indian Express (Jan. 10, 2019), https://www.newindianexpress.com/nation/2019/jan/10/tribals-call-assam-bandh-on-friday-against-centres-move-to-grant-st-status-to-six-communities-1923332.html (last visited on December 10, 2020).

threatened by their inclusion in the list. It is also necessary to analyse whether the Tai Ahom community possesses the characteristics required to be identified as ST.

This paper is focused largely on criticizing the inclusion of a group better off than other STs in the same category, enabling them to benefit from affirmative action instead of the groups more needy than the Ahoms.

I. THE HISTORY OF THE AHOM DYNASTY

The Indian history contains a long list of dynasties, be it those who conquered territories through rapid expansion, displaying the prowess of the rulers, or those which developed internally through the formation of indigenous empires. Amongst these glorified names lies one that is especially renowned due to its territorial stronghold for close to six hundred years since the thirteenth century, as well as, efficiency in governance– the Ahom dynasty.[4] The Ahom dynasty traces its roots to the Tai race of Southeast Asia.[5]

The efficiency in administration during the Ahom dynasty arose from a structure of governing, wherein a King, though possessing absolute and ultimate discretionary power to take a decision, was open to accepting advice from his Council of Ministers.[6]

The Ahom society had accepted Sukapha as their king because of his birth in the royal Chao-pha clan (noble-celestial). He was an extraordinary administrator who established the Ahom kingdom[7]. The segmented Tai society was allowed to choose its leader from this clan alone.[8] His two chief counsellors Burhagohain (Chao-Frongmung) and Bargohain (Chao-Thaomung) were chosen from the next most important clans. Three other lineages of magician-priests were the Bailung, Deodhai and Mohan. These clans, along with four others, Dihingiyas, Sandiqui, Lahan and Duara, were considered the nobility in the Ahom community during the rule of Sukapha. It is understood that to some extent the Ahom king, even after the time of Sukapha, shared leadership with the heads of these privileged lineages.[9]

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[4] N. Acharyya, *Early Ahom Administrative Hierarchy (Summary)*, 27 PROCEEDINGS OF THE INDIAN HISTORY CONGRESS (1965).
[5] *Id*.
[6] *Id*.
[7] Piku Doley, *Role of Su-Ka-Pha in Founding Ahom Kingdom in Assam,* 3(1) PRATIDHWANI THE ECHO 54 (2014).
[8] Amalendu Guha, *The Ahom Political System: An Enquiry into the State Formation Process in Medieval Assam*, *11* SOCIAL SCIENTIST 1228 (1983).
[9] *Id*.

Thus, claiming divine descent, the Ahom dynasty witnessed a series of rulers in a set up that was monarchical but also involved aspects of oligarchy and aristocracy.[10] It is understood that the prestigious 'Satgharia Ahom'[11] formed the embryonic aristocracy.[12] The important lineage groups kept increasing and high offices were only filled in from these. In the mid-1500s, the expanding ruling class made the hereditary nobles (Chao) ally themselves with the Brahmin literati. Since the Ahoms already benefited from a hierarchical structure, there was no difficulty for them to compromise and respect the rigid caste society of the Assamese people.

In the early 17th century, during Susengpha's (Pratap Simha) rule two important offices of Barbarua and Barphukan were created. He made sure that people from only the four most respectable clans were appointed to these offices. Thus, the stratification of the society that started in the 13th Century did not end with change of time or of rulers.

The Ahom kingdom enjoyed immense privileges and an increasing status of nobility over the years, having lived in mansions and practised the system of slavery, with many non-Ahoms hired for service, agriculture and so on. Hence, the political system of the Ahoms was feudal in nature[13], implying that the non-Ahoms were the serfs in the dynasty headed by the nobility.

The biggest victims of this stratification were the outsiders (non-Ahoms). The Borahi and the Moran ethnic groups were seen as serfs by the Ahoms during the 13th century. They were not paid for their labour and often exploited. These people later learnt new skills and then assimilated into the society; however, even after these changes a section of these groups became slaves for the Ahom people.

According to studies, there is evidence of a stringent system of social class that existed in the Ahom society.[14] The Gohains and the Rajkhowas were under the Ahom king and Phukans held offices of medium ranks, assisted by the baruas. The petty chiefs were called Bhuyans and his rule was called the Bhuyan-Raj. Even the military system was based on these classes; the Hazarikas commanded 1000 men, Saikias commanded 100 men and Boras commanded 20 men. The Paik system developed during

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[10] S.C. Rajakhowa, *Ahom Kingship*, *in* 5 PROCEEDINGS OF THE INDIAN HISTORY CONGRESS (1941).
[11] The Satgharia Ahom aristocracies were delineated by the Ahom king Subinpha. These were Ahoms of the seven houses: the Chaophaa, the Burhagohain and the Borgohain families (the Gohains), and four priestly lineages—the Deodhai, the Mohan, the Bailung and the Chiring (the Gogois).
[12] Tejimala Gurung, *Emergence of the Ahom Monarchy in Upper Assam (13th-15th Century), in* 2 SOCIETY AND ECONOMY IN NORTH EAST INDIA (Fozail Ahmad Qadri ed., 2006).
[13] GUHA, *supra* note 8.
[14] NITUL GOGOI, CONTINUITY AND CHANGE AMONG THE AHOM (2006).

this time also emphasises on a social hierarchy.[15] The labour system was one where every male member who was not born in a family noble, priestly or high social classed family was considered a Paik.[16]

It can be understood that historically, Ahoms were governed by an organised hierarchical system, deep-rooted into their society. Therefore, the Tai Ahom community consists of different social classes. The highly graded system within the community gives rise to both privileged and unprivileged classes within the same community. Owing to the hierarchy, people received varied surnames to point out the social tier that the person occupied. These surnames given by the Ahom rulers have survived through many generations and can be found commonly in the current society also.

Strategically, the Ahom dynasty expanded to the easternmost part of the Brahmaputra Valley, by overthrowing the Kachari and the Chutiya in the sixteenth century. In the subsequent century, the Assamese valley was entirely under the domination of this kingdom, with the traditions of the Ahoms influencing almost all the regions under their rule. Further, the Ahoms also managed to maintain their authority via large armies, a hierarchical system of administration and a State income to facilitate the same.[17]

However, civil war, Mughal domination, the Burmese invasion and the subsequent interjection of the British in the affairs of the Ahoms ultimately led to the decline of a once-mighty empire.[18] The Ahom kingdom was under pressure after the Mughals started to pose a threat to the territory of Assam, putting lower Assam at risk of annexation. This led to an increase in trade with the Mughals to keep friendly relations, as well as, changes in the system of administration to cope with the Mughal influence.[19] However, these changes were not enough as the Mughal influence continued to grow stronger.

The Mughal influence was not the only problem faced by the Ahom kingdom. Assam had reached a precarious position due to the Moamoria Rebellion, a civil war due to the rise in popularity of the neo-Vaishnavite movement called Ekasarana Dharma.[20] The entry of the aggressive Moran tribe opposing

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[15] Barend Jan Terwiel, *Ahom and the Study of Early Tai Society,* Siamese Heritage (June 14, 1982), http://www.siamese-heritage.org/jsspdf/1981/JSS_071_0g_Terwiel_AhomAndStudyOfEarlyTaiSociety.pdf (last visited on April 2, 2020).

[16] GUHA, *supra* note 8.

[17] TERWIEL, *supra* note 15.

[18] Chitrangkita Gayan, *Early Phase of Female Education in Assam*, 7 INTERNATIONAL RESEARCH JOURNAL OF MANAGEMENT SCIENCE & TECHNOLOGY 290 (2016).

[19] M. Parwez, *Crisis and Decline of the Ahom State: The Eighteenth Century Perspective,* 2(3) INTERNATIONAL JOURNAL OF SCIENTIFIC RESEARCH (2013).

[20] Ananth Karthikeyan, *Moamoria Rebellion and the Fall of Assam,* DNA India (Dec. 10, 2017), https://www.dnaindia.com/analysis/column-moamoria-rebellion-and-the-fall-of-assam-2566362 (last visited on March 29, 2020).

the established way of life resulted in a rebellion from 1769 to 1805, damaging the stronghold of the rulers.[21]

The final blow to the ruling community was when the Burmese wiped out the Ahom dynasty only to be themselves subsequently defeated by the British in the First Anglo-Burmese War.[22] This marked the downfall of the Ahom dynasty that had dominated Assam and administered the State smoothly for numerous decades.

The decline of the Ahom kingdom resulted in the elimination of the privileges and entitlements of the Ahoms. Over the years, the social and economic status of the Ahom community became similar to the other communities of Assam. The Ahoms were subsequently granted the status of OBC as a result of their domination by the colonial empire. However, dissatisfaction within the community grew over time as they started to demand ST status.

II. THE CONSTITUTION (SCHEDULED TRIBES) ORDER (AMENDMENT) BILL, 2019

On January 8, 2019, the Union Cabinet approved of an addition to the list of groups categorised as STs in India[23] in order to confer the status of STs to six new communities, one of them being the Tai Ahom community.

Known as The Constitution (Scheduled Tribes) Order (Amendment) Bill, 2019, an introduction of the Tai Ahom, Koch Rajbongshi, Chutiya, Matak, Moran and thirty-six tea tribes of Assam has been proposed.[24] This Bill seeks to amend the existing Constitution (Scheduled Tribes) Order, 1950.[25]

The State Government was directed to take steps towards making the implementation of the Bill a possibility in the future. The Assam Government hence set up a Committee consisting of five members in order to suggest measures for protecting the ST status of the existing communities. Additionally,

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[21] PARWEZ, *supra* note 19.
[22] KARTHIKEYAN, *supra* note 20.
[23] PTI, *Bill to Provide ST Status to 6 Communities in Assam Soon: Rajnath Singh*, Economic Times India (Jan. 8, 2019), https://economictimes.indiatimes.com/news/politics-and-nation/bill-to-provide-st-status-to-6-communities-in-assam-soon-rajnath-singh/articleshow/67437808.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst (last visited on March 28, 2020).
[24] The Constitution (Scheduled Tribes) Order (Amendment) Bill, 2019.
[25] The Constitution (Scheduled Tribes) Order, 1950.

this Committee has been given the responsibility to determine the quantum of reservation for the said communities and a new quantum of reservation for the Other Backward Classes ('OBCs').[26]

The proposed Bill, once passed, will create a transformation in the position of the Tai Ahom community that is at present a part of the OBCs. In order to understand the changes in the set of rights available to them, the position of this community before and after the implementation of the Bill must be analysed.

A. AS PROPOSED – TAI AHOMS AS A SCHEDULED TRIBE

The definition of STs is provided under Article 366, clause (25) of the Constitution of India, 1950. According to this definition, such status can be conferred on tribes or tribal communities or any group within such tribes and communities. Further, the definition points to Article 342 of the Constitution of India, which gives the President the power of selecting communities that shall receive the status of STs, after consultation with the Governor of the State.

The first significant change towards the development of constitutional rights to the STs came in 1951 as a result of *State of Madras v. Champakam Dorairajan,*[27] in which a government order was struck down due to the number of seats for admission in a university being fixed per community. This was done with the ultimate objective to assist the backward groups, thus working towards Article 46 of the Constitution of India which is a Directive Principle of State Policy that promotes education and economic rights of the Scheduled Castes ('SCs') and STs. However, due to a violation of Article 15 of the Constitution of India, this segregation of seats was not approved.

As a result of this case, measures were taken to provide opportunities to the SCs and STs. Article 15 of the Constitution thus witnessed an amendment via the Constitution (1st Amendment) Act, 1951, with the introduction of clause (4)[28]. According to this clause, the State has the power to make special provisions towards the advancement for the SCs, the STs and backward classes in the spheres of social position and education. Articles 15 and 29(2)[29] shall not be a barrier to this clause.

Further, Article 15(5) was introduced in the Constitution of India to ensure the advancement of the said backward classes with respect to admission to educational institutions, including private

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[26] Sushanta Taludkar, *Sword of Constitution (ST) Amendment Bill, 2019 Hangs Over Sarbananda Sonowal as Assam CM Walks Tightrope Over Expansion of Scheduled Tribe List, First Post India (*Jan. 21, 2019), https://www.firstpost.com/india/sword-of-constitution-st-amendment-bill-2019-hangs-over-sarbananda-sonowal-as-assam-cm-walks-tightrope-over-expansion-of-scheduled-tribe-list-5932951.html (last visited on March 28, 2020).

[27] State of Madras v. Champakam Dorairajan, AIR 1951 SC 226.

[28] INDIA CONST. art. 15(4).

[29] INDIA CONST. art. 29(2).

educational institutions, whether aided or unaided by the State. The application of Article 19(1)(g), that is, to practise a profession of one's choice or to undertake any occupation, trade or business, cannot prevent the State from making laws or provisions on this matter.[30]

There are various other rights granted to the STs and SCs by the Constitution of India. One important right is Article 16(4A)[31] which states that reservations in promotions can be made by the State for these groups of people, in consonance with the law.[32]

Part XVI of the Constitution of India gives additional rights to the STs and the SCs. Article 330[33] provides reservations to the House of the People in proportion to the population of these communities in the respective States. Similarly, seats to the Legislative Assemblies of the States also have reservations in accordance with Article 332.[34]

Article 335 of the Constitution of India directs that STs and SCs must be considered in the employment of services of the Union and the States as long as the efficiency of administration is not hampered. This Article also allows the State to consider promotions of these communities as well as lowering qualifying marks and other such standards of evaluation in this regard.

Further, the STs are also to have a Commission known as the National Commission for the STs under Article 339[35] of the Constitution of India in order to monitor all the processes and ensure that all these aforementioned rights are guaranteed to them.

Apart from these, The Scheduled Castes and The Scheduled Tribes (Prevention of Atrocities) Act, 1989 also provides protection to the SCs and the STs, through relief and rehabilitation for the grief caused through atrocities.

These are the main sets of rights that the STs are given. It has been proposed that the Tai Ahom community receives all these rights under the status of STs.

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[30] INDIA CONST. art. (19)(1)(g).
[31] INDIA CONST. art. 16(4).
[32] Jarnail Singh v. Lachhmi Narain Gupta, 2018 SCC Online SC 1641.
[33] INDIA CONST. art. 330.
[34] INDIA CONST. art. 332.
[35] INDIA CONST. art. 339.

B. EARLIER POSITION- TAI AHOMS AS OTHER BACKWARD CLASSES

The Constitution of India does not provide for a concrete definition of OBCs. However, a definition for backward classes has been provided by the National Commission for Backward Classes Act, 1993[36], which refers to all the backward classes mentioned in the lists prescribed by the Central Government.

The OBC category is a result of surveys and Commissions that indicated that apart from those communities listed under the SCs and STs, there are still a plethora of communities, still not as advanced and require assistance in order for their upliftment. This is the classification of the socially and educationally backward classes as referred to in the Constitution of India, which include the victims of untouchability since the inception of the Constitution.[37]

One of the notable Commissions in this regard was the Second Backward Classes Commission, better known as the Mandal Commission. The function of the Mandal Commission was to identify those communities or castes that can be categorized as OBCs and to fix a definite proportion for these OBCs. A reservation of 27 percentage was hence agreed upon for these backward classes after determining the aggregate reservation in posts for the SCs and STs[38], in consonance with the judgement of the Supreme Court[39] which introduced a ceiling of 50 percentage reservation in jobs.

An important aspect of the OBCs is the creamy layer, as coined in the Sattanathan Commission in 1971. The creamy layer refers to those people within the OBCs who are both socially and economically advanced hence excluded from the benefits that the OBCs get through jobs, education and government services. The determination of the creamy layer has been fixed at a gross annual income of 8 lakh.

The OBCs have been given rights at par with the SCs and STs under Articles 15(4) and 15(5) of the Constitution of India. Additionally, they receive rights under Article 16(4) of the Constitution of India which protects opportunities of the backward classes in terms of appointments and posts via reservation.

According to Article 340 of the Constitution of India, for the upliftment of the OBCs (referred to as socially and educationally backward classes) and improvement of their condition, a Commission is to

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[36]The National Commission for Backward Classes Act, 1993, §2(a).
[37] Marc Galanter, *Who Are the Other Backward Classes?: An Introduction to a Constitutional Puzzle*, 13 ECONOMIC AND POLITICAL WEEKLY (1978).
[38] Bhattacharya, *The Mandal Commission in a Historical and Statistical Perspective,* 51 PROCEEDINGS OF THE INDIAN HISTORY CONGRESS 641, 643 (1990).
[39] Indra Sawhney v. Union of India, AIR 1993 SC 477.

be set up if the President of India deems it fit. These are the basic rights that are guaranteed to the OBCs, according to the Constitution of India.

C. CRITICISMS – LOOPHOLES IN THE CHANGE IN STATUS OF THE TAI AHOMS

The framers of the Constitution understood that certain communities were suffering from utmost social, economic and educational backwardness on account of various factors like primitive agricultural practices, lack of infrastructure facilities and geographical isolation. Most of these communities were identified as STs as per provisions contained in Clause 1 of Articles 341.[40] The reservation policy in India ensures that people belonging from these backward communities receive education and get employment.[41]

It is important to note that the Ahom people underwent the same changes in the social life as the other Assamese people. They were not subjected to any differential treatment or exploitation. However, the Ahom nobles and royalty had opposed the British administration in upper Assam since they saw the British as the reason behind the loss of the ruling status in its entirety.

The Ahoms saw the British as alien rulers and refused to accept their administration; a feeling of honour and dignity amongst them prevented them from taking part in the system. They refused to recognize or accept the British as rulers and attempted to stay away from contact with them in every matter. The prior feeling of pride and power remained in them even when they realized that they were reduced to mere subjects. They felt that they had lost their leadership and position in every field to the newly emerged middle-class elite. This led to an apparent social, economic and educational backwardness because of which the Kaka Saheb Kalelkar Commission recommended their inclusion as an Other Backward Class (OBC) upon their repeated insistence.[42]

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[40] INDIA CONST. art. 341. ("(1) The President may with respect to any State or Union territory, and where it is a State after consultation with the Governor thereof, by public notification, specify the castes, races or tribes or parts of or groups within castes, races or tribes which shall for the purposes of this Constitution be deemed to be Scheduled Castes in relation to that State or Union territory, as the case may be
(2) Parliament may by law include in or exclude from the list of Scheduled Castes specified in a notification issued under clause (1) any caste, race or tribe or part of or group within any caste, race or tribe, but save as aforesaid a notification issued under the said clause shall not be varied by any subsequent notification".

[41] Surendrakumar Bagde, *Does Affirmative Action Work? Caste, Gender, College Quality, and Academic Success in India,* 106 AMERICAN ECONOMIC REVIEW 1495, 1500 (2016).

[42] Girin Phukon, Preface to GIRIN PHUKON, DOCUMENTS ON AHOM MOVEMENT IN ASSAM, at xvii (2010).

It is true that there has been a demand from the Tai Ahom community for the status of ST.[43] However, this demand exposes numerous flaws. The grounds for criticism of the Tai Ahom community becoming a part of the STs have been discussed below.

D. Adding the Tai Ahom Community to the ST List of Assam Will Perpetuate Inequality

The Ahom community is a community which has a history of rule over most of Assam, they are neither backward because of agricultural practices, nor infrastructural facilities and nor are they geographically isolated. STs often reside in inaccessible rural areas[44] and this is a major reason for them not attending college or gaining employment. Ahoms on the other hand, distanced themselves from modern education because of their own sense of pride. It should be kept in mind that they were not denied the benefits, nor were they out of resources when the British introduced the new system of education in Assam. Nevertheless, they were given the OBC status in the post-independence period with the belief that it would be of assistance to them.

The idea behind the inclusion of the Ahoms in the list of OBCs does not reflect a reasoning for their inclusion in the list of STs. This is indicated in the very demand of the Ahom tribes for the status of ST alongside other tribes, such as the Moran tribe, which were historically exploited as serfs by the Ahoms. The OBC status may be seen as appropriate for the condition of the community but ST status is not appropriate. One of the most important reasons behind this is that, if communities which are more advanced compared to the current ST communities, like the Ahoms, are given the same status, then the benefits of reservation will not reach the backward ST communities. The proportion of seats reserved for these backward communities in educational institutes and employment will decrease, making the whole policy of reservation for STs ineffective.

A concern in this matter is that tribal communities enumerated in the ST list in Assam are worried that such "advanced and populous" communities being given ST status will be a compromise on their own rights for reservation.[45] There is no doubt that granting ST status to the Ahoms will dilute the benefit of other communities who already have special status and protection under the law. If these newly

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[43] Sentinel Digital Desk, *AATASU reiterates demand for ST status to six communities*, The Sentinel (Oct. 28, 2017), https://www.sentinelassam.com/news/aatasu-reiterates-demand-for-st-status-to-six-communities/ (last visited on Mar. 26, 2010).

[44] BAGDE, *supra* note 41.

[45] Smriti Ramachandran, *Tribes oppose Assam govt's proposal to include 6 OBC communities on tribal list*, HINDUSTAN TIMES (May 29, 2017), https://www.hindustantimes.com/india-news/tribes-oppose-assam-govt-s-proposal-to-include-6-obc-communities-on-tribal-list/story-0VtDi6gFqCx3XFEu3bQ24J.html (last visited on Mar. 27, 2020).

added communities take away the bulk of the reservations in jobs and educational institutes then the whole idea behind reservations for the backward communities will become obsolete and pointless. Protective policy-making, especially the instrument of reservation, is not designed to make oppressed communities fight with one another, but rather to redistribute resources and protect those who were historically monopolised by the ruling classes, so that we get a more just social order. The social order in this sense will not be restored if OBC communities are placed in the ST status.

The Coordination Committee of the Tribal Organizations of Assam expressed that if such communities are given ST status then the identities of the indigenous ethnic tribes of Assam will be seriously threatened.[46] It also referred to the 1996 decision of the Government to grant ST status to Koch-Rajbangshis through an ordinance which resulted in the said community capturing more than 80% seats in Assam Engineering College, 100% seats in the Assam Ayurvedic College and more than 75% seats in all the medical colleges in the state.[47]

Equality has been guaranteed by the Constitution of India and it not only conceives of providing formal equality but also of providing real and absolute equality. Article 14 finds its place in the Constitution in order to ensure equal treatment to all irrespective of their caste, religion, race, language and place of birth.[48] Article 15(4) and 16(4) of the Constitution of India are concrete measures to bring about the mandate of equality enshrined in Article 14. It obliges the State to remove inequalities and backwardness.

However, the consequence will not be desirable if a community more advanced than the others get equal reservation as STs. The idea behind the policy of reservation was to achieve equality but inclusion of the Ahoms in the ST list will perpetuate inequality as other STs will not get their share of affirmative action. In *Indra Sawhney*[49]'s case, it was observed that to bring equality between unequals, it is required to adopt positive measures to abolish inequality. The equalizing measures would have to use the same tools by which inequality is perpetuated. Hence, if Ahoms are given the same protection under the ST list then it will result in inequality and people in different, unequal positions will receive same benefits.

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[46] Sentinel Digital Desk, *CCTOA demand withdrawal of ST (Scheduled Tribes) Bill*, The Sentinel (Nov. 21, 2019), https://www.sentinelassam.com/top-headlines/cctoa-demand-withdrawal-of-st-scheduled-tribes-bill/ (last visited March 27, 2020).

[47] RAMACHANDRAN, *supra* note 45.

[48] INDIA CONST. art. 15.

[49] Indra Sawhney v. Union of India, AIR 1993 SC 477.

E. The Ahom Community Cannot Be Compared to Other Ruling Communities Who Have Been Granted the ST Status

The superior position of the Ahom community over other communities that have been conferred the status of STs is apparent on a comparison between the Ahoms and the Meena community, which has a similar origin of wealth and opulence.

The Meenas of Rajasthan, who were conferred the ST status in 1954 are a prosperous, land owning community mainly inhabiting the western districts of Rajasthan. They have a history of rule over the region.[50]

The Meena community was a ruling community in the 11th century.[51] However, during the British administration, the Meena community was conceived as a criminal tribe.[52] The Meenas were constantly at war with the Rajputs, mostly indulging in guerrilla warfare to hold on to their lost kingdoms and the British Government may have listed them as a criminal tribe to solidify the British coalition with the Rajput kingdom in Rajasthan.[53]

In the mid-1870s, Lieutenant Colonel WH Beynon, Agent to the Governor General in Rajputana summed up the position of the Meena tribe along with other tribes like the Bheels saying that 'the unruliness and predatory habits of the Bheels and Meenas are closely connected with the injustice, if not the cruelty, which they have constantly experienced at the hands of the (Native) State officials and the ruling castes'.[54] Some British officers tried to understand the difficult circumstances of these tribes. The difficulties faced by them rendered it impossible to bring them on an equal footing with other citizens without providing them with special protections in a postcolonial India.[55]

After the passing of the Habitual Offenders (Control and Reform) Act 1952, the formerly notified criminal tribes came to be known as 'denotified tribes', or DNTs. This brought several social and

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[50] The Economic Times, *How Meenas got ST status*, The Economic Times (May 31, 2007), https://economictimes.indiatimes.com/news/politics-and-nation/how-meenas-got-st-status/articleshow/2087874.cms (last visited March 29, 2020).
[51] S. H. M. Rizvi, Mina the Ruling Tribe of Rajasthan: Socio-Biological Appraisal 17-24 (1987).
[52] Surender Singh Charan, *A Sociological Evaluation of the Major Government Schemes Meant for Promoting Education and Health among The Members of the Meena Tribe in Rajasthan*, 3 Shrinkhla Ek Shodhparak Vaicharik Patrika 28, 28 (2016).
[53] *Id*.
[54] Mark Brown, *Postcolonial Penality: Liberty and repression in the shadow of Independence, India c. 1947*, 21 Theoretical Criminology 186, 194 (2017).
[55] *Id.*

economic handicaps to these tribes and violence and abuse at the hands of higher caste groups. This stigmatization was also faced by the Meena community for a long time. The Meenas were conferred with the ST status because of their drastic change in status from a higher social group to a criminal tribe. Unlike the Ahoms, they were treated as a lower community and the administration actively discriminated against them. Hence the reasoning behind conferring ST status to the Meena community is understandable.

The Ahoms have not faced such discrimination in the society. The Ahoms ruled major parts of Assam from the 13th to the 19th century, enjoying superior status for a long period of time. Even though the British administration had difficulty in trusting them because of their ruling lineage, they were not excluded from any development in Assam. Problems Arose when they failed to adjust into the new system of British administration.[56] This sentiment was expressed in a memorandum to the Government '…Thus fallen from the position of dominance and sufficiency the Ahoms were stunned in their utter helplessness and were unable to accommodate themselves to altered circumstances ushered in by the British mode of Government for a considerable number of years and were out-stripped by other races of the Province- the result being that they are now admittedly the most backward community in the Province-socially, educationally, economically'.[57]

This shows that the Ahoms cannot be compared to other ruling communities that have been granted ST status since they have had more dominance in all respects.

It is also necessary to understand that even today, they are not a deprived community in general. There are disparities in income which varies from place to place. For example, the poverty ratio of the community is 21.52 in the district Dibrugarh, which is lower than the state average of 31.98 and 45.79 in the district of Tinsukia, which is higher than the state average.[58] There is wide variation in the levels of income in the districts which may be a reason for the disparity in the Ahom community as well.

The infant mortality rate of the community (33.96) is also lower than the national and state average, which points out that the health attainment of the community is also better than many others. The literacy rate of the community (97.80) is also higher than the national(74.04) and the state average(72.19). Therefore, the contention of the Ahom Community for the attainment of ST status seems unreasonable.

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[56] PHUKON, *supra* note 42, ix.

[57] BIMAL DEV & DILIP LAHIRI, COSMOGONY OF CASTE AND SOCIAL MOBILITY IN ASSAM 97 (1984).

[58] Pranjal Protim Buragohain, *Poverty and Inequality in Development at Community Level: an Empirical Analysis in the context of the Tai-Ahoms of Assam, India*, INTERNATIONAL RESEARCH JOURNAL OF SOCIAL SCIENCES 6,7 (2016).

F. THE CHANGE OF STATUS OF THE TAI AHOM COMMUNITY TO ST IS REDUNDANT

On an analysis of the demand of the Tai Ahom Community to gain ST status, we find one major criticism, namely, redundancy. The social structure of the Ahom community, as aforesaid, was stratified in such a manner that the sections higher up in the hierarchy received accumulated privileges, leaving the lower sections with little or no privileges. Hence, they had a socially and economically divided system within their community. Clubbing the entire community as ST creates conflict within the community as the groups that were higher up in the hierarchy received privileges as the ruling class, indicating that they were the groups of the highest order in the whole of Assam.

The end of the British rule in India changed the economic situation in a substantial manner by the introduction of modern education and jobs. However, this did not erase the whole class division in the society because the ruling class enjoyed wealth left by their ancestors while other members of the Ahom community did not enjoy such wealth or privileges. Hence, those lower down in the hierarchy are the most in need of reservation than the earlier ruling class. Therefore, there is a possibility of inequality in the Ahom community also. Providing equal benefits to the privileged section will only be a drawback to those less fortunate. Therefore, certain basic benefits are required for the lower strata of the Ahom community as a remedy for the discrimination they faced after the decline of the Ahom kingdom and this will become redundant if the whole community is given the benefits.

The real requirements for placing the Ahoms at par with other unreserved communities are two-fold. Firstly, they require basic protection, in the form of rights for their upliftment, for the discrimination faced. Secondly, these rights should be available only to the lower strata of the Ahom community that were devoid of aristocratic privileges even when the Ahoms were the ruling class.

It is important to note that these basic rights of reservation are already satisfied with them being a part of the OBCs. Further, to focus on the people who are in need of reservation the most, the creamy layer principle has been put in place. Hence, both the requirements are already fulfilled. There is absolutely no requirement for the community to be conferred the status of STs since they are already receiving the basic rights that they are truly in need of.

The Bill provides no clarity on the proposed position of the Tai Ahom community and the purpose of making this change in their status after so many years. It is rather pointless giving the community, already recognised as a backward class, the status of ST.

Most of the basic protections offered to the STs are already available to OBCs, namely Article 15 and Article 16 of the Constitution of India. The OBCs have been given a strong protective shield via legislation for decades. For the purpose of upliftment of the groups, a Commission is also allowed to be established, in parity with the Commission set for the STs.

Even if we assume that presently, the Government is of the opinion that the whole of the community is in need of reservation, shifting the community from OBCs to STs is still redundant. To understand this redundancy, the application of the creamy layer has been analysed.

Previously, one of the prime distinguishing factors between OBCs and STs was the exclusion of the creamy layer of OBCs from benefits that the non–creamy layer received. This creamy layer principle however did not apply to the STs, giving all members equal protection without distinguishing whether members were advanced in any respect. In this situation, transferring the status of the Tai Ahom community from OBCs to STs would have bestowed them with greater benefits as the community as a whole would have been provided with all the rights and protections.

However, at present, the above scenario is far from the reality. In the recent decision of the Supreme Court of India in *Jarnail Singh and Others v. Lachhmi Narain Gupta and Others,*[59] a case regarding promotion in government services, the Court observed that the creamy layer principle could also be applied to the SCs and STs. Hence, the rationale that the transition provides better protection and upliftment of the entire community, serves no true purpose.

The principle of creamy layer was established in *Indra Sawhney v. Union of India*.[60] However, creamy layer was not decided only on the basis of economic backwardness. Social advancement was highlighted as a major factor that must be considered when establishing the creamy layer principle. The indicative factors of social advancement include property holding and economic growth as they are closely linked with social acceptance. It is contended that this layer must necessarily be excluded.

The creamy layer principle should be implemented where an individual falls above a predetermined economic level. These individuals may not suffer from social discrimination and may be considered as the affluent section of the backward classes. The means test therefore, can be applied in this situation.

The creamy layer achieves social purpose and confers an elevated status or standing in society. Hence, if the creamy layer, who are socially accepted and economically well off, is treated at par with the rest of the backward classes and given a reservation, it would violate Article 14, Article 16(1) and 16(4) of the Indian Constitution. This is because the creamy layer is not socially or economically equal to the backward classes.

In the said case of *Jarnail Singh v. Lachhmi Narain Gupta,* as highlighted by the Respondents, the State provides reservation under two circumstances- backwardness and inadequacy of representation. Three important elements- equity, justice and efficacy are context specific and there is no yardstick to identify

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[59] Jarnail Singh v. Lachhmi Narain Gupta, 2018 SCC Online SC 1641.
[60] Indra Sawhney v. Union of India, AIR 1993 SC 477.

or measure them. If the State fails to identify and measure these three elements, then the provision for reservation is invalid.

Hence, the judgement delivered in the present case, pertaining to the creamy layer, is one which treats unequals as equals. The object of reservation is to ensure equality of the backward classes with other citizens of India. This will not be possible if the creamy layer within a particular class receives all the jobs in the public sector, leaving the rest of the class as backwards. Thus, when a Court applies the creamy layer principle to SCs and STs, it does not interfere in the Presidential List under Articles 341 or 342 of the Constitution. Only those who have come out of untouchability or backwardness are excluded from the benefit of reservation under Articles 14 and 16, even though they are still present in the Presidential Lists.

The present judgement states that Articles 14 and 16 should be interpreted harmoniously with Articles 341 and 342. When there is an application of the Doctrine of Harmonious Interpretation, the Parliament has the freedom to include or exclude people from the Presidential List based on the relevant factors. Similarly, the Constitutional courts implement the principle of reservation with requisite jurisdiction by applying Articles 14 and 16 of the Constitution.

Hence, the application of the creamy layer test to SCs and STs, in exercise of application of the basic structure test to uphold the amendments that led to Articles 16(4-A) and 16(4-B), did not interfere with Parliament's power under Article 341 or Article 342 of the Constitution of India.

This judgement makes it very clear that the creamy layer principle is not limited to the OBCs. The principle can also be applied to the STs and the SCs. It exposes the lack of requirements or need for the Tai Ahom community to be shifted from the OBCs to the STs, since they are already receiving the same treatment in this regard.

Therefore, there is no requirement of conferring the status of ST to the Ahom community as it does not result in a substantial change from their current position as OBCs.

G. THE TAI AHOM COMMUNITY DOES NOT POSSESS TRIBAL CHARACTERISTICS

Lastly, the title of ST is immensely unfit for the Ahom community as it does not possess the characteristics that gives communities a distinct tribal identity.[61] The Lokur Committee was established to formulate the criterias required to grant ST status to a community in 1965. These

[61] Townsend Middleton, *Scheduling Tribes: A View From Inside India's Ethnographic State,* 65 FOCAAL—JOURNAL OF GLOBAL AND HISTORICAL ANTHROPOLOGY 13 (2013).

criterias are: (a) indication of primitive traits, (b) distinctive culture, (c) geographical isolation, (d) shyness of contact with the community at large, and (e) backwardness.[62] Apart from their distinctive culture, none of the other criterias match with the Ahom Community and since the Ahoms do not possess characteristics of a tribe, there is no reason to make them a ST.

Padmanath Gohaibaruah, an eminent literary scholar of Assam realised that the coming of British in Assam marked a downfall of the social status of the Ahoms. Therefore, the Ahom Sabha was formed in 1893 with him as its President.[63] The Ahom Sabha became popular in most parts of Assam and ignited a strong feeling amongst the community to organize under a common platform. In the initial stages it engaged with the economic and social difficulties of the Ahoms. Eventually, the organization realized that the earlier anti-British policy followed by their ancestors was not benefitting them and sought to focus on strengthening their community through British support.

Most of the leaders of the Ahom revival movement belonged from the economically affluent and educationally advanced section of the community. They were acquainted with the merits of western culture and started to call upon others to take part in contemporary development. This means that a few people from this community did take advantage of the system of modern education and managed to uplift themselves. The system did not keep the community from developing itself. Rather, the community at large chose to distance itself in the feeling of pride.

The Ahoms tried another method to raise their social status, by claiming to be Kshatriyas. A Kshatriya Association was formed with Padmeswar Singh Naoboisa Phukan as the General Secretary.[64] This organization sought state patronage for the Ahom Claim of being Kshatriyas. From 1902 onwards, the Chief Commissioner of Assam received numerous petitions and requests to recognize Ahoms as the prestigious Kshatriya warrior class.[65] Several branches of the Kshatriya Association formed in Golaghat, Dibrugarh, North Lakhimpur, Nagaon and Tezpur also participated actively in this process by sending petitions. However, the government rejected this claim firmly on the ground that claims made by aboriginal tribes in Assam cannot be taken seriously. The disappointed Ahoms blamed this on a prejudiced Brahmin lobby that they believed were determined to reduce the Ahoms to low positions.[66]

Such instances prove that the Ahoms made attempts to become a part of the Hindu caste society and that they did not see themselves as a tribe until recently. It should also be noted that these developments were happening at a time when the country was not independent.The claim of being an ST can be

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[62] Government of India, National Commission for Scheduled Tribes: A Handbook, 2005.
[63] PADMANATH GOHAINBARUAH, MOR SOWARANI 48 (3rd ed., 2003).
[64] Bimal Dev & Dilip Lahiri, Cosmogony of Caste and Social Mobility in Assam 97 (1984).
[65] JAYEETA SHARMA, EMPIRE'S GARDEN: ASSAM AND THE MAKING OF INDIA 220 (2011).
[66] *Id.* at 220.

traced back to as recently as 1981, when a memorandum was sent to the Prime Minister of India by the All Assam Tai Ahom Society ('AATAS'). It can be understood that the motive behind this memorandum were the benefits and opportunities arising out of the ST status. It was not accepted at that time. They have been able to gather political support for this claim but it loses its validity when seen under the circumstances of other tribes. The situation has not changed much from that time and the reasons for which the community did not get the ST status then (which has been discussed at length above) stand correct even today. All these reasons make the conferment of the title of ST to the Tai Ahom community legally and socially inconsistent and arbitrary.

CONCLUSION

This article emphasizes that the proposal of giving the Tai Ahom community the status of a Scheduled Tribes is unsuitable. At present, the finalisation of the status of the Tai Ahom community is being awaited. The deadline for the submission of the final report on the Scheduled Tribe status of the six communities, including the Ahoms, was October 30, 2020.[67] The grounds of criticisms in this respect are the perpetuation of equality, redundancy and the lack of requisite characteristics to fit the description of STs.

In terms of characteristics, the Ahom community is definitely more fitting amongst the Other Backward Classes. Keeping in mind the lower sections of the historical Ahom societal hierarchy, it is clear that the lower sections of this hierarchy were deprived of social, economic and other privileges and must be protected and uplifted by the reservation system. The OBC status of the Ahom community already ensures this protection to the lower sections of the said hierarchy as implementing the creamy layer principle ensures the targeted upliftment of the unprivileged sections of the said community is successfully indulged in. A change from OBC to ST will not make any difference with regard to persons categorised as being in the creamy layer, therefore, the claim for ST in this context is redundant as the principle of creamy layer has been made applicable to persons belonging to ST Communities, as is the case with OBC Communities.

Thus, in the light of all the arguments raised against the Tai Ahom Community's proposed transfer from Other Backward Classes (OBC) to Scheduled Tribes (ST), it is asserted that the authors are not in favour of such an initiative by the Central Government, and believes that granting of reservation should be done sparingly to the most vulnerable communities only.

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[67] Deepali Sharma, Hindustan Times, *Deadline for Report on ST Status for 6 Assam Communities Ends Today. Here's What You Need to Know*, Hindustan Times (Oct. 30, 2020), https://www.hindustantimes.com/india-news/deadline-for-report-on-st-status-for-6-assam-communities-ends-today-here-s-what-you-need-to-know/story-75VysEnVHeAcHsKHvWaziL.html (last visited on December 18, 2020).

CREATING ACCESS THROUGH CREATIVE COSTS IN INDIA

Vasu Aggarwal*

In civil proceedings, parties bear high monetary costs in the form of expenses incurred on notices, typing charges, witnesses' expenses, and attorney's fees, among others. In India, the presumption is that the costs follow the event—the prevailing party will be entitled to recover its attorney's fees. The effect of this presumption is that it disincentivises insincere litigation, and thus, declutters courts. However, the increasing costs can act as a deterrent, thus restricting access to justice. On the other hand, in the United States, the presumption, for the attorneys' costs, is that the parties bear their costs. The effect of this presumption is that it ameliorates access to justice, as it does unnecessarily burden indigent persons. There is a dearth in literature with respect to understanding such costs in India. This paper attempts to cover the lacuna in the literature and argues that both access to courts and decluttering of courts are interconnected concepts. The paper further argues that India's presumption serves better access to courts by decluttering them in the long term. In the short term, the recent conceptualisation of creative costs such as planting trees and volunteering at NGOs provides a potential model for both access to courts and the decluttering of the courts. The first section explains and examines the benefits of the Indian and American presumptions. The second section suggests methods to provide the benefits of the American presumption in the Indian system of costs by introducing creative costs.

* B.A., LL.B. (Hons.) Student, NLSIU. Email: vasuaggarwal@nls.ac.in. The author would like to thank Professor (Dr.) Nanda Kishore and Ambarin Khambati for their kind comments on previous drafts of this paper.

INTRODUCTION

In civil proceedings, parties bear high monetary costs in the form of expenses incurred on notices, typing charges, witnesses' expenses, attorney's fees, among others. In India, the civil proceedings last for years in some cases, and thus, these monetary costs tend to be tremendously high. The party that loses the civil suit may be directed to compensate the winner for four kinds of costs—general costs, miscellaneous costs, vexatious costs, and costs for causing a delay.[1] However, in the scheme of the Code of Civil Procedure, 1908 ('CPC'), these costs have traditionally been monetary.

In India, there is a presumption favouring the loser compensating the winner for the general costs. This presumption has a general effect of deterring frivolous civil litigation by placing a potential monetary burden of paying other party's costs. In contrast to this, in the United States, the presumption, concerning an attorney's fees mainly, is that the parties bear their costs. The presumption ameliorates access to courts for those indigent,[2] as there is no fixed burden of paying the other party's costs. Although there seems to be immense literature regarding the debate on the two different presumptions in general, there is a dearth in literature covering recent innovations in awarding costs. This dearth is primarily due to civil procedure, which is considered to lie in the practitioners' domain instead of that of the academicians.[3]

In a recent series of peculiar orders, the Delhi High Court directed parties to plant trees, provide mid-day meals to orphanages and foster homes, and sanitary pads to the orphanages. More interestingly, such directions replaced the traditional monetary costs, as they resulted from improper behaviour by these parties during litigation. This paper argues that this innovation has the potential to put the age-old debate on costs to rest.

In light of various recent developments, this paper argues that *firstly*, the presumption in India [loser-pays] has a greater policy significance in India than the American presumption because it has a greater potential of decluttering the courts and the only purported benefit advantage of the American presumption is better access to courts. *Secondly*, access to courts, which is an advantage of the American presumption, can be realised in the Indian system through two measures - in the long run, by following the presumption, it would disincentivise frivolous litigation, declutter of the courts, and reduce the time and consequently, the costs of civil proceedings, and thus, ameliorating the access to courts, and, in the short run, the system of creative costs can be adopted, that would ameliorate the

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[1] C.K. TAKWANI, CIVIL PROCEDURE WITH LIMITATION ACT, 1963, 405 (8th ed. 2019).

[2] *See* Code of Civil Procedure, 1908, No.5, Acts of Parliament, 1908 (India), Order XXXIII Rule 1 for the definition of indigent parties.

[3] *See* Nanda Kishore, *Indian Civil Procedure: Scholarship Urgently Wanted!* (last visited Dec. 7, 2020), https://www.academia.edu/8662447/Indian_Civil_Procedure_Scholarship_Urgently_Wanted at p.7.

access to courts for the indigent by not placing the monetary burden on them. It may be noted that the scope of this paper is limited to costs in civil proceedings, and does not address any claims arising out of other facets of procedure that may cause delay or reduce access to courts.

I. PRESUMPTION OF COSTS: *LET THE LOSER PAY*

In India, under S.35(2) of the CPC, a presumption is created that the costs follow the event—the party obtaining a favourable decision from a court should be awarded the costs.[4] This presumption has been strengthened by judicial interpretation of the provision. In various decisions, the Supreme Court has expressed its disapproval of the lower courts' failure to award costs[5] and has held that when the courts decide that the costs should not follow the event, reasons for the same must be recorded in writing.[6] For example, In *Jugraj Singh v. Jaswant Sing*h, the procedural issue was whether the power of attorney was correctly delegated. Although the delegation of authority was improper in the first instance, it was corrected at the second instance. Despite the correct delegation the second time, it was challenged before both the High Court and the Supreme Court. The Supreme Court held that the delegation was correct, and said, "we are surprised to note that the learned Judge in the High Court did not award costs".

This paper refers to India's position, which is akin to the English position, traditionally referred to as the English rule. The Indian system of costs is contrasted with the American system of costs herein.[7]

In the United States, the federal law provides a presumption of a different nature, in the form of attorney's fees, compared to Indian law. It provides that the parties must pay their own attorney's fees,[8] and if a party wants to claim the attorney's fee, the party must request the court for the same.[9] Adversarial proceedings then follow this based on which the court is expected to allocate the costs.[10] Therefore, in terms of fixing the attorney's costs, American law is different from Indian law to the extent of this presumption.

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[4] Code of Civil Procedure, 1908, No.5, Acts of Parliament, 1908 (India).
[5] Jugraj Singh v. Jaswant Singh, 1970(2) SCC 386 at ¶ 13; Kali Prasad Singh v. Ram Prasad Singh, 1974 (1) SCC 182 at ¶ 7.
[6] *Id.*
[7] More specifically, while relying on different articles/cases too, this paper uses the term Indian rule and not English Rule even in the cases where these sources/authorities have used the term 'English Rule' to maintain uniformity.
[8] Fed. R. Civ. P. 54(2).
[9] *Id*., 54(2)(a).
[10] *Id*., 54(2)(a)-55(2)(d).

Thus, the *first* question that must be considered is whether the presumption should lie in favour of the winner (per the Indian rule), or are the parties to bear their costs (per the American rule). Among other factors, the presumption is based on reasons of public policy or convenience. These reasons must be so socially desirable that they outweigh the general requirement of a balance of probabilities.[11] Thus, to address the question of presumption, conflicting policy reasons for costs must be assessed.

A. BENEFITS OF THE AMERICAN RULE: ARE THERE ANY?

There are two reasons for the American rule of costs. *First*, the principled reason for such presumption is to provide access to courts for the indigent. With the potential of higher monetary costs hanging over their heads, those who do not have access to resources might be averse to filing civil suits even when they have legitimate claims.[12] However, this paper disagrees with the American rule's potential to increase access to courts for two reasons. *Firstly*, the winning party may still apply for attorney costs and obtain it against an indigent.[13] Thus, the risk of an indigent paying for the other party's attorney's costs is not completely excluded. *Secondly*, as much as it excludes the indigent person from paying the other party's attorney's costs, it excludes the indigent person from getting compensated. For example, hypothetically, even if an indigent person wins a case, they might still experience only a pyrrhic victory, given that they would not be able to get compensated for their costs. Therefore, the principled reason for American rule is incomplete and insufficient to provide access to the courts.

Second, the practical reason for such a presumption is the difficulty in ascertaining an average attorney's fees. This practical concern arises from the fact that the wealthier party may be incentivised to employ costlier attorneys to increase their chances of winning, with the hope of having the other party pay for the costlier attorney.[14] Therefore, it becomes difficult to ascertain the average fee that an attorney charges. However, this practical difficulty must still arise when the party files a motion to claim attorney's fees in the American system.[15] In those cases too, the courts do resolve this exact difficulty. Thus, this practical reason is not a valid justification for the American rule.

A consequentialist reason for this rule is that it impedes the attorneys and clients' freedom to contract, as the attorneys would then be dependent on the other party to pay their fee.[16] However, this reason, in itself, is insufficient to make a case for American rule as not only can freedom of contract have

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[11] Raymond I. Geraldson, *Effect of Presumptions*, 26 MARQ. L. REV. 115, 131 (1942).
[12] For a discussion of the policy reasons behind the American rule, *see* James R. Maxeiner, *Cost and Fee Allocation in Civil Procedure*, 58 THE AMERICAN JOURNAL OF COMPARATIVE LAW 195, 198 (2010).
[13] Fed. R. Civ. P. 54(b)(2).
[14] Maxeiner, *supra* note 12.
[15] As has been stated earlier, per Rule 54 of Federal Rules of Civil Procedure the parties may apply to obtain the costs of the proceedings.
[16] Maxeiner, *supra* note 12.

exceptions,[17] but also because the losing party is liable to indemnify the winning party, and not be liable to pay the attorney of the other party. Even if that were not the case, it has been proven that attorneys are incentivised to complete their submissions with the best quality when their fees are independent of the party's victory.[18]

B. BENEFITS OF THE INDIAN RULE

On the other hand, the Indian rule has two policy reasons. *First*, the Indian rule compensates the party, who had to pay legal expenses, for doing legally correct acts. This means that the party that was following the law must not have to pay court fees, or attorney's fees, as the party has not committed any wrong.[19] On the other hand, the party that has failed in the suit is responsible for making the winner pay attorney's fees. Therefore, the losing party must make the winning party 'whole'.[20] Thus, the losing party is responsible for compensating the winning party.

However, only a presumption and not a blanket rule can be justified by this policy reason. This presumption may, in principle, be rebutted. The policy reason for allowing such rebuttal may be that the law itself may at times be inherently ambiguous, especially in cases related to broader principles as opposed to narrower and well-defined rules.[21] Thus, when there is an actual interpretation problem, the parties may not ascertain whether their actions conform with the law, because the law itself has a problem of ambiguity.[22] Therefore, by making/defending a claim in the court, the party does not, *per se*, do something incorrectly.

Second, Indian rule tends to achieve the result of decluttering the courts. If the parties have to pay their litigation costs, the parties may want to try their luck by instituting the civil proceedings. However, if the parties have to pay the other party's costs, it deters them from filing the suits where they are merely

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[17] John F. Vargo, *The American rule on Attorney Fee Allocation: The Injured Person's Access to Justice,* 42 THE AMERICAN UNIVERSITY LAW REVIEW 1567 (1993) (for a discussion of the inception of the American rule, its history and its practical application prior to 1993.)

[18] Albert Ehrenzweig, *Reimbursement of Counsel Fees and the Great Society: In Sorrow and in Anger and in Hope,* 54 CALIFORNIA LAW REVIEW 792, 800 (1996) (arguing that the fear of unrecovered fees is strong enough to "compel complete submission instead of mere compromise" and prevents attorneys from defending meritorious claims.)

[19] Howard Greenberger, *The Cost of Justice: An American Problem, an English Solution,* 9 VILL. L. REV. 400 (1964), highlights the importance of the Indian rule in making the winning party 'whole' by getting compensation from the losing party and argues that certain issues in the American Civil Justice System can be addressed by adopting the Indian rule.

[20] *Id.*

[21] For a detailed discussion of this concept *see* Louis Kaplow, *Rules versus Standards: An Economic Analysis*, 42 DUKE LAW JOURNAL 556 (1992).

[22] *Id.*

"trying their luck". Thus, a deterrence effect is achieved by fear of being subjected to the other party's costs. This deterrence effect is especially true for the non-meritorious claims that have a larger effect of overburdening the courts.[23] Thus, deterring non-meritorious claims that overburden the courts, the Indian rule reduces the courts' burden and declutters them.

II. Access to Courts: Benefits of American rule in the Indian Scheme

From the discussion of the Indian rule and the American rule, the principal shortcoming of the Indian rule appears to be that it restricts access to courts. However, to address the issue of access to courts, two solutions are suggested - first, following the presumption and awarding reasonable costs, and second, awarding creative sustain access to courts while employing the Indian rule.

A. Following the Presumption and Awarding Practical Costs - Solution for the Long term

Although better access to courts may have been considered a product of the American rule, the real purpose of access to courts is that the Indian rule may realise access to justice. When the courts are so cluttered that the cases drag on for years, an initial impetus will not help realise the actual purpose of access to justice in the form of lower costs to bear. In lengthy litigations, the parties' costs to pay to their attorneys would add up to be so high that the initial impetus that the American rule attempts to provide would not achieve its larger goal of access to justice.

In India, the pendency of cases has been increasing significantly. Currently, over 92,73,674 civil cases are pending before the Indian district and taluka courts.[24] Over 63% of these cases are more than one-year-old.[25] Over 5,00,000 civil cases of these are more than ten-years-old.[26] More than 32,02,215 civil

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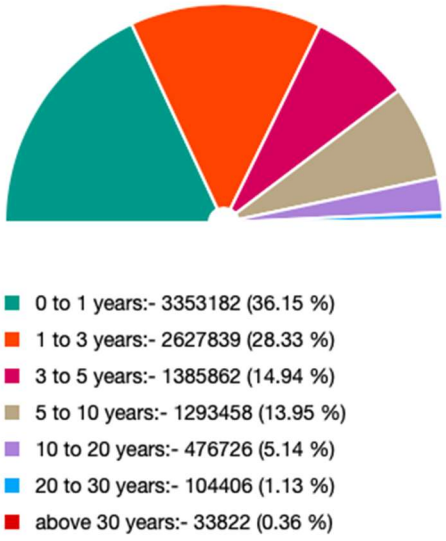
[23] Calvin A Kuenzel, *The Attorney's Fee: Why Not a Cost of Litigation*, 49 Iowa L. Rev. 75 (1963), compares the American rule and the Indian rule to conclude that Indian rule is preferable as it brings social benefits in the form of decluttering the courts, in addition to the reasons explained in Section II.B. However, this article stresses upon the attorneys' personal monetary gains appearing to be higher in the American rule than the Indian rule as the cause for not shifting to the Indian rule which clearly provides many more social benefits; *see also* Greenberger, *supra* note 19.

[24] National Judicial Data Grid, https://njdg.ecourts.gov.in/hcnjdgnew/?p=main/pend_dashboard (last visited Aug. 17, 2020). The data, on this website, is collated from the data provided on individual websites of individual courts. It may be noted however that this data may not accurately represent the actual number due to issues in procuring data from some Courts.

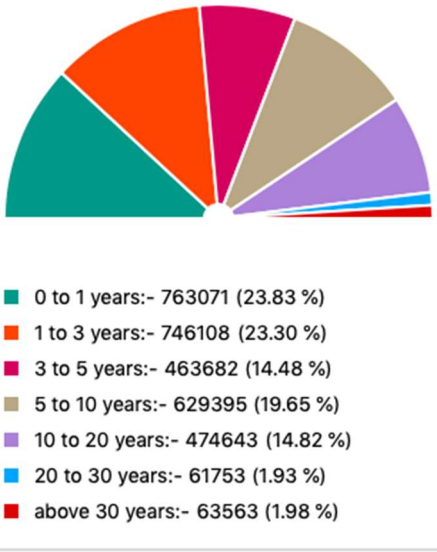
[25] *Id.*

[26] *Id.*

cases are pending in the High Courts, and here too, more than 5,00,000 cases are more than ten years old.[27] When cases are dragged for this long, the cost of civil litigation automatically increases. When the cost of civil litigation increases, it disincentivises indigent litigants to approach the courts. For example, sixty-four per cent of the litigants are expected to pay more than Rs. 20,000 on a single case.[28] More than fifty-two per cent of the litigants spend more Rs. 40,000 on a single case.[29] This is in a country where the monthly per capita income is less than twelve thousand rupees.[30] Hypothetically, an average Indian who wants to litigate will have to spend about three months of their salary on litigation, and if they lose, they would be expected to spend much more than that. Therefore, these statistics point towards a pressing need to declutter Indian courts.[31]



Age-Wise Pie-chart of the Cases in District and Taluka Courts[32]



Age-Wise Pie-chart of the Cases in High Courts[33]

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[27] *Id.*

[28] Daksh, *Access to Justice Survey* 2020, https://dakshindia.org/access-to-justice-survey-results/index.html# (last visited Aug. 25,2020). For an understanding of the methodology adopted to conduct the survey, *see* Daksh, *Access to Justice Survey 2015-16*, https://dakshindia.org/wp-content/uploads/2016/05/Daksh-access-to-justice-survey.pdf.

[29] *Id.*

[30] The Hindu, *High Court directs couple to plant 100 trees for employing minor gir*l (Mar. 27, 2019) https://www.thehindu.com/news/cities/Delhi/high-court-directs-couple-to-plant-100-trees-for-employing-minor,-girl/article26426002.ece.

[31] It may be relevant to point out that failure to comply with the presumption of costs is not the sole reason for cluttered courts. However, compliance with the presumption may declutter the courts to a certain extent.

[32] National Judicial Data Grid, *supra* note 24.

[33] *Id.*

There are two reasons why the Indian rule, already present in the system, has failed in India. *First*, the Indian rule has not been applied as it was envisaged. The purpose of costs under S.35 of the CPC was to indemnify the winner to a realistic and practical extent.[34] However, the litigation costs which are awarded to the winning parties have been dismally low.[35] With a few exceptions,[36] the quantum of costs paid to attorneys has not been revised in India.[37] Another example of costs being low is S.35A of the CPC—which provides for costs in vexatious proceedings. For vexatious claims or defences, costs have been fixed at a maximum of three thousand rupees since the inception of S.35A.[38] Even though the sum of three thousand rupees may have been appropriate in 1977, it is not appropriate for present circumstances when the provision was first laid down. This is because it has not been adjusted for inflation since 1977. The courts have followed a traditional approach and explicitly limited the power to award costs to what has been laid down in the CPC, read with the High Court Rules. When actual costs are not laid down in the statutes, the courts must not award actual costs.[39] Since the costs have not been adjusted according to the prevailing economic conditions, it fails to create the deterrence effect. Therefore, it fails to meet its purpose of decluttering the courts and indemnifying the parties.

Second, courts have distressingly failed to follow the statutory provisions. S.35(2) of the CPC categorically provides that the court must record reasons for not awarding costs favouring the winner.[40] Courts order the costs to be borne by parties themselves without providing any reasons for the same.[41] This is in clear contradiction to the statutory rule laid down in S.35(2). The requirement

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[34] Salem Advocate Bar Association v. Union of India, (2005) 6 SCC 344. In this case, the Supreme Court formed a committee to review modalities of the 1999 and 2002 amendments to the CPC. This committee reported on three issues. This paper refers to Part-I of this report and the judgment thereafter, related to the costs in civil proceedings.

[35] Law Commission of India, *Costs in Civil Proceedings* at ¶ 6.6 (Law Commission Report No. 240, 2012), https://lawcommissionofindia.nic.in/reports/report240.pdf.

[36] *See* the amendment to the Delhi High Court Rules, *infra* note 37, which increases the limit on costs to be paid to attorneys to six thousand five hundred rupees and fourteen thousand five hundred rupees when claims exceed one lakh and five lakhs respectively. However, for non-pecuniary claims, the limit was five thousand rupees.

[37] Law Commission of India, *supra* note 35 at ¶ 6.14. *See also*, Delhi High Court (Original Side) Rules, 2018, Chapter 23, Rule 2 which provides that costs must reflect actual costs, including witness fees, miscellaneous costs etc.

[38] Code of Civil Procedure, *supra* note 4, § 35A.

[39] *See* Sanjeev Kumar Jain v. Raghubir Saran Charitable Trust, (2012) 1 SCC 455, where the Delhi High Court did not award attorney costs since the High Court Rules did not permit it.

[40] Law Commission of India, *supra* note 35 at ¶ 4.2.

[41] For an understanding of the extent to which the courts have failed to follow § 35(2), *see* Hanumant Pandurang Deshmukh v. Vithal Maruti Bhosale, W.P. No.263/2016 (Bombay High Court) at ¶ 17; B. N. and Associates, Patna & Ors. v. Pramod Kumar, F.A. No. 81/2018 (Patna High Court) at ¶ 44; Krishna Pandey S/o Ram Nagina Pandey v. Ram Nagina Pandey S/o Jagarnath Pandey & Ors., F.A. No. 219/1999 (Patna High

of recording reasons is built to augment the presumption and ensure compliance.[42] Therefore, the deterrent effect that the Indian rule intends to achieve in principle cannot be realised without adherence to the statutory provisions.

Therefore, there is a need to strictly follow the statutory presumption and adjust the costs according to the prevailing economic conditions. A simple solution to adjusting costs could be to enact a dynamic provision for automatic adjustment of the original three thousand rupees amount to inflation each year. For example, if adjusted for inflation, the three thousand rupees costs in 1977 would translate to seventy-four thousand rupees in 2020. Such calculations may be performed easily by referring to the inflation value provided by the Government each year. The maximum cost of seventy-four thousand rupees would be effective, given the prevailing market/economic conditions. Under this provision, whenever the inflation for each year is released, the costs are automatically adjusted by the implementing body without the legislature's involvement. This paper concedes that this is a long term solution, that it would take years for the deterrence to declutter the courts effectively, and there is a need for a short-term solution to providing better access to justice.

B. The Inception of Creative Costs: A New Approach

The inception of creative costs provides a mechanism to create access to courts in the short run. Until now, this paper has considered the contours of costs in the traditional sense: awarding monetary claims in favour of one of the parties. However, recently, the contours of costs have been widened by the High Courts. For example, the Delhi High Court, in *Merck Sharp and Dohme Corp. v. Abhaya Kumar Deepak*, directed the losing party to plant trees worth eighty lakh rupees.[43] In this case, the petitioner had filed for an injunction against the respondent for listing, and selling a medicine (pharmaceutical composition used to cure diabetes). This case was disposed of by the court because of the compromise deed that the parties had filed. However, the respondent failed to follow the deed. They intentionally breached the compromise deed. The petitioner, thus, filed a contempt complaint against the respondent. The respondent tendered an unconditional apology to the court and expressed its willingness to be subjected to the punishment that the court deemed fit. In this case, the court directed the respondent to spend eighty lakh rupees for planting trees, and thus, used it for the benefit of society.

Court) at ¶ 66; Rama Nand v. Chief Secretary, Government of NCT of Delhi, Civil Appeal Nos. 5829-5830/2012 (Supreme Court of India) at ¶ 19; Commissioner of Income Tax, New Delhi v. Nalwa Investment Limited, ITA Nos. 822, 853, 935 & 961 of 2005 (Delhi High Court) at ¶ 31.

[42] Providing clear reasoning tends to deter insincere deviation from presumptions, because it adds to the transaction cost.

[43] Merck Sharp and Dohme Corp. v. Abhaya Kumar Deepak, CONT. (CAS) (C) 846/2018 (Delhi High Court).

The court further directed that the compliance reports be filed on specific dates after planting these trees.

There have been similar examples of High Courts awarding costs creatively like this. The Delhi High Court directed a couple to plant trees, in a case involving the employment of a minor, as costs,[44] and in another case, the Delhi High Court directed a restaurant chain to provide mid-day meals to children in ten orphanages and ten foster-homes for two years and provide sanitary pads to an orphanage.[45]

These costs seem very beneficial; however, this kind of cost does not have legal backing under the CPC's costs regime. In these cases, the courts have not provided for any legal backing, have not even invoked S.151 of the CPC which gives the court the power to make such orders as may be necessary to prevent abuse of the process of the court.

III. SUGGESTIONS: THE WAY FORWARD

This paper argues that these kinds of creative costs have much more potential to help achieve access to courts. The risk of monetary burden deters access to courts, and these creative costs do not create that monetary burden. It is important to note here that creative costs, in the cases illustrated above, had monetary elements. For example, the parties were responsible for buying the trees, planting them, and taking care of them. However, similar creative costs can be envisaged which do not have monetary elements in them. For example, when buying trees is taken out of these costs, what remains are non-monetary costs, namely planting them and taking care of them. If indigent parties are subject to these creative costs instead of monetary costs, in those cases, indigent persons will not be unnecessarily deterred from approaching courts. Therefore, the American system of costs' purported benefit, namely, access to courts, may be achieved through creative costs while maintaining the benefit of Indian rule—decluttering the courts by having a potential non-monetary deterrent in the form of creative costs. Thus, although an indigent person would not feel the unnecessary (unfair) monetary burden, the indigent person would not indulge in non-meritorious claims because the indigent parties would still be expected to perform the social acts imposed upon them as creative costs.

At this stage, it may appear that an essential benefit of Indian rule—decluttering the courts, is being retained through creative costs, but another important value of the Indian rule—'making the winning

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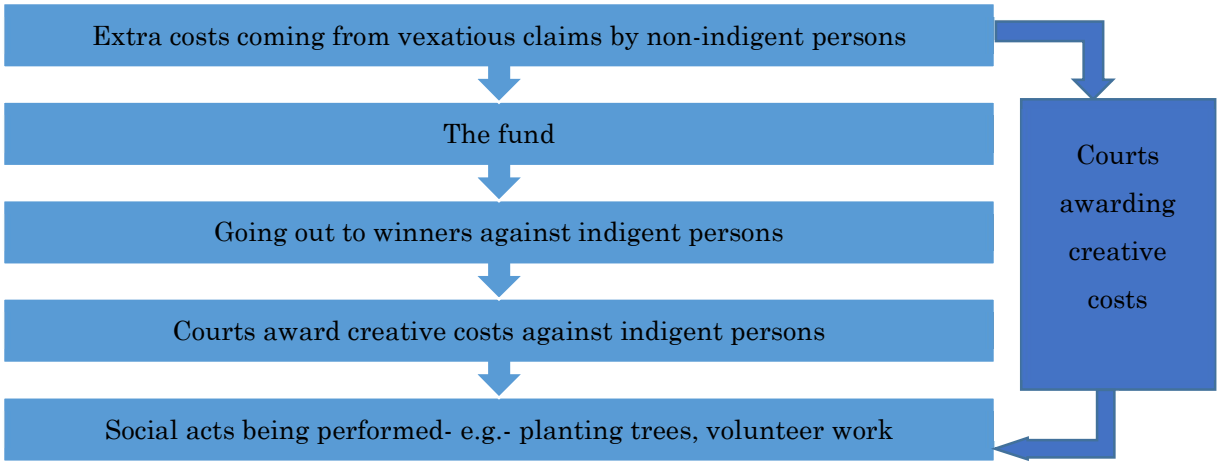
[44] The Hindu, *High Court directs couple to plant 100 trees for employing minor girl* (Mar. 4, 2019). https://www.thehindu.com/news/cities/Delhi/high-court-directs-couple-to-plant-100-trees-for-employing-minor-girl/article26426002.ece.

[45] The Hindu, *Restaurant chain told to provide mid-day meal* (Mar. 27, 2019) https://www.thehindu.com/news/cities/Delhi/restaurant-chain-told-to-provide-mid-day meals/article26647676.ece>.

party 'whole', is getting lost. However, it is possible to retain this value—making the winning party 'whole'—of the Indian rule. To retain this value, it is suggested that a separate fund be created. This fund would be financed through extra costs than just compensation obtained from vexatious or frivolous non-indigent parties' claims.[46] This fund may then be used to compensate the parties that win against indigent persons—who would be liable to discharge creative costs imposed upon them. It must be noted that the general rules of taxation of costs, including the cap on costs awarded, apply to the parties litigating against indigent parties. This ensures that no party is unduly advantaged by virtue of their litigation being against the indigent parties.



[There are two sides to this flow-chart. On the right side, the flow-chart displays the current system of costs, where the parties are being directly asked to perform Social Acts through creative costs. On the left-hand side, in the straight-line flow-chart, the same beginning and same end-result are being achieved, but the problem of access to courts is being solved in the process. This problem is being solved by creating the fund, as displayed by the second holder in the chart. The extra costs obtained from the vexatious claims are put into this fund. Further, from this fund, the parties winning against the indigent are expected to be compensated and to deter frivolous suits by the indigent, they are expected to perform these social acts.]

When awarding creative costs, there is a need for the courts to tread carefully. The creative costs are social acts, and the *ad hoc* nature of these costs has not led to a uniform application. While laying down rules with well-defined contours may be not only difficult but also counter-productive,[47] a standard

[46] These extra costs may be accumulated through § 35A and § 35B of the CPC. § 35A provides for costs in respect of false or vexatious claims or defences, and § 35B provides for costs for causing delay.
[47] It would be difficult because of the vast variety of acts that may count as social acts. It would be counterproductive because it would restrict the scope based on precedents, and where there is a different need

must guide the court's decision to avoid any interference by personal prejudices. This includes steering clear of religious work and anything that may be impugned to favour the judiciary or the judges.[48] The creative costs must align with the values laid out in the Indian Constitution.[49] The award for creative costs may specifically derive its components from Part IVA of the Constitution. A similar idea was echoed in *Merck Sharp and Dohme Corp. v. Abhaya Kumar Deepak* when the court suggested that the duty to care for our natural resources, as described under Article 51A, falls upon the citizens.[50] The order for creative costs should also be a reasoned order, and in the current scheme of the CPC, it may be reasoned under S.151 of CPC.

CONCLUSION

This paper attempts to add another dimension to the age-old debate between the Indian rule [presumption that costs follow the events] and the American rule [presumption that parties bear their costs]. The Indian rule offers two advantages—*first*, making the winner 'whole'; and *second*, it deters insincere litigation and helps in decluttering the courts. However, one benefit of the American rule compared to the Indian rule is that it ameliorates the access to courts by not overburdening the indigent persons with the other party's extra costs.

This paper argued that there are solutions to turn the disadvantage of the American rule on its head. In the long term, in India, where the courts face an endless backlog, the costs of litigation exponentially increase because of the delay in resolution. If the presumption is followed strictly and practical costs are awarded by default, insincere litigations would decrease, thereby reducing the burden on the courts

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of time or an unfavourable situation, it may fail to provide the right action. *See* Mitali Agarwal, *Beyond the Prison Bars: Contemplating Community Sentencing in India*, 12 NUJS L. REV. 138, 139 (2019).

[48] For example, in Ashok Kumar Mittal v. Ram Kumar Gupta, (2009) 2 SCC 656, it was observed that the court awarded the costs be paid to the High Court Legal Services Committee (HCLSC). The Court held that judges cannot award costs to create a corpus or an expense fund for the HCLSC. Other observations made by the court with respect to costs were that the primary object of costs is to compensate parties for the expenses incurred by them during the litigation and must flow from the loser to the winner. The present system of awarding meagre costs was criticized.

[49] Religious work may mean anything that may be construed to be favouring a particular religion. For example, recently, a Ranchi court conditioned bail upon distribution of copies of the Quran. This would be in furtherance of a religion and must not be granted as creative costs. *See* Asia News International, *Ranchi court drops condition of distribution of Quran copies for bail to Richa Bharti for posting communal comments* (Jul. 17, 2019), https://www.firstpost.com/india/ranchi-court-drops-condition-of-distribution-of-quran-copies-for-bail-to-richa-bharti-for-posting-communal-comments-7012701.html.

[50] Merck Sharp and Dohme Corp. v. Abhaya Kumar Deepak, CONT. (CAS) (C) 846/2018 (Delhi High Court).

and reducing delay in resolution time. By reducing the time spent on dispute resolution, the costs, in totality would also decrease, thereby, significantly increasing access to courts.

In the short run, the problem of access to the courts can be solved by subjecting the indigent persons to creative costs, which creates a balance between the social and economic burden indigent parties would have to bear for frivolous litigation, thereby curbing insincere litigation.