



Access Benefit Sharing and Biodiversity

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Abstract: *Access and benefit sharing form the core of resources of forests and local areas that are used by industries, government for commercial purposes. At the heart of the issue is the dispute resolution mechanism that has become a bottleneck in the smooth delivery of rights that can be monetary or name based to the local community. The paper suggests ways to include alternate dispute resolutions and its processes in the legislation of Biodiversity Act 2002 so as to reap the benefits arising from it. The paper does not recommend replacing litigation to alternate methods but complementing them to traditional ways to ensure the legal mandate enshrined by our founding fathers of the constitution and its legislations. India is one of the mega biodiversity zones and has global hotspots like the western ghats. Hundreds and thousands of species of medicinal herbs, shrubs, trees, fungi, animals, birds, etc. are endemic to India. The knowledge of such remote resources is limited to vulnerable tribes of remote areas. This traditional knowledge is passed on from one generation to another. In the garb of modernisation, we must not forget the cultural heritage of our nation and therefore it is eminent to restore faith of tribals and locals in legislation of India so as to become global leaders in terms of regional knowledge and its application.*

Keywords: Genetic resources, Indigenous people, Benefit sharing, Biodiversity, Traditional knowledge

I. INTRODUCTION

Access benefit sharing means the sharing of benefits that can be monetary or recognition of region. Benefits are to be shared with the local community involved in the possession and extraction of the concerned resource available locally.

In the highly capitalised world economy of today, benefits arising out of market based sale or use of genetic resources to the original finder is oblivious. For this reason the Nagoya protocol was agreed to by India, which came into force in 2014. Nagoya protocol solely addresses the issues arising out of access benefit and sharing i.e. ABS. It becomes important to understand the genesis of this concept of ABS.

The origin of ABS lies in the Convention on Biological Diversity i.e. CBD. It has three main goals such as, 1. conservation of biological diversity; 2. Sustainable use of components of biodiversity and 3. The fair and equitable sharing of benefits arising from genetic resources.

Genetic resources mean the genetic material of organisms derived from plant and animal based products, excluding human beings. CBD acknowledges sovereign rights of state over their natural and genetic resources. All of which derive power from the rights of the indigenous/local people. Sovereign rights imply that each state/ nation has right to reserve utilization of genetic resources for



itself, it can exclude others from utilisation and make users obliged to report on benefits drawn from genetic resources or even its derivatives. Article 15 of the convention mentions about sovereign rights of states over resources. This is to firmly establish the rights of communities over their natural resources and traditional knowledge.

II. INTERNATIONAL LAWS ON BIODIVERSITY

History is evidence to the fact that prior to the enactment of CBD, natural genetic resources and traditional knowledge of local community was exploited at maximum levels. Capitalist tendencies led to monopolization of resources without any moral or legal responsibility to share benefits. This gave rise to inequality and later, the realisation of false promises and fraud done to the local communities. Inevitably, agitation took roots and discontent spread.

No matter how much biotechnical changes are made to the original genetics of the resources obtained from local communities, there has to be some amount of reasonable power to the locals to enforce their rights. This was internationally recognized through convention on biodiversity and Nagoya protocol. And later domestically, many developing and developed countries have forayed into the avenue of creating legislation to secure rights of the locals.

To clear the confusion between the user and provider, CBD has defined the user states as those who exploit/use of genetic resources and the provider are the holders of genetic resources who have control within the national territory. CBD also provides for access to genetic resources by user that is subject to 'prior informed consent' of the provider. This is based on the principle to prevent biopiracy and fraud or misappropriation by users. Prior informed consent- PIC- is one of the basic tenets of ABS and can be obtained by user from government/providers after disclosing information about access to the needed genetic resources obtained. PIC is based on mutually agreed terms i.e. MAT. MAT are the conditions of ABS that are agreed between the user and provider.

In such ideal cases benefit is shared between the local providers through the government but many times disputed remain unresolved. The process of going through courts is arduous and time consuming as compared to alternate dispute resolutions methods like – mediation, conciliation and arbitration. Such methods of dispute resolution provide for amicable resolution where unbiased third party is involved to adjudicate the differences and settle cost of benefit sharing in the longer run. Dispute resolution is mentioned in the guidelines by Ministry of environment, forests and climate change in India. Internationally, the article 6g of Nagoya protocol provides for inclusion of dispute resolution clauses in MAT.

III. DOMESTIC LEGISLATION ON BIODIVERSITY

India has operationalised the implementation of convention of biological diversity through the Biological Diversity Act in 2002 i.e. BDA. The act aims to realise the goals of CBD. This has been implemented in a decentralised format. The grass root level approach model in the act has far and wide reaching scope. The BDA act has mandated for a National Biodiversity Authority at the central level; State Biodiversity Boards i.e. SBBs in states and Biodiversity Management Committees i.e. BMCs at the local level.



Key component of the biodiversity act is that people are able to seek benefits from commercial utilisation of biological resources and the associated traditional knowledge relating to the use of the said resource and its genetic makeup. In 2014, the ministry of environment forest and climate change released guidelines for the access and benefit sharing. The usage of term 'guidelines' has failed to clearly distinguish if it is indeed a legal document subject to enforcement or not.

But ground realities are different than what appears on paper. The lack of awareness renders the local people unaware of the material profits from their traditional knowledge used by industries. They remain oblivious to the remedies available. Sometimes the lack of economic sources leads them to helplessness.

Moreover, litigation is usually considered full of hassles by general populace, the costs and time required are further deterrents. Disputes arise between commercial bosses and local people for sharing profits. But mere compensation for the losses incurred is not enough. It is the moral responsibility of society as a whole to rightfully share the profits arising in the long term.

For this, the arena of alternate mechanism to litigation must be explored to treat the limitations of litigation. Although this doesn't mean that route to litigation for resolving disputes must be neglected. But due to the overburdened judiciary system, the alternate dispute resolution mechanism can come to the rescue to solve disputes.

National Green Tribunal under Ministry of Environment Forest and Climate Change is responsible to solve environmental issues. NGT has been established by an act of parliament in 2010 and is quasi-judicial in nature. Recent initiatives by activists through NGT have ensured that biodiversity act is implemented. At the root lies the establishment of Biodiversity Management Committees which ensures to take care of issues of local community. Just like the NGT, other dispute settlement mechanisms like that under ADR can be of immense help in cutting down the out of pocket expenditure of community people in fighting for their rights.

Article 50 of Biodiversity Act 2002 states that disputes between state biodiversity boards must be referred to national biodiversity boards. The appeals of which go through NGT, as stated in article 52A. prior to establishment of national green tribunal in 2010, the appeals used to go to high courts, as mentioned in article 52 of the act. This has proven beneficial as orders of NGT are quicker with respect to environmental issues which lag behind in high courts behind crores of pending cases. And the expertise offered by NGT and respective state biodiversity boards has humungous potential. It must be observed that the biodiversity act 2002 is based on the ground breaking model of convention of biological diversity 1992. The 3 goals of biodiversity act 2002 are the same as mentioned in CBD i.e. of conservation, sustainability of resources and fair and equitable sharing of resources.

IV. OVERVIEW OF AMALGAMATION AND INTERPRETATION OF LAWS

Hence, based on the tradition more research is needed on the article 27 of CBD and must be replicated at the ground level in India as well. Article 27 of the convention states that in case of settlement of disputes, parties concerned shall seek solution by negotiation. If parties can't reach agreement by negotiation, they may jointly seek mediation by a third party. According to article 3b,



arbitration can be another option and last resort shall be when case is submitted for conciliation, as mentioned in article 4.

Biodiversity act 2002 must therefore be amended to include the features of mediation, arbitration and conciliation which have globally proved to be a boon to the bane of choked judiciary.

In a landmark judgement of Uttarakhand high court in 2018, held that biological resources are definitely property of a nation where they are geographically located but are also property of indigenous and local communities who have conserved it through centuries. They are the ones who grow biological resources or have traditional knowledge of these resources, are actually the beneficiaries under the biodiversity act 2002.

It must be observed that the guidelines for access benefit sharing by ministry of environment hold great potential for country's economic growth through sustainable commercialisation of biological resources and the traditional knowledge. This cannot be realised unless there is clarity on provisions, so as to avoid legal challenges in the future.

There must be more light towards the jurisdiction and scope of powers of national biodiversity authority i.e. NBA and the state biodiversity boards i.e. SBBs, in order to avoid overlapping powers in the spectrum of governance.

The already existing three tier structure created by 73rd and 74th amendments in 1992 of local and urban local bodies complements the decentralised structure of NBA, SSB and BMC under biodiversity act of 2002.

As per the national biodiversity authority i.e. NBA, Indian biological resources and associated knowledge are subject to terms and conditions, which secure equitable sharing of benefits. This is mentioned in section 7 of the biodiversity act. Furthermore, it would be required to obtain prior approval of NBA before seeking any IPR based on biological resource or knowledge obtained from India.

However, the scope of biodiversity act must be widened and more research needs to be carried out in the field of application of dispute settlement among user and producers in India. Other national mechanisms related to biodiversity and traditional knowledge viz. Protection of plant varieties and farmers' rights act 2001 -- this act enables farmers as an individual or as a community or through an NGO to claim plant breeder's rights. It emphasises on benefits sharing in case of use of that particular variety by the farmers.

Indian patents act -- provides for detailed disclosure of source/origin of biological material or local knowledge. Failing to provide details would attract revocation of patent. Traditional knowledge digital library -- mechanism for prior art for traditional knowledge. This library is shared with European patent office. This data repository can be beneficial as source of evidence while serving justice during alternate dispute resolution.

There are scanty examples of proper sharing of benefits with tribes. A model that truly stands out as an epitome of an example is that of kani tribe model in Kerala. In that the tropical botanical garden and research institute i.e. TBGRI scientists understood the secret of stamina of kanitribals in forest walks due to arogyapacha. The drug was further developed and named jeevani. 50 percent of the royalty was shared with the kanis by forming a charitable trust.



This is an excellent model and should be replicated at a national level. This serves as an inspiration to the community in India as a whole. Today, 70 percent of the kanis are members of the trust and receive benefits.

What must be noted is that this was done in 1987, even before the CBD. This reflects the amount of dedication and attachment of Indians towards their cultural heritage. The Indian state of Odisha contains most number of tribals in India. There are more than 75 particularly vulnerable tribals groups and more than 7500 scheduled tribes in India. The conservation of these communities is essential to in turn conserve and protect the organisms endemic to the region. Protection of such species, resources and local knowledge that is usually passed on to generations verbally is the true heritage of our country. The mandate of biodiversity act 2002 is in line with the fundamental duty enshrined in article 51A to value and preserve the rich heritage of our composite culture.

CONCLUSION

Due to the large scale commercialisation of resources and exploitation of local knowledge, the tribals have been suffering since time immemorial. Their rights need to be served well to them as per the law of the land. Ever since the time of British invasion and their rule, exploitation of local resources has been going up. The capitalistic tendencies need to be limited to realise the social fabric of India. Hence, the reforms to Biodiversity Act 2002 must be realised and amended with respect to the inclusion of Alternate Dispute Resolution mechanisms to further harness the treasure trove that the locals possess while ensuring their right to monetary gains as well.

REFERENCES

- [1]. <http://nbaindia.org/content/22/2/1/aboutnba.html>
- [2]. <https://www.cbd.int/abs/>
- [3]. <https://www.cbd.int/abs/infokit/brochure-en.pdf>
- [4]. <https://india.mongabay.com/2020/04/india-bioresource-access-and-benefit-sharing-how-far-have-we-come/>
- [5]. <http://www.legalservicesindia.com/article/224/ADR-Mechanism-in-India.html>
- [6]. <https://www.cbd.int/convention/articles/?a=cbd-27>
- [7]. <https://www.cbd.int/convention/rules.shtml>
- [8]. <https://www.wipo.int/ipadvantage/en/details.jsp?id=2599>
- [9]. <https://mahaforest.gov.in/index.php/Contentpage/index/Ri9vcnZ1cEhTZnhTWIZRPQ%3D%3D/en>