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# **THE EXIGENCY FOR FAIR AND EQUITABLE DISTRIBUTION OF BENEFITS VIS A VIS NAGOYA PROTOCOL**

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## **ABSTRACT**

The Convention on Biological Diversity, 1992 set out before the world that apart from conservation of biodiversity, one of the main aims necessary to be achieved is the fair and equitable distribution of benefits arising out of the utilization of traditional knowledge and biological diversity. In order to realize this aim, the Nagoya Protocol, 2014 was enacted which reiterated that a mutually satisfactory disposition must be drawn between the country of origin of the traditional knowledge or genetic resource and the country seeking to utilize it. The most fundamental aspect in working out this disposition is that due regard must be had to the rights of the indigenous community which not only preserved the biological diversity of the area concerned but also passed on the traditional knowledge from generation to generation. Therefore, in case an organization or a foreign country seeks to exchange technology in relation to genetic resources or utilize traditional knowledge, it is imperative upon the country of origin to ensure that the economic and social up-liftment of the local community is one of the chief notions to be considered. Thereby, any benefit extracted from the traditional knowledge or biological resources must be distributed among the local communities. In order to apply the CBD in India, the Biological diversity Act, 2002 was enacted. However, in December 2021, the Biological Diversity (Amendment) Bill was introduced in Lok Sabha which has been introduced to alter certain provisions in the present Act but the Bill has been facing backlash from environmentalists, civil societies, NGOs and citizens.

## **Introduction**

In the year 1992, when Earth Summit was held, three sister conventions originated- The United Nations Framework Convention on Climate Change, United Nations Convention to Combat Desertification and the Convention on Biological Diversity (CBD). The main objectives of CBD were: - (1) conservation of biological diversity, (2) sustainable use of components of biological diversity, and (3) fair and equitable sharing of benefits arising out of utilization of genetic resources, transferring of technologies and to provide provisions for funding. The third objective was dealt with under Article 15 of the CBD where-under it was acknowledged that genetic resources fall under the sovereign right of the states. Hence, if such resources are sought to be utilized, the 'prior informed consent' of the state of origin is necessary to be obtained. The CBD also mentioned that all terms of access to and transfer of genetic resources as well as technology including biotechnology would be decided mutually between the parties. Article 16 of CBD facilitates the access to and transfer of technology for ensuring that the objective of conservation and sustainable use of biological diversity can be realized. Where one of the contracting parties is a developing country, it is imperative upon the other party to provide access to environment friendly technology on such concessional or preferential terms as may be agreed by them. Furthermore, CBD in its Article 8(j) went on to mention 'traditional knowledge'.

Thereafter, the World Summit on Sustainable Development, 2002 was held in Johannesburg, where the aspect of fair and equitable sharing of benefits was discussed again but in relation to the rights of indigenous communities. It was recognized that such an initiative can form the basis of not only upholding the rights of these communities but also serve as a measure for the preservation of biological diversity and genetic resources. In the seventh conference of parties (COP), an ad hoc group negotiated upon the matter. Resultantly, in order to give effect to the third objective of the CBD, a protocol exclusively dealing with the fair and equitable distribution of benefits arising out of the utilization and commercialization of genetic resources was introduced in the form of Nagoya Protocol, 2010 which came into effect in 2014.

## **The Nagoya Protocol**

The main aim of the protocol was to raise public awareness about the economic value of ecosystem and the genetic resources. While recognizing the interdependence of states on one another with respect to genetic resources and traditional knowledge, the protocol seeks to

provide a transparent mechanism which can be conducive to the domestic legislations of the state of origin and the state seeking to received the resources. The traditional knowledge and genetic resources are indicative of the rich culture of a particular state and there is a need to acknowledge the contributions of local communities in safeguarding the knowledge by word of mouth-passed down from generation to generation or by documentation or in any other form.

Article 2 of CBD read with Article 2 of the protocol states that ‘utilization’ means the use of genetic resources or bio-chemicals for the purpose of research or development. This process may be applied for procuring any product or for modifying any biological system, living organism or derivative thereof. Article 5 states that the benefit arising out of the use of genetic resources should be such that it must be mutually acceptable to both the contracting parties. It is also imperative that the indigenous communities must be considered the custodians of such resources and traditional knowledge and their rights must be ascertained on the basis of the safeguards guaranteed to them under the domestic legislations.

### **Biological Diversity Act, 2002**

In order to give practical application to the objectives set out in the CBD, Biological Diversity Act, 2002 was enacted in India; due to which the Act has identical objectives as the CBD. The Act defines a hierarchal three-tiered machinery with National Biodiversity Authority (NBA), State Biodiversity Boards (SBBs) and Biodiversity Management Committees (BMCs).<sup>1</sup>

The NBA ensures that the objectives of the Act (and CBD) are effectively implemented. It also acknowledges India’s rich biological diversity and need for encouraging participation of the people and primarily, the indigenous communities by fairly and equitably distributing the benefits arising out of the utilization or commercialization of India’s natural assets. NBA has been entrusted with the scrutiny of requests for access to genetic resources made by foreign individuals or corporations. Along with this, if any requests are made for the transfer of results of research with respect to these biological resources, the permission of NBA is a necessity.

SBBs, constituted by state governments, have the decision making power in relation to matters where access is sought by Indian nationals for commercial purposes. BMCs are required to be established at grass root level by local self-governments and have been endowed with

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<sup>1</sup> *Convention on Biological Diversity (CBD)*, MOEF, GOVERNMENT OF INDIA (July 18, 2022, 11:12 PM) <https://moef.gov.in/en/division/environment-divisions/conservation-and-survey-cs/convention-on-biological-diversity-cbd/>

maintaining records of the components of biodiversity and the traditional knowledge treasured by indigenous communities. Such records are known as the People's Biodiversity Register (PBR). The main purpose of such documentation is to recognize the rights of local tribes and communities over the genetic resources and to ensure that these resources are not made subject of commercial benefits by 'outsiders'. These outsiders (who may be foreigners or even Indians) if seek to extract the resources from these areas, have to provide monetary or non-monetary incentives to the local community. Therefore, the Act has the potential to revolutionize the rights of indigenous communities and to enhance their economic wellbeing.

### **Protection of rights of indigenous communities- Why needed?**

#### **I. Bio-privacy and Intellectual Property regime in relation to traditional knowledge**

Bio-privacy is the misappropriation of biological resources of an area or traditional knowledge especially when such resources or knowledge are in direct relationship with the indigenous communities. This misappropriation is at the hands of multinational organizations or other organizations for the purpose of making profits. It has been recognized by all legal regimes of the world that the natural assets of earth are being capitalized by organizations without duly acknowledging the role of local communities in their preservation.<sup>2</sup>

The disregard toward efforts of these communities is not only adversely impacting their economic prospects but also the cultural integrity of the nation as a whole. Therefore, international community has been taking initiatives to preserve the rights of local communities and to ensure that traditional knowledge is not misappropriated for capitalist gains of a powerful few. However, protection of traditional knowledge is quite recent to international regulatory bodies. One of the most fundamental issues in this regard is that the term 'traditional knowledge' has not yet found an exhaustive or all-inclusive definition.<sup>3</sup> The need for protection of traditional knowledge has been stated as a historical shift in the trend of international law. This has led to the development of *sui generis* systems for protecting traditional knowledge by some of the countries. These systems have been developed in relation to plant genetic resources as well as the resources obtained from animals.

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<sup>2</sup> Janna Rose, *Biopiracy: when indigenous knowledge is patented for profit*, THE CONVERSATION (July 20, 2022, 06: 50 AM), <https://theconversation.com/biopiracy-when-indigenous-knowledge-is-patented-for-profit-55589>

Regulations regarding patents state that there should be an element of novelty in securing protection for a particular invention. However, in cases of traditional knowledge or genetic resources, it has been debated time and again that the pre-requisite of novelty is absent. Such knowledge has been with the local communities since times immemorial, making it deeply embedded within the identity of the community. In India, numerous cases have been reported where genetic resources like Neem, Turmeric, Basmati rice were intended to be patented by international organizations for the purpose of earning profits but in all such cases, it has been stated by the Patenting authorities that the element of novelty cannot be established in relation to such products and hence, indigenous communities must not be devoid of the economic benefits which may be extracted out of the use of such resources.<sup>4</sup>

Due to this reason, organizations like WIPO have taken initiative to introduce two kinds of intellectual property protection for the traditional knowledge- First, **Defensive protection**, which aims to put a halt on the activities of ‘outsiders’ for acquiring intellectual property over traditional knowledge. It has been stated that this kind of protection can even be used for protecting external cultural manifestations like sacred symbols, etc. Second kind is the **Positive protection**, which empowers the communities so that they are in a position to promote their traditional knowledge, control its use and also to benefit there-from.<sup>5</sup>

While international players, states and organizations have been working towards bringing about an IPR regime which can be conducive to the needs of the growing world economy and at the same time ensuring security of interests of the indigenous communities, it is also necessary that the members of such communities must be made aware about the rights attached to the use of genetic resources and traditional knowledge. If their position as custodians of traditional knowledge is respected, it would lead to the up-liftment of the entire community and in the long run, the entire nation.

## II. Socio-economic Factors

The process of granting patents as well as the process of preservation of biological and genetic resources from falling under the purview of patents is financially burdensome. However, the process of preservation being the prerogative of the nation must be analyzed keenly. The

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<sup>4</sup> Saba, *Protecting Traditional Knowledge-the India story till date*, SCC ONLINE BLOG (July 21, 2022, 08:16 PM) <https://www.sconline.com/blog/post/2018/04/23/protecting-traditional-knowledge-the-india-story-till-date/>

<sup>5</sup> *Traditional Knowledge and Intellectual Property- Background Brief*, WIPO (July 20, 2022, 4:10 PM), [www.wipo.int/pressroom/en/briefs/tk\\_ip.html#wipo-int](http://www.wipo.int/pressroom/en/briefs/tk_ip.html#wipo-int)

potential benefits of the genetic resource must be weighed against the costs requisite in its protection from the monetary exploitation by 'outsiders'.

Biological diversity has presented great potential in the field of not only agriculture but also pharmaceuticals.<sup>6</sup> It has been reiterated that these resources are necessary to be researched upon in order to ensure greater good of society as a whole. But, where the resources are of such a nature that the cultural integrity and sentiments of locals are attached therewith, it is important to strike a balance between development as well as sustenance of the indigenous communities.

It has been reiterated that the debate around preservation of traditional knowledge and biological diversity is not a single isolated concept but the intermingling of human rights, need for the conservation of biodiversity and the intention of improving the standard of living of the downtrodden indigenous communities.

In the contemporary world, mobilization of resources and the exchange of information and technology have facilitated new changes being brought about in different fields and also the exchange of traditional knowledge. It has thus, been acknowledged that the information held by local communities can be of immense prominence. However, this acknowledgement makes the recognition of their rights a pre-requisite. The lack of literacy and formal education among these communities must not be considered to be a factor contributory to the looting of their due and fair share of benefits.

### **Correlation between the Nagoya Protocol and the Biological Diversity Act, 2002**

The fundamental aim of both is to ensure that indigenous communities must not be robbed of the right to their traditional knowledge or the biological resources. These have been treasured by these communities and protected selflessly. Both these legislations stress upon the fact that the country of origin and the country seeking to acquire the traditional knowledge must work out a disposition which must be acceptable to both the sides. In the process, due regard must be had to the interests of the local communities. Furthermore, if their traditional knowledge is in-fact appropriated by another country or organization, a blueprint must be set out satisfactorily as per which the rights of local communities must be recognized and protected.

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<sup>6</sup> Paul Oldham, *Biopiracy and Bioeconomy*, RESEARCH GATE (July 20, 2022, 10:03 PM), [https://researchgate.net/publication/228247416\\_Biopiracy\\_and\\_the\\_Bioeconomy](https://researchgate.net/publication/228247416_Biopiracy_and_the_Bioeconomy).

Their monetary or non-monetary benefits must be set out beforehand so that there is no loss of livelihood and at the same time, the objective of conservation of biodiversity can be upheld.

While Nagoya protocol was introduced to deal exclusively with the fair and equitable distribution of benefits arising out of the utilization of biological diversity or genetic resources, the Act, 2002 goes a step further to establish a cognizable and non-bailable case against a person who contravenes any provision of the Act as per its section 58.<sup>7</sup> Thereafter, the guidelines on access to Biological Resources and Associated Knowledge and Benefits Sharing and Regulations, 2014 were introduced. Apart from certain grey areas in relation to its interpretation and implementation, the Act, 2002 has led India to be included in the category of the few countries which are taking steps to realize the goals set out in the CBD, 1992. The binding character of CBD has thus, been upheld.

### **Issues associated with PBRs and the road ahead**

BMCs are the custodians of these prized records (PBRs) and it is only on the basis of these records that the fair and equitable sharing of benefits can be actuated. However, in 2016 it was brought to the notice of the National Green Tribunal that only 9,700 BMCs were set up in contrast of 2,70,573 local bodies; making merely 3.58% BMCs operational in the entire country. Furthermore, only 1,388 PBRs had been maintained till that time. Utterly disappointed in the administration, the NGT directed 100% compliance in relation to the constitution of BMCs and ordered the amount of ₹ 10 Lakh per month as fine for non-compliance.<sup>8</sup>

Thereafter, the condition improved considerably but only on quantitative front. Almost 100% compliance was achieved by constituting of BMCs and about 70% PRCs were prepared across India but the quality of documentation has been called into question time and again. It has been found that the quintessential duty of maintaining PBRs is outsourced to NGOs or universities. The purpose of introducing the provision of such documentation was to improve dialogue between the administration and the local communities but it has been eroded by this swift and shallow achievement.

This calls for urgent measures for empowering the local communities by ensuring that PBRs are regularly maintained and indigenous communities are consulted, for making the endeavor

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<sup>7</sup> Aditya Bhattacharya, *Need for clarity on Biological Diversity Act*, FINANCIAL EXPRESS, Nov. 8, 2021.

<sup>8</sup> Bahar Dutt, *The People's Biodiversity Register, meant to empower local communities, is leaving them out*, THE HINDU, Oct. 18, 2020.

a success. At state level, it becomes necessary that each state government should take the initiative to establish as many BMCs as are the number of local self governments and thus, 100 percent compliance can be secured. The NBA has the most fundamental duty to scrutinize into the matter where a foreign national or organization is seeking to make use of Indian biological resources which must be abided by, so that the cultural heritage and natural resources of the nation are not misappropriated.

### **The Biological Diversity (Amendment) bill, 2021**

The Ministry of Environment, Forest and Climate Change introduced the bill, 2021 in Lok Sabha on December 16, 2021 and it was referred to a joint parliamentary committee on December 20, 2021. The bill has been introduced to simplify the compliance requirements for Indian companies which had the duty to procure prior intimation from the SBBs. The bill has introduced certain exceptions in this regard. It states that in case of (1) codified traditional knowledge, (2) cultivated medicinal plants and their products; and (3) AYUSH practitioners shall be exempted from procuring the consent of SBBs before utilizing traditional knowledge.<sup>9</sup>

Further, the bill also seeks to simplify the procedure of IPR procurement. As per the original legislation, the approval of NBA was required before the applying for the utilization of Indian biological resources. However, the Amendment Bill states that the approval of the NBA will be required only before the grant of the IPR.

The original Act stated that all decisions relating to benefit sharing will taken by the NBA, however, the Bill seeks to vest this power in the particular BMC concerned. Thereby, the applicant needs to negotiate the terms of benefit sharing with the BMC. The Act extended the provisions of benefit sharing to research, bio-survey and bio-utilization but the Bill has excluded these from the purview of benefit sharing.

The Amendment Bill, 2021 has been severely criticized on the ground that it promotes commercialization more than the welfare of indigenous communities. It has been seen that the main aim of bringing about the amendment was to facilitate applicants to apply for IPRs in a much easier manner thus, prioritizing commerce over conservation. Due to this reason, a blind eye will be turned on the local communities. Bio-piracy is detrimental to indigenous

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<sup>9</sup> *The Biological Diversity (Amendment) Bill, 2021*, PRS LEGISLATIVE RESEARCH (July 21, 2022, 5:19 PM) <https://prsindia.org/billtrack/the-biological-diversity-amendment-bill-2021>.



communities and is far from over, but, the Bill, 2021 will dilute the strong initiatives taken against bio-privacy to a large extent.<sup>10</sup>

India is world renowned for its rich biological diversity and cultural boons. It gave the world, the great wisdom of Ayurveda, Unani medicine, etc. While India has enjoyed much praise as being the originator of these ancient treasures, it becomes inexplicably important that the roots of this knowledge must be honored and also protected from falling into the hands of capitalist organizations which may reduce them to mere profit making products. While acknowledging the origin of this traditional knowledge, regard must also be had to the communities which protected it and passed it onto the next generations. For the same purpose, their rights must be recognized and economic incentives must be provided to them for not only improving their standard of living but also for ensuring that they have decent participation in transactions involving traditional knowledge and biological diversity. It is only by taking such initiatives that the ancient traditional knowledge and biodiversity can be preserved.

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<sup>10</sup> The Hindu Bureau, *Environmentalists oppose proposed changes to Biological Diversity Act*, THE HINDU, Dec. 17, 2021.

## References

- (1) Nagoya Protocol on Access to Genetic Resources and the fair and equitable sharing of benefits arising from their utilization, CONVENTION ON BIOLOGICAL DIVERSITY, UNITED NATIONS, 2014.
- (2) Convention on Biological Diversity, UNITED NATIONS, 1992.
- (3) *Convention on Biological Diversity (CBD)*, MOEF, GOVERNMENT OF INDIA (July 18, 2022, 11:12 PM) <https://moef.gov.in/en/division/environment-divisions/conservation-and-survey-cs/convention-on-biological-diversity-cbd>.
- (4) Janna Rose, *Biopiracy: when indigenous knowledge is patented for profit*, THE CONVERSATION (July 20, 2022, 06: 50 AM), <https://theconversation.com/biopiracy-when-indigenous-knowledge-is-patented-for-profit-55589>.
- (5) Saba, *Protecting Traditional Knowledge-the India story till date*, SCC ONLINE BLOG (July 21, 2022, 08:16 PM) <https://www.sconline.com/blog/post/2018/04/23/protecting-traditional-knowledge-the-india-story-till-date/>.
- (6) *Traditional Knowledge and Intellectual Property- Background Brief*, WIPO (July 20, 2022, 4:10 PM), [www.wipo.int/pressroom/en/briefs/tk\\_ip.html#wipo-int](http://www.wipo.int/pressroom/en/briefs/tk_ip.html#wipo-int).
- (7) Paul Oldham, *Biopiracy and Bioeconomy*, RESEARCH GATE (July 20, 2022, 10:03 PM), [https://researchgate.net/publication/228247416\\_Biopiracy\\_and\\_the\\_Bioeconomy](https://researchgate.net/publication/228247416_Biopiracy_and_the_Bioeconomy).
- (8) *The Biological Diversity (Amendment) Bill, 2021*, PRS LEGISLATIVE RESEARCH (July 21, 2022, 5:19 PM) <https://prsindia.org/billtrack/the-biological-diversity -amendment-bill-2021>.
- (9) The Hindu Bureau, *Environmentalists oppose proposed changes to Biological Diversity Act*, THE HINDU, Dec. 17, 2021.
- (10) Aditya Bhattacharya, *Need for clarity on Biological Diversity Act*, FINANCIAL EXPRESS, Nov. 8, 2021
- (11) Bahar Dutt, *The People's Biodiversity Register, meant to empower local communities, is leaving them out*, THE HINDU, Oct. 18, 2020.