

Whose access and whose benefit? Securing customary rights in India

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Introduction

Adivasis (the indigenous people of India) and peasants, pastoralists and fisherfolk need to defend their rights to the resources on which they depend (land, forests and water) in order to live and carry out their livelihoods with dignity. These communities have nurtured, shaped and conserved these resources, including their genetic diversity (crops, trees, livestock, poultry, micro-organisms). Their mutually sustaining, complex, multi-layered relationship with the living world is one based on custodianship and stewardship over the resources to be handed down to future generations. It sustains life, livelihoods and spirituality, sows the seeds for future generations, and is grounded in the moral and political economy of the rights of mother Earth. This relationship, in the worldview of indigenous and other local communities, cannot be reduced to a commodity to be traded or 'accessed and benefited' via monetary payment, as is implied by the recently agreed Nagoya Protocol to the Convention on Biodiversity (CBD).

This article provides a critique of the Nagoya Protocol in the Indian context, concluding that it is unlikely that the Protocol's provisions on prior informed consent (PIC) and community protocols will enable communities to protect their customary rights. It then explores how Adivasi and pastoralist communities have used other national laws and self-mobilisation to protect their biodiversity and intellectual rights and safeguard their access to genetic resources for livelihoods and 'benefits', as understood according to their worldview.

The Nagoya Protocol in the Indian context

The Nagoya Protocol elaborates Article 15 of the CBD that deals with access to genetic resources and benefit-sharing (ABS). 'Access' and 'benefits' in this case are grounded in an intellectual property rights (IPR) framework because they often involve the development and patenting of commercial products to generate benefits. IPRs include patents, geographical indications, trademarks, plant variety protection, copyrights and protection of undisclosed

information. These regimes grant exclusive proprietary rights over an intellectual product to an individual or company to exploit an invention commercially for a certain period. Knowledge and associated genetic resources are seen as tradeable commodities, and access and benefits are mediated by the market. This commoditisation of knowledge and biodiversity is utterly antithetical to indigenous and pastoralist worldviews.

Moreover, the IPR framework cannot be neatly applied to protect biological resources and traditional knowledge because:

- it is impossible to identify an individual inventor;
- traditional knowledge often cannot be attributed to a particular geographical location;
- it is not always possible to demonstrate the required criteria of 'novelty' and 'inventive step'; and
- the concept of exclusive ownership of plants and knowledge is alien to many cultures.

Recent examples illustrate that states use ABS legislation to facilitate access by corporations to the genetic resources and knowledge of communities, as these are the raw material for the multi-million dollar international bio-tech industry (Kalpavriksh, GRAIN and PANOS South Asia, 2010). The benefits will essentially be profits flowing into the coffers of industry, with some (if any) monetary 'benefits' to be given to the community knowledge holders. The Government of India's 11th five-year research plan reaffirms its commitment to the IPR regime. Genetic resources and bio-prospecting are key research areas of the Indian Council of Agricultural Research (ICAR) in animal science, driven by the search for 'novel

genes' in indigenous breeds, which can be used to create new breeds, which are then commercialised and sold to farmers. In the process, IPRs/patents on genes will be obtained by scientists in research institutions and private companies.

Within the Nagoya Protocol, the space for communities to exercise their voice, reject the IPR regime and establish their own worldview lies in Articles 6, 7 and 12. Articles 6 and 7 talk about the Prior Informed Consent (PIC) of the community, which has to be obtained before anyone can access traditional knowledge or genetic resources held by communities.¹ Article 12 speaks of how states shall respect the indigenous and local communities' customary laws, community protocols and procedures pertaining to traditional knowledge associated with genetic resources. The communities can use PIC, community protocols and customary laws to protect their knowledge from the IPR regimes and bio-piracy. However, all these provisions are subject to domestic legislation.

None of India's key legislations concerned with the ABS system – Protection of Plant Varieties and Farmers' Rights Act (2001) and the Biological Diversity Act (2002) – require prior informed consent (PIC) of the concerned communities, nor have a mandate or provision for 'community protocols'. Only the PIC of the State, represented by the National Biodiversity Authority (NBA), is required.² It is assumed that the interests of the State equate to the interests of the people. Increasingly, however, the State is using its powers to defend the interests of corporations and big business, bartering away the rights of communities (Kalpavriksh, GRAIN and PANOS South Asia, 2010). Communities must instead turn to other

¹ The PIC component of the Nagoya Protocol flows from article 8(j) of the CBD, wherein parties shall, subject to national legislation, commit to: *respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities, and promote their wider application with approval and involvement of the holders of such knowledge, innovations and practices, and encourage the equitable sharing of benefits arising from the utilisation of such knowledge, innovations, and practices.*

² Under India's Biodiversity Act, even communities who are the knowledge-holders have to apply to the Biodiversity Authority to establish their claim to benefits.

laws and non-legal approaches to protect their customary rights. I explore some examples of these from Andhra Pradesh in the following sections.

Indigenous peoples (Adivasi) laws that protect biodiversity rights

The rights of Adivasis and other communities to their resources, biodiversity and associated traditional knowledge, are protected through two strong domestic laws.

- **The Panchayats (Extension to the Scheduled Areas) Act No.40, 1996 (PESA):** PESA empowers communities to take control over resources through the aegis of village councils – known as *gram sabhas* – and also to design and approve development plans, including those for agriculture.

- **The Scheduled Tribe and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 (FRA):** FRA recognises the rights of Adivasis and other traditional forest dwellers over their intellectual property and traditional knowledge related to biodiversity, and their right of access to biodiversity and to govern their forests according to their customs and traditions. Free, prior informed consent (FPIC) must be obtained before any forest within customary boundaries is diverted for non-forest uses.

Struggles to secure customary forest rights

The Savara Adivasis of Heeramandalam Mandal, Srikakulam District, live on hill-tops in forests and have refused to ‘descend’, despite several attempts over the years by State authorities to bring them out of the forest. In 2008, soon after the FRA officially came into force, Savara Adivasis began asserting their rights to live in the forest, with the support of the Adivasi Aikya Vedika (AAV) (see Box 1). Every step of the way, they had to struggle against a recalcitrant bureaucracy reluctant to part with power and resources.

Box 1: Adivasi Aikya Vedika (AAV)

Adivasi Aikya Vedika is an alliance of Adivasi people through which Adivasis can protect their cultural identity, territoriality, governance, knowledge systems and customary law that affirms their sacred relationship with mother Earth. They challenge the dominant external forces and models of development that are displacing them from their territories using constitutional safeguards and legislations, particularly PESA and FRA, and affirm their own customary laws and systems of governance. Between 2002 and 2006, AAV played a key role in mobilising Adivasis across Andhra Pradesh to protest against forest evictions and to fight for recognition of their customary forest rights, as part of a nationwide mobilisation of Adivasis and other traditional forest dwellers. AAV was formed in 2000, at a gathering of Adivasi peoples from across the state of Andhra Pradesh. Its leadership is drawn from its members who are spread across nine districts of Andhra Pradesh.

Box 2: Mapping our territories to defend our rights

In November 2011, members of six adjacent village *gram sabhas* sharing customary boundaries met with government officials. They discussed details of the re-survey and decided to initiate the exercise in Bondigudda, Srikakulam. It took three days to walk around the entire customary forest boundary perimeter, the people leading the surveyor, making sure that he captured every turn as a waypoint, which the community marked with a pile of stones.³ The customary *sarrihadula* or traditional border posts of the village, identified by pre-existing physical structures (e.g. rocks/ancient trees), were also marked. The three-day march saw participation from every family and also neighbouring villages. It included elders (women and men) with historical knowledge, women who have an intricate and multi-hued relationship with the forest, and the youth in whose hands lie the present and future. The experience pulsated with the spirit of self-determination and self-rule, and was a way of collectively reconnecting the community to their culture, traditional knowledge and territories. It involved intense deliberation and dialogue to arrive at consensus within and between villages, respecting ancient traditions of porosity of boundaries.

The government unilaterally prepared community forest resource titles, which were to be jointly managed under a pre-existing and highly controversial

³ A waypoint is GPS terminology that indicates a point captured with its latitude and longitude.

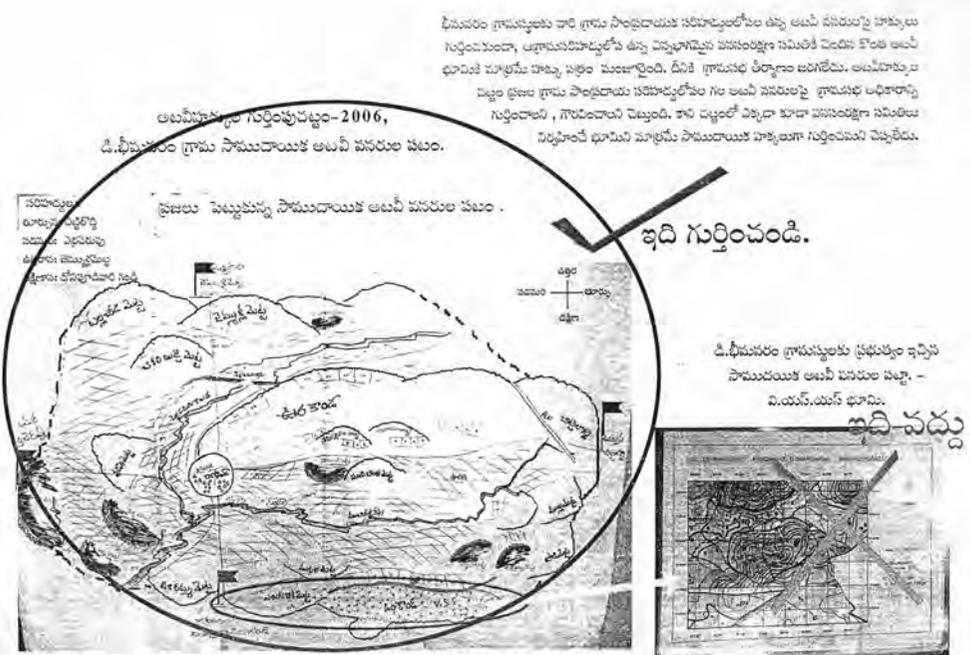


Photo: Anthra, Yakshi and Adivasi Aikya Vedika

Customary forest resources and the traditional boundaries – which is the community forest as per customary law, versus the limited forest area managed through joint forest management (JFM) – marked 'VSS' on the map.

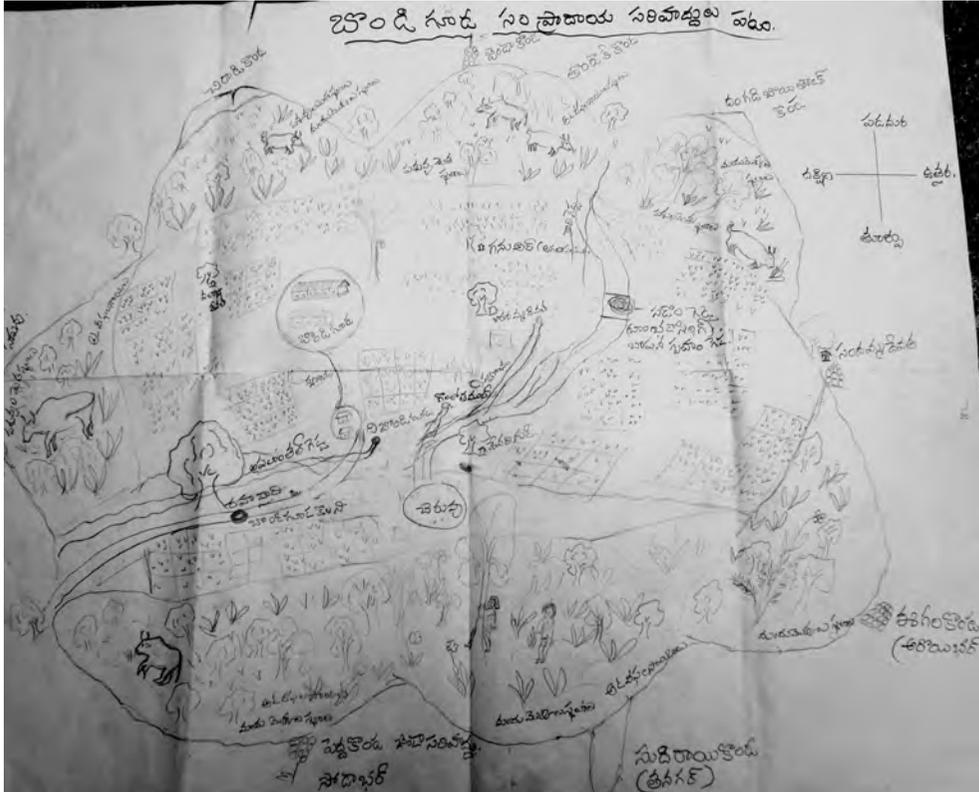


Photo: Anthra, Yakshi and Adivasi Aikya Vedika

A map of Bondigudda village showing community forest boundaries according to customary law and governance.

Photos: Anthra, Yakshi and Adivasi Aikya Vedika



Marking the names of traditional boundaries – Bondigudda village.



Villagers of Bondigudda creating boundary markers on every turning of their traditional customary boundary with a heap of stones.

programme known as Joint Forest Management (JFM), administered by India's forest department. The titles under-represented the true extent of community forest tenure traditionally enjoyed within customary boundaries, the integrity of which was vital for community survival and resilience. The people unanimously passed *gram sabha* resolutions refusing acceptance of these 'jointly managed forest' areas under the JFM, and also rejected individual titles which had been allocated, which were a fraction of their original claims (Ramdas, 2009). They resolved to remap their community forest resources according to customary systems of forest governance. They realised that it was imperative to secure community forest tenure rights, and that individual rights would follow. Sixty-two villages were involved in generating community maps based on customary boundaries (see Box 2).

The village *gram sabhas* and AAV have successfully used these maps to show government authorities at local, State and national levels how and why the JFM land does not represent their customary boundaries, and thus constitutes a breach of the law. The pressure finally resulted in the Integrated Tribal Development Agency deciding, in August 2011, to redo community forest maps according to communities' traditional customary boundaries, as the starting point for preparing community forest titles.⁴

Traditional council asserts the right to deny access

In 2010, the village of Dabbagudem had to decide whether to give permission to an outside trader from Tamil Nadu to access and purchase valuable medicinal herbs found in their forests. The village elders decided to call a traditional village council meeting (*dakkojanguber*), which is legally equivalent to the village *gram sabha* under PESA and hence its decisions are binding. The council debated over three days. Most



Photo: Anthra, Yakshi and Adivasi Aikya Vedika

Healer with medicinal plants in Dabbagudem village.

of the women and elders spoke out strongly against granting permission. The medicinal plants desired by the trader were an intricate part of medicines used by the villagers to keep them healthy and protect them from endemic malaria. While some youth were initially undecided about this issue, believing it would fetch them money, when they heard how critical these plants are for the communities' health and survival, they too supported the elders and women.

After listening to everyone's opinions, the council passed a resolution against trading in these valuable medicinal plants, and reaffirmed that they were to be exclusively used by the community, thus forbidding any community member from selling the herb. They feared that the herb would disappear if they allowed it to be commercialised. The community has abided by this decision, as have other villages, and the trader from Tamil Nadu has not ventured into these villages subsequently. This is an example of a village using its rights under national legislation to deny consent to use of their biodiversity

⁴ The government agency responsible for tribal development at the district level.

Photo: Anthra, Yakshi and Activasi Aikya Vedika



Medicine used to prevent malaria.

and knowledge, through customary forms of decision-making.

Defending rights to rear local sheep breeds

Since 1995, the NGO Anthra has been working with pastoralist communities in Medak district to document, record and restore traditional knowledge of animal health, animal breeds, fodder varieties and management practices, and to defend grazing rights. Community shepherds, deeply concerned about increasing sheep morbidity and mortality, analysed factors that might be affecting sheep health and concluded that the gradual dilution of the pure Deccani breed (see Box 3) was compromising the health of their animals, leading to an explosion of diseases. This realisation became a strong stimulus for shepherds to revive the breed, resulting in the emergence of community collectives such as the Deccani Gorrela-Mekala Pempaka Dharla Sangham and the Mahila Bathukuderuvu Sangham.^{5,6} These organisations use community action to defend their livelihoods, including their rights to

Box 3: The Deccani sheep

The Deccani breed is spread across the four states of Andhra Pradesh, Karnataka, Maharashtra and parts of northern Tamil Nadu located in the Deccan plateau. The original custodians of the breed are the Kuruma/Kuruba/Dhangar castes whose stories narrate how the gods created the black wool sheep, and assigned the community with the specific task of its care (Murty and Sontheimer, 2004). Shepherds selected the breed over the years for its tolerance to drought, fodder and water shortages, capacity to migrate long distances and ability to endure large variations in diurnal temperatures. The wool has traditionally been spun into yarn by women and woven by men into blankets known as *gongadi*.

rear local breeds. The shepherds had stopped rearing the pure Deccani due to a combination of factors:

- structural adjustment policies which sought to divert land from traditional to industrial production;
- liberalisation of wool markets resulting in dumping of cheap international wool; and
- programmes to replace the Deccani breed with fast-growing sheep for meat.

These factors led to the near extinction of traditional wool crafts (Anthra, 2009).

⁵ The Deccani Sheep and Goat Rearers Collective.

⁶ Women's Life and Livelihood Collective.



Photos: Anthra, Yakshi and Adivasi Aikya Vedika

Deccani sheep and shepherds – both men and women.



Shepherds wearing *Gongadi* wool – a versatile textile used to protect shepherds from the sun, rain and cold.



Weaving *Gongadi* textiles.

Community strategies to conserve the breed have involved actions to secure grazing rights in forests using the FRA law, which legalised grazing in forests, involving the *gram panchayats*.⁷ They convinced them to pass resolutions to protect the last remaining village common property resources, restoring ancient forest grazing paths which had been encroached on, preventing the harvest of acacia trees, which are critical sources of summer fodder, and desilting village water bodies.⁸ They are also promoting animal health and sustainable agriculture based on indigenous knowledge and practices, and are involved in rediscovering and sustaining the communities' breeding knowledge about the Deccani. Elders share knowledge with young people through different community gatherings and cultural events that are closely associated with the breed. With the revival of the breed, came the

revival of wool and the *gongadi* woolcraft. Shepherds, spinners, weavers and *kada* specialists, who produce the *gongadi* borders, are rebuilding linkages between them and all are deriving benefits from conserving the breed.

In a context of climate change, the hardy black wool Deccani breed promises to be the best option for the pastoralists and farmers of the Deccan. However, the communities now face a new threat: a State decision to expand Hyderabad city, swallowing up 600 villages, including those in Medak district. The villages are determined to use the powers of the *gram panchayat* under PESA to resist this takeover.

Conclusions

Adivasis and pastoralist communities in India are challenging the fundamental premises of ABS agreements and laws which lie within a capitalist market

⁷ Local village institutions of self-governance formed under the Andhra Pradesh Panchayat Raj Act, 1994.

⁸ *Acacia nilotica* trees are being harvested for their timber value.

construct. Simultaneously they are forging the path forward for access and benefits from genetic diversity and associated knowledge based on their worldviews. This is contingent upon them securing unconditional rights to their territories and resources – land, forests, water, biodiversity, knowledge, customary laws and governance systems.

Since Indian ABS legislation does not require or support PIC or community protocols, communities are testing the effectiveness of existing domestic legislation designed to protect their rights to their territories and resources. This legislation also supports communities' self-rule and local systems of governance, helping to revitalise and democratise the decision-making roles of traditional village councils, and strengthening their legitimacy in the eyes of outsiders.

Community actions (such as community mapping by the Adivasi and community platforms to design conservation strategies by the pastoralists) help communities reconnect to their territories, knowledge systems and resources. They have encouraged the application of tradi-

tional knowledge in all spheres of life to rebuild the resilience and well-being of the community– from building homes, to revitalising traditional irrigation, cultivating food crops, conserving traditional seeds, rearing local animal breeds and healing. They have also enabled the transfer of knowledge, and the use of and 'benefit' from this, from the elders to the youth. Community organisation has also encouraged communities to actively engage with questions concerning governance of resources, biodiversity and knowledge, rather than being passive recipients of policies and laws, and has enabled them to secure their customary rights where national laws support these.

Although the experiences described here do not involve the use of community protocols, there are many common elements – reviving traditional knowledge, exploring national/international laws to support rights, and strengthening customary laws and decision-making institutions. I hope I have shown how these interlinked processes can help communities to secure their livelihoods and their rights to the resources on which they depend.

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