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Plant varieties and farmers' rights: a balancing act

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India, an emerging giant in the global economy, continues to depend on the agricultural sector for food security and employment. Research and development in the agricultural sector, improved production technologies and the availability of high-yield varieties (including during the Green Revolution) fuelled a 350%-plus growth in agricultural production between 1950 and 2008. Even so, plant varieties and farmers' rights in India have not received as much attention as industrial property rights. The Seeds Act 1966 merely laid down standards and procedures for the regulation of seed quality and did not envisage grant of proprietary rights. Further, the Patents Act 1970 does not provide patent protection for:

- discoveries;
- methods of agriculture or horticulture;
- plants and animals in whole or in part, including seeds, varieties and species; and
- essentially biological processes for the production or propagation of plants.

However, awareness of plant varieties has increased in developed countries. The Agreement on Trade-Related Aspects of Intellectual Property Rights, signed by India in 1994, requires protection of plant varieties through patents, an effective *sui generis* system or any combination thereof. Hence, an effective system in India for the protection of plant varieties and the rights of farmers and plant breeders was considered necessary – specifically, in order to:

- encourage the development of new plant varieties;
- accelerate agricultural development; and
- facilitate the availability of high-quality seeds and planting material for farmers.

To meet these objectives, the Protection of Plant Varieties and Farmers' Rights Act was introduced, providing integrated protection to both plant varieties and farmers' rights. Although the legislation was enacted in 2001, its provisions came into force in 2005 and 2006. To implement the act, the Protection of Plant Varieties and Farmers' Rights Rules 2003 were enacted.

UPOV and New Agricultural Policy

The International Union for the Protection of New Varieties of Plants (UPOV) Convention was adopted in Paris in 1961. It was subsequently revised in 1972, 1978 and 1991. Although India has not acceded to UPOV, Indian legislation largely follows the framework of the 1978 revision and borrows certain elements from the 1991 revision. UPOV makes breeders' rights a priority of policy making and does not provide for the concept of farmers' rights.

In 2000 India introduced the New Agricultural Policy in order to promote technically sound, economically viable, environmentally non-degrading and socially acceptable use of natural resources and maintain a steady growth rate in agricultural productivity to meet the increasing demand for food. The New Agricultural Policy further seeks to encourage private investment in agriculture, increase agricultural yields and develop new crop varieties with higher nutritional value in order to ensure food and nutritional security. In parity with international developments regarding the protection of plant varieties, the New Agricultural Policy also expressly required that legislation be enacted to protect plant varieties.

Protection of Plant Varieties and Farmers' Rights Act

Registration of varieties

The Protection of Plant Varieties and Farmers'

Rights Act defines a 'variety' as a plant grouping within a single botanical taxon of the lowest known rank, which can be:

- defined by the expression of the characteristics resulting from a given genotype of that plant grouping;
- distinguished from any other plant grouping by expression of at least one of those characteristics; and
- considered as a unit in terms of its suitability for propagation, which:
  - remains unchanged after such propagation; and
  - includes propagating material of the same variety, extant variety, transgenic variety, farmers' variety or essentially derived variety.

The act defines a 'farmers' variety' as a variety which has been traditionally cultivated and evolved by farmers. 'Extant varieties' include varieties that have been notified under the Seeds Act, farmers' varieties and 'commonly known' varieties. Broadly, an 'essentially derived variety' is a variety that:

- has been predominantly derived from an initial variety (with the breeder's authorisation and subject to agreed terms and conditions);
- retains the expression of the essential characteristics that result from the genotype or combination of genotypes of the initial variety; and
- is distinguishable from the initial variety.

For a new variety to be registrable under the Protection of Plant Varieties and Farmers' Rights Act, it must conform to the tests for novelty, as well as distinctiveness, uniformity and stability (DUS). The act lays down criteria for each test. An essentially derived variety must be dealt with as a new variety under the act. However, the criterion of novelty does not apply to the registration of extant varieties (including farmers' varieties).

The variety for which registration is sought ought not contain any gene or gene sequence involving terminator technology. Further, the application must contain the complete passport data of the parental lines from which the variety has been derived, along with the geographical location in India from which the genetic material has been taken and all information relating to the contribution of any farmer, village community, institution or organisation in breeding, evolving or developing the variety.

The act establishes an opposition mechanism on advertisement of an application in the *Plant Variety Journal*. Once a variety has been granted registration, a certificate of registration is issued to the applicant and the details are published. A certificate of registration is valid for:

- nine years in the case of trees and vines (renewable up to 18 years); and
- six years in the case of other crops (renewable up to 15 years).

For extant varieties, the total period of validity must not exceed 15 years from the notification date. For the purpose of registration under the act, the government has categorised 107 crops and species as new varieties and 114 crops and species as extant or farmers' varieties.

Breeders' rights

A 'breeder' is a person, group of persons, farmer, group of farmers or any institution which has bred, evolved or developed any plant variety. On registration, the breeder or its successor, agent or licensee receives the exclusive right to produce, sell, market, distribute, import, export or otherwise deal with the variety.

Farmers' rights

The Protection of Plant Varieties and Farmers' Rights Act recognises the multiple roles of a farmer (ie, cultivator, conserver of the genetic pool and breeder). Having bred or developed a new variety, a farmer is entitled to registration and other protection in the same manner as a breeder. Further, a farmer engaged in the conservation of genetic resources is entitled to recognition and reward. Also, a farmer may save, use, sow, re-sow, exchange, share or sell farm produce that includes seed from a variety protected under the act in the same manner as before the act came into force –

"The Protection of Plant Varieties and Farmers' Rights Act recognises the multiple roles of a farmer (ie, cultivator, conserver of the genetic pool and breeder)"

although the farmer may not sell the branded seed of a variety protected under the act.

Infringement and penalties

A right established under the Protection of Plant Varieties and Farmers' Rights Act is infringed when an unauthorised party:

- sells, exports, imports or produces a registered variety; or
- uses, sells, exports, imports or produces any other variety while giving it a denomination that is identical or deceptively similar to that of a registered variety, so as to cause confusion among the general public.

Further, penalties have been prescribed for:

- falsely applying the denomination of a registered variety;
- selling varieties to which false denominations have been applied; and
- falsely representing a variety as registered.

The act prohibits an innocent farmer from being held liable for infringement.

Protection of Plant Varieties and Farmers' Rights Authority

The Protection of Plant Varieties and Farmers' Rights Act establishes the Protection of Plant Varieties and Farmers' Rights Authority, responsible for:

- registering varieties;
- providing measures for the development of new varieties;
- considering applications for compulsory licensing; and
- protecting the rights of farmers and breeders.

In line with its obligations under the act, the authority has established the Plant Varieties Registry, the National Gene Bank, a network for DUS testing and a database of varieties in common knowledge. It has also established a 'farmers' cell' to provide assistance to farmers in connection with registration of their varieties and undertake training and awareness programmes.

Bene t sharing and rights of communities

The Protection of Plant Varieties and Farmers' Rights Act establishes a benefit-sharing mechanism for varieties other than essentially derived varieties. The Protection of Plant Varieties and Farmers' Rights Authority can invite claims of benefit sharing on registration of a variety and determine the merit of each claim after hearing each party.

The act further recognises the contributions of indigenous people and local communities in the evolution of varieties and allows any person, group of persons or organisation to claim on their behalf. On verifying and ruling on a claim, the authority may order a breeder to pay compensation to the National Gene Fund.

National Gene Fund

The Protection of Plant Varieties and Farmers' Rights Act does not contemplate a royalty arrangement enforceable by farmers against other private parties, but instead establishes the National Gene Fund. Benefit-sharing payments, compensation payable to village communities, annual fees from breeders and contributions from national and international organisations accrue to the National Gene Fund, and will be used for benefit sharing, conservation and the sustainable use of genetic resources. Further, the government has notified rules for recognising and rewarding farmers engaged in the conservation of genetic resources.

Interpretation

Few provisions of the legal framework for breeders' and farmers' rights have been tested in contentious proceedings. In 2011 the Delhi High Court dismissed a petition to block an order of the registrar of the Plant Varieties Registry granting issuance of certified copies of an application to a third party. The court held that complete disclosure must be made by the applicant and there is no secrecy or confidentiality in the registration process. It also observed that no right vests in the applicant to be heard on the issue.

In 2013 the Delhi High Court ruled that the registrar may extend the time limit for filing an opposition notice based on the absence of any exclusionary words or negative language in the Protection of Plant Varieties and Farmers' Rights Act. The court, observing that the relevant rules leave much to be desired, relied on the form prescribed for seeking a time extension and the intent and purpose of the act.

Recently, the Delhi High Court ruled on whether parent lines of extant hybrid varieties can be considered as novel plant varieties for the purpose of registration. In other words, could a parent line be considered as a new variety on account of its hybrid being known in the market? Relying on the definition of 'propagating material',

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the court held that there could be no novelty in the parental line since its propagating or harvesting material (ie, the hybrid seed) was sold or otherwise disposed of.

Trends

The plant variety registration procedure was initiated in 2007. Out of 10,998 applications filed for protection from May 21 2007 to February 10 2016, the majority were filed by farmers (6,322), followed by private entities (3,204). While 1,470 applications were filed by public organisations, only two were filed by individual breeders.

Regarding categories of application, typical varieties constituted the majority (8,102 applications). Some 1,428 applications were filed in respect of hybrid varieties, of which the private sector contributed the most. Regarding types of variety, more than half (6,315) were filed for farmers' varieties. The applications filed for extant varieties totalled 2,401, a little ahead of applications filed for new varieties (2,103). The fewest applications were filed for essentially derived varieties (179).

A study of crop groups reveals that most applications (6,459) were filed for cereal crops, of which 4,913 pertained to rice. Other major cereal crops for which applications were filed include maize, sorghum and wheat. The fewest applications were filed for trees (two). Commercial interest in developing flowers and plantation crops appears to be negligible, with 26 and 23 applications, respectively. Tetraploid cotton has drawn the maximum private investment, with 962 applications filed by private entities.

Challenges

The Protection of Plant Varieties and Farmers' Rights Act is progressive in that it endeavours to distribute rights equitably between several sectors. However, certain provisions require serious reconsideration in order to achieve the underlying legislative intent.

The law directs revenue into the National Gene Fund, but the issue remains of how those funds can best be used. It has been advocated that farming communities should collectively access the revenue deposited in the National Gene Fund and determine suitable avenues of expenditure, except where an identifiable farmer's variety has been used. Further, a clear procedure for determining and realising benefit sharing must be laid down. Although the act acknowledges and provides for the registration of farmers' rights, farmers depend on the Protection of Plant Varieties and Farmers' Rights Authority for benefit sharing and compensation claims.

In cases where the propagating material is not in line with the disclosed information, the determination of compensation should not be left to the sole discretion of the authority; it should be based on actual loss, factoring in the projected harvest value of the crop. Further, a review of the trends in plant variety applications reveals that the private sector has largely focused on hybrid crops and there is a need to incentivise investment in other crops. In terms of infrastructure, the Plant Varieties Protection Appellate Tribunal envisaged under the act is yet to be constituted – indeed, the transitional provision empowering the IP Appellate Board to exercise the jurisdiction of the tribunal (with the appointment of a technical member) has not yet taken shape.

Conclusion

Developed and developing countries have taken widely divergent paths in respect of plant variety protection. While developed nations opt for stringent protection of breeders' rights, in developing countries such as India where the population is still largely dependent on the farming sector, strong protection for traditional knowledge and farmers' rights is indispensable. It is thought that farmers' rights limit returns for breeders, which can discourage private investors. This places a greater burden on public research institutions for the development of varieties. As India is the third-largest producer of farm and agricultural products, with such products comprising 10% of the country's total exports, new incentives for innovation and private investment must be developed – the benefits to overall agricultural productivity cannot be underestimated. ■

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