



SAFEGUARDING TRADITIONAL KNOWLEDGE AND BENEFIT-SHARING: A STUDY WITH SPECIAL REFERENCE TO INDIAN LEGISLATURE

PRANJAL PANKAJ GUPTE
Symbiosis Law School, Pune

ABSTRACT:

In India, the legal framework and the protection of traditional knowledge in biodiversity conservation is intricate and continuously developing. The important legislation which governs the area is the Biodiversity Act, 2002 which sets up a three-tier system to help regulating the access to biological resources and which is closely associated with the traditional knowledge so as to ensure the fair and just sharing of benefits. Apart from the Biological Diversity Act, 2002 there are other acts which governs the safeguarding of traditional knowledge includes Protection of Plants Varieties and Farmers Rights Act, 2001 and the Patent Act, 1970 (amended in 2005). Although there are laws which exists to protect the traditional knowledge in India, it still faces number of challenges to its effective protection. One of the challenges is the inappropriate and comprehension of traditional knowledge amongst the policymakers and the implementers. Moreover, enforcing agreements for benefit sharing also possess challenges. In this research, the researcher will examine the constitutional aspects of legal structure for safeguarding the traditional knowledge and benefit sharing. The researcher will also contend that the privilege of traditional knowledge is a basic right under the Indian Constitution, which is grounded in Article 21 (Right to life and personal liberty), Article 14 (Right to Equality), Article 29 and Article 30 (Cultural and Educational Rights).

KEYWORDS: Biological Diversity, Traditional Knowledge, Constitution of India, Benefit sharing, Indigenous Community.

Introduction:

Biodiversity comprehensively refers to variety of living creations. It enacts a vital role in the survival of entire ecosystem. India is considered to be a mega – diversity country with a diverse range of eco-systems. India's biodiversity occurs at the three stages which consists of species, genetics and the ecological system. These are frequently correlated with traditional knowledge and practices. The biological diversity act, 2002 was brought in by the Parliament to implement and to execute the Convention on Biological Diversity (CBD). The act was first constituted on 5th February, 2013 in conformity with the Article 253 of the Indian Constitution, which enables the Government of India to execute its international commitments through national legislation.¹

India is standing at the crossroads of tradition and modernity while conserving its rich biodiversity which is indispensable for the welfare of its people and global environment. While protection of biodiversity is considered as the leading edge, it also constitutes numerous complications in India. Mankind got nourished in the course of nature which encompasses biological diversity as a component to provide the basic needs of the human existence. With respect to the terms of biodiversity status, India is amidst the 17 biodiversity countries in the world. Despite having only 2.4% of the world's surface area, it contains roughly about 7.8% of total species, including over 46000 plant species and over 81000 animal species as per the information provided by the Botanical Survey and Zoological Survey in India.²

Several rules and regulations have been enacted during the course of time to conserve and safeguard this diverse range of species in our country. India is currently struggling with the difficulties and facing confrontations of biodiversity loss and environmental degradation, there has been a growing acknowledgment of the immeasurable role depicted by the traditional knowledge in the chamberlain of nature. The concepts of benefit sharing and preservation of traditional knowledge are fundamentally recognised by this principle. Benefit sharing denotes the ethical responsibility to share the benefits which has procured from the utilization of traditional knowledge with the communities who has preserved and nurtured it

¹ Rajesh Sagar, Intellectual Property, Benefit-sharing and Traditional Knowledge: *How Effective Is the Indian Biological Diversity Act, 2002*, 8 J. WORLD INTELL. PROP.383 (2005)

² Frequently Asked Questions on the Biological diversity Act, 2002, National Biodiversity Authority,(October.31, 2023, 12:35 PM), <http://nbaindia.org/content/19/16/faq.html>.

for ages. Simultaneously, protecting the traditional knowledge determines in ensuring that these age-old wisdom systems are not misemployed, embezzled or exposed to any immoral action. Traditional knowledge deals with indigenous and local communities and their practices which is pertinent to the preservation and sustainable use of the biodiversity. The convergence of this propositions in the context of biodiversity conservation is a very complex issue which demands for a comprehensive and a thorough legal framework.

LITERATURE REVIEW:

To form an idea about the ground of research, the following literary works were reviewed: -

1. Intellectual property, Benefit-sharing and Traditional Knowledge: How effective is the Indian Biological Diversity Act, 2002?, Rajesh Sagar³

This literature review underscores the urgency about addressing the concerns related to access to biodiversity, benefit-sharing and traditional knowledge. The author points out the various shortcomings of the act. Further, the author states that the act does not provide effective measures for the protection of biological resources and is biased against the interest of the tribal and local communities. The author highlights about the reservations which are raising the recommendations that the Indian Government should undertake balanced approach to realize the objectives of the Convention on Biological Diversity Act and by making sure that the conservation and utilization of biodiversity is done properly and efficiently.

2. Protecting Traditional Knowledge in International Intellectual Property Law: imperatives for Protection and choice of Modalities, Tesh Dange⁴

In this paper, the author paints a picture about the international efforts which were taken to protect the Traditional Knowledge and it further incorporates about the discussions and negotiations which were made under the inter-governmental organisations which exclusively deals with the biodiversity, indigenous peoples' rights and human rights. This article further recognizes the challenges and the difficulties which are faced in reaching at a common consent on Traditional knowledge protection and emphasises the importance of identifying different modalities. It explores different modalities which are essential for the protection at the global level, with a focus on embodying defensive and positive approach and by adopting a pluralistic outcome.

Access and Benefit Sharing of Indigenous Peoples from the Convention on Biological Diversity to the Nagoya Protocol, Rahul Tanwani and Malcolm Katrak⁵

This article gives us an idea about Access and Benefit Sharing (ABS) system. It also discusses the challenges and complexities after the convention on biological diversity. The article highlights the case of the San people and the Medicinal Hoodia plant in Southern Africa, where difficulties arose in implementing the Access and Benefit Sharing system. Furthermore, the article also mentions the setting up of the working group on Article 8(j) and the working group on Access and Benefit Sharing to address the

concerned issues. The article talks about the Bon guidelines and the need for explanation on the role of indigenous and local communities of the Access and Benefit Sharing system. Comprehensively, the article provides the insights into the restraints and defects of the Access and Benefit Sharing system and the efforts made to address them.

3. The Balancing Act⁶ written by Kanchi Kohli and Shalini Bhutani, the report of a research initiated jointly by Kanchi Kohli and Shalini Bhutani as a part of the campaign for Conservation and Community Control over Biodiversity is highlighted in this book. It further emphasises about the functions of several legal mechanisms brought under the Biodiversity Act,2002 for the regulation of Biodiversity access and benefit sharing by conduction interviews and various surveys. The book elaborates on the history of Access and Benefit sharing mechanisms and its relations to convention on biological diversity in India. Furthermore, the book talks about the International Regime on Access and Benefit Sharing which deals with Nagoya protocol. At last, the book concludes by the observations made in tipping the balance into the field of biological conservation.

4. Justifiably sharing of ‘Access and Benefit sharing’, Nafees Kamran⁷

In this article, the author has addressed the notion of access and benefit sharing in relation to the developing countries resources and traditional knowledge. It further highlights about the historical injustice of resources which are being taken away from them without even providing the benefits to the countries and communities who has provided them with

⁷ Nafees Kamran, Justifiably sharing of “Access and Benefit Sharing”, 28 Supremo Amicus [336] (2022).

the resources. The article also discusses about the role played by the non-governmental organisations in elevating the awareness about these issues and the need for equitable benefit sharing. Furthermore, the author has drawn the attention to the importance of prior informed consent (PIC) and mutually agreed terms (MAT) in increasing the access of genetic resources. The article has also mentioned about the Nagoya protocol on Access to Genetic resources and the Fair and Equitable sharing of Benefits. The article further talks on the evolution of access and benefit sharing and its importance as to how the justice should be achieved and by addressing the historical injustice.

5. Biodiversity Act, 2002, An Analysis⁸ by Udhisha Ghosh and Chandralekha, Akkiraju, Symbiosis Law School, Pune is a research paper which has been carried out with an attempt to highlight the threats to Biodiversity and the legal machinery which is brought into force to address such threats. Under the heading- Lacuna of the Act, it states that how the Biodiversity Act,2002 has moved its attention from the conservation of the biodiversity to only profit sharing of the benefits which has arose of the costs of the biodiversity resources. The authors have also challenged on the constitutional validity of the act. Furthermore, the report enumerates about the principles which are governing the Nagoya protocol for the access and benefit sharing of the biological resources. Lastly, the report provides with recommendations by

the virtue of incentive approach and other general and specific recommendations. This will help in understanding the gravity of the problem and provide a workable solution to the problems.

6. Introduction to CBD framework, National Commitments and Achievements⁹, Kanchi Kohli ICED Jaipur, 6.6.2016 is a presentation which is dealing with the Conservation on Biological diversity, Biodiversity and India's biodiversity laws and later it dealt with the Nagoya protocol. In the second part of the presentation the author has talked about India's experience with Access and Benefit Sharing regime. The article briefly talks about the reports which are filed by India to the Conservation on Biological Diversity on the day-to-day basis which has assisted in acknowledging the degree of conformity of Indian legislature with the CBD. Furthermore, the data which is provided in the article will help us know whether the biodiversity in India is growing or deteriorating. The article has included and discussed about the protocols to Conservation on Biological diversity and the rules regarding to it.

7. Protection of traditional knowledge in India, Maitreyi Shishir¹⁰
In this paper, the author has expressly talked about the concept of traditional knowledge in India and how it plays an important and crucial part in the community's society and physical existence. Further, the author has discussed as to how the traditional knowledge gets in danger when the people who do not have the rightful authority over it starts exploiting them for the industrial use which has led to the hampering of the rights of the rightful claimant. The article also discusses about the unique manner of protecting the traditional knowledge which includes the creation of digital library namely, the Traditional Knowledge Digital Library. The author has shed the light on the present international protection and how the proper initiatives have to be taken.

RESEARCH QUESTIONS:

1. Whether the provisions contained in the Indian Constitution provides for an adequate protection of natural resources?
2. To what extent the constitutional provisions of India align with the goals of biodiversity conservation, traditional knowledge preservation and equitable benefit sharing?
3. What are the practical challenges and barriers that hinder the effective implementation of the legal provisions for benefit sharing and traditional knowledge protection?
4. What are the key gaps, ambiguities, inconsistencies within the Indian legal framework related to benefit sharing and traditional knowledge protection in India?

RESEARCH OBJECTIVES: -

1. To analyse the existing legal framework in India related to benefit sharing and traditional knowledge in the context of biodiversity conservation.

2. To analyse the constitutional provisions relevant to biodiversity conservation, traditional knowledge and benefit sharing to determine their alignment with the broader goals of environmental sustainability and treaties.
3. To investigate the practical challenges and barriers that hinder the effective implementation of legal provisions related to benefit sharing and traditional knowledge protection.
4. To critically look into the ambiguities and inconsistencies within the Indian legal framework related to benefit sharing and traditional knowledge protection in India.

RESEARCH METHODOLOGY:

1. The researcher in this work aims to conduct research through a doctrinal method of research as well as with empirical method. In this researcher shall involve collection from Articles in Journals, Books, Articles, Commentaries from on various online libraries and databases.
2. Data collection will be done by the following methods:
 - 2.1 Comprehensive review of existing legal documents, including statutes, regulations, policies and international agreements.
 - 2.2 Examination of relevant case laws and court judgments to understand the practical application of the legal framework.
 - 2.3 By conducting semi-structured interviews with key stakeholders, including representatives from indigenous communities, legal experts, governmental officials, environmental organisations and scholars in the field.
3. Data Analysis will be done by: -
 - 3.1 Legal framework analysis
 - 3.2 Constitutional analysis.

CRITICAL ANALYSIS:

- Traditional Knowledge is considered as a wide collection of knowledge, customs, advancements, and cultural manifestations which has been passed down through various generations by different communities. It typically encompasses knowledge which pertains to agriculture, medicine, natural resource management and various other areas. However, the definition given in the Biological Diversity Act, 2002 is not specific and is deemed to be inadequate and it is lacking accuracy by failing to encompass the complete spectrum of Traditional Knowledge.
1. The absence of precision or clarity: The definition of traditional knowledge is not specific enough in defining the range and categories of knowledge which falls under it. It has also failed to encompass all aspects of indigenous and local knowledge systems.
 2. Biodiversity focus should be characterized by its exclusivity: Traditional Knowledge goes beyond the biological diversity as it encompasses and focuses on cultural, social and economic knowledge that the indigenous communities which has possessed, in addition which highlights biodiversity.

3. The traditional knowledge undergoes evolution and has been adapted over the time and therefore a fixed and precise definition does not have the capability to fully capture its dynamic nature or the current obstacles which are faced by the indigenous communities.

- In our Indian Constitution, there are several provisions which pertain to the conservation of biodiversity and safeguarding of indigenous communities. These provisions are distributed throughout various sections of our constitution viz. Preamble, Fundamental rights and Directive Principles of State policy. The Indian constitution has also provided the assurance for certain fundamental rights enshrined under Article 29 and Article 30 of the Indian constitution which talks about culture and educational rights¹¹. Nonetheless, the articles do not explicitly acknowledge or does not contain any specific provisions that directly pertains and deals with safeguarding traditional knowledge (TK). While Article 29 and Article 30 emphasises on the preservation and development of cultures and languages, it does not explicitly mention about the safeguarding and preservation of

Traditional Knowledge. There is in particularly absence of specific regulations which addresses the protection, ownership and conveyance of traditional knowledge systems which are held by the indigenous and local communities. This absence in the provisions has led to the ambiguities and has resulted in the challenges to the ownership, control and the commercial use of traditional knowledge.

- The Indian Constitution does not expressly mandate Free, Prior and Informed Consent (FPIC) mechanisms which are particularly tailored for accessing or using traditional knowledge. Free, Prior and Informed Consent (FPIC) is a concept which ensures that the local community especially the indigenous community who holds the traditional knowledge have the right to give or to withhold the consent before any external entity accesses who utilizes or exploits their knowledge. The constitution does not contain any clear mechanisms for FPIC which has led to uncertainty and difficulties in which the constitutional principles are defined for fair and impartial benefit sharing amongst the communities with Traditional Knowledge¹². Consequently, there are certain outcomes as a result of this which includes: -
 1. The lack of clear and unambiguous provisions for Free, Prior and Informed Consent has created unreliability in determining as to how equitably and impartially the benefit sharing to be done in respect from the use of traditional knowledge. The absence of clarity can ultimately lead to the disagreement over the recompensating or the division of profits which has been acquired by the traditional knowledge.
 2. There is a high risk of potential exploitation or misuse of traditional knowledge without proper acknowledgment, recognition, compensation or having consideration for the rights and interests of the local and indigenous communities who has possessed this knowledge.

the constitutional provisions can lead to conflicts and difficulties in implementing policies. Although the Constitution of India protects and safeguards certain rights of indigenous communities under Article 29 and Article 30 which talks about the cultural and educational rights, it does not explicitly specify about

the extent of autonomy that the indigenous and local communities have over the traditional knowledge in the context of natural resources. Due to these ambiguities in respect of distribution of natural resources that are linked to the traditional knowledge, disputes may arise between the local communities and state in respect of access, usage and ownership rights.

- When it comes protecting the traditional knowledge, the lack of clear legal precedents or varying interpretations done by the court has led to the inconsistent executions and enforcements of laws. This lack of proper and effective legal measures by the Judges can hinder and impede the success of legal actions which are taken against the unapproved application and exploitation of traditional knowledge.
- Constitution of India does not clearly address about the Intellectual Property Rights which are related to the Traditional Knowledge and Access and Benefit sharing. This absence of specific provisions and rules has resulted into several uncertainties relating to Intellectual Property Rights. The insufficiency of express constitutional provisions which outlines and defines the ownership rights of the traditional knowledge in respect of Intellectual Property Rights might create uncertainties as to who holds and owns the rights to this traditional knowledge. Without the clear constitutional provisions, protection of traditional knowledge through patents and copyrights becomes demanding. It has also increased the risk of embezzlement.
- The Indian Constitution is lacking specific instructions or clauses which expressly outline the procedure which ensures the fair and equitable benefit sharing from the commercial use of biodiversity and traditional knowledge. This lack of specific constitutional provisions has led to the uncertainties of the principles and procedures for the equitable benefit sharing amongst the users of traditional knowledge and the indigenous communities. Due to the lack of clear regulations, there has been an increase in the risk of inequitable benefit-sharing which could result in disproportionate benefit for external entities utilizing traditional knowledge.

SUGGESTIONS:

The researcher has the following recommendations on the same to enhance its applicability and implementation on the legal framework for benefit sharing and protection of traditional knowledge in biodiversity conservation: -

1. By innovating policies and not relying on orthodox and unconventional policies at the local and international level can increase effectiveness without much spending.
2. To address the gaps and ambiguities in the Indian Constitution in context of benefit sharing and protection of traditional knowledge; amendments, intervention by the specific legislative and executive bodies and policy reforms will be required. It is essential to create a robust and strong legal framework which will adhere to the constitutional principles that protects and respects the rights of the indigenous and local

communities.

3. By advocating and changing the legal system, policy interventions and special recommendations which addresses the principles of Free, Prior and Informed Consent (FPIC) which are often used to strengthen the legal framework for traditional knowledge protection. Although the constitution of India does not directly give reference about the Free, Prior and Informed Consent (FPIC) for traditional knowledge, there can be a room for interpreting current provisions in a manner that it upholds the rights and interests of the local and indigenous communities in regards to traditional knowledge. Furthermore, evolution of jurisprudence and legislative reforms might help in addressing the gaps and uncertainties which concerns FPIC and benefit sharing in the context of traditional knowledge.
4. To address the ambiguity regarding the governmental and state's control over the natural resources, legal framework, regulations and guidelines must be explicitly mentioned and define indigenous community in respect of traditional knowledge. It necessitates by developing procedures that respects the community possession, allows for meaningful participation and defines clear responsibilities in decision making processes by involving in the management and use of natural resources with are interlaced with the traditional knowledge.
5. A comparative study of the laws of the countries who has achieved the considerable success and recognition in the field of biological diversity conservation and by adopting and implementing the most appropriate provisions of that countries in India.

CONCLUSION:

In conclusion, while the Constitution of India has provided a solid foundational framework for tackling and addressing the issues of environmental protection, cultural and educational rights, there are still notably significant gaps and ambiguities which need to be taken into consideration regarding the protection and benefit sharing of traditional knowledge in biodiversity conservation. To bridge this gaps, a concrete and comprehensive effort comprising of legislative reforms, judicial actions, policy intervention and clear guidelines by the concerned authorities shall be given to ensure the recognition, protection and fair benefit sharing of traditional knowledge in accordance with the constitutional principles and to protect and safeguard the rights of local and indigenous communities. Building up the legal framework and by implementing effective procedures can help in substantially contributing to the biological diversity preservation, and sustainable development while protecting and preserving the rights of indigenous communities in respect to traditional knowledge.

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