

THE BIOLOGICAL DIVERSITY ACT 2002 AND RULES 2004

Concerns & Issues

This note is meant to provide a brief orientation to growing area of concern and relevance to the vast majority of India's population. This population, in particular tribal and traditional communities – farmers, fisherfolk and indigenous peoples, is heavily dependent on biodiversity and biological resources for their survival and livelihoods. India's biodiversity is severely threatened; wildlife populations, traditional cultures, geological cycles, and a range of other attributes are being destroyed. There are a variety of reasons for this, including increasing exploitation of biological resources for trade both at national and international levels.

Why is this the case? Are not our laws, policies and programmes effective enough to deal with this ecological crisis?

It is in this light that we need to view the Biological Diversity Act and Rules, individually and in conjunction with other laws and policies. Do they actually help tackle the forces of destruction and facilitate community control on their resources?

THE BIOLOGICAL DIVERSITY ACT 2002

The Biological Diversity Act 2002 is a law meant to achieve three main objectives:

- the conservation of biodiversity;
- the sustainable use of biological resources;
- equity in sharing benefits from such use of resources.

Its key provisions aimed at achieving the above are:

1. Prohibition on transfer of Indian genetic material outside the country, without specific approval of the Indian Government;
2. Prohibition on anyone claiming an Intellectual Property Right (IPR), such as a patent, over biodiversity or related knowledge, without permission of the Indian Government;
3. Regulation of collection and use of biodiversity by Indian nationals, while exempting local communities from such restrictions;
4. Measures for sharing of benefits from the use of biodiversity, including transfer of technology, monetary returns, joint Research & Development, joint IPR ownership, etc.;
5. Measures to conserve and sustainably use biological resources, including habitat and species protection, environmental impact assessments (EIAs) of projects, integration of biodiversity into the plans, programmes, and policies of various departments/sectors;
6. Provisions for local communities to have a say in the use of their resources and knowledge, and to charge fees for this;
7. Protection of indigenous or traditional knowledge, through appropriate laws or other measures such as registration of such knowledge;
8. Regulation of the use of genetically modified organisms;
9. Setting up of National, State, and Local Biodiversity Funds, to be used to support conservation and benefit-sharing;
10. Setting up of Biodiversity Management Committees (BMC) at local village level, State Biodiversity Boards (SBB) at state level, and a National Biodiversity Authority (NBA).

While some of the above provisions are progressive, there remain important weaknesses, including the following:

1. It exempts those plants that are registered under the Protection of Plant Varieties and Farmers' Rights (PVPFR) Act, 2001. This Act provides corporations and scientists who are breeding new varieties of crops, to gain intellectual property rights (see more on the relationship between the Biodiversity and Plant Varieties laws, below). Such an exemption means that the progressive provisions listed above, many of which are absent from the PVPFR Act, would not apply to plant varieties registered under PVPFR Act.
2. It does not provide citizens the power to directly approach the courts; such power is restricted to an appeal in the High Court against any order by the NBA or the SBB.
3. It is unnecessarily soft on Indian corporate and other entities, requiring only "prior intimation" to a SBB for the commercial use of bioresources, rather than *permission* from the NBA as in the case of foreigners. This is unjustified, given that Indians (especially industrial corporations) are not necessarily any more responsible towards the environment or towards local communities, also some Indian companies could just be local fronts for foreign enterprises.
4. It does not fully empower local communities, to protect their resources and knowledge from being misused, or to generate benefits (except charging collection fees). It has very weak or no representation of local community members on the State Biodiversity Boards or National Biodiversity Authority.
5. The power of declaring a Biodiversity Heritage Sites lies with the state government (Article 37 of the Act): It is important that the heritage sites should be designated only after consultation and moreover consent of the affected communities. Further, these should be in the control/management of local communities, and the provision for compensation made in the State Biodiversity Fund (see Section 32) be applied only where there is a mutually agreed to dislocation/curbing of rights. Else we will have the people-parks conflict recurring in another form, as decisions for which areas need to be conserved would be top-down.

Several organisations and people feel that the basic framework of the Act is problematic, since it accepts intellectual property rights on biodiversity, could be used to further commercialise biodiversity, and does not truly empower communities. Others feel that the Act provides some potential for checking biopiracy, achieving conservation, and facilitating community action. They stress that a combination of strong rules, and amendments related to the above points, would help strengthen this potential.

BIOLOGICAL DIVERSITY RULES 2004

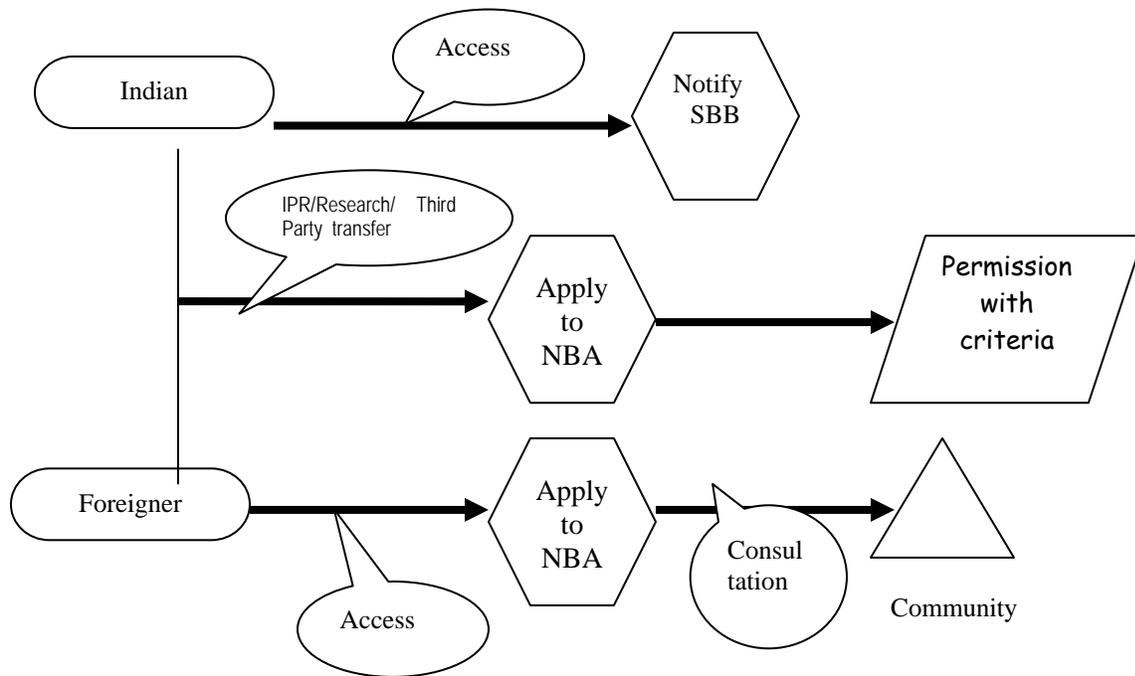
There was hope that Rules under the Act would strengthen the provisions on conservation, sustainable use, and equity. Unfortunately, that hope was shattered when the government notified the Biological Diversity Rules 2004 on 15th April.

The Biodiversity Rules are the executive orders made by the Government in order to carry out the purposes of the Act (Section 62)¹.

¹ Every rule made under this Act is to be placed in the Parliament for a period of thirty days and the houses can make changes in the rules (sec 62(3)). This gives the space to make suitable changes in rules, by asking members of Parliament to raise issues in the Parliament

The Rules among other things outline the procedures to be followed for access to biological resources (wild plants and animals, crops, medicinal plants, livestock, etc), their commercial utilization, transfer of rights of research, and intellectual property rights related to biodiversity.

From the point of view of local communities, it is important to understand the process of allowing access/utilization of bioresources and also the role of communities. Presented below is a diagrammatic representation of the same



It is keeping this in mind that we need to look at some provisions directly relevant to local communities, the most critical of them being the Biodiversity Management Committee (BMC). Section 41 of the Act states:

“Sec 41(1) Every local body² shall constitute a Biodiversity Management Committee within its area for the purpose of promoting conservation, sustainable use and documentation of biological diversity including preservation of habitats, conservation of land races, folk varieties and cultivars, domesticated stocks and breeds of animals and microorganisms and chronicling of knowledge relating to biological diversity”.

Under the Biodiversity Rule, Sec 22 expands on constitution and role of Biodiversity Management Committees, and states:

² (h) "local bodies" means Panchayats and Municipalities, by whatever name called, within the meaning of clause (1) of article 243B and clause (1) of article 243Q of the Constitution and in the absence of any Panchayats or Municipalities, institutions of self-government constituted under any other provision of the Constitution or any Central Act or State Act

- (1) Every local body shall constitute a **Biodiversity Management Committee** (BMCs) within its area of jurisdiction.....
- (6) The *main* function of the BMC is to prepare People's Biodiversity Register (PBR) in consultation with local people (this is a comedown from the broader role envisaged in Sec 41 of the Act. The Register is supposed to contain comprehensive information on availability and knowledge of local biological resources, their medicinal or any other use or any other traditional knowledge associated with them) (*italics ours*).
- (7) The other functions of the BMC are to advise on any matter referred to it by the State Biodiversity Board or Authority for granting approval, to maintain data about the local v aids and practitioners using the biological resources.

Therefore, the role for BMCs defined in the Biodiversity Rules are a complete comedown from what was envisaged in the Biodiversity Act, which itself had its own set of problems. Some of the critical problems both from the Act and Rules are:

Constitution of the Biodiversity Management Committees (BMC)

1. The definition of local body is problematic, as it leaves out gram sabha or other village assemblies. Since the local body has to appoint/select the BMC, the political affiliation and relationship between a village and the panchayat body will play an important role in the constitution and functioning of the BMC.
2. The process of local body constituting BMC, is by nomination. Rules 22(2) & (3) expressly mention that the members will be **NOMINATED** by the local body & the Chairperson will be **ELECTED** by the committee, then the BMC could become another power center and might not actually function to conserve biodiversity or protect community rights.

Focus of work and functioning

1. The Act clearly spells out a list of functions for the BMC, among which are promoting conservation and maintaining PBR. The Rule dilutes this and states that the main role is to merely maintain PBR.
2. **Peoples Biodiversity Register:** The Peoples Biodiversity Register (PBR) is a document that records the diversity of species of flora, fauna, crops, livestock etc. As on date, there is no legal protection available for the knowledge recorded in the PBR. This is problematic when it comes to the question of access to this document. Even though communities create and maintain a database of their resources of knowledge, there is no or requirement that their consent would sought when it comes to accessing the information in the PBRs.

Although Rule 17 says local bodies will be consulted before approval for access to bio resources is given, the definition of "consult" is not clear and in many cases it might remain a mere formality.

3. Though the Act clearly has spelt out criteria for rejecting applications, it has not listed community consent as one of them. Rule 7 is clearly biased, as it gives BMC only an advisory role in the of grant approvals.

BIODIVERSITY ACT/RULES AND INTELLECTUAL PROPERTY RIGHTS

The biodiversity legislation provides for a regulatory system by which access to knowledge relating to biodiversity can be granted. Providing for an approval procedure for a patent or any other intellectual property right based on any Indian biological material and knowledge is seen by several groups campaigning against “patents on life” as a significant departure from the earlier stance of the Government of India. The Act does not prohibit IPRs and therefore the criticism is that it facilitates the privatization of India’s traditional knowledge. The Act only forbids an application for any IPR in or outside India without prior approval of the NBA (Section 6). The NBA may either allow or disallow an application for a patent or any other IPR. Neither the procedure in the relevant Rule 18 nor the Form III for seeking such approval factors in consultation of communities.

On occurrence of an instance of biopiracy, the NBA is empowered by the Act to take any necessary action to oppose the grant of IPR in any country outside India on behalf of the Government of India [Section 18(4)]. In the absence of a globally agreed single forum wherein such cases can be challenged the NBA may have to only engage in fire-fighting at different patent and or trade mark offices overseas.

Indian trade negotiators have at international fora agreed that patents will be allowed on such resources or knowledge only if there is:

- **Disclosure of source** and **country of origin** of the biological resource and of the traditional knowledge used in the invention
- Disclosure of Evidence of **prior informed consent**
- Disclosure of Evidence of **benefit sharing**

IPRs IN THE CONTEXT OF PROTECTION OF PLANT VARIETIES AND FARMER’S RIGHT ACT

The IPR provisions in Biodiversity Act must also be seen in the light of the growing pro-IPR trend of the Government of India, more visible in other IPR-related laws & policies such as:

- the Protection of Plant Varieties and Farmer’s Rights Act, 2001 which introduces plant breeders rights
- Amendments in the Patent Act, 1970 towards compliancy of WTO TRIPs’ standards

An IPR sought under the PVP law does not come under the purview of the Biodiversity Act, in other words a person seeking a plant breeder right does not require approval of the NBA. The PVP Authority is only to keep the NBA informed of such grant of rights.

Therefore all the three legislations (Biodiversity Act, Protection of Plant Varieties and Farmer’s Rights Act, and Patents Act) move in tandem towards a pro-IPR regime, and in that sense are not “incompatible”.

So even though an international convention like the Convention on Biological Diversity (Article 16.5), states that intellectual property rights must not conflict with the conservation and sustainable use of biodiversity, the biodiversity law is apparently based on the premise that IPRs & biodiversity conservation are not antithetical! It is important to note that is only after India became a signatory to this convention that the process of drafting the legislation begun in India.

This is how the IPR philosophy or rather politics (contained in the Patents & PVP Legislation) has even corrupted a supposedly conservation oriented legislation.

RECOMMENDED ACTIONS

There is space and time for people to lobby for better rules and Act, for the two following reasons.

1. Every rule made under the Biodiversity Act is to be placed in the Parliament for a period of thirty days and the houses can make changes in the rules (sec 62(3)). This gives the space to make suitable changes in rules, by asking members of Parliament to raise issues in the Parliament.
2. Section 65 of the Biodiversity act gives the “Power to remove difficulties” “(1) If any difficulty arises in giving effect to the provisions of this act, the Central government, may, by order, not inconsistent with the provisions of this Act, remove the difficulty: provided that no such order shall be made after the expiry of a period of two years from the commencement of this Act”

We can use this section to ask for requisite changes in the Act.

This can be done in various ways

1. Interaction with members of the National Biodiversity Authority, raising concerns and critical issues with them.
2. Educate and lobby with MLAs/MPs, by a series of discussion workshops
3. Pass Resolutions/memorandums at district, state and national level.
4. Immediate protest during next winter session of Parliament – Delhi Action; demand MPs meet with protestors (to be a part of National Coordination of Farmer’s Movement)
5. Mobilisation of panchayats and gram sabhas to oppose setting up of Biodiversity Management Committees under current Rules
6. Spreading awareness regarding these issues amongst communities, NGOs and govt. officials
7. The local, regional and national media can be tapped to raise awareness of these issues, stressing on the gravity of the situation.

References

Text of the Act <http://www.grain.org/brl/?docid=322&lawid=1378>

Text of the Rules <http://www.grain.org/brl/?docid=299&lawid=1378>

Critique of the rules at www.kalpavriksh.org

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