Good Intentions, Poor Understanding

The case of India’s Biological Diversity Act (2002)

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1. Introduction

The Biological Diversity Act (2002)³ and the Rules (2004)⁴ aims to provide for “conservation of biological diversity, sustainable use of its components and for the equitable sharing of the benefits arising out of the use of biological resources”.

For achieving this object, the Act facilitates the setting up of a National Biodiversity Authority (NBA) at the national level and State Biodiversity Boards (SBB) at the state level and Biodiversity Management Committees (BMC) at the local self-government level (read Panchayat).

The functions of these statutory authorities range from conserving the biological wealth of the country to implementation of the procedures for seeking prior consent to access the biological resources, power 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 intellectual property rights. All these actions come under the broad term, Access to genetic resources and Benefit Sharing (ABS) that is currently guided by an international legal framework of the Convention on Biological Diversity called the Nagoya Protocol. India is currently a Party to the Protocol.

These authorities along with the Central Government and the State Governments work together for the effective implementation of the said Act. With the need for each state in India to develop their own Rules, for effective implementation of the Act, there is a need for all the 29 SBBs, the NBA and the thousands of BMCs to understand the intent of the Act, the mandate and focus in singularity so that implementation is effective.

After more than fifteen years of implementation at different levels, if there is one experience that can be counted as definite, it is the current differential interpretation of the Act and the related national Rules by each of the institutional mechanism under the Act that is making the Act one of the most challenging legal frameworks in the country.

³http://nbaindia.org/uploaded/Biodiversityindia/Legal/31.%20Biological%20Diversity%20Act%202002.pdf
⁴http://nbaindia.org/uploaded/Biodiversityindia/Legal/33.%20Biological%20Diversity%20Rules,%202004.pdf
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Not only that there is differential interpretation of the Act, provisions of the Act in themselves are confusing. The executive and judiciary are still to come to terms with simple implementation provisions. Pronouncements by the National Green Tribunal and several High Courts of India are a testimony to this⁵.

This paper focuses on a select number of provisions of the Act and the Rules at national level, state and local levels and current interpretation, implementation. The purpose is to not only provide overview of current challenges in implementation but also to provide the executive and the judiciary to reconcile provisions in the absence of strong case law in India under the Act.

2. Key Provisions and their Interpretation and Implementation

In this section, we will examine certain key provisions of the Act and the Rules with regard to interpretation and implementation that is discussed in subsequent sections.

a. Procedures for seeking consent to access the biological resources (Prior Informed Consent)

Under the Biological Diversity Act (2002), Chapter II specifically deals with the regulation of access to biological resources. The provisions of this Chapter provide for the prior permissions that are required to be taken from the National Biodiversity Authority or the State Biodiversity Boards -depending on whether it is a citizen or a body corporate registered in India or otherwise, for “obtaining any biological resource for commercial utilisation, or bio-survey and bio-utilisation for commercial utilisation” (Sections 3 and 7 of the Act and Rule 14 of the Rules).

However, these procedures do not apply to the local people and communities of the area. Also, commercial utilization does not include traditional practices.

⁵ Shalini Bhutani, Kanchi Kohli. Litigating India’s Biological Diversity Act: A study of legal cases. November 2016
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Another provision (Section 6 of the Act and Rule 18 of the Rules) makes it mandatory to get an approval of the NBA before applying for any intellectual property right in India.

The authority may also restrict or prohibit the request for access to biological resources if it is likely to have an adverse impact on the environment, the livelihoods of local people and the ecosystem function and also in cases where the request is for endangered, endemic and rare species (Rule 15 & 16 of the Rules).

Also, for the transfer of results of research to third party, prior approval of NBA should be taken (Section 4 and Section 20 of the Act and Rule 17, 19 of the Rules).

b. Procedures to have prior consent and mutually agreed terms

Interestingly, the Act calls for no prior consent while procuring the resources but merely requires ‘consultation’. This provision is not in line with the provisions of the international legal framework on ABS, the Nagoya Protocol that calls for prior consent. Notwithstanding this provision, the recently issued Guidelines by the NBA to SBBs, Section 3, suggests the SBBs ‘may’ consult the BMCs. This is not in line with the provisions of the Act and the Rules.

While it is the duty of the NBA to ensure the Benefit Sharing procedures in conformity with the mutually agreed terms between the applicant and the benefit claimers (Section 21 of the Act), the ground level implementation of this procedure has to be carried out by the Biodiversity Management Committees (BMCs). The BMCs are responsible for bridging the gap between the two and helping them to obtain prior informed consent and also to reach a consensus on mutually agreed terms.

c. Benefit Sharing procedures

Benefit Sharing is a mechanism by which a fair and equitable share in the benefits arising out of access and utilization of biological resources for commercial purposes is secured for the benefit claimers (local communities) and further the conservation of biological diversity. Sections 3, 4, 6, 7 and 21 of the Biological Diversity Act, 2002 elaborate the Benefit Sharing procedures.
The mandatory approval of the NBA or the SBBs, as the case may be, is the highlight of this procedure. The NBA is further duty bound to ensure that the equitable share in the benefits that would arise from the utilization of biological resources and associated knowledge are secured while the approval is granted, in accordance with mutually agreed terms between the applicant, local body concerned and the benefit claimers and pass on the benefits to the benefit claimers.

3. Implementation experience of India

The implementation of the Act in India has been chequered due to lack of consistency in the interpretation of provisions by the NBA and SBBs. Several instances of wrongful interpretation of the provisions, including powers for search and seizure, lack of options for compounding the offences and the like are making research, development and benefit sharing a nightmare for several stakeholder groups. Limitation of technical, legal and implementation capacities of all the three levels of institutions (NBA, SBBs and BMC) is a serious concern that is impacting the implementation.

The following section provides a few examples of such inconsistencies within the provisions of the Act, Rules and the interpretation.

3.1 Interpretation of the clauses

- Collaborative research

Section 5 of the Act mandates that collaborative research projects shall (a) conform to the policy guidelines issued by the Central Government in this behalf; (b) be approved by the Central Government.

Interpretation of this section range from any project being implemented by agencies, institutions and academia that are not approved through the Central Government are not exempted to almost all collaborative projects currently under implementation at the state and local levels being not in line with the provisions of the Act. This will simply stop all research collaborations in the country since a miniscule of ongoing collaborations are approved by the Central governments. No one seem to have raised
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any objection to this provision thus far and going by the strict interpretation of the Act, a large number of collaborative projects are illegal considering this Section, especially those being undertaken by NGOs, academic institutions and state level agencies, unless each one of them is prior approved by the NBA.

This nullifies the spirit of the Act in itself and significantly undermines the actions of academic and related institutional mandates to manage and sustainably use our biological resources.

• Commercial Utilization

As per Section 2 (f) of the Act, “commercial utilization means end uses of biological resources for commercial utilization such as drugs, industrial enzymes, food flavours, fragrance, cosmetics, emulsifiers, oleoresins, colours, extracts and genes used for improving crops and livestock through genetic intervention, but does not include conventional breeding or traditional practices in use in any agriculture, horticulture, poultry, dairy farming, animal husbandry or bee keeping”.

In the absence of clear definition of what is conventional breeding, traditional practices, what constitutes animal husbandry, this clause is many times misused and misinterpreted by the implementing agencies.

For example, it is still unclear as whether artificial insemination of animals is a traditional practice and in-vitro fertilization a new practice. Such clauses are providing room for more difficulties in implementation of the Act and will be prone to be misused both by regulators and stakeholders.

• Exemptions for vaids and hakims

Section 7 of the Act provides some exemptions as follows, “provided that the provisions of this section shall not apply to the local people and communities of the area, including growers and cultivators of biodiversity, and vaids and hakims, who have been practicing indigenous medicine”. 
The constant question that is asked is ‘who is a vaid and hakim’? Are these local and traditional communities and their representatives or those who practice traditional medicine, including those professional doctors with AYUSH practices. In the absence of clarity, several SBBs are differentially using the exemption clause.

- **Use of mutually agreed terms**

Section 21.(1) details that ‘The National Biodiversity Authority shall while granting approvals under section 19 or section 20 ensure that the terms and conditions subject to which approval is granted secures equitable sharing of benefits arising out of the use of accessed biological resources, their by-products, innovations and practices associated with their use and applications and knowledge relating thereto in accordance with mutually agreed terms and conditions between the person applying for such approval, local bodies concerned and the benefit claimers’.

If one has to legally interpret the provisions of the Act, then each application for access and benefit sharing has to be negotiated with the user of resource and associated knowledge before arriving at the nature and quantum of benefits.

This provision is to a large extent nullified by the Guidelines for Benefit Sharing that were notified by Government of India, in 2014, where a pre-determined amount of benefit sharing, in terms of percentage for various actions has been provided for.

If the Guidelines are to be used, then the provision of mutual agreement, negotiated benefits, options for non-monetary benefits all become redundant.

Not only this, the nature of Guidelines is such benefits are to be paid by users at multiple levels, mandating capturing of benefits at different levels for each transaction or agreement. This is not only in violation of the provisions of Act but also against the principles of contract law and natural justice.
• ‘Prior intimation’- meaning and interpretation

Section 7 of the Act states that Indians dealing with commercial utilization of biological resources and associated knowledge need to ‘intimate’ the SBBs. ‘Intimation’ as per Black’s law means “notice of a legal obligation coupled with a warning of the penalties for failure to comply”.

Instead, the SBBs have interpreted it to be as ‘permission’ -which means “the act of permitting”; “a license or liberty to do something” or “authorization”. It can be well argued whether the SBBs have interpreted the Section in its correct spirit from the legal perspective.

Here, ‘prior intimation’ is for the utilization of biological resources for commercial utilization. In essence, it is the commercialization related actions which the Act wants to regulate. However, this provision along with Section 23(b) and Section 24, are being differentially interpreted by the State Biodiversity Boards in India where even non-commercial research is being brought under the purview of the Act. The SBBs are making it uneasy even for researchers who are undertaking surveys for non-commercial purposes to undertake research.

For instance, several SBBs like the Gujarat State Biodiversity Board have had situations that prevented Indian researchers undertaking academic research from doing field surveys in the State. This is certainly against the provisions of the parent Act.

• Function of SBBs- regulatory or restrictive?

Section 23(b) clearly states that the function of the SBBs is to regulate by granting of approvals or otherwise commercial utilization or bio survey and bio utilization of any biological resource. ‘Regulation’ means ‘the act or process of controlling by rule or restriction’ and ‘restriction’ means ‘a limitation or disqualification’.

The SBBs should by way of issuing regulations, which should be in line with the provisions of the national Act, deal with this issue.
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The SBBs are interpreting the Act as more a prohibitive measure than as a regulative measure which means ‘to forbid by law’ or ‘to prevent or hinder’. This has resulted in arbitrary acceptance and rejection of applications and this is detrimental to the public interest.


Section 63(1) of the Biological Diversity Act, 2002 provides that the State Government may by notification in the Official Gazette, make rules for carrying out the purposes of this Act. Most States in India have brought into force rules with regard to the implementation of the Act.

These Rules primarily set up the State Biodiversity Board (hereinafter SBB) and the Bio Management Committees (hereinafter BMC), and provide for the procedure to access biological resources for citizens in that State.

Section 63(2) provides the matters concerning which the Rules may provide for. The matters enlisted in the Rule are not meant to mandatorily be included in the rules framed by the State Governments but it is left to these Governments to include all or any of the matters.

The extent of the powers that can be exercised under Section 63 (2) by the States has been examined across a few states, for illustrative purposes.

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<thead>
<tr>
<th>SL NO</th>
<th>STATE</th>
<th>PROCEDURE FOR INTIMATION</th>
<th>BENEFIT SHARING</th>
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<tbody>
<tr>
<td>1.</td>
<td>Karnataka6</td>
<td>Every application to be accompanied by a fee of Rs. 10,000. {Rule 15 (2)}</td>
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<td>The Board shall, after consultation with the BMC and after collecting information from the applicant and other sources, dispose the application within 2 months. {Rule 15 (3)}</td>
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<td>The Board may by order, prohibit or restrict any activity deemed detrimental or contrary</td>
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| 2. Maharashtra | Application to be accompanied by a fee of Rs. 500 (research purpose) and Rs. 5000 (commercial purposes). \[Rule 17(1)\]  
   The Board shall, after due appraisal and consultation (includes issuing public notice, dialogue or discussion, formal consent from the assembly) with the BMC and after collecting information from the applicant and other sources, dispose the application within 3 months. \[Rule 17(2)\]  
   The Board may, on being satisfied, allow or restrict any activity if it is of the opinion that it is detrimental or contrary to the objectives of conservation or sustainable use of biodiversity or equitable sharing or benefits arising out of such activity. \[Rule 15(4)\]  
   If an application cannot be acceded to, the Board may reject the application. No application to be rejected without the applicant being heard. \[Rule 15(6)\] |
| 3. Kerala | Application to be accompanied by a fee of Rs. 100 (research purpose) and Rs. 1000 (commercial purposes). The access shall be as per the guidelines issued from time to time. \[Rule 16(1)\]  
   The Board shall, after consultation with the BMC and after collecting information from the applicant and other sources, dispose the application within 90 days. \[Rule 16(2)\]  
   On being satisfied with the merit of the application, the Authority may grant the approval for access to biological resources subject to conditions as it may deem fit. \[Rule 16(3)\]  
   The Board has full right to reject any application for good and sufficient reasons but the agreement shall provide for measures of conservation, protection and benefit sharing arising out of the utilization of the bio-resources. \[Rule 16(5)\] |
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<th>before such rejection, the applicant will be heard. (\text{Rule 16 (6)})</th>
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| 4. | Uttar Pradesh\(^9\) | Every application to be accompanied by a fee of Rs. 2,500 \(\text{Rule 15 (2)}\)  
The Board shall, after due appraisal and consultation with the BMC and after collecting information from the applicant and other sources, dispose the application within 3 months. \(\text{Rule 15 (3)}\)  
The Board may grant the approval of the access on being satisfied with the merit of the application subject to terms and conditions as it may deem fit. \(\text{Rule 15 (4)}\)  
If an application cannot be acceded to, reasons have to be recorded for such rejection. \(\text{Rule 15 (7)}\)  
No application to be rejected without the applicant being heard. \(\text{Rule 15 (8)}\)  
The Board shall take steps to widely publicize the approvals granted through print and electronic media and monitor compliance of conditions on which approval was granted. \(\text{Rule 15 (9)}\) |
| 5. | Rajasthan\(^10\) | Application to be attached with fee as may be fixed and notified by the Board with the prior approval of State Govt. \(\text{Rule 19 (1)}\)  
After due consideration of the application and consultation with the BMC and after collecting information from the applicant and other sources, dispose the application within 3 months. \(\text{Rule 19 (2)}\)  
On being satisfied with the merit of the application, the Board may allow the application or restrict any activity if it is of the opinion that it is detrimental or contrary to the objectives of conservation or sustainable use of biodiversity or equitable sharing or benefits arising out of such activity. \(\text{Rule 19 (3)}\)  
The Board has full right to reject any application for good and sufficient reasons but

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<th>Sikkim(^{11})</th>
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<td>6.</td>
<td>Application to be accompanied by a fee of <strong>Rs. 100</strong> (research purpose) and <strong>Rs. 1000</strong> (commercial purposes). (\text{Rule 17 (1)})</td>
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<td>The Board shall decide the application after consultation (includes issuing public notice, dialogue or discussion, formal consent from the assembly) with the local bodies and dispose the application within 3 months. (\text{Rule 17 (2)})</td>
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<tr>
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<td>On being satisfied with the merit of the application, the Board may allow the application or restrict any activity if it is of the opinion that it is detrimental or contrary to the objectives of conservation or sustainable use of biodiversity or equitable sharing or benefits arising out of such activity. (\text{Rule 17 (3)})</td>
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<tr>
<td></td>
<td>If an application cannot be acceded to, reasons have to be recorded for such rejection. No application to be rejected without the affected party being heard. (\text{Rule 17 (6)})</td>
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If we examine the provisions of the Rules in the above-mentioned states, a lot of differences and ambiguity can be found. Each of these states have different fee structures, procedures for application, approvals, determining the benefits. In several instances, there are terms like ‘may deem fit’ with regard to granting of approvals and the conditions which the usage is subject to arbitrariness. Also, the need for application related to research actions by Indians is not in line with the provisions and/or the spirit of the Act.

Lack of Transparency in Decision Making

Also, rules in states like Uttar Pradesh require publicizing the grant of approvals through print and electronic media and regularly monitor the compliance of conditions. However, no such information is accessible on the public domain. Even the current website of National Biodiversity Authority does not provide details of decisions and reasons for decisions while considering ABS applications. Such details have been provided until 2014 but all the information has since been withdrawn, making the decision-making process non-transparent.

There is no information for citizens to refer and understand the basis which are used for granting approvals. For the proper functioning of the Act, there has to be room for transparency in decision making.

In the absence of such information and ambiguities in the Act and state Rules, people who wish to comply with the provisions of the Act are left to determine compliance to their imaginations.¹²

4. Conclusions

The Biological Diversity Act is one of the poorly known and understood legal provisions in the country, enacted during the last two decades. There is hardly any mention or discussion of this important legal framework even within the legal fraternity.

The Act was made to facilitate access to resources, use the resources and share the benefits. However, the implementation indicates restricting access using the provisions of regulations.

Unlike other resources, biological resources need to be used to provide the benefits. If we intend to shut the doors on prospective users of the resource, there is no point in implementing the Act.

Lack of expertise, experience and differential interpretation of provisions of the Act compound the problem associated with conflicting provisions in the Act and the Rules.

It is time for NBA and the SBBs to assess the importance of the Act and use it to facilitate compliance than merely undertake the role of a ‘policeman’ guarding the resources.

Ten years of discussions to develop the Act should not be lost in our interest to command and control users of our resources. It should not, however, be also interpreted that creating a facilitating situation means more non-compliance. Experiences have shown that better compliance results from clearer interpretation and concomitant actions to ease compliance that is predictable and timely.
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