

THE ART OF SHARING? - ABS GUIDELINES AND IMPLEMENTING THE DIVERSITY OF BIODIVERSITY ACT

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ABSTRACT

India is blessed with one of the world's most rich and diverse biodiversity. It is home to myriad of species, subspecies and variants of both flora and fauna making it one of the most sought after bio-geographic locations. The legal structure around biodiversity in India consists of the parent act – the Biological Diversity Act, 2002 formed under the aegis of the Convention on Biological Resources, the underlying rules and various guidelines. The Access and Benefit Sharing (ABS) Guidelines formed under this framework are a monumental step towards the aim of conservation. However, the outcry against it has been the highlights in the field of environmental conservation recently. This paper aims to look at the framework of the Biological Diversity Act, 2002. The Act is the guide and authority for permitting sharing and use of biological resources of our country. The paper shall entail an exploration of the ABS guidelines (2014 and 2019 draft) and highlight its caveats that have recently come into light. With the true potential of this entire framework and specially the draft 2019 guidelines being questioned for paradoxical consequences, the paper aims to highlight the issues with the legal mechanism of this country regarding the usage of our biological resource which is the cause of the impediment in India's pursuit of the aims of Convention on Biological Resources.

Keywords: Biological Diversity Act, ABS guidelines, Legal mechanism, Convention on Biological Resources

INTRODUCTION

“If conservation of natural resources goes wrong, nothing else will go right.”

– M.S.Swaminathan

The use of biological resources (hereinafter referred as BRs) by humans is not a new phenomenon. During medieval times, humans used natural resources for their personal use like food, shelter, protection.¹ The populist of the settlements had always developed around rich biodiversity areas. With the advancement of technology, the usage of BRs has taken a progressive direction. The advancement in genetic studies has made it possible to use genetic material for various commercial uses. Today, genetic resources are being used in the field of agriculture, pharmaceutical, personal care products, food etc. However, the permit is required access these BRs. Unlike medieval times, humans and corporations cannot just garner any resources as per their choice.

India became a signatory to the Convention on Biological Diversity on 5th June, 1992.² During the Rio de Janeiro summit, this convention brought forward. Several countries ratified the convention and pledged fulfill its aims. The convention lays down three major objectives³ :

- 1) The conservation of biological diversity
- 2) The sustainable use of the components of biological diversity
- 3) The fair and equitable sharing of the benefits arising out of the utilization of genetic resources

In order to render its obligation towards the convention, India enacted the Biological Diversity Act in 2002. The aims of this act are *conservation of biodiversity, sustainable use of resources and guiding the fair and equitable access and sharing to the biological resources of our country.*⁴

¹Dr. Rakesh Shah, ACCESS AND BENEFIT SHARING OF BIOLOGICAL RESOURCES, last accessed 8th June, 2020, <https://www.ignfa.gov.in/document/biodiversity-cell-ntfp-related-issues1.pdf>

² Preamble, The Biological Diversity Act, 2002

³ Introduction, Convention, Convention on Biological Diversity,(last accessed 8th June, 2020), <https://www.cbd.int/intro/>

⁴ Supra, note 2

SCOPE OF THE PROJECT

The paper aims to examine the Biological Diversity Act, 2002 through its sanctioned mechanisms for access and sharing of BRs of this country. The Act mandates guidelines called Access and Benefit Sharing of Biological Resources (ABS) guidelines. The first guideline was released in 2014 and a draft guideline had been forwarded for public comments in 2019. The said draft guideline has caused much uproar among the environmentalists, social activists and related scholars. The author seeks to highlight the lacunas in the draft, the Act and the overall legal mechanism for conservation of biodiversity in this country.

LIMITATIONS OF THE PROJECT

This paper is limited to a qualitative analysis with the help of online materials/literature in form of articles, blogs and news, the relevant acts/guidelines/rules/conventions. This paper does not embark a quantitative analysis.

The paper looks at the Biodiversity Act and the ABS guidelines in detail. Other related mechanism like the Convention on Biological Diversity, the Nagoya Protocol, and the Biodiversity Rules has not been discussed in detail to curtail the subject matter of the project according to the scope.

THE BIOLOGICAL DIVERSITY ACT, 2002

“Conservation must be more than a convenient slogan.”

-Maria Cantwell

Background and origin OF THE ACT

In furtherance of its obligation towards the Convention on Biological Diversity (hereafter referred as ‘the Convention’), India enacted the Biological Diversity Act, 2002 (hereafter referred as ‘the BD Act’). In early 2000s, the Ministry of Ecology, Forests and Climate Change (MoEFCC) acknowledged the absence of proper legislation on subject matter of access and

usage of biological resources. The present legislations at that time did not entail any mechanism on sharing of biological resources or genetic material. The rampant rise in bio-piracy and continuous pilfering of traditional knowledge pushed the idea of a specific legislation.⁵Hence, the BD Act saw the light of the day in 2002. There were various drafts prepared by enthusiastic scholars but were never accepted for a review or as a suggestion.⁶The subject matter of 'conservation' had to be imbibed in the act to its fullest meaning and extent. The protection of flora and fauna is not the only interpretation of the word 'conservation'. The legislation had to be equipped with not only the power of protection but also preservation, development, regeneration, propagation and sustainable use.⁷

Overview of the act

As mentioned before, the BD Act was enacted with the purpose of conservation of biodiversity in its multilayered form. The BD Act is the regulatory authority for access to biodiversity. The National Biodiversity Authority (NBA) and the State Biodiversity Boards (SBBs) work at the centre and state level respectively to manage the access and usage of BRs by entities and humans. NBA is equipped with the power to approve the application for usage of BRs for commercial purpose, survey or research, transfer of genetic material, patent application.⁸ NBA is also the authority to determine the terms and conditions along with the sharing proportion of the BRs or genetic material.⁹Any foreign entity (individual, company etc) is required to take permission from NBA.¹⁰ The SBBs are responsible for the same at state level in respect to Indians. The SBBs also perform the advisory function to state governments in matters pertaining to the Act.¹¹Even at local level; Biodiversity Management Committees (BMCs) are responsible for ensuring the involvement of local citizens for the same purpose. This involves the consent of

⁵Punam Singh, CRITICAL REVIEW OF BIODIVERSITY ACT, 2002, *Department of Humanities and Social Sciences IIT Bombay*

⁶Udisha Ghosh, Chandralekha Akkiraju, BIODIVERSITY ACT 2002- AN ANALYSIS, *Academike*

⁷ National Forest Policy, 1988

⁸ Section 19, The Biological Diversity Act, 2002

⁹ Section 21, The Biological Diversity Act, 2002

¹⁰NATIONAL STUDY ON ABS IMPLEMENTATION IN INDIA, *The National Framework*, last accessed 10th June, 2020, <https://snrd-asia.org/wp-content/uploads/2018/04/National-Study-on-ABS-Implementation-in-India.pdf>

¹¹ Section 23, The Biological Diversity Act, 2002

the local population in the manner in which the local BR is being used by any entity.¹² A minimum of two local women are involved in these committees.¹³ This three-layered structure ensures the capitalization of the BRs of our country.¹⁴ BMCs are also responsible for documentation of biodiversity; they are consulted by the NBA and SBBs regarding BRs under their area.¹⁵

With the rising population of India, eyes from all over the world are on India as to how it utilizes its vast biodiversity to feed the growing population.¹⁶ The pollution of all forms of natural resources of the country has led to the verge of their complete destruction. UN launched a project¹⁷ to utilize the BRs of the country with the involvement of locals for better prospective products.¹⁸ This is a viable implementation of the third objective of the Convention.

India has also ratified the *Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization*.¹⁹ The Protocol furthers the objectives of the Convention. It also recognizes the obtaining of consent of local parties/communities for the use of the genetic material.²⁰

The Convention, the Protocol and the Act; all recognize the right of the 'locals'. Hence, the prior informed consent (PIC) step has been incorporated in the Act. They recognize the fact that the participation and consent of locals is significant due to the role they play in conservation of that BR of that area. Being the safe-keepers of the BRs of their area, it is important to obtain the consent and opinion of the local communities before the exploitation of the particular BR is allowed.²¹ Certain exceptions are also provided under the Act where prior permission is not

¹²SHIFTING THE NEEDLE ON BIODIVERSITY CONSERVATION IN INDIA, *UN environment programme*, last accessed 10th June, 2020, <https://www.unenvironment.org/news-and-stories/story/shifting-needle-biodiversity-conservation-india>

¹³ Id.

¹⁴ Supra, note 9

¹⁵K. Venkataraman, ACCESS AND BENEFIT SHARING AND THE BIOLOGICAL DIVERSITY ACT OF INDIA: A PROGRESS REPORT, *Asian Biotechnology and Development Review*, 2008

¹⁶ Id.

¹⁷*Strengthening the Implementation of the Biological Diversity Act and Rules with a Focus on its Access and Benefit Sharing Provisions*

¹⁸ Supra, note 8

¹⁹ Signatories, the Nagoya Protocol, last accessed 7th July, 2020, <https://www.cbd.int/abs/nagoya-protocol/signatories/>

²⁰ Art 6, Access to Genetic Resources, The Nagoya Protocol, last accessed 7th July, 2020, <https://www.cbd.int/abs/text/articles/?sec=abs-06>

²¹ Supra, note 9

required for using the BRs. These exceptions are given to local communities, *vaids and hakims*, people who grow and cultivate that particular BR.²²

Following are the monetary considerations while obtaining permission²³:

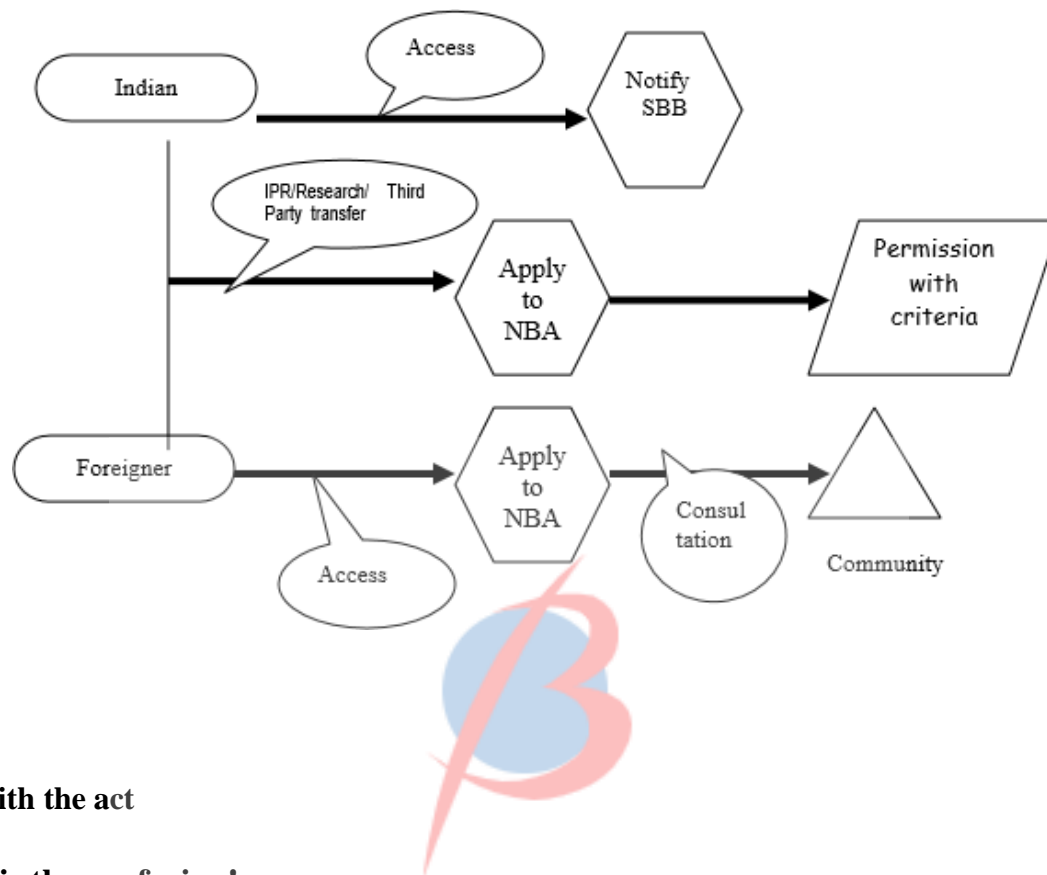
- a. In order to access BR for research and commercial utilization, the sum of amount to be paid is Rs. 10,000. (in addition to Form I)
- b. In order to transfer the results of such research to any foreign entity for monetary consideration, the sum of amount to be paid is Rs. 5000. (in addition to Form II)
- c. In order to obtain any IPR related research, the sum of amount to be paid is Rs. 500. (in addition to Form III)
- d. In order to transfer any results from research whose permission had already been granted, the sum of amount to be paid is Rs. 10,000. (in addition to Form IV)

In a situation where the permission was initially obtained for research but was later contemplated for commercial use, a separate arrangement can be made between the party and NBA for sharing of the benefit. ²⁴The Act also stipulates the extent of benefit sharing, the mannerism of use of the BR – the input method and the results. The ultimate aim of conservation has to be kept in mind hence the sustainable method and use is encouraged by the Act.

²² Section 7, The Biological Diversity Act, 2002

²³ Rule 14, 15,16,17, 18 Biological Diversity Rules, 2004

²⁴ Section 17 (1) and 19 (1) of the Biodiversity Act, 2002



Issues with the act

➤ ‘What’ is the confusion!

The Act despite its glorification has been called out for various caveats time and again.²⁵ The variety of cases filed before the Indian courts have demonstrated a pattern of issues with the Act. The Act is very ambiguous in its interpretation of ‘what’ is regulating, i.e., the subject matter. In the pre-ABS period, the entities were making commercial use of BRs without paying any benefit to the SBBs.²⁶ This issue was brought before court many times until ABS guidelines was enacted in 2014 to deal with this caveat. Time and again the extent of the term ‘biological resource’ has been questioned before the courts. In Uttarakhand, paper manufacturers filed petitions in the court against notices by the SBB on the clarification of what kind of BR they were using. In a similar case, coal was ruled out from the ambit of BR. The courts have had a hard time interpreting what is the extent of BR to which the Act and the guidelines are being imposed

²⁵AlphonsaJojan, THE CURIOUS CASE OF THE INDIAN BIOLOGICAL DIVERSITY ACT, *The Wire*, last accessed at 13th July, 2020, <https://thewire.in/environment/india-biological-diversity-act>

²⁶ Id.

upon. This is not a failure on part of the judiciary but rather the drafters of leaving such open-endedness in the laws.

➤ **Not vocal for 'local'?**

The locals are obliged to answer the SBB. This is a tyrannical method to undermine the right and authority of the local communities who not only make livelihood by the use of the BRs but also safe guard it. This methodology of restricting the movements of locals is reflected in the number of cases filed on the locals under the Forest Act and other such similar legislations. This is in contravention to the spirit of both the environment and biodiversity related legislatures as well as the constitution.

Despite the legal mechanism's aim and efforts, the concerned authorities have not been able to win the confidence of the local communities; which is why despite the number of BMCs in place, the local community lacks enthusiasm in participation to these use of BRs and often protests against it. The financial benefits accrued from the agreements do not amount to much. The bridge of communication between the NBA and the local people is wide. The lack of knowledge about the legal mechanism in place and its benefits is the cause of reluctance among the local communities in participating in these agreements.

➤ **Delegation of Power**

There is a gap between the NBA and SBBs when it comes to authority or powers. The SBBs have not been trusted with much responsibility. The role of SBBs must be expanded and they should be trusted with more delegated duties. This would not only form a chain of delegation ensuring more clarity of functions but also promote answerability. Research and exploitation of the flora is more common than that of fauna despite availability of its vast pool full of potential.

➤ **The Uniqueness issue**

There were many IPR related cases where Indian BR was patented or exploited by a foreign entity and the result of it was accredited to that entity. Hence, the BD Act when drafted was enabled with an IPR exploitation safety valve provision. According to the act, no non-Indian entity is entitled to access any BR unique to India without obtaining permission from the NBA. However, the problem lies with the application of the provision. First, it is extremely difficult to prove which BR is unique to India; secondly, the NBA cannot stop a person from obtaining a patent merely in basis of confusion whether the BR is uniquely Indian or not. Again, with the lack of surveillance, it is very easy to steal the BR for its place of existence hence hampering the traditional knowledge of the communities.

➤ **Word game**

The Act and rules also employ the term ‘use’ for genetic material and ‘commercial utilization’. In simplest meaning the term ‘use’ denotes *the act of employing something for a purpose*²⁷ while ‘utilization’ denotes *to make practical and efficient use*²⁸. The aim of the Act is strictly to make sustainable use of BRs, the casual usage of such terms denotes lack of clarity.²⁹ Furthermore, the definition of ‘commercial utilization’ is exclusionary in nature. The usage of BR for monetary gain is commercial utilization and the definition does not include conventional method of breeding. Thus, it leaves out space for any entity (human/corporation) to indulge in conventional breeding method thus not requiring permission from the authorities and later modify their methods.³⁰ The Act will thus have no control on the commercial usage thereafter.

²⁷ Dictionary

²⁸ Id.

²⁹ S. Bala Ravi, INFIRMITIES AND INCONSISTENCIES OF INDIAN LEGISLATIONS ON ACCESS AND BENEFIT SHARING, *Current Science*, January 2006, JSTOR

³⁰ Id.

THE ABS GUIDELINES

“I do not intend that our natural resources shall be exploited by the few against the interests of many.”

– Theodore Roosevelt

Issues with ABS mechanism (2014)

There are several issues with the implementation of the ABS guidelines. Local communities are to be recipients of 95% of the share. The amount of revenue that is pooled for the local communities is far from their reach in actuality.³¹ The benefit sharing is controlled by the accessor but regulated by the NBA. It is a selfish move on part of the accessor and neglectful attitude on part of NBA. On top of that the intertwined relationships between various communities over the use of a particular BR makes it difficult to pin down the ‘rights’ issue. In southern Kerala, the usage of plant *Trichopuszeylanicusto* make an anti fatigue drug tells us a failure story. The researchers from Jawaharlal Nehru Tropical Botanic Garden and Research Institute took on board a few locals form the *Kani* tribe and initiated their project of drug development. However, members from other villages of the same tribe objected on the lack of consultation and the project later fell apart. PepsiCo has failed to provide the benefit sharing to its beneficiaries regarding the use of seaweed it heavily gains profits from. One of the other major issues faced with the usage of BR is that most of them are without permits. Many people are not even aware that such permissions are required under the concerned laws. The lackadaisical approach of SBBs also hampers the entire goal of the legal mechanism. Technological advancement has proved to be another serious obstacle to ABS. The Digital Sequence Information is an advanced technology that records genetic sequence. The same is available in public domain and hence no permission is required to make use of that information. The information is being directly used for production of various products without even having to obtain permission for physical access to it. This also denotes the anti-sustainable use. This is a

³¹AathiraPerinchery, BIORESOURCE ACCESS AND BENEFIT-SHARING: HOW FAR HAVE WE COME IN INDIA?, *Mongabay*, last accessed 10th July, 2020, <https://india.mongabay.com/2020/04/india-bioresource-access-and-benefit-sharing-how-far-have-we-come/>

clear failure of scientific foresight on part of the drafters and the government that should be immediately taken into consideration before any valuable resource is exploited without its due consideration received.

Table VI
Category wise Details of Actual BS with the NBA

Category	Amount in Rupees
Access and transfer of BR and associated TK(Forms I and IV)	39,09,765
Access of BR and associated TK (Form I)	4,25,993
IPRs (Form III)	3,940
Total	43,39,698

There are several issues with the 2014 guidelines itself. New draft guidelines have been presented and opened for public comments which aim to tackle the matters at hand as posed by the older guidelines. The new draft aims to make the process simpler, more transparent and digitalized so as to avoid the free use of the BRs of our country and to bridge the gap between the aim and implementation when it comes to benefit sharing.

The 2014 guidelines have been challenged in the court to be unconstitutional and *ultra vires* of the BD Act.³² It was the *Ayush* companies that brought this challenge to the court arguing that if any Indian entity is not dealing with a non-Indian entity regarding a BR then the 2014 guidelines are not applicable to them. This occurred due to notices by the particular SBB over sharing of the economic profit. However, the case is not yet decided.

As noble as the aim of the Convention, the Act and the guidelines maybe; it is undeniable that it is the human actions that the biodiversity and the natural resources are in danger of extinction and depletion.³³ As pointed in the paper before, conservation is seen in the simplest way as the protection of biodiversity. The Convention aims to push the legal mechanism of the signatory countries towards more than that. It aims to achieve sustainable use of the BR. However, in achieving so, it has also opened up the ways to exploitation of the resources. Every BR that is identified needs to be carefully studied before being used to avoid exploitation. The legal

³² Supra, note 24

³³VigneshKamath, CONVENTION ON BIOLOGICAL DIVERSITY: A BOON OR BANE, QUESTION GLOBAL BIODIVERSITY SCIENTISTS, *Research Matters*, (last accessed 11th July, 2020), <https://researchmatters.in/news/convention-biological-diversity-boon-or-bane-question-global-biodiversity-scientists#:~:text=Following%20the%20CBD's%20obligations%2C%20India,implement%20provisions%20under%20these%20acts.>

mechanism is in place to ensure appropriate use of the resources and the genetic material. However, the blatant misuse of resources and rampant bio-piracy showcases the failure of the system in place which is far from achieving its objectives.

The ambition was to set up transparent and non vague rules and procedures to ensure that the access granting and benefit reaping process run smoothly resulting in positive and sustainable outcomes. The experiences clearly reveal that the interpretation and implementation of the provisions in this mechanism has been severely faulty.³⁴ It is also reflects in the pile of cases before the National Green Tribunal (NGT).³⁵ There is a mechanism in place, however the number of cases show how the authorities have failed to establish the compliance of the mechanism.³⁶

The draft ABS Guidelines (2019)

All of these failures led to release of draft guidelines on ABS by the NBA on 24th April, 2019.³⁷ NBA powered by Section 64 along with Section 18 (1) and Section 24 (1) of the BD Act have followed further in the implementation of Nagoya Protocol by releasing these guidelines.³⁸ Public comments have been invited and these guidelines have led to a heated debate. It is argued if these guidelines will be effective in overcoming the shortcomings of the previous mechanism or will further hamper the already defective procedures.

³⁴BalakrishnaPisupati, ShyamaKuriakose, BIODIVERSITY ACT: A JUNGLE OF CONFUSION, *The Hindu Business Line*, (last accessed 17th June, 2020), <https://www.thehindubusinessline.com/opinion/columns/biodiversity-act-a-jungle-of-confusion/article29112025.ece>

³⁵ Id.

³⁶ Id.

³⁷NBA ISSUED GUIDELINES ON ACCESS TO BIOLOGICAL RESOURCES AND ASSOCIATED KNOWLEDGE AND EQUITABLE SHARING, last accessed 18th June, 2020, <https://patentsrewind.wordpress.com/2019/04/26/nba-issued-guidelines-on-access-to-biological-resources-and-associated-knowledge-and-equitable-sharing/>

³⁸MoEFCC, GUIDELINES ON ACCESS TO BIOLOGICAL RESOURCES AND ASSOCIATED KNOWLEDGE AND EQUITABLE SHARING OF BENEFITS REGULATIONS, 2019, last accessed on 18th June, 2020, <http://asbb.gov.in/access/draft-guideline-abs.pdf>

➤ **The Number Game**

- A. These guidelines focus heavily on the benefit sharing aspect. Use of terms like ‘mode of benefit sharing’ is found throughout the regulations. At every instance, the process of obtaining permit for access of BR or transfer of its results has been elaborated considerably. The guideline is found to focus primarily on the ‘how much’ aspect of benefit sharing instead of ‘how’ and ‘who’. The objective of the Act as well as the Convention and the Protocol is not just the monetary aspect of sharing but rather the aspect of sharing itself as well which is completely missing. The concentration on the financial benefit accruing from the sharing of BRs is devoid of the fair and equitable sharing component of the objective. The lack of clarity and attention on the sharing aspect also denotes the absence of sustainable use of BR component of the objective.
- B. Furthermore, there is no answer as to how the percentage of benefit was reached in the various procedures. There is lack of resonated backing for the determinative standard of the pre-decided percentage of benefit sharing. This is in total disregard to the objectives of the guideline and the antagonistic to the total setup of mechanism. The fixations were there before as well, but a pre-decided number defeats the future chance of negotiation to arrive at a better profit sharing arrangement. It makes the situation stringently pre-bound. There is also no reasonable standard as to how the ex gross factory sale and price has been calculated and put in place.
- C. The mode of payment through the annual ex-factory sale price is severely problematic. Depending on the turnover of the company, the payment of annual fee is fixated. It has been determined in the draft that if a company has turnover below Rs. 1crore, it can be exempted from its obligation of benefit sharing by payment of annual fee of Rs. 500. For a company that it making monetary benefits in lakhs by utilization of BRs can excuse itself from its benefit sharing obligation by a meager amount of annual fee payment. This pre-determined slab is in fact ridiculous in nature when looked at.³⁹The slab fixated is paltry which amounts to nothing for a benefit reaping company and is a mockery to the foundation of the sustainable development and use. As opposed to the 2014 guidelines

³⁹AlphonsaJojan&VineethaVenugopal, Biodiversity Act : Draft ABS Guidelines Helps Businesses By Diluting Sharing Of Benefits With Local Communities, *Live Law*, last accessed at 15th April, 2020, <https://enalsar.informaticsglobal.com:2278/columns/biodiversity-act-draft-abs-guidelines-145638>

where the levy stood at 0.1% from the ex factory sale price and hence amounted to thousands of rupees.⁴⁰

- D. Secondly, the draft has removed the obligation to pay the fees for benefit sharing if the accessor pays a collection fee to the BMC.⁴¹ In contrast, the 2014 guidelines collected both the fees. Example, if the ex factory sale price of a company stands at Rs. 50 lakh, the collection fees stood at Rs 25, 000 by computation based on 0.5% of the sale price.⁴² Now, there is only one payment.

Both the payment methodologies have been brought down significantly from the 2014 guidelines. This is no where a proportionate or reasoned reduction. With the prices at rise over the years, the amount should have by all reasonable standards increased given the increasing amount of profit being accrued by the entities with the commercial use of BRs. Instead, the government slashed down the already insubstantial amount fees paid by the corporations.

➤ **The Exemptions**

The draft has also provided blanket exemption to some BRs.⁴³ Thus, the use of such BRs for commercial use will be exempted from benefit sharing. This complete exemption for certain BRs (bamboo, cane, finfish, shellfish, poultry, livestock, cultivated biological resources and cultivated medicinal plants/trees)⁴⁴ is extremely detrimental to the indigenous communities. In case there is a situation where the local community has a particular knowledge of the abovementioned BR, they would not be receiving any benefit share for it due to the total exemption. This is against the spirit of the Act, the convention, the Protocol and the very purpose of the guidelines.

⁴⁰ Id.

⁴¹ Id.

⁴² Id.

⁴³ Id.

⁴⁴ Supra, note 38

➤ **Missing the ‘Local’ point**

The NBA is equipped with the power to engage in the agreements and negotiate the terms and conditions which achieve the aim of equitable benefit sharing. However, the guideline fails to elaborate on the aspect of identifying the importance of the actual recipients of the benefit which is the local communities. There is lack of focus on the significance of the indigenous communities with whom the benefit is to be shared. The guideline misses out on identifying the ‘how’ and ‘who’ completely.

➤ **Still missing the Delegation**

The other issue with the absence of sharing aspect is that the end result is affected as well. It is very well known that the local communities have often not received their due consideration. The silence on sharing aspect fails to address this problem again. With the focal point becoming the monetary outcome of the arrangement rather than how the arrangement is made and dealt with, the local communities are left wanting for their due attention. The goal has been centralized in attaining the money that the arrangement will procure. In that very wake, BMCs are not engaged in the benefit sharing process. The arrangement operates between the applicant and the NBA or SBBs sometimes. The inadequacy of attention to BMCs also denotes a paradox of the guideline’s objective. BMCs are closer to the community, the ignoring of the same is ignoring the locals as well; both of which are problematic and against the greater purpose of the whole mechanism.

Along with the BMCs, the SBBs are also in a redundant role here. Even earlier it has been pointed that SBBs need to be entrusted with bigger responsibilities. The draft again disregards the need for delegation of power. The consolidation of power with the NBA causes a misbalance of power in the three-tier structure. The easier and coherent method of working would be if the functions and responsibilities are sensibly and neatly demarcated between the three tiers along with reasonable power of decision making. If the negotiation power is left alone with one player, the NBA, it is not a very fruitful tactic when it comes to negotiation and deliberations.

The existing ABS guideline and the draft put the NBA at the centre with SBBs and BMCs acting at it direction as branches and denominators. It is already pointed before that the local

communities are answerable to the SBBs and in turn to the NBA. With the concentration of the power with the NBA, it is the central authority with all powers. The very BR, traditional knowledge that they nurtured is being exploited by external entities without their explicit consent. The manner in which the structure stands, local communities are made the benefit reapers of the BR but at the mercy of the system. They do not have an actual consent to refuse the entry of external entities into their forests or to stop them from using the resource. The power to grant permission lies with the NBA. This structure monopolizes the system where the local communities have no true voice or consent.

This very structure is focused on the obligations that are to be followed for BR or related genetic material unique to India. However, research/ survey/commercial utilization or transfer of genetic material/germplasm is not a one way use system. There can be BR or genetic material that can be brought to India. Such foreign BR which is not unique to India but now found in India is under the absence of any regulatory mechanism as ABS is silent on it.⁴⁵ Thus the mechanism needs to be updated to deal with the influx of BR from other side as well.

➤ **Miscellaneous**

The draft has made provision for a discount amounting to 25% if any applicant on successful submission of proof of payment to BMC of a levy fee (in case of use of BRs for commercial purposes) along with the profit payment to the NBA. This is a form of double payment and most likely to be challenged in a court.

On a technical note, the very opening paragraph of the draft uses the term 'regulations' and 'guidelines' synonymously. It is a wrongful use of legal language. Guidelines denote a set of advices or recommendations required to be practice whereas Regulations goes a step further to legitimize the guidelines officially. Regulation is accompanied by enforcement mechanism apart from mere suggestions. The use of both the term interchangeably shows a poor use of legal language or lack of attention in drafting.

⁴⁵ Supra, note 39

The Economics of biodiversity?

“I do not believe there is a natural resource economics. There is either good economics or bad economics.”

- Milton Friedman

The aim of the entire biodiversity legal mechanism seems to be based on *bio-economy*.⁴⁶ The use of BRs for its economic value; however this also includes the safeguard of the BRs. It also includes the estimation of the damage caused to the BR and ensures punitive action in case of any violation or related crime. In a market, only the marketable products sell well and make profits. Similarly, the valuable BRs are marketable and profit producing; which is why value assessment of BRs is required so as to put the BR to appropriate use in a market. ABS is a mechanism based on the principle of balance where a BR is put to use for revenue generation and part of the revenue is given to the cultivator of the BR. The bio-economy scheme fits right into ABS. As the bio-economy theory is broken down into steps, we realize how the ABS plays a significant role in stabilizing it.⁴⁷

- a. Recognizing a particular BR having marketable potential
- b. Estimating the potential of the BR so that it could be used to its full potential
- c. Recognizing its origin and its cultivators/safekeeping communities
- d. Recognizing the right industry where the potential of the BR will be rewarded with the best return.

Once the BR is ready to be utilized by the right industry, ABS can play the role of guiding author making sure that the BR is not exploited and the revenue generated reaches the hands of the local communities.

Economizing of any commodity specially when it comes to resources have always been criticized heavily. However, what the guidelines is actually doing is commoditization and marketization of BRs.

⁴⁶Economics of Biodiversity for Access and Benefit Sharing (ABS)

⁴⁷ Id.

CONCLUSION

Before we try to dissect the guidelines and the Act further for its shortcomings; we need to ask one question- Is this the *modus operandi* sanctioned by the Convention or the Protocol and other international agreements? Is this what the drafters aimed at when they actively strived for 'conservation', 'sustainable use' and 'fair and equitable sharing'?

The ABS guidelines (draft 2019) have various lacunas so does the BD Act. However, most issues are identifiable on both marking the caveats to be in the whole mechanism itself.

The Act is unclear on the definition of BR and genetic material.⁴⁸ Hence, if a BR is granted access, the related genetic material automatically gets accessed. This kind of open-ended access is detrimental to both the resources and the indigenous communities who strive to conserve them.

The Act and ABS both are unclear on the accessors of the BR and genetic material. The ABS is a mechanism to ensure the implementation of the equitable sharing of benefit and the Act is the philosophical foundation behind it. However, absence of distinction between different kind of accessors/entities (humans-researchers/surveyors or body corporate) defeats the purpose behind the objective. Different accessors use the BR or genetic material for different reasons and obtain varied results. There should be classification of the accessors in the Act and the guidelines. The Act is very flexible in its approach towards Indian entities when it comes to accessing the BR and using it for commercial reason.⁴⁹ The Indian entities are required to inform the SBBs before accessing and using the BR and that is all. There is no requirement of obtaining permission or details sharing. This is too easy for Indian companies that use BR for their commercial purpose. There is no recourse for the citizens to approach the court directly regarding issues with the whole mechanism. Rather, they can only approach the court against order passed by the NBA and the SBBs.⁵⁰

As much as there was requirement of a specific legislation on conservation of biodiversity and sustainable use of BR, the BD Act and its related regulations have proven to be the classic case

⁴⁸Supra, note 6

⁴⁹THE BIOLOGICAL DIVERSITY ACT 2002 AND RULES 2004- Concerns & Issues

⁵⁰Id.

of failure of rightful and appropriate implementation like many other legislations in India. The bridge between the positivist law and real law is extremely wide in this case. The implementation of the BD Act and the ABS guidelines (2014) has been a faltering case. The draft ABS guidelines (2019) is atop that not just problematic in its words but if passed will prove to be problematic in its implementation as well and ass to the woes of its parent Act.

All of the above mentioned issues throughout the project point towards one singular cause-anthropocentric approach. The root cause lies in the fact that the aim might have been conservation but the words are facilitating of human needs. Irresponsible and selfish human activity is the reason that biodiversity all over the world was at threat in the first pace. The Convention came into existence after the planet lost some valuable biodiversity and realized the need for conservation. The growing human needs were the reason for endangerment of biodiversity; there was a need to strike balance between the needs and the use of biodiversity for those needs. Hence, the component of sustainable use found its place in the convention too. The indigenous communities were the conservers of the BR and its related traditional knowledge in which the corporations have been tapping since ages for its commercial use and making profit. The importance of recognizing the right of the conservers of the traditional knowledge while balancing it with the commercial use of the BR led to the incorporation of the fair and equitable sharing of benefits. The objectives were founded and incorporated with a particularly backed reason.

However, the failures of the BD Act and ABS guidelines to make avail the local communities their monetary due; the continued endangerment of the biodiversity and depletion of resources suggest clearly that the objectives are far from being achieved. The words on paper and its execution are both a lackadaisical work on part of the authorities. The 2019 draft ABS guidelines represent that the process has been eased up to make ABS process easier. However, what is not being explicitly represented that the BR of this country has been basically been invited for exploitation. The continuous easement of process for commercial use of resources while it has been documented that the indigenous communities have not been receiving their due consideration show the government's bias towards industrialization and development. The Indian industries have never known to be environmentally responsible.⁵¹ Despite that, the legal

⁵¹ Supra, note 50

mechanism on biodiversity is continuously being diluted to suit their needs. The Act or draft does not even cover foreign entities bringing germplasm into India. The payment is being reduced to pitiful amount knowing that the benefit is to be credited to the local communities who spend their entire lifetime conserving the resource the industries mercilessly exploit. One of the other objectives of the Act is to document the biodiversity but that is also been done without the involvement of the local communities who are the stakeholders. As mentioned before in the project, the local communities are devoid of any actual right. Hence, the overall mechanism is in to a *recipe for exploitation*.⁵²

The legal setup exists for safeguard of resources and locals. The legal setup and its consequent amendments and additional regulations should therefore be *eco-centric* instead of anthropocentric. For ages, environment was never perceived as a serious arena. Despite various conventions and protocols being tabled internationally and various nations signing up to fulfill those obligations; it took the severe effects of climate change, extinction of myriad flora and fauna, pollution or depletion of all natural resources, for the world to have a wake call. This is not a precautionary approach but rather a reactive approach. Damage control starts after the damage is done instead of taking measures to prevent the damage from occurring or at least slowing down its occurrence. This is the very troublesome attitude that humans had regarding environmental concerns that the situation has come to this.

The exploitation is indicative as to how the act is failing. So, instead of just putting laws on paper and making them look good, the government should make provision for safeguarding the BRs, and the traditional knowledge. The government should create opportunities to also incentivize the local communities to come forward in partaking in the development of BR and its utilization instead of losing the confidence of their own people and hence losing the valuable BRs, the knowledge to mis-appropriation.⁵³

India is home to mega-biodiversity but it is lacking behind in development and economy whereas the US barely has any biodiversity hotspots but is making money out of other nations' bio-resources. The idea behind the criticism of the Indian bio-diversity legal mechanism is not to

⁵² Supra, note 5

⁵³G. NarasimhaRaghavan, NEP'S TAKE ON TRADITIONAL KNOWLEDGE AND BIODIVERSITY, *Current Science*, 2007

suggest that the BRs of the country should be put up in closed jars and not be used at all. But rather the idea is to realize the true spirit of the set-up which is bonafide use of resources. India should strive to utilize its resources to profit economically but at the same time should be mindful of the proportion to which the resources be capitalized.

In ascertaining the economic value of the BRs, the drafters and government has somewhat lost sight of the aspect of protection of biodiversity. The Act and its branches are more concentrated on the benefit sharing. The tilt of balance is towards the capitalization of resources rather than concerning about the sustenance of the bio-diversity. The ABS guidelines (2014) and the 2019 draft are representatives of this issue. This approach needs to change.

There are several issues with the parent legislation itself and they manifest themselves in the respective rules and guidelines. The ABS mechanism is touched by it clearly. The lacunas of the Act are carried forward in the ABS guidelines as well. The 2019 draft ABS guidelines have gone ahead and created even bigger loopholes than which already existed and opened the biodiversity of the country to exploitation at the hands of the industries at the cost of environment and indigenous people.

Coming to the question posed at the beginning of this segment; the convention or other international agreements had set the goals to balance the need for development with the importance of environment. However, the modus operandi undertaken by the Indian authorities has far strayed from the objectives. The bias towards capitalization, at the expense of biodiversity as reflected in the 2019 draft ABS guidelines is being driven by political ideologies of the ruling party at the centre. The convention certainly did not perpetrate opening the BRs to exploitation or tagging them at such cheap price.

Even though there is a segment of debate that *value addition* to BRs is a form of bio-piracy itself.⁵⁴ However, for the purpose of this project, the author has not delved onto that debate and analyzed the mechanism in the light of the objectives of the Convention and assuming it to be in good faith. Political ideology of the ruling party influences the drafting of various laws. The 2019 draft ABS guidelines are an example of it. Not that the previous editions of laws drafted under

⁵⁴P. Balakrishna, ACCESS TO GENETIC RESOURCES AND TRADITIONAL KNOWLEDGE: PRIORITIES FOR NATIONAL AND REGIONAL ACTIONS, *Current Science*, 1998

other ruling parties were the best parameter but the dilution of the ABS framework is quite severe this time and therefore more damaging than before. The apple has fallen too far from the tree this time.

While on one hand the country boasts to be one of the few countries that submitted the 6th National Report to the CBD⁵⁵, on the other hand traditional Indian companies battle it out in the courts regarding the notices sent by the SBBs to them. In *Divya Pharmacy v/s Union of India*⁵⁶, the court observed that it is the parliament which recognized the rights of Indigenous communities and at the same time how can it allow the exploitation of those communities by Indian entities?⁵⁷

As much as the objective of the Act may point to, there is barely any diversity illustrated by the Biodiversity Act. It was opined that the ABS guidelines should focus on the raw materials, i.e., the BRs or genetic material itself than the end product. That would ensure the focal point of the ABS guidelines stays on the BR and the indigenous communities instead of the monetary consideration.⁵⁸ However, this suggestion was not taken note of. The draft ABS guideline is demonstrative of the 'art of sharing'; the bias towards industries makes sure they receive the bigger and better piece of cake without actually putting any effort or cost for the cake. Overall, the Act and the ABS guidelines are laws written in nice words but with no vision. There is lack of spirit of the Convention to which it adheres and no real substance inside the box but it sure comes in good packaging.

⁵⁵ Press Information Bureau, Government of India, MoEFCC, 29th October, 2018, last accessed 16th July, 2020, <https://pib.gov.in/Pressreleaseshare.aspx?PRID=1557771>

⁵⁶Writ Petition (M/S) No. 3437 of 2016, Uttarakhand High Court

⁵⁷ Id.

⁵⁸PROCEEDINGS OF THE 53RD AUTHORITY MEETING, NBA, 22nd May, 2019