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PROBLEMS AND CONCERNS OF FARMERS RIGHTS UNDER IPR

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ABSTRACT

Farming communities are entitled to reward and need encouragement and support for continuing their efforts in enhancing biodiversity. This biodiversity is vital for the future food security of the world. It is also favourable for sustainable agriculture and environment friendly development of the world. At international level many conventions have been convened for the purpose of addressing the issues concerning the ownership of and access to plant genetic resources. Many provisions and concepts in the international agreements concerning the subjects like, International Undertaking, Union International Pour Law (UPOV), and Conservation on Biological diversity and Trips broadly inform, and directly constitute, key elements of India's legislation on Plant Variety protection and Farmers rights. Being a member of WTO, India enacted a separate sui generis legislation for this purpose rather than on Patent system. Indian legislation is unique legislation as it seeks to put Farmers right at par with those of Breeders. But some provisions related to Farmers rights are not clear and some other proves counterproductive to Farmers. Therefore there is a need to cure these deficiencies and to make it more effective.

Keywords: Benefit Sharing, Branded Seeds, Breeders Right, Farmers rights, Plant genetic resources.

1. INTRODUCTION

The concept of intellectual property evolved in 19th century, witnessed increased recognition and acceptance in Global community. One of the aspects of the intellectual property rights was the protection of breeder's rights and the recognition of their labour, skill and capital in the development of improved varieties. This extension of intellectual property rights to plant breeders could be ascribed to phenomenal changes that took place during the 20th century. Prior to green revolution technology, in the beginning of the second half of 20th

century, the scarcity of food had threatened the survival of the millions of people, especially in developing and under-developed countries. But the development and introduction of high yielding – hybrid varieties of many food crops helped to ease the situation world over. Since then the development of new and improved hybrid seeds was seen as a future guarantee for food security. In order to give boost to research in the development of the new and improved varieties of crops, some incentives were sought to be given to the breeders and genetic engineers. Accordingly, plant breeders were given protections and many international conventions were convened for this purpose.

With the passage of time, need was felt to accord some sort of protection and benefits to farmers as well. This includes the recognition of the role that farmers play in suitably using biodiversity and specifically in developing, conserving and enhancing agricultural biodiversity. It is in this context that the concept of providing intellectual property rights protection to plant varieties was introduced.

2. INTERNATIONAL LEGAL FRAMEWORK

Scientific advancement in the field of biotechnology and tissue culture has ushered in an agricultural revolution. Developments of new plant varieties and better quality of seeds have accelerated the agricultural development. It has, therefore, been internationally recognized that rights of plant breeders should not only be recognized but a *sui generis* legal mechanism be evolved to protect their rights as well. At global level the international convention for protection of new varieties of plant (UPOV) was concluded in 1961. The purpose of this convention is to recognize and to ensure to the breeder of a new variety or to his successor in title a right. The state parties to this convention constitute a union for the protection of new varieties of plants. But this convention does not afford protection to farmers.

The UTO –TRIPS also recognized the need to develop legal system for protection of plant varieties either through patent or an effective *sui generis* system. Considerable debate and ambiguity exists around the meaning of the term effective *sui generis* system, for no explanation is given of what such a system might look like. This ambiguity gives countries considerable flexibility in developing a system that, true to the meaning of *sui generis*, is 'of its own kind'.

UPOV system of plant breeder's rights would constitute an effective '*sui generis'* system. The UPOV system of plant breeder's rights is significant because it creates an alternative to patent protection. Whereas patents cover inventions and have the generic criteria of non – obviousness, novelty and industrial applicability. Plant breeder's rights extent to plant varieties only, and require that varieties be novel, distinct, uniform and stable.

After according protection to plant breeders, it was soon realized that the rights of the breeders were in conflict with those of farmers. In fact, it was argued that the breeders were enjoying the fruits of labour of farmers engaged in conserving, evolving and protecting traditional varieties which become basic material for evolving improved hybrid varieties. As a result the concept of farmers rights were put forth. The international undertaking (IU) adopted by FAO (food and agricultural organization) conference in 1983 is the first international agreement to address issues concerning access and proprietary claims to plant genetic resources (PGR's) food and agriculture. The international undertaking recognizes the plant breeder's rights; it also advances the concept of farmer's right as;

> *"Rights arising from the past, present and future contribution of farmers in conserving, improving and making available plant genetic resources, particularly those in the centers of origin /diversity. These rights are vested in the international community, as trustees for present and future generations of farmers, for the purpose of ensuring full benefits to farmers and supporting the continuance of their contributions."*

Another convention is convention of Biological Diversity (CBD) addresses issues similar to those taken up in the international undertaking, with the key difference being that the CBD is binding on its signatories. For this reason, certain provisions of the CBD are believed to provide legal counterweight to Article 27 (3) (b) of TRIPS. Article 3 of the convention affirms the sovereign right of states to their biological resources and like the international undertaking; the convention acknowledges the historic contemporary contribution of the local communities to the conservation and the cultivation of biodiversity, and to the body of knowledge about biodiversity. However both the international undertaking and convention on biological diversity falls short of providing farmers any exclusive proprietary control over varieties similar to the protection offered by plant breeder's rights.

The international treaty on plant genetic resources for food and agriculture (PGRFA), 2001 is the latest treaty in this field. The treaty aims at the promotion of sustainable agriculture and food security. It also focuses on the situation of farmers, their contribution to the conservation of agro biodiversity etc. this treaty gives recognition to farmers contribution in conserving and enhancing plant genetic resources for food and agriculture. However the treaty is silent with regard to farmer's rights over their land races. In fact the recognition of the farmer's contribution does not include any proprietary rights. The only rights that are recognized are the residual rights to save, use, exchange and sell farm saved seeds.

3. INDIAN POSITION

3.1. Emergence and Development

The emergence of the plant variety protection in India may be understood by examining changes in the policy environment during 1980's and early 1990's that facilitated the growth and the political organization of private industry. Prior to it, in India, protection to plant varieties through IPR's had been historically denied. The Patent act of 1970 was silent about it. A series of policy changes occurred during the late 1980's and early 1990 have to facilitate the development of breeding programmes in the private sector. The introduction of these policies facilitated the growth of the private sector plant breeding in India.

After joining Trips Agreement, it became necessary for India to enact a law providing protection to plant breeders for new varieties developed by them. At the same time there was an intense campaign by different NGO's and the civil society for the inclusion of provisions according adequate protection to Indian Farmers. Being a member of WTO India also realized the need to protect interests of plant breeders, farmers and promote conservation of genetic resources and seed industry. It was thought proper to enact a separate *sui generis* legislation for this purpose. As a result, the main legislative instrument in India, for the protection of rights of plant breeders and farmers, that is, the Protection of Plant Varieties and Farmers Rights Act, 2001was passed. This Act is based on UPOV convention. But it recognizes the role of farmers as cultivator and conservers and contributions of traditional rural and communities in the country's agro – biodiversity by making provisions for benefit sharing and compensation and also protecting the traditional rights of farmers. The Act

provides for the establishment of an effective system for the protection of plant varieties, the rights of farmers and plant breeders.

The Act seeks to put farmer's rights at par with breeder's rights, apart from granting to them the traditional rights like, right to save, sow, re-sow etc. of their farm produce. The Act envisages that the farmers should be treated like commercial breeders and should receive the same kind of protection for the varieties they develop. However, the farmer is not entitled to sell the 'branded seed' of a protected variety.

The Act also provides avenues for benefit sharing between commercial plant breeders and the farmers as the protectors and developers of traditional varieties on their lands. A farmer who is engaged in the conservation of the genetic resources of land races and wild relatives of economic plants and their improvement through selection and preservation shall be entitled for recognition and reward from the Gene Bank. Any person or Government or non- Government organization can register a community claim on behalf of any village or local. The Act provides for an obligation on registered breeder to any to any farmer, as conserver of a plant genetic material, which material is used by such breeder for evolving a new variety.

3.2. Legal Framework

The main legislative instrument in India, for the protection of rights of plant breeders and farmers is the *Protection of Plant Varieties and farmers Rights Act, 2001*. The Act essentially constitutes Governments response to its obligations under Article 27(3) (b) of the TRIPS. The Act provides for the establishment of an effective system for the protection of plant varieties, the rights of farmers and plant breeders. The Act encourages the development of new plant varieties by engaging in breeding experiments and ensures that the breeder is adequately rewarded for his investment of skill, labour and capital. The Act is enacted to achieve following objectives:

1) To stimulate investment for research and development, both in public and private sector for the development of new plant varieties for accelerated agricultural development in the country.
2) To facilitate the growth of seed industry in the country, which will ensure the availability of high quality seeds and planting material to the farmers?
3) 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 new plant resources.

Many provision and concepts in TRIPS, UPOV, the international undertaking and conservation of biological diversity broadly inform, or directly constitute key elements of India's legislation on Plant variety protection and Farmers rights. India uses the *sui generis* option to construct legislation that establishes Plant Breeders rights based on the UPOV model, and articulate a concept of Farmers rights that derives from the international undertaking. The Act therefore focuses upon the establishment of plant breeder's rights and farmers rights. The regime for plant breeder's rights largely follows the model provided by UPOV and the criteria for registration are the same as those found in UPOV, namely novelty, distinctiveness, uniformity and stability. The Act also seeks to put farmer's rights at par with breeder's rights, apart from granting traditional rights (generally in the form of exemptions) to them. The Act envisages that the farmers should be treated like commercial breeders and should receive the same kind of protection for the varieties they develop. The Act also

provides avenues for benefit sharing between commercial plant breeders and the farmers as the protectors and developers of traditional varieties on their lands.

3.2.1. Breeders Rights

Under the provisions of this Act, the word "breeder" has been given a broader meaning. Breeder means any person or group of persons or a farmer or group of farmers or any institution which has bred, evolved or developed any variety. This definition confers equal status to the farmers as those of breeders, so for as it enables them to register the varieties they have traditionally developed through centuries. For registration of a new variety, it shall confirm to the criteria of novelty, distinctiveness, uniformity and stability. However, the criteria of novelty are dropped for the registration of an 'extant variety.' An extent variety is registrable within a specified time if it confirms to such criteria of distinctiveness, uniformity and stability.

The Act confers an exclusive right on the breeder of a registered variety or his successor, his agent or licensee to produce, sell, market or distribute, import or export the variety. Such a right shall be available for a period of nine years in the case of trees and six years in case of other crops. The term may however be reviewed for the remaining period on payment of fees specified for the purpose. But the total period shall not exceed 18 months in case of trees and vines, 15 years in case of extent varieties and other varieties from the respective dates of their notifications. The breeder may authorize any person to produce, sell, market or otherwise deal with the registered variety subject to certain conditions.

3.2.2. Farmers Rights

Indian legislation is the first legislation in the world to grant formal rights to the farmers. The Act recognizes farmers as the cultivator, conserver and the breeder who has bred several varieties. The farmer who has bred or developed a new variety has a right to register it as an ordinary breeder. Farmers have been given a right to save, use, sow, re-sow, exchange, share or sell his farm produce including seeds of a protected variety. However, the farmer is not entitled to sell the 'branded seeds' of a protected variety. Right to sell seeds by a farmer has been given because in India, the farming community is the largest seed producers and if this right is denied it would result in a substantial loss of income from them and would displace the farming community as the country's major seed provider.

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 for recognition and reward from the Gene bank. Any person or government or non – government organizations can register a community claim on behalf of any village or local community and have it duly recorded at notified centre. Thus it enables the registration of farmers varieties even if the farmer themselves cannot do this due to illiteracy or lack of awareness.

There are other provisions that are favourable to the farmers for instance; a right established under the Act is not to be deemed to be infringed by a farmer who at the time of such infringement was not aware of the existence of such right. Further, any breeder who wants to use farmer's varieties for creating essentially derived varieties must seek express permission from the farmer involved in the conservation of such varieties. The Act provides for an obligation on registered breeder to pay farmer, as the conserver of a plant genetic material, which material is used by such breeder for evolving a new variety. The amount of benefit payable to the beneficiary is determined by the authority established for this purpose

under the Act. The authority on receipt of the certificate of registration is to publish contents of the certificate and invite claims of benefit sharing.

The Act provides for registration of 'Extent varieties' and it is defined to include many varieties, including farmer's varieties that are already in the public domain. Section 14 of the Act makes farmers variety separately eligible for registration. While detailed eligibility criteria of registration have been laid down for new and extent varieties, no separate criteria have been laid down for the purpose of registration of farmer's variety, except that a farmer's variety need not be new/ novel.

4. PROBLEM AND CONCERNS

The Act recognizes the Farmers right to sell his farm produce. However he is not entitled to sell "Branded seed" of a variety under section 39 of the Act. The provisions related to branded seeds are ambiguously worded. It states that, "…*provided that the farmer cannot sell the branded seeds of the variety protected under the Act."* This has been taken to mean that a farmer cannot sell his produce 'as branded seeds'. But it has been argued that the provision 'clearly restricts the rights of the farmer to sell the protected variety, even the right to sell surplus seeds of protected variety…'if it is a branded seed. This places a farmer in a disastrous situation, where he cannot sell his surplus produced from sowing the seeds of the branded variety. He is left with only one option of selling his produce back to the breeder. If the breeder refuses to purchase such seeds that will practically amount to denying an Indian farmer of his Livelihood.

Secondly if a farmer registers his variety that has been developed by him through centuries, he shall lose all his rights in it after a maximum period of 18 years, after which it falls in public domain. But the problem becomes grave in view of peculiar conditions of Indian farmers who have neither means nor skill to commercially exploit their variety. Though it is claimed that the Act seeks to put farmer's rights at par with the breeder's rights, but the two are not similarly situated. Therefore, the provisions in its present form strengthens the 'common heritage' regime in the long run; where the farmers cannot adequately exploit their protected varieties during the period of protection and can have no claim once that period is over. Even during the period of protection the scope of claiming benefit is narrowed down. If a farmer registers his variety, he cannot claim compensation when it is used by another breeder for the development of new varieties is repeatedly used as a parental line, in which case the authorization of the breeder of registered variety is necessary under the Act.

Thirdly, breeder has all the avenues of commercially exploiting his variety but that is not the case with farmers who in India are usually illiterate and ignorant about their rights. So, even if they register their varieties, or someone else registers it on their behalf, they may get nothing for non- awareness and non availability of adequate means for commercial exploitation of the same.

Fourthly, the provisions for benefit sharing contained in section 24 are poorly drafted. These are general in nature and are applicable to all the 'varieties registered under the Act.' Therefore, farmers variety registered under the Act shall also be open to the claims of benefit sharing. There is neither provision in the Act nor any rule in the rules appended to the Act that restricts the claims of benefit sharing to such varieties.

Fifthly, while the infringement of rights of a breeder has been made penal, the violation of the rights of the farmers has only civil consequences.

Sixthly, the Act makes provisions for the establishment of the Gene fund. The purposes for which the money out of the Gene fund can be used have been prioritized and the utilization of the fund for paying reward to the farmers has been given the least priority which is not in favour of the famers.

Seventhly, there is no provision in the Act that would guarantee the benefit sharing to the farmers for the use of traditional knowledge evolved and preserved by them.

Eighthly, Section 42 protects farmers from innocent infringement provided that the farmer accused must prove his innocence. It is submitted that, the requirement of a farmer to prove his innocence may place him in a difficult situation. Given their low legal literacy, they may not be able to spell out clearly their innocence when placed against a giant breeder, like an MNC, which has all the means and expertise at their disposal. More so, it is not clear whether they can take the assistance of NGO's in their legal battle.

5. CONCLUSION AND SUGGESTIONS

Farming communities need recognition of their past, present and future efforts in conserving, developing, and making available plant genetic resources. In the process of conserving and developing these resources the farming communities have evolved different practices and traditions which now constitute both their basis of livelihood and culture. These include the practices like selling of seeds, saving of seeds for re-sowing in next season and sharing and exchange of seeds for acquiring better quality of seeds. These practices need to be protected in order to protect the livelihood of the farmers. Therefore many conventions have been convened for the purpose of addressing the issues concerning the ownership and access to plant genetic resources.

After adjoining TRIPS agreement, it became necessary for India to enact a law providing protection to Plant breeders for new varieties developed by them and it was thought proper to enact separate *sui generis* legislation for this purpose. As a result, the main legislative framework for the protection of rights of plant breeders and farmers, that is, the protection of plant varieties and Farmers rights Act, was passed 2001. The act attempts to draw a balance between the Farmers rights and Breeders rights. It contains provisions that deal with the rights of both the groups with the overall objective of accelerating agricultural development for future food security. The Act takes into consideration the peculiar conditions of the Indian Farmers and contains provisions which help in effective realization of their rights. There are many provisions in the Act which are innovative and pro-farmers. These include exemption from payment of fees, protection against innocent infringement, right to claim compensation in case of loss, entitlement of NGO's to assist farmers in realizing their rights, prohibition of the use of the terminator Gene technology, establishment of the gene fund etc. But at the same time there are some provisions related to the Farmers right in the Act which are not clear and some others may prove counterproductive to Farmers.

Therefore following amendments are suggested in order to make it more effective.

- It is desirable that a new clause be added to section 14 to the effect that would distinguish 'extent varieties' from 'farmer's varieties' and clear cut criteria be laid down for the registration of the same.
- Keeping in view the peculiar conditions of the Indian Farmers, the claims of benefit sharing should not be applicable to 'Farmers varieties' and an express clause exempting 'Farmers variety' from such claims should be incorporated in the relevant section of the Act.

- Since Indian Farmers lack expertise and do not have adequate means to make full commercial exploitation of a variety registered by them, they should be allowed to claim compensation from any breeder using that variety even after that period of protection is over.
- It is desirable that the words 'branded seeds' in the proviso to Section 39 (iv) be replaced by the words 'as branded seeds' in order to make it more clear.
- The provisions relating to paying of compensation in case of false claim by a breeder should be redrafted and provision be made for payment of so much of compensation as to have a deterrent effect upon the breeder. The repetition of the Act should be made penal with stricter jail term.
- A provision for free legal assistance to the farmers in order to establish their innocence in the case of innocent infringement should be incorporated.

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