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THE BIOLOGICAL DIVERSITY ACT 2002: NATURE, SCOPE AND EFFECTIVENESS

Dr. Shamsuddin
Department of Law
Amity University Rajasthan
Jaipur, Rajasthan, India

Abstract - Biodiversity is the important part of human beings as we depend on it even for our most basic needs like food and medicines etc. In India, there was not any law for the conservation for the diversity up to 2002, but in year 2002 parliament enacted the Biological Diversity Act 2002 for the compliance of the provisions of Convention of Biological Diversity, 1992. There are various factors which threat to biodiversity like overexploitation of natural resources, environmental pollution and degradation etc. The Act deal with diversity issues, for the protection of diversity Nation Biological Diversity Authority, State Biological Authority is constituted which implement the policies of the Act. Central Government as well as State Government is empowered to give the direction to the said authorities. This paper analyses the nature, scope and effectiveness of the act.

Keywords - Biological Diversity, Ex Situ Conservation, In Situ Conservation, Threatened Species, National Biodiversity Authority, etc.

I. INTRODUCTION

The **Biological Diversity Act, 2002** is an Act of the Parliament of India for preservation of biological diversity in India, and provides mechanism for equitable sharing of benefits arising out of the use of traditional biological resources and knowledge. The Act was enacted to meet the obligations under Convention on Biological Diversity (CBD), to which India is a party.

II. BIODIVERSITY AND BIOLOGICAL RESOURCE

Biodiversity has been defined under Section 2(b) of the Act as “the variability among living organisms from all sources and the ecological complexes of which they are part, and includes diversity within species or between species and of eco-systems”. The Act also defines, Biological resources as “plants, animals and micro-organisms or parts thereof, their genetic material and by-products (excluding value added

products) with actual or potential use or value, but does not include human genetic material.”¹

III. CONSTITUTIONALITY OF THE BIOLOGICAL DIVERSITY ACT

The Indian Constitution guarantees a set of Fundamental Rights to its citizens under Part III of the Constitution. Some of these fundamental rights are guaranteed to citizens and non-citizens as well. Article 21 and Article 14 are two of the fundamental rights guaranteed even to non-citizens. It is necessary to examine how Article 14 is violated by the Biodiversity Act, 2002. The act distinguishes citizens of India and other persons on the basis of citizenship and residential status. For any legislation to be intra vires Article 14 it has to pass two tests

- The intelligible differentia test
- The rational nexus with the objective of the act test

The intelligible differentia states that a classification in itself does not make the Act/action ultra-vires. An act becomes ultra-vires when the classification is not based on intelligible differentia. In the given act, the classification is based on both citizenship and residential status. Now after the classification test is passed the legislation should pass the test- that the classification must have a rational nexus with the objective of the act. The objective of this act are-conservation of biological diversity, sustainable use of resources and fair and equitable sharing of benefits arising out of utilization of genetic resources. The objectives that the act seeks to achieve and the classification of persons and other persons do not have a rational nexus with the objectives of this act i.e. to conserve of biological diversity.

Secondly, these provisions deter foreign joint ventures as well as collaboration with foreign scientists because of strict prohibition on even minor equity holdings in a company. It would be impractical for a company holding thousands of shares to follow this procedure when only a minor portion of shares are held by other persons or corporations not based in

¹ Section 2(c) of Biological Diversity Act, 2002



India. There should be restrictions when, the non-Indian shareholders are in a position to influence the decisions and management of the company in question, not otherwise.

Finally, the act assumes that resident citizens of India and corporations of India are never a threat to biodiversity. The main objective of the act is conservation of biodiversity and the legislators should bear in mind that even the Indian citizen residents and Indian corporations can be exploitative.

Thus, the act has to grant approvals for access for development of the holders of the traditional knowledge and for the protection of biodiversity.²

IV. NATIONAL BIODIVERSITY AUTHORITY AND STATE BIODIVERSITY BOARDS

The National Biodiversity Authority (NBA) is a statutory autonomous body, headquartered in Chennai, under the Ministry of Environment and Forests, Government of India established in 2003 to implement the provisions under the Act. State Biodiversity Boards (SBB) has been created in 28 States along with 31,574 Biological management committees (for each local body) across India.

A. Function of National Biodiversity Authority-

Section 18 of the Biodiversity Act deals about the functions of National Biodiversity Authority. The main functions are as follows-

- Regulation of acts prohibited under the Act
- Advise the Government on conservation of biodiversity
- Advise the Government on selection of biological heritage sites
- Take appropriate steps to oppose grant of intellectual property rights in foreign countries, arising from the use of biological resources or associated traditional knowledge³

B. Procedure of hearing of national biodiversity authority-

The National Biodiversity Authority shall, in the discharge of its functions and duties under the Biodiversity Act 2002, be bound by such directions on questions of policy as the Central Government may give in writing to it from time to time but opportunity must be given to express its view as far as practicable. The decision of the Central Government in all case, either in policy matters or others shall be final.

The State Biodiversity Board shall be directed for functions and duties under the Act by the State Government.

C. Settlement of disputes between national biodiversity authority & state biodiversity boards -

If a dispute arises between the National Biodiversity Authority and a State Biodiversity Board, the said Authority or the Board, as the case may be, may prefer an appeal to the Central Government within such time as may be prescribed. The National Biodiversity Authority shall be guided by the principles of natural justice and shall follow such procedure as may be prescribed by the Central Government.⁴

The National Biodiversity Authority shall have, for the purpose of discharging its functions under this section, the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 in respect of the following matters, namely⁵:-

- (a) summoning and enforcing the attendance of any person and examining him on oath;
- (b) requiring the discovery and production of documents;
- (c) receiving evidence on affidavits;
- (d) issuing commissions for the examination of witness or documents;
- (e) reviewing its decisions;
- (f) dismissing an application for default or deciding it ex parte;
- (g) setting aside any order of dismissal of any application or any order passed by it ex parte;
- (h) any other matter which may be prescribed.

Any person, aggrieved by any determination of benefit sharing or order of the National Biodiversity Authority or a State Biodiversity Board under this Act, may file an appeal to the High Court within thirty days from the date of communication to him, of the determination or order of the National Biodiversity Authority or the State Biodiversity Board, as the case may be: Provided that the High Court may, if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal within the prescribed period, allow it to be filed within a further period not exceeding sixty days.⁶

D. Bar of Civil Courts

Civil Court are barred to take cognizance of any offence under the Biodiversity Act 2002 except on a complaint made by the Central Government or any authority or officer authorized in this behalf by that Government; or any benefit claimer who has given notice of not less than thirty days in the prescribed manner, of such offence and of his intention to make a complaint, to the Central Government or the authority or officer authorized as aforesaid.⁷

² Kudrat. (2015). Biodiversity Act: 2002. Access from <http://www.lawtopus.com/academike/biodiversity-act-2002-analysis/>. Accessed on 1 Aug 2016

³ Section 18 of Biological Diversity Act, 2002

⁴ Section 50 of Biological Diversity Act 2002

⁵ Section 50(6) of Biological Diversity Act 2002

⁶ Section 51 of Biological Diversity Act 2002

⁷ Section 61 of Biological Diversity Act 2002



V. REGULATION OF ACCESS TO BIOLOGICAL DIVERSITY

As per section 3 of Biodiversity Act 2002, a person who is not a citizen of India or a citizen of India, who is a non resident as defined in clause (30) of section 2 of the Income tax Act, 1961 or a body corporate, association or organization- not incorporated or registered in India or incorporated or registered in India under any law for the time being in force which has any non Indian participation in its share capital or management, shall without previous approval of the National Biodiversity Authority, obtain any biological resource occurring in India or knowledge associated thereto for research or for commercial utilization or for bio survey and bio utilization.

Results of research are not to be transferred to by aforesaid persons without approval of National Biodiversity Authority. Transfer does not include publication of research papers or dissemination of knowledge in any seminar or workshop, if such publication is as per the guidelines issued by the Central Government.⁸

The provisions of mandatory approval by central government provision will not apply to collaborative research projects involving transfer or exchange of biological resources or information relating thereto between institutions, including Government sponsored institutions of India, and such institutions in other countries, if such collaborative research projects, (a) conform to the policy guidelines issued by the Central Government in this behalf; (b) be approved by the Central Government.

Application for intellectual property rights not to be made without approval of National Biodiversity Authority.

VI. APPLICABILITY OF THE ACT FOR NRI

A foreigner, non-resident Indian as defined in clause (30) of section 2 of the Income-tax Act, 1961 or a foreign company or body corporate need to take permission from the NBA before obtaining any biological resources or associated knowledge from India for research, survey, commercial utilization.⁹ Indian citizens or body corporates need to take permission from the concerned State Biodiversity Board.¹⁰

Result of research using biological resources from India cannot be transferred to a non-citizen or a foreign company without the permission of NBA. However, no such permission is needed for publication of the research in a journal or seminar, or in case of a collaborative research made by institutions approved by Central Government.¹¹

No person should apply for patent or other form of intellectual property protection based on the research

arising out of biological resources without the permission of the NBA. The NBA while granting such permission may make an order for benefit sharing or royalty based on utilisation of such protection.¹²

VII. FUNCTIONS OF THE NATIONAL BIODIVERSITY AUTHORITY

The function of the National Biodiversity Authority (NBA) is provided in Section 3,4 & 6 of the Biological Diversity Act 2002. The main functions of the NBA is as follows-

1. It shall be the duty of the National Biodiversity Authority to regulate activities referred to in sections 3, 4 and 6 and by regulations issue guidelines for access to biological resources and for fair and equitable benefit sharing.
2. The National Biodiversity Authority may grant approval for undertaking any activity referred to in sections 3, 4 and 6.
3. The National Biodiversity Authority may-
 - (a) advise the Central Government on matters relating to the conservation of biodiversity, sustainable use of its components and equitable sharing of benefits arising out of the utilization of biological resources;
 - (b) advise the State Governments in the selection of areas of biodiversity importance to be notified under sub section (1) of section 37 as heritage sites and measures for the management of such heritage sites;
 - (c) perform such other functions as may be necessary to carry out the provisions of this Act.
4. The National Biodiversity Authority may, on behalf of the Central Government, take any measures necessary to oppose the grant of intellectual property rights in any country outside India on any biological resource obtained from India or knowledge associated with such biological resource which is derived from India.¹³

VIII. POWER OF CENTRAL GOVERNMENT UNDER THE ACT

The main powers of the Central Government which are mentioned in the Act are as follows-

- A. **Drafting of Policy for Diversity Conservation:** - The Central Government shall develop national strategies, plans, programmes for the conservation and promotion and sustainable use of biological

⁸ Section 3 of Biological Diversity Act 2002

⁹ Section 3 of Biological Diversity Act, 2002

¹⁰ Section 7 of Biological Diversity Act, 2002

¹¹ Section 4&5 of Biological Diversity Act, 2002

¹² Section 6 of Biological Diversity Act, 2002

¹³ Vikaspedia. Biodiversity - Legal Acts & Rules. Access from- <http://vikaspedia.in/energy/environment/biodiversity-1/biodiversity-legal-acts>. Access on 01 Aug. 2016.



diversity including measures for identification and monitoring of areas rich in biological resources, promotion of *in situ*, and *ex situ*, conservation of biological resources, incentives for research, training and public education to increase awareness with respect to biodiversity.¹⁴

"Ex situ conservation" & "In situ conservation"

Chapter IX of Biodiversity Act 2002 provided regarding powers of Central Government where the two special terms are used "ex situ conservation" & "in situ conservation" where "ex situ conservation" means the conservation of components of biological diversity outside their natural habitats and "in situ conservation" means the conservation of ecosystems and natural habitats and the maintenance and recovery of viable populations of species in their natural surroundings and, in the case of domesticated or cultivated species, in the surroundings where they have developed their distinctive properties.¹⁵

- B. **Measures for Threatened Species:** - If the Central Government has reason to believe that any area rich in biological diversity, biological resources and their habitats is being threatened by overuse, abuse or neglect, it shall issue directives to the concerned State Government to take immediate ameliorative measures, offering such State Government any technical and other assistance that is possible to be provided or needed.¹⁶
- C. **Notify threatened species:-** The Central Government, in consultation with the concerned State Government, may from time to time notify any species which is on the verge of extinction or likely to become extinct in the near future as a threatened species and prohibit or regulate collection thereof for any purpose and take appropriate steps to rehabilitate and preserve those species.

IX. BENEFIT SHARING

Benefit sharing out of usage of biological resources can be done in following manner:

- Joint ownership of intellectual property rights
- transfer of technology
- location of production, research development units in the area of source
- payment of monetary and non-monetary compensation
- setting up of venture capital fund for aiding the cause of benefit claimers¹⁷

¹⁴ Section 36(1) of Biodiversity Act 2002

¹⁵ Explanation Section 36 of Biodiversity Act 2002

¹⁶ Section 36 (2) of Biodiversity Act 2002

¹⁷ Section 21(2) of Biological Diversity Act, 2002

X. PENALTIES

If a person, violates the regulatory provisions he will be "punishable with imprisonment for a term which may extend to five years, or with fine which may extend to ten lakh rupees and where the damage caused exceeds ten lakh rupees such fine may commensurate with the damage caused, or with both."¹⁸

Any offence under this Act is non-bailable and cognizable.

XI. CONCLUSION

The Biological Diversity Act, 2002 was enacted by India so as to give effect to its commitments under the Convention on Biological Diversity (CBD), 1992 (the BDA became effective in 2004 after the Biological Diversity Rules (BDRs) were notified). The BDA has provisions for regulated access to biological resources (BRs) for various purposes including for scientific research, for commercial utilisation, for bio-survey or for bio-utilisation. These conditions of access are put in place to ensure conservation of biological diversity and fair and equitable sharing of the benefits arising out of the commercial use of Biological Resources and associated traditional knowledge.

The Biological Diversity Act is a well-crafted legislation that takes into consideration the imperatives of implementing a complex law given the realities facing India. Despite its well-crafted nature, the implementation of the Biological Diversity Act has many weaknesses. The provisions have not been implemented effectively, which was mainly due to inadequate awareness about the law among various stakeholders and the weakness of institutional mechanisms. Moreover, well-articulated guidelines, without which no legislation can be effectively implemented, are not yet in place. Considering the importance of promoting conservation and sustainable use of Biological Resources, there is an urgent need to remove the shortcomings being faced for proper implementation of the Act so that benefits can accrue to the communities who protect and nurture Biological Resources and associated traditional knowledge. Strengthening of institutional and human resources will have to be carried out to ensure any meaningful BS from access to Biological Resources and associated traditional knowledge in the country.

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