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## RECOGNITION OF CUSTOMARY LAW AND INSTITUTIONS AND COMMUNITY PROTOCOLS OF INDIGENOUS PEOPLE IN DOMESTIC ABS LEGISLATION OR POLICIES IN ACCORDANCE WITH THE PROVISIONS OF NAGOYA PROTOCOL

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**Abstract.** The Nagoya Protocol on Access and Benefit Sharing (ABS) provides for the rights of Indigenous people and local communities in accordance with United Nations Declaration of Rights of Indigenous People. The Parties are obliged to take legislative, administrative and technical measures to recognize, respect and support/ensure the customary laws & institutions and community protocols of Indigenous peoples and local communities (ILCs). Within the ambit of contemporary debates encompassing Indigenous peoples' right to self-determination, this paper examines the effectiveness of international law (i.e. Nagoya Protocol) to influence existing or evolving domestic laws, policies or administrative measures of Parties on access and benefit sharing. Through opinion surveys of Indigenous organizations and national authorities of CBD's Parties, the findings indicate that the space, recognition and respect created in existing or evolving domestic ABS measures for rights of Indigenous communities are too inadequate to effectively implement the statutory provisions related to customary laws & institutions and community protocols, as envisaged in Nagoya Protocol. As the bio-cultural rights of Indigenous people are key to conservation and sustainable use of biodiversity, the domestic ABS laws need reorientation to be sufficiently effective in translating the spirit of international ABS laws into domestic policies.

**Keywords:** community institutions, community protocol, customary law, genetic resources, indigenous people, Nagoya Protocol.

### 1. INTRODUCTION

Indigenous people have been acknowledged for making significant contributions to the sustainability of planet Earth. As highlighted in Joint Submission of Grand Council of the Crees *et al.* [1], Indigenous peoples and local communities (ILCs) have a distinct and essential role [2]<sup>1</sup> in

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<sup>1</sup> See [2] "... plant diversity is of special concern to Indigenous and local communities, and these communities have a vital role to play in addressing the loss of plant diversity". Also see, e.g. European Council, "Indigenous peoples within the framework of the development cooperation of the Community and the Member States", Resolution, 30 November 1998: "... many Indigenous peoples inhabit areas crucial for the conservation of biodiversity, and maintain social and cultural practices by way of which Indigenous peoples have a special role in maintaining and enhancing biological diversity and in providing unique sustainable development models".

safeguarding biodiversity that benefits humankind<sup>2</sup>. The Office of the High Commissioner for Human Rights has noted that by respecting and protecting their rights, biodiversity objectives are strengthened. Yet Indigenous peoples remain among the most disadvantaged peoples globally [3]<sup>3</sup>. With an exploitative history grounded in cultural misappropriation, Indigenous people continue experiencing cultural erosion, and reckless and inequitable exploitation of natural resources. While Indigenous people continue to face challenges of multi-dimensional poverty, and ongoing cultural degradation, several international instruments support safeguarding the important role Indigenous people play as stewards of biodiversity and natural ecosystems<sup>4</sup>.

Biological diversity and associated Indigenous traditional knowledge (TK) of the Indigenous people and local communities (ILCs) are provided protections under the Convention on Biological Diversity (CBD) and the Nagoya Protocol on Access and Benefit Sharing in a manner consistent with rights of ILCs in accordance of United Nations Declaration for Rights of Indigenous People (UNDRIP)<sup>5</sup>. Contextually, at the core of the human rights of ILCs is their demand for self-determination [4]. Defined by Anaya [5], the self-determination comprises certain core values, including non-discrimination, protection of cultural integrity, rights over lands and natural resources, social welfare for economic well-being, and self-government. The right to self-determination of the ILCs is supported through recognition of local self-governance of natural resources and traditional knowledge enshrined in Articles 8(j) and 10(c) of the Convention [4]. Providing further clarity to the rights of ILCs, the Nagoya Protocol establishes obligations on Parties relating to recognition of customary law and institutions, community protocols, involvement in issuing prior informed consent (PIC) and mutually agreed terms (MAT), free access to biological resources, and unrestricted exchange of genetic resources.

A range of provisions of the Nagoya Protocol, including Articles 5.2, 5.5, 6.3, 8, 15.1 and 16.1, specifically oblige Parties to formulate, enact and implement the domestic legislation, policies, administrative measures and governance systems in support of rights of ILCs. Additionally, Articles 5, 6.2, 7, 8, 12 and 18.2 of the Nagoya Protocol require domestic legislation relating to ABS including establishment of prior informed consent (PIC), mutually agreed terms, and recognition of laws, customs, and institutions of ILCs. A total of 47 countries and European Union have developed domestic ABS legislation, policy or an administrative framework [6].

Compliance of Parties with the relevant provisions of the CBD, Nagoya Protocol and UNDRIP is ripe for further evaluation both quantitatively and qualitatively. Following the entry into force of the Nagoya Protocol in October 2014, all 101 Parties of the Protocol have been requested to submit an Interim National Report of Implementation by November 2017<sup>6</sup>. This paper looks to explore evaluation of implementation to inform cases where the competent national authorities (CNAs) of the Parties are unable to file their interim or final compliance reports.

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<sup>2</sup> Office of the High Commissioner for Human Rights, "It's not enough to support the Declaration on the Rights of Indigenous Peoples, says UN expert", statement issued by UN Special Rapporteur on the situation of human rights and fundamental freedoms of Indigenous people, James Anaya, on the occasion of the International Day of the World's Indigenous Peoples, Geneva, 9 August 2010: "[Indigenous peoples] have preserved, generation after generation, an extraordinary wealth of knowledge, culture, and spirituality in the common benefit of humankind, contributing significantly to the world's diversity and environmental sustainability".

<sup>3</sup> See [3] "Indigenous peoples face many challenges and their human rights are frequently violated: they are denied control over their own development based on their own values, needs and priorities; they are politically under-represented and lack access to social and other services. They are often marginalized when it comes to projects affecting their lands and have been the victims of forced displacement as a result of ventures such as the exploitation of natural resources".

<sup>4</sup> For example, UN Permanent Forum on Indigenous Issues (UNPFII), International Convention on the Elimination of All Forms of Racial Discrimination, International Labour Organization Convention 169, UN Declaration on the Rights of Indigenous Peoples (UNDRIP), Expert Mechanism on the Rights of Indigenous Peoples, etc.

<sup>5</sup> The *Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization* was adopted by the Conference of the Parties to the Convention on Biological Diversity at its tenth meeting on 29 October 2010 in Nagoya, Japan. In accordance with its Article 32, the Protocol was opened for signature from 2 February 2011 to 1 February 2012 at the United Nations Headquarters in New York by Parties to the Convention. The Protocol entered into force on 12 October 2014.

<sup>6</sup> Under art. 29 of Nagoya Protocol, no country had filed any report on ABS Clearing-House until 5 August 2017, website: <https://absch.cbd.int/>. However, as on 25 January 2018, 67 national reports had been submitted on the website.

This paper aims to determine the extent of domestic ABS laws globally and recognition of rights of Indigenous people grounded in two special variables, namely: (1) Recognition of Customary Laws and Institutions of ILCs; and (2) Recognition of Community Protocols of ILCs. The variables chosen under this study have direct relevance to historically violated rights of Indigenous communities. Importance of these variables is reiterated by the UN Permanent Forum on Indigenous Issues (UNPFII) while emphasizing role of the CBD for respecting and protecting Indigenous rights of ILCs consistent with the UNDRIP [7]: "... consistent with international human rights law, *States have an obligation to recognize and protect the rights of Indigenous peoples to control access to the genetic resources that originate in their lands and waters and any associated Indigenous traditional knowledge. Such recognition must be a key element of the [proposed] international regime on access and benefit-sharing, consistent with the United Nations Declaration on the Rights of Indigenous Peoples [8]*".

Implementation is evaluated through both analysis of the legal measures, and survey data of Indigenous organizations/individuals from around the world and the competent national authorities (CNAs) of 12 countries from Asia. The results of the analysis illustrate the importance of the CBD and the Nagoya Protocol play in effectively realizing the human rights of ILCs in accordance with UNDRIP.

## 2. METHODOLOGY

As part of a project on ABS studies at Academy of International Studies of Jamia Millia Islamia<sup>7</sup>, the field data was gathered from 2012 to 2015. Evaluative research methods were applied to examine the position of ILC representatives in international forums and the impact of their position on ABS laws. *Nonreactive* (analysis of existing documents and secondary information)<sup>8</sup> as well as *reactive* (structured interviews and participant observation) research methods were employed in the study and development of this paper.

### 2.1. SAMPLING FOR STRUCTURED INTERVIEWS

Stratified random sampling was employed for the purposes of conducting the structured interviews, with a list of potential respondents being prepared beforehand. Civil society organizations and individuals working on or advocating issues and causes relevant to ILC were first selected and contacted. The list of participants was narrowed down based on scope of expertise and operational constraints (able to answer questions in English via email for instance). A total of 5876 organizations, groups and individuals had been contacted to evaluate interest. Based on participant availability a total of 15 in-depth interviews were conducted with individuals intensively involved in their communities, and active in international forums. Individuals represented diverse organizations from various parts of the world as represented in Table 1. Their responses are conveyed in Table 2 and have been expressed in percentage format.

Participant	Organization	Country
Emma Chippendale	Unrepresented Nations and Peoples Organization (UNPO)	Belgium
Sali Django	Mbororo Social and Cultural Development Organization (MBOSCUDA)	North West Region, Cameroon

<sup>7</sup> A central university by Act of Indian Parliament: <http://jmi.ac.in>

<sup>8</sup> In nonreactive research the people studied are unaware that they form part of a study. They thus leave evidence of their social behaviour or actions 'naturally'. Creating nonreactive measures follows the logic of quantitative measurement, although qualitative researchers also make use of nonreactive observation. The operational definition of the variable includes how the researcher systematically notes and records of observations. Because nonreactive measures indicate a construct indirectly, the researcher needs to rule out reasons for the observation other than the construct of interest.

Paul Joffe	Grand Council of the Crees (Eeyou Istchee)	Canada
Babagana Abubakar	Kanuri Development Association (KDA)	Nigeria
Alpha Beretay	World Institute for a Sustainable Humanity	Sierra Leone
Andy Savage	Direct Sponsor (Tribal Networks)	Ireland
Peter Watson	Legal Assistance Centre	Namibia
Nsase Soki Maurice	Foret pour le Development Integral (FODI)	Democratic Republic of the Congo (DRC)
Alex Nyamujulirwa George	(individual)	Tanzania
Imad Abdel Moniem	(individual)	Sudan
Hemant Larma	Mizoram Chakma Development Forum	New Delhi/India
P. Murugan	NESAM Trust	Tamil Nadu/India
Amit Kumar	Citizens Foundation	Himachal Pradesh/India
Sanjay Garg	Centre for Policy Solution	Jaipur/India
M. Sudhakar	(individual)	Karnataka/India

*Tab. 1. Participants of Research*

Responses were also gathered from various national focal points of governments from Asian countries particularly. The CBD Competent National Authorities (CNAs) from 50 jurisdictions were contacted for face-to-face and email interviews. A total of 12 CNAs responded with substantial information in the questionnaire, including: India, Bangladesh, Nepal, Thailand, Vietnam, Lao PDR, Timor Leste, Brunei Darussalam, Philippines, Mongolia, China and Russia. Bahrain, Singapore, Qatar and South Korea replied that they had not started any preparation for ABS legislation or policy in their respective countries.

## 2.2. STRUCTURED INTERVIEWS

A set of questions were developed to structure the interviews (see Table 2: Survey Questions and Responses, and Table 3: Opinions of CBD/NP Parties). Questions were categorized into two Groups: (1) Recognition of Customary Laws and Institutions of ILCs, (2) Recognition of Community Protocols of ILCs. Participants from Indigenous organizations/individuals (Table 2) received a questioner comprised of 3 relevant questions, with CBD CNAs receiving 3 pertinent questions (Table 3). The nature and number of questions were limited to maintain predominance and to respect the time investment in sufficiently responding to the survey, at times during international forums and contacted face-to-face.

## 2.3 PARTICIPANT OBSERVATION

Observation of international negotiation processes in the CBD was also utilized to inform this research. Participant observation is a research technique used for qualitative research purposes [9].

DeMunck and Sobo [10] describe participant observation as the primary method used by anthropologists doing fieldwork, which involves “active looking, improving memory, informal interviewing, writing detailed field notes, and (...) patience” [11]. The first and third authors directly observed the following two international meetings on the ABS regime:

- The Second Meeting of the Open-Ended *Ad Hoc* Intergovernmental Committee for the Nagoya Protocol on ABS (ICNP-2) (9 – 13 April 2012, New Delhi, India)
- The Eleventh Meeting of the Conference of the Parties (COP11) to the Convention on Biological Diversity (8 – 19 October 2012, Hyderabad, India)

Questions of Opinion Survey	Respondents (n=15)	
	In parenthesis, the no. of Respondents	Response Percentage
Recognition of Customary Laws & Institutions of ILCs		
1. Does your country truly respect, recognize and enforce the rights and ITK of your own Indigenous people?	1. Yes, our country does. (1) 2. Yes, but not truly. (8) 3. No. (4) 4. I don't know. (2)	1. 06.66% 2. 53.34% 3. 26.66% 4. 13.34%
2. Does your country's ABS legislation/policy recognize the customary law/institutions of your Indigenous people?	1. Yes, our existing/evolving ABS legislation/policy has such a provision. (2) 2. No, there is no such provision in our existing/evolving ABS legislation/policy. (3) 3. No ABS instrument is evolved or evolving in my country. (1) 4. I am not aware. (9)	1. 13.34% 2. 20.00% 3. 06.66% 4. 60.00%
Recognition of Community Protocols of ILCs		
3. Does your country's ABS legislation/policy provide for supporting the concerned ILCs to develop community protocols am not aware. (10)of your Indigenous people?	1. Yes, our existing/evolving ABS legislation/policy has such a provision. (3) 2. No, there is no such provision in our existing/evolving ABS legislation/policy. (1) 3. No ABS instrument is evolved or evolving in my country. (1) 4. I am not aware. (10)	1. 20.00% 2. 06.66% 3. 06.66% 4. 66.68%

Tab. 2. Survey of Indigenous Organizations and Individuals

The authors specifically interacted and observed the delegates of selected countries. They attended the negotiations, side events and meetings of ILCs, NGOs and international organizations at ICNP-2 focused on and ABS mechanism, and COP11. Particular attention was paid to how ILC members were engaged and involved in scheduled sessions of the ICNP-2 and COP11, as well as in side events. Debates concerning customary institutions, community protocol, and Indigenous rights had been attended and observed, in particular.

The present paper is grounded in the framework principles of ‘equity and justice’ enshrined in the Nagoya Protocol and the impact this has on national ABS regimes. It has been noted that “good policy

is just a starting point – good practice is more difficult to achieve” [12]; this fact is particularly relevant in ABS with the breadth of legal complexities inherent in governance of GRs and TK. Negotiation of international or national instruments take long route to translate into reality, with only half of the 102 Parties to the Nagoya Protocol have so established relevant domestic ABS legislation or policies. These complexities are exacerbated in the context of realizing right and interests of Indigenous people. Cotula and Mayers highlight the gap between what is “on paper” and what happens “in practice” in the context of land tenure in the territories where Indigenous people and marginalized communities reside. They underscore the fact that despite a growing international recognition of communities’ rights to self-determination and management of their natural resources [13], international rights are far from a solution against local disempowerment or the denial of procedural and substantive justice [14]. Activists are similarly skeptical of the Nagoya Protocol, as to whether it will help or hinder communities at the local level [15]. Such doubts on the overall impacts are often identified when ABS regimes are closely scrutinized. The highly publicized Hoodia case of benefit sharing in South Africa represents a moral victory for the San community for recognition of their rights relating to traditional knowledge, the outcome has been suggested to have undermined traditional values, knowledge, and resource governance systems of San community [4]. Critics further argued that the governance reforms weakened the San’s traditional forms of authority, increased the community’s reliance on external expert opinion, exacerbated power and information asymmetries in and across San communities, and initially fostered mistrust between the San and Nama communities<sup>9</sup>. This case is illustrative of the justice dynamics and challenges face by Indigenous peoples in aiming to actualize their rights to governance of GR and TK. As noted by Hon. Rosalie Abella, Justice of the Supreme Court of Canada, in discussing the plight of Indigenous people: “We need more than the rhetoric of justice. We need justice....” [16].

Q. No	Questions of Opinion Survey	Response Options	% age of Countries’ Response	Responses of Countries											
				South Asia			South East Asia					North Asia			
				I	N	Ba	Th	L	V	P	Br	Ti	M	R	C
Recognition of Customary Laws & Institutions of ILCs															
1.	In accordance of Article.12.1 of Nagoya Protocol, does your country’s ABS legislation/ policy recognize the customary law/institutions of your Indigenous people?	1. Yes, our existing/ evolving ABS legislation/policy has such a provision. 2. No, there is no such provision in our existing/evolving ABS legislation/policy. 3. I am not aware.	1. 44.44% 2. 33.33% 3. 22.22% NA <sub>t</sub> = 1 NA <sub>p</sub> = 2	1	NA <sub>p</sub>	2	3	3	1	1	NA <sub>p</sub>	NA <sub>t</sub>	2	1	2

<sup>9</sup> This has been addressed by the recent San-Nama Benefit Sharing Agreement.

Q. No	Questions of Opinion Survey	Response Options	% age of Countries' Response	Responses of Countries											
				South Asia			South East Asia						North Asia		
				I	N	Ba	Th	L	V	P	Br	Ti	M	R	C
Importance to Community Protocols of ILCs															
2.	In accordance of Article.12.3 (a) of Nagoya Protocol, does your country's ABS legislation/policy provide to ensure the development of community protocols before granting any PIC to users of ITK?	1. Yes, our existing/evolving ABS legislation/policy provides to ensure the development of community protocols. 2. No, there is no such provision in our existing/ evolving ABS legislation/ policy. 3. I do not know.	1. 12.50% 2. 75.00% 3. 12.50% NAt = 3 NAP = 1	NAt	NAt	2	2	3	2	1	NAP	NAt	2	2	2
3.	Does your country's ABS legislation/policy provide for supporting the concerned ILCs to develop community protocols of your Indigenous people?	1. Yes, our existing/evolving ABS legislation/policy has such a provision. 2. No, there is no such provision in our existing/ evolving ABS legislation/ policy. 3. I am not aware.	1. 50.00% 2. 37.50% 3. 12.50% NAt = 2 NAP = 2	NAt	NAP	3	1	1	2	1	NAP	NAt	2	2	1

Tab. 3. Opinions of CBD/NP Parties [position of countries represents that of 2014]

NAt = Not Attempted; NAP = Not Applicable.

I = India; N = Nepal; Ba = Bangladesh; Th = Thailand; L = Lao; V = Vietnam; P = Philippines; Br = Brunei; M = Mongolia; R = Russia; C = China

### 3. ANALYSIS AND DISCUSSION

States' acceptance and compliance with international law has a seemingly direct causal relationship with advocacy for Indigenous rights. It is hypothesized that States which have a poor record of recognizing, respecting, honouring and realizing the rights of their own Indigenous people are less likely to be vocal champions on the international stage. Consequently, the implementation of relevant provisions of Nagoya Protocol may also be treated with less emphasis at the domestic level, including not becoming a Party to the Protocol at all. As noted in the Joint Submission of Grand Council of the Crees *et al.* [1]: "States have adopted measures to the detriment of Indigenous and local communities. In

some States, the existence of specific Indigenous peoples is not recognized<sup>10</sup> [17, 18] – and even if they are, States often refuse to affirm Indigenous peoples’ resource rights in national legislation [19]<sup>11</sup>. This position is echoed by UN Department of Economic and Social Affairs (DESA) emphasizing: “...Indigenous peoples continue to lobby governments for the full legal recognition of their traditional land rights” [20]. Likewise, Faizi and Nair [21] have established that India has the world’s largest population of “*adivasis*”<sup>12</sup>, yet, unfortunately, they are refused to be accepted as ‘Indigenous people’ by the post-colonial Indian governments and were defined as ‘Scheduled Tribes’ in the Constitution. This differentiation separates “*adivasis*” from Indigenous people resulting in a spectrum of inequalities and limiting access with international jurisprudence on self-determination. An analysis of domestic variables informs understanding of the field implications of domestic ABS legislation or policies, if it exists in the countries implementing the Nagoya Protocol.

### 3.1 Recognition of Customary Laws and Institutions of ILCs

A crucial question for consideration is what constitutes customary law. WIPO in a 2013 paper on relevant terms cited the Black’s Law Dictionary definition as “law consisting of customs that are accepted as legal requirements or obligatory rules of conduct; practices and beliefs that are so vital and intrinsic a part of a social and economic system that they are treated as if they were laws”<sup>13</sup>. Scholars have explained that the Indigenous property systems are normally characterized by collective ownership (where the community owns a resource, but individuals may acquire superior rights to or responsibilities for collective property) and communal ownership (where the property is indivisibly owned by the community). Subsequently, although some property is alienable within and outside of communities, Indigenous property systems emphasize duties and obligations to objects and resources. Indigenous property systems also generally emphasize the sacred, spiritual and relational values of resources rather than the utilitarian and economic [22]. Customary law of Indigenous peoples relating to ‘intangible property’ differs from mainstream dominant legal systems of States. Tsosie [23] clarifies that in many dominant legal systems, “property law” is utilitarian having focus on “private property rights”, and is based on a bundle of rights that “typically includes the rights to include, exclude, use, sell, transfer, purchase and impede” [22]. The customary law reflects the strengths of Indigenous and traditional societies as to how they link philosophical principles of conservation into real life practice. The utilitarian value of customary law for conservation is founded in its long history and robust institutions regulating the use of natural resources [24]. It is firmly agreed that customary law as a whole is not static but is based around sets of core principles that provide guidance for ongoing adjustments to dynamic environmental and social environments. Tobin [25] has suggested that the customary law is at the core of Indigenous identity. Lastly, Swiderska [26] described it as: “having adjusted to fit to particular historical, social and ecological contexts, the common principles of customary law include reciprocity, respect for the Earth and all living things, a focus on relational and restorative ethics and justice, and focusing on collective good rather than personal gain”.

<sup>10</sup> “The Asian and Pacific region is home to about 70 per cent of the world’s Indigenous people, yet only a handful of States in that region have officially recognized the existence of Indigenous peoples in their countries”. For instance, India does not recognize its Indigenous people, instead call them as ‘tribes’ [17]. Also see, “The leaders of the country’s indigenous communities called upon the government to seriously consider the issue of constitutional recognition as indigenous instead of small ethnic group; otherwise, the process of amendment of constitution will remain incomplete.” [18].

<sup>11</sup> “In the courts [of Canada], government lawyers routinely deny the very existence of Indigenous Peoples and their rights, stating in their pleadings and legal arguments that, unless proven by Indigenous Peoples in the courts, neither Indigenous Peoples nor their rights exist. This means Indigenous Peoples must bring their elders, histories, cultures, ways of life and stories into a legal system foreign to them...” [19].

<sup>12</sup> *Adivasi* is a member of any of the aboriginal tribal peoples living in India before the arrival of the Aryans in the 2<sup>nd</sup> millennium BC (source: <https://en.oxforddictionaries.com/definition/adivasi>). The same *adivasis* were termed as Scheduled Tribes in the Constitution of India, Article 366 (25).

<sup>13</sup> WIPO, Glossary of Key Terms Related to Intellectual Property and Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions WIPO/GRTKF/IC/25/INF/7 (7 May 2013), Annex at 8, online: [http://www.wipo.int/edocs/mdocs/tk/en/wipo\\_grtkf\\_ic\\_25/wipo\\_grtkf\\_ic\\_25\\_inf\\_7.pdf](http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_25/wipo_grtkf_ic_25_inf_7.pdf); Black’s Law Dictionary, 6<sup>th</sup> ed. (1990), Minnesota: West Publishing Co.



Despite supporting conservation and sustainability, only a cross-section of nations are recorded recognizing the customary laws of Indigenous people, and to varying degrees [27, 28], particularly as these relate to customary land tenure and local resource management. The United Nations recognized the close relationship between Indigenous peoples, their lands and economic, social and physical well-being in Chapter 21 of Agenda 21, urging Parties to take measures for the “recognition of their values, traditional knowledge and resource management practices with a view to promoting environmentally sound and sustainable development” (Agenda 21, 26.3.iii). Scholars have highlighted that respecting customary law in ABS regimes is the best way to promote the goals of the Convention, as a lack of respect is likely to lead to intractable conflicts and the failure or limited success of ABS initiatives. Equity in a contingent element of exchange of traditional knowledge, innovation and practices which could contribute to the security of nations and all peoples in meeting the challenges of a rapidly changing global environment [22].

The surveyed respondent groups/individuals provided fragmented views when reflecting on levels of respect, recognition and enforceability of rights of respective Indigenous people within their jurisdiction. Little more than half of surveyed Indigenous organizations/individuals (53.34%) responded ‘affirmatively’ that the countries respect, recognize and enforce the rights and ITK of own Indigenous people but not truly (Table 2: q.1). Additionally, over one-quarter (26.66%) of the respondents Indigenous noted they lacked adequate respect, recognition and enforcement of rights relating to ITK. Indigenous Only about 7% of respondents affirmed clearly that the country had recognized and enforceable rights for Indigenous people relating to ITK (Table 2: q.1). An additional 13% of the respondents did not respond at all. This data of surveyed Indigenous organizations/individuals suggests that countries of the world only partially respect, recognize and enforce the rights and ITK of their own Indigenous people.

Customary laws and institutions of Indigenous people have paramount importance in conserving and managing the biological resources and associated ITK. However, often customary laws and rules of Indigenous people or local communities (ILCs) are undocumented and seldom taken into account in national laws or administrative mechanisms. A critical issue identified by respondents was the limited priority provided to rights of ILCs under national regimes and even in their own territories. Indigenous organizations and individuals surveyed were asked to verify the status of national ABS legislations or policies having respect to or recognition of customary laws/institutions of respective Indigenous people. Only 13.34% of respondents ‘confirmed’ customary law/institutions of Indigenous people were recognized in domestic ABS legislation/policy. These respondents indicated their existing or evolving ABS legislation/policies had such relevant provisions with replies listed in Table 2: q.2. Conversely, 20% of respondents responded ‘negatively’ indicating that their existing/evolving ABS legislation/policies lacked such provisions. The majority of respondents (60%) were totally unaware of such issues. Therefore, it can be drawn hereby that the majority of Indigenous organizations/individuals surveyed were unaware or did not view the ABS legislation/policy in their respective country adequately recognized customary laws/institutions of Indigenous people.

Competent national authorities (CNAs) responded differently with 44% (India, Vietnam, Philippines and Russia) having responded “affirmatively” that their existing/evolving ABS legislation/policy have provisions recognizing the customary laws/institutions of their Indigenous people, in accordance of Article 12.1 of Nagoya Protocol (Table 3: q.1). Comparatively, 33% of the CNAs (Bangladesh, Mongolia and China) responded ‘negatively’ stating that their existing/evolving ABS legislation/policies lack provisions recognizing the customary laws/institutions of their Indigenous people (Table 3: q.1). Among the responding countries, two countries – Thailand and Lao – were unaware of the facts. The responses of competent national authorities reveal that only a limited cross-section of countries recognize the customary laws/institutions of their Indigenous people in texts of existing/evolving ABS legislation/policy and have relevant provisions.

Observations suggest that customary laws and institutions of ILCs have limited substantive recognition globally and nationally, with the scope of domestic protections where present having variance in terms of the type of rights protected, who constitutes an “Indigenous person” in law, and

the effectiveness of legal protections. Opinions of Indigenous communities have also been supported by the responses of CNAs who revealed that only some countries recognize the customary laws/institutions of their Indigenous people in texts of existing/evolving ABS legislation/policy. Article 12 of Nagoya Protocol (TK associated with Genetic Resources) is of particular importance to ILCs as it requires Parties to take into consideration the customary laws, community laws and procedures of ILCs with respect to TK associated with genetic resources [29]. Critics express disappointment in the Nagoya Protocol suggesting the outcome of compromise between different Parties of the CBD does not go far enough [30]. A critical tension relates to legitimacy of rights if State sovereignty clearly overrules the rights of Indigenous people throughout the whole of the Protocol [31]. The recognition of rights and ITK of Indigenous people receives inadequate space in domestic ABS legislation/policies of Parties.

Recognition (in domestic ABS laws) of customary laws or institutions of the Indigenous people remains limited, with critics providing two core arguments: (1) the language creates a double standard between ILCs' rights and those of Parties by qualifying the scope of protections through terms "in accordance with domestic law", "established rights", "as appropriate", "as applicable" and "with the aim of ensuring" effectively undermining rights of ILCs [32],[31]<sup>14</sup>, and (2) in regards to Article 12.1 of Nagoya Protocol, the standard of protection is inadequate with Parties obliged to only take into account customary laws of ILCs [25].

Similarly, the Joint Submission of Grand Council of the Crees *et al.* [1] reiterates that the States cannot be relied upon to safeguard the customary law and practices of Indigenous peoples through national legislation. For example, in Africa [33] and Asia [34], customary law is often subjugated to national laws or is otherwise insufficiently protected. Surprisingly, such inadequacies occur even in cases where there may be significant recognition of Indigenous legal systems [35]. Roy [34] has elaborated the same in a starker tone noting: "Indigenous peoples' customary laws and institutions continue to suffer from de-recognition and policy neglect due to discriminatory or assimilationist state policies. Like Indigenous peoples in other parts of the world, Indigenous peoples in Asia have been subject to social, political and economic marginalization, especially through conquest and colonization. In only a few cases have Asian Indigenous peoples been able to retain a substantive level of political and legal autonomy".

Overall it can be asserted that Indigenous peoples often have significant conflicts of law with dominant legal systems of States citing that their definition of duties, obligations, powers, limitations and harms are defined through their customs, not national or foreign courts. Cotula and Mathieu [36] express that the customary laws that govern communities' sustainable use of natural resources face conflicts with international and State laws partially due to fundamental differences in treating the property concepts in two opposing types of laws [36]. Understandings of 'property' under State law is attributed to the private rights of a person or entity to appropriate and alienate both the physical and intellectual property. In contrast, communities' property systems (under customary laws or institutional arrangement) tend to emphasize relational and collective values of resources [37]<sup>15</sup>. Unfortunately, the implementation of State law tends to overpower and contravene customary law. As Sheleef suggests", a system that denies legal pluralism has direct impacts on communities' lives, for example, by undermining the bio-cultural practices and institutions that underpin sustainable ecosystem management" [38].

Finally, as the Joint Submission of Grand Council of the Crees *et al.* [1] reiterates, the failure to respect customary law will contribute to the further erosion of traditional biodiversity management systems and traditional knowledge associated with biodiversity, and thus to barriers to meeting the goals of the Convention as well as the loss of global cultural diversity.

<sup>14</sup> If comparison of the Articles 6.2, 7, 11, 12, 16.1 of Nagoya Protocol is being done.

<sup>15</sup> Such systems have been described as "...commonly characterized by collective ownership (where the community owns a resource, but individuals may acquire superior rights to or responsibilities for collective property), and communal ownership (where the property is indivisibly owned by the community)" [23].

### 3.2 Recognition of Community Protocols of ILCs

Community Protocols hold potential as legal tools to facilitate, through the use of cultural-rooted and participatory approaches such as endogenous development, the assertion of communities' rights over their territories, cultures and traditional knowledge [39]. Through safeguarding communities' custodianship rights over their natural environment and traditional way of life community protocols aim to assist communities in establishing a firm foundation upon which to develop the future management of their natural resources by setting out their values and customary procedures that govern the management of their natural resources [40]. They also provide a vehicle for articulating their procedural and substantive rights to, *inter alia*, be involved in decision-making according to the principle of free, prior and informed consent, develop the specific elements of projects that affect their lands, and ensure that they are involved in the monitoring and evaluation of such projects [40]. Köhler-Rollefson [41] further adds that community protocols vary in how they are documented, shared, and utilized and have been highlighted as a meaningful affirmation of community laws, practices, and procedures. This approach Köhler-Rollefson suggests is intended to mobilize and empower communities to use international and national laws to support the local manifestation of the right to self-determination [41]. By exhibiting community-determined values, procedures and priorities community protocols set out rights and responsibilities under customary, state and international law as the basis for engaging with external actors such as governments, companies, academics and NGOs [39]. They can be used to catalyze constructive and proactive responses to threats and opportunities posed by land, resource development, conservation, research and other legal and policy challenges [39]. Article 12.1 requires Parties to take into consideration the customary laws, community laws and procedures of ILCs with respect to TK associated with genetic resources, to support the development of Community Protocols in relation to ABS in TK, and not to restrict the customary use and exchange of genetic resources and associated TK within and amongst ILCs in their implementation of the Nagoya Protocol [29]<sup>16</sup>.

Respondents of Indigenous organizations/individuals surveyed were asked to confirm whether their country's ABS legislation/policy provides for supporting the concerned ILCs to develop community protocols. Only 20% of the respondents affirmed that their respective country's ABS legislation/policy included a provision(s) in support of community protocols (Table 2: q.3). The majority (66.7%) of respondents were not aware of such provisions in their ABS legislation/policy (Table 2: q.3). An additional 6.66% of the respondents denied any such provision in evolving ABS legislation/policy, while 6.66% of indicated there was no ABS legislation/policy in place (Table 2: q.3). The responses provided by Indigenous organizations/individuals indicate that evolving/existing national ABS legislation/policies in various countries have given limited emphasis or reference to community protocols, if any such provision exists in their respective laws.

Article 12.3(a)<sup>17</sup> of Nagoya Protocol provide the Parties should support Indigenous people and local communities, especially women, in development of community protocols relating to governance, access, and utilization of ITK associated to genetic resources. Implications of this provision were explored through structured interviews with the CNAs of 12 countries considering if domestic ABS legislation/policy provides for the recognition and development of community protocols before granting any PIC to users of ITK (in accordance of Article.12.3(a) of Nagoya Protocol). Of the 12 interviewed only 8 CNAs (Table 3: q.2), with only one country (Philippines) (12.5%) confirming that its existing/evolving ABS legislation/policy provides for the development of community protocols (Table 3: q.2). The majority of surveyed countries (75%) – Bangladesh, Thailand, Vietnam, Mongolia, Russia and China – responded that no such provision existed in their evolving ABS legislation/policies

<sup>16</sup> Article 12.1 reads: "In implementing their obligations under this Protocol, Parties shall in accordance with domestic law take into consideration Indigenous and local communities' customary laws, community protocols and procedures, as applicable, with respect to traditional knowledge associated with genetic resources<sup>17</sup>".

<sup>17</sup> Article 12.3(a) reads: "Parties shall endeavour to support, as appropriate, the development by Indigenous and local communities, including women within these communities, of (a) Community protocols in relation to access to traditional knowledge associated with genetic resources and the fair and equitable sharing of benefits arising out of the utilization of such knowledge".

(Table 3: q.2), with one country (Lao) (12.5%) indicating it was unaware of the issue. Four countries namely India, Nepal, Brunei and Timor did not respond on the question. These results suggest that existing/evolving ABS legislation/policies in majority of countries do not provide sufficient protections or enablers to promote the development of community protocols, as envisaged in Article 12.3(a) of Nagoya Protocol.

Related, inquiry moved beyond recognition, to explore the level of support provided for ILCs to develop community protocols with the 8 countries respondents of CNAs (Table 3: q.3). From among the responding countries, 50% of CNAs namely Thailand, Lao, Philippines and China responded positively that their existing/evolving ABS legislation/policies have provision for supporting the concerned ILCs to develop community protocols of their Indigenous people (Table 3: q.3). Conversely, 37.5% of the responding CNAs (Vietnam, Mongolia and Russia) expressed that their existing/evolving ABS legislation/policies lacked such a provision for supporting the concerned ILCs to develop community protocols of their Indigenous people (Table 3: q.3). Bangladesh was the only respondent which was unaware. Overall, half of the CNAs highlighted the fact that their respective existing/evolving ABS legislation/policies have provision for supporting the concerned ILCs to develop community protocols of their Indigenous people.

Finding largely the scarce attention provided by Parties to the recognition and support for development of community protocols, significant concerns relating to the effectiveness of the Nagoya Protocol remain. Some scholars question the Nagoya Protocol, asking whether the instrument and its national level implementation would move beyond merely facilitating the transfer of TK, to supporting communities' biocultural rights to self-govern their natural resources and associated TK [42]. Consultations conducted by Natural Justice in Asia and Africa have revealed that the process of developing a protocol could be abused by certain parties either from outside or from within the community [43]. Subsequently, Jonas, Bavikatte and Shrumm argue that communities' ability to exercise their rights to protect their knowledge, innovations and practices and to support their customary uses of bioresources will depend solely their capability to understand the legal framework adequately in context of their rights and obligations at various levels, to foresee the practical implications of their involvement in ABS, and to overcome the power asymmetries underlying their interface with State agencies (Parties) and commercial entities [4]. Irrespective of the respect extended by national authorities of Parties to community protocols and ILCs' customary rights, community protocols are embedded in the Nagoya Protocol as a community-led modality for the codification of customary legal principles. Leveraging localized governance models which are grounded in customary law provides a potentially useful framework with which communities can appraise whether ABS would help or hinder their local development aspirations and engage stakeholders in "protecting" or "promoting" territories, knowledge, innovation, and practices [4]. Globally, there is increased belief by ILCs that the legal validity of community protocols would assist to give recognition to customary laws at the national level leading to enhanced recognition, protection, and respect for rights of ILCs by States. According to the Indigenous groups, having the shortcoming of intellectual property laws for traditional knowledge, it is nevertheless suggested that community protocols could serve as an interface with intellectual property and ABS laws as well as in the context of protected areas [44, 45].

#### 4. CONCLUSIONS

Customary laws and institutions of ILCs receive limited legal recognition globally and nationally. Evidently, the trend of responses from Indigenous organizations/individuals exhibits only partially recognition and enforcement of the rights and ITK in a limited number of jurisdictions. Where recognition is provided effective implementation was found lacking. Article 12 of Nagoya Protocol in requiring Parties to take into consideration the customary laws, community laws and procedures of ILCs with respect to TK, to support the development of Community Protocols in relation to ABS in TK, and not to restrict the customary use and exchange of genetic resources and associated TK within and amongst ILCs provides significant space to assist ILCs in protection of ITK, preservation of customary

law, and development of community protocols. State sovereignty clearly overrules the rights of Indigenous people both in domestic laws as well as on the ground. Importantly, the promotion of community-controlled governance depends on the space given in domestic laws of the countries. While a number of countries' existing policies/laws recognize the ILCs, limited influence is provided for ILCs to claim or enforce their rights even by using enabling laws. Limited capacity remains a reality, with Parties remaining challenged with implementation and reporting under the Nagoya Protocol and even under the Convention.

Bio-cultural rights of ILCs over all aspects of their ways of life that are relevant to the conservation and sustainable use of biodiversity generates a broad range of legal intersections. These aspects include rights relating to their knowledge, innovations and practices, natural resources, lands and waters, traditional occupations, and customary laws and systems of governance. Effectively, these are rights to self-determination, but specifically self-determination oriented towards stewardship of ILCs' traditional lands, waters, resources, and knowledge Article 12.3 of Nagoya Protocol recognizes and upholds the ownership rights of ILCs over their traditional knowledge. Contrary to this provision, many jurisdictions do provide sufficient recognition for Indigenous nationalities and provider countries lack the necessary know-how to effectively support ILCs in the development community protocols. This lack of progress comes on the backdrop of increasing recognition of rights to self-govern their territories, natural resources and traditional knowledge in international law and institutions<sup>18</sup>. Such rights of self-determination are unequivocally manifested in 'bio-cultural rights,' which are relevant to the conservation and sustainable use of biodiversity including rights of their knowledge, innovations and practices, natural resources, lands and waters, traditional occupations, and customary laws and systems of governance.

As illustrated, the core concern of this paper is to what extent the ILCs' right to self-determination is recognized, respected and honoured by the States. Noticeably, while many Indigenous peoples do not have written laws or systems of governance, the customary laws exist and are practiced in different levels and forms. A crucial factor is how strong the communities are in asserting their right to control their lands and resources. As emphasized in the Joint Submission of Grand Council of the Crees *et al.* [1], States generally disregard requests to carefully consider the human rights implications of proposed texts relating to Indigenous peoples. Shortcomings in the Nagoya Protocol relating to scope and deference to implementation in accordance with national legislation are likely to be exploited by some States in the future. Corrective measures include the a meaningful recognition of the legal pluralism inherent in indigenous governance systems requiring as noted by Tobin "incorporation directly or indirectly of principles, measures and mechanisms drawn from customary law within national and international legal regimes for the protection of traditional knowledge" [46]<sup>19</sup>.

Observations illustrate a prevailing trend of State laws being compartmentalized and disaggregated. The implementation of those disaggregated State laws further compounds challenges by requiring communities to engage with complex administrative frameworks, and a multiplicity of stakeholders<sup>20</sup>. Communities face a stark choice to either reject their domestic framework (something which is a virtual impossibility, considering the ubiquitous nature of State law) or engage with them at the potential expense of becoming complicit in the disaggregation of their otherwise holistic ways of

<sup>18</sup> For example, the UN Convention to Combat Desertification, UN Framework Convention on Climate Change (including under the programme on Reducing Emissions from Deforestation and Forest Degradation in Developing Countries), UN Forum on Forests, Food and Agriculture Organization (including the International Treaty on Plant Genetic Resources for Food and Agriculture), UN Educational, Scientific and Cultural Organization (including cultural conventions and Biosphere Reserves), International Union for Conservation of Nature (including World Conservation Congress resolutions and World Parks Congress recommendations), UN Permanent Forum on Indigenous Issues, International Convention on the Elimination of All Forms of Racial Discrimination, International Labour Organization Convention 169 Concerning Indigenous and Tribal Peoples in Independent Countries, UN Declaration on the Rights of Indigenous Peoples, Expert Mechanism on the Rights of Indigenous Peoples, Agenda 21, and the World Intellectual Property Organization.

<sup>19</sup> This is arguably a huge challenge and most States are a long way from incorporating Indigenous worldviews into legal and policy frameworks

<sup>20</sup> Examples include government agencies, conservation and development NGOs, private sector companies, and researchers.

life and governance systems [4]. Both the conditions result in a losing outcome for ILCs. Further operationalization of the Nagoya Protocol is needed to assist in the effective realization of Indigenous rights, and preservation of Indigenous knowledge systems.

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Аржжуменд Хасрат. Нормативне регулювання визнання інституцій, забезпечення діяльності корінних народів у процесі прийняття національного законодавства про імплементацію норм Нагойського протоколу. *Журнал Прикарпатського університету імені Василя Стефаника*, **5** (2) (2018), 67–82.

Нагойський протокол про доступ до генетичних ресурсів (ABS) визначає права корінних жителів та місцевих громад згідно з Декларацією Організації Об'єднаних Націй про права корінних народів. Сторони зобов'язані приймати законодавчі, адміністративні та технічні заходи для визнання, поваги та підтримки, забезпечення звичайних законів та інститутів громад корінних народів та місцевих громад. У статті досліджується ефективність міжнародного права (тобто Нагойського протоколу) щодо впливу на існуючі закони, політику чи адміністративні заходи. Зроблено висновки, що простір, визнання та повага, створені в рамках існуючих або планованих національних антикризових заходах захисту прав корінних громад, є недостатніми для ефективного здійснення положень звичайних законів та норм, інститутів громад корінних народів, як це передбачено Нагойським протоколом. Оскільки біокультурні права корінних народів є ключовими елементами збереження та сталого використання біологічного різноманіття, закони про доступ до генетичних ресурсів потребують якісного доопрацювання, щоб бути достатньо ефективними.

**Ключові слова:** інститути громад, протокол Співтовариства, звичаєве право, генетичні ресурси, корінні народи, Нагойський протокол.