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## THE BIOLOGICAL DIVERSITY ACT, 2002: RELEVANCY IN PROTECTION, PRESERVATION AND PROMOTION OF TRADITIONAL KNOWLEDGE

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### ABSTRACT

***“An investment in knowledge always pays the best interest.”<sup>1</sup>***

Benjamin Franklin, *The Way to Wealth: Ben Franklin on Money and Success*, 1757.

The spirit of this quote is reflected in the Biological Diversity Act, 2002 which contains *inter alia* contains provisions pertaining to the protection of indigenous traditional knowledge as well as its regulated transfer. The transfer of such community knowledge is facilitated through the access and benefit-sharing mechanisms contained in the Act itself. It is pertinent to note here that the main objective of the Act as well as the Convention on Biodiversity, 1992 on which the former is based is to secure the biological diversity from deterioration and adverse effects. In addition to that, they also recognize the close relationship that the indigenous communities have with such resources and the knowledge which they have treasured through generations. However, regrettably, the Biological Diversity Act, 2002 and the Biological Diversity Rules, 2006 have created numerous ambiguities concerning the definition of Traditional Knowledge as well as the ambit of protection extended. The Act leaves issues such as whether the ABS system aptly suits the Indian context includes components of Traditional Knowledge such as Traditional Ecological Knowledge, Traditional Technical Knowledge, and Traditional Values

and Ethics, and indeed benefits the cause of the knowledge holders unanswered, leaving for more to be desired. It is in this context that the Biological Diversity Act, 2006 shall be analyzed and commented upon.

**KEYWORDS:** Biological Diversity Act, Traditional Knowledge, Biodiversity Management Committee, State Biodiversity Board, People’s Biodiversity Register.

### I. Introduction and Background of the Legislation:

The Biological Diversity Act, 2002 (*hereinafter referred to as BDA*) is niche legislation that was the culmination of the ratification of the Convention on Biological Diversity, 1992 (*hereinafter referred to as CBD*) in 1994. The *CBD* was framed with the larger objective to ensure sustainable use of the world’s biological diversity<sup>2</sup> and also securing the traditional knowledge (*hereinafter referred to as TK*) associated with it.<sup>3</sup> Any sharing of such resources or knowledge is conditioned upon securing such objectives and also the *free and informed prior consent of the holders of TK*.<sup>4</sup> The Act of 2002 was enacted to further its purpose within the territorial jurisdiction of India.

### II. Salient Features of the Act:

#### A. Recognition of Holders of Traditional Knowledge as “Benefit Claimers”:

Article 8(j) of the *CBD* urges the contracting parties to take steps for in-situ conservation by

<sup>1</sup> Benjamin Franklin, *The Way to Wealth: Ben Franklin on Money and Success*, Poor Richard’s Almanac (1757).

<sup>2</sup> UNEP, *Convention on Biological Diversity, 1992*, 1760 UNTS 79, at Preamble.

<sup>3</sup> *Id.*

<sup>4</sup> UNEP, *supra* note 2, at art. 8.

means of developing national legislations that “respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovation and practices”.<sup>5</sup> The BDA for the first time concretises this aspect of in-situ conservation by clothing it with statutory approval. The Act of 2006 makes a novice attempt to recognise and protect the indigenous and local communities by defining them as “benefit claimers” thereby acknowledging their role as “conservers of biological resources, their by-products, creators and holders of knowledge and information relating to the use of such biological resources, innovations and practices associated with such use and application”.<sup>6</sup>

### **B. Exemption of Holders of Traditional Knowledge from seeking permission from National Biodiversity Authority:**

The BDA *inter alia* lays down a streamlined mechanism for obtaining knowledge associated to any biological resource occurring in India, be it for research or commercial utilization or bio-utilization or bio-survey. It provides that any person who seeks to have access to such knowledge would need prior approval of National Biodiversity Authority (*hereinafter referred to as NBA*), also constituted under the BDA.<sup>7</sup> Prior intimation is also required to be given to the State Biodiversity Boards (*hereinafter referred to as SBBs*) statutorily required to be constituted in each State.<sup>8</sup> However, the benefit claimers under the Act more specifically “the local people and

communities of the area are exempted from such requirements”<sup>9</sup>.

### **C. Provision of Benefit Sharing while granting Approval for Intellectual Property Rights:**

BDA mandates the prior approval of the NBA while applying for intellectual property rights for “any invention based on any research or information on a biological resource obtained from India”.<sup>10</sup> While granting such approval the NBA is empowered to “impose benefit sharing fee or royalty or both or impose conditions including the sharing of financial benefits arising out of the commercial utilization of such rights”<sup>11</sup>. Such benefit sharing fee is then distributed to the benefit claimers. The NBA may also direct benefit sharing in other forms such as grant of joint ownership of intellectual property rights to benefit claimers<sup>12</sup> and payment of monetary compensation and other non-monetary benefits to the benefit claimers, as may be deemed fit.<sup>13</sup>

### **III. Empowering Local Communities in the Protection of Traditional Knowledge under the Act:**

The BDA is not only a statutory framework for facilitating the equitable use of biological resources and the TK associated with it, but also empowers the local communities nourishing and holding the knowledge to use such resources, through generations. One such empowering provision is the constitution of Biodiversity Management Committees (*hereinafter referred to as BMCs*) in areas under the local bodies such as Panchayats and Municipalities. Such BMCs are empowered *inter alia* for “promoting conservation, sustainable use and documentation of biological diversity...and chronicling of knowledge relating to biological diversity.”<sup>14</sup> Further, it is mandated that the NBA and the SBBs **shall consult** the

<sup>5</sup> UNEP, *supra* note 2, at art. 8(j).

<sup>6</sup> The Biological Diversity Act, 2002, No. 18, Acts of Parliament, 2003 (India), at Sec. 2(a).

<sup>7</sup> *Id.* at Sec. 3.

<sup>8</sup> *Supra* note 6, at Sec. 7.

<sup>9</sup> *Supra* note 6, at Sec. 7.

<sup>10</sup> *Supra* note 6, at Sec. 6(1).

<sup>11</sup> *Supra* note 6, at Sec. 6(2).

<sup>12</sup> *Supra* note 6, at Sec. 21(2)(a).

<sup>13</sup> *Supra* note 6, at Sec. 21(2)(f).

<sup>14</sup> *Supra* note 6, at Sec. 41(1).

BMCs of the concerned territorial jurisdiction in the decision-making process pertaining to the use of biological resources and its associated TK occurring in such area.<sup>15</sup> The BMCs are further empowered to collect fees from such persons who accesses or collects biological resources within its territory.<sup>16</sup> The BMCs are also provided with financial autonomy to **“conserve and promote diversity...and for the benefit of the community”** in biodiversity conservation by creation of a Local Biodiversity Fund which shall be under the control of the local body constituting such BMC.<sup>17</sup> Such statutory recognition of the active and relevant role of the grassroot level stakeholders in the whole decision making process go a long way in motivating and incentivising the local communities to continue their endeavour in preservation of biological resources endemic to their area as well as propagation of the know-how associated with it.

#### IV. Interplay between BDA and The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006:

*The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006* just like the BDA is directed towards recognizing their **“responsibilities and authority for sustainable use, conservation of biodiversity and maintenance of ecological balance...”**<sup>18</sup>. Pursuant to such avowed objectives, the Act of 2006 primarily seeks to provide statutory recognition to the ancestral rights of the forest dwellers to their lands and habitats which are very integral to the **“survival and sustainability of the forest ecosystem”**<sup>19</sup>. Interestingly, there forest dwellers are very often the indigenous and local communities and the stress on sustainable use of biological resources is the focus of the both the

legislations. The harmony and parity between these two legislations can be seen from the fact that the definition of **“sustainable use”** as understood in Section 2(o) of the BDA has also been adopted in the Act of 2006 in Section 2(n)<sup>20</sup>.

The intent of the BDA in statutorily empowering the “benefit claimers” through BMCs is furthered by the Act of 2006 by recognizing the forest rights which *inter alia* includes:

- (a) “Right to protect, regenerate or conserve or manage any community forest resource which they have been traditionally protecting and conserving for sustainable use.”<sup>21</sup>
- (b) “Right of access to biodiversity and community right to intellectual property and TK related to biodiversity and cultural diversity.”<sup>22</sup>

Hon’ble Supreme Court in ***Orissa Mining Corporation Ltd. v. Ministry of Environment & Forests, (2013) 6 SCC 476*** has upheld the vires of the 2006 Act and termed it as a **“social welfare or remedial statute”**<sup>23</sup>. Hence, it is not only desirable but also necessary that both the BDA, 2002 and the Act of 2006 are read harmoniously and using the tool of purposive interpretation to further strengthen the statutory protections available for protection of biological diversity, its associated TK and the holders of such knowledge, who are the indigenous people/forest dwellers.

#### V. Legislative Gaps to be addressed in the BDA for Protection of Traditional Knowledge:

The objective of the *CBD* as well as the BDA seem to be conservation of biodiversity and its sustainable use, and in that context give due regards to the indigenous communities and local people who are holders of TK associated with the effective utilization of our biological resources, it may only be natural to also adopt a conservationist approach to the preservation of TK and cultures. However, the BDA provisions

<sup>15</sup> *Supra* note 6, at Sec. 41(2).

<sup>16</sup> *Supra* note 6, at Sec. 41(3).

<sup>17</sup> *Supra* note 6, at Sec. 42-47.

<sup>18</sup> The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006, No. 2, Acts of Parliament, 2007 (India), at Preamble.

<sup>19</sup> *Id.*

<sup>20</sup> *Supra* note 18, at Sec. 2(n).

<sup>21</sup> *Supra* note 18, at Sec. 3(i).

<sup>22</sup> *Supra* note 18, at Sec. 3(k).

<sup>23</sup> *Orissa Mining Corporation Ltd. v. Ministry of Environment & Forests, (2013) 6 SCC 476 (India), at paras 51 and 52.*

have the color of the commodification of such knowledge, written all over it, which would effectively exclude from its ambit important components of Traditional Knowledge Systems like the values and ethics behind such TK and recording the heritage of the communities who have successfully passed it over to subsequent generations.

**VI. Conclusion & Recommendations:**

A. The definition of TK must be inserted in the BDA, 2002 to bring clarity on what would qualify as such within the meaning of the Act.

B. The People's Biodiversity Registers maintained by the BMCs under Section 41 of the BDA to chronicle "*information on availability and knowledge of local biological resources*" and TK associated with it may be converted into Heritage Registers that would include in detail, information about particular biological resources and its associated TK practices of the indigenous and local communities. This tracing of the cultural heritage would throw the spotlight on the pure practices, lifestyles, values, and ethics of these communities who are the actual holders of TK and nurturer of the resources in its pristine form. Such changes would enable the law to elevate itself from a means of mere commodification of knowledge to respecting, preserving, and promoting the same, in a manner that has benefits beyond capitalist principles.

C. The BMCs should be democratized further by separating them permanently from the local bodies. While the BMCs may be set at the local body level, it is important that the elected members of the local bodies do not hold posts in the BMC as well, nor should they have any role in its functioning. The jurisdiction of BMC shall however remain the same as local bodies. The Chairperson and other members should be elected by the indigenous and local people of the area which falls within such local limits, only after extensive awareness campaigning of the relevance of the BMC and its role. This will strengthen the functioning of the BMCs and enable them to exercise their

powers under the laws more effectively. Further, there shall be no departmental interference but only oversight. The representatives of the government departments must just have an advisory role.

D. The uncertainty in Section 6(1), BDA, 2002 needs to be clarified to the extent that whether the provisions are also intended to extend to TK.

E. The resource managers i.e., biodiversity authorities etc. must collaborate with the holders of TK i.e., the indigenous and local communities, give them a seat at the table and use their experience of generations to create biodiversity-friendly sustainable practices and rules of governance. Case studies of successful collaborations may be taken aid of in this regard. The exclusion of these communities from their natural habitats was a colonial policy that needs to be remedied.

**Reference:**

**Laws:**

***International Instruments***

1. UNEP, *Convention on Biological Diversity, 1992*, 1760 UNTS 79.

***Indian.***

1. The Biological Diversity Act, 2002, No. 18, Acts of Parliament, 2003 (India).

2. The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006, No. 2, Acts of Parliament, 2007 (India).

**Cases:**

1. Orissa Mining Corporation Ltd. v. Ministry of Environment & Forests, (2013) 6 SCC 476 (India).