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Legal elements found in the framing of Indian biodiversity law - a critical analysis.

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### Abstract

*This article examines the legal and institutional elements embedded in India's Biodiversity Governance framework, with particular reference to the Biological Diversity Act 2002, the Biological Diversity Rules 2004, the Access and Benefit Sharing Guidelines, 2014 and the Biological Diversity (amendment) Act 2023. It argues that although the Act was enacted to implement the three cardinal objectives of Convention on Biological Diversity, its structure and operation reveal significant conceptual and institutional deficiencies. The study analyses the absence of precise statutory definitions, the weak regulation of domestic commercial users, the inadequate representation of indigenous and local communities and the marginal positioning of biodiversity management committees within the decision making framework. It further highlights the lack of meaningful community consent, the limited legal protection accorded to People's Biodiversity Registers, the absence of gender sensitive representation and the tension between biodiversity governance and intellectual property regimes. The article also critiques the Access and Benefit Sharing Guidelines for lacking transparency in determining benefit sharing formulas. Finally, it contends that the 2023 amendment dilutes the original conservation oriented objectives of the Act by prioritising ease of doing business and weakening institutional accountability. The article concludes that biodiversity law in India must move beyond formal compliance and evolve into an empowering framework grounded in participation, protection and equitable justice.*

*Keywords: Biodiversity legal framework, CBD, legal elements.*

### 1.Introduction

In general, biodiversity (De long D C,1996) refers to the variety of organisms that exist. It is essential to the ecosystem's survival as a whole (Balwan 2012). Several laws have been developed over the years to preserve and safeguard this variety of species in the nation. The most significant one in this context, however, was the passing of the Biological Diversity Act of 2002 and the Biodiversity amendment act of 2023, which attempted to put the 1992 international Convention on Biological Diversity [CBD] into effect. Subsequently, federal legislations were framed to comply with the trio-cardinal principles of the convention such as conservation of biodiversity, sustainable utilisation of its resources and access and benefit-sharing of biological resources of its occurrence (K. P. Laladhas 2022). With the passage of the BD Act, 2002 at the start of the twenty-first century, the issue of ABS system regulation in India was first given genuine weight. As a result, India came

to understand the significance and applicability of this approach considerably later than other countries. This makes it crucial to examine the elements that went into crafting the BD Act's language.

## **2.Element as an essential component**

A legal and institutional “element” refers to a basic component of a legal framework that enables institutions to promote the sustainable use of resources. These elements may appear within a single law or be distributed across several legal instruments. They typically include statements of intent, jurisdictional authority over resources, and clearly defined goals and objectives. Legal definitions clarify the meaning and scope of key terms, while duties of care establish obligations for individuals or institutions to act responsibly. Hierarchies of responsibility allocate roles across administrative levels. Effective frameworks also incorporate stakeholder participation, mechanisms for implementation and enforcement, and procedures for dispute resolution to address conflicts and ensure compliance.

## **3. Key elements and its inclusion in the Biodiversity Act 2002 and rules.**

The enactment of the Biological Diversity Act, 2002 was a necessary step to implement the objectives of the Convention on Biological Diversity (CBD). The legislation mainly focuses on regulating access to biological resources, particularly by foreign individuals, organizations, and corporations. The Act required the creation of Biodiversity Management Committees (BMC), which is supposed to give local communities a say in the preservation, sustainable use, and ABS of bioresources. Although several provisions of the Act, 2002 and its accompanying rules are progressive in nature, they continue to exhibit significant gaps and limitations.

One important lacunae is the absence of definition of certain terms, The phrase "conservation" of biological diversity is not defined in the Act or the Rules adopted under it, despite the fact that the Act's primary goals are the preservation of biological diversity and its sustainable use. The manner the Act limits access to biological resources is heavily reliant on the terms "commercial utilisation," "use," and "utilisation." However, the terms "use" and "utilisation" are not defined in the Act or the Rules. According to the Act, "commercial utilisation" refers to any action that makes money. It suggests using in conjunction with or to support a business that seeks to make money.

The Act excludes plant varieties that are registered under the Protection of Plant Varieties and Farmers' Rights (PPVFR) Act, 2001. This framework enables corporations and researchers engaged in developing new crop varieties to obtain intellectual property rights over their innovations. As a result it weakens the biodiversity act. The Biological Diversity Act experiences a problem that it allows the Government to exempt certain items “including biological resources normally traded as commodities” from the ambit of the Act (Sharma S.K et al 2018) . Such an exclusion when there is no other regulations regulating seed transboundary trade creates a legitimate route in the case of seeds, which are traded commodities. And in the event that seeds are excluded, the PPVFR Act, which grants unrestricted access to all genetic resources, inclusive of variants safeguarded by plant breeders' rights, to anybody doing research without the need for prior informed consent. There is essentially no mechanism to make sure that the communities that created and preserved these resources receive an equitable share of the advantages once they are removed through commerce and used in conventional or non-conventional breeding.

It is unjustifiable that Indian corporations and other entities must merely make "prior intimation" to a State Biodiversity Board in order to use bioresources for commercial purposes, as opposed to "permission" from the National Biodiversity Authority, which is required for foreigners. For the

commercial exploitation of bioresources, all Indians, particularly industrial corporations, should also get prior authorization rather than just an intimation because, in the absence of legal force, they would not necessarily be accountable to the environment or to the communities in which they operate. Furthermore, it's possible that by taking use of this legal loophole, certain Indian businesses and citizens, who are exempt from the Act's operation, may be acting as local fronts for international corporations. Additionally, there is no particular system in place to monitor on a daily basis whether Indian nationals, corporates, companies, or organisations that have got registration in the country are using biological resources for commercial purposes, conducting biosurveys and using bioutilization for commercial purposes, or using it for any other reason. Furthermore, there are no rules governing the use of those biological resources for profit. Valued biological resources could be in danger of going extinct as a result of this unrestricted system, and local agents could give it to international businesses.

The Act specifies how permissions for access to and utilisation of the country's biodiversity must be obtained. However, there is debate concerning the National Biodiversity Authority's (NBA) constitution, which gives it the authority to give these licences. Section 8 of the aforementioned Act states that there are currently no representatives from tribes, or other communities in the NBA. Consequently, the Act falls short of fully empowering local communities to safeguard their resources and traditional knowledge from misuse or to secure equitable benefits. It also lacks explicit provisions ensuring adequate representation of local community members in State Biodiversity Boards. Furthermore, the legislation does not provide sufficient mechanisms for protecting emerging indigenous knowledge, nor does it establish a framework for its formal registration.

Another key element commentable due to absence is lack of gendered representation. Gender bias in the development and implementation of policies and programmes stems from the failure to integrate both sexes in biodiversity conservation, which also loses local and international relevance. Local biodiversity is preserved through traditional knowledge held by both men and women. In the preamble of CBD, it is stated that women play vital role in the conservation and sustainable use of biological diversity and there is the need for the full participation of women at all levels of policy making and implementation for biological diversity conservation (Christian 2018) The Biological Diversity Act does not highlight the involvement of women in achieving national objectives and goals. In fact, the composition of the NBA and SBB does not reflect any form of gender-balanced representation.

#### **4. Critical elements missing both from the Act and Rules**

4.1 The Grama Sabha and other village assemblies are not included in the definition of local body, which presents an issue. The political and social relations involving intrigue to gain authority or power between a village and the panchayat body would be crucial to the BMC's constitution and operation, as the BMC must be appointed or selected by the local body.

4.2 The local body that forms the BMC does so through nomination. Since Rules 22(2) and (3) clearly state that the committee will pick the Chairperson and that members will be nominated by the local authority, the BMC may merely turn into another power structure with no real purpose to safeguard community rights or conserve biodiversity.

4.3 The Act explicitly outlines a range of functions for the Biodiversity Management Committees (BMCs), including promoting conservation and maintaining People's Biodiversity Registers (PBRs). However, the Rules narrow this scope by reducing their primary role to merely maintaining PBRs.

4.4 People's Biodiversity Register: The PBR is a database that details the variety of plant, animal, and crop species, among other species. As of right now, the knowledge listed in the PBR is not protected by the law. Regarding the matter of access to this document, this is difficult. Despite the fact that communities build and manage a database of local knowledge resources, there is no provision requiring their consent when accessing the material in PBRs.

4.5 Despite the fact that Rule 17 specifies that local entities must be consulted prior to permission to use bioresources is granted, but phrase "consult" is not well defined, and in many situations it may only be a formality.

4.6 Community consent is not one of the criteria stated in the Act, despite the fact that it has clearly outlined the requirements for rejecting applications. Given that Rule 7 assigns BMC solely an advising role, it is obviously biased.

However, the BMCs' only responsibility under the Rules is to prepare PBRs. The rights of IPLCs, who can be considered as primary parties in the preservation of biological resources, are severely violated by this.

It can thus be inferred that documentation alone, when not supported by legal safeguards, may inadvertently facilitate exploitation. One can find a trend to centralise natural resource management throughout India, and it seems that there is a lack of trust in the ability of local organisations to make decisions. Therefore, the Act's provisions cannot be justified by giving locals preferential inclusion without actually giving them any authority. Such a measure invites irritation, even in light of the fact that the 73rd and 74th Amendments to the Indian Constitution have upheld the necessity of village-level decision-making.

4.7 The Biological Diversity Act, 2002 establishes a regulatory framework governing access to biodiversity-related knowledge. However, it does not prohibit the grant of intellectual property rights, thereby enabling the potential privatization of India's traditional knowledge. The Act merely restricts the filing of IPR applications, whether within or outside India, without obtaining prior approval from the National Biodiversity Authority (NBA), which retains the discretion to approve or reject such applications. Notably, neither Rule 18 of the Biological Diversity Rules, 2004 nor Form III prescribes any mechanism for obtaining this approval in consultation with the affected local communities. If bio-piracy is detected, the Act gives the NBA the authority to act on behalf of the Indian government and oppose the granting of intellectual property rights in any other country. If there isn't a single, internationally recognised forum where these kinds of issues may be heard, the NBA might be limited to battling fires at several international IP offices. The intellectual property provisions within the Biological Diversity Act must also be understood against the backdrop of the Indian government's increasingly pro-IPR orientation, which is reflected in related legal and policy developments, such as: (a) the Protection of Plant Varieties and Farmers' Rights Act, 2001, which establishes plant breeders' rights, and (b) subsequent amendments to the Patents Act, 1970.

So all these enactments (Biodiversity Act, Protection of Plant Varieties and Farmer's Rights Act, and Patents Act) are not "incompatible". Although an international convention like the Convention on Biological Diversity, states that intellectual property rights must not conflict with the conservation and sustainable use of biodiversity, the biodiversity law is apparently based on the premise that IPRs and biodiversity conservation are not antithetical (Sharma R 2022).

NBA was founded in 2003 to oversee the execution of Section 8 of the Biological Diversity Act. Additionally, by offering them technical support and direction, it systematizes the efforts of the SBB and BMC. On the other hand, the NBA has come under fire for its lackluster performance. The government's indifference appears to be one of the causes of this. The NBA's chairperson and members may still be removed by the federal government (sec.9). The Central Government's directives will bind the NBA (sec. 38) and so it is not an independent or autonomous organisation. The IPLCs, real keepers of biological knowledge, is inadequately represented in the NBA and SBB because the Act does not make their representation mandatory.

Additionally It is mandatory for all local bodies to establish a Biodiversity Management Committee (BMC) in their jurisdiction to encourage the preservation, sustainable utilisation, and recording of biological variety. The NBA is not required to abide with the BMC's recommendation or ruling, though. As a result, even in cases where the BMC disagrees, the NBA has the sole authority to handle biological resource and knowledge conservation while the BMC has the responsibility to do so. Since Rule 7 only assigns BMC an advising role in grant decisions, it is obviously biased.

The Act concentrates property rights into the hands of individual innovators through monopoly intellectual property rights, or the state through sovereign appropriation. However, it fails to establish a framework that recognizes or secures the rights of the original custodians of biological resources and associated knowledge.

## **5. Access and Benefit Sharing Guidelines**

Effective ABS implementation in India would be achieved only when it is linked with conservation objectives (Devi et al 2016). There was a suggestion to create a set of guidelines on ABS at the NBA's 12th meeting. Additionally, it was suggested that the rules be straightforward and practical and include clauses pertaining to the bioresources' commercial utilisation.. In 2014 the ABS Guidelines (ABS guidelines, 2014) came into existence. The commercialization of bioresources and ABS associated with them is the primary emphasis of these guidelines. They offer a mechanism for determining the financial responsibility of the genetic resource user for every previously designated activity for which bioresources are procured. They also specify how these advantages are to be distributed. The recommendations primarily address the financial responsibilities of bioresource users, their determination, and the percentage of benefits to be shared.

Additionally, the ABS Guidelines provide that the stakeholders must compensate the NBA for any monetary or non-monetary benefits that result from commercialising the intellectual property rights (IPRs) earned on discoveries connected to genetic resources, as agreed upon by the applicant and the NBA. Benefit sharing may be carried out in monetary or nonmonetary ways, depending on what the application and the NBA/SBB in question decide after consulting with the BMC, benefit claimant, etc., in accordance with the ABS standards. ABS should be ascertained by taking

into account parameters including the commercialisation of the bioresource, the phases of R&D, the prospective application of the research's findings, the amount of money invested in these areas in preliminary phases, type of technology used, the sequence of timelines and key milestones spanning from the project's initiation to the completion of the final product, and the risks associated with product commercialization. It's interesting to note that benefit sharing doesn't change depending on whether the final product uses one or multiple biological resources.

The published guidelines don't go into detail on how the different payout amounts were determined. Additionally, they do not provide an explanation for how the various payout figures were determined. They also fail to explain why, in certain cases, local level committees receive direct funding and why, in other cases, this has not been planned. Unfortunately, neither the document's readers nor its intended beneficiaries are given much insight into the reasoning.

The National Biodiversity Authority (NBA) also act as a checkpoint under the Nagoya Protocol framework. According to the relevant guidelines, any individual seeking to apply for intellectual property rights in India for an invention derived from research involving a biological or genetic resource sourced from a Party to the Nagoya Protocol must submit an application to the NBA in Form 'C' to obtain a no-objection certificate. This application must be accompanied by evidence of the resource's origin, along with documentation demonstrating prior informed consent, mutually agreed terms, or an internationally recognized certificate of compliance. In contrast, where the resource is obtained from a non-Party to the Nagoya Protocol, only proof of the source of origin of the biological resource and any other pertinent documentation is required.

## **6. Dilution of elements in amendment**

The amended Biological Diversity Act (BD Act 2023) puts profits over people. And rely on “ease of doing business” as a rationale for big corporates to be exempted from sharing their profits with tribal populations. One of the amendments to the Biological Diversity Act, 2002 introduced an exemption for “AYUSH practitioners and traditional knowledge holders” from the obligation to pay ABS compensatory payments intended for tribal and other communities that have traditionally collected, conserved, and utilized medicinal plants and herbs which are very integral to the AYUSH sector. In practice, this exemption effectively grants the AYUSH industry undue leniency. Moreover, it weakens regulatory safeguards that are essential for supporting the livelihoods of tribal and forest-dwelling communities engaged in the conservation of biological resources. The modification appears to be a clear attempt to weaken a significant ruling rendered by the Uttarakhand High Court (Divya Pharmacy 2018) in 2018. Large Ayurvedic enterprises' annual turnovers, when seen as a whole, indicate that ABSs have much more potential. This could be the reason behind the industry's strong campaign against paying ABS.

A central aim of the Biological Diversity Act, 2002 is the conservation of biological resources alongside ensuring fair and equitable benefit sharing. However, in its amended form, the Act departs significantly from this original objective. By decriminalising offences—replacing penal provisions with monetary penalties—it undermines the capacity of institutions to effectively hold large corporations accountable.

## **7. Conclusion**

The Act is perfectly in synchronization with the CBD, its preamble apparently underscores the threefold objectives verbatim, yet the realization of the objectives depends on its proper and

effective implementation (Ijaiya 2021).As of now all the important elements are getting diluted.Framing of law by adding textbook elements without ground-level implementation would be of no gain.

Pivotal elements are present in our Act but its interpretation and implementation is not in tandem with the objectives.The legal framework should function as an enabling mechanism that both incentivizes participation and formally acknowledges the rights and obligations of diverse stakeholders. By doing so, it can encourage individuals, indigenous peoples, and local communities - along with entrepreneurs, businesses, and other actors - to actively contribute to biodiversity conservation. Such a framework ought not only to impose regulatory controls but also to create supportive conditions through recognition of customary rights, equitable benefit-sharing arrangements, and clear allocation of responsibilities. In this way, the law can foster a more inclusive and participatory approach, aligning economic activity with ecological sustainability and ensuring that those who conserve and sustain biological resources are meaningfully empowered and rewarded.

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