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THE SUI GENERIS PROTECTION TO THE PLANT VARIETIES: FARMER'S RIGHTS V. BREEDER'S RIGHTS

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ABSTRACT

Protection of plant varieties relates to intellectual property rights over plant varieties that guarantee exclusive commercial rights to rights-holders for a specific period of time. Article 27(3) (b) of the TRIPS Agreement obliges all WTO member states to introduce such protection within certain set time frames through domestic legislation. These rights are one form of IPR that is aggressively imposed on developing countries and are often claimed to be a 'soft' patent regime. Plant variety laws are as threatening as biodiversity industrial patents and also represent an attack on the farming rights of other local communities. From a legal point of view, the protection of plant varieties in India remains a far from being settled issue even though the Plant Varieties Protection and Farmers' Rights Act was adopted in 2001 in accordance with the TRIPS Agreement. This study argues that the IP regime's goal should be to balance the competing needs of maximizing societal innovation while rewarding the individuals who contribute to that innovation appropriately. One of the main characteristics of the PGRFA Treaty is its emphasis on the rights of farmers. To this end, the study aims to analyze issues related to plant variety protection with reference to the TRIPS Agreement together with the Biodiversity Treaty and the PGRFA Treaty in the context of Protection of Farmers Rights and Breeders Rights.

KEY WORDS

Protection to Plant Varieties, TRIPS Agreement, UPOV Convention, Sui generis, Protection of Plant Varieties and Farmers' Rights Act, 2001

INTRODUCTION

In India, among the Total Work force, 86%¹¹⁶¹ of the work force includes the people from Unorganised sector (around 395 million people) and majority of the people around 253 million are engaged in the agricultural work on self-employed basis¹¹⁶². Agriculture is considered as the main source of business in India. Plant variety protection provides breeders with a financial incentive to engage in and work at plant breeding. IPRs encourage private new breeding method research and development, hence lowering the need for government financing for such operations. By providing developing countries with access to hybrid markets that can help them close their traditional agricultural deficits, PVP adoption aimed to remove one of the barriers to international agricultural trade. Plant variety protection, like all other IPRs, encourages foreign breeders to make high-risk investments in nations that offer sufficient protections, which raises foreign investment. The legal security provided by intellectual property rights is one of the most significant motivations for private sector engagement in agrogenetic modification. Developing nations emphasise the necessity of a national plant variety protection regime, as opposed to a similar system of protection in industrialised nations, for a number of reasons. First, in emerging countries, agriculture is closely related to the whole economy. Compared to wealthy countries, emerging countries have a larger agricultural population. The economic dependence of agricultural industries in the south sets them apart from those in the north. Smaller land holdings, labor-intensive farming methods, subsistence farming, and less

¹¹⁶¹ "Report on Conditions of Work and Promotion of Livelihoods in the Unorganised Sector"

¹¹⁶² Agricultural Statistics at a glance - 2018, Government of India

involvement in international trade are some of the differences.

Before the TRIPS Agreement went into effect, agricultural discoveries in India were not protected by intellectual property laws¹¹⁶³. The TRIPS Agreement's Article 27.3(b) mandates that WTO members offer intellectual property protection for plant varieties through "patents or an effective sui generis system, or by any combination thereof." The importance of the UPOV system stems from the fact that it offers an alternative to patent protection. Patentable inventions must satisfy the requirements of novelty, non-obviousness, and industrial applicability. Plant breeders' rights are assessed on a separate basis under UPOV (which only applies to plant varieties), and the variety must be unique, distinct, uniform, and stable. India was required to comply with the TRIPS Agreement's requirements by either adopting the UPOV model or passing its own unique statute. As a result, the 2001 Protection of Plant Varieties and Farmers' Rights Act was passed (PPV&FR Act). and is effective as of 2007.

RESEARCH QUESTION

- Whether the Sui Generis system's efficiency is competent enough in India?
- Whether the Farmers rights and the Breeders Rights are equally protected by the PVPFR Act?
- Whether there is any commercial exploitation of protected varieties by farmers?

RESEARCH OBJECTIVE

- To analyze present Sui generis system for protection of Plant varieties in India
- To examine the effectiveness of the PVPFR Act in terms of protection of Farmers Rights and Breeders rights
- To find out the commercial exploitation of protected plan varieties, if any.

RESEARCH METHODOLOGY

Doctrinal method of research is used in this research paper. Only Secondary sources of law are the basis for this research work

EVOLUTION OF THE PPV & FR ACT, 2001

The Plant Variety Bill was put up in December 1999 with the goal of starting the legislative process prior to the TRIPS adoption date of January 1, 2000. This is the first step in the development of India's sui generis plant variety protection. This proposal, which was mostly the legislation governing a plant breeder's rights, was by no means comprehensive. The act was sent to a joint parliamentary committee in case it wasn't quickly passed. After multiple hearings in 2000, the committee ultimately decided to drastically rewrite the legislation. It kept the primary clause governing the plant breeder's rights regime but included a significant new chapter on "the rights of the farmer." In essence, the Committee changed the initial draught by adding a component that, as will be shown in the analysis below, led to certain inconsistencies in the overall legal system envisioned by the Plant Variety Act¹¹⁶⁴. The Protection of Plant Varieties and Farmers' Rights (PPVFR) Act is Indian law that complies with TRIPS Article 27.3(b). The Indian government is attempting with this legislation to acknowledge the role played in plant breeding by both farmers and commercial plant breeders. It is the result of two sets of pressures on the government: one set from the global system to introduce IPP in order to recognise the contribution of commercial plant breeders to the development of new varieties, which was strengthened by the booming private seed industry in India; and the other set from farming communities opposed to the introduction of any type of IPRs in the agricultural sector¹¹⁶⁵. Because its entry was made easier when the Seed Act was amended in 1988, giving the private sector greater freedom to engage in the industry, the private seed business in India has advocated in favour of the establishment of IPP to include the

¹¹⁶³ Philippe Cullet and Radhika Kolluru, "Plant Variety Protection and Farmers' Rights", 24 Delhi Law Review 41 (accessed on 24 November 2022)

¹¹⁶⁴ Ibid 3

¹¹⁶⁵ Ibid 3

agricultural sector. The seed industry's main justification was that only the appropriate IPRs could provide incentives for the manufacture of improved seed kinds¹¹⁶⁶.

The farmers, however, benefited from the breeding work done by publicly supported organisations, which, starting in the middle of the 1960s, had produced the better seed types that had helped India's Green Revolution become a reality. These publicly sponsored institutions did not rely on IPRs; instead, government policymaking governed the institutions' operations. However, once India joined the WTO, the tide began to turn in favour of expanding IPRs in agriculture. Registration of essentially derived varieties (EDVs) is permitted by the PPVFR Act. The requirements for EDV registration are the same as those for new varieties. The breeder is given the only authority to create, offer for sale, market, distribute, import, or export the variety thanks to the registration. Although there was no legal requirement to do so, India adopted the PBRs system to preserve novel plant varieties by significantly borrowing from the UPOV Convention, notably the DUS criterion. Thus, despite the fact that India's system varies from UPOV in a number of ways, India did not fully take advantage of the chance to build a plant variety protection system that reflected the interests of the nation¹¹⁶⁷. In accordance with Article 27.3(b) of TRIPS, the PPVFR Act intends to "create an effective system for the protection of plant varieties, the rights of farmers and plant breeders, and to foster the production of new kinds of plants." And the acts main three goals are¹¹⁶⁸: -

- Protection of farmers' rights for their contributions made at any time to the preservation, advancement, and availability of plant genetic resources for the creation of new plant varieties is one of three main goals.

- PBR protection to encourage public and private sector investment in research and development for the creation of novel plant types;
- Putting Article 27.3 (b) of the TRIPS Agreement on PVP into practice.

SUI GENERIS PROTECTION OF PLANT VARIETIES IN INDIA

The TRIPS Agreement gives a hint as to what the term "effective" could entail. The rights to be granted by an IPR are either explicitly expressed or described as "equitable compensation" in the context of national enforcement of rights and methods for the multilateral prevention and resolution of conflicts. TRIPS uses the term "effective" in particular. This formulation contends that, in order to comply with the pertinent provisions of the TRIPS Agreement, a sui generis system must provide effective action against any act of infringement. The main drawback of this method is that it does not take into account the amount of protection needed or the requirements for a sui generis system being evaluated. India, which represents the vulnerabilities and aspirations of developing countries, is extremely important in the discussion around plant variety conservation. The reasons behind this are as follows:

- India is a country that owns germplasm and has access to a variety of genetic resources.
- It boasts the most modern stand in the nation. This is because there was a significant investment in agricultural research from scientists to technical support staff, particularly during the Green Revolution era, which solidified the scientific foundation.
- It has a large pool of skilled employees, allowing for the availability of comparable capabilities at a reduced price.
- A further benefit from India's perspective is the price of the technology itself. In contrast to other recent significant technologies, biotechnology is labor-

¹¹⁶⁶ "Mrinalini Kochupillai (2011) India's Plant Variety Protection Law - Historical and Implementation Perspectives"

¹¹⁶⁷ Ibid 3

¹¹⁶⁸ "Biswajit Dhar, Sui Generis Systems for Plant Variety Protection", (accessed on 24 November 2022)

intensive rather than capital-intensive. This is a situation that is ideal for a resource-rich but cash-strapped nation. Effectiveness and enforcement, according to one school of thinking, are influenced by the particular interests of owners of intellectual property rights and their desire to have any rights recognised and protected under Part III of the TRIPS Agreement. The formation of a protection system, on the other hand, that completely safeguards "all actors"—that is, commercial actors and other agricultural actors—involved in the conservation and development of plant varieties—is what is meant by "Effectivity." A few nations that lacked the time or funds to create a wholly unique and locally relevant sui generis regime chose to assume the rights of plant breeders under the UPOV without fully considering its implications ratify the UPOV Convention on February 24, 1999).¹¹⁶⁹ Among the crucial elements of a "effective" special-case system are:

- In accordance with Article 8 of the TRIPS Agreement, a sui generis protection regime should attempt to establish a framework that particularly supports "food security" in addition to continuing to safeguard inventors' interests.
- An efficient sui generis system merges sustainable development with the regime of intellectual property rights in line with Article 7 of the TRIPS.

The plant varieties that can be protected is outlined in Sections 14, 23, and 29¹¹⁷⁰ of the Act. Three categories of variations are included in Section 14: 1. farmers' varieties, 2. Extant varieties, and 3. New varieties. The genera and species that can be registered under the PPVFR Act for new varieties was notified by the Central Government. This suggests that the Indian Government would cap the number of genera and species that are protected by the Act at a figure that has not yet been determined. No genus or species would be removed from the notified list after notification

unless it was in the public interest. Four criteria have been used to define current varieties: The following varieties are considered to be in the public domain:

- a. varieties that have been registered under the Seeds Act of 1966;
- b. farmer varieties;
- c. varieties about which there is widespread information; or
- d. any additional varieties.

However, farmers' varieties have been characterized as

- a. varieties that have historically been grown and developed by farmers in their fields and
- b. a wild relative or landrace of a variety that farmers are familiar with.

Thus, Section 14¹¹⁷¹ offers opportunity to all plant stakeholders. Farmers and commercial plant breeders generally use alternative breeding methods to safeguard the plant types they create. The distinctness, uniformity, and stability of the types that meet the requirements for protection are listed in Section 15¹¹⁷². As a result, the UPOV Convention's guiding principles were used to define each characteristic in the legislation.

FARMERS RIGHTS VIS-À-VIS BREEDERS RIGHTS

The PPVFR Act's Chapter VI – Farmers rights specifically protects the interests of plant breeders and other villagers and local residents in two ways: first, by protecting their on-farm activities, and second, by offering benefits in the form of incentives for their contributions to farming. Breeders' rights are recognised by the PPVFR Act for seed and/or propagating material of the protected variety, and they include the following [Section 28(1)¹¹⁷³]: production, selling, marketing, distribution, exporting, and importing. The rights granted by UPOV '91 are equivalent to those that are outlined in this clause. Both breeders and farmers' rights are safeguarded by this. The breeder was recognised for his ingenuity, but he was unable

¹¹⁶⁹ Sudhir Kocchar- "How Effective is the Sui Generis Plant Variety Protection in India: Some Initial Feedback?" (accessed on 24 November 2022)
¹¹⁷⁰ The Protection of Plant Varieties and Farmers' Rights Act, 2001

¹¹⁷¹ Ibid
¹¹⁷² Ibid
¹¹⁷³ Ibid

to endanger the farmer's capacity to maintain the livelihoods of other farmers. Additionally, farmers have the right to compensate if a variety fails to perform as predicted under the given circumstances and results in crop failure¹¹⁷⁴.

The Act acknowledges that, with particular attention to the environment, farmers play a crucial role as both innovators and Agro-biodiversity conservators.

Farmer's Privileges under the PPV&FR Act of 2001:

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- Similarly, to a breeder of a variety, a farmer who has created or produced a novel variety is entitled to registration and protection;
- Farmers' varieties may be listed as extant varieties;
- In the same manner as he was permitted prior to the effective date of this Act, A farmer is allowed to save, use, sow, re-sow, exchange, share, and sell his or her agricultural products, including seed that is covered by the PPV&FR Act of 2001. However, a farmer is not allowed to sell branded seed that is covered by the PPV&FR Act of 2001 without the permission of the breeder; [Section 43¹¹⁷⁵].
- Farmers are entitled to praise and benefits for protecting the genetic resources of domesticated and wild relatives of commercially important plants;
- Farmers who assist in the preservation of soil races and wild relatives of plants whose genes have been used in varieties protected by the Act, as well as those who assist in the development of the same plants through selection and preservation, are entitled to a monetary reward. The National Gene Fund, which the Act established, will administer this reward. The conservation focus is

important for at least acknowledging the relationship between conservation and usage, although being limited for commercial use only.

- Additionally, Section 39(2) of the Act of 2001 contains a provision for farmers to be compensated for varieties that do not perform as expected.
- In any Act-related proceeding before the Authority, Registrar, Tribunal, or High Court, the Farmer shall not be required to pay any fees.

PRESENT SCENARIO OF PROTECTION OF PLANT VARIETIES IN INDIA

India rejected the UPOV model because it failed to protect farmers' rights and interests, which were at contradiction with or at the very least inconsistent with the rights of breeders that UPOV valued. The concept of farmers' rights is significant not just in India but also internationally. The Food and Agricultural Organization's approval of the International Undertaking on Plant Genetic Resources, 1983 reflects the global legal conceptualization of farmers' rights. In terms of their creative contributions, farmers' rights are equally significant to those of commercial plant breeders and cannot be disregarded or compromised. Farmers cannot be judged using the same yardstick to bring about rights parity since they operate in a very different environment than commercial plant breeders. Farmers' rights are not included in the UPOV Convention, hence only a few developing nations have ratified it thus far. India, a country whose economy and more than 50% of its people are dependent on agriculture, cannot afford to compromise on the interests of the farmers¹¹⁷⁶.

The Plant Variety Act is not the only piece of legislation that is relevant for protecting plant varieties in India at this time. At least two further related acts remain. Without explicit implementation-level coordination between these acts, it will be challenging to establish a

¹¹⁷⁴ Ibid 6

¹¹⁷⁵ The PPVFR Act, 2001

¹¹⁷⁶ Ibid 6

balance between economic usage and conservation. The 1970 Patents Act is the first of them. Plant variations are clearly distinguished from inventions since the Patents Act expressly forbids their patentability. There is a clear relationship to agriculture since patents on biological materials utilized for inventions in the field of agricultural genetic engineering will be pursued in the future. Additionally, there is a direct link between the farmer's current and existing variety. These connections are not covered by the Act. The 2002 Biodiversity Act is the second related law, and in reality, it largely focuses on regulating biological resources, gaining access to them, and dispersing knowledge and advantages. A substantial chance of conflict exists in practice since the Biodiversity Act particularly addresses IPR-related concerns¹¹⁷⁷.

CONCLUSION

It is crucial to draw the conclusion that IPR is in fact integrated in agriculture and sustainable development in light of the fragmented stance of international law. Agro-biodiversity preservation, general knowledge protection, and the extent of life patenting that affects the development of genetic engineering cannot be separated from the introduction of intellectual property rights in agriculture. The delicate balancing act between the complicated goals and vulnerabilities of the present is what makes good international judgments. Therefore, the only way to address the shared requirements of the north and the south is to harmonise the divided international law. Despite being hailed as progressive PVP legislation, the Plant Variety Act has a lot of drawbacks. As long as there remains a structure for the registration of farmers' varieties, it is initially questionable if farmers will ever be able to benefit from the Act's generally friendly provisions. But very few, if any, farmers will be able to benefit from their offerings because the majority of their cultivars don't match the

standards for distinctive character, uniformity, and stability. The second corollary's focus is on the essentially derived variants. On the one hand, the Act explicitly states that its objective is to offer a framework for protecting the interests of farmers and commercial breeders. However, although while India formally requests membership in the UPOV Convention Act of 1978, the Act also protects varieties that are fundamentally derived in addition to new kinds¹¹⁷⁸.

In accordance with Section 46.2(d), it will also be necessary to pay for the use of farmers' varieties in the creation of new kinds, with the proceeds going to the Gene Fund. Despite the best efforts to safeguard the agricultural community, this section's formulation is likely to have implementation issues because it was poorly, if not entirely, drafted. The plant variety authority has too much latitude in deciding on the compensation when it comes to the liability clause for bad seed protection. National NGOs working in the industry, including the Gene Campaign, believe that this will result in arbitrary rulings. They say that if a breeder made false claims and the farmer suffered crop loss as a result, compensation must be at least double the projected harvest value. Furthermore, if the crime is repeated, a jail term should be made available. As a result, even though the Act appears to have noble intentions in principle, it appears that in fact the 1999 Bill's initial emphasis will take precedence¹¹⁷⁹.

SUGGESTION

As a result, there are significant overlaps between the three Acts' objectives that call for particular coordination clauses. Additionally, there may be serious issues with benefit sharing when the three Acts are put into practice. For instance, despite the Biodiversity Act's provision for benefit sharing in situations when patents

¹¹⁷⁷ C. Niranjan Rao- "Indian Seed System and Plant Variety Protection".

¹¹⁷⁸ Ibid 8

¹¹⁷⁹ Bonwoo Koo, Carol Nottenburg and Philip G. Pardey- "Plants and Intellectual Property: An International Appraisal" (accessed on 24 November 2022)

pertaining to biological material are awarded, the Patents Act makes no mention of benefit sharing. In addition, new international legal responsibilities, such as the PGRFA Treaty, have come into existence since the Act was passed and must be seamlessly incorporated. Therefore, it may be said that there are two very distinct ways to look at the "Indian sui generis" system. The Plant Variety Act is a progressive statute since it explicitly acknowledges that farmers' rights may be thought of as intellectual property rights in the same manner as other products of human ingenuity. However, it is probable that the chapter on farmers' rights won't be put into effect because of its illogical design, lack of cooperation with other acts, and pressure from the government while joining the UPOV Convention.

Finally, in terms of overlaps, another related but significant problem, namely "agricultural subsidies," is the deciding factor for plant variety conservation. It is stated that as long as agricultural subsidies limit market access, the adoption of PVPs won't have a favourable effect on global agricultural commerce. For developing countries to gain from PVPs, interaction with other market mechanisms is crucial. Therefore, agricultural subsidy barriers must be removed before countries can benefit from PVPs. To achieve the various goals of the Act, including safeguarding the interests of both farmers and breeders and harmonizing matters like darker bearing on breeders' rights, further development will be needed. This will allow farmers to exploit the protected variety for commercial purposes without restriction, with minimal restrictions on the use of the protected variety's logo.

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