

ANALYSIS OF THE BIOLOGICAL DIVERSITY (AMENDMENT) ACT, 2023: A LEGISLATIVE COMMENT

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Abstract

The Biological Diversity Act, 2002 is the first exclusive legislation dealing with biological diversity in India. It was by way of this legislation that the provisions of Convention on Biological Diversity were enforced in India. With passage of time, it was observed that though the Act of 2002 is a progressive law, it still needs to be amended not just to remove some weaknesses but also to incorporate the provisions of the Nagoya Protocol. As a result, the Biological Diversity (Amendment) Bill was introduced in Lok Sabha on 16th December 2021, that received presidential assent on 3rd August 2023. This paper aims at critically analysing the modifications introduced by this amendment.

Keywords: Biodiversity, Biological Diversity Act, Amendment

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I Introduction

BIOLOGICAL DIVERSITY encompasses a variety of life on the face of Earth. It includes all the plants, animals, and microorganisms along with their genetic resources. Biodiversity can be studied at genetic, species and ecosystem levels. Each and every living organism has its own relevance and importance on this planet, which makes its conservation and sustainable use all the more necessary. Conservation of the environment and protection of flora and fauna is a subject that has never evaded our international fraternity. United Nations has time and again introduced different programs, conventions, and treaties to ensure the conservation of the environment. These include the International Plant Protection Convention, 1951; the Stockholm Declaration, 1972; the Convention on International Trade in Endangered Species, 1975; Ramsar Convention on Wetlands, 1975; the World Conservation Strategy, 1980; the Bonn Convention on Migratory Species of Wild Animals, 1983; the World Charter for Nature, 1983; Basel Convention, 1992; etc.

India, marked by great ethnic diversity, is known for its harmonic connection with the environment. Comprising around 2.4% of the world's total landmass, India has 7-8% of the biological variety found anywhere. The Himalayas, Indo-Burma, Sundaland, and Western Ghats make four biodiversity hotspots for India. Not very long ago, even India has seen a declining biodiversity. As such, numerous legislation and policy systems have been created to ensure environmental preservation and protection. These include among others the Indian Forest Act of 1927, the Wildlife (Protection) Act of 1972, the Forest (Conservation) Act of 1980, the Environment (Protection) Act of 1986, and the National Forest Policy of 1988.

The Convention on Biological Diversity (CBD), adopted by the United Nations at the Earth Summit, 1992 which was held at Rio De Janeiro, was the first international legally binding treaty that dealt exclusively with Biological Diversity. It sought to promote biodiversity conservation and sustainable use. India became a signatory to it in 1994. In order to implement the provisions of CBD, the Indian legislature drafted and enacted the Biological Diversity Act, 2002 (BDA). The Act establishes a three-tier system to ensure its proper implementation, this includes the National Biodiversity Authority (NBA), the State Biodiversity Boards (SBBs), and the Biodiversity Management Committees (BMCs). The NBA, SBB, and BMCs work together to oversee compliance and benefit-sharing mechanisms.

II Issues Pertaining to the Execution of the Biological Diversity Act, 2002

The challenges in the successful execution of the 2002 Act are evident through several figures. According to the Act, roughly 275,000 BMCs must be built. However, as of July 2016, just 9,700 BMCs have been established. Likewise, BMCs must uphold Peoples Biodiversity Registers (PBRs) to record local biodiversity and traditional knowledge, and by July 2016, only 1.388 of these registers had been compiled. As a result of the National Green Tribunal's involvement, by July 2022, 276,000 Biodiversity Management Committees (BMCs) have been established and 267,000 People's Biodiversity Registers (PBRs) have been finalized. From 2006-07 to 2021-22, the NBA sanctioned 2,982 applications, comprising 426 for access to biological resources for research or commercial objectives, and 2,344 for acquiring Intellectual Property Rights.¹

¹Lok Sabha Secretariat. "Report of the Joint Committee on the Biological Diversity (Amendment) Bill, 2021" 6-7 (2022).

The Guidelines on Access to Biological Resources and Associated Knowledge and Benefits Sharing Regulation, 2014, have been implemented to address the deficiencies in benefit sharing and access regulation, in accordance with the provisions of the Nagoya Protocol adopted under the CBD. Consequently, it is reasonable to assert that the BDA and the 2014 Guidelines collectively satisfy India's commitments under the CBD and the Nagoya Protocol.

III Biological Diversity (Amendment) Bill, 2021

Apart from the above-discussed implementation-related lacunas, various other concerns were also raised by people from the medical, industry, and research sectors advocating the need to simplify procedures and reduce bureaucratic hurdles in order to provide a favourable environment for cross-border collaborative research. Also, a demand was being raised to remove the red-tapism attached with the patent application process. The Ministry of Environment, Forest, and Climate Change is the nodal authority that is responsible for the implementation of the Biological Diversity Law. Upon receiving suggestions relating to amendments in the said Act, the Ministry constituted numerous committees between 2017 and 2021 and also consulted different ministries and departments before drafting the Biological Diversity (Amendment) Bill, 2021. The Ministry of Agriculture and Farmers Welfare, Ministry of AYUSH, Ministry of Tribal Affairs, Ministry of Science & Technology (Department of Biotechnology), Ministry of Rural Development, and Ministry of Panchayati Raj were solicited for their insights and recommendations regarding the present circumstances and necessary modifications. The information pertaining to the reports provided by several committees established by the Ministry, along with the proposals from other ministries and departments, was meticulously evaluated throughout the formulation of this Bill of 2021. With the view to deal with all these queries and give effect to the recommendations being made on the law relating to biological diversity the Biological Diversity (Amendment) Bill, 2021 was introduced in the Lok Sabha on 16th December 2021. Thereafter, it was referred to the Joint Parliamentary Committee on 20th December 2021 to prepare a report after detailed examination to be submitted before the legislature. The Bill of 2021 sought to-

- (i) Promote the cultivation of medicinal plants and uplift India's traditional medicine system of;
- (ii) streamline approval processes for research, patent application, and commercialization;

- (iii) Decriminalise offences; and
- (iv) Encourage foreign investment in the biodiversity sector.²

The most important changes that this Bill sought to bring about in the Act of 2002 were-

- (i) The term Indian Companies should include companies registered in India and controlled by Indians, irrespective of any foreign shareholding;³
- (ii) The list of entities exempted from payment of access and benefit sharing should include Indians accessing raw materials derived from cultivated medicinal plants;
- (iii) Instead of asking for approvals from the NBA, Indian entities should only have to register themselves;⁴
- (iv) Agricultural waste should be exempted from the application of the Act except in cases of patenting;⁵
- (v) Decriminalisation of violations under the Act and prescribing only fines as a way of punishment.⁶

IV Biological Diversity (Amendment) Act, 2023

The committee chaired by Dr. Sanjay Jaiswal gathered oral testimony from members of several Ministries and engaged in talks with representatives from state Biodiversity Boards in many states. Input was solicited from several parties. The committee presented its findings to Parliament on August 2, 2022. Following the committee's recommendations, the Lok Sabha enacted the Biological Diversity (Amendment) Act on July 25, 2023. The Rajya Sabha approved it on 1 August 2023. On August 3, 2023, it was enacted by the President and became law.⁷

Key features of the Amendment Act of 2023

The Amendment Act of 2023 has made numerous minor and major changes in the Biological Diversity Act, 2002. Some of the most significant changes have been discussed below-

- (i) *Expanded access*: The definition of “access” has been broadened to include a wider array of activities.

² The Biological Diversity (Amendment) Bill, 2021 Statement of objects and reasons.

³ The Biological Diversity (Amendment) Bill, 2021, s. 5.

⁴ *Id.*, s. 8.

⁵ *Id.*, s. 29.

⁶ *Id.*, s. 38.

⁷ The Biological Diversity (Amendment) Act, 2023 (Act 10 of 2023).

- (ii) *Benefit claimers*- The definition of benefit- claimers has been clarified.
- (iii) *Addition of ‘derivatives’*- The addition of the term ‘derivatives’ in the definition of ‘biological resources’ widens the scope of by-products derived from a biodiversity resource.
- (iv) *Codified Traditional Knowledge*- A new definition has been added by the 2023 Amendment Act. It ensures the protection of established practices. It basically means that traditional knowledge and practices that have been recorded in the form of books have been acknowledged and protected.⁸
- (v) *Indian- Controlled company*- by way of an amendment to section 3(2)(c)(ii), a company incorporated in India and controlled by an Indian will be considered as a domestic entity irrespective of its foreign shareholding.⁹
- (vi) *A boost to the Indian Medicine System*: Section 7 of the Act of 2002 that deals with “Prior intimation to State Biodiversity Board for accessing biological resource for certain purposes” has been amended to include “registered AYUSH practitioners” in the list of people exempted from its application. Also, “cultivated medicinal plants” have also been exempted from the application of S. 7. The idea is to empower the local communities to be able to utilize resources and to encourage farmers to increase the cultivation of medicinal plants.¹⁰
- (vii) *Approval for Intellectual Property Rights*: S. 6 has been amended to change the requirement of the approval of NBA from “before applying for IPR” to “before the grant of IPR”. As far as an Indian individual or company is concerned, they only need to register themselves with the NBA before the grant of an IPR. But will require approval from the NBA at the time of commercialization. This will not only simplify the patenting procedure but also ensure a speedy grant of patents to domestic entities.¹¹
- (viii) *Exemptions*: The exemption available to goods Normally Traded as Commodities under section 40, has been extended to Agricultural waste, cultivated medicinal plants, and derivatives of goods Normally Traded as Commodities.¹²
- (ix) *Decriminalisation of certain offences*: New S. 55, 55 A, and 55 B have been substituted for the old S. 55 as a result of which the amount of penalty has been

⁸*Id.*, s. 3.

⁹*Id.*, s. 5.

¹⁰*Id.*, s. 9.

¹¹*Id.*, s. 8.

¹²*Id.*, s. 29.

increased manifold, for the punishment of imprisonment has been done away with.¹³

The object behind this is

- a. The amount of penalty has to be huge enough in order to have a deterrent impact on foreign companies; and
- b. Though the local community has knowledge and expertise, still investment is required. Therefore, the legislature has removed the provisions relating to imprisonment.¹⁴

Effect of Amendment Act, 2023¹⁵

The above amendments have not only made the patenting procedure simpler but also made the process of obtaining patents for Indians easier and speedier. The roles and responsibilities of the NBA and SBBs have now been defined more clearly. The amendment under S. 55 relating to decriminalization has been introduced due to the lack of awareness amongst the masses about the provisions of the Biological Diversity Act, 2002.

Apart from these, the changes made in S. 7 and 40 that have exempted the cultivation and use of medicinal plants and their by-products, codification of traditional knowledge and registration of Ayurveda, Yoga & Naturopathy, Unani, Siddha, and Homoeopathy (AYUSH) practitioners, and expansion of list of Normally Traded Commodities will not only benefit the local people but also promote ease of business for domestic companies.

Key issues and concerns with the Amendment Act¹⁶

Though the legislature with the help of the Joint Parliamentary Committee and various Ministries and departments of the Indian Government tried its level best to come up with a comprehensive Amendment Act that will resolve all the concerns relating to the Act of 2002, still there are some areas that raise a concern. These include-

- (i) *Preference of business over conservation*

¹³*Id.*, s. 38.

¹⁴*Supra* note 2 at 116.

¹⁵ Kapil Kumar and Dr. Deepa K. Tiku, "Decoding the Biological Diversity (Amendment) Act, 2023", *BioSpectrum*, October 6, 2023.

¹⁶ The Hindu Bureau, "Biological Diversity Amendment Bill passed in Lok Sabha" *The Hindu*, July 25, 2023.

It is being argued that instead of keeping with the spirit of CBD and focusing on the conservation of biodiversity, the amendments seem to be giving more importance to the commercialisation and interest of the industry.

(ii) *Deterrence effect lost due to decriminalization*

As a result of the amendments made to 55 that have removed imprisonment as a means of punishment, the enforcement procedure may be weakened and affect the efforts to stop illegal practices.

(iii) *Exemption from benefit sharing*

The exemption given to AYUSH practitioners from the obligation of sharing of benefits is contrary to the very fundamentals of CBD. This could lead to domestic companies that will evade their responsibility of sharing the profits earned with indigenous people who hold the traditional knowledge.

(iv) *Disparity between domestic and foreign companies*

The changes made in the meaning of Indian companies have raised concerns relating to exploitation of biodiversity by companies that, though registered in India, have foreign shareholding as they don't need to seek permissions anymore and can bypass the approval process.

(v) *Ignorance of conservation-related issues*

Another argument against this amendment Act of 2023 has been the fact that instead of focusing upon conservation-related aspects of biodiversity law and addressing them, the Act focuses more on facilitating commercial interests by reducing regulations and giving exemptions.

Policy Recommendations

(i) **Improved Legal Frameworks**

For improvement in the efficiency of the Access and Benefit-Sharing (ABS) arrangements, there is a need to improve upon both the international governing instruments and the domestic legislation. While the CBD and the Nagoya Protocol offer a foundation for conservation of biodiversity and ABS, it remains only possible to improve their implementation through the adoption of strong legal frameworks that are fully

enforceable.¹⁷ To elaborate, the process of fortifying international treaties entails that all the contracting nations effectively implement and observe clear regulations capable of providing the much-needed transparency and accountability on the use of genetic resources. Also, the process of synchronization of the ABS laws can resolve inequities and challenges resulting from variations in national laws to ensure easier compliance with international laws during the implementation of other activities relating to cross-border cooperation, thus easing legal risks affecting stakeholders¹⁸.

(ii) Improving Implementation Strategies

Several procedures require enhancement for improved execution of the CBD and Nagoya Protocol. For instance, regarding the negotiation standards, it is important to emphasize that equality and justice must dominate the negotiation process to ensure that all pertinent stakeholders are included and their rights are adequately protected. Another important factor is the development of capacities of the local stakeholders in order to strengthen the communities to actively participate in ABS negotiations and in processes that involve benefit sharing¹⁹. Supporting local communities' or indigenous people's access to training and legal support is a potent way of strengthening their abilities to negotiate with other parties and understand their rights under ABS frameworks.

(iii) Ensuring Equitable Benefit Sharing

A means of sharing the fruits of the research fairly between the intellectual creators and the performers of the activity is critical for the success of the various ABS agreements. The legislature needs to outline long-term and effective systems for sharing of benefits to make sure that the relevant benefits that accrue from the use of genetic resources are well distributed among the various players, especially the local and indigenous communities. Indeed, there is an urgent need to apply measures to safeguard the indigenous peoples' rights, which include; acknowledgment of indigenous knowledge, fair practice of self-

¹⁷Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity, opened for signature October 29, 2010, UNEP/CBD/COP/DEC/X/1 (October 12, 2014).

¹⁸ Ruth Okediji, "The Limits of ABS Agreements in Promoting Equity" 6(3) *International Environmental Agreements: Politics, Law and Economics* 237 (2006).

¹⁹Patricia Kameri-Mbote, 'ABS Agreements and International Law: Navigating Complex Legal Landscapes,' 17(3) *Yale Journal of International Law* 90 (2004).

administered participation, and entitlement to shield them from unethical or exploitative bio-piracy.

(iv) Promoting Global Cooperation

International cooperation is essential for any kind of biodiversity conservation since genetic resources, including the related traditional knowledge, may sometimes cross state boundaries. Strengthening cooperation with other countries at the global level may provide for the development of a coordinated and integrated approach that will allow the countries cooperating in the field to exchange the practices, experience, material and informational resources and other information. CBD Secretariat, the United Nations Environment Programme (UNEP), the International Union for Conservation of Nature (IUCN), such international organisations participate in the formation of ABS agreements in that they offer forums for negotiations and technical assistance, as well as support to Capacity-building processes. These organizations can similarly coordinate arrangements to oversee compliance with implementation of ABS arrangements or test that the measure of equitableness and benefit imparted to the nations of origin matches the amount provided.²⁰

Therefore, improving the legal regimes for conservation and sustainable use of biodiversity requires building upon, and improving international conventions, and the alignment of domestic legislation with widely accepted legal principles. Implementation strategies need to be enhanced based on the proper approach to negotiation and procedures for capacity-building of local actors to manage projects efficiently. Specific tactics for equal distribution and the protection of the rights of indigenous people and Fair Benefit Sharing include proper structures to foster the appropriate distribution of benefits and pursuing legislation that safeguards the rights of the indigenous people.²¹ These policy recommendations will help to focus on promoting the objectives of biodiversity conservation; economic development and social preparedness in order to ensure that the object of conservation of biodiversity resources is achieved while ensuring equitable and fair sharing to the benefits of genetic resources amongst all stakeholders across the globe.²²

²⁰Jennifer M. Durnin, "The Role of NGOs in ABS Agreements: Opportunities and Challenges" 20(2), *Law Environment and Development Journal* 157 (2015).

²¹Jorge Cabrera Medaglia, 'The Importance of Capacity Building in Implementing ABS Agreements,' 12(2) *Int'l J. of Biodiversity and Conservation* 34 (2010).

²² Timothy Swanson, 'Global Environmental Resources and ABS: Developing an Effective Mechanism,' 16(1) *International Journal of Sustainable Development & World Ecology* 45 (2009).

V CONCLUSION

It would be fair to conclude based upon the above discussion that the enactment of the Biological Diversity (Amendment) Act, 2023 has come a long way in facilitating ease of research and business, especially for domestic entities. The special status given to domestic companies and Indian AYUSH practitioners gives them an edge over foreign entities trying to access Indian biodiversity resources. Though a number of major changes have been brought about by this amendment, still there are some areas that need to be worked upon and require the attention of the legislature. These include-

- (i) A need to maintain a balance between sustainable conservation of India's biodiversity resources and the promotion of economic development;
- (ii) A need to engage in transparent and inclusive consultations with various stakeholders, including the Indigenous people, conservationists, local communities, scientists and industry representatives;
- (iii) A need to ensure that all perspectives are considered before reaching a decision and ensuring that a balance is maintained between the legal provisions relating to biodiversity resources and the principle of conservation and sustainable use of biological diversity.

Apart from this, it is hoped that the amendments are going to yield the desired results and resolve the queries that were being raised by various stakeholder's time and again. But the benefits and aim of this Amendment shall only be brought to light against the backdrop of time.²³

Implications for Future Research

There are several research avenues that deserve emphasis in future studies to continue to improve on the existing provisions for conservation and sustainable utilization of biodiversity resources. Firstly, future research should address the complicated question of the deep environmental impact of granting access and ABS agreements by undertaking thorough monitoring and evaluation of the agreements. When environmental managers and policymakers know the direct and indirect impacts of working with and engaging a specific stakeholder group, it can offer insight in establishing and refining these structures. Moreover, further investigations and studies must be conducted on the possibilities of improving

²³ Note on Biological Diversity (Amendment) Act, 2023, *available at*: <https://ceerapub.nls.ac.in/note-on-biological-diversity-amendment-act-2023/> (last visited on Nov. 12, 2023)

awareness and capacity among the communities and people of the area. This includes creating instruction that can enhance the abilities of various groups to engage in ABS negotiation and disbursal.

Final Thoughts

The equitable sharing of benefits resulting from the use, preservation, and management of biodiversity resources is made possible via ABS agreements, which are crucial for ensuring global sustainability. In addition to improving the economic and social welfare of the local and indigenous populations, these agreements assist the nations in promoting biodiversity protection. Analysing the position of the importance of ABS for contributing to the sustainability of the global environment, it can be easily concluded that the enhancement and support of these agreements are inevitable. Governments, international bodies, and beneficiary communities must work together to improve on laws that govern such practices and promote fairness in sharing benefits that accrue from such practices. Taking the pros into consideration and working upon the cons, the legislature can make an important positive contribution to the promotion of sustainable development and conservation of natural resources.

Call for Action

For better realization of the strategic advantage for the different stakeholders, it is imperative to identify, encourage and enhance the effectiveness of the Biological Diversity Act, 2002. Legal systems of the governments should also be strengthened in order to overcome a lack of homogeneity and vagueness of the agreements made, as well as the norms that have been set; the norms and best practices for the negotiations and for the implementation should be identified. Strengthening local stakeholders is important so that at least they have capacities to participate in the ABS processes. Moreover, encouraging global cooperation which implies the improvement of international activities and the role of world organizations in implementing ABS agreements can also contribute to the successful outcomes of the current agreements. These agreements must encourage both equitable sharing of benefits of the resources and proper protection of the rights of indigenous people. Collectively, the stakeholders are in a position to guarantee an effective and fair distribution of the benefits accruing from the genetic resources and; thus, ensure sustainability and emancipation for the benefit of world biodiversity.