

INTELLECTUAL PROPERTY RIGHTS . PAPER – IV

***TOPIC : PROTECTION OF PLANT VARIETIES AND FARMERS'
RIGHTS ACT, 2001 : LAW AND PRACTICE .***

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CONTENTS

<u>TOPIC</u>	<u>PAGE NO</u>
(I) INTRODUCTION	1-3
(II). DEVELOPMENT OF THE PROTECTION OF PLANT VARIETIES AND FARMERS RIGHT ACT, 2001 IN INDIA .	3-6
(III) IMPORTANT DEFINITIONS UNDER THE LEGISLATION	6-9
(IV) FARMERS RIGHTS , BREEDERS RIGHTS , RESEARCHERS RIGHTS AND PUBLIC INTEREST . IV.I BREEDERS RIGHTS . IV.II. RIGHTS OF RESEARCHERS . IV.III FARMERS RIGHTS . IV.IV. OTHER KINDS OF FARMERS' RIGHTS IN THE ACT . IV. V PROTECTION OF PUBLIC INTEREST .	9-18
(V) CLAUSES THAT NEED AMENDMENT .	18-19
(VI) KIND OF VARIETIES REGISTERABLE UNDER THE PLANT VARIETY ACT.	20

(VII) OBJECTIVES OF PROTECTION OF PLANT VARIETIES AND FARMERS' RIGHTS ACT IN INDIA .	20
(VIII) WHAT ARE REGISTERABLE PLANT VARIETIES IN INDIA.	21
(IX) _PLANT VARIETIES CANNOT BE PROTECTED UNDER THE ACT .	21-22
(X) CRITERIA FOR PROTECTION / REGISTRATION OF VARIETIES	22
(XI) PROCEDURE FOR REGISTRATION . XII.I REGISTRATION AND TERM OF PROTECTION	23-25
(XII) REVOCATION OF PROTECTION .	26
(XIII). OFFENCES AND PENALTIES .	26-28
(XIV) OTHER FEATURES OF THE PROTECTION OF PLANT VARIETIES AND FARMER'S RIGHTS ACT .	28-30
(XV) CONCLUSION.	30-31
REFERENCES	32

PROTECTION OF PLANT VARIETIES AND FARMERS' RIGHTS ACT, 2001: LAW AND PRACTICE .

I. INTRODUCTION :

Intellectual Property Rights on plant variety means that the person or the institution who establishes the ownership right on the plant variety alone has the legal right to produce, store, process and market the seed of that variety for as many years as the ownership is valid. The provisions of the TRIPS Agreement have widened the scope of protection of intellectual property rights relating to agriculture through plant variety protection. A reference to Article 27 of the TRIPS will show that all inventions regardless of the field of technology are eligible for protection. Member countries will have to provide a legal framework for the protection of inventions relating to plant varieties. Indian patent act (1970) does not permit the patenting of plant varieties and animal breeds which are existing in nature. TRIPS provides a choice for protecting plant varieties . Members may choose from patents, a *sui generis* system or a combination of the two . Most developing countries including India have decided not to have patents for plant varieties and have chosen *sui generis* option The *sui generis* (self generating) system means any system a country decides on, provided it grants effective Plant Breeders' Rights. TRIPS does not specify what kind of breeders' rights is meant and it does not say what else a member state can include in its law , apart from Breeders' Rights . The Protection of Plant Varieties and Farmers' Rights Act 2001 is the Indian *sui generis* legislation . The UPOV¹

¹ UPOV is an abbreviation of Union pour la Protection des Obtentions Vegetales (Union for protection of new varieties of plant). It is an international convention which provides a common basis for the examination of plant varieties in different member States of UPOV for determining whether a plant variety merits protection under UPOV or not.

Convention provides an example of *sui generis* systems which were considered under Article 27.3(b)² of TRIPS Agreement and hence the Government of India enacted the Protection of Plant Varieties and Farmers' Rights Act, 2001. To protect the rights of the breeders and farmers, Government of India has enacted the Plant Varieties Protection and Farmers Rights (PVPFR ACT, 2001) and effective from January, 2006. It has become imperative on the part of the Government of India to develop our own *sui generis* (a Latin phrase meaning 'of their own kind') system to provide a frame work for Plant Variety Protection and Farmers Right.

The creation of new plant varieties and their use for agricultural production is a matter of great public interest. Moreover to accelerate agricultural development, it is necessary to protect plant breeders' rights to encourage scientific research and create incentive for producing new plant varieties the persons or organizations, which produce such varieties, should be rewarded either by granting them patent rights or by an effective *sui generis* system.

In order to provide for the establishment of an effective system for protection of plant varieties, the rights of farmers and plant breeders and to encourage the development of new varieties of plants it has been considered necessary to recognize and protect the rights of the farmers in respect of their contribution made at any time in conserving, improving and making available plant genetic resources for the development of the new plant varieties.

Such protection is likely to facilitate the growth of the seed industry which will ensure the availability of high quality seeds and planting material to the farmers. India having ratified the Agreement on Trade Related Aspects of the

²

3. "Members may also exclude from patentability:

(b) Plants and animals other than micro-organism and essentially biological processes for the protection of plant or animals other than non-biological and microbiological processes. However, *Members shall provide for the protection of plant varieties either by patents or by an effective sui generis system or by any combination thereof.* The provisions of this paragraph shall be reviewed four years after the date of entry into force of the WTO Agreement."

Intellectual Property Rights has to make provision for giving effect to Agreement. To give effect to the aforesaid objectives the Protection of Plant Varieties and Farmers' Rights Bill was introduced in the Parliament.

The Government of India has decided to adopt a *sui generis* legislation to give protection to breeders of new varieties of plants. Hence the Government of India enacted the Protection of Plant Varieties and Farmers Rights Act, 2001 .

India is one of the first countries in the world to have evolved an intellectual property rights legislation simultaneously granting rights to both breeders and farmers. The Protection of Plant Varieties and Farmers. Rights Act, 2001, establishes a unique system by extending the concept of Plant Breeders Rights (PBRs) currently applied to new varieties of breeders, to varieties held by farmers., NGOs and public sector institutions.

The law emerged from a process that attempted to incorporate the interests of various stakeholders, including private sector breeders, public sector institutions, nongovernmental organizations and farmers, within the property rights framework. While the Act is based on the important principle of distributing ownership rights in a fair and equitable manner, the assigning of multiple rights could pose several obstacles to useful utilization and exchange of resources. If the system is not carefully structured, a .tragedy of the anti commons. situation could arise. The tragedy of the anti commons refers to *under use* of resources arising from multiple ownership or rights to exclude others from use. It occurs when governments grant too many people rights over a resource with no one having an effective privilege of use.

My project attempts to evaluate the potential implications of India's Plant Variety and Farmers. Rights Act Law and practice in India vis-à-vis Intellectual Property Rights .

II. DEVELOPMENT OF THE PROTECTION OF PLANT VARIETIES AND FARMERS RIGHT ACT, 2001³ IN INDIA :

India's Protection of Plant Varieties and Farmers' Rights Act of 2001 is the most far-reaching legislation with regard to establishing rights for farmers to save, use, exchange and sell farm-saved seed.

A unique aspect of the 2001 Act is that it confers three concurrent rights - to breeders, to farmers and to researchers. When it comes to Farmers' Rights, the Act recognizes the farmer as cultivator, conserver and breeder. The Act establishes nine rights for farmers, of which the most important in this regard are the right to seed and the right to compensation for crop failure (Art. 39):

➔ The provisions on the right to seed specify that farmers are entitled to save, use, sow, re-sow, exchange, share and sell farm produce, including seeds of varieties protected by plant breeders' rights. They are, however, not allowed to sell seeds of protected varieties as branded packages. All the same, this stands as the most liberal legislation to date in this sphere, allowing farmers all the customary rights they previously enjoyed.

➔ The Act seeks to protect farmers from exaggerated claims by seed companies regarding the performance of their registered varieties. The breeder is obliged to disclose to farmers the performance of the variety under given conditions. If the material fails to perform according to this information, farmers may claim compensation from the breeding company through the Authority set up to administer the Act.

Not only does the 2001 Act protect the rights of farmers to save, use, exchange and sell farm-saved seed, it also seeks to ensure that these seeds are of good quality, or at least that farmers are Adequately informed about the

³ This act received the assent of the [President of India](#) on the October 30, 2001. Act 53 of 2001.

quality of seed they buy. In addition, safeguards are provided against innocent infringement by farmers. Farmers who unknowingly violate the rights of a breeder are not to be punished if they can prove that they were not aware of the existence of such a breeder's right (Art 42).

Ensuring Farmers' Rights to save, use, exchange and sell seed in this way must be seen as a success with regard to this component of Farmers' Rights, as these rights are basically fully ensured through the Act. Whether the provision on compensation in case of crop failure can be implemented in practice is another question, as there have been no cases so far. On the whole, India's Protection of Plant Varieties and Farmers' Rights Act is the most advanced in terms of Farmers' Rights to save use, exchange and sell seed to date. It applies to all farmers in India, and to all crop species. So far, twelve crop species have been brought under the scope of the Act, and more species will follow. The practice of saving, using, exchanging and selling seeds may well exist elsewhere, but India is the only country so far where a law has been passed establishing and securing Farmers' Rights to this extent.

The Government of India states four reasons for introducing the Protection of Plant Varieties and Farmers' Rights Act, 2001:

- To protect the intellectual property associated with the development of plant varieties in fulfillment of an agreement signed by India under the World Trade Organization (WTO).
- To recognize the rights of farmers arising from their contribution in conserving, improving and making available plant genetic resources to develop new plant varieties.
- To stimulate public and private investment in plant breeding to accelerate agricultural development
- To ensure high quality seed and planting material to farmers by promoting the seed industry.

The Protection of Plant Varieties and Farmers' Rights Act 2001 enacted by Government of India has several unique features. The act ensures Plant Breeders Rights on New varieties of seeds. The law also grants Farmers Rights . The act also include for setting up of a Plant Varieties and Farmers' Rights Protection Authority and its Regional Centres, National Community Gene Fund, Compulsory Licensing and Protection of Public Interest Appellate Board.

Registration of new varieties will be done at regional centres as notified by the Central Government. For registration, criteria are new, distinctiveness, uniformity and stability. Breeder has to furnish information on parent materials and geographical location from where plant genetic material has been taken for development of the new variety. Certificate of registration will be issued by the Registrar of the authority and it will prescribe the conditions of the entitlement. Plant varieties can be excluded from registration in case where prevention of commercial exploitation of such varieties is necessary to protect public order or public morality or human, animal and plant life and health or to avoid serious prejudice to the environment Eg. Narcotic Compensation has to be given to farmers if the registered variety does not meet the promised level of performance under given conditions. National Gene Fund is to be utilized for making payment for benefit sharing, compensation to communities and supporting the activities relating to conservation and sustainable use of genetic resources .

III. IMPORTANT DEFINITIONS UNDER THE LEGISLATION :

'Farmer' means any person who cultivates crop either by cultivating the land himself or cultivates crops by directly supervising the cultivation of land through any person; or conserves and preserves, severally or jointly, with any person any wild species or traditional varieties, or adds value to such wild species or traditional varieties through selection and identification of their useful properties.⁴

⁴ Section 2 (k) The Protection of Plant Varieties and Farmers' Rights Act 2001.

'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 .⁵

'Seed' means a type of living embryo or propagate capable of regeneration and giving rise to a plant which is true to such type ⁶.

“Denomination” in relation to variety or its propagating material or essentially derived variety or its propagating material means , the denomination of such variety as the case may be expressed by means of letters or a combination of letter and figures written in any language .⁷

“Variety” means a plant grouping except micro-organism within a single botanical taxon of the lowest known rank which can be –

- (i) defined by expression of the characteristics resulting from a given genotype of that plant grouping;
- (ii) distinguished from any other plant grouping by expression of at least one of the said characteristics; and
- (iii) considered as a unit with regard to its suitability for being propagated, which remains unchanged after such propagation , and includes propagating material of such variety , extent variety , transgenic variety , farmers variety and essentially derived variety .⁸

“ Farmers’ Variety” means a variety which-

- (i) has been traditionally cultivated and evolved by the farmers in their fields; or
- (ii) is a wild relative or land race of a variety about which the farmers possess the common knowledge; where farmer means any person who (i) cultivates crops by cultivating the land himself; or (ii) cultivates crop by directly supervising the cultivation of land through any other person; or (iii) conserves and preserves, severely

⁵ Section 2(c) The Protection of Plant Varieties and Farmers’ Rights Act 2001.

⁶ Section 2 (x) The Protection of Plant Varieties and Farmers’ Rights Act 2001

⁷ Section 66 of The Protection of Plant Varieties and Farmers’ Rights Act 2001.

⁸ Section 2(za) of The Protection of Plant Varieties and Farmers’ Rights Act 2001.

or jointly, with any person any wild species or traditional varieties or adds value to such wild species or traditional varieties through selection and identification of their useful properties.

“ Essentially Derived Variety” is a variety which is predominantly derived from another variety (protected or otherwise) and conforms to the initial variety in all aspects except for the differences which result from the act of derivation, and yet is clearly distinguishable from such initial variety .

“ Plant variety protection” means

- (i) in the case of trees and vines, eighteen years from the date of registration of the variety;
- (ii) in the case of extant varieties, fifteen years from the date of the notification of that variety by the Central Government under section 5 of the Seeds Act, 1966
- (iii) in the other cases, fifteen years from the date of registration of the variety.

Initially the certificate of registration shall be valid for nine years in the case of trees and vines and six years in the case of other crops and may be revived and renewed for the remaining period on payment of fees as may be fixed by the rules.

The **“ farmers’ rights”** as defined in the Act are:

- (i) a farmer who has bred or developed a new variety shall be entitled for registration and other protection in like manner as a breeder of a variety under this Act;
- (ii) the farmers’ variety shall be entitled for registration if the application contains declaration as specified in clause (h) or sub-section (1) of section 18;
- (iii) a farmer who is engaged in the conservation of genetic resources of land races and wild relatives of economic plants and their improvement through selection and preservation shall be entitled in the prescribed manner for recognition and reward from the Gene Fund.

Provided that material so selected and preserved has been used as donors of genes in varieties registrable under this Act;

(iv) a 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 .

IV. FARMERS RIGHTS , BREEDERS RIGHTS , RESEARCHERS RIGHTS AND PUBLIC INTEREST :

The Act , while providing for an effective system of protection of plant breeders' rights, also safeguards the rights of farmers and researchers . It also safeguards the larger public interest by providing for the grant of compulsory licences in certain circumstances .

IV.I BREEDERS RIGHTS⁹:

Breeders Rights over the varieties they have developed are more than adequately protected by the draft legislation. On registration, the Breeder has rights of commercialization for the registered variety either in his/ her own person or through anyone he designates. These rights include the right to produce, sell, market, distribute, import or export a variety, in short, full control over formal marketing.

The strong protection granted to a plant breeder over his/ her variety is seen in the section dealing with infringement of Breeders Rights where punishment in the form of substantial fines and jail terms has been prescribed for those who infringe the rights of the registered breeder.

⁹ Article on India's plant variety protection and Farmer's Rights Act, 2001 by Suman Sahai Gene Campaign J-235/A , Sainik Farms, Khanpur, New Delhi 110 062, India.

Penalties for infringing Breeders Rights

Violation of Breeders right can be construed at several levels. It applies to the variety itself as also to its packaging. Infringement will be established if the packaging is the same or even similar, such that the package could appear to be that of the Breeder. Legally, a similar looking package will be considered "Passing off" and so actionable. Any one other than the Breeder naturally can not use the registered name or denomination. The use of the same or similar name in any way, by action or even suggestion, will constitute a violation and will be punishable.

Penalties are prescribed for applying false denomination and for selling varieties to which false denomination is applied.

The Breeders Rights have been strengthened to the extent that if there is mere suspicion of violation or infringement, the onus of proving innocence is placed on the alleged violator. In any prosecution for falsely using a denomination, the burden of proof is reversed and it is incumbent on the alleged violator to prove that the consent of the Breeder was obtained. This is somewhat excessive and needs to be toned down. The normal course in law is for the accuser to furnish proof for the accusation and so it must remain in this case too.

Penalties can range from Rs. 50,000 to Rs. ten lakhs as well as a jail term ranging from three months to two years, depending on the severity of the damage caused. If the violator is actually selling, offering for sale or merely in the possession of a registered variety belonging to someone else, the punishment is somewhat worse.

The penalty remains the same , between Rs. 50,000 and ten lakh but the jail term applicable will not be less than six months, going up to two years. If the offence is repeated, the minimum jail term prescribed is one year , extending to three years and the fine starting at Rs. one lakh, can go up to Rs. 20 lakh.

The Indian legislation in providing a well-defined breeder's right provides sufficient incentive for the seed industry to invest in this sector. At the same time, it is important to recognize that IPR protection does not necessarily deliver a successful product. If a variety decisively provides an advantage, it will be bought, if it does not, it will fool the farmers for a few seasons and then fail. It is also necessary to keep in mind that all IPR systems must strike a balance between the monopoly granted to the IPR holder, in this case the Plant Breeder, and the benefits to society, in this case the farmers and consumers. Since nobody concerned with public interest would want plant breeding to shift into just a few hands, it is important to maintain competition and vitality in the plant breeding sector. That is why freedom and rights for other researchers to use all genetic material, including IPR protected material, is important. An IPR system in a country should not grant such strong rights to breeders that farmers suffer and their livelihoods are threatened. On the other hand, the breeders' innovation should be rewarded so that they continue to breed useful varieties to benefit agricultural and food security.

IV.II. RIGHTS OF RESEARCHERS :

The Bill has provisions for Researchers Rights which allows scientists and breeders to have free access to registered varieties for research. The registered variety can also be used for the purpose of creating other, new varieties. The Breeder can not stop other breeders from using his/ her variety to breed new crop varieties except when the registered variety needs to be used repeatedly as a parental line. In that case authorisation is required. Section 30 allows the use of any registered variety by any person using such variety for conducting experiment or research ; or the use of a variety by any person as an initial source of variety for the purpose of creating other varieties. The authorization of the breeder of a registered variety is required where the repeated use of such a variety as a parental line is necessary for commercial production of such other newly developed variety .

IV.III FARMERS RIGHTS :

The Act recognizes the farmer not just as a cultivator but also as a conserver of the agricultural gene pool and a breeder who has bred several successful varieties.

The Act makes provisions for such farmers' varieties to be registered, with the help of NGOs so that they are protected against being scavenged by formal sector breeders. The rights of rural communities are acknowledged as well. Farmers' Rights are defined in the following way :

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.;

Provided that the farmer shall not be entitled to sell branded seed of a variety protected under this Act."

Explanation: - for the purpose of clause (iii) branded seed means any seed put in a package or any other container and labeled in a manner indicating that such seed is of a variety protected under this Act.

This formulation allows the farmer to sell seed in the way he has always done, with the restriction that this seed can not be branded with the Breeder's registered name. In this way, both Farmers and Breeders rights are protected. The Breeder is rewarded for his innovation by having control of the commercial market place but without being able to threaten the farmers' ability to independently engage in his livelihood, and supporting the livelihood of other farmers. Further, the farmers have also been provided protection of innocent infringement when at the time of infringement a farmer is not aware of existence of breeder's rights. Farmers need not to pay any fee to Authority for any service under the Act

Importance of Farmer's Right to Sell Seed: The pivotal importance of the farmer having the right to sell (not save, not exchange, but sell) seed has to be seen in the context of seed production in India. If the farmer were to be denied the right to sell, it would not only result in a substantial loss of income for him but far more importantly, such a step would

displace the farming community as the country's major seed provider.

Weak Farmers Rights in the legislation will allow seed corporations to dominate the seed market. Strong Farmers Rights keeps the farming community alive and well all viable competitors and an effective deterrent to the take over of the seed market by the corporate sector. Control over seed production is central to food security which is in the forefront of national security.

IV.IV. OTHER KINDS OF FARMERS' RIGHTS IN THE ACT ¹⁰ :

➤ Farmers' Right on Seeds

The farmers' right on seeds is a traditional right enjoyed by farmers all along the history of agriculture. This right includes the right to save the seed from one's crop and use the saved seed for sowing, exchanging, sharing or selling to other farmers. It is fundamental to the conservation role performed by farmers. The process of conservation encompasses the total genetic variability in time and space, including traditional and new varieties; the farmers' right on seeds encompasses the total genetic variability, including protected varieties. The PPVFR Act, therefore, allows this right on seed to all varieties, including varieties registered under this Act .

The Act restricts farmers from selling seeds of a protected variety in packages and containers with labels bearing its registered name. To further safeguard this right on the seeds of registered varieties, the Act prohibits use of technologies like the terminator gene technology, which destroys the germination capability of saved seeds .

¹⁰ <http://www.mssrf.org/bd/bd-pub/Manual%20on%20farmers%20rights.pdf> page 20 .

➤ **Farmers' Right to Register Traditional Varieties**

The PPVFR Act allows the registration of traditional varieties or farmers' varieties . Registration of the variety grants PBR on the variety, which allows exclusive legal right to the PBR-holding farmers to produce and market its seed. Farmers are awarded PBR by the Act on their recognition as breeders.

Traditional varieties developed or conserved by a community of farmers and new varieties developed by one or more farmers are eligible for registration. In the case of registration of a traditional variety, it is important to involve all communities associated with its conservation, if there is no clear evidence to establish an exclusive role for the origin of the said variety. Similarly, when a variety developed by a farmer is registered, it is important to recognize spousal contribution under joint ownership . Farmers need not have to pay any fee either to register their varieties or to renew these registrations . This is a major incentive to the innovative breeders among farmers. On the contrary, professional breeders and public research institutions are required to pay separately Rs.5,000 to 10,000 as registration and renewal fees. The PPVFR Act is unique in respect of this right, because the plant variety protection laws of many other countries do allow only protection of new varieties bred by professional breeders.

➤ **Farmers' Right for Reward and Recognition**

In recognition of the important role farmers have been playing for the conservation of varietal wealth of crop plants, the PPVFR Act has a provision to reward and recognize individual farmers or farming and tribal communities for such contribution. According to the Act, a National Gene Fund is to be created to facilitate reward and recognition to eligible individual farmers and communities . This is provided as an incentive to encourage conservation undertaken by farming and tribal communities. Farmers conserving traditional varieties and wild species of crop plants are deemed eligible to receive reward and recognition.

➤ **Farmers' Right for Benefit Sharing**

Earlier sections have highlighted the important role of farmers' varieties for breeding new plant varieties. Usually one or more farmers' varieties or their derivatives are used as parents to breed new varieties. These farmers' varieties could be traced to have been contributed by one or more farming or tribal communities. It is also possible that the new variety that is registered under the Act has become popular among farmers. But because it is registered, its PBR-holder alone is entitled to commercially produce and market its seed. The popularity and exclusive marketing right may lead to huge seed sale and profits to the PBR-holder. The Act provides for equitable sharing of the benefit earned from the new variety with farming or tribal communities that had contributed varieties used as parents .

➤ **Farmers' Right to get Compensation for the Loss suffered from the Registered Variety**

The primary purpose of registration of a plant variety under this Act is to establish exclusive commercial right on the variety. Commercial demand arises from the capability of the variety for better agronomic performance. Some of the seed companies, however, promote their seed by making exaggerated claims on the agronomic performance of their varieties. Farmers purchasing and cultivating such seeds may eventually realize the deceit. The PPVFR Act has a provision to check such unfair marketing practices by breeders and their seed sellers. The Act requires that the seed be sold with a declaration on its agronomic performance and the cultivation conditions ensuring this performance. The performance could be higher yield, better pest or disease resistance, better quality, and so on. In the event farmers are not able to achieve the claimed performance on having cultivated under the specified conditions, the PBR-holder will be made liable to pay compensation to affected farmers .The Authority on confirmation of the compensation claim decides the amount of compensation to be paid by the PBR-holder. For establishing the compensation claim farmers may be required to prove that they had cultivated a specific variety with seed marketed by a specific PBR-holder, that they cultivated variety in accordance with the

recommended practices in recommended region and that they suffered an estimated loss due to poor performance of the crop.

Compensation claims made by a group of farmers belonging to one region or an association of farmers are likely to be more forceful than claims made by few scattered individual farmers. The PPVFR Rules are not very explicit to be helpful to farmers in this respect. Intensive capacity building to farmers is important for accessing legitimate compensation and minimizing the frivolous claims.

➤ **Farmers' Right to receive Compensation for Undisclosed use of Traditional Varieties**

The cause of benefit sharing arises from a declaration made by the breeder that the pedigree of a new variety has certain traditional varieties or traditional knowledge sourced from certain regions/communities. However, there can be situations where the breeder of a new variety may not disclose the correct identity of parental varieties or knowledge. This lapse may arise either from a honest ignorance on the identity and origin of the parental varieties or a dishonest suppression of parental variety identity. Under such circumstances if such parental varieties belonged to one or more rural communities, they may be denied the opportunity for benefit share due from the new variety. The communities concerned also may not have the capability to detect such use of their varieties or traditional knowledge in the breeding of a new variety. Under such situations, any third party who has a reasonable knowledge on the possible identity of the traditional varieties or knowledge used in the breeding of the new variety, is eligible to prefer a claim for compensation on behalf of the concerned local or tribal community. The third party could be an NGO, an individual, a government or private institution. Such compensation claims are to be submitted to the PPVFR-Authority by such third party. The Authority on verification of the veracity of the claim shall admit the same and decide on the compensation to be awarded. The awarded compensation will be remitted in the National Gene Fund by the PBR-holder. The National Gene Fund shall disburse the compensation to the party who made the claim. A good understanding of

plant varieties and professional skill in plant breeding science will help in detecting many of such eligible cases for compensation.

➤ **Farmers' Right for the Seeds of Registered Varieties**

The Act tries to achieve this objective by ensuring adequate availability of seeds of registered varieties to farmers at reasonable cost. Access to seed by farmers is important for availing the benefits of scientific crop improvement. While allowing exclusive right to the PBR-holder on commercial production and marketing of seeds, the Act directs the PBR-holder to meet farmers' demand for seeds of the variety at reasonable prices. According to the Act, when the PBR-holder does not satisfy this requirement three years after registration of the variety, farmers have the right to take the matter of non-availability of seed, its poor supply, or its high price to the PPVFR-Authority. On receiving such complaints and on its verification, the PVP Authority may take remedial actions. One of these actions may be enforcement of compulsory licensing. Compulsory licensing revokes the exclusive right on commercial production and marketing of seed granted to the PBR-holder and transfer this right to third parties determined by the Authority. This revoke of exclusive right is done for a period decided by the Authority. The third parties, who are given right to produce and market the seed, are required to meet the demands and supply seed at reasonable prices.

➤ **Farmers' Right for Receiving Free Services**

Considering the poor economic capability of farmers and with a view that this economic weakness shall not be a hurdle for accessing farmers' rights, the PPVFR Act totally exempts farmers from paying any fees. This exemption is applicable to individual, group or community of farmers. The exemption includes the fees required to be paid to the Registrar of Plant Varieties for registration of farmers' varieties, for conducting tests on them, for the renewal of registrations and the fees prescribed for opposition, benefit claim, etc. This exemption also covers fees on all legal proceedings at the PVPA-Tribunal or the Intellectual Property Appellate Board (IPAB) or any Court of law. This exemption, however, does not include fee on

lawyers privately hired by farmers to represent them at the Tribunal or Appellate Board or Courts.

➤ **Protection against innocent infringement**

The draft legislation has also attempted to address a concern voiced by several quarters, that when the new system of Plant Breeders Rights is imposed for the first time, there will probably be many cases of unknowing infringement of Breeders Rights. Section 43 specifies that the farmer can not be prosecuted for infringement of rights specified in the Act if he can prove in court that he was unaware of the existence of such a right.

➤ **Exemption from fees**

Further protecting farmers from the new set of provisions being put in place, the Bill stipulates that if farmers wish to examine documents and papers or receive copies of rules and decisions made by the various authorities, they will be exempt from paying any fees. Such fees would be payable by all other people.

IV. V PROTECTION OF PUBLIC INTEREST :

The new Act includes public interest clauses, like exclusion of certain varieties from protection and the grant of Compulsory Licensing. To secure public interest, certain varieties may not be registered if it is felt that prevention of commercial exploitation of such variety is necessary to "protect order or public morality or human, animal and plant life and health or to avoid serious prejudice to the environment".

V. CLAUSES THAT NEED AMENDMENT:

➤ **Benefit Sharing**

Benefit sharing is a new concept not available in any other law, giving protection to Intellectual Property Rights. This concept is introduced in the protection

of rights given to breeders to new plant varieties. The use of farmer varieties to breed new varieties will have to be paid for. Revenue will flow into a National Gene Fund. Despite its good intentions of protecting the interests of the farming community, the formulation of this section is likely to create problems in implementation because the language is ambiguous. The Gene Fund should be the recipient of all revenues payable to the farming community under various heads. Farming communities should collectively, rather than individually, access this money, except in clear cases where an identifiable farmer's variety has been used. Farmers should have the right to decide how this money that they have earned will be spent. The use of the money should not be restricted to conservation or for maintaining ex situ collections.

Benefit sharing means, such proportion out of the benefit accruing to the breeder by virtue of monopoly granted to him as may be determined by the Protection of Plant Varieties and Farmer's Rights Authority in favour of and for payment to the beneficiary.

The method for fixing and realising benefit sharing should be made simpler and easier to implement. One approach to fixing benefit sharing could be a system of lump-sum payments, based for example on (projected) volume of seed sale.

➤ **Protection against bad seed**

In providing a liability clause in the section on Farmers Rights, the farmer in principle is protected against the supply of spurious and/ or poor quality seed leading to crop failures. At present there is too much left to the discretion of the Plant Variety Authority which will fix the compensation. This could lead to arbitrary decisions and should be amended. If it is proven that the breeder has made false claims and the farmer has suffered a crop failure, then compensation should be awarded amounting to at least twice the projected harvest value of the crop.

Compensation should be large enough to be a deterrent. In addition, a jail term should be provided if the breeder repeats the offence.

VI. KIND OF VARIETIES REGISTERABLE UNDER THE PLANT VARIETY ACT ¹¹ :

1. A new variety if it conforms to the criteria of novelty, distinctiveness, uniformity and stability
2. An extant variety ¹²if it conforms to criteria of distinctiveness, uniformity and stability.

VII. OBJECTIVES OF PROTECTION OF PLANT VARIETIES AND FARMERS' RIGHTS ACT IN INDIA :

The objectives of the Protection of Plant Varieties and Farmers' Rights Act are:

- (i) **to stimulate** investments for research and development both in the public and the private sectors for the developments of new plant varieties by ensuring appropriate returns on such investments;
- (ii) **to facilitate** the growth of the seed industry in the country through domestic and foreign investment which will ensure the availability of high quality seeds and planting material to Indian farmers; and
- (iii) **to recognize** the role of farmers as cultivators and conservers and the contribution of traditional, rural and tribal communities to the country's agro biodiversity by rewarding them for their contribution through benefit sharing and protecting the traditional right of the farmers.

¹¹

¹²

An "Extant Variety" means a variety, which is—

- (i) notified under section 5 of the Seeds Act, 1966 (54 of 1966); or
- (ii) a farmers' variety; or
- (iii) a variety about which there is common knowledge; or
- (iv) any other variety which is in the public domain.

VIII. WHAT ARE REGISTERABLE PLANT VARIETIES IN INDIA?

Four types of plant varieties can be registered under PPVFR Act, 2001. -

1) NEW VARIETIES: A variety which is not in public domain in India earlier than one year before the date of filing; or outside India, in the case of trees or vines earlier than six years, or in any other case, earlier than four years.

2) EXTANT VARIETY: A variety which is notified under Seed Act, 1966 or a variety about which there is common knowledge or a farmers' variety or any other variety which is in public domain is considered as an Extant variety.

3) FARMERS' VARIETY: A variety which has been traditionally cultivated and evolved by the farmers in their fields or a variety which is a wild relative or land race of a variety about which farmers possess common knowledge.

4) ESSENTIALLY DERIVED VARIETY (EDV): An "essentially derived variety" shall be said to be essentially derived from such initial variety when it is predominantly derived from such initial variety, or from a variety that itself is predominantly derived from such initial variety, while retaining the expression of the essential characteristics that result from the genotype or combination of genotype of such initial variety and it is clearly distinguishable from such initial variety. An EDV conforms to such initial variety that results from the genotype or combination of genotype of such initial variety.

IX. PLANT VARIETIES CANNOT BE PROTECTED UNDER THE ACT:

A plant variety which is :

(i)not capable of identifying such variety; or

(ii)consists solely of figures; or

(iii)is liable to mislead or to cause confusion concerning the characteristics, value, identify of such variety, or the identity of breeder of such variety;

(iv)is likely to deceive the public or cause confusion in the public regarding the

identity of such variety;

(v) is comprised of any matter likely to hurt the religious sentiments respectively of any class or section of the citizens of India;

(vi) is prohibited for use as a name or emblem for any of the purposes;

(vii) is comprised of solely or partly of geographical name.

X. CRITERIA FOR PROTECTION / REGISTRATION OF VARIETIES :

1. NOVELTY: As per the act, on the date of filing of the application for registration, the propagating or harvested material of such variety has not been sold or otherwise disposed by the breeders (in India) before one year of application (or outside India) before four years of application. The criterion of novelty does not apply to the extant varieties including farmers' varieties.

2. DISTINCTIVENESS: The variety is considered distinct if it is clearly distinguishable by at least one essential characteristic from any other variety whose existence is a matter of common knowledge in any country at the time of filing of the application.

3. UNIFORMITY: It is considered uniform, if subject to the variation that may be expected from the particular features of its propagation. It is sufficiently uniform in its essential characteristics.

4. STABILITY: It is considered stable, if its essential characteristics remain unchanged after repeated propagation or, in the case of a particular cycle of propagation, at the end of each cycle.

XI. PROCEDURE FOR REGISTRATION :

The registration of a plant variety under the PPVFR Act is a legal process. This process

establishes the PBR on the plant variety in favour of the applicant(s). PBR is the legal ownership right granted on a plant variety similar to the legal ownership right on a property. PBR is inheritable according to succession laws, transferable and also salable

Who can apply for registration?

An application for registration can be made either individually or jointly with any other person by following:

- person claiming to be the breeder of the variety or his successor or assignee;
- a farmer or a group of farmers claiming to be the breeder of the variety;
- any person authorized by any of the persons specified above to make application on their behalf;
- any university or publicly funded agricultural institution claiming to be the breeder of the variety.

Under the Act “**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. The variety for which registration is sought must be one which is farmers’ variety; or an extant variety; or of such genera or species as the Central Government may specify by notification in the official Gazette other than the farmers’ varieties and the extant varieties.

Form of application

An application for registration of a variety must be filled in prescribed Performa.

It must be in respect of a variety, must state the denomination assigned to the variety

and must be accompanied by an affidavit stating that such variety does not contain any gene or gene sequence involving terminator technology. It must further contain a complete passport data of the parental lines from which the variety has been derived along with the geographical location in India from where the genetic material was taken. The application must also be accompanied by a statement containing a brief description of the variety bringing out its characteristics of novelty, distinctiveness, uniformity and stability. The application must contain a declaration that the genetic material or parental material acquired for breeding, evolving or developing the variety has been lawfully acquired.

The application for registration of a variety must be accompanied with prescribed fees and enough quantity of seeds of the said variety for the purpose of conducting tests to evaluate whether seeds along with parental material conform to the specified standards.

Acceptance and Advertisement of Registration Application

The Registrar may accept the application absolutely or with limitations on being satisfied about the particulars contained in such application. If the Registrar is satisfied that the application does not comply with the requirements of this Act, the application may be either rejected by him or the applicant may be required to amend the application to the satisfaction of the Registrar. However, the Registrar cannot reject the application for registration without affording an opportunity to the applicant to defend the case.

Once the application for registration of a plant variety is accepted, the Registrar will advertise the application with limitations, if any, and the specifications of the variety including its photographs or drawing in the prescribed manner for calling objections from the persons interested in the matter.

Opposition to the Acceptance

After the advertisement of acceptance, within three months from the date of the advertisement, any person, on payment of the prescribed fees, may give notice of

opposition to Registration, in writing, to the Registrar. The grounds for opposition may be any of the following:

- The person opposing the application is entitled to the breeder's right as against the applicant; or
- The variety is not registrable under this Act; or
- The grant of certificate of registration may not be in public interest; or
- The variety may have adverse effect on the environment.

The Registrar is empowered to pass an order upholding or rejecting the application by giving reasons for the same after considering all the grounds on which the application has been opposed .

XLI REGISTRATION AND TERM OF PROTECTION:

Once the application for registration of a variety, other than an essentially derived variety, has been accepted with or without opposition, the Registrar shall register the variety; issue a certificate of registration to the applicant sealed with the seal of the Registrar.

The breeder is required to deposit such quantity of seeds or propagating material of the registered variety in the National Gene Bank as may be specified for reproduction purposes at breeder's expense.

The period of validity of certificate of registration is nine years in case of trees and vines; and six years in case of other crops. This validity period can be reviewed and renewed on payment of the prescribed fees subject to a maximum period of validity, which is

- in case of tree and vines, eighteen years from the date of registration of the variety;
- in the case of extant varieties, fifteen years from the date of notification of that variety by the Central Government under Section 5 of the Seeds Act, 1966; and
- in other cases, fifteen years from the date of registration of the variety

XII. REVOCATION OF PROTECTION¹³ :

Section 34 lays down the grounds on which protection may be revoked . The protection granted to breeder may be revoked by the authority on the application of any interested party on following grounds:

- That grant of certificate of registration has been based on incorrect information by the applicant ;
- Certificate of registration granted to a person not eligible for protection.
- Breeder has not complied with the provisions of the Act or rules or regulations under the Act
- Breeder has failed to comply with directions of the Authority issued under the Act
- Grant of certificate for registration is not in the public interest .

XIII. OFFENCES AND PENALTIES¹⁴:

A person other than the breeder shall be held liable for prosecution if he applies the denomination of a registered variety or applies false denomination to a variety. The penalties imposed under the Act are as follows:

1. Penalty for applying false denomination:

A person who applies any false denomination to a variety or indicates the false name of a country or place or false name and address of the breeder of a registered variety in the course of trading such variety shall unless he proves that he acted without intent to defraud shall be punishable with imprisonment for a term of minimum three months and a maximum of two years, or with a fine of minimum Rs.50,000/ - and a maximum of Rs.5 lakhs, or with both if he applies any false denomination to a variety or indicates the false name of a country or place or false name and address of the breeder of the variety registered. ¹⁵

¹³ Law relating to Intellectual Property Rights by V.K. Ahuja page no. 541-542.

¹⁴ Chapter 68 Law relating to Intellectual Property Rights by V.K. Ahuja page no. 558- 560 .

¹⁵ Section 70 of The Protection of Plant Varieties and Farmers' Rights Act 2001.

2. Penalty for selling varieties to which false denomination is applied:

A person who sells, exposes for sale or has in possession for sale or for any purpose of trade or production of any variety to which false denomination is applied or indicates the false name of a country or place or false name and address of the breeder of a such variety is punishable under Section 71. The punishment is a term of imprisonment from six months to two years or a fine of rupees fifty thousand to rupees five lakh, or both.

3. Penalty for falsely representing a variety as registered:

A person who makes false representation as to denomination of a variety or essentially derived variety or their propagating material not being registered under the Act, to the effect that it is a registered variety is punishable with imprisonment for six months to three years, or fine of rupees one lakh to five lakh, or both a prison term and a fine.

4. Penalty for subsequent offence:

A person who has been convicted once for an offence under the Act faces heavy punishment for a second and every subsequent such offence: imprisonment for one to three years or a fine of two to twenty lakh rupees or both.

The provisions of the Act have the overriding effect. If there is anything in any other law in force, which may not be consistent with the provisions of this Act, the Act will prevail.

Civil remedies against infringement :

The civil remedies against infringement are injunction and damages. The damages may be calculated as the loss sustained by the breeder in relation to the profits he ought to have made or losses he might have suffered by reason of infringement committed by the infringer. The damages may be calculated also as the quantum of profits gamed by the infringer, the plaintiff may claim in one of the two ways and not of both. If the damages are claimed in terms of the loss sustained by the plaintiff and

the loss of reputation he suffered or the goodwill he lost, the plaintiff cannot at a later stage claim the damages in terms of the profits gained by the infringer or vice-versa. The suit for this purpose can be instituted by the registered breeder or by his agent or licensee, if specially authorized. Where, the agent or the licensee proposes to take action against the infringer he can do so only after due notice to the breeder. If the breeder does not co-operate, the agent or the licensee shall make the breeder a defendant in the suit. The Court in which, the suit may be filed in the District Court having the jurisdiction to try the suit. By injunction, the plaintiff may restrain through Court, the infringer to continue his act of infringement. The Court will grant an order during the pendency of the suit as an urgent remedy restraining the infringer from his acts of infringement taking into consideration the merits of the case and the balance of convenience. And makes such interim injunction permanent and absolute if the suit is decreed in favour of the plaintiff.

Appeals : All decisions made by the Registrar or by the Authority are appealable to the High Court. There is no appeal against the orders of Registrar to the Authority.

XIV. OTHER FEATURES OF THE PROTECTION OF PLANT VARIETIES AND FARMERS' RIGHTS ACT :

1. *Compulsory licence :*

The Act provides for the granting of compulsory license to a party other than the holder of the Breeder's certificate if it is shown that the reasonable requirements of the public for seeds have not been satisfied or that the seed of the variety is not available to the public at a reasonable price. The breeder is entitled to file an opposition but should the charge be valid, the breeder may be ordered by the Authority to grant a compulsory license under certain terms and conditions including the payment of a reasonable license fee. Compulsory License however will not be awarded if the Breeder can demonstrate reasonable grounds for his inability to produce the seeds .

While determining the terms and conditions of a compulsory licence the authority is to endeavour to secure reasonable compensation to the breeder of the variety relating to the compulsory licence having regard to the nature of the variety, the expenditure incurred by such breeder in breeding the variety or for developing it and also that compulsory licence of such variety possesses adequate means to provide to the farmers, the seeds or its other propagating material of such variety, timely and at reasonable market price. Section 50 provides for the flexible duration of compulsory licence. The duration may vary from case to case, keeping in view the gestation periods and other relevant factors, but in any case the duration shall not exceed the total remaining period of the protection of that variety.

2. Gene Fund :

A gene fund is created under the Act from the contribution received from national and international agencies/ benefit sharing from breeder/ annual fee payable to authority by way of royalties. This will help in the conservation and sustainable use of genetic resources both in-situ and ex-situ and for strengthening the capabilities of the panchayat in carrying out conservation and sustainable use. Fund will be applied for disbursing shares to benefit claimers (individual and organization), for compensation to village communities and benefit sharing award. Central Government shall constitute a National Gene Fund. The fund may consist of :

- (1) contributions made by registered breeders towards benefit sharing,
- (2) the annual fees payable by registered breeders as royalty to the Government,
- (3) compensations deposited as payable by breeders to village communities and
- (4) contributions received from National and International Organizations and other sources such as grants by the government, budgetary provision and donations. It is out of these amounts the Authority directs payments to benefit shares and to communities entitled to compensation.

3. National Register of Plant Variety :

A Register called National Register of Plant Varieties shall be kept at the head office and the name of all the registered plant varieties along with breeder's particulars such as names and addresses of the breeders, the right of such breeders in respect of registered varieties, the particulars of denomination of each registered variety etc will be maintained.

XV . CONCLUSION:

This Act is an Indian *sui generis* legislation; it is the legislation which provides an extensive protection to the farmers than any other legislation of any other country related farmers' right.

The Act recognizes the farmer not just as a cultivator but also as a conserver of the seed and a breeder who has bred several successful varieties. Moreover, the Act will bolster plant-breeding activity in the private sector. The drawback is that farmers will not benefit uniformly because the corporate companies would focus on hybrid seed production which would involve technology backed farming. Farmers belonging to lower of middle class would not be able to match up due to lack of awareness, capital and skills. Multi National seed companies would always have the edge over farmers due to their patented or licensed technology in the agriculture sector.

Finally, the Act is highly centralized. The Authority constituted under the Act, for the purpose of protecting farmers rights has regional offices and there is no linkage with the Taluka and village level. To make the Act effective it is necessary the Act should reach to the farmers and only linking with taluka and Panchayat level can do it.

The solution to these problems would be to increase expenditure of plant breeding technologies so as to reach out to the poor and increase awareness of

biotechnology amongst the lower classes. In addition, pest and nutrient management technologies can be made popular among the farmers belonging to the small and medium sections of the society.

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