

FARMERS' RIGHTS IN INDIA: ASSESSING CONCEPTUAL AND IMPLEMENTATION ISSUES

Sujith Koonan*

Abstract

India is a pioneer in developing explicit legal provisions to recognise and protect farmers' rights. The legal regime related to farmers' rights in India has been developed as a response to the developments under international law. Farmers' rights have become a part of Indian legal system through statutory frameworks related to plant variety protection and biodiversity. These two statutes have come into force as India's response to obligations under two international treaties – Agreement on Trade Related Intellectual Property Rights, 1994 and Convention on Biological Diversity, 1992. Farmers' rights regime in India involves mainly two statutes - the Protection of Plant Varieties and Farmers' Rights Act, 2001 and the Biological Diversity Act, 2002. While the former addresses farmers' rights directly, later deals with some of the key aspects of farmers' rights. The legal recognition of farmers' rights in India has been criticised on various grounds including conceptual and implementation aspects. The impact of intellectual property rights protection for agricultural biotechnology on conceptualisation and implementation of farmers' rights is extremely controversial and significant. While the legal formulation of farmers' rights in India is infamous for its loose policy type language, some of the ongoing developments such as the proposed Seeds Bill are likely to make implementation of farmer's rights further ineffective. In this context, this paper critically examines the concept of farmers' rights as recognised under international law and India.

Introduction

The farming communities across the world have been following, since time immemorial, the practice of sharing of knowledge and resources. Sharing of seeds among farmers constitutes perhaps the most important part in these traditional agricultural practices.¹ As such hitherto there was no legal interference with this practice of free flow of knowledge and resource, both at the national and international level. From a legal angle, it could be said that there was no well defined property right regime regulating or controlling plant genetic resources. Reasons for this could be either there was no need for a formal legal articulation

* Assistant Professor, Amity Law School, Amity University Uttar Pradesh

¹ See Stephen B. Brush, "Farmers' Rights and Genetic Conservation in Traditional Farming Systems", 20(11) *World Development* 1617-1630 (1992).

of private property rights or absence of such a regime was considered as beneficial to farmers and farming communities and to the society as a whole.² Indeed, free flow of knowledge and resources has claimed to have produced immense results in the enhancement of food production and thereby achievement of food security.³

However, the scenario has changed significantly over the last few decades particularly with the development of agricultural biotechnology. The development in the field of agricultural biotechnology has resulted in the unprecedented growth of commercial seed production. This development was complemented and supported by the evolution of private property rights regime vis-à-vis plant genetic resources. The concept of plant breeders' rights (PBRs) emerged in this context which refers to private property right over plant genetic resources developed by commercial breeders. Generally, the legal consequence of PBRs is that the genetic resources or seed protected by the PBRs can be used only with the proper authorisation of the right holder. Any kind of unauthorised use will attract legal action against the user.

The idea of farmers' rights has evolved in this context of the fast development of the legal protection of the commercial breeders' rights in the seeds developed with the help of modern science and technology. While the rights and interests of commercial breeders are recognised and protected under the law, similar efforts taken by farmers for centuries are left legally unrecognised and unprotected. Primarily, it is this asymmetry in recognising the rights of farmers and farming community at par with the rights of commercial breeders that form the major rationale behind the legal concept of farmers' rights.⁴

² Thomas Cottier, "The Protection of Genetic Resources and Traditional Knowledge: Towards More Specific Rights and Obligations in World Trade Law", 7(2) *Journal of International Economic Law* 555, 562 (1998).

³ See Stephen B. Brush, "Farmers' Rights and Protection of Traditional Agricultural Knowledge", 35(9) *World Development* 1499-1514 (2007); Cary Fowler *et al.*, "Unequal Exchange? Recent Transfers of Agricultural Resources and their Implications for Developing Countries", 19(2) *Development Policy Review* 181-204 (2001) and Craig D. Jacoby and Charles Weiss, "Recognizing Property Rights in Traditional Biocultural Contributions", 16 *Stanford Environmental Law Journal* 74-124 (1997).

⁴ Carlos M. Correa, Options for the Implementation of Farmers' Rights at the National Level, Trade-related Agenda, Development and Equity (TRADE) Working Paper 8, December 2000, at p. 3.

India is one of the few countries having specific legal provisions addressing farmers' rights. The concept of farmers' rights has become an explicit part of the Indian legal system through the Protection of Plant Varieties and Farmers' Rights Act, 2001. While this can be considered as a landmark as a beginning, farmers' rights provision under the Act has invited several critique both from a conceptual and implementation point of view. In this back ground, this paper explains the nature and scope of farmers' rights in India and captures critique relevant for further meaningful development and implementation of the concept.

Conceptualising farmers' rights: the international law context

The concept of farmers' rights has been a subject matter of discussion at the international level at least since the adoption of the International Undertaking on Plant Genetic Resources, 1983 by the Food and Agricultural Organization. However, the legal conceptualisation of farmers' rights at the international level reached a decisive stage with the adoption of the International Treaty on Plant Genetic Resources for Food and Agriculture, 2001 (hereafter the FAO Treaty). The term farmers' rights found a place in a legally binding international agreement for the first time through the FAO Treaty. However, the FAO Treaty is not the only legal basis of farmers' rights under international law. There are other multilateral treaty regimes having linkages with farmers' rights such as the Convention on Biological Diversity, 2002; International Convention for the Protection of New Varieties of Plants, 1961 revised in 1972, 1978 and 1991 and the Agreement on Trade Related Intellectual Property Rights, 1994 (TRIPS). In this backdrop, this part of the paper traces the trajectory of the legal conceptualisation of farmers' rights under international law.

The idea of farmers' rights denotes in simple terms the rights of farmers over their resources and knowledge. The term 'resources and knowledge' can have wide meaning and scope in common parlance. It may encompass a number of concerns related to all important factors of agricultural production such as land, water, seeds, traditional agricultural practices and traditional agricultural knowledge. However, the contemporary legal regime does not address all these

aspects of farmers' rights. In fact, farmers' rights as a legal norm has well-defined boundaries. Broadly, there are two major issues that are addressed by the concept of farmers' rights in the contemporary legal context - plant genetic resources and traditional agricultural knowledge. The term 'plant genetic resources' consists of seeds, plants and plant parts useful in crop breeding, research or conservation for their genetic attributes.⁵ The term 'traditional knowledge' in the context of agriculture may be seen as referring to knowledge regarding a particular crop with desired characteristics and the environment suitable to such crops.⁶

The context in which the legal norm of farmers' rights has been evolved at the international level seems to provide an explanation for this limited scope. As mentioned earlier, the idea of farmers' rights has taken its roots from the linkages that developed between intellectual property rights regime and agriculture. The development of intellectual property rights regime in this regard was mainly focused on plant genetic resources and knowledge associated with it. Having begun primarily as a counter balance strategy against the development of intellectual property rights, farmers' rights were also evolved as a legal norm addressing rights of farmers in plant genetic resources and knowledge.

A. Rationale for Recognising Farmers' Rights

The rationale for the recognition of farmers' rights under international law (as well as domestic law) is usually based on three pillars. Firstly, the notion of equity as a rationale for the legal recognition of farmers' rights comes into forefront in the specific context of the development of agricultural biotechnology increasingly protected and facilitated by the intellectual property rights regime. The argument in this regard is mainly based on the fact that one of the major inputs to the modern agricultural biotechnology essentially comes from the enormous effort undertaken by farmers and farming communities in different parts of the globe for several centuries. Hence, it is argued that, while the modern

⁵ Ronan Kennedy, "International Conflicts over Plant Genetic Resources: Future Development?", 20(1) *Tulane Environmental Law Journal* 1- 42, 2 (2006).

⁶ Thomas Cottier and Marion Panizzon, "Legal Perspectives on Traditional Knowledge: The Case for Intellectual Property Protection", 1(4) *Journal of International Economic Law* 371- 400, 371 (2004).

commercial breeders are benefited from the legal system, the historical efforts of farmers go unrewarded.⁷

This fundamental asymmetry can be further translated into an issue of non-convergence of basic regulatory framework between the developed and developing countries. At the global level, developing countries are the major contributors of basic plant genetic resources or genetic materials for the modern biotechnology based research and commercial production of plant varieties. Developed countries, on the other hand, are the major producers of technologically induced new plant varieties. In this context, it can be argued that developed countries, which are poor in basic genetic resources, receive substantial gains from the resources conserved, protected and improved by the developing countries.

Secondly, farmers' rights are seen as a tool to protect and conserve agricultural biodiversity. Agricultural biodiversity could be defined as that part of biodiversity that feeds and nurtures people. It includes genetic resources for food and agriculture such as harvested crop varieties, livestock breeds, fish species and non-domesticated resources within field, forest and in aquatic ecosystem.⁸ One of the important contributing factors towards the conservation and improvement of agricultural biodiversity is the farming practices found within the centres of diversity. Indeed, traditional farming practices are diversity oriented and farmers enrich biodiversity through selection and improvement of seeds. Thus, the concept of farmers' rights could be justified as a systematic tool to support and facilitate the conservation activities undertaken by traditional farmers.⁹

⁷ Philippe Cullet, "Environmental Justice in the Use, Knowledge and Exploitation of Genetic Resources", in Jonas Ebbesson and Phoebe Okowa (eds), *Environmental Law and Justice in Context* (Cambridge: Cambridge University Press, 2009).

⁸ Patricia Kameri-Mbote and Philippe Cullet, "Agro-Biodiversity and International Law: A Conceptual Framework", 11(2) *Journal of Environmental Law* 257-279 (1999).

⁹ C.S. Srinivasan, "Exploring the Feasibility of Farmer's Right", 21(4) *Development Policy Review* 419-447 (2003).

The significance of agricultural biodiversity lies in the fact that it contributes directly to the livelihood of a large segment of human kind and constitutes the basis for all human food consumption and for food security. Despite the significance of agricultural biodiversity for basic human needs and existence little attention has been paid in the past to conserve and protect agricultural biodiversity. This has resulted in the increasingly declining condition of the agricultural biodiversity.¹⁰ The homogenisation of agricultural production largely promoted by the technically induced plant varieties is one of the major highlighted reasons for this decline. For instance, green revolution varieties have been observed as one of the significant reasons for the decline of agricultural biodiversity.¹¹

Thirdly, preservation of farmers' traditional practices is seen as a strategic resistance against the increasing application of the private property right regime in the case of plant varieties. The underlying reason is the possible implications of the private property right regime upon farmers and broadly its social and environmental implications.

The private property regime *vis-à-vis* plant genetic resources as developed under international law over the last few decades tends to promote the perpetual dependence of farmers upon commercial breeders. The transaction of commercial varieties is essentially market based. This would likely to threaten the livelihood of farmers who extensively depend upon farm-saved seeds, which is less expensive. Further, the commercialisation of seed production has the potential to exacerbate the rural poverty in developing countries. The expansion and application of intellectual property rights to plant varieties has been further criticised as contrary to the traditional farming practices that historically did not regulate seed production and exchange.¹²

¹⁰ Ashish Kothari, "Reviving Diversity in India's Agriculture", *Seedling*, December 1994.

¹¹ Bongo Adi, "Intellectual Property Rights in Biotechnology and the Fate of Poor Farmers' Agriculture", 9 (1) *Journal of World Intellectual Property* 91-112 (2006).

¹² Craig Borowiak, "Farmers' Rights: Intellectual Property Regimes and the Struggle over Seeds", 32 (4) *Politics & Society* 511-543 (2004).

Another implication of protecting the private property rights of commercial breeders is the possibility of legal action against farmers for violation of private property rights such as patents and PBRs. Given the asymmetry in the capability of fighting cases between poor farmers in developing countries and big multinational corporations, it is unlikely to deliver justice.¹³ In this context, recognition of farmers' rights under international law could be justified as a counter-balance against the strong private property rights of commercial breeders. The underlying idea is to protect the rights of farmers to save, exchange and sell farm saved seeds.

B. Farmers' Rights under International Law

The concept of 'farmers' rights' was formally introduced into a binding multilateral instrument at the global level through the International Treaty on Plant Genetic Resources for Food and Agriculture, 2001 (hereafter the 'FAO Treaty').¹⁴ The FAO Treaty expressly recognises farmers' rights. However, it cannot be asserted that the idea of farmers' rights at the international level emerged with the FAO Treaty. The concept of farmers' rights was evolved in a historical context preceding the FAO Treaty. In fact, the legal conceptualisation of farmers' rights through the FAO Treaty owes significantly to the prior historical context particularly the development that occurred under the auspices of the Food and Agricultural Organization (FAO) at least since the early 1980s.

The development of the legal concept of farmers' rights could be traced back to the International Undertaking on Plant Genetic Resource, 1983 (hereafter the 'International Undertaking').¹⁵ The International Undertaking was adopted with the objective of ensuring free access to plant genetic resources. The cardinal principle of the International Undertaking was that genetic resources are a

¹³ Philippe Cullet, "Farmer Liability and GM Contamination: Schmeiser Judgment", 39(25) *Economic and Political Weekly* 2551–2554 (2004).

¹⁴ The International Treaty on Plant Genetic Resources for Food and Agriculture (FAO Treaty) was adopted at the thirty first session of the FAO conference in November 2001 through resolution 3/2001. The FAO Treaty entered into force in 29 June 2004.

¹⁵ The International Undertaking on Plant Genetic Resource was adopted by Resolution 8/83 at the Twenty Second Session of the FAO Conference held in Rome in 1983.

common heritage of mankind and should be available without restriction.¹⁶ The International Undertaking, as it was originally adopted, does not address the issue of farmers' rights. However, the relevance of the International Undertaking lies in the fact that it is this document that has triggered the debate on private property rights in crop genetic resources and the subsequent formulation of the concept of farmers' rights under international law.

The constant discussion under the auspices of the Food and Agriculture Organization eventually led the FAO Conference to adopt a resolution on 29 November 1989 expressly recognising farmers' rights (hereafter the 'Resolution 5/89'). The Resolution 5/89 was annexed to the International Undertaking and thereby it became an integral part of the International Undertaking. The Resolution 5/89 could be considered as the first documented expression of farmers' rights at the international level and therefore can be considered as a landmark in the trajectory towards the legal conceptualisation of farmers' rights.

Failure of the International Undertaking to establish a concrete system to promote the realisation of farmers' rights was an important reason behind the move towards the revision of the International Undertaking.¹⁷ The initiation of the revision of the International Undertaking could be considered as a starting point of the efforts towards the FAO Treaty. Negotiations were initiated in 1994 in the first extra ordinary session of the Commission on Genetic Resources for Food and Agriculture. Initially the aim was to adopt a new agreement in 1996. However, the negotiation prolonged till 2001 due to lack of consensus among negotiating parties on various issues.

The significance of the FAO Treaty is that, the concept of farmers' rights, for the first time, found express manifestation in a legally binding instrument at the international level. Hence, in a legal point of view, the FAO Treaty is the most important and direct source in international law regarding farmers' rights. It

¹⁶ *Id.*, Article 1.

¹⁷ Elsa Tsioumani, "International Treaty on Plant Genetic Resources for Food and Agriculture: Legal and Policy Questions from Adoption to Implementation", *15 Year Book of International Environmental Law* 19-144 (2006).

should also be noted that the FAO Treaty is widely accepted by countries. India ratified this treaty in 10 June 2002.

FAO Treaty emphasises farmers' contributions for the conservation and development of plant genetic resources as the basis of farmers' rights. The FAO Treaty further rationalises the recognition of farmers' contributions by highlighting it as the basis of food and agricultural production throughout the world.¹⁸

The FAO Treaty adopts an approach different from that of the International Undertaking with regard to the conceptualisation of farmers' rights. The FAO Treaty follows an illustrative approach in defining the concept of farmers' rights by providing certain measures to protect and promote farmers' rights. The illustrated measures to protect and promote farmers' rights are: the protection of traditional knowledge relevant to plant genetic resources, the right to equitably participate in sharing benefits arising from the utilisation of plant genetic resources and the right to participate in decision making on matters related to the conservation and sustainable use of plant genetic resources.¹⁹

In addition to the illustrated measures, the FAO Treaty further recognises, in principle, the rights of farmers to save, exchange and sell farm saved seeds.²⁰ This traditional practice of farmers is recognised by prohibiting the interpretation of the provisions of the FAO Treaty in such a way to limit the rights of farmers to save, use, exchange and sell farm saved seeds.

Another important feature of farmers' rights as conceptualised under the FAO Treaty is the fact that the Treaty casts the responsibility for realising farmers' rights upon national governments (FAO Treaty: Article 9.2). By saying so, the Treaty grants flexibility to the concerned state parties to forge measures to protect and promote farmers' rights according to their needs and priorities and according to their domestic legislation.

¹⁸ International Treaty on Plant Genetic Resources for Food and Agriculture, 2001, Article 9.1.

¹⁹ *Id.*, Article 9.2.

²⁰ *Id.*, Article 9.3.

Key Conceptual Issues

The FAO Treaty does not go much beyond recognising the term ‘farmers’ rights’. Article 9 of the FAO Treaty uses completely the non-mandatory language. For instance, Article 9.2 does not make it obligatory for member countries to provide legal framework to ensure protection of traditional knowledge, benefit sharing and right to participation. The obligation of member countries in this regard is diluted by using the expression “Contracting Party should, *as appropriate, and subject to its national legislation*, take measures to protect and promote Farmers’ Rights” (emphasis added).

FAO Treaty casts responsibility for the realisation of farmers’ rights with national governments. This means, member countries have absolute freedom to decide the ways and means to be adopted for the realisation of the farmers’ rights. This flexibility may create uncertainty as to the way in which farmers’ rights are to be implemented at the national level and it may also delay the implementation process. In fact, the Governing Body of the FAO Treaty in its Resolution 2/2007 acknowledges that: “there is uncertainty in many countries as to how Farmers’ Rights can be implemented and that the challenges related to the realization of Farmers’ Rights are likely to vary from country to country”.²¹

Similar approach is reflected in the provision dealing with farmers’ privileges also. Article 9.3 does not grant farmers the ‘right to save, use, exchange and sell farm-saved seed/propagating material’ positively. Instead the provision adopts a different approach where in it prevents the interpretation of the FAO Treaty in such a way to limit these rights. Further, the scope of these rights will depend upon national legislation. Hence, in effect, farmer’s privileges will be protected only if they are recognised and protected under concerned domestic legislation.

Hence, it could be stated that the FAO Treaty does not prescribe anything regarding farmers’ rights. It only provides guidance in a limited way to the

²¹ Food and Agricultural Organization, Report of the Second Session of the Governing Body of the International Treaty in Plant Genetic Resources for Food and Agriculture held in Rome, 29 October – 2 November 2007, Doc. No. IT/GB-2/07/Report.

member countries on the ways through which farmers' rights may be protected. From a developing country perspective, FAO Treaty cannot be considered as a complete success. This is particularly because, developing countries in their initial proposal raised several key concerns such as collective rights of farmers with respect to their innovations, knowledge and cultural diverse systems, prior informed consent, traditional rights of farmers to keep, use, exchange, share and market their seeds and any other plant reproductive material, including the right to re-use farm-saved seed and modification of intellectual property rights systems to ensure that they are in harmony with the concept of farmers' rights. While looking at Article 9, it is clear that these concerns of developing countries have been watered down.²²

Another major issue that arises in this context is related to the key contents of farmers' rights (Traditional Knowledge, Benefits sharing and right to participation) illustrated under Article 9. The farmers' rights provision under the FAO Treaty (Article 9) is silent as to the nature and scope of protection to be granted to these key aspects of farmers' rights. While benefit sharing has been dealt with under Article 13, other two illustrated contents are not addressed under the FAO Treaty.²³ In addition to that, the issue of benefit sharing has been addressed through a separate protocol adopted under the Convention on Biological Diversity, 2002 (Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization, 2010). However, the Nagoya Protocol is not yet come into force due to shortage of ratification.²⁴ The scenario becomes complex given the fact that the issue of traditional knowledge is still an unresolved issue at the international level. This issue is a subject matter of ongoing negotiations in various international forums, particularly the Convention on Biological Diversity and the World Intellectual

²² Svanhild-Isabelle Batta Bjørnstad, Breakthrough for 'the South'? An Analysis of the Recognition of Farmers' Rights in the International Treaty on Plant Genetic Resources for Food and Agriculture 48 (Lysaker: The Fridtjof Nansen Institute, Report No.13/2004).

²³ In 2010, a legally binding document on benefit sharing has been adopted under

²⁴ While 50 ratifications are required for the Nagoya Protocol to come into force, only eight countries have ratified the Nagoya Protocol. India ratified the Nagoya Protocol on 9 October 2012. For the complete list of signatories and ratifications, see <http://www.cbd.int/abs/nagoya-protocol/signatories/>

Property Organization. Hence, the outcome of these ongoing efforts will be a crucial determining factor in the realisation of farmers' rights.

Legal Framework in India

The legal regime relating to farmers' rights in India has been evolved in response to the developments that have taken place at various multilateral fora. The concept of farmers' rights has become a part of Indian legal system through statutory frameworks related to plant variety protection (the Protection of Plant Varieties and Farmers' Rights Act, 2001) and biodiversity (the Biological Diversity Act, 2002). While the former addresses farmers' rights directly, later deals with some of the key aspects of farmers' rights. These two statutes have come into force as India's response to obligations under two international treaties – Agreement on Trade Related Intellectual Property Rights and Convention on Biological Diversity. In fact, India is one of the few countries having specific legal provisions addressing farmers' rights.

A. Protection of Plant Varieties and Farmers' Rights Act

The legal framework of farmers' rights in India attained significant momentum with the enactment of the Protection of Plant Varieties and Farmers' Rights Act (PVP Act) in 2001. The PVP Act expressly emphasises, in its preamble, the need to recognise and protect the rights of 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 varieties. The PVP Act provides a separate chapter to elaborate the content and meaning of farmers' rights. Since the PVP Act is the direct source of farmers' rights in India, the nature and scope of farmers' rights in India is essentially depended upon the articulation of the concept under the PVP Act.

The PVP Act was enacted primarily to comply with India's obligations arising from the Agreement on Trade Related Intellectual Property Rights (TRIPS). Article 27.3.b of the TRIPS casts an obligation upon the state parties to provide plant variety protection either through patents or through a *sui generis* system. India responded to this obligation by enacting the PVP Act. Due to

several reasons including strong pressure from civil society organisations, farmers' rights were included subsequently as a part of this legal framework which was framed originally for the protection of new plant varieties. The PVP Act, by including both farmers' rights and breeders' rights, tends to strike a balance between the interests of the modern commercial breeders and farmers.

Interests of and concerns for farmers are recognised in the PVP Act in different ways. Foremost among these are the provisions providing entitlements for farmers. These entitlements are mainly provided under Chapter VI of the PVP Act. In addition to that, the PVP Act tends to protect the interests of farmers by envisaging institutional structure for the promotion of welfare of farmers and by providing special exemptions from several procedural requirements.

Specific recognition of entitlements of farmers under the PVP Act could be explained as five major rights. First, the PVP Act provides farmers the right to register a new variety. This right also includes the right to register farmers' variety.²⁵ This right treats farmers at par with breeders so far as assertion of rights over new varieties is concerned. However, regarding the registration of farmers' variety, the Act provides significant exemptions by not requiring necessary documents which are otherwise to be submitted along with the application for registration of a variety.²⁶ Consequently, the application for registration of farmers' varieties does not require documents such as affidavit to the effect that the variety does not contain any gene or gene sequence involving terminator technology, complete passport data of the parental lines from which the variety has been derived and statement describing the characteristics of novelty, distinctiveness, uniformity and stability.²⁷ By virtue of this right, farmers are entitled to exercise and enjoy the benefits sought to be conferred by the

²⁵ Farmers' variety is defined in the PVP Act as a variety which - (i) has been traditionally cultivated and evolved by the farmers in their fields; or (ii) is a wild relative or land race of a variety about which the farmers possess the common knowledge. *See* Protection of Plant Varieties and Farmers' Rights Act, 2001, Section 2(l).

²⁶ Protection of Plant Varieties and Farmers' Rights Act, 2001, Sections 39 (1)(ii) and 18.

²⁷ *Id.*, Section 18.

registration of a variety, that is, the exclusive right to produce, sell, market, distribute, import or export the variety.²⁸

Second entitlement is the right to 'recognition and reward'. A farmer who is engaged in the conservation of genetic resources and its improvement through selection and preservation is entitled to recognition and reward.²⁹ Right to recognition and reward is subject to the condition that the genetic material so preserved and improved is used as donors of genes in varieties registrable under the PVP Act. The right to recognition and reward as enshrined under the PVP Act recognises the key role played or continues to play by farmers in the field of conservation and improvement of crop genetic resources and envisages reward for such farmers if such conserved and protected genes are utilised for making a new variety registrable under the PVP Act.

The idea of reward for farmers' contributions to the development of a new variety could be seen as a part of a general design of benefit sharing under the PVP Act. The PVP Act envisages the right to benefit sharing to all persons who contributed to the development of a new variety.³⁰ The sharing of benefits is designed to be in monetary form. The amount to be paid in the course of benefit sharing is to be determined by considering the extent and nature of the use of genetic material of the claimant in the development of a new variety and the commercial utility and market demand for a new variety.³¹

Third is the right to claim compensation. The PVP Act recognises the right to claim compensation to village or local communities for their contribution to the evolution of a variety registered under the Act.³² An important feature of this right is that it is a group right or a community right. Consequently, the principle of *locus standi* is diluted in putting claim for compensation. This means the right holding village or local community need not necessarily lodge claim for compensation. The PVP Act permits any person, group of persons or any

²⁸ *Id.*, Section 28.(1)

²⁹ *Id.*, Section 39.(1) (iii.)

³⁰ *Id.*, Section 26.

³¹ *Id.*, Section 26.(5)

³² *Id.*, Section 41.

governmental or non-governmental organisations to file the claim on behalf of the right holding community. This is particularly relevant in the case of farmers given the probable incapacity of farmers in various matters related to lodging claim for compensation before the appropriate authority such as satisfying the technical requirements and follow up of registration of new varieties.

The right to claim compensation is available to farmers in another situation also, that is, if they purchase a registered variety. In case a registered variety has been sold to farmers, the breeder of such variety has a duty to disclose the expected performance of the variety under given conditions. If the variety fails to perform as per the disclosure, concerned farmers can claim compensation from the breeder.³³

Fourth is the protection of traditional practices of farmers. It is already mentioned that farmers across the world have been traditionally following the practice of sharing of knowledge and resources. In the context of genetic resources, it means mainly the practice of using, reusing, saving and exchanging the seeds. With the development of modern agricultural biotechnology and the consequent development of commercial seed industries, legal framework has been developed or promoted to protect the interests of commercial breeders. This is largely happening by recognising private property rights over commercial seed varieties through patents or plant breeders' rights. The inevitable consequence of these developments is the legal restriction or prohibition of traditional practices of farmers *vis-à-vis* genetic materials. This situation makes the protection of farmers' practices as one of the major contents of the legal concept of farmers' rights.

The PVP Act tends to recognise and protect farmers' practices. It is provided in the Act that farmers have the right to 'save, use, sow, resow, exchange, share or sell' farm produce including seed of a protected variety in the same manner as they were entitled prior to the PVP Act.³⁴ However, farmers are

³³ *Id.*, Section 39.(2)

³⁴ *Id.*, Section 39.(1)iv.

not entitled to sell the seed of a variety protected under the Act. This means, out of the bundle of rights provided to protect farmers' practices; the right to sell cannot be invoked in the case of seeds of a variety protected under the Act.

Fifth is the protection of innocent infringement. By virtue of this protection, farmers shall not be sued for infringement of rights granted under the PVP Act provided the infringement was innocent, that is, a farmer who alleged to have infringed the rights was unaware of such rights.³⁵ This means an action by a farmer which is otherwise actionable under the PVP Act is not actionable if such infringement was innocent. The legal consequence of such protection is that a right holder under the PVP Act cannot claim damages or share of profits from farmers for innocent infringement of his rights.

Besides the above mentioned entitlements, there are mainly two other ways through which farmers' interests are recognised and protected under the PVP Act. First, special considerations and privileges are provided to farmers by way of exemptions such as exemption from documents to be submitted along with the application for registration of a variety and exemption from fees to be paid in any proceedings before the authority, registrar or the tribunal or the High Court under the Act.³⁶ The special consideration could also be seen in the dilution of the principle of *locus standi* by permitting any person or organisation to file claim for compensation on behalf of farmers or local community.³⁷

The second way of ensuring the protection of interests of farmers is through institutional arrangements provided under the PVP Act – Protection of Plant Varieties and Farmers' Rights Authority (hereafter 'the Authority') and the Gene Fund.³⁸ It is explicitly mentioned in the Act that the general function of the Authority includes the protection of the rights of farmers and to ensure that the seeds of varieties registered under the Act are available at reasonable price and reasonable quantity.³⁹ Gene fund is a financial mechanism envisaged under the

³⁵ *Id.*, Section 46.

³⁶ *Id.*, Sections 44 & 18.(1)

³⁷ *Id.*, Section 41.(1)

³⁸ *Id.*, Sections 3 and 45.

³⁹ *Id.*, Sections 8 and 47.

Act. This is the mechanism for implementing major entitlements such as compensation and benefit sharing. Hence, it could be said that the Authority and the Gene Fund play crucial role in the realisation of farmers' rights as envisaged under the PVP Act.

B. Biological Diversity Act

The Biological Diversity Act, 2002 (hereafter 'Biodiversity Act') is another important statute significant to farmers' rights in India. The Biodiversity Act was enacted with the purpose of complying with the Convention on Biological Diversity, 1992. The Biodiversity Act does not address farmers' rights explicitly. Nevertheless, two important aspects of farmers' rights are dealt with under the Biodiversity Act. They are access to biological resources and fair and equitable sharing of benefits arising out of the use of biological resources.

While the PVP Act is silent on the issue of access, this is one of the important objectives of the Biodiversity Act. Therefore, the Biodiversity Act is the major statutory framework in India applicable to the issue of access to plant genetic resources. Access to biological resources or knowledge (this includes plant genetic resources and knowledge) is regulated under the Biodiversity Act through a license mechanism. This means, prior approval from the National Biodiversity Authority is required to access biological resources and knowledge.⁴⁰ The requirement of prior approval is also applicable to the case of transfer of the results of any research relating to biological resources obtained from India.⁴¹

The application of the prior approval system is limited to foreign citizens, foreign corporations and Indian citizens who are non-resident.⁴² Indian citizens and Indian companies are expressly excluded from this provision. The Biodiversity Act provides a lesser degree of regulation to Indian citizens and corporations registered in India by requiring prior intimation from the State

⁴⁰ Biological Diversity Act, 2002, Section 3.(1)

⁴¹ *Id.*, Section 4.

⁴² *Id.*, Section 3.(2)

Biodiversity Board. There is a significant difference between ‘prior approval’ and ‘prior intimation’. Foreign citizens and companies have to wait until they get permission from the National Biodiversity Authority. At the same time their Indian counterparts have to just intimate and do not have to wait for the permission.

This differential treatment would likely to have implications on farmers’ rights. Regulation at the point of access could be considered as an effective measure through which the scope and extent of benefit sharing can be determined. Moreover, this is the stage where key norms of prior informed consent and mutually agreed norms can be effectuated fruitfully. This is apparent in the Biodiversity Act where it gives power to the National Biodiversity Authority to put terms and conditions in the prior approval including terms and conditions regarding benefit sharing.⁴³ While this differential treatment can be justified on the ground that the most serious breaches will occur when biological resources or traditional knowledge are transferred to foreign countries without regulation, this does not seem to make much sense so far as the rights of the traditional farmers and local communities are concerned.⁴⁴

Equitable sharing of benefit is another important area where the Biodiversity Act is linked to farmers’ rights. The Biodiversity Act makes it a mandatory duty of the National Biodiversity Authority to ensure that the terms and conditions subject to which approval is granted secure equitable sharing of benefits. The Biodiversity Act also provides that the benefit sharing arrangement shall be in accordance with mutually agreed terms and conditions between the person applying for approval, local bodies concerned and the benefit claimers.⁴⁵

The Biodiversity Act gives an illustrated list of benefits that could be shared. This includes joint ownership of intellectual property rights, transfer of technology, establishment of research and development units in the area of

⁴³ *Id.*, Section 19.(3)

⁴⁴ Rajesh Sagar, “Intellectual Property, Benefit-Sharing and Traditional Knowledge – How Effective is the Indian Biological Diversity Act, 2002?”, 8(3) *Journal of World Intellectual Property* 383- 400, 387 (2005).

⁴⁵ Biological Diversity Act, 2002, Section 21.(1)

benefit claimers and monetary compensation.⁴⁶ As a general strategy, the Biodiversity Act provides that the compensation amount is to be deposited in the National Biodiversity Fund. It is further envisaged that the amount may be paid to claimers directly if it is possible to identify precisely the claimers.⁴⁷ However, this is subject to the discretion of the National Biodiversity Authority.

The idea of equitable sharing of benefits is further facilitated under the Biodiversity Act by making it mandatory for any person intending to apply for intellectual property rights, in or outside India, for any inventions based on biological resources obtained from India to get prior approval from the National Biodiversity Authority.⁴⁸ One of the purposes of this provision is to ensure equitable benefit sharing by empowering the National Biodiversity Authority to put conditions in this regard on approval.⁴⁹ This provision does not distinguish between foreign citizens and corporations and their Indian counterparts. However, this provision is not applicable to the registration of plant varieties under the PVP Act.

Implementation Issues: An Analysis

The PVP Act has received mixed comments and responses in the context of farmers' rights. While some hail it as a landmark being the first of its kind in the world, some others criticise it as incapable of producing any significant outcome for farmers.⁵⁰

The appreciation of the PVP Act, mainly, is based on the fact that farmers' rights have been incorporated as a separate chapter recognising some of the core rights of farmers. Whereas the critique is mainly based on the fact that the PVP Act treats farmers at par with modern commercial breeders. This approach does not take into consideration the essential difference in working, preferences and

⁴⁶ *Id.*, Section 21.(2)

⁴⁷ *Id.*, Section 21.(3)

⁴⁸ *Id.*, Section 6.(1)

⁴⁹ *Id.*, Section 6.(2)

⁵⁰ N.S. Gopalakrishnan, "Protection of Farmers Right in India: Need for Legislative Changes", *Cochin University Law Review* 105-116 (2001).

concerns between modern commercial breeding and the traditional farming system. These two systems rely on and promote different knowledge systems and identify innovations differently and reward inventors in different ways.⁵¹ This could be explained with two points.

First, the modern commercial breeding industry seeks rewards mainly in the form of financial benefits, whereas the established farming practices do not concentrate exclusively on financial incentives. Second, knowledge produced through farming practices cannot easily be attributed to a single farmer or a group of farmers. To put it another way, farmers' knowledge is often less individualistic than scientific knowledge produced in the laboratory.

The PVP Act does not consider this essential difference. The procedure prescribed under the Act for registration of farmers' variety could be taken as a best example to establish this gap. Even though the PVP Act does not require farmers to comply with all conditions prescribed under the Act, farmers need to produce a declaration as to the lawful procurement of the genetic material or parental material to register a farmers' variety. It has been argued that this requirement does seem to be unrealistic given the farming practices followed traditionally in this country.⁵²

Further, the equal treatment of farmers and commercial breeders under the PVP Act with regard to the registration of new varieties would do little good to farmers. Because, various conditions required to be followed in the registration of a new variety requires technical expertise. Given the social and economical conditions of majority of farmers in India, this provision would have little effect when it comes to implementation.

The socio-economic condition of farmers will also likely to affect the benefit sharing mechanism envisaged under the PVP Act. The PVP Act requires farmers to be vigilant and make application before the authority which is situated most likely far away from their places. To counter this implication, the PVP Act

⁵¹ Philippe Cullet, "Revision of the TRIPS Agreement Concerning the Protection of Plant Varieties". 2 (4) *Journal of World Intellectual Property* 617-656 (1999).

⁵² See Gopalakrishnan, note 50 above.

presupposes that non-governmental organisations would take care of this matter. However, this does not seem to be sufficient, especially given the fact that the socially and economically under privileged farmers will have to fight against big companies having huge financial and human resources.⁵³

Regarding the procedural and administrative aspects, there could be three major critique of the PVP Act. First, the PVP Act envisages that the revenue generated from the use of farmers' variety is to be maintained by the Gene Fund and part of this money will be used for the administrative expenses of the Gene Fund. Being this a responsibility of the government, it could be argued that the whole amount should be used for the benefit of farmers. Second, the PVP Act provides for compensation to farmers from commercial breeders if the seeds purchased by farmers failed to yield as declared by the breeder. Regarding the quantum of compensation, the PVP Act gives complete discretion to the Authority. In this scenario, it could be suggested that there should be some guidelines as to the quantum of compensation such as 'it should be at least twice the projected harvest value of the crop'.⁵⁴ Third, the PVP Act provides protection to farmers from innocent infringement of breeders' rights. Here the critical point is that the burden of proof lies on farmers. It is for the farmers to prove that the infringement was 'innocent'. This could be considered as a deviation from the general principle that the duty to prove lies on the person who alleges the violation of rights. Moreover, the PVP Act does not provide any particular reason for this deviation.

Another major critique of farmers' rights as provided under the PVP Act is related to the classic property rights of farmers. Section 39 of the Act provides that farmers are not allowed to indulge in commercial exchange of seeds of a variety protected under the Act. As per the classical property concept, a farmer has absolute control over the seeds purchased by him. Therefore, the right to exchange such seeds, whether in a commercial or non-commercial manner, could

⁵³ *Id.*, at p. 115.

⁵⁴ Suman Sahai, "Plant Variety Protection and Farmers' Rights Law", 36(35) *Economic and Political Weekly* 3338-3342 (2001).

be considered as inevitably emanating from the classic property right concept. This right has been curtailed or restricted by the PVP Act. Moreover, it is a fact that majority of seed requirement in India is met by farmer-to-farmer exchange.⁵⁵ It could be, therefore, argued that the PVP Act does not provide sufficient reason for restricting this classic property right and its implications upon agricultural economy do not seem to have considered adequately.

Broadly, the major reason for these seemingly unrealistic normative and procedural manifestations could be attributed to the fact that the PVP Act was originally designed for the registration of new variety bred by modern corporate breeders. Farmers' rights were included subsequently at the instance of the Joint Parliamentary Committee without changing the rest of the provisions of the framework.⁵⁶ Therefore, inconsistencies and contradictions are very likely both at the conceptual and procedural level.

Further, the presence of the Biodiversity Act makes the legal and institutional framework addressing farmers' rights in India complex. The complexity is particularly apparent in the case of access and benefit sharing. A brief comparative analysis of two statutes could reveal that there is overlapping and differences between these two statutes. This might lead to obscurity at the level of implementation and realisation of farmers' rights also. Most importantly, there are three issues relevant to farmers' rights in this regard.

First, it is most likely that access to plant genetic resources will be regulated under the Biodiversity Act in accordance with mutually agreed terms with the participation of all stakeholders.⁵⁷ This reveals an unclear scenario where a person or corporation intends to develop a new plant variety by using a plant genetic resource(s) in India should seek prior permission from the National Biodiversity Authority in consultation with farmers and local communities and the consequent new plant variety will be registered under the PVP Act. Since, the

⁵⁵ Niranjan Rao, "Indian Sees System and Plant Variety Protection", 39(8) *Economic and Political Weekly* 845-852 (2004).

⁵⁶ Biswajit Dhar and Sachin Chaturvedi, "Introducing Plant Breeders' Rights In India: A Critical Evaluation of the Proposed Legislation", 1(2) *Journal of World Intellectual Property* 245 – 262 (2005).

⁵⁷ It is to be noted that this provision shares the norms provided under the FAO Treaty which envisages right to participation as an important content of farmers' rights.

PVP Act also contains norms regarding benefit sharing, it is most likely that farmers have to apply afresh before the Protection of Plant Varieties and Farmers' Rights Authority for benefit sharing. Here the critical question is the relevance and legal validity of terms and conditions entered into as part of approval by the National Biodiversity Authority regarding benefit sharing when a farmer or a farming community approach the Protection of Plant Variety and Farmers' Rights Authority for benefit sharing. Another problem arise in this context is the presence of more than one forum to address single issue.

Second issue is related to the difference in the scope of benefits. It is already noted that the PVP Act envisages only monetary benefits. Whereas the Biodiversity Act enlists a number of benefits other than monetary compensation. This raises a number of questions such as whether farmers can approach two different statutory authorities to claim benefits related to a single issue and whether the registered owner of the plant variety under the PVP Act can be held liable to share benefits under the Biodiversity Act on the basis of the instrument of prior approval?

Third issue is related to the difference in the ways in which monetary benefit is to be dispensed. The PVP Act does not provide any direct rights in this regard by providing that monetary compensation is to be deposited in the Gene Fund. At the same time, the Biodiversity Act, to some extent, recognises the right of the claimers to receive monetary compensation directly. Here again the question comes whether farmers can choose the forum to claim monetary compensation? Even if this is possible at a theoretical level, it may be very difficult to happen in practice given the socio-economic condition of most of the farmers in India.

A probable solution to these overlapping and conflicting regimes is an effective co-ordination between two statutory frameworks. This could be facilitated by a new regulation or guideline on access and benefit sharing by the central government by incorporating all relevant norms such as prior informed consent, mutually agreed terms and an expanded list of benefits. The impediment of socio-economic conditions of farmers and local communities could be

addressed by envisaging a pro-active role for statutory bodies to ensure that relevant norms are followed in meaning and spirit. In fact the Biodiversity Act already follows this approach by entrusting the duty on the Biodiversity Authority to ensure mutually agreed terms between the user, local communities and claimers.

Conclusion

Legal regime in India relating to farmers' rights consists of two major statutes – the Protection of Plant Varieties and Farmers' Rights Act, 2001 and the Biological Diversity Act, 2002. The Protection of Plant Varieties and Farmers' Rights Act, 2001 addresses farmers' rights directly. The rights of farmers provided under this Act are registration of farmers' variety, right to claim compensation for default seeds purchased from breeders, benefit sharing and recognition of traditional rights of farmers. The Biological Diversity Act, 2002 is linked to farmers' rights as it regulates access and benefit sharing. This Act provides norms of prior informed consent and mutually agreed terms for accessing biological resources in India. These norms are crucial for farmers' rights as it facilitates fair and equitable sharing of benefits arising from the use of plant genetic resources.

The existence of more than one statutory framework makes farmers' rights in India a subject of 'regime complex'. There are several overlapping areas between the existing statutory regimes. For instance, both the Protection of Plant Varieties and Farmers' Rights Act and the Biological Diversity Act deal with benefit sharing. However, the scope of benefit sharing is significantly different under these two statutes. While the Plant Variety Protection Act talks only about monetary compensation, the Biological Diversity Act provides a number of benefits other than monetary compensation.

A probable solution to these overlapping and conflicting regimes is an effective co-ordination between two statutory frameworks. This could be facilitated by a new regulation or guideline in this regard by the Central Government by incorporating all relevant norms. The poor socio-economic conditions of farmers and local communities could be addressed by envisaging a

pro-active role for statutory bodies to ensure that relevant norms are followed in meaning and spirit. In fact the Biodiversity Act already follows this approach by entrusting the duty on the Biodiversity Authority to ensure mutually agreed terms between the user, local communities and claimers.

Legal regime of farmers' rights is still evolving. Two major challenges in this regard are the proposed Seeds Bill, 2004 (latest amendment in February 2011) and the evolution of the legal framework for the protection of traditional knowledge. It is too early to analyse these ongoing developments. However, it is very important that the evolving statutory framework needs to be brought in harmony with the existing statutes. Otherwise the presence of multiple legal and institutional frameworks will weaken the implementation and thereby affecting the interests of farmers. Moreover, adequate care and attention must be taken to ensure that protection of the commercial rights of seed companies is not at the cost of food security of the country and the livelihood of farmers.