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Indigenous People Rights over Biological Resources of India in the Context of Biodiversity Act of India

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ABSTRACT

Over the centuries, indigenous peoples have developed a close and unique connection with the lands and environments in which they live. They have established distinct systems of knowledge, innovations and practices relating to the uses and management of biological diversity on these lands and environments. Much of this knowledge forms an important contribution to research and development, particularly in the areas such as pharmaceuticals, agricultural and cosmetic products. This increasing economic importance of biological resources and related knowledge of these resources has made the allocation of property rights as one of the most contentious issues in the discussions concerning biodiversity management. But this new allocation does not recognize any property rights of holders over their knowledge. As far as India is concerned one of the mega biodiversity countries of the world and is also concentrated with indigenous people too. A major intervention in this regard is the adoption of the Biodiversity Act of 2002. But existing legal framework does not confer positive protection on the rights of traditional knowledge holders in their traditional knowledge. In this context, this paper seeks to analyze how the text of the law and its implementation has seriously taken care of the community control over biodiversity, the associated knowledge, its use, and protection.

I. INTRODUCTION

The current concern with TK policy in India may be traced back to the early 1980's when the first set of biodiversity and cultural heritage misappropriations by multinational pharmaceutical business were brought into light.[3] While looking into the Indian context, India is one of the recognized mega-diverse countries of the world, harbouring nearly 7-8% of the recorded species of the world, and representing 4 of the 34 globally identified biodiversity hotspots (Himalaya, Indo-Burma, Western Ghats and Sri Lanka, Sundaland).India is also a vast repository of

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[3] Sudhir Krishnaswamy, *Access to Knowledge and Traditional Protection: The Indian Experience*. In Ramesh Subramanian and Lea Shaver (eds.,). *Access To Knowledge In India: New Research on Intellectual Property, Innovation & Development*, Bloomsbury Academic, UK (2007), p. 17.

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traditional knowledge associated with biological resources.[4] India is home to various unique ethnic groups who possess various TK and the conservation becomes inevitable in context of its relation with country's identity. India is fortunately endowed with a wide range of agro-climatic conditions that support the growth of an equally diverse range of plant and animal species. It has been well recognized that valuable and productive biological resources are crucial for sustainable economic development.[5]TK accounts as a valuable attribute of the indigenous and local communities that depend on it for their health, livelihood and general well being.

In the recent decades, there has been increased demand for the genetic resources, especially those associated with traditional medicines, all over the world. A large number of plant species that were traditionally used by local communities have now been commercialized. It has been pointed out in various international negotiations and forums that any attempt to exploit the TK for industrial or commercial benefit can lead to its misappropriation and may affect the interest of its rightful custodians. There are concerns that this knowledge is being used and patented by third parties without the prior informed consent of TK holders and these concerns have pushed India to enact the Biodiversity Act in 2002 with a three tired institutional mechanism. So in this background, it is pertinent to examine how far the act has protected the resource rights of local communities.

II. THE ROLE COMMUNITIES IN THE CONTEXT OF BD ACT: EMPOWERMENT OR MARGINALIZATION

It is well known fact that Indigenous communities have been immensely contributed for the social, economic and culture of our country. But their contribution to world stock of knowledge has not been properly acknowledged in existing laws and legislations. To an extent Nagoya protocol has clarified indigenous and local communities are holders and owners of such knowledge. It is quite evident that some governments such as Malaysia and Kenya have been recognized their contribution by incorporating protective measures where as countries like India is endowed with rich biological resources associated with traditional knowledge of indigenous communities has not been acknowledged and protected in the existing legislation.[6] So in this context, it is pertinent to examine how the protection of indigenous communities has been

[4] CBD, "Status and trends of biodiversity, including benefits from biodiversity and ecosystem services", available at https://www.cbd.int/countries/profile/?country=in(accessed on 11/8/2019)

[5] S. Kannaiyan, "Biological Diversity and Traditional Knowledge" , 2007, available at http://nbaindia.org/uploaded/docs/traditionalknowledge_190707.pdf

[6] Chakrabarty, S.P., Kaur, R. "A Primer to Traditional Knowledge Protection in India: The Road Ahead", Vol .42, 2021, Liverpool Law Review, pp.401–427, at p. available at https://doi.org/10.1007/s10991-021-09281-4(acessed on 21/1/201).

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envisaged by CBD as well as Nagoya endorsed in the context of biodiversity act. Coming to Indian context, the term "indigenous" is a contested issue. A significant discussion regarding applicability of the term indigenous still exists under the domestic legislation even after parties to international human rights instruments as well as CBD and Nagoya. It is well known fact that term "indigenous peoples" have been recognized in international human rights instruments as well as the specific declarations of indigenous people where as the application of these instruments remain as challenging in the Indian context. It is established fact there is an inseparable relationship between a genetic resources and the knowledge associated with its holders and it is imperative that the approval and involvement of the holders of such knowledge are necessary to provide permission to access the material. Even after the conclusion of Nagoya protocol, which gives certain clarity on ownership the communities over the GRs and associated TK as contemplated by Article 8 (j) of the CBD but it has not been implemented in many ABS laws including India. However, the Community rights over genetic resources themselves have wanted more clarity and the ownership status of the associated TK needs to be clarified. In the Article 8 j of the CBD which recognizes the contribution of local and indigenous communities to conservation and sustainable utilization of biodiversity and also considered as holders of such knowledge and innovation. However the biodiversity act has partial compliance with CBD provisions in many respects such as PIC and in the recognition of the term Indigenous people. However, the Act avoids the term indigenous people and uses the vague phrase "local people".[7] The CBD unequivocally recognizes the indigenous people, their knowledge system, and their rights in relation to biodiversity management.[8] So in this context as Faizi pointed out that it seems that in recognizing the indigenous people they perceive a threat to their existence. Primarily, the government do not recognize the term indigenous per se, irrespective of using the word aboriginal once, in a document before the international community.[9] This position of India in the international forum reinstated that tribals survive but not as indigenous communities.[10] It is interesting to note that the Indian government voted in favor of the UN Declaration on the Rights of Indigenous Peoples (UNDRIP in 2007) and signed the ILO Convention 107. But the government continues to deny the term and concept of "Indigenous Peoples" claiming that all Indians are Indigenous. However it is interesting to note that earlier discussion relating to

[7]Faizi.S. A diverse bill. Down to Earth, 2001, available at https://www.downtoearth.org.in/blog/a-diverse-bill-16212(acessed on3//9/2013).
[8] Ibid
[9] Chakrabarty, S.P., Kaur, R. "A Primer to Traditional Knowledge Protection in India: The Road Ahead", Vol .42, 2021, Liverpool Law Review, pp.401–427, at p. available at https://doi.org/10.1007/s10991-021-09281-4(acessed on 21/1/201).
[10] Ibid.

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international human rights instruments particularly in ILO 1957, India placed no objection with regard to the term indigenous and supported upliftment of communities into larger social and political system. But in the later discussions, particularly in ILO convention in 169, the term was attached with certain rights such as right to self determination and rights over land and resources has led to the current objection of indigenous by India. Still India follows the ILO 107 which has already replaced by ILO 169 and till date has not taken any step for ratification of the Convention 169. In this context, India is trying to justify her objection by evoking political and substantive reasons. So India claimed that it is impossible to determine who came first in its territories due to centuries of migration and absorption of different cultural groups. On such conditions it is not easy to date back centuries and millennia when the movement of different groups and culture and religion has happened. On the question of indignity, the second argument of India is purely political one. Indian government argued that recognition of special rights and entitlements of having been the earliest or original occupants might spur and legitimate chauvinist claims by groups all over India, many of which might be very powerful locally while in some sense non dominant nationally. The main issue here is that a political mobilization based on indigenousness is likely to prove disastrous, or to have undesirable consequences in a country like India. So it will undermine sovereignty and territorial integrity due to the stated rights of indigenous peoples rights to self determination.[11] While, India reiterated its same position during the adoption of UNDRIP, India stated that had consistently favored promotion and protection of indigenous rights but the right of indigenous peoples to self-determination does not apply to India because self-determination applies only to people under foreign domination and not to those living in independent states. On such condition the indigenous right to self- determination could not applicable to India. The great paradox is that proclaiming itself as the protector of indigenous rights internationally has denied such rights to indigenous communities in self boundary. But it seems to be India's long standing concern to keep the concept of indigenous at safe distance .In the biodiversity act carefully avoids the term indigenous people and uses the vague phrase "local people, local community and benefit claimers interchangeably. Moreover; it does not offer any definition on local people, leaving it to the bureaucracy for the rules to be formulated. Where CBD was clear on whom these holders are, our own national legislation shows a remarkable callousness by using loose and vague terminology leading one to wonder whether there is deliberateness to the ambiguity. So it can be seen that Indian Biodiversity Act is more focused on the international trade in biological

[11] Bengt, G Karlsson., "Asian Indigenousness: The Case of India", Vol3(NO:4), Indigenous Affairs, 2008, pp-24-30, atp.26, available at www.iwgia.org/iwgia_files_publications_files/IA_3-08_India.pdf(accessed on 10/06/2014)

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resources, neglecting the rights and interests of local and indigenous communities.[12]

III. INVOLVEMENT OF LOCAL COMMUNITIES IN DECISION MAKING PROCESS

The participation of communities are envisaged in the act through the a three tier mechanism which comprises the National Biological diversity Authority of India (NBA), the State Biodiversity Boards (SBBs) and Biodiversity Management Committees (BMCs) at the national, state and local level respectively. But the exclusion of communities can be seen in the structure of tier mechanism. The National Biodiversity Authority (NBA) was established in Chennai which consists of 10 senior officials from government departments and five additional specialists as members. There is not even a symbolic representation of communities within the NBA or its Expert Committees. This in effect means that communities have very little space to question the use of a biological resource or its associated knowledge which they hold. Another body created for smooth function of the act is SBB. SBB is a body corporate set up by the State Government in accordance with the provisions of Section 22 of the Biological Diversity Act. The administrative and financial composition of the SBBS is the same as that of the NBA. The SBB consists of a chairperson and not more than five ex-officio members to be appointed by the State Government to represent concerned departments of the States, and not more than five expert members on the subject. Here, the SBB could not seen adequate representation of the communities in the decision making process related to the access and benefit sharing process. It is under the BD Act that the idea of biodiversity management committees (BMCs) was introduced in the country. The Act mandates that seven-member BMCs be set up by every local body not less than one third would be women and not less than 18% belonging to SC/ST. BMCs are envisaged as the third rung of decision-making on who will access, use, and/or conserve biological diversity in the local area under their jurisdiction.[13]

When relating to the use of biological resources the act has envisaged only two roles for BMCs that is "consultation" by NBA and secondly, collect levy for use of biological resources in their area. However, in the BD Act, its text and subsequent implementation unfortunately do not further the principles of PIC and to obtaining the PIC of the owners of the genetic resources, there is only implicit understanding on our part and the absence of the use of the exact words is obvious. Under section 41(2) of the Act used the term "consultation*"* with the Biodiversity Management Committees (BMCs) rather than seeking consent while taking any decision

[12]Gopalakrishnan N. S., Protection of TK: The Need for a *SuiGeneris* Law in India", Vol.5 (N0.5), Journal of World Intellectual Property Right, 2002, pp-725-742, atp.727, available at http://onlinelibrary.wiley.com/doi/10.1111/j.1747-1796.2002.tb00179.x/epdf (acessed on 25/4/2015)

[13] Kohli, Kanchi, and Shalini Bhutani, "Biodiversity Management Committees: Lost in Numbers." Economic and Political Weekly, Vol. 49(No. 16), 2014, pp. 18-20, atp.18, available at http://www.jstor.org/stable/24480147.

relating to use of knowledge associated with resources occurring with the jurisdiction of the BMC.[14] Again the definition of "consult" is not clear and in many cases it might remain a mere formality and not constitute prior informed consent. The term "consult" has a track record of eliciting dubious connotations in India, as it has almost never translated into prior informed discussions.[15] It would be difficult to bring the requirement of prior informed consent mandated under the CBD within the meaning of consulting. One of the paradoxes of the above said provision is that it does not ensure the PIC and involvement of communities. While it is mandatory for the NBA to consult the Biodiversity Management Committees (BMC) before taking decisions relating to the use of biological resources. But there is no obligation on the part of NBA to follow the suggestion or decisions of the BMC since the obligation is only to "consult. It has to be noted that the language of section 21(1) of the Act implies that the PIC is a condition precedent for any approval to be granted by the NBA.[16]Under Sections 19(3) and 20(3) give the NBA the freedom to decide the terms and conditions of approval[17]. Contrary to its position, making prior informed consent of benefit claimants makes its mandatory but at same time act seeks to make the NBA the final authority in the grant of access to resources and the knowledge associated with them. One of the weaknesses of BDA is the involvement of only one stakeholder in the approval mechanism i.e., the National and State authorities. The regulation of access, utilization or transfer of results is done by NBA and SBB and not the local communities. The NBA has literally dominated the PIC system by ignoring the consent of other local stakeholders because law only requires the NBA to engage in "consultation" with local biodiversity committees.[18]Further, there is no established role for individuals, indigenous people, or local groups in the PIC-granting process. The lack of contribution of providers for access to GR approval is clear indication of single-consent nature of the governing statute and it represents a very typical model of the centralization of GR control by government. The centralized approach to the grant of consent to use, transfer and commercialization of TK without the prior informed consent and involvement of local communities seems to be against the letter and spirit of the international norms in this regard. The non-inclusion of TK holders in the process of agenda setting and decision making at the international, national and local levels and the lack of their practical capacity have been identified as one of the key reasons for

[14]Sec.41(2), Biological Diversity Act 2002

[15] Kalpavriksh and GRAIN, "Six Years of the Biological Diversity Act in India" 2009, pp.1-68, atp.48, available at https://kalpavriksh.org/wp-content/uploads/2022/07/Six-Years-of-BD-Act-final-text.pdf (acessed on 5/4/2011).

[16] Sec.21(1), Biological Diversity Act 2002

[17] Sec.19(3) and 20(3), Biological Diversity Act 2002

[18] Kuei-Jung Ni, "Legal Aspects of Prior Informed Consent on Access to Genetic Resources", Vol.42, Vanderbilt Law Review, 2021, pp. 227-278, at p. 2021, https://scholarship.law.vanderbilt.edu/vjtl/vol42/iss1/5(acessed on 7/4/2021).

the non-effectiveness of existing or envisaged legal provisions.[19] This is also perhaps the reason for adopted a defensive approach by the Indian state acting on behalf of the traditional knowledge holders is the principal entity responsible for granting access and determining the terms of benefit sharing. This however shows a lack of political will to recognize indigenous and local communities as owners of the resources. Secondly, the function of BMC is levy fees for the use of biological resources in their area, which will be part of a Local Biodiversity Fund. Similarly in the case of PIC, the power to grant approval for access to biological resources and knowledge, for which the afore-mentioned fees can be levied, is firmly vested with the NBA or SBB. However, the BD Act, its text and subsequent implementation unfortunately do not further the above functions of BMC and it's remained in paper only. So from the above context, it also manifested marginalization of communities in decision making process and principles of decentralization did not find place in the clauses and procedures of this law. But the act has provided a highly inherent institutional mechanism which talks about top- down structures and procedures rather than bottom level decision making. Such mechanism would further alienate local people from the decision-making process.

IV. ROLE OF COMMUNITIES IN BENEFIT SHARING

"Fair and equitable benefit-sharing" is one of the objectives of the CBD. The CBD specifically addresses the benefits sharing in relation to access and utilization of genetic resources is often referred to with the phrase Access and Benefit Sharing or ABS. For example, genetic resources can be utilized to develop specialized enzymes, modified genes or small molecules that are employed in new pesticides, medicines, active ingredients and chemical or industrial products. In this case, benefit sharing is closely linked to the recognition in the CBD of the rights of countries and communities over the genetic resources and associated TK.[20] The CBD establishes a set of principles that aims to guarantee these rights in view of the utilization of genetic resources and associated TK. In accordance with Articles 15, paragraphs 3 and 7 of the Convention, benefits arising from the utilization of genetic resources as well as subsequent applications and commercialization shall be shared in a fair and equitable way with the Party providing such resources that is the country of origin of such resources or a Party that has acquired the genetic resources in accordance with the Convention. Such sharing shall be upon mutually agreed terms.[21]In accordance with CBD article 5(2) of the Protocol, "Each Party shall

[19] Indrani Barpujari and Ujjal kumar Sarma, "Protection of Traditional Knowledge:Role of the National IPR Policy, Vol.53(No.41), Economic and Political Weekly, 2018, pp.29-34, atp.33.avilable at https://www.epw.in/journal/2018/41/perspectives/protection-traditional-knowledge.html(acesssed on 10/2/2021).
[20] Ibid.
[21] Art.15(3) and (7), Convention of Biodiversity 1991

take legislative, administrative or policy measures, as appropriate, in order that the benefits arising from the utilization of TK associated with genetic resources are shared in a fair and equitable way with indigenous and local communities holding such knowledge".[22] Corresponding to this, sections 21 of the Act address issues of fair and equitable benefit sharing and contemplate both monetary and non-monetary benefits in accordance with the Protocol.[23]Fair and equitable benefit is to be determined by the NBA under section 21. The irrationality of this provision is even more highlighted in the succeeding Sections 21 and 41 of the Act. Now from Section 21(1) provides that the NBA is under an obligation to ensure that the terms and conditions on which the approval is given, are in accordance with mutually agreed terms and conditions, which presupposes a contract on mutual agreed terms between the person seeking access, the local bodies concerned and the benefit claimers.[24] Since the NBA is to ensure itself of this fact before granting approval, it is only logical to conclude that the contract is a precondition that is to be satisfied before applying for approval. Section 21(1) of the Act does not assume the NBA as the authority that gives PIC and MAT but rather the authority that gives permits if PIC and MAT conditions are satisfied. In fact Section 21(1) of the Act indicates that the local bodies and benefit claimants would be the ones who will negotiate MAT for GR and TK. From section 21(1) it can be assumed that the rights over genetic resources and associated TK do not rest with the NBA but with the benefit claimers providing access to the resources and knowledge. The NBA is tasked with the role of entering into the ABS agreements and concluding them in accordance with the mutually agreed terms as negotiated by the benefit claimers.[25] So in this context, Section 41(2) becomes extremely important at this point. Under the section 41(2) 41 places a mandatory obligation on the part of NBA and SBB to consult with the BMC while taking decisions relating to the use of the biological resources and associated knowledge within its territorial jurisdiction. It can be inferred from above discussed sections that BMC rather than the NBA has ownership over the biological resources within its territory. But, in practice this is different as the NBA signs the ABS agreements and determines the MAT, while the SBBs decide on MATs for ABS applications from Indians. Also, when required information is not obtained within a stipulated period of 30 days from the concerned SSB, NBA takes it for granted that they have no objection and process the application.[26] This is considered

[22] Art.5(2), Nagoya Protocol 2010.
[23] Sec.21, Biodiversity Act 2002
[24] Sec.21(1), Biodiversity Act 2002
[25] Kabir Sanjay Bavikatte and Morten WalloeTvedt(Beyond the Thumbrule Approach : Regulatory Innovations for Bioprospecting in India, Vol 11(No.1), Law, Environment and Development Journal 2015, pp. 3-20 at, p.11, available at http://www.lead-journal.org/15001.pdf 2015..http://www.lead-journal.org/15001.pdf (accessed on 10/3/2016)
[26] Varma R V *Access and benefit sharing in India: Challenges A head. In book : Biodiversity for sustainable*

as great drawback of the system and in many cases the application are processed without getting the consent of BMC the local custodians of the bio resources.[27] There is also no provision in the Act obligating the local bodies to enter into such agreements only with consultation and participation of the holders of knowledge particularly indigenous and local communities in cases where the knowledge belongs to them. It can be seen that the community would have no role determining benefit sharing and all money will go back to the National Biodiversity Fund. From this it can be assumed that terms and conditions in the agreement between benefit claimants and local bodies will not be taken seriously by the NBA. This in fact is taking away the ownership and control of the biological resources and knowledge traditionally held by them, without their active involvement. Even though a provision included by parliament is to give respectability to the agreements entered with the benefit claimers, there is no clear legislative assertion that this is mandatory and that the terms and conditions of such agreements are binding on the parties and the NBA. But in its implementation has clearly ousted local communities rights over biological resources and the knowledge associated with them instead of giving legal recognition to them. It has been twenty five years since India enacted the BDA act but it does not seem to have managed to use its rich biodiversity sustainably or ensure that benefits reach those who have conserved it. From the above analysis, it can be seen that the regulatory framework for access to biological resources in India does not accommodate mechanism for the protection of rights of PIC of local and indigenous communities. As an obligation to Nagoya protocol, introduced Guidelines on Access to Biological Resources and Associated Knowledge and Benefits Sharing Regulations, 2014 which fails to incorporate bio cultural protocol of communities. It is to be noted that the Biodiversity Act and guidelines are essentially in response to international treaty obligations under the Convention on Biological Diversity, and Nagoya protocol not primarily to protect the interest of the nation in respect of its bio resources and indigenous knowledge systems.

V. CONCLUSION

From the reading of the Biological Diversity Act, it has followed a centralized approach for granting prior informed consent to use materials on mutually agreed terms and conditions rather than a decentralized one. Moreover, the act does not provide a framework for the rights of all holders of biological resources and related knowledge. The act is conspicuously shy in its treatment towards the knowledge of indigenous communities. It shows the reluctance on the part of Indian government to recognize that ownership of traditional knowledge rests with the

development, 2017, at p.91, available at Doi/10.1007/978-3-319-42162-9-5(accessed on 10/5/2018).
[27] Ibid.

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community and to develop legislation from that perspective, keeping in mind the new commercial interest that is the reason for this unsatisfactory situation. In the implementation of act has taken a divergent approach and taken a strategic departure from the rubric of the CBD and Nagoya. The departure is a logical corollary to the recognition of their role as is also suggested in the CBD.

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