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Commentary

Plant Variety Protection and Farmers' Rights Law

A long and arduous struggle for the recognition of the rights of farmers has ended with the passing of the Plant Variety Protection and Farmers Rights Bill by the Lok Sabha. The bill recognises the farmer as a conservator of the agricultural gene pool and as a breeder. It makes provision for such farmers' varieties to be registered. The rights of rural communities are acknowledged as well. While the bill can be improved in some respects, the next major step is to decide through which international platform India will interact with other nations. At present the only such platform is UPOV. However, India should work, with other developing countries, to evolve an alternative to UPOV.

SUMAN SAHAI

On August 9, 2001 the Lok Sabha finally passed the Plant Variety Protection and Farmers Rights Bill. With this has ended a long and arduous struggle waged for the recognition of the rights of farmers in India's sui generis legislation. If the Bill clears the Rajya Sabha, India will have put in place a law to grant plant breeders' rights on new varieties of seeds for the very first time. This was necessitated by the commitments that India made in the agreement on Trade Related Intellectual Property Rights (TRIPs) when it ratified the Uruguay GATT Round in 1994. Article 27. 3 (b) which deals with the protection of new plant varieties, offers three options. Protection will have to be granted by a patent, an effective sui generis system or by a combination of the two. The sui generis system refers to the grant of plant breeders' rights, of what kind is not defined, except to say

that it should be effective. India ultimately opted for the sui generis option, but not without a determined struggle by civil society to stop seed patents.

The bill passed by Lok Sabha recognises the farmer not just as a cultivator but also as a conservator of the agricultural gene pool and a breeder who has bred several successful varieties. The bill 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. The final version of the much fought over clause on what constitutes a farmers' right (Section 39, clause (iv)), now reads:

The farmer...shall be deemed to be entitled to save, use, sow, 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 labelled 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 cannot 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.

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 per cent of the country's annual requirement of over 60 lakh tonnes. If the farmer were to be denied the right to sell, it would 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. Their only replacement, if this happens, will be the large life science corporations since budget cuts have seriously weakened the capacity and output of the other player, the public research institutions.

Globally, the agro-chemical giants turned life-science corporations are emerging as the largest seed producers in the industrialised nations. In Europe and the US, as also in Canada, Australia, New Zealand, Japan and, to a lesser extent, Korea and some Latin American countries, seed production is now in the hands of the

large corporations. Control over the seed sector was established by the simple expediency of buying up all the smaller seed companies. In India, such a strategy cannot work because there are simply no seed companies of any significance or size that can be bought and that would transfer their market share to the MNC that bought it.

In India, a strategy to control seed production would have to rest on knocking the farmers out of the market by some other means. Since they are not organised in a company that can be purchased, this can only be done by legally taking away their right to sell seed. If the farmer can be stopped by law from selling seed (and by implication, producing seed), the market automatically becomes available to the next alternative, the MNC. This is precisely why the farmers' right clause in the Indian PVP legislation has been the subject of such a tussle between the seed industry and pro-farmer groups like Gene Campaign. Weak farmers' rights 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 a takeover of the seed market by the corporate sector. Control over seed production is central to self-reliance in food. The need for this self-reliance cannot be overemphasised. Food security is in the forefront of national security. A nation that does not produce its own seed and its own food cannot be a secure nation.

Other Farmers' Rights

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) cannot do so without the express permission of the farmers involved in the conservation of such varieties.

EDVs are those varieties which are more or less (essentially) the same as the parent variety except for very minor changes. The EDV category refers to those varieties where a single character has been changed in a variety which otherwise remains more or less identical to the parent variety. Most genetically modified (GM) varieties are EDVs. For example Bt cotton is a cotton variety identical to its parent except for the single difference of containing a bacterial gene from the *Bacillus thuringiensis*. So also Bt corn.

Any person or governmental or non-governmental agency is entitled to register a community's claim and have it duly recorded at a notified centre. This intervention enables the registration of farmer varieties as sources of germplasm, even if the people themselves cannot do this themselves 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 new variety goes, on behalf of the communities, into a National Gene Fund.

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. Passport data refers to the data submitted about the parentage of the new variety. In this case it includes details like name and location of any farmers' varieties used. If any concealment is detected in the passport data, the breeders certificate stands to be cancelled. Breeders will have to submit an affidavit that their variety does not contain a Gene Use Restricting Technology (GURT) or terminator technology.

Clauses that Need Amendment

Benefit-sharing: Despite its good intentions of protecting the interests of the farming community, the bill is likely to create problems in implementation because certain concepts like the National Gene Fund are confused and very poorly, even incompletely, written [Section 46 (2) d]. The Gene Fund should be the recipient of all revenues payable to the farming communities under various heads. This money should be collectively, rather than individually, accessed by farming communities. Exceptions can be made where individuals are clearly identified as breeders of specific varieties. The use of the money should not be restricted to conservation or for maintaining ex situ collections. That would mean that the revenue generated from the use of farmer varieties would partly be used to maintain the National Gene Bank in Delhi. This would be blatantly unfair. The money earned by the farming community should be theirs to spend as they wish and not be frittered away to meet the expenses incurred by committees or to maintain national facilities which are the nation's responsibility.

The method proposed for fixing and realising benefit sharing is a messy, convoluted exercise that could only have been dreamed up by a bunch of babus. The share of benefits payable to farmers will, among

other things, be calculated on the basis of the commercial utility of the variety and be recoverable as an arrear of land revenue by the district magistrate within whose local limits of jurisdiction the breeder liable for such benefit sharing resides. So if Monsanto is the registered breeder of a new variety, will it be the district magistrate of St Louis, Missouri, US, who will recover benefits for the farmers? The headquarters, and therefore the place of residence of Monsanto, the breeder, happens to be St Louis. This nonsensical condition needs serious revision. Possibly the least problematic approach to fixing benefit sharing would be a system of lump sum payments, based for example on 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 bad quality seed. However, the clause is weakly framed, leaving too much to the discretion of the authority. Companies selling poor quality seeds with tall claims have been the cause of several crop failures leading to irrecoverable losses for the farmer, sometimes with the tragic consequence of farmers committing suicide. The bill states that if the seed supplied does not perform as has been promised by the breeder/company, the farmers shall have the right to claim compensation. Compensation should be specified and should be large enough to be a deterrent. 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. In addition, a jail term should be provided if the breeder repeats the offence of selling bad quality, non-performing seeds.

Protection against innocent infringement: The 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 may be unknowing infringement of breeders' rights. Section 43 specifies (somewhat fuzzily) that the farmer cannot 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. This well intended point is badly made. Nothing is said about what would constitute a violation of breeders' right. This becomes specially critical since the Act would allow the farmer to sell generic seed of the variety protected by breeders' right. And what would constitute proof in a court of law that the farmer was unaware of the existence of

such a right? In all likelihood this will boil down to a 'your word against mine' situation and be very difficult to prove.

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 wanting to examine documents and receive copies of decisions from the National Authority, the Registrar, the Tribunal and various other committees.

Breeders' Rights

Breeders' rights over the varieties they have developed are fully protected by the bill. On registration, the breeder has complete rights of commercialisation for the registered variety either in his/her own person or through anyone he designates. These unequivocal rights include the right to produce, sell, market, distribute, import or export a variety, in short, full control over production and commercialisation.

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 have been prescribed for those who infringe the rights of the registered breeder. The breeder has to disclose the source of parental varieties used in the breeding of the new variety. When farmer varieties or land races are used, this is to be accompanied by payment of a certain sum as 'royalty', under the benefit sharing clause. The breeder also has to sign an affidavit that the variety does not contain any sequences that will restrict gene expression and induce sterility (the so-called terminator technology).

Penalties for infringing breeders' rights: Violation of a breeders' rights 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. The registered name or denomination naturally cannot be used by any one other than the breeder. The use of the same or similar name in any way, by action or even suggestion, will constitute a violation and will be punishable. 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 designed to protect a breeder from unfair competition by other commercial breeders.

The grounds constituting violation are laid out in such elaborate detail, listing the smallest acts that can be construed as infringement in a way that the hold of the breeder over his variety is very strong indeed. Unless the alleged violator proves that he acted in innocence, without the intention to defraud, jail terms and penalties are stiff. Penalties are prescribed for applying false denomination and for selling varieties to which false denomination is applied.

The bill is very clear on penalties to be imposed if a person falsely uses a denomination or misrepresents the address of the breeder during trading. Penalties in this case can range from Rs 50,000 to Rs 10 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

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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 Rs 10 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 1 lakh, can go up to Rs 20 lakh. With deterrents like this in place, the legitimate rights of the breeder are adequately protected.

The bill has provisions for researchers' rights which allow scientists and breeders to have free access to registered varieties for research. Specifically, the bill spells out that any one doing research can use any variety registered by the plant breeder for conducting experiments. The registered variety can also be used for the purpose of creating other, new varieties. That means that the registered breeder cannot stop other breeders from using his/her variety to breed new crop varieties. This flexibility is however curtailed in one case, when the registered variety needs to be used repeatedly as a parental line for commercial production of another variety. In that case, new breeders will need the authorisation of the breeder whose variety they want to use repeatedly.

Apart from the rather fulsome attention paid to farmers' rights, the bill 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".

The bill provides for the granting of compulsory licence 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 licence under certain terms and conditions including the payment of a reasonable licence fee. The authority shall determine the duration of the compulsory licence granted but in any case the licence cannot exceed the total remaining period of the protection of that variety. Compulsory licence however will not be awarded if the breeder can demonstrate reasonable grounds for his inability to produce the seed.

Needed Correctives

There is much that can be improved in the bill. It has areas of concern which need to be revisited, like the special treatment given to EDVs, which will often be GM varieties. The creation of a separate track for their clearance raises questions. Why should there be a separate track if there is no covert intention of pushing through varieties which may be the subject of opposition? In the interests of transparency, EDVs should be dealt with in the same way as other conventionally bred varieties, providing the same opportunities for their examination and opposition as has been provided for the registration of other varieties.

The authority, which will oversee implementation, is wretchedly bureaucratic, packed with ex officio holders of transient posts who, experience shows, bring little knowledge and even less interest. What is needed in place of this babu pyramid is an abundance of independent experts and stakeholders and NGOs. Another clause in need of serious improvement is the one that provides compensation to farmers if the seed provided by a breeder fails to perform. The intention is there to protect the farmer's interest but the clause is far too casually, even sloppily worded. There is too much reliance on the authority's discretion and not enough firm guidelines. Some ball park figure should be mentioned, say, compensation should amount to twice the value of the failed harvest.

The text of the bill needs a language overhaul. For one it is shoddily written. In some places the language is so poor and ambiguous that it could even lead to legal disputes. Once the bill clears the Rajya Sabha, it will be important to frame appropriate rules that are clearly articulated and designed to enable the implementation of the specific goals of the bill. Attention will have to be paid in 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.

What Next?

Once we have enacted a plant variety protection and farmers' rights law, the next step will be to decide through which international platform India will interact with other nations. At present the only international platform is the International Union for the Protection of New Varieties of Plants (UPOV), a western platform regulating plant breeders' rights for the industrial nations. UPOV is controlled by the life science corporations. No develop-

ing country is a member and neither should India become one.

UPOV is an inter-governmental organisation with headquarters in Geneva. It is based on the International Convention for the Protection of New Varieties of Plants. The convention was signed in 1961. It was revised in 1972 and 1978. The convention was further revised in 1991 to strengthen the protection offered to the breeder and dilute the exemptions granted to the farmer for planting back seed. The conditions of UPOV 1991 do not allow the farmer to save seed unless individual governments with the consent of the breeder, allow limited exceptions. UPOV 1991 also introduces patents by allowing dual protection. This means new seed varieties can be protected both by a patent and a plant breeders' rights.

Gene Campaign opposes India joining UPOV because UPOV does not address our needs and because its working is totally alien to the conditions of agriculture prevailing in the countries of the south. We believe that developing countries must create their own platform which will grant, apart from breeders' rights, also farmers' rights, and be geared to work towards food and nutritional security in our countries. There is no concept of farmers' rights in the UPOV system, rights are granted only to the breeder which in today's context are the seed companies.

UPOV laws are formulated by countries which are industrial, not agricultural economies. These countries do not have the large numbers of small and marginal farmers like we do. Almost all agricultural research and plant breeding in India is financed with public money unlike UPOV members where private capital finances plant breeding. In Europe and the US agriculture is a commercial activity. For the majority of Indian farmers however, it is a livelihood.

Alternative to UPOV

Gene Campaign along with Centre for Environment and Agriculture Development, has drafted an alternative treaty to UPOV to provide a forum for developing countries to implement their farmers' and breeders' rights. This treaty is called the Convention of Farmers and Breeders, CoFaB for short. CoFaB has an agenda that is appropriate for developing countries. It reflects their strengths and their vulnerabilities and it seeks to secure their interests in agriculture and fulfil the food and nutritional security goals of their people.

Unlike the provisions of the UPOV, the CoFaB treaty seeks to fulfil the following goals:

- Provide reliable, good quality seeds to the small and large farmer.

- Maintain genetic diversity in the field.
- Provide for breeders of new varieties to have protection for their varieties in the market, without prejudice to public interest.
- Acknowledge the enormous contribution of farmers to the identification, maintenance and refinement of germplasm.
- Acknowledge the role of farmers as creators of land races and traditional varieties which form the foundation of agriculture and modern plant breeding.
- Emphasise that the countries of the tropics are germplasm owning countries and the primary source of agricultural varieties.
- Develop a system wherein farmers and breeders have recognition and rights accruing from their respective contribution

to the creation of new varieties.

The UNDP *Human Development Report 1999* describes CoFaB 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' interests and food and nutritional security goals. Gene Campaign's purpose in drafting an alternative to UPOV was to provide the basis for a discussion on what kind of non-UPOV platform developing countries should have. Once there is a comprehensive analysis and critique and a consensus emerges among developing countries, it will not take long to come up with a minimum operational framework with which to start. [EW](#)