Commentary on the Indian Protection of Plant Varieties and Farmers’ Rights Act 2001

Dwijen Rangnekar

Introduction

This chapter investigates the way in which farmers’ varieties are treated pursuant to India’s Protection of Plant Varieties and Farmers’ Rights Act and the accompanying Protection of Plant Varieties and Farmers’ Rights Rules, 2003.1 Read together, the Act and the Rules represent the first time that farmers’ rights have been explicitly recognized and promoted in national law. The Indian law was heralded by M.S. Swaminathan (1998) as unique in the sense that it is the first time anywhere in the world that the rights of both breeders and farmers have received integrated attention. For Olivier de Schutter (2009), the UN special rapporteur on the right to food, India’s legislative architecture stands alongside the African Model Law for the Protection of the Rights of Local Communities, Farmers and Breeders, and for the Regulation of Access to Biological Resources2 as an act of resistance to deepening proprietary claims in plant genetic resources. The drafting history of India’s law is testimony to struggles to resist intellectual property rights in plants while seeking to push the canon for the rights of marginalized developers and users of plant genetic resources.

It may surprise some readers that aspirations for plant breeders’ rights (PBRs) in India predate the completion of the Uruguay Round. In 1990, the Indian Council for Agricultural Research published a study on introducing PBRs, and, thereafter, a technical mission was commissioned by the Food and Agriculture Organization (FAO) to review the topic (Rangnekar, 1998). Opposition to PBRs came from farmer movements, such as the Beej Satyagraha, and public interest litigation that sought to call the government to account on a range of issues, including plans for seeking membership in the International Union for the Protection of New Varieties of Plants (UPOV). Initial drafts of the legislation failed to explore residual latitude in Article 27.3(b) even while opting for a *sui generis* system for plant variety protection (for a discussion of options, see Leskien and Flitner, 1997; International Plant Genetic Resources Institute, 1999; the Crucible Group, 2001; and Rangnekar, 2002). For that matter, these early drafts also failed to incorporate norms and principles related to farmers’ rights.
as elaborated in countervailing global treaties, such as the FAO’s International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA). Following this introduction, the chapter provides a brief overview of the legal architecture of the Indian Act and Rules and how they are administered. Thereafter, it analyzes the main provisions of the Act and Rules concerning farmers’ rights and farmers’ varieties, noting in particular the registration criteria, process and the rights conferred therein. In this context, the chapter analyzes the actual performance or implementation of the Act and Rules, considering the numbers of applications and grants of rights over different types of varieties, including farmers’ varieties. Finally, it reviews the National Gene Fund and reports on the status of applications and concludes with some apprehensions about the legislative architecture.

Administration

The Act sets out provisions for a Protection of Plant Varieties and Farmers’ Rights Authority (Act, Chapter II) with a duty to ‘promote, by such measures as it thinks fit, the encouragement for the development of new varieties of plants and to protect the rights of the farmers and breeders’ (Act, section 8(1)). This duty includes, among things, ensuring the registration of extant varieties, preparing documentation of the registered varieties, indexing and cataloguing of farmers’ varieties, collecting statistics concerning plant varieties, ensuring adequate seed supply of registered varieties and maintaining the Register (Act, section 8(2)). Specific importance is given to the establishment of a Plant Varieties Registry (Act, section 12) and the development of a very detailed National Register of Plant Varieties (Act, section 13; Rules, section 23). Of relevance to the topic is the constitution of two committees: the Extant Variety Registration Committee and a Standing Committee on Farmers’ Rights. The Extant Variety Registration Committee, established in 2006, is to advise individuals on the registration of extant varieties, including procedures for registering each species and category of varieties and periodically reviewing applications. The Standing Committee on Farmers’ Rights is tasked with translating the provisions for farmers’ rights, primarily in Chapter VI of the Act, into practice. Finally, appeals to orders and decisions of the Protection of Plant Varieties and Farmers’ Rights Authority will be heard by a Plant Varieties Protection Appellate Tribunal, under whose jurisdiction will also be matters concerning the registration of a variety, claims on benefit sharing, compulsory licensing and payment of compensation, among others (Act, section 56). The decisions of the Tribunal shall be executable as a decree of a civil court (Act, section 57(5)).

Farmers’ rights

In the vast literature on the subject, a broad range of rights have been identified as constituting the rights of farmers, including the right to reuse saved seeds of registered varieties, the right to reward and recognize varieties through a
National Gene Fund, the right to benefit sharing, the right to register one's own varieties, the right to information and compensation for crop failure, the right to compensation for undisclosed use of traditional varieties and the right to adequate availability of registered propagating material. Some of these rights are included in the definition of farmers' rights in Article 9 of the ITPGRFA as discussed earlier in this volume. However, this chapter notes that that the Indian Act transcends the ITPGRFA, inasmuch as it states that:

- A farmer who has bred or developed a new variety shall be entitled to registration and treatment (i.e. protection) in a manner akin to a breeder.
- A farmer's variety is entitled to be registered if it fulfils all registration requirements. This has implications for subsequent users of such registered farmers' varieties; they will need to demonstrate obtaining prior informed consent from the farmers concerned if and when they apply for intellectual property rights on new varieties that incorporate a registered farmers' variety.
- A farmer engaged in conservation and improvement of genetic resources shall be entitled to recognition and reward from the National Gene Fund.4
- A farmer is entitled to save, use, sow, resow, exchange, share or sell his farm produce, including seed of a protected variety, provided that the farmer does not sell branded seed of the variety.5

These provisions for farmers' rights have been among the most difficult hurdles in negotiating India's accession to the 1978 International Convention for the Protection of New Varieties of Plants (UPOV Convention).6

Applicants: farmers as breeders

The entitlement for a farmer to be treated as a breeder is a celebrated feature of the Act (Swaminathan, 1998). Quite unlike laws in other jurisdictions, the definition for applicants who may apply to register a new variety under the Act (which confers breeders' rights) include 'any farmer, farmer group or community of farmers' (Act, section 16(1)(d)), which exists alongside the more standard categories of breeders. However, updates in the Plant Variety Journal or recent secondary literature (e.g. Nagarajan et al., 2010; Kochupillai, 2011) suggest that as yet no farmer has submitted an application to register a new variety and claim breeders' rights. While this situation may change in the future, the possibilities for farmers to be holders of PBRs could be illusionary. Nothing in either the Act or the Rules provides for differential criteria for the registration of varieties developed by farmers in comparison to other categories of applicants. Farmer applicants seeking to register their varieties for the grant of PBRs have to meet the same distinctness, uniformity and stability (DUS) standards and requirements for novelty that all other applicants need to satisfy (Act, section 15). For that matter, the fees for either registering a new variety or maintaining the registration (and, therefore, the rights conferred) are also the same for farmers as for all other applicants (see Table 13.1). The Act allows some
differential treatment for farmers in section 44, wherein farmers and farming communities are exempt from paying fees in proceedings before the Tribunal, the Authority or a High Court.

In this respect, it is useful to recall the negotiating history that led to the UPOV Convention. Discussions in Europe in the 1950s drew attention to how equitable standards for uniformity and stability between varieties developed by breeders and farmers were discriminatory to the breeding practices of farmers, which favoured levels of variability and heterogeneity in the variety. Illustratively, the 1954 Stockholm Conference on the Human Environment, under the auspices of the Organisation for European Economic Co-operation, heard delegates arguing for differential standards of uniformity and stability so as to valorize the work of farmer-breeders (Akerman and Tedin, 1955). These views failed to translate into either national practice or the emergent UPOV system. It is disappointing that India’s legal architecture has failed to explore the possibilities of differentiating between different categories of applicants based on their breeding practices by incorporating alternative registration criteria. On the other hand, it is important to note that in 2009, the government passed regulations which specified that, as far as farmers’ varieties were concerned, uniformity standards could be relaxed to allow double the number of off-types as otherwise permitted pursuant to the Plant Variety Journal of India7 (see the following discussion).

Independent of these provisions for farmers to register new varieties and be treated like breeders, there are provisions for the registration of farmers’

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**Table 13.1 Fees for registering a new variety**

<table>
<thead>
<tr>
<th>Test fees</th>
<th>20,000–50,000$^a$</th>
</tr>
</thead>
<tbody>
<tr>
<td>Annual renewal fees (per year) for:</td>
<td></td>
</tr>
<tr>
<td>Individuals</td>
<td>5,000</td>
</tr>
<tr>
<td>Educational institutions</td>
<td>7,000</td>
</tr>
<tr>
<td>Commercial enterprises</td>
<td>10,000</td>
</tr>
<tr>
<td>Application for registering as agent/licensee</td>
<td>10,000</td>
</tr>
<tr>
<td>Registration of essentially derived varieties for:</td>
<td>5,000 (Individuals)</td>
</tr>
<tr>
<td>Educational institutions</td>
<td>7,000</td>
</tr>
<tr>
<td>Commercial enterprises</td>
<td>10,000</td>
</tr>
<tr>
<td>Application for variation/cancellation of registration for:</td>
<td>3,000 (Individuals)</td>
</tr>
<tr>
<td>Educational institutions</td>
<td>5,000</td>
</tr>
<tr>
<td>Commercial enterprises</td>
<td>7,000</td>
</tr>
<tr>
<td>Notice of opposition</td>
<td>1,500</td>
</tr>
<tr>
<td>Application for benefit sharing</td>
<td>5,000</td>
</tr>
</tbody>
</table>

*Source: Protection of Plant Varieties and Farmers’ Rights Rules, 2003.*

Notes:

- All monetary values in Indian rupees.
- * Dependent on the species.
varieties. The latter enable particular provisions associated with farmers’ rights such as access and benefit-sharing rights to be triggered. These are discussed in the following section.

The different categories of ‘varieties’ and conditions for registration

At the heart of India’s innovative legislative architecture are the multiple categories of plant varieties, such as farmers’ varieties, extant varieties and new varieties, among others (see Table 13.2). In explaining this feature of India’s law, it is important to recognize that the Indian effort has either followed existing templates, such as the UPOV Convention’s *sui generis* system or sought to open up and travel new avenues. In Article 2, the Act defines variety as a plant grouping, except a microorganism, within a single botanical taxon of the lowest known rank, and it is mapped by the expression of characteristics that are distinguishable from others in the same plant grouping and are stable and uniform. The categories of variety noted in the legislation with possibilities for registration are:

- **Extant varieties:** By definition, extant varieties are those that are already in circulation – thus, those that include ‘varieties in common knowledge’ (see discussion later in this chapter), farmers’ varieties and any other variety in the public domain. Once a species is notified under the Act, a three-year moratorium is provided to allow extant varieties to be registered, which only requires a demonstration of DUS since, by definition, they fall foul of the requirement of commercial novelty.

- **Farmers’ varieties:** This is a subcategory of extant varieties, and the Act defines farmers’ varieties as those that have been traditionally cultivated and evolved by the farmers in their fields and also includes a wild relative or landrace or a variety about which the farmers possess common knowledge.

- **Varieties in common knowledge:** A subset of extant varieties, the term is not directly defined in the Act. However, while alluded to by the UPOV Convention,8 it is pronounced a number of times in the Act. A 2009 notice in the *Plant Variety Journal* explains that varieties in common knowledge are those in the public domain and should have been sold or otherwise disposed of in India for at least one year prior to the date of application and less than 13 years. This could include those varieties that are merchandised as ‘truthfully labelled.’

- **New varieties:** This category of variety is the subject of registration under the Act for conferring breeders’ rights – thus, mutually defined by being (commercially) new and DUS (as discussed later in this chapter). In sum, these varieties will be awarded, upon successful registration, with PBRs.

- **Essentially derived varieties:** These are defined primarily in phenotypical terms with respect to an initial variety from which it is predominately derived while also retaining the expression of essential characteristics related to the
<table>
<thead>
<tr>
<th>Definition</th>
<th>New variety</th>
<th>Extant variety</th>
<th>Farmers’ variety</th>
<th>Variety in common knowledge</th>
<th>Essentially derived variety</th>
</tr>
</thead>
<tbody>
<tr>
<td>A variety that meets the conditions for registration, notably commercial novelty, DUS.</td>
<td>A variety already available in India, which is either notified under section 5 of the Seeds Act, 1966; a farmers’ variety; a variety about which there is common knowledge or any other variety that is in the public domain.</td>
<td>A variety that has been traditionally cultivated by farmers in their fields or is a wild relative, landrace or a variety about which farmers possess common knowledge.</td>
<td>While not explicitly defined in the Act, this includes varieties in the public domain and should have been sold or otherwise disposed in India for at least one year prior to the date of application and less than 13 years.</td>
<td>With respect to an initial variety, an essentially derived variety is predominantly derived from the initial variety and thus conforms to it in the expression of essential characteristics and is clearly distinguishable from the initial variety too.</td>
<td></td>
</tr>
<tr>
<td>Commercial novelty: the variety has not been sold or otherwise disposed of in India from the date of application, earlier than one year and elsewhere earlier than 6 years for trees and vines or 4 years for other species.</td>
<td>Since by definition they cannot satisfy commercial novelty, the conditions for registration are limited to DUS. Once a species is notified, there is a three-year moratorium within which extant varieties can be registered.</td>
<td>As a subcategory of extant varieties, there is no requirement for commercial novelty. A June 2009 regulation modifies the standard DUS requirements by tolerating twice the number of off-types for uniformity testing.</td>
<td>The conditions of registration are identical to those of extant varieties.</td>
<td>The conditions for registration are identical to those of new varieties.</td>
<td></td>
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</table>
DUS: The variety is clearly distinguishable in its essential characteristics from other varieties, and these features are uniform and stable upon repeated propagation.

Rights conferred

An exclusive right to ‘produce, sell, market, distribute, import or export the variety’ (Act, section 28(1)). These rights are conferred for a period of 9 years for trees and vines and 6 years in the case of other crops (Act, section 26(6)), with the possibility of renewal thereafter, up to a maximum of 18 years for trees and vines, 15 years for other crops.

The rights conferred for these categories of varieties remain somewhat ambiguous in the Act and the Rules. However, a careful reading suggests that the rights are quite identical to those granted to new varieties with some differences. In particular, the maximum duration of registration that is allowed for extant varieties is 15 years. Further, some commentaries suggest that registration of farmers’ varieties – which otherwise fall within the broader category of extant varieties – may be for longer durations.
genotype of the initial variety. These varieties may also be clearly distinguishable from the initial variety. Interestingly, essentially derived varieties can be registered under the Indian Act, subject to a set of requirements (Act, section 23).

The conditions for registration of new varieties broadly cohere with the UPOV Convention’s template of (commercial) novelty, distinctness, uniformity and stability (Act, section 15(1)). The novelty requirement is identical to the UPOV Convention’s approach (compare with section 15(3)(a) of the Act). However, there is a different approach for extant varieties – in that, by definition, they fall foul of any construction of novelty and, thus, are exempt from establishing novelty and must only satisfy DUS requirements (Act, section 15(3)).

Even as the conditions for registration cohere with the UPOV Convention, there is an important difference, in that the requirements for DUS (Act, section 15(3)) are pre-fixed in terms of essential characteristics. For example, distinctness requires the variety to be ‘clearly distinguishable by at least one essential characteristic from any other variety whose existence is a matter of common knowledge’ (Act, section 15(3)(b), emphasis added). The Act defines essential characteristics as characteristics that ‘contribute to the principal features, performance or value of the plant variety’ (Act, section 2). Such an agromonic assessment is a departure from the UPOV Convention’s construction of these standards. As evidenced by the amendments that Kenya had to make to complete its accession to the UPOV Convention in 1978, it will prove to be an additional hurdle to India’s membership to the UPOV Convention, if and when accession arises (Rangnekar, 2014).

As provisions for registering farmers’ varieties are made under the generic class of extant varieties, they also have to meet DUS requirements. Recognizing a paucity of experimental data and also limited understanding of the range of variability tolerated by farming communities, Nagarajan, Yadav and Singh (2008) noted that the species-level DUS standards for farmer varieties should be developed iteratively and carefully. That said, these authors also believe that farmers’ varieties have a tendency towards levels of homogeneity and distinctness that is also reflected in their wider acceptance and vernacular classification of folk varieties and wild cultivars. Consequently, they recommended that the parameters and standards of DUS should ‘marginally vary’ from other categories of varieties (ibid., 710). Subsequently, 19 species were notified under the Act (Nagarajan et al., 2010). A June 2009 regulation passed under the Act relaxed the uniformity requirement for farmers’ varieties to allow twice the number of off-types as indicated for variety as provided for under the Plant Variety Journal of India.

Rights conferred with respect to different types of registered/protected varieties

What then about the ‘rights’ that farmers acquire? As far as new varieties are concerned, the Act, at first blush, appears to confer standard 1978/91
UPOV-style PBRs (Act, section 28), including the exclusive right to produce, sell, market, distribute, import or export the variety. As in the case of the UPOV Convention, these rights are subject to various exemptions (e.g. researchers’ rights – Act, section 30) and limits (e.g. compulsory licensing – Act, Chapter VII). However, unlike the UPOV Convention, the Indian system introduces particular equity provisions (e.g. benefit sharing – Act, Chapter IV). However, the Act also grants farmers the rights to save seeds to sow and exchange or sell seeds of a protected variety (Act, section 39).

The duration of the rights following the successful registration of a new variety are as follows:¹¹

- for trees and vines, initially for 9 years and thereafter they can be reviewed and renewed for a maximum period of 18 years from the date of registration;
- for other species, initially for 6 years and thereafter they can be reviewed and renewed for a maximum period of 15 years from the date of registration.

Unlike rights that result from registering a new variety, the rights that accrue from registering a farmers’ variety are largely negative rights – akin to defensive publication to forestall misappropriation and defeat others’ novelty claims. These rights are then linked to other sections of the Act. For instance, the documentation that must necessarily support an application for registration and conferment of PBRs (Act, section 18) includes a declaration of prior informed consent from the providers of registered farmers’ varieties (Act, section 18(1)(h)). In this sense, India’s legal architecture provides an array of measures that are notable for farmers’ rights.

Srividhya Nagarajan et al. (2008, 711) insist that the rights here must necessarily be ‘notional’ as the variety has already been part of the public domain. Consequently, it would appear that the registration would assist in larger struggles against biopiracy while also enabling claims for benefit sharing from the National Gene Fund (compare Act, section 45) or, as Nagarajan et al. explain, to ‘negotiate a deal’ if and when the variety is used as parental material in breeding a new variety (ibid.).

This brings us to the third possible set of rights that flow from the Act, not exclusive rights such as those discussed earlier with respect to new and farmers’ varieties, but, rather, freedom to use rights related to varieties that may be owned or registered by others. Chapter VI of the Act addresses seed saving and benefit sharing from the National Gene Fund. Section 39(1)(iv) of the Act clearly spells out the following:

A 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.

With the proviso that the farmer is not entitled to sell branded seed of a variety protected under this Act – a point, as shortly explained, reinforced by seed
market regulations. The provision, it could be argued, is quite similar to the practice of ‘brown bagging’ as elaborated under the US system of plant variety protection. Under the Plant Variety Protection Act in the United States, farmers have provisions that allow for the sale of harvested grain of a protected variety as seed, with the proviso that the variety’s name not be used. Hence, the phrase ‘brown bagging’ is associated with this practice. In 1995, the US Supreme Court in *Asgrow v. Winterboer* decided that the exemption should be understood to limit the amount of seed for sale to the amount that the farmer would need to replant their own farm.

These provisions for saving/selling seeds are, unsurprisingly, contentious. In addition, the Seeds Bill 2004 substantially watered down these (and other) provisions, while ostensibly seeking to promote the provisions of quality seeds. Widespread opposition within and beyond the Indian Parliament ensured the bill’s withdrawal and the establishment of a Parliamentary Standing Committee on Agriculture, chaired by Ram Gopal Yadav, tasked with assessing the bill. Their report in November 2006 led to a revised Seeds Bill, 2010. However, state governments have lobbied for further amendments, and this version of the Seeds Bill still awaits parliamentary approval (Singh and Chand, 2011).

Two of the provisions of the Seeds Bill are relevant to the issues discussed in this chapter: (1) protection for farmers’ right to grow, save, resow, exchange, share or sell seeds; and (2) the status of farmers’ varieties within the National Register of Seeds. With an estimated 70 percent or more of the required domestic seed provided by farmers themselves, it is crucial that the seed market regulations do not erect regulatory barriers to its circulation. The Seeds Bill, 2004, sought to impose quality standards (e.g. germination rates and so on) for all seeds that are transacted, including, therefore, farmers’ varieties. Additionally, the bill sought to introduce a mandatory requirement for all varieties to be registered prior to their being transacted (including bartering). For a variety of commentators, these provisions in the Seeds Bill, 2004, not only conflicted with how farmers’ rights have been drawn out in the Act but also posed problems for the reality and significance of seed exchange in India (Bala Ravi, 2010). The recommendations from the Parliamentary Standing Committee, were largely – though not entirely – adopted in the Seeds Bill, 2010. For instance, the seeds of farmer’s varieties are exempted from a requirement for registration under the National Register of Seeds, which, therefore, removes a possible barrier to this system of seed exchange. Further, the constraints on farmers’ rights to exchange, share or sell seeds (including harvested seeds of a registered variety) have been brought into line with the provisions of the Act.

**National Gene Fund**

Finally, provisions associated with the National Gene Fund contribute to farmers’ rights. Reflecting ideas found in the ITPGRFA, India’s legislative architecture has made the National Gene Fund a reality (Act, section 45). Different
sources of revenues, such as an annual fee and a royalty paid by the breeder, among others, are to constitute the fund (Act, section 35(1)). The fund will then support the benefit-sharing arrangements that the Act prescribes and will also be the financial resource from which farmers and farming communities will be supported in their conservational activities concerning plant genetic resources. A national debate and consultation process was conducted to establish an agreement on the structure of fees and royalty rates for the National Gene Fund, with an agreement being announced in the Gazette in August 2009 (see Nagarajan et al., 2010):

- New varieties: An annual fee Rs 2,000, plus 0.2 percent of the sales value of the seeds during the previous year plus 1 percent of royalty, if any, received during the previous year from the sale proceeds of seeds.
- Extant varieties: For those notified under section 5 of the Seeds Act, 1966, the annual fee shall be Rs 2,000; for other extant varieties, the annual fee shall be Rs 2,000 plus 0.1 percent of the sales value of the seeds during the previous year plus 0.5 percent of the royalty, if any, received during the previous year from the sale proceeds of the seeds.

Naturally, much attention will be placed on how this agreement proceeds to finance the National Gene Fund and how disbursements are made thereafter.

Application status

Applications to register varieties began being received in May 2007, both for new varieties and extant varieties (the latter includes farmers’ varieties). In addition, criteria for registering ‘varieties in common knowledge’ were finalized and published in June 2009, after which point applications were received. The initial applications for registering plant varieties tended to be for extant varieties, and, more recently, there have been applications for new varieties and farmer varieties (Table 13.3). By May 2013, a total of 4,094 applications for the registration of plant varieties – across all categories – were received, of which 37.8 percent were for extant varieties, 33.2 percent were for farmers’ varieties and 28.9 percent were for new varieties (compare with Table 13.3). As in other jurisdictions, the examination of applications takes time, and their full assessment involves a number of field trials as well. In addition, the Indian legal system also requires examination, depending on the type of variety and the benefit-sharing and prior informed consent declarations. It is not surprising that applications to register farmers’ varieties are overwhelmingly in rice. In 2009–10, three farmers’ varieties in rice were successfully registered, establishing the first-ever registration of farmers’ varieties. The first new varieties successfully registered in India were in 2009–10, with two bread wheat variety certificates being granted to the Maharashtra Hybrid Seed Company. In addition, there have been numerous certificates of registration granted for extant varieties, totalling over 600 by 2012–13 (compare with Table 13.4).
Table 13.3 Annual applications to register plant varieties (2007–13)

<table>
<thead>
<tr>
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<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Extant variety</td>
<td>355</td>
<td>260</td>
<td>297</td>
<td>216</td>
<td>177</td>
<td>243</td>
<td>1,548</td>
</tr>
<tr>
<td>Farmer variety</td>
<td>2</td>
<td>3</td>
<td>44</td>
<td>30</td>
<td>921</td>
<td>359</td>
<td>1,359</td>
</tr>
<tr>
<td>New variety</td>
<td>69</td>
<td>171</td>
<td>227</td>
<td>395</td>
<td>149</td>
<td>176</td>
<td>1,187</td>
</tr>
<tr>
<td>Total*</td>
<td>426</td>
<td>460</td>
<td>568</td>
<td>642</td>
<td>1,247</td>
<td>785</td>
<td>4,094</td>
</tr>
</tbody>
</table>

* Note that totals may not add up as all categories of varieties (e.g. essentially derived varieties and varieties in common knowledge) are not included here.

Table 13.4 Annual registrations of plant varieties (2008–13)

<table>
<thead>
<tr>
<th></th>
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<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Extant varieties</td>
<td></td>
<td>40</td>
<td>123</td>
<td>131</td>
<td>99</td>
</tr>
<tr>
<td>New varieties</td>
<td></td>
<td>2</td>
<td>20</td>
<td>34</td>
<td></td>
</tr>
<tr>
<td>Farmers’ varieties</td>
<td></td>
<td>3</td>
<td>3</td>
<td>3</td>
<td></td>
</tr>
<tr>
<td>Essentially derived varieties</td>
<td></td>
<td>1</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Source: Author’s calculations from the annual reports of the Protection of Plant Variety and Farmers’ Rights Authority, various issues.

Conclusion

The Protection of Plant Varieties and Farmers’ Rights Act and associated regulatory interventions provide a complex legal architecture for farmers’ rights and the registration of farmers’ varieties. While many features of this legal architecture have been celebrated, some of them are possibly illusionary. In particular, provisions to treat farmers as applicants for new varieties may be illusionary as there is nothing in either the Act or the Rules that would ensure differential treatment of the plant material that reflects the different crop improvement, breeding or conservation objectives and practices of farmers. At present, there is very little accommodation for the fact that the materials farmers have developed through informal innovation systems may not satisfy the DUS requirements that are found in most countries’ plant variety protection laws and the UPOV Convention from which they draw their inspiration. For that matter, neither will they be differentially treated in terms of payment of fees. Alternatively, the Act does not require commercial novelty as a registration requirement for farmer varieties as they are considered a subcategory of extant varieties.

Although farmers’ varieties are held to such high standards for registration, they are not protected in the same way as new varieties under the Act. Indeed,
the only positive right associated with farmers’ varieties is that parties must show proof of having gained prior informed consent from the owners of the registered farmers’ varieties if those varieties are incorporated in new varieties over which those parties are seeking intellectual property rights protection. It appears there is no other instance or checkpoint where proof of the farmers’ variety registrant’s prior informed consent is necessary.

Despite these limitations, there have been a number of applications to register farmers’ varieties under the Act, totalling 1,359 in 2012–13, with three successful registrations in the same period. However, in contrast, as far as this author can verify, there have been no applications submitted by farmers to register a new variety – akin to the status of a breeder. In closing, it is also necessary to flag concerns about the manner in which other regulatory instruments, such as the Seeds Bill, may diminish some of these achievements in farmers’ rights, such as the right to sell saved seeds. In addition, concerns remain as to the manner in which securing rights in farmers’ varieties impacts farming communities and their cultural and social practices concerning seeds. In this respect, it is important that the laws do not end up disrupting long stabilized cultural practices.

Notes


3 International Treaty on Plant Genetic Resources for Food and Agriculture, 29 June 2004, online: <www.planttreaty.org/content/texts-treaty-official-versions> (last accessed 4 March 2015).

4 Additionally, section 41 of the Act makes available ‘rights of communities,’ which allows for the filing of claims for benefit sharing and, thereby, seeking benefit sharing from the National Gene Fund.

5 Other provisions in the Act can be seen to buffer farmers’ rights. Thus, for example, section 42 allows for ‘protection of innocent infringement,’ wherein a farmer may avoid infringement on establishing that ‘at the time of such infringement [the farmer] was not aware of the existence of such right’ (Act, section 42(i)).

6 International Convention for the Protection of New Varieties of Plants, 2 December 1961, revised 1978, online: <www.upov.int/en/publications/conventions/index.html> (last accessed 10 May 2012). In 1997, the UPOV Convention decided to allow accession to the 1978 Act, despite it being closed to those countries that had sought its advice on conformity prior to the entry into force of the 1991 Act. This special provision was open until 24 April 1999. However, at its thirty-third ordinary session in October 1999, it decided to make further special provisions for allowing accession to the 1978 Act for India, Nicaragua and Zimbabwe. Alongside these extraordinary efforts, the negotiations have occurred under a cloud of secrecy and warranted a public interest litigation in October 2002 by a nongovernmental organization, Gene Campaign. Responding, the government of India denied it was ‘pursuing’ the offer to accede to the 1978 UPOV Convention.

The 1978 and 1991 Acts of the UPOV Convention refer to ‘varieties in common knowledge.’ For instance, distinctness requires the variety to be ‘distinguishable by one or more important characteristic from any other variety whose existence is a matter of common knowledge.’

As noted earlier, once a species is notified under the Act, a three-year moratorium is provided for the registration of extant varieties. For farmers’ varieties, an October 2009 notification extended this period to 5 years from the date of a species being notified.

The 19 species are bread wheat, rice, maize, sorghum, pearl millet, pigeon peas, chickpeas, lentils, black grams, green grams, field peas, kidney beans, diploid cotton (two species), tetraploid cotton (two species), jute (two species) and sugarcane.

Bearing in mind that there are fees to be paid for renewing the registration (see Table 13.1) and that the rights holder is obliged to maintain the variety true to type throughout the duration of the registration.

Bearing in mind that an earlier version, the Seeds Bill, 2008, lapsed in 2009, thus making this the third iteration (see Bala Ravi, 2010, for a discussion).

References


