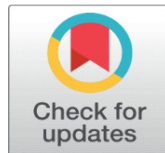


TRADITIONAL MEDICINAL KNOWLEDGE OF INDIGENOUS PEOPLE AND ACCESS AND BENEFIT SHARING: A STUDY IN LEGAL PERSPECTIVES

Ms. Shreya Bajpai,¹ Ms. Chhaya Sikarwar²

¹ Research Scholar Maharashtra National Law University, Nagpur

² Research Scholar Maharashtra National Law University, Nagpur



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ABSTRACT

India takes pride in being the custodian of invaluable traditional medical knowledge derived from its rich natural resources. This knowledge has its roots in the continuous embrace and interaction with biodiversity. As a highly diverse nation, India has a select group of individuals dedicated to preserving the biodiversity, thereby safeguarding their traditional medicinal wisdom. These indigenous people or tribes have invaluable traditional knowledge of certain skills and medicines. The transmission of this information to the general population becomes difficult since these indigenous or tribal people are constrained by territorial boundaries. However, invading their country is not a problem in order to financially exploit the indigenous people's TMD knowledge base. This has led to both the eradication of their biodiversity and the denial of it. The biodiversity legislation and Indigenous People Law were designed to protect biodiversity and the rights of indigenous group of people as a result of this expanded use of traditional medicinal knowledge.

Native Indians who live in tribal areas in India use traditional medical knowledge to maintain their health and, in turn, their way of life. Multinational corporations frequently bio-pirate this tribal group's traditional medical knowledge in order to sell it as a medicine. The primary legal issue that arises in this situation is the denial of the right to access benefit sharing, which is the significant legal paradigm introduced by national legislation adopted in accordance with the aforementioned universal laws. In addition to the Universal Laws safeguarding the rights of Indigenous groups, the Nagoya Protocol of 2010 and the Bonn Guidelines of 2001 regulate access and benefit-sharing on a global scale. Within India, the Access and Benefit Sharing Mechanism is governed by the Biodiversity Act of 2002, the Biological Diversity Rules of 2004, and the Access and Benefit Sharing Guidelines of 2014. These legislative measures aim to ensure the equitable and fair distribution of benefits by the state. Concurrently, sections 3 and 7 of the Biological Diversity Act, 2002, provide unrestricted access to biological diversity for any Indian citizen, as well as any corporate entity, association, or organization registered in India. The law stipulates that the State Biodiversity Board must be notified in advance to obtain such biological diversity knowledge. This paper examines the legality of pharmaceutical companies' persistent bioprospecting activities in relation to the rights affirmed for Indigenous groups. Additionally, it investigates whether the Biological Diversity Act of 2002 infringes upon the access and benefit-sharing rights of Indigenous or Tribal groups.

Keywords: Biodiversity, Indigenous People, Traditional Medicinal Knowledge, Access, and Benefit Sharing

1. INTRODUCTION

India is a proud repository for invaluable traditional medicinal knowledge from natural resources. This traditional medicinal knowledge originates from consistent acquaintance and interaction with biodiversity. India is a mega diverse

nation with certain exclusive group of people who preserves the biodiversity to sustain their Traditional Knowledge pertaining to medicine. These group of people known as indigenous or tribes possess invaluable traditional knowledge of some specific medicine and skills. In order to commercially explore the Traditional Medicinal Knowledge base of indigenous people, encroachment upon their territory is an unproblematic issue. This has resulted in both the destruction of their biodiversity and denial of rights of ownership knowledge. The biodiversity legislation and Indigenous People Law were designed to protect biodiversity and the rights of indigenous group of people as a result of this expanded use of traditional medicinal knowledge.

According to Article UN CBD, 1992, traditional medical knowledge is considered the property of local or indigenous populations. Furthermore, Article 15 of the Indigenous and Tribal Peoples Convention, 1957, confers rights to protect the natural resources found on indigenous peoples' land. Consequently, these rights include the participation of indigenous communities in the utilization, management, and conservation of natural resources. It is also important to remember that this law safeguards the right to just recompense for any harm suffered by indigenous people. Additionally, Article 24 of the UN Declaration asserts the right of indigenous peoples to traditional medicines and the continuation of their medical practices, which includes the preservation of their essential medicinal plants.¹

The Convention on Biological Diversity (1992), along with the Bonn Guidelines (2001) and the Nagoya Protocol (2010), regulates access and benefit-sharing on a global scale. In India, the Access and Benefit Sharing mechanism is governed by the Biodiversity Act (2002), the Biological Diversity Rules (2004), and the Access and Benefit Sharing Guidelines (2014). These laws aim to ensure the equitable distribution of benefits by the state. However, Section 3 of the Biological Diversity Act, 2002 mandates that only non-Indian citizens or corporate bodies, associations, or organizations not registered in India must obtain prior authorization from the National Biodiversity Authority to access India's biological diversity. Simultaneously, Section 7 of the Biological Diversity Act, 2002 permits Indian citizens, as well as companies, groups, or organizations registered in India, to freely access the biological diversity of indigenous peoples. It shows that the only mandate under the law to access such biological diversity knowledge is to provide prior intimation to the SBB established under Biodiversity Act, 2002. This legally unrestricted access to traditional knowledge appears to have led mostly to the commercial exploitation of indigenous people's traditional medical knowledge. Traditional Medicinal Knowledge of this tribal group of people are often bio pirated by multinational companies to commercialize it as a medicine. Moreover, this causes the denial of benefit sharing with indigenous group of people, a legal impasse of Intellectual Property Rights. This paper examines the legality of bioprospecting consistently carried on by the pharmaceutical companies in light of the rights affirmed for indigenous group of people.

2. UNDERSTANDING TRADITIONAL KNOWLEDGE

The initial step in assessing whether something constitutes traditional knowledge within a medicinal product system is to define "Traditional Knowledge." Once this definition is established, it is essential to identify the presence of a medicinal system corresponding to that traditional knowledge. In the international debate, the term "traditional knowledge" is used in a variety of contexts, with frequently contrasting subject matter coverage, distinct elements of the IP regime, and various stakeholders and beneficiaries with conflicting interests. Consequently, it is essential to have a basic comprehension of the term "Traditional Knowledge."

A first practical definition, still in use today, was developed using the findings of a WIPO² study conducted in 2001. According to this definition, "Traditional Knowledge" refers to "Tradition-based literary, artistic, or scientific works; performances; inventions; scientific discoveries; designs; marks, names, and symbols; undisclosed information; and all other Tradition-based innovations and creations resulting from intellectual activity in the Industrial, Scientific, Literary, or Artistic fields."³

The aforementioned concept highlights the need to acknowledge and respect all unique knowledge that emerges in all realms of human life. This emphasizes the significance of traditional knowledge that comes from any human

¹ United Nations Declaration on the Rights of Indigenous Peoples 2007, Article 24

² World Intellectual Property Organization, "Findings of WIPO Study" (2001)

³ World Intellectual Property Organization, "Traditional Knowledge (TK) is Knowledge that..." available at: [https://www.wipo.int/tk/en/tk/#:~:text=Traditional%20knowledge%20\(TK\)%20is%20knowledge,its%20cultural%20or%20spiritual%20identity](https://www.wipo.int/tk/en/tk/#:~:text=Traditional%20knowledge%20(TK)%20is%20knowledge,its%20cultural%20or%20spiritual%20identity) (last visited on Aug. 18, 2024).

community. When the knowledge comes from a group of people who are not mainstreamed for a variety of reasons, this is quite unique. WHO's alternative definition of traditional knowledge makes this clear.

3. KNOWLEDGE EMBARK AND TRADITIONAL MEDICINAL KNOWLEDGE

WHO defines Traditional Medicinal Knowledge as "Traditional Medicine refers to the knowledge, skills and practices based on the theories, beliefs and experiences indigenous to different cultures, used in the maintenance of health and in the maintenance of health and in the prevention, diagnosis, improvement or treatment of physical and mental illness."⁴

Combining the above two definitions provides a good understanding of traditional medical knowledge, which is defined as information, rituals, and practices that are deeply ingrained in indigenous people's cultural identities and have been passed down through the generations in medical systems. The usage, production, and development of animal and plant species as medicines or foods with medicinal characteristics and purposes are included here, in addition to the rituals and beliefs associated with the use of medicines.

This emphasizes the importance of the original medicinal knowledge held by the indigenous group of people who have isolated themselves from the third generation world and the pressing necessity to safeguard their intellectual property rights. Thus, the international legal system and domestic legislation both met this requirement, giving indigenous groups of people substantial protection for their legal rights.

4. THE UNIVERSAL LEGAL FRAMEWORK AND INDIGENOUS KNOWLEDGE

The U.N. Convention on Biological Diversity

The principal instrument established under the international legal framework governing biodiversity is the Convention on Biological Diversity (CBD), which was instituted by the United Nations in 1992. The widespread acceptance of the Convention on Biological Diversity (CBD) is evidenced by the 168 countries that have signed the agreement and the 189 parties to it. The CBD established a Conference of the Parties (COP) to oversee its administration, implementation, and enforcement. In addition to providing general guidelines for signatories, the COP ensures the effective management of biological diversity in accordance with the CBD's objectives. Article 3 of the CBD grants state government with sovereign power to control its biological diversity and the authority to decide how access to it will be permitted.⁵

This law requires that the contractual parties should respect indigenous knowledge and facilitate its wider use with the prior approval of the relevant indigenous community. As a result, contracting parties are required to comply with the following under Article 8(j) of the Convention on Biological Diversity:

"Subject to national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities . . . and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices."⁶

The CBD asserts that state parties bear a heightened obligation to exercise their sovereign powers as outlined in Article 8(j) of the CBD, 1992. Furthermore, Article 10(c) of the CBD mandates that state parties protect their biological resources "in accordance with traditional cultural practices" to maintain sovereignty over these resources. The necessity for comprehensive legal protection is underscored by the International Labour Organization's expansion of indigenous rights to encompass cultural rights.

Cultural Rights Aspect of Indigenous Knowledge

The International Labour Organization (ILO) has notably worked to connect the traditional medicinal knowledge of indigenous peoples with their cultural rights. The ILO has implemented measures to protect the traditional knowledge and cultural practices of these communities. Through the ILO Convention No. 169, titled "Indigenous and Tribal Peoples

⁴ World Health Organization, "The Promotion and Development of Traditional Medicines, Report of a WHO meeting" WHO Technical Report Series 622, available at: <https://www.who.int/publications/i?healthtopics=7b989a66-ebf4-4d1a-9bde-59f12b3d3590> (last visited on Aug. 21, 2024).

⁵ The Convention on Biological Diversity, Article 3

⁶ The Convention on Biological Diversity, Article 8(j)

Convention,” Native Americans and other tribal groups are granted various rights, many of which pertain to the preservation and recognition of their traditional medicinal knowledge.⁷

Article 13 of the International Labour Organization's Convention No. 169 (1989) establishes that governments must maintain the crucial relationship between indigenous peoples and their lands. These lands are essential habitats for plant species that provide the traditional medicinal knowledge of indigenous communities⁸. Article 15 of the International Labour Organization's Convention No. 169 (1989) mandates that states implement protections for the rights of indigenous peoples to natural resources within their territories. This includes the rights to participate in, use, manage, and conserve their biological diversity. It explicitly acknowledges the indigenous communities' right to control both their traditional knowledge and these resources.⁹ Article 15(2) mandates that states establish procedures to consult indigenous groups prior to authorizing any programs for the exploration or exploitation of their lands. This consultation process is intended to determine the extent to which the interests of indigenous communities might be affected.¹⁰

Pharmaceutical firms, however, disregard benefit sharing with the original knowledge holder when they access the traditional medical knowledge of the indigenous people for commercial usage. These pharmaceutical firms defend it by claiming that traditional knowledge is in the “public domain” and that they have a private commercial right to exploit it. Thus, for sole financial gain, those corporations are heavily involved in pirating traditional medical knowledge.

5. BIOPIRACY AND TRADITIONAL MEDICINAL KNOWLEDGE

International law robustly affirms the rights of indigenous peoples to their traditional knowledge within medicinal systems. In this context, pharmaceutical companies are aptly characterized as “bio pirates” because they claim the right to profit from the exploitation of traditional knowledge without sharing the benefits with the original knowledge holders. Biopiracy is defined as the appropriation of indigenous communities' traditional knowledge with the intent of obtaining exclusive patent ownership over that knowledge.¹¹ This exploitation manifests in various forms and is carried out with meticulous precision.

Biopiracy occurs in three different forms. The initial form is Bio-prospecting, a procedure that occurs when someone discovers an undiscovered plant or organism.¹² Following discovery, researchers continue studying the plant or organism, which frequently results in a new discovery of previously undiscovered specifications. The practice of “Bio-prospecting” becomes controversial when traditional knowledge is incorporated into findings and then modified to render them patentable. Another form of biopiracy involves identifying unique traits in known plants that differ from the typical species, making them eligible for patents. The most common type of biopiracy, however, is the commercial exploitation of traditional knowledge. In this sort of biopiracy, the subject-matter expertise of an indigenous, vulnerable group of people is utilized.

In order to create their own drugs, pharmaceutical companies use the third type of strategy, which involves extracting active compounds from traditional medical procedures, patenting them, and combining them with other ingredients. Frequently, the individuals who originally developed the traditional medical techniques are not always sufficiently compensated in this process. On the one hand, the pharmaceutical business refers to this practice as “bioprospecting,” and on the other, those who are concerned with biodiversity protection refer to it as “biopiracy.” This

⁷ International Labour Organization. (1989). Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries.

⁸ International Labour Organization. (1989). Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries, Article 13

⁹ International Labour Organization. (1989). Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries, Article 15

¹⁰ International Labour Organization. (1989). Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries, Article 15(2)

¹¹ Gavin Stenton, “Biopiracy within the Pharmaceutical Industry: A Stark Illustration of just how Abusive, Manipulative, and Perverse the Patenting Process can be towards Developing Nations” ResearchGate, available at: https://www.researchgate.net/publication/228650370_Biopiracy_within_the_Pharmaceutical_Industry_A_Stark_Illustration_of_just_how_Abusive_Manipulative_and_Perverse_the_Patenting_Process_can_be_towards (last visited on Aug. 21, 2024).

¹² *ibid*

propensity leads to legal conflict that work to defend the rights of indigenous groups of people.¹³ This is widespread in India, and in a nation like India, the prevalence of such exploitation creates many legal rights-related issues.

6. INDIAN INDIGENOUS TRADITIONAL MEDICINAL KNOWLEDGE AND IMPLICATIONS OF ITS COMMERCIAL USAGE

India, a nation with a sizable repository of traditional medicinal knowledge, employs it to produce a variety of medicinal products. For instance, to improve skin and treat certain skin conditions, Indian traditional medicine practitioners and doctors used a range of formulations that included diverse plant extracts. There are other Indian formulations, such as *Rakta Citraka*, *Evam Krsna Citraka Prayoga*, *Thaamarai Thylam*, *Tila Bara-e-Tahabbuj-A*, and *Kushtahara lepa*¹⁴

As an illustration, consider the intervention in the Indian market by Avon Products Inc., a multinational cosmetics company, which took use of exotic plant species present in India. Avon Products Inc., is a cosmetics and personal care corporation established in the United States with annual revenues of \$11 billion and a market valuation of more than \$9 billion.¹⁵ Since the “Avon Lady” is a well-known phenomenon in many parts of the world, this company, which was founded in 1886, is recognized as a major competitor globally in the cosmetics industry¹⁶. However, Avon’s emphasis on skin care products was mirrored by the company’s keen interest in Asian medicinal plants. In fact, Avon tried to patent these plants in order to use them in their skin care products.

These patent claims from Avon’s Products Inc. are an instance of biopiracy when patent applications fall short of meeting the criteria for patentability in light of traditional knowledge-based previous art. The location, timing, and presence of any benefit-sharing agreements, as well as Avon’s Products Inc.’s alleged acquisition of the plants, are all unsupported by specific evidence. In practice, there is no proof of any benefit-sharing contracts relating to Avon’s Products Inc.’s patent claims. But every plant listed by Avon is native to several Asian countries and indigenous peoples, and it has long been used in traditional medicine. It is therefore hypothesized that Avon’s exploitation of Asian biodiversity is an attempt to claim a discovery while purposefully ignoring local and Indigenous cultures’ traditional medicinal knowledge.

The commercialization of “Arogyapacha,” a traditional plant remedy of one indigenous community, is another example of biopiracy. Arogyapaccha is a plant utilized mostly for its anti-fatigue qualities and has a background of traditional medicinal knowledge held by the “Kani,” a tribal group in Kerela, India. A research organization¹⁷ bio pirated this tribal group’s traditional medicinal knowledge in order to sell it as a medicine named “Jeevni”.

This is a result of the several justifications advanced by the multinational corporations for using the traditional medicinal knowledge of the indigenous people. They assert that medicinal techniques and knowledge are perpetually in the public domain for the common good. Nevertheless, this classification does not legitimize the refusal to share benefits or the infringement of the rights of indigenous groups.

7. TRADITIONAL KNOWLEDGE IN PUBLIC DOMAIN CATEGORIZATION

Pharmaceutical companies argue that since medical techniques reside in the public domain and thus belong to humanity at large, rather than to the proprietors of traditional medicinal knowledge, they bear no legal obligation to compensate the holders of these traditional systems. This classification of public domain usage is in direct conflict with international biodiversity agreements frequently cited by pharmaceutical companies and their supporters. As a result, these companies are permitted to engage in bioprospecting without the obligation to share commercial benefits, as the original ownership rights of indigenous peoples are not acknowledged.

The term “biopiracy” is particularly fitting if the custodians of traditional medicinal knowledge possess rightful claims to the medicinal methods from which active ingredients are extracted. In such cases, pharmaceutical companies

¹³The Convention on Biological Diversity, Article 7

¹⁵ Edward Hammond, “The Avon Lady comes collecting Asian medicinal plants” 1 (Third World Network, New Delhi, 2012).

¹⁶ *ibid*

that do not compensate the holders of this knowledge are guilty of misappropriation. This situation consequently raises the issue of denying the ownership rights of Indigenous Communities over their traditional medicinal knowledge. Furthermore, it results in the exclusion of these communities from benefit sharing, creating a legal impasse in the realm of Intellectual Property Rights.

These arguments stem from the notion that traditional knowledge is in the public domain and from the wording of the Convention on Biological Diversity, which grants host state governments control over natural resources.¹⁸ Traditional knowledge about therapeutic plants should not be protected for reasons that are justified commercially. Pharmaceutical companies argue against biopiracy claims by asserting that, although traditional knowledge may be eligible for some form of intellectual property protection, this does not necessarily mean it should be protected in such a manner. This defence stems from the issue of ownership rights being violated and the ensuing denial of benefits.

The central issue is whether traditional knowledge in medicinal systems warrants proprietary protection, to which pharmaceutical companies generally respond in the negative. They claim that since the knowledge is already in a “sort of public domain there is no economically justifiable reason” for such preservation. This utilitarian perspective on property rights assumes that biopiracy, while objectionable at a local level, is ultimately beneficial on a global scale. This leads to the unjustified denial of the rights of the most of the indigenous or tribal group of people. The aforementioned circumstances call for the development of a mandatory legal mechanism that will help improve the prospects for traditional healers’ livelihoods by ensuring that they are fairly compensated for their contributions to the nurturing and preservation of traditional knowledge in the medicinal system if their knowledge become commercialized. These commercial entities pretend that they are in their own field of labor while bio pirating traditional information. By doing this, they completely dismantle the possibility of knowledge ownership or benefit sharing in the event that it is used for profit-making and commercial purposes.

8. TRADITIONAL KNOWLEDGE IN MEDICINAL SYSTEMS AND THE RIGHTS OF INDIGENOUS PEOPLE

Traditional knowledge of indigenous group of people is protected as a human right for indigenous people to have access to traditional medicinal knowledge. Indigenous cultures stand out because they are isolated from the outside world and they rely on it for both survival and cultural identity. Therefore, it is crucial to recognize not only the economic, social, and cultural rights of indigenous peoples but also their rights to self-determination and environmental development to safeguard their cultural rights. The right to maintain and advance one’s cultural heritage is a fundamental one for indigenous people. International human rights law asserts that ethnic, religious, or linguistic minorities must be guaranteed the right to enjoy their own culture without denial. This commitment to cultural preservation is supported by this law.¹⁹

What does “enjoy culture” entail within the framework of these agreements and the broader discourse of international law? The Human Rights Committee, the monitoring body for the ICESCR²⁰ and ICCPR²¹ monitoring body, the Human Rights Committee, conducted a legal analysis of the situation. These accords recognize that culture can take on many different forms, including a way of life that relies on the use of land resources, especially for indigenous people. The effective inclusion of members of Indigenous Communities in decisions that impact them may need for positive statutory safeguards in addition to activities to enforce their rights.

The right of indigenous groups to self-determination includes the authority to decide how their environment will change. The 1986 Declaration on the Right to Development was among the earliest international declarations to recognize this right, stating that the human right to development encompasses the full realization of the right of peoples to self-determination. This includes the exercise of their inalienable right to complete sovereignty over all their natural wealth and resources.²²

¹⁸ The Convention on Biological Diversity, Article 3

¹⁹ International Covenant on Civil and Political Rights 1976, Article 27

²² Declaration on the Right to Development 1986

According to ILO Convention No. 169, indigenous peoples possess extensive rights concerning the use and management of land. This convention acknowledges their primary substantive rights in protecting biodiversity and associated resources, mandating nations to take specific measures to safeguard the people, cultures, and habitats of indigenous groups.²³ It also imposes penalties for unauthorized use of the lands belonging to these communities.²⁴ A key provision of the Convention stipulates that indigenous peoples possess ownership rights to the lands they traditionally occupy as well as the natural resources located therein.²⁵

The United Nations Conference on Environment and Development, approved at the 1992 Earth Summit, encompasses various rights and obligations related to development and environmental policy. Principle 22 of the Declaration mandates that states must recognize and support the cultural identities of indigenous peoples in their development initiatives and acknowledge the importance of their surrounding environment.²⁶

Similarly the Johannesburg Declaration and Plan of Implementation of the World Summit on Sustainable Development is an important step toward recognizing indigenous rights in the local environment. The Declaration states that indigenous peoples must be protected in order to uphold human dignity, including cultural rights, and to promote sustainable development. Finally, Article 17 of the Declaration, which deals with indigenous people acknowledges the “unique symbiosis between tribal culture and environment and the importance of enabling indigenous peoples to profitably share their traditional knowledge.”

9. LEGAL IMPLICATION OF ABSENCE OF LEGAL PROTECTION OF TRADITIONAL MEDICINAL KNOWLEDGE

The purpose of the Biological Diversity Convention is to support “the conservation of biological diversity and the fair and equitable sharing of benefits arising out of the genetic resources.” Supporters of the pharmaceutical industry’s tactics claim that the Convention gives signatory States total discretion over how to manage their own natural resources to achieve these objectives. By explicitly transferring these rights to national governments in charge of the territory where the resources are found, the CBD effectively nullifies any pre-existing rights that indigenous peoples may have had to natural resources, as biological resources are placed under the jurisdiction of sovereign states, it is the duty of national governments and the legislation they establish to prevent the depletion of a biological resource, whether it be a plant species or an animal species. As a result, contracting parties are required to recognize the multiple dimensions of biological diversity and to exercise particular caution in monitoring biological resources with the greatest potential for sustainable use. They must also carefully oversee activities that have, or are likely to have, significant adverse impacts on the sustainable use of biological diversity.²⁷

According to the CBD, access to these plants is entirely controlled by national governments and their respective regulations, as the responsibility for protecting plant and animal species has been delegated to sovereign nations. Therefore, rather than foreign bio prospectors, local governments are largely accountable for the harm and losses suffered by indigenous group of people. The paper argues that the Indian government's failure to utilize its authority under the Convention on Biological Diversity to protect its citizens has led to an injustice against the bearers of traditional knowledge. This injustice will persist unless sovereign states pass laws forbidding pharmaceutical companies from misappropriating traditional medicinal knowledge and using their biodiversity for research programs without sharing monetary benefit with the indigenous people. The lack of a legal framework upholding indigenous peoples rights to their traditional medicinal knowledge deprives them of all rights, including the right to consultation over the sharing of the knowledge.

²³ International Labour Organization. (1989). Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries, Article 4

²⁴ International Labour Organization. (1989). Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries, Article 18

²⁵ International Labour Organization. (1989). Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries, Article 15 ILO

²⁶ United Nations Conference on Environment and Development 1992, Principle 22

²⁷ The Convention on Biological Diversity, Article 7

10. THE RIGHT TO CONSULTATION AND THE RIGHT TO PARTICIPATE IN THE DECISION-MAKING PROCESS

In several jurisdictions, for instance in *R. v. Sparrow*²⁸, the Canadian Supreme Court held that the Crown must consult with Aboriginal Peoples prior to interfering with their rights. Thus, “Duty to Consult” seems to be a key responsibility of the governments when making any decisions relating to the environment and related industries. Globally a prior consultation²⁹ is acknowledged as a prerequisite for interfering with the rights of individuals, particularly when it concerns vulnerable groups. In India, several legislative frameworks such as the Wildlife Protection Act of 1972, the Forest Rights Act of 2006, the Environmental Impact Assessment Notification of 2006, and the Indian Forest Act of 1927, include provisions that mandate the participation of indigenous and local communities in the decision-making process. As part of the consultation and participatory decision-making process, it is essential to identify the community or individuals who must be consulted.³⁰

Before acquiring biological resources for research, commercial use, or bio-survey and bio-utilization, Indian citizens, entities, and corporations that are registered or incorporated in India and have no non-citizen involvement in their share capital or management are exempt from needing prior approval from the National Biodiversity Authority (NBA).³¹ However, they are not exempt from the law's compliance requirements. Indian nationals, corporations, and entities registered in India must notify the State Biodiversity Boards (SBB) in advance of any collection of biological resources for commercial use, as well as any bio-surveys or commercial utilization of such resources.

In accordance with the CBD's mandate to acknowledge the rights of indigenous peoples, the 2002 Act exempts local communities, cultivators, producers, and traditional medicine practitioners such as Vaidas and Hakims from the requirement of prior notification. A close reading of the Indian Biological Diversity Act, 2002 reveals that, unlike nationals and Indian organizations, which only need to provide prior notice, non-citizens and foreign companies are subject to a prior approval requirement. Regardless of their status, all entities obtaining biological resources must comply with the legal provisions. However, there is a misconception among Indian organizations regarding the fair and equitable sharing of benefits derived from the commercial use and exploitation of biological resources. Many believe they are exempt from the obligation to share these benefits.

The signing of benefit-sharing contracts under the Act has led to some uncertainty. According to the Biological Diversity Act of 2002, any individual who is not an Indian citizen or resident must enter into benefit-sharing agreements with the National Biodiversity Authority to obtain any biological resource found in India, or knowledge related to it, for purposes of research, commercial use, bio-survey, or bio-utilization. Section 7 addresses Indian nationals, research organizations, and companies registered in India. These entities must provide advance notice to the State Biodiversity Boards before acquiring any biological resource for commercial purposes or conducting bio-surveys and bio-exploitation for commercial use. There is no explicit provision requiring Indian organizations to enter into benefit-sharing agreements with the State Biodiversity Board. However, neither any Indian companies nor any foreign companies exploiting the traditional medicinal knowledge by bio pirating the biodiversity of indigenous group of people shares its commercial benefits with them. For instance, Divya Pharmacy an Indian pharmaceutical company which used biodiversity of Uttarakhand State's Indigenous region to produce medicines, denied sharing the benefits. The State Biodiversity Board of Uttarakhand state therefore challenged this before its High Court and it was held that it is mandatory even for Indian firms to share the benefits though biological Diversity Act of 2002 contains no express provision regarding this. This highlights a significant legal difficulty, namely the fact that the indigenous group of people lacks the legal capacity to oppose such corporations as the biodiversity falls under the purview of State sovereignty. This legal predicament necessitates amending Section 7 of the Biological Diversity Act of 2002 to address the legal ramifications associated with the denial of ownership rights to traditional medicinal knowledge holders and the exclusion from benefit sharing of its commercial application.

³¹ The Convention on Biological Diversity, Article 7

11. CONCLUSION

Indigenous peoples hold traditional knowledge in medicinal systems in high regard, as it serves as a crucial element of tribal cultural customs and encompasses valuable information regarding the use of medicines. The knowledge of medicinal properties is said to be in the public domain and cannot be protected by a tribe because the CBD assigns exclusive control to the government rather than the indigenous people, according to drug firms and their supporters.

Through specific provisions and the establishment of a subsequent working committee, the CBD takes extensive measures to preserve indigenous peoples and grant them sovereignty over the natural resources crucial to their culture. Simultaneously, the Convention on Biological Diversity grants the state sovereignty over the biodiversity that encompasses much of this traditional knowledge.³²

The U.N. Human Rights Declaration, along with its successors, the ICESCR and ICCPR, grants all individuals the right to their culture. To preserve their cultural heritage, indigenous peoples are additionally afforded a measure of self-governance and self-determination. Given that indigenous peoples and their cultures are intrinsically linked to their local environment for both survival and cultural identity, they are also entitled to the use and management of their local environment as an aspect of their human right to culture. Furthermore, the rights of indigenous peoples to traditional knowledge within their medicinal systems are acknowledged by both international law and principles of equity.

³² The Convention on Biological Diversity, Article 8(j)