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FARMERS' RIGHTS & AGRICULTURAL SECURITY: INDIA'S PLANT VARIETY PROTECTION AND FARMERS' RIGHTS ACT, 2001

The 1986 GATT Round, popularly known as the Uruguay Round, brought in new elements into the trade discussion, specially relating to agriculture. One of the most controversial agreements of the Uruguay Round is that relating to the granting of Intellectual Property Rights on biological materials embodied in the TRIPS chapter. TRIPS refers to Trade Related Intellectual Property Rights and specifically requires member nations to grant patents on microorganisms, non/biological and microbiological processes as well as effective IPR protection for plant varieties.

TRIPS provide 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 the *sui generis* option instead. The *sui generis* system (translating roughly into *of its own kind*) means any system a country decides on provided it grants effective Plant Breeders Rights. TRIPS does not specify what kind of Breeders Rights and it does not say what else a member state can put in its law, apart from Breeders Rights. In short, TRIPS is a flexible system, which leaves a lot to the discretion of members. As a response to the TRIPS agreement, India has started enacting a series of domestic laws to implement the commitments it has made. The Plant variety Protection and Farmers, Rights Act, 2001, is the Indian *sui generis* legislation.

The Indian law, which has been hailed as progressive, pro/developing country legislation, has some notable features. Apart from a well-defined Breeder's Right, it has strong and proactive Farmers Rights. In fact the Indian legislation succeeds in balancing the rights of Breeders and Farmers and exploits the flexibility granted in TRIPS, in an intelligent manner. There are clauses to protect the rights of Researchers and provisions to protect the public interest.

The Indian legislation is the first in the world to grant formal rights to farmers in a way that their self-reliance is not jeopardized. What is very significant and positive about this legislation is that it charts its own course, deviating from the norms set by UPOV. The Union for the Protection of New Plant Varieties (UPOV) is at present the only platform for regulating Plant Breeders Rights. It is a developed country platform, which is modulated to protect the interests of agriculture in industrial countries. It does not even have the notion of Farmers Rights. The innovative Indian legislation has opened up interesting possibilities for developing a developing country platform for regulating Breeders and Farmers Rights so that both, not just one, are acknowledged and protected. The salient features of the new law are as follows.

BREEDERS RIGHTS

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.

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 lakh 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.

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.

There are however some views (B Sharma, 2002) , that the Indian law actually grants very restricted rights to researchers because of the acknowledgment of Essentially Derived Varieties, EDV, which is defined in detail in the 1991 UPOV Convention. According to the expansive definition of EDVs, it is felt that all kinds of research will become subject to the Breeders authorization if a protected variety is used for research. In the Indian Act, the Breeders authorization is needed for making EDVs. The processes for making EDV have been made so encompassing in UPOV (natural selection, mutant selection, somaclonal variants, backcrosses and transformation by genetic engineering) , that all known forms of creating new varieties would be covered. This would squeeze the researcher's space to the extent that for practically any kind of research on the protected variety, the authorization of the breeders would be needed, establishing their control on a lot of germplasm.

FARMERS RIGHTS

The Act recognises 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.

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. In India, the farming community is the largest seed producer, providing about 87% of the country's annual requirement of over 60 lakh tons. 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 as 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.

Other kinds of farmers' rights in the Act

Apart from the right to sell non-branded seed of protected varieties, the rights of farmers and local communities are protected in other ways too. There are provisions for acknowledging the role of rural communities as contributors of landraces and farmer varieties in the breeding of new plant varieties. Breeders wanting to use farmers' varieties for creating Essentially Derived Varieties (EDVs) can not do so without the express permission of the farmers involved in the conservation of such varieties.

Any one is entitled to register a community's claim and have it duly recorded at a notified center. This intervention enables the registration of farmer varieties even if the farmers themselves cannot do this due to illiteracy or lack of awareness. If the claim on behalf of the community is found to be genuine, a procedure is initiated for benefit sharing so that a share of profits made from the use of a farmer variety in a new variety goes into a National Gene Fund.

Disclosure

Other details supportive of the rights of farmers are the explicit and detailed disclosure requirements in the passport data required at the time of applying for a Breeders certificate. Concealment in the passport data will result in the Breeders certificate being cancelled.

GURT (terminator) forbidden

Breeders will have to submit an affidavit that their variety does not contain a Gene Use Restricting Technology (GURT) or terminator technology.

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.

Clauses that need amendment

Benefit Sharing

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.

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.

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".

Compulsory License

The Act provides for the granting of compulsory license to a party other than the holder of the Breeders 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 seed.

CORRECTIVES NEEDED

The Authority which is to oversee implementation is far too bureaucratic. It would be advisable to have more independent experts, stakeholders and NGOs. Now that there is an Act in place, it will be important to frame appropriate rules that are clearly articulated and designed to enable the implementation of the specific goals. Attention will have to be paid to detail. This is a task requiring specific knowledge and would be most successfully undertaken in consultation with independent experts having some experience in the field.

IS UPOV APROPRIATE FOR DEVELOPING COUNTRIES?

The Indian legislation has been hailed as a mature and balanced legislation, which has succeeded in showing the way to developing countries, to create alternatives to the UPOV system. The interests of developing countries are not served by UPOV, which is completely insensitive to their needs. In all fairness, UPOV was not created for developing countries and therefore does not address itself to their concerns. In understanding the UPOV system, it is crucial to understand that right from 1961, even when it was more flexible than it is today, UPOV granted only one right, the right to the Plant Breeder. There was never any concept of Farmers Rights. What was granted at best was an exemption to farmers and researchers, from the otherwise exclusive rights granted to the breeder.

The Union for the Protection of New Plant Varieties (UPOV), is a corporate backed , organization based in Geneva. It was set up in 1961 at a time when investments in agricultural research in western nations were diminishing in the public sector research establishment and moving in to private hands. This was a logical step in industrialized economies where the percentage of people engaged in agriculture was reduced to about 2 to 5% of the total population. As the corporate sector made private investments, it sought returns on these investments and set up UPOV to protect the interests of breeders who were increasingly corporate breeders.

UPOV started as a flexible system, which apart from granting breeders rights was not particularly concerned about restricting the exemptions it provided to the other players, namely farmers and other researchers. This began to change as the corporate breeders consolidated their hold on the plant breeding and seed producing industry. Amendments to the UPOV convention were brought in 1972, 1978 and 1991. All these amendments had one goal, to further strengthen the hold of the breeder and reduce any exemptions that were granted in early versions of the convention. The valid treaty of today is the 1991 treaty which has almost exclusive rights of breeders, no exemptions for farmers or researchers. In fact UPOV has moved to accept the patents system now so that it is not only a platform for breeders' rights but also for patents on plant varieties. In short, UPOV provisions are not suited to the agricultural conditions of developing countries nor are they good for supporting the livelihoods of farming communities.

AN ALTERNATIVE TO UPOV

Gene Campaign, along with other civil society organizations, believes that UPOV does not have conditions favourable to developing countries. It is our view that developing countries need to craft their own platform, to address their special needs, which are very different to the needs and requirements of, industrialized countries for whom UPOV was developed.

Some efforts have already been made to provide an alternative to UPOV. The model law drafted by the Organization of African Unity (OAU) and Gene Campaign's Convention of Farmers and Breeders (CoFaB) are being discussed in various forums. CoFaB has been described by the UNDP (United Nations Development Programme) as "a strong and coordinated international proposal which offers developing countries a far better alternative to European legislation, by focusing on the need to protect farmers rights and food and nutritional security goals of their people."

CoFaB reflects the developing countries' strengths and vulnerabilities. It aims to secure their interests in agriculture and fulfil the food and nutritional security goals of their people. CoFaB seeks to achieve *inter alia* the following goals:

- Supply of reliable, good quality seeds to the small and large farmer
- Provide for breeders of new variety to have protection for their varieties in the market, without prejudice to public interest
- Acknowledge the role of farmers as creators of land races and traditional varieties which form the foundation of agriculture and modern plant breeding
- Develop a system wherein farmers and breeders have recognition and rights accruing from their respective contribution to the creation of new varieties and sharing of benefits due to such new variety accordingly
- Acknowledge the enormous contribution of farmers to the identification, maintenance and refinement of germplasm
- Maintain genetic diversity in the field
- Emphasise that the countries of the tropics are germplasm owning countries and the primary source of agricultural varieties

The OAU model too addresses the concerns which are typical to the developing countries. The model was developed as a direct response to the decision taken and the directive given by the OAU Council of Minister in 1988. The principle objective was to ensure the conservation, evaluation and sustainable use of biological resources, including agricultural genetic resources as well as associated indigenous knowledge in order to improve their diversity as a means of sustaining the life support systems. It seeks to achieve, *inter alia*, the following:

- Recognise, protect and support the inalienable rights of local communities, including farming communities, over their biological resources, crop varieties, medicinal plants, knowledge, technologies and practices
- Recognise and protect the rights of breeders over varieties developed by them
- Provide a mutually acceptable system of access to biological resources, community knowledge, technologies and practices subject to the prior informed consent of the State and the concerned local communities
- Provide and promote appropriate mechanisms for the enforcement of the rights of local communities, including farming communities, and breeders and the conditions essential for access to biological resources, community knowledge, technologies and practices
- Ensure and promote the supply of good quality seed and planting material to farmers
- Ensure that plant genetic resources are utilized in a sustainable and equitable manner so as to guarantee national food security.

These documents could start the discussion on developing an international agreement, which would be supportive of food and agricultural security in developing countries.

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