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EDITORIAL

Dear Readers,

It is with immense pleasure that we present to you the VBCL Law Review, 2024. This marks the first issue of our Annual Law Journal since it was indexed in the prestigious UGC-CARE Listed Journals.

In the ever-evolving and dynamic legal spectrum, research and publication play a crucial role. Academic writing is intrinsically linked to rigorous research, serving as a reflection of both the depth of inquiry and the researcher's understanding of their chosen area of study. The importance of ethics and integrity in legal research cannot be ignored. Research in law not only influences academia but also impacts policy-making, judicial reasoning, and societal transformation. Upholding the highest standards of academic integrity ensures that legal scholarship remains a reliable and credible resource for all stakeholders, including law makers, law practitioners, research scholars, and students.

Unethical practices such as plagiarism undermine the very foundation of research and erode trust in academic contributions. On the other hand, research grounded in ethical principles contributes to building a robust body of knowledge that addresses contemporary challenges with fairness and objectivity. As custodians of the legal fraternity, we have a shared responsibility to encourage research that not only explores new frontiers in the legal domain but also adheres to the principles of honesty, transparency, and accountability.

The VBCL Law Review 2024 is presented in two volumes. As usual, we have tried to include contemporary legal issues encompassing judicial education and training, human rights, data protection, environmental issues, legal theories, plea bargaining, gender identity etc. I acknowledge my gratitude to all authors who have contributed research papers to VBCL Law Review.

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I would like to express my gratitude to our management, all the eminent members of the editorial board, and the Peer Review Committee for their relentless support and commitment to uphold the standards and integrity of this journal.

With Regards
Prof. (Dr.) Raghunath K.S.
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CONTENTS

Sl.No.	Topics	Page No.
1.	Historical Development of Judicial Education and Training in India *Prof. (Dr.) V.J. Praneshwaran & Ms. Prakriti Kalyanpur*	1-13
2.	Exploring the Contours of Indian Concept of Obscenity with Particular Reference to Obscenity in Clothing Choices at Public Spaces *Dr. Manoj Kumar Sharma & Mr. Yoganshu Sehgal*	14-28
3.	Synthesizing Scientific Procedure, Administration of Criminal Justice and Philosophy of Law *Dr. Rangaswamy D.*	29-47
4.	Reproductive Justice for Transgender: Issues and Challenges *Dr. Mithilesh Narayan Bhatt*	48-63
5.	Decoding the Legal Scaffolding of Cryptocurrency *Dr. Meenakumary S*	64-75
6.	Decoding the Intersectionality Between Muslim Marriage Laws and Child Protection Legislation in India *Dr. Gitanjali Ghosh*	76-87
7.	The Impact of Analyzing the Effectiveness of Alternative Dispute Resolution Methods in Divorce Cases *Dr .N.D. Gowda*	88-96
8.	The New Criminal Laws and Concerns of Implementation *Dr. Preethi Harish Raj*	97-108
9.	Repealing of Laws: Need of the Hour *Dr. Deepu. P*	109-121
10.	Marine Pollution by Oil Spills - A Legal Perspective *Dr. E. Ajitha*	*122-137*
11.	The Spiral of Silence and its Role in Shaping Public Opinion: Implications for Freedom of Expression in Social Media *Dr. Arundhati & Smt. Sudha Hegde*	138-150
12.	Women Directors in Corporate Boards: Breaking Barriers and Building Inclusive Leadership *Dr. Arti Aneja & Mr. Sumit*	151-168
13.	Scientific Evidence, Forensic Expertise and the Rules of Criminal Process in India: A Critical Analysis in the Wake of Legal Transformation *Mr. Rakesh P. S. & Dr. Harigovind P. C.*	169-184

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14. Challenges on the Mainstreaming of Persons with Disabilities: Insight into the Perception of Disability and the Rights of Persons with Disabilities
Mr. Mobin Jacob & Dr. Naveen S. 185-205

15. A Global Perspective on Plea Bargaining: Comparative Analysis of India, USA, Australia, Germany and the UK
Mr. Raunak Sood & Dr. Dimpal T. Raval 206-217

16. Custodial Violence in India: A Grave Violation of Human Rights and the Rule of Law
Ms. Suparna Banerjee & Mr. Saurav De 218-230

17. Legal Perspectives on Media's Detrimental Role in Gender Identity
Ms. Sharika Rai B 231-242

18. Judiciary's Role in Defending the Rights of The Prostitutes and its Impact in Assam: An Analysis
Ms. Dolly Kumar & Mr. Chandan Bordoloi 243-256

19. The Evolution of Legal Protections for Women and Children in India: An Analysis of New Criminal Laws
Ms. Meghna & Dr. Shaharyar Asaf Khan 247-270

20. Natural Rights and the Interaction with Natural Law A Modern Evaluation
Prof. Mamatha R & Prof. Mahantesh G S 271-280

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THE IMPACT OF ANALYZING THE EFFECTIVENESS OF ALTERNATIVE DISPUTE RESOLUTION METHODS IN DIVORCE CASES

Dr. N.D. Gowda*

ABSTRACT

With a burgeoning population and an overwhelming backlog of cases, the Indian judiciary faces formidable challenges.Alternative Dispute Resolution (ADR) methods offer a promising solution by providing efficient and accessible avenues for dispute resolution. In family law cases, where emotions often run high and tensions can escalate quickly, finding a way to resolve disputes peacefully and efficiently is crucial. Mediation and ADRare two methods that have gained popularity in recent years due to their ability to help families navigate legal challenges while minimizing conflict.Mediation can be a highly effective method for resolving family law disputes, such as Divorce, Child Custody, and Property Division. In addition to mediation, there are other forms of ADR that may be used in family law cases. These include Arbitration, Collaborative law and Negotiation. While each method has its unique characteristics, they all share a common goal of avoiding traditional courtroom litigation. Exploring ADR methods in Divorce cases can be highly beneficial for divorcing couples seeking a more efficient, cost-effective and amicable resolution.ADR methods can be particularly useful in family law cases because they offer more privacy and flexibility than traditional litigation. Additionally, these methods often result in more tailored and creative solutions that better address the

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unique needs of the family involved.By promoting legal awareness and demystifying ADR methods, this approach seeks to cultivate a culture of dispute resolution outside of traditional litigation.The information contained in this article reflects the author's view and is believed to be correct at the date of publication. However, it is necessarily of a brief and general nature and should not be relied upon as a substitute for specific professional legal advice. As ADR gains momentum, it can not only alleviate the burden on the courts but also foster a more equitable and efficient justice system, ultimately contributing to a more harmonious society in India

Keywords:*Traditional legal system, Alternative Dispute Resolution, Mediation, Family Laws, Divorce.*

INTRODUCTION

In the 21st century, people are trying alternative methods for solving their disputes instead of the traditional legal system, these methods and systems are called Alternative Dispute Resolution (ADR) methods. Disputes or conflicts are dynamic in nature and are usually resolved inside a courtroom or outside it. States are adopting new policies and measures to resolve disputes beyond the traditional legal system, which is groaning under the backlog of pending cases. In this context, ADR or different ways people can resolve a dispute without trial has become popular. ADR is encouraged due to a number of advantages, such as, flexibility, privacy, easy in procedure, cost effectiveness and speedy resolution of disputes. The right to a speedy trial is an inalienable right and is an important facet of the right to life and personal liberty under Article 21 of the Indian Constitution as observed in the case of *Hussainara Khatoon v. State of Bihar*[1]. ADR refers to a set of practices and techniques aimed at permitting amicable resolution of legal disputes outside courtrooms. It includes mediation, arbitration, negotiation, conciliation, and a variety of hybrid processes by which a neutral person who is appointed by the parties in the disputes, facilitates the resolution of legal disputes through consensus. During Divorce proceedings, children are the inadvertent victims of legal tussle, as couples attack each other personally. The court proceedings only vitiate the atmosphere by escalating distrust and anger as the sole objective of both the parties is to defeat the other, dividing family members into two hostile camps[2]. This lack of accommodation by the legal system in resolving

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1 [1979]AIR 1369

2 NandiniGore, Karanveer Singh Anand,"Alternative Dispute Resolution: As a Solution for Family Disputes",[7June2022],Karanjawala&Company,<https://www.mondaq.com/india/arbitration-dispute- resolution/1199420/alternative-dispute-resolution-as-a-solution-for-family-disputes#authors> accessed 28 September 2024,5.30pm

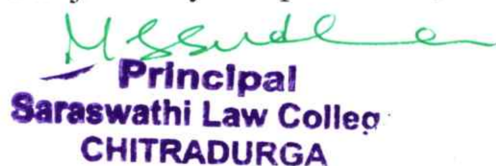
family disputes is one of the reasons for the introduction of ADR as an alternative mechanism for resolving family disputes.A courtroom is not an ideal place to settle hurt and emotional feelings, since family disputes, have a traumatic effect and the legal system does not openly respond to emotions ranging from disappointment and anxiety to depression, sadness, grief, anger, and trauma faced by the parties.

HISTORICAL BACKGROUND OF ADR SYSTEM

The concept of ADR is not new in to India. India has had a historical legacy of settling disputes, alternatively, through panchayats even before the Britishers came in and established their authority. ADR can prove to be a panacea not only for business disputes, but also for matrimonial and family disputes where it not only impacts the parties involved, but also the future of their children. The process established its roots in family disputes after the mid 1970s. With the change in time and increase in the number of cases the method of ADR became more popular because it gives freedom from the long courtroom trials and is economically suitable to the parties.

Families can get into conflict over many different issues like domestic disputes, restitution of conjugal rights, breakdown of marriage, testamentary and intestate property issues, childcare custody, Divorce and separation, maintenance and eldercare. Disputes can also take a wide variety of forms, including physical, sexual, financial, verbal, and psychological. ADR, meanwhile, can resolve differences and conflicts in an amicable and congruous manner, by encouraging communication. Even the provision of the Indian matrimonial legal system touts the idea of an amicable end to differences. As time passed, ADR started to be practised in the form of gathering discussions, panchayats, family councils etc. It was considered as a cheap and easy way to obtain justice[3]. Moreover, mediation is considered the first choice of the parties to the dispute to resolve the issues, especially in case of family disputes[4].

In India the need to evolve alternative mechanisms simultaneous with the revival and strengthening of traditional systems of dispute resolution has been reiterated in reports of expert bodies. Each of these reports saw the process of improving access to justice through legal aid mechanisms and ADR as a part of the systemic reform of the institution of the judiciary coupled with substantive reforms of laws and processes.



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3 Utsav Mandal, Ancient Judicial System, (7thedn, 2023), https://www. legalservice india.com/legal/article-7176-ancient-judicial-system> accessed 28 Septomber 2024, 6pm

4 *Madhubhushi Sridhar, Alternative Dispute Resolution: Negotiation and Mediation*, at 1, (1stEd. LexisNexis Butterworths, 2006).

ANALYSIS OF THE STATUS OF ADR IN FAMILY LAWS

The ADR system is not a new phenomenon, it has been in India since time immemorial. The ancient method of conflict settlement made a substantial contribution to the resolution of issues involving family, social groupings and property disputes.Maintaining peace and harmony is the most important factor to consider while settling family conflicts. ADR is based on the principle of amicable dispute resolution and mediation is one such procedure that allows the parties to get down and focus on what they genuinely want, rather than what they need to pursue or what the law would allow them to fight for. Family dispute mediation is a method in which a mediator, an unbiased third party, assists in the resolution of family problems by encouraging voluntary agreement among the parties. The family mediator facilitates communication, promotes understanding and directs members' attention to their individual and shared goals[5]. The family mediator assists the parties in considering their choices, making decisions, and reaching their own agreements.

The legislative is responsible for making and amending laws, but the judiciary is responsible for developing and interpreting them to meet the demands and conditions of society. As a result, unless and until the beneficial provisions of India's matrimonial legislation promoting and advocating reconciliation in matrimonial disputes are favourably interpreted and strictly applied by the courts, the letter of the law may be an illusory mirage that only exists on the statute book. As a result, it is the solemn responsibility of matrimonial courts in India to guarantee that the mandatory settlement efforts are really implemented, and parties are encouraged to actually unlike them for out-of-court settlements. As a result, the courts bear a heavy burden to fulfil this solemn responsibility, failing which it will be impossible or ineffective to enforce reconciliation measures in matrimonial disputes in the Indian jurisdiction[6]. As a result, it would be most valuable to identify and quote some recent high-profile Indian court decisions that have emphasised and highlighted the critical importance of beneficial Indian laws that mandates reconciliation procedures.

In *Bini v. K.V. Sundaran*[7], the High Court of Kerala had to decide on a unique question, whether conciliation is compulsory after the introduction of the Family Courts Act, 1984, even on the excluded grounds of conversion to another religion, renunciation of the world, mental instability, venereal illnesses and leprosy. Calling the Family Courts Act, 1984 a special statute

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5 Anupam Kurlwal, *An Introduction to Alternative Dispute Resolution System*,(2nd edition,2014)

6 Navya Mallela, *Alternative Dispute Resolution in Family Disputes*, (The Law Gurukul, Jun 11, 2021)

7 [2008] AIR, Kerala 84

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and its provisions to make attempt at reconciliation mandatory at the fine instance, the High Court held that, though no attempt at reconciliation is required under The Hindu Marriage Act, 1955, in a petition for Divorce on the grounds of conversion to another religion or other grounds excepted under Section 13 (1) of the Hindu Marriage Act, 1955 or on similar or other grounds available under any other law, the Family Court is bound to make an endeavour for reconciliation and settlement after the introduction of the Family Courts Act, 1984. The requirement is mandatory. The Family Courts Act of 1984, which is a special statute, is responsible for this conceptual change.

The Court further said that "the primary objective is to promote and preserve the sacred union of parties to the marriage. Only if the attempts for reconciliation are not fruitful, the further attempt on agreement on disagreement may be made by way of settlement".

EFFECTIVENESS OF ADR METHODS IN DIVORCE CASES

Divorce cases can be particularly contentious and emotionally charged. The adversarial nature of traditional litigation can often amplify these emotions, making it harder to negotiate and reach an agreement. ADR methods provide a more collaborative and respectful approach, which can help couples maintain a positive relationship, especially if they have children. Additionally, ADR methods can be more efficient and cost effective than traditional litigation. Court cases can drag on for months or even years and the costs can quickly add up. ADR methods, on the other hand, can often be completed in a matter of weeks or months and the costs are typically lower. Finally, ADR methods allow couples to have more control over the outcome of their case. In traditional litigation, a judge makes the final decision, which may not be in either party's best interests. With ADR methods, the couple has more input and can work together to find a solution that works for both of them[8].

Divorce can be a distressing and emotionally challenging process for all parties involved. Traditional litigation often exacerbates the tension and can result in prolonged court battles, leaving both spouses dissatisfied with the outcome. However, there is a growing shift towards ADR methods, which offer couples a more amicable and efficient way to navigate the complexities of Divorce.

Exploring ADR methods in Divorce cases can be highly beneficial for Divorcing couples seeking a more efficient, cost effective and amicable resolution. Mediation, Collaboration, Arbitration and Settlement Conferences offer viable alternatives to traditional litigation, empowering

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8 https://www.familylawattorney-irvine.com/blog/2019/november/what-are-the-benefits-of-alternative-dispute-res/>accessed 29 September 2024, 5.45pm

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couples to take charge of their Divorce process and craft agreements that address their specific needs. By embracing these alternatives, individuals can transition into the next phase of their lives while minimizing emotional and financial strain.

I. Meditation:

Mediation is a voluntary and confidential process where a neutral third party, known as a mediator, facilitates communication and encourages compromise between Divorcing couples. Unlike litigation, mediation empowers both partners to have direct input in decision making, allowing them to craft their own agreements regarding property division, child custody and support. This process tends to be less adversarial, fostering better post-Divorce relationships and reducing the likelihood of future disputes.

II.Collaborative Divorce:

Collaborative Divorce is another ADR method that promotes cooperation and mutual problem solving. Each spouse hires a collaboratively trained attorney and all parties, including lawyers and other professionals, such as child specialists or financial neutrals, sign an agreement to work together respectfully and honestly. Collaborative Divorce aims to find creative solutions that prioritize the individual needs and interests of both parties and any children involved.

III.Arbitration:

Arbitration offers Divorcing couples the opportunity to present their case to a neutral third party, called an arbitrator, who acts as a private judge. Unlike mediation, the arbitrator makes a binding decision after hearing both sides. This method provides a faster and less formal alternative to traditional litigation, allowing couples to avoid the lengthy court process while maintaining some control over timing and outcome.

IV.Settlement Conferences:

Settlement conferences involve couples and their attorneys meeting with a judge or a neutral third party to discuss the specific issues of their Divorce case. This process often takes place well before a scheduled court hearing, allowing the parties to explore settlement possibilities. Settlement conferences encourage open dialogue, clarification of concerns and potential compromises, encouraging resolution without the need for a trial[9].

BENEFITS OF ADR

Divorce processes takes a lot of time when it goes to court for trials. This is so because it takes time for the court to set specific dates, prepare for trial, gather evidence, etc. As ADR is handled outside the courtroom, they will be

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9 Melissa Bender, *Divorce and Out-of-Court Proceedings: Alternative Dispute Resolution* [2ndedn, June 25, 2023]

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settled within a few months and will not be dragged all along.In courtroom cases, it will be one party winning and the other losing. This results in bitterness and creates a lot of tensions between the couple who are dissolving the marriage. It might have an everlasting impact on the children of the divorced couple, if any. ADR helps to bring down these sorts of negative effects and allows the couple to make their own decisions regarding the dissolution of their marriage and this has very high chances of being a win-win situation for both the parties.

In addition to advocate's fee, other litigation expenses are also involved, including court costs. Hence, ADR mechanism saves a huge expense, by staying out of this litigation. People always like to control the situations that they are under, especially when it comes to sensitive and personal matters like divorce which have a very direct impact on their future. While a couple goes to a courtroom to get the problem decided upon and then it is left to the Judge to decide upon the fate of the lives of the couple. Whereas in ADR, the couple themselves who analyse the problem and voice out their issues and lay down the contentions by themselves.

ADR may not be appropriate in highly contentious Divorce cases. But when both spouses are willing to be transparent and compromise, ADR can help relieve the emotional and financial burdens that you might experience while going through Divorce[10].

The chief benefit of ADR for divorce cases is the emphasis on cooperation and collaboration. The adversarial nature of conventional litigation had the tendency to exacerbate rifts and conflict between family members, with children often taking the brunt of the negative consequences. With ADR methods like Mediation and Collaborative Divorce, the parties took the reins of their future without court intervention. Another benefit of ADR is the potential cost savings it offers to the parties. This aspect of ADR is particularly beneficial to parties who are open to compromise, as it eliminates court costs and minimizes attorney's fees[11].

ADR also provides the parties with more privacy than courtroom litigation. Laws regarding judicial transparency keep case filings and records open to the public. In contrast, the details of ADR proceedings are kept private for the most part. This also allows the parties in a Divorce to be more candid, knowing that their personal affairs won't be aired out for the public to see.

ADR is a good option to resolve family law issues. Here are some advantages to consider:

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10 Manasa.R.V , 'Alternative Dispute Resolution Mechanism and Divorce' International Journal of Multidisciplinary Educational Research, Volume:12,11(3), November: 2023, p,97

11 Sarah. M. 'Alternative Dispute Resolution in Divorce' [June 4th, 2021.] https://www.litowichlaw.com/alternative-dispute-resolution-adr-in-divorce/

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I. Cost-Effective: ADR processes such as mediation and arbitration are generally less expensive than going to court. They often involve fewer legal fees and less formal procedures.

II.Time-Saving:ADR can often resolve disputes more quickly than litigation, which can be a lengthy process due to court schedules, procedural delays, and backlog.

III. Flexibility: Parties have more control over the process and outcome in ADR. They can choose the mediator or arbitrator, as well as the time and location of sessions.

IV. Preservation of Relationships: ADR methods focus on collaborative problem solving, which can help preserve relationships between parties, especially in situations where on going interactions are necessary, such as when children are involved.

V. Confidentiality:ADR proceedings are generally private, whereas court proceedings are often matters of public record. This confidentiality can encourage parties to be more open and honest during negotiations.

However, there are also some cons of ADR. They include:

I. Lack of Formal Structure:ADR processes may lack the procedural safeguards of the court system, leading to concerns about fairness.

II.Enforceability:While arbitration awards are enforceable like court judgments, mediation agreements may not have the same level of enforceability unless they are submitted to the Court for approval and adoption as an order.

III. Lack of Precedent: ADR decisions do not create legal precedents, which mean that similar disputes may be resolved differently in the future.

IV. Risk of Deadlock:If parties cannot reach a resolution through ADR, they may still end up in court, which could prolong the dispute and increase costs.

CONCLUSION

Embracing ADR methods can significantly streamline the Divorce process and lay the groundwork for positive future relationships. When selecting an ADR method, it's essential to consider the unique circumstances and goals.Additionally, ADR can make Divorce much easier on the children. With Mediation, Collaborative Divorce or Arbitration, we will ultimately spend less time in court, allowing the concerned persons to spend more time with them. In addition, custody, visitation and parenting time arrangements can be worked out through ADR eliminating the need to involve your children in the case.

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However, there are certain situations where ADR might not be appropriate. If there are allegations of substance abuse, Domestic Violence or child neglect or you are certain that your spouse will not be honest with financial disclosure it may be best to litigate your case in court. The success of ADR in dissolving the marriage depends totally on the willingness of both the parties to communicate openly, compromise and seek mutual solutions. Hence, using ADR methods helps to get a free and fair, unbiased solution to the dispute of dissolution of marriage involved. It also helps minimise emotional and financial stress.The integration of ADR into the fabric of the Indian legal systemnot only has the potential to unclog overburdened courts but also to empower individuals with a more expedient, cost-effective, and just means of resolving conflicts.

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EDITORIAL

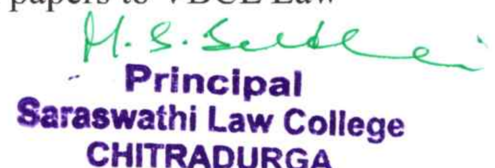
Dear Readers,

It is with immense pleasure that we present to you the VBCL Law Review, 2024. This marks the first issue of our Annual Law Journal since it was indexed in the prestigious UGC-CARE Listed Journals.

In the ever-evolving and dynamic legal spectrum, research and publication play a crucial role. Academic writing is intrinsically linked to rigorous research, serving as a reflection of both the depth of inquiry and the researcher's understanding of their chosen area of study. The importance of ethics and integrity in legal research cannot be ignored. Research in law not only influences academia but also impacts policy-making, judicial reasoning, and societal transformation. Upholding the highest standards of academic integrity ensures that legal scholarship remains a reliable and credible resource for all stakeholders, including lawmakers, lawpractitioners, research scholars, and students.

Unethical practices such as plagiarism undermine the very foundation of research and erode trust in academic contributions. On the other hand, research grounded in ethical principles contributes to building a robust body of knowledge that addresses contemporary challenges with fairness and objectivity. As custodians of the legal fraternity, we have a shared responsibility to encourage research that not only explores new frontiers in the legal domain but also adheres to the principles of honesty, transparency, and accountability.

The VBCL Law Review 2024 is presented in two volumes. As usual, we have tried to include contemporary legal issues encompassing judicial education and training, human rights, data protection, environmental issues, legal theories, plea bargaining, gender identity etc. I acknowledge my gratitude to all authors who have contributed research papers to VBCL Law Review.



I would like to express my gratitude to our management, all the eminent members of the editorial board, and the Peer Review Committee for their relentless support and commitment to uphold the standards and integrity of this journal.

With Regards
Prof. (Dr.) Raghunath K.S.
Editor in Chief

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CHITRADURGA

CONTENTS

S. No.	Topics	Page No.
1.	Striking a Balance: Understanding the Dynamics of Big Data and Cloud Sovereigns in the Era of Data Localization *Prof. (Dr.) T.R. Subramanya & Ms. Mitike Shrivastava*	1-15
2.	Child Delinquency: An Empirical Study on Functioning of Childcare Institutions under Juvenile Justice (Care and Protection) Act, 2015 *Dr. D.C.Nanjunda*	*16-32*
3.	Customary Laws Vs. Child Rights: The Perennial Ripple of Child Sexual Abuse in Nagaland *Prof. (Dr.) M. K. Bhandari, Dr. Kuldeep Singh Panwar & K. Livi. Yeptho*	*33-45*
4.	Human Rights: A Natural and Positive Edict *Prof. (Dr.) Prakash Kanive & Prof. Mahantesh G. S.*	*46-56*
5.	A Factual Study on Freedom of Press and Parliamentary Privileges in India *Mr. K.S. Jayakumar & Prof. (Dr.) C.Basavaraju*	*57-76*
6.	Advancing Sustainable Development and Realising Human Rights via Nuclear Energy: An Analysis of the Necessity for Augmenting Public Participation in India *Ms.Rishika Singh , Prof. (Dr.)Vishnu Konoorayar & Dr. Gopal K. Sarangi*	*77-97*
7.	From Bodily Integrity to Data Protection: The Expanding Horizons of Right to Privacy In India's Legal Landscape *Dr. Aneesh V. Pillai*	*98-114*
8.	Declining Status of Women and Increasing Distorted Relations Therein: A Socio-Legal Analysis *Dr. Anu Prasannan*	*115-127*
9.	Unlocking the Potential of Alternative Dispute Resolution in Resolving the Environment Social and Governance Disputes: A Critical Appraisal *Dr. Balajinaika B G & Ms.Neha Tripathi*	*128-142*
10.	Development of Institutional Arbitration in India: Assessing Performance and way towards Improvement *Ms. Priyanka Shrivastava, Prof. Dr. J.P. Yadav & Prof. Subir K. Bhatnagar*	*143-155*

M. S. Seidle
Principal
Saraswathi Law College
CHITRADURGA

11. Digital Deception: Navigating Artificial Intelligence Through Dark Patterns for The Protection of Consumer Rights
Mr. Rudragouda M Hommaradi & Prof. (Dr.). Suresh V Nadagoudar 156-167

12. Uniform Civil Code And Secularism In India
Mr. Sadashivappa M.S. & Prof. (Dr.) M. S. Benjamin *168-178*

13. Balancing Biotechnology and Biodiversity: Reflections from International and Domestic Legal Framework
Dr. Alka Bharati *179-189*

14. Prior Informed Consent: A Tool for Addressing Bio-Piracy
Dr. Kariyanna K.S. *190-199*

15. Anti-Defection Law on Trial
Ms. Suman C. Patil *200-213*

16. Rethinking Diplomacy: Afghanistan's Trade Renaissance
Mr. Sayed Qudrat Hashimy *214-237*

17. The Paradox of Umbrella Clauses: Balancing State Interference and Investor Protection in Africa's Investment Framework
Mr. Jackson Simango Magoge *238-251*

18. Sedition, Subversion, and Terrorism: Legitimate Association or Unholy Alliance?
Mr. Souvik Ghosh & Dr. Sarfaraz Ahmed Khan *252-272*

19. Showcasing the Deficiencies in ADR Procedures: A Comprehensive Analysis of Mediation Processes
Mr. Pradeep Kumar Bharadwaj & Dr. G. Vinodini Devi *273-289*

20. Sustainable Technologies, Technology Transfer, Tax Reduction and Income Tax Act, 1961: Harnessing Sustainable Tax Policy of India
Dr. Jasper Vikas *290-303*

21. Land Revenue Administration in Karnataka: The Jamma Land Tenure System of Coorg
Mr. Devaiah N.G. & Dr. Nagaraju V *304-311*

Principal
Saraswathi Law College
CHITRADURGA

PRIOR INFORMED CONSENT: A TOOL FOR ADDRESSING BIO-PIRACY

Dr. Kariyanna K.S*

ABSTRACT

Bio-piracy is the unauthorized appropriation of genetic resources and associated traditional knowledge by individuals or institutions seeking monopoly rights through patents. It is rapidly increasing worldwide. Bio-piracy is one of the major environmental problems that have arisen today. It is a situation where indigenous knowledge, originating with indigenous people, is used by others for profit, without consent from and with little or no reward or appreciation to the indigenous people themselves. Indigenous communities are vulnerable to bio-piracy. Multinational companies from developed countries are exploiting developing countries' genetic resources and indigenous communities' traditional knowledge through patents on the inventions derived from those genetic resources. Today, many of the world's tropical areas have suffered from Bio-piracy. Indigenous peoples in tropical countries did not use their traditional knowledge for commercial purposes. Therefore, they were able to care for their traditional knowledge without any damage over the past centuries. But today, as biological and related sources, knowledge becomes the source of the most valuable assets in the financial market. Although there are many legal frameworks, internationally and domestically, to protect the genetic resources and traditional knowledge due to the inadequacies of these existing legal entities, bio-piracy has

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become one of the world's most serious environmental problems. India have been a victim of bio-piracy and has adopted several measures, both legally and institutionally, as per the standards set by International Instruments for achieving the core objectives of conservation, sustainable utilization, and equitable sharing. However, instances of Bio-piracy are increasing while the actual beneficiaries owing biological resources mostly remain at the receiving end. There are some measures to address bio-piracy including prior informed consent. This article aims at examine the role of prior informed consent in addressing bio-piracy and also highlights the main barriers to obtaining prior informed consent.

Keywords: *Bio-piracy, Bio-prospecting, Biodiversity, Conservation, Patent, Traditional Knowledge, Prior informed consent*

INTRODUCTION

By virtue of advancement in science and technology, countries poised to bring intellectual property rights laws, both at the international and national level, which give monopoly rights over invented biological resources. Recent advancements specifically in the area of biotechnology have generated increased activity and interest in the search for useful genetic resources or other potentially valuable biological discoveries in nature.[1] The exploration of biological resources for new commercial uses is essential for global economic and social development.

It is possible today to launch new products or find out new use of existing products based on traditional knowledge by utilizing the technological development in the field of biotechnology.[2] This process of exploration of biodiversity for valuable biological and genetic resources is called "bio-prospecting". Put it simply, investigation of biological resources for a new commercial use. The act of bio-prospecting is not an illegal act but permitted action in the interest of society. India has always been at the forefront when it comes to a debate about misappropriation of its traditional knowledge by corporate entities and foreign research organizations. The traditional knowledge is considered as information about natural products carried over by communities through generations without proper account or documentation of the same. Recently, the debate has been curated (articulated) as involving issue of bio-piracy, where an entity makes use of traditional knowledge illegally and reaps benefits out of such exploitation

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1 N. S. Sreenivasulu and C. B. Raju: *Biotechnology and Patent Law: Patenting Living Beings* (Manupatra 2008) 57

2 This is proved particularly in the field of biotechnology.

M. S. Seede
Principal
Saraswathi Law Colleg
CHITRADURGA

without prior consent of communities and sharing any benefits with communities.[3]

In the recent days multinational companies from developed countries with an intention of making money started to commercially exploit the biological resources and related traditional knowledge by claiming intellectual property rights without the consent of the developing countries or the indigenous community. This act is called as bio-piracy. Sadly, not many positive examples of bio-prospecting exist. Ideally, it involves ethical considerations such as prior informed consent, access and benefit sharing agreements, and material transfer agreements before research commences. Prior informed consent to certain extent can be used as tool to address issue of bio-piracy.

PRIOR INFORM CONSENT AS A TOOL FOR ADDRESSING BIO-PIRACY

A golden thread running through attempts to protect local or indigenous knowledge, resources and indigenous people from the act of bio-piracy is the instance that "Prior Informed Consent" is to be afforded them in all cases.[4] This implies that in all circumstances where an indigenous people or local community is engaged in a transaction encompassing intellectual property rights, biological resources or traditional knowledge, there will be full consultation, and complete exchange of information, leading to full explicit consent prior to any appropriation of information. In other words 'prior informed consent' means before using biological resources or indigenous knowledge for the bio-prospecting to develop new product or before obtaining intellectual property rights, consent should be obtained from the government or from the indigenous community who have developed, nurtured and preserved biological recourses and related traditional knowledge.[5] Before obtaining prior informed consent of traditional knowledge holders should be informed about the reasons, risks and implications of accessing and using the biological resources and indigenous knowledge.[6]

'Prior informed consent' as a principled requirement is based upon a central tenet of common law, namely that partly contracting or entering into an agreement with legal consequences must be capable of understanding the implications of the transaction at hand. The Convention on Biodiversity

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3 SSRANA and Comapny, 'Biopiracy initiative By India, https://www. lexology.com/library/detail.aspx?g=136f19ca-9129-4d78-a932-cdd01f1745fa accessed on 30th October 2024

4 Ethics and Practice in Ethno biology, and Prior Informed Consent with Indigenous Peoples, Regarding Genetic Resources, Biodiversity, Biotechnology and the Protection of Traditional Knowledge (St Louis 2003)

5 Tejaswini Apte, *A Simple Guide to Intellectual property and Biodiversity and Traditional Knowledge* (Kalpavriksh Grain and IIED 2006) 47

6 Ibid.

M. S. Sudl
Principal
Saraswathi Law College
CHITRADURGA

includes provisions on prior informed consent. It insists that prior informed consent be obtained from contracting parties providing access to genetic resources and that these parties, in turn, respect, preserve and maintain knowledge, innovation and practices of communities and promote their eider application with the approval and involvement of the holder of such knowledge.[7] Each contracting states and institutions are responsible for implementing prior informed consent. The notion of the prior informed consent has become one of the basic principles of access regimes at the international level while at the national level is still awaiting implementation in many cases.[8] "Prior informed consent" is the interface between the assertion of sovereignty and the commitment to facilitate access, providing the state with opportunities to decide the conditions under which access is to be provided.[9]

INTERNATIONAL SCENARIO

At the international level neither TRIPS nor World Intellectual Property Organisation (WIPO) deals about the rights of national government or indigenous community relating to prior informed consent before accessing biological resources or traditional Knowledge.[10]Current interpretation of TRIPS Agreement shows that governments may be violating the TRIPS provisions while imposing requirements on those seeking a patent to disclose the origin of the genetic resources and provide evidence of prior informed consent before a patent is issued.[11]Yet some advocate that governments can insist for prior informed consent without violating the provisions of TRIPS Agreements.[12]

The basic and main provisions of the Convention on Biological Diversity (CBD) relating to prior informed consent have been extended through non obligatory Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Benefit Sharing Arising out of their Utilization,[13] adopted during

7 Article 15.5 of the Convention on Biological Diversity states Access to genetic resources shall be subject to prior informed consent of the Contracting Party providing such resources, unless otherwise determined by that Party.

8 Philippe Cullet, *Intellectual Property Protection and Sustainable Development* (LexisNexis, Butterworth's 2005) 157

9 Ibid.

10 Anne Perrault, 'Facilitating Prior Informed Consent in the Contexts of Genetic Resources and Traditional Knowledge' (2004) Hein Online

11 Ibid, Those provision of TRIPS which suggest that requirement would violate TRIPS are; Article 27.1, which establishes the substantive condition of patentability, Article 29, which establishes the formal conditions for granting a patent , and Article 62, which establishes the proceedings for patent acquisition.

12 Ibid.

13 Gionathan CURCI STAFFLER 'Towards a Reconciliation Between the Convention on Biological Diversity and TRIPS Agreement: An Interface among Intellectual Property Rights on Biotechnology, Traditional Knowledge and Benefit Sharing' http://ictsd.org/i/ip/29215/ accessed on 30th October 2024

Principal
Saraswathi Law Colleg.
CHITRADURGA

the Sixth Meeting of the Conference of the Parties(COP) which took place at Hague in May 2002.[14]

These guidelines specifically include a basic framework for prior informed consent. the Bonn Guidelines clearly seeks to encourage transaction at the international level. Thus basic principles on which prior informed consent is based include the need to minimize the cost of access and need to ensure that restrictions on access are transparent and based on legal grounds. Further it also speaks about the elements of the prior informed consent system. According to this provision before obtaining consent there should be clarity and certainty, access to genetic resources should be facilitated at the minimum cost and consent should be obtained from the competent authority of member country. Further it states to obtain consent from the indigenous communities.[15] The specific elements of prior informed consent under the Bonn Guidelines include the setting up of a clear institutional framework, timing, deadlines and overall process.[16] In accordance with the Convention, the Guidelines provide that access has to be obtained from the competent authority leaving specific arrangements at the national level to the discretion

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14 See Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising out of their Utilization, in decision VI/24, , Un Doc UNEP?CBD/COP/6/20(2002). Decision VI/24 states that,As provided for in Article 15 of the Convention on Biological Diversity, which recognizes the sovereign rights of States over their natural resources, each Contracting Party to the Convention shall endeavour to create conditions to facilitate access to genetic resources for environmentally sound uses by other Contracting Parties and fair and equitable sharing of benefits arising from such uses. In accordance with Article 15, paragraph 5, of the Convention on Biological Diversity, access to genetic resources shall be subject to prior informed consent of the contracting Party providing such resources, unless otherwise determined by that Party.

15 Decision VI 27 states Elements of a prior informed consent system may include: Competent authority(ies) granting or providing for evidence of prior informed consent; Timing and deadlines; Specification of use; Procedures for obtaining prior informed consent; Mechanism for consultation of relevant stakeholders; Process.

16 Decision VI/33 of the Bonn Guidelines speaks Timing and deadlines: Prior informed consent is to be sought adequately in advance to be meaningful both for those seeking and for those granting access. Decisions on applications for access to genetic resources should also be taken within a reasonable period of time.

Principal
Saraswathi Law Coll.
CHITRADURGA

of the national government.[17] It also states about the procedures to be followed while obtaining prior informed consent. According to this Guideline an application for access to genetic resources could require some information relating to legal entity, name of the collector, type and amount of genetic resources, evolution, duration, purpose, benefit sharing agreement, accurate information regarding intended use, budget, and treatment of confidential information and so on.[18] Two further elements should be noted concerning the relationship between prior informed consent and traditional knowledge. Firstly, the Guidelines recognize that there is no congruence between access to genetic resources and access to related traditional knowledge which should be sought separately.

Secondly, while the Guidelines do not provide for the consent of holders of genetic resources and traditional knowledge as a condition of prior informed

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17 According to decision VI o the Bonn Competent authority (ies) granting prior informed consent; a) Prior informed consent for access to in situ genetic resources shall be obtained from the Contracting Party providing such resources, through its competent national authority (ies), unless otherwise determined by that Party.b) In accordance with national legislation, prior informed consent may be required from different levels of Government. Requirements for obtaining prior informed consent (national/provincial/local) in the provider country should therefore be specified. C). National procedures should facilitate the involvement of all relevant stakeholders from the community to the government level, aiming at simplicity and clarity. D) Respecting established legal rights of indigenous and local communities associated with the genetic resources being accessed or where traditional knowledge associated with these genetic resources is being accessed, the prior informed consent of indigenous and local communities and the approval and involvement of the holders of traditional knowledge, innovations and practices should be obtained, in accordance with their traditional practices, national access policies and subject to domestic laws. E) For ex situ collections, prior informed consent should be obtained from the competent national authority (ies) and/or the body governing the ex situ collection concerned as appropriate

18 Decision VI of the Bonn Guidelines states Procedures for obtaining prior informed consent : An applications for access could require the following information to be provided, in order for the competent authority to determine whether or not access to a genetic resource should be granted. This list is indicative and should be adapted to national circumstances: a)Legal entity and affiliation of the applicant and/or collector and contact person when the applicant is an institution; Type and quantity of genetic resources to which access is sought; b)Starting date and duration of the activity; c)Geographical prospecting area; d)Evaluation of how the access activity may impact on conservation and sustainable use of biodiversity, to e)determine the relative costs and benefits of granting access; f)Accurate information regarding intended use (e.g.: taxonomy, collection, research, commercialization); g)Identification of where the research and development will take place; h)Information on how the research and development is to be carried out; I)Identification of local bodies for collaboration in research and development; j)Possible third party involvement; k)Purpose of the collection, research and expected results; l)Kinds/types of benefits that could come from obtaining access to the resource, including benefits from derivatives and products arising from the commercial and other utilization of the genetic resource; m)Indication of benefit-sharing arrangements; n)Budget; O)Treatment of confidential information.

Principal
Saraswathi Law College
CHITRADURGA

consent, this is mentioned as a desirable aim together with the need to respect their established legal rights.[19]Indigenous people have reiterated the need for respect of their right to free and prior informed consent without which access to genetic resources and their knowledge cannot be allowed.[20] Much indigenous knowledge has been disclosed without the consent of its holders. Indigenous people have long demanded the respect and guarantee of their prior informed[21] consent to document their knowledge.[22] This implies that to undertake such documentation they must be consulted and informed. Further, the requirement of prior informed consent of indigenous and local communities for access to traditional knowledge coupled with genetic resources may have evolved as part of international customary law.

Various international instruments provide a basis for this prior informed consent. These include instruments that deal with human rights.[23] Thus rights inextricably fundamental to the enjoyment of these rights (which would include indigenous people rights over their land, genetic resources and associated traditional knowledge) cannot be interfered with. Further, it implies that any abridgment of these rights must be with the consent of the rights' holders. By the UN Declaration on the Rights of Indigenous People (UNDRIP), in particular, the most recent of soft law on the subject, states have agreed to take steps to appriciate and protect the exercise of rights of indigenous people that are enumerated in Article 31 of the Declaration . These include their right to 'maintain, control, protect and develop', among others, their cultural heritage and traditional knowledge as well as the manifestations of their sciences, technologies, and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of flora and fauna, and oral traditions.[24] Indigenous people are also accorded similar rights in respect of their intellectual property over such cultural heritage, traditional knowledge and traditional cultural expressions. These rights flow from the

19 Philippe Cullet, *Intellectual Property Protection and Sustainable Development* (LexisNexis, Butterwoths 2005) 160

20 Yovana Reyes Tagle, 'The Protection of Indigenous Knowledge Related to Biodiversity: The Role of Database' http://www.sylff.org/wordpress/wp-content/uploads/2009/03/sylff_p131-146.pdf accessed on 29th October 2024

21 Graham Dutfield, *'Protecting the Rights of Indigenous People: Can Prior Informed Consent Help'?* (Springer, 2004)

22 Ibid.

23 International Human Rights Instruments such as; Universal Declaration of Human Rights (UDHR), The International Covenant on Economic, Social and Cultural Rights (ICESCR), The International Covenant on Civil and Political Rights (ICCPR), The International Labour Organisation and United Nation Declaration on the Rights of Indigenous People. For more details see, Sreenivasulu N.S and Kariyanna K.S, 'Protection of Traditional Knowledge Under International Human Rights Frame Work(2012) IBR

24 Gurdial Singh Nijar, 'Incorporating Traditional Knowledge in an International Regime on Access to Genetic Resources and Benefit Sharing: Problems and Prospects'(2010) IJIL

Principal
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recognition of the self-autonomous status of indigenous people. This accords the right to self-determination and, as a necessary concomitant, the right to exercise control over their resources and traditional knowledge. This right to exercise control imports notions of prior informed consent for access to associated traditional knowledge.[25]

BARRIERS TO OBTAINING PRIOR INFORMED CONSENT

Obtaining the prior informed consent, in reality, is difficult one due to much traditional knowledge is widely accessible in libraries, academic writing and digital database. Further, interrelated legal, political and economic barriers exists for obtaining free prior informed consent, They include, for example, a lack relevant or effective laws and regulations, burdensome procedures, a lack of desire of many communities and some governments to facilitate access and, perhaps, unrealistic expectations.[26]

Even the law at the national and international level exists regarding the prior informed consent barriers to obtaining prior informed consent exist. These barriers include; some laws and regulations relating to access respond inadequately to issues related to implementation of prior informed consent, providing insufficient detail and direction to governments and potential participants. While most communities have well-established decision making process, some communities have not articulated in writing a process by which consent may be obtained from them by outside groups. Articulating these procedures often requires additional financial, personnel, and technical resources.[27]

Further, many communities have no interest in facilitating access to genetic resources and traditional knowledge. Because the companies look at the knowledge in the economic perspective but for the indigenous people, it is sacred, spiritual and culture which they do not want to share with other. Nothing more than that, they do not want money some time.[28]Further many entities seeking access to genetic resources and traditional knowledge believe that laws, regulation, and procedures particularly those relating to prior informed consent from local communities impose unnecessary barriers to access that generate excessive costs. Many scientific institutions, in particular, believe that laws and regulations are too complicated and transaction cost is too high, given that their research activities likely pose relatively modest adverse impacts to biodiversity and that their proposed uses are almost always non-commercial.[29]

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25 Ibid.

26 Anne Perrault, 'Facilitating Prior Informed Consent in the Contexts of Genetic Resources and Traditional Knowledge'(2004) *Hein Online* 4

27 Ibid.

28 Krishna Ravi Srinivas, 'Traditional Knowledge and Intellectual Property Rights: A note on Issues, Some Solutions and Some Suggestions'(2008) *Hein Online* 3

29 Ibid.

Principal
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CHITRADURGA

On the other hand, Indian Biodiversity Act 2002 and Biodiversity rules 2004 do not speak about the prior informed consent of the Indigenous people. It only speaks about the intimation and prior approval of National or State Biodiversity Authority. According to this act before obtaining the biological resources previous approval should be taken from the National or State Biodiversity Authority.[30] Further, at the very best under Section 21 of the Act[31] the National Biodiversity Authority is required to ensure that there is equitable benefit sharing on mutually agreed terms. It is debatable whether or not this is equivalent to prior inform consent.[32] So there is less scope for the prior informed consent of the indigenous people who have developed nurtured and preserved knowledge since form the ancient time.

In July 2000, India submitted a paper on protection of biodiversity and traditional knowledge to the TRIPS Council and Committee on Trade and Environment, stating that there is a need for legal and institutional means for recognizing the rights of tribal communities on their traditional knowledge

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30 Section 3 of the Biodiversity Act states that (1) No person referred to in sub-section (2) 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-utilisation.

31 Section 21 of the BDA states (1) The National Biodiversity Authority shall while granting approvals under section 19 or section 20 ensure that the terms and conditions subject to which approval is granted secures equitable sharing of benefits arising out of the use of accessed biological resources, their by-products, innovations and practices associated with their use and applications and knowledge relating thereto in accordance with mutually agreed terms and conditions between the person applying for such approval, local bodies concerned and the benefits claimers. (2) The National Biodiversity Authority shall, subject to any regulations made in this behalf, determine the benefit sharing which shall be given effect in all or any of the following manner, namely:- (a) grant of joint ownership of intellectual property rights to the National Biodiversity Authority, or where benefit claimers are identified, to such benefit claimers; (b) transfer of technology; (c) location of production, research and development units in such areas which will facilitate better living standards to the benefit claimers; (d) association of Indian scientists, benefit claimers and the local people with research and development in biological resources and bio-survey and bio-utilisation; (e) setting up of venture capital fund for aiding the cause of benefit claimers; (f) payment of monetary compensation and other non-monetary benefits to the benefit claimers as the National Biodiversity Authority may deem fit. (3) Where any amount of money is ordered by way of benefit sharing, the National Biodiversity Authority may direct the amount to be deposited in the National Biodiversity Fund: Provided that where biological resource or knowledge was a result of access from specific individual or group of individuals or organizations, the National Biodiversity Authority may direct the amount to be paid directly to such individual or group of individuals or organizations in accordance with the terms of any agreement and in such manner as it deems fit. (4) For the purposes of this section, the National Biodiversity Authority shall, in consultation with the Central Government, bi regulations, frame guidelines.

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based on biological resources at the international level, and to institute mechanisms for sharing of benefits arising from commercial exploitation of biological resources using such traditional knowledge.[33] It proposed that: Patent application should be required to disclose the source of origin of the biological material utilized in their invention under the TRIPS Agreement and should also be required to obtain prior informed consent of the country origin.

CONCLUSION

Prior informed consent which is one of the tools against bio-piracy, could some extent protect the indigenous and local communities from the act of bio-piracy. But this tool alone could not protect interest of indigenous communities. It can be assumed that prior informed consent would lead to mutually agreed terms of benefit sharing. Indigenous advocates argue that, especially since indigenous people's rights are at stake in this process, their consent ought to be obtained in accordance with indigenous customary laws/ practices and/or special procedures/ institutions, with the understanding that the common goal is the equitable sharing of benefits of genetic and cultural resources and the protection of traditional knowledge. Furthermore they maintain that the granting of consent should be built upon this base. They believe that exposure of indigenous and local communities to external research activities varies; thus the process of prior and informed consent may need to be structured differently according to indigenous and local communities degree of exposure to Western researchers and/ or contractual agreements.

33 Martin Khor, *Intellectual Property, Biodiversity and Sustainable Development: Resolving the Difficult Issues*, (Zed Books 2002) 39

3.2.1 Number of papers published per teacher in the Journals notified on UGC website for the year 2024-25

Sl. No.	Title of paper	Name of the Author/s	Departments of Teacher	Name of Journal	Year of publication	ISSN Number	Link to the recognition in UGC enlistment of the Journal
1	A Study of Artificial Intelligence's importance in the Research Domain	Dr. N.D. Gowda	Law	International Journal of Creative Research Thoughts	Jan-24	2320-2882	https://ijcrt.org/papers/IJCRT2401320.pdf
2	Legal Frame Work on issues of Agricultural Labourers in India	Dr. Ramesha. K & Dr. L. Srishyla	Law	International Journal of Research and Analytical Reviews	Dec-24	2348-1269	
3	The Impact of analysing the effectiveness of Alternative Dispute Resolution Methods in Divorce Cases	Dr. N.D. Gowda	Law	VBCL Law Review	Dec-24	2456-0480	https://www.vbcllawreview.com/archives
4	Prior Informatied Contact: A Tool for Addressing Bio-Piracy	Dr. Kariyanna. K.S	Law	VBCL Law Review	Dec-24	2456-0480	https://www.vbcllawreview.com/archives