

Sui Generis Plant Variety Protection: Indian Perspective

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Abstract: Human beings are the most intelligent among the creatures of the Earth. That is what they believe. However, they are only part of the system, and not the centre. Every creature has its own value and position in the system. Human activities often forget this fact. The Plant Patent was a tremendous step forward in the development of new cultivars for the benefit of the public. The 'Peace' rose, was the single breakthrough that had maximum impact. From the Plant Patent Act, other forms of breeders' rights was spawned worldwide, including our own Plant Variety Protection Act (PVPA). Proof of the success has been the increasing use and acceptance of plant patents and the lack of challenges to the act and plant patent litigation. The paper deals with origin and development PBRs, the objectives of the act, its authorities and the farmer's rights and penalties relating to that. The paper focuses on the future farmer's rights and how the interest of the public can be maintained.

Keywords: *Plant variety, PVPA, PBRs, Farmers rights, TRIPS, UPOV, EDV's.*

I. INTRODUCTION

Agriculture is one of the most interesting fields to analyze in the context of intellectual property rights because there have been significant law and policy changes in the past few decades in this area. Developing nations underscore several factors necessitating a national regime for plant variety protection rather than adopting a system similar to the protection prevalent in developed nations. Plant variety protection relates to intellectual property rights over plant varieties which guarantee rights-holders exclusive commercial rights for a specific period of time. Plants are the product of nature and the traditional techniques to generate new plant varieties have been used for hundreds of years.

Plant variety protection is linked to both agricultural innovation and the conservation of biological resources, although on different levels. It was only recently that newer ways of inducing desirable features of plants have been rewarded through intellectual property rights. The usual rationale for introducing exclusive intellectual property rights in specific fields of technology is that an individual or legal entity that devotes significant resources to the development of new technologies should be rewarded with a temporary exclusivity. This is linked to the idea that certain forms of knowledge can easily be copied. In such cases, individuals who have not contributed to the development of an invention would be in a position to benefit from the fruits of the invention if no exclusive right was offered to the inventor. In the agricultural field, inventiveness was traditionally based on the sharing of biological resources and related knowledge among farmers in most parts of the world. This scene has changed slowly in the early part of the 20th century in certain OECD countries where a private sector seed industry slowly developed. The development of the private sector in this field led to calls for a form of intellectual property rights protection over plant varieties to give sufficient incentive to private sector actors to enter the seed business. However, while in most fields of technology, the preferred mode of legal protection for inventions was patents, in the agricultural field, an alternative form of intellectual property rights, plant breeders' rights (PBRs) was developed. Several factors led to the development of this alternative form of intellectual property protection. On the one hand, it was progressively recognized that a form of intellectual property rights was necessary to foster private investment in the seed sector. On the other hand, there were two forms of resistance to the extension of patent rights in this field. For a while, the industry argued that the notion of inventiveness which characterized patents would be diluted if plant varieties were brought onboard because a new plant variety was seen more as an improvement on an existing product of nature than as a 'scientific' invention. Other actors argued and in some cases still argue, that seeds had always been part of the common heritage of humankind and were freely exchanged among farmers and farming communities.

The different positions expressed with regard to the introduction of plant breeders' rights have assumed added significance in the wake of the adoption of the TRIPS Agreement. At present, Plant varieties can be protected by giving protection in three ways: i) by granting patents or; ii) by providing effective sui generis system or; iii) by any combination of patents and sui generis system. The Indian Parliament has passed the Plant Variety Protection and Farmers' Rights Act in 2001 to give protection to newly bred plant varieties. India has now put in place a law to grant Plant Breeders' Rights on new varieties of seeds. The law also grants some rights to the farmers. The purpose of this study is to analyze the provisions of the Plant Varieties and Farmer's Rights Act 2001 and to evaluate the effectiveness of the Act in achieving the purpose of enforcement this Act.

II. ORIGIN AND DEVELOPMENT OF PBRs IN INDIA

India and so many other developing countries do not protect plants by strict patenting system. But there is a mandate in the TRIPs Agreement that plant varieties must be protected by the member states. The question of the introduction of plant variety protection is one that concerns mostly developing countries like India. Indeed, most developed countries had already introduced either plant patents or PBRs before the adoption of TRIPS. Developing countries that are member of WTO were left with the choice of either adopting the existing regime proposed in UPOV or to devise their own plant variety protection system adapted to their specific situation. In pursuance to the TRIPs Agreement India has enacted 'Protection of Plant Varieties and Farmers' Rights Act, 2001, a *sui generis* system of plant variety protection. The model for this Act was the UPOV Convention through which India decided to implement plant variety protection regimes which seek to provide protection to commercial plant breeders and to farmers. Thus, the Indian plant variety protection regime introduces unique kind of protection to both PBRs and farmers.

Under the Indian Protection of Plant Varieties and Farmers' Rights Act 2001, plants are divided into four main classes: new varieties, extant varieties, essentially derived varieties and farmers' varieties. Plant varieties can only be protected by PBRs, if they fulfill the four basic criteria of novelty, distinctness, stability and uniformity or homogeneity. Each of these characteristics is given further content by UPOV itself. The concept of novelty requires further elaboration because it differs from its acceptance under patent law. Under UPOV, a variety is novel if it has not been sold or otherwise disposed of to others, by or with the consent of the breeder, for purposes of exploitation of the variety. Novelty is thus defined entirely by commercialisation and not by the fact that the variety did not previously exist. UPOV gives a specific time frame for the application of novelty. To be novel, a variety must not have been commercialised in the country where the application is filed more than a year before the application and in other member countries more than four years (six years in the case of trees and vines). The criterion of distinctness requires that the protected variety should be clearly distinguishable from any other variety whose existence is a matter of common knowledge at the time of the filing of the application. Stability is obtained if the variety remains true to its description after repeated reproduction or propagation. Finally, uniformity implies that the variety remains true to the original in its relevant characteristics when propagated.

III. OBJECTIVES OF THE ACT

The objectives of this Act are three fold:

- i. stimulation of investment for research and development in public and private sectors for the development of new plant varieties by ensuring returns on such investment
- ii. promotion and growth of the seed industry through domestic and foreign investment; and
- iii. Recognition of the role of farmers as cultivators and conservers and the contribution of the traditional rural and tribal communities to the country's agro-biodiversity by rewarding them for their contribution through benefit sharing and protecting the transitional rights of the farmer.
- iv.

IV. AUTHORITIES UNDER THE ACT

The Act establishes an authority under section 3, known as Protection of Plant Varieties and Farmers Rights Authority. It is a body corporate having perpetual succession and a common seal with the power to acquire, hold and dispose of movable and immovable properties and can sue and be sued.

The composition of the authority under section 3(4) indicates a chairperson and fifteen members. The qualification of the chairperson requires a person of outstanding caliber and eminence with long practical experience to the satisfaction of the central government especially in the field of plant variety research or agricultural development. A standing committee of five members has to be appointed by the chairperson of the authority. One member of the committee should be a representative of farmer's organization. The standing committee's job as per section 3(7) is to advise the authority on all issues including farmers' rights.

Functions of the Authority:

- a. promotion and development of new varieties of plant and rights of , farmers and breeders
- b. Registration of new plant varieties,
- c. Characterization and documentation of varieties,
- d. Compulsory licensing of protected varieties; and
- e. collection, compilation and publication of plant varieties, seeds and germplasm.

V. RIGHTS OF THE FARMERS

In section 39 (iv) of the chapter on Farmers' Rights, the right to sell seeds, even protected seeds have finally been provided. The farmer shall be deemed to be entitled to save, use, sow, resow, exchange, share or sell his farm produce including seed of a variety protected under this Act in the same manner as he was entitled

before the coming into force of this Act. However, the farmer is not entitled to sell 'branded seed of a variety protected under this Act'.

VI. FEATURES OF FARMERS' RIGHTS

The Act acknowledges the role of rural communities as contributors of landraces and farmer varieties in the breeding of new plant varieties. Breeders wanting to use farmers' varieties for creating Essentially Derived Varieties (EDVs) can not do so without the express permission of the farmers. Anyone can register a community's claim and have it duly recorded at a notified center. If the claim is found to be genuine, a share of profits made from the new variety has to go into a National Gene Fund.

1. Exemption from fees:

Further protecting farmers from the new set of provisions being put in place, the new Act stipulates that farmers wishing to examine documents and papers or receive copies of rules and decisions made by the various authorities will be exempt from paying any fees.

2. Disclosure:

Explicit and detailed disclosure in the passport data about the parentage of the new variety is required. If concealment is detected in the passport data, the Breeders certificate stands to be cancelled.

3. No terminator technology:

Breeders must to submit an affidavit that their variety does not contain a Gene Use Restricting Technology (GURT) or terminator technology. There are two main types of GURTs: variety-level GURT (v-GURT) and trait-level GURT (t-GURT). V-GURT causes the seeds of the affected plant variety to be sterile in contrast to t-GURT which results in the expression of a selected trait. T-GURT introduces a mechanism for trait expression into the variety which can only be turned on, or off, by treatment with specific chemical inducers. The gene of interest can thus be expressed at particular stages or generations of the crop.

4. Protection against innocent infringement:

Rightly assuming that farmers may unknowingly infringe Breeders' Rights since they will not be used to the new situation, the law provides for protection from prosecution for innocent infringement.

5. Benefit-sharing:

Benefit sharing' is a new concept not available in any other law, gives protection under the Act. This concept is introduced in the protection of rights given to the Breeder of new plant variety. It is an obligation cast on the registered Breeder to pay the conserver of plant variety, the genetic material of which is used by the breeder in evolving his new plant variety. Here the beneficiary is the person or persons who conserve the plant varieties. Benefit sharing means such proportion out of the benefit accruing to the breeder by virtue of monopoly granted to, as may be determined by the Authority in favor of and for payment to the beneficiary.

6. Protection against bad seed:

The clause protecting the farmer from spurious seed leaves too much to the discretion of the Authority. There should be specific guidelines, such as that compensation should amount to at least twice the projected harvest value of the crop. In addition, a jail term should be provided for repeated offence.

VII. RIGHTS OF BREEDERS AND RESEARCHERS

Breeders' Rights are fully protected by the legislation. The Act defines the term Breeder under section 2(c) as- breeder means a person or group of persons or a farmer or group of farmers or any institution which has bred, evolved or developed any variety. Further farmer under this Act means any person who- (i) cultivates crops by cultivating land himself; or (ii) cultivates crops directly supervising the cultivation of the land through any other person; or (iii) conserves, preserves, severally or jointly with any other person any wild species or traditional varieties through selection and identification of their useful properties.

On registration, the breeder has complete rights of commercialisation for the registered variety. These include the right to produce, sell, market, distribute, import or export the registered variety.

VIII. PENALTIES FOR INFRINGING BREEDERS' RIGHTS

Violation of a Breeders' Right can apply to the variety itself, as well as to its packaging. Penalties can range from Rs. 50,000/- to ten lac as well as a jail term ranging from three months to two years, depending on the severity of the damage caused. For repeated offence, fines can go up to Rs. 20 lac and the jail term to three years. The new law has provisions for Researchers' Rights which allow scientists and breeders free access to

registered varieties for research. The registered variety can also be used for the purpose of creating new varieties. This flexibility is curtailed only when the registered variety needs to be used repeatedly as a parental line for commercial production of another variety.

IX. PROTECTION OF PUBLIC INTEREST

The legislation includes public interest clauses, like exclusion of certain varieties from protection and the grant of compulsory licensing. To safeguard public interest, certain varieties may not be registered if it is felt that prevention of commercial exploitation.

In order to see that the certificate holders can not hold the interest of the society to ransom, the Act provides for the grant of compulsory licenses to interested persons to use the protected variety in case of failure of the breeder to satisfy the reasonable requirements of the public by providing seeds at reasonable price or seeds becoming non available. The compulsory license is available for production, sale and distribution of the seed or other propagating material of the variety after the expiry of three years from the date of issue of certificate of registration. The terms and conditions of these compulsory licenses include reasonable compensation to the breeder and providing to the farmers, seeds in a timely manner at a reasonable price.

X. CONCLUSION:

From the above discussions it can be concluded that, many developing countries like India have an agricultural economy that is geared towards the domestic market. Such an economy is dependent upon farmer-produced seed of varieties that are both maintained and further adapted to their local growing conditions by small-scale farmers. A country with such an economy want to acknowledge the rights of farmers arising from their contribution to crop conservation and development and the sharing of their knowledge on adaptive traits. They also want to encourage farmer-to-farmer exchange of new crop/plant varieties that are adapted to the local growing conditions. UPOV Convention is a bane to the farmers of India because it prevents private preservation and exchange of the new variety.

The regime for plant protection in India is similar to that set out by UPOV and the requirements for protection are novelty, distinctness, uniformity and stability. Under Article 39(iv) the farmer is entitled to save use, sow, resow, exchange, and share or sell his farm produce including seed of a protected variety. However he is unable to sell seed that has is branded with the Breeder's name. In this way the breeder has control of the commercial marketplace without threatening the farmers' ability to practice his livelihood. Again the Act has incorporated provisions beneficial to the breeder from the UPOV 1991 and introduced a set of new norms for the protection of the interests of the farmers that are outside the scope of UPOV 1991. The Act made adequate provisions to protect the breeder's rights. But as far as farmers' rights are concerned to get registration the farmer has to undergo detailed and lengthy procedure of registration. In addition to that he has to give scientific details of his plant variety. This practically excludes the possibility of any farmer from registering his newly bred variety unless he takes the help of scientific institutions.

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- [6]. Seed means a type of living embryo or propagule capable of regeneration and giving rise to a plant which is true to such type.
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