Page 1942 - 1952 **DOI:** *https://doij.org/10.10000/IJLMH.115581*

INTERNATIONAL JOURNAL OF LAW MANAGEMENT & HUMANITIES

[ISSN 2581-5369]

Volume 6 | Issue 4

2023

Sui Generis Protection to the Plant Varieties, Farmer's Rights v. Breeder's Rights: An International Perspective

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ABSTRACT

The research paper talks about the sui generis system with reference to the farmer's rights and breeder's rights and further to this I had also tried to show the international aspect of the same. Firstly, it gives a brief introduction about the sui generis system that how it got evolved, it's meaning and I have disused about the protection of sui generis plant varieties. Sui generis is now a system which guards the unique plants made by the breeder's and for this the Intellectual Property Rights plays a very major role. So in this research paper I had also written that how the Intellectual Property Rights helped sui generis system to get evolved and to get strong. The research paper has a brief history about the International conventions by which it has slowly and gradually got developed.

Later in this research paper I have discussed about the situation in India and have related to the different foreign countries like USA, U.K and more. At the end the manuscript talks about the Gala rose controversy and I have tried to explain that how sui generis system also protects the traditional knowledge.

Keywords: *Sui Generis, Plant Varieties, Farmers Rights , Breeders Rights.*

I. INTRODUCTION

If we talk about the meaning of term 'Sui Generis' as a general English word then it is unique and original of its own kind. Further as we know that the Earth is the only habitat in the entire universe and we the animals are not as old as plants are and eventually as the Earth got evolved from a pale orange dot then to ice age and now to a perfect eco system[2]. Meanwhile as plants are bi sexual in nature they started growing after the ice age and they by themselves developed various varieties of the plants and some of them got evolved by themselves and by time became unique that is Sui Generis.

Due to the substantial changes in legislation and policy over the past few decades, the agriculture business is one of the most important sectors to comprehend and analyze the context

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[2]EXOPLANET EXPLORATION, https://exoplanets.nasa.gov (last visited Feb 24, 2023).

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of intellectual property rights. Plant variety management includes the preservation, use, and exploitation of plant varieties by farmers, commercial breeders, governments, and international organizations.

Intellectual property rights over plant varieties that give owners sole commercial rights for a predetermined period are referred to as "plant variety protection."

Rapid alterations to the global system managing genetic resources are having a significant impact on the framework of agricultural development in developing nations. A crucial part of this transformation is the obligation of WTO Members to broaden intellectual property protection (IPP) in agriculture by protecting improved varieties of plants with an effective sui generis system of protection, in addition to the Convention on Biological Diversity (CBD) and the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGR). This is just one of many requirements of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), which has a significant impact on how many developing nations protect their intellectual property.

The Agreement on TRIPs requires WTO Members to introduce an "effective sui generis system" for the protection of plant varieties. This commitment by WTO Members implies that most developing countries, which hitherto had not extended intellectual property rights (IPRs) to their agricultural sector, would have to do so. They would thus have to adopt intellectual property protection (IPP) regimes more like those prevailing in the industrialized countries. The adoption of IPRs in agriculture has a recent origin, even in the developed world.

II. SUI GENERIS PROTECTION

'Sui generis' protection, also known as specificity protection, is a system of protection that is specific to plant varieties. It is a form of intellectual property protection that is available to breeders of new plant varieties. Sui generis protection is available in a number of countries, including France, Italy, Spain, and the United States.

Under a sui generis protection system, breeders have the exclusive right to produce, sell, and distribute their new plant varieties. They also have the exclusive right to use the variety for breeding other plants. This system is different from breeders' rights, which is a system that is available in a number of other countries, including the United Kingdom and Canada.

Farmers' varieties contribute significantly to plant breeding variety. A lot has been written regarding the creation of sui generis protection regimes for plant varieties as an alternative to the prevalent form of protection outlined in the International Convention for the Protection of

New Varieties of Plants (UPOV Convention).

Under a breeders' rights system, breeders have the exclusive right to produce, sell, and distribute their new plant varieties. However, they do not have the exclusive right to use the variety for breeding other plants. This system is also different from intellectual property rights, which is a system that is available in a number of other countries, including the United States.

Under an intellectual property rights system, breeders have the exclusive right to produce, sell, and distribute their new plant varieties. They also have the exclusive right to use the variety for breeding other plants. However, they must file a patent application in order to protect their plant variety. This system is the most common system of protection for plant varieties, and it is available in a number of countries, including the United States.

III. DESCRIPTION

(A) The Paris Convention of 1883[3]

It was the first international accord for IP law harmonization. It not only extended protection to industrial property but also applied to agriculture and extractive industries. The USA made the first attempt to recognize the intellectual property right of a plant breeder by enacting the Plant Patent Act in 1930. The aim of the Act was to protect a sexually propagated plant by patents. On the other hand, the enactment of the act fuelled debate on the extension of IPR protection to agriculture. Experts opined that patent protection should be extended to the plants whereas sui generis protection should be extended to recognize the rights of the plant breeders.

The Convention on the Unification of Certain Points of Substantive Law on Patents for invention was embraced by several European nations. The convention stipulated that biological processes used to produce plant and animal species, or fundamentally their variants, should not be included in the definition of patentable subject matter.

Later, in 1973, the European Patent Convention adopted these exceptions in its article 53, and the TRIPS Agreement, 1995, adopted the same language in Article 27 (3) (b).

(B) The Convention on Biological Diversity[4]

It was adopted in 1992. It recognized a nation's sovereign rights over its biological resources. The importance of local communities and indigenous people in preserving biological resources was recognized in Article 8 (j) of the agreement, along with their right to a fair and equal share of the benefits associated with their usage. Later, it was recognized that this benefit-sharing was

[3] Law Essentials, https://lawessential.com/blogs-ip/f/an-analysis-of-sui-generis-protection-in-plant-varieties (last visited March 03, 2023).
[4] Ibid, note 3.

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a crucial element in the realization of farmers' rights.

(C) Establishment of the World Trade Organization[5]

The TRIPS Agreement stipulated that by 1995, agricultural intellectual property should be covered by a patent, strong sui generis protection, or both. This implied that both developed and developing WTO members would extend some sort of protection to agriculture. Additionally, the right to defend farmers' rights and create a balance between breeders' and farmers' rights was granted by the provision for extending the sui generis protection. Additionally, it allowed for the extension or restriction of farmers' rights based on the requirements of the relevant country.

(D) The History of Breeders' Rights

The first breeders' rights legislation was based on the idea of common law rights and trade secrecy under common law, breeders had the exclusive right to use their new plant varieties for breeding other plants. This right was based on the idea that breeders were the creators of new plant varieties and that they had a right to protect their creations. Now if we talk about trade secrecy breeders had the exclusive right to keep their new plant varieties secret. This right was based on the idea that breeders were the only ones who knew how to produce their new plant varieties and that they had a right to protect their trade secrets.

The first breeders' rights legislation was also based on the idea of plant variety protection. Under plant variety protection, breeders had the exclusive right to produce, sell, and distribute their new plant varieties. This right was based on the idea that breeders were the only ones who could produce new plant varieties and that they had a right to protect their intellectual property.

IV. DISCUSSION

(A) Protection of plant varieties in India[6]

The history of the coming into force of the enforcement of the Act is wrought with a tussle between farmers and breeders. Immediately after independence, the Government of India adopted a model where farmers' interests and food security were protected by ensuring only public sector enterprises in the food industry. The move towards privatization of agriculture was induced by India's international obligations as well as pressure from other countries which protected its plant varieties. The first bill on Plant Breeders Rights' was introduced by the Ministry of agriculture in 1994. The bill contained some provisions on farmers' rights.

[5] Ibid, note 3.

[6] LSLAW, https://www.lakshmisri.com/Media/Uploads/documents/plant_variety_protection_in_india.pdf (last visited, March 07, 2023).

However, private seed companies advocated for a complete removal of such protection, while NGOs and the farmer community insisted for even stronger farmers' rights protection. As a member of the WTO and a signatory to the TRIPs Agreement, it was India's obligation to amend its laws to fall in tandem with the minimum protection guaranteed by TRIPs. To fulfill its obligations, India chose a sui generis regime of plant variety protection and enacted the Protection of Plant Varieties and Farmers' Rights (PPV&FR) Act, 2001. One of the major reasons to reject a strict adherence of the UPOV Convention, and formulate a sui generis system was its severe criticism with regard to the monopolies it grants to breeders and that it turns a blind eye to farmers contributions and rights and also endangers biodiversity. States should only grant monopolies if the anticipated benefit of the protection promotes development. However, in a country like India, where farmers' have traditionally practiced free exchange of seeds for greater agricultural produce, monopolization would have the anticipated benefit. Thus, the PPV&FR Act was enacted with the objective to provide an effective system of protection of plant varieties, as well as rights of farmers and plant breeders. Development of new varieties for accelerated agricultural development of the country was encouraged.[7] The act recognized the contribution of farmers in conserving and improving plant genetic resources and also recognized the necessity to incentivize and protect the efforts and investment of plant breeders. It was an attempt to balance farmers' and breeders' rights. In essence, the act envisaged equal rights to farmers and breeders, and even stipulated protection for varieties developed by farmers, putting them on a similar pedestal as a commercial breeder.

Another important legislative move was the 2002 amendment to the Patents Act, 1970. The amendment added plants and animals to the list of inventions that are not patentable in India. Section 3 (j) of the Act states that '...plants and animals in whole or any part thereof other than micro-organisms but including seeds, varieties and species and essentially biological processes for production or propagation of plants and animals are not inventions within the meaning of the Act.'[8] By virtue of this, the only protection that a breeder has in India over newly bred or discovered plant varieties is through the PPV&FR Act, unlike countries like the United States which provide different regimes of protection, e.g. a patent Act[9] as well as plant variety protection legislation.[10]

One distinguishing feature of the Indian act is its focus on the rights of farmers. A chapter titled

[7] The Protection of Plant Varieties and Farmers' Rights Act 2001, No. 53 Acts of Parliament, 2001 (India).
[8] The Patents Act 1970, § 3(j), No. 39, Acts of Parliament, 1970 (India).
[9] The Plant Patent Act 1930,§ 35, No. 2, US House of Representatives (USA).
[10] The Plant Variety Protection Act 1970,§ 7, US House of Representatives (USA).

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'Farmers Rights' enumerates all the rights available to the farmers.

Article 39 (1)[11] lies down: Farmers' right.—

1. A farmer who has bred or developed a new variety shall be entitled for registration.
2. A farmer who is engaged in the conservation of genetic resources of land races and wild relatives of economic plants and their improvement through selection and preservation shall be entitled in the prescribed manner for recognition and reward from the Gene Fund: but for that material so selected and preserved has been used as donors of genes in varieties registrable under this Act;
3. 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 but he can't sell a branded seed of a variety protected under this Act.

The traditional right to save seeds has been restricted by a proviso that states that farmers shall not be allowed to sell seeds in a manner that indicates that it is a variety protected under this Act.[12] This provision has been brought in to safeguard breeders' interests. Allowing a farmer to sell seeds or produce of protected variety in 'branded' packaging without due authorization of the breeder is equivalent to passing off a product under a protected trade mark. It shall hurt the legitimate interests of the breeder. The proviso on the one hand protects the traditional rights of the farmers while at the same time ensures that the legitimate interests of breeders are not hampered. Section 42 also protects a farmer against innocent infringement and absolves liability if the farmer, at the time of such infringement, was not aware of the existence of such rights. The origin of the term 'brown-bagging' can be traced to the practice of farmers and other parties selling seeds in brown bags in the village markets. These seeds were often second generation seeds of protected varieties or of unknown origin. This traditional system of exchange of seeds has continued well into the 21st century, but has not remained as innocuous as before. Brown bagging now involves questions of who has the lawful authority over the seeds and what constitutes infringement. This practice can be accorded responsibility for the Rose Controversy. Seed companies with patent protected rose varieties may enter into a contract with farmers, horticulturists to grow their rose varieties. Since in India, farmers have a right to save seeds or other propagating material, some farmers may save seeds from the authorized growth of roses and grow their own second generation roses. Since their genetic makeup is identical to the authorized roses, it is often hard to catch the deception.

[11] The Protection of Plant Varieties and Farmers' Rights Act 2001, No. 53 Acts of Parliament, 2001 (India).
[12] The Protection of Plant Varieties and Farmers' Rights Act 2001, § 39(1), No.53 Acts of Parliament, 2001 (India).

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Most breeders only understand that there has been unauthorized use of their plant variety when they see an unaccounted influx of their protected variety in the markets. In the 2014 Rose Controversy as well, the farmers who grew the Gala Roses contended that they were only exercising their traditional right to resow seeds. Their argument is based on Article 39 (1) (iv) of the PPV&FR Act. Pursuant to resowing the second generation seeds, farmers had the right to commercially exploit the produce, so long as the packaging was not branded.

Another riveting argument is the non-application of any UPOV obligation as India is not a party to it. To the contrary, the patent holders, backed by other breeders in Europe contend that there has been an infringement of their patent and that India has not protected their rights in an adequate manner.

V. ROSE CONTROVERSY—ARGUMENTS AND REMEDIES[13]

Several arguments that can be raised by both parties in the Rose Controversy are based on certain widely accepted IP principles.

1. Nationality principle

The nationality principle is of the most relevant to ensure parity in the treatment of right holders across various jurisdictions. Since IP rights are territorial in nature, each country formulates laws which suit their national interests. The nationality principle harmonizes such varied laws by stating that states must provide as much protection to foreign works and right holders as they allow their own nationals. The principle has two-fold aspects: first, foreign nationals should be granted equal rights according to the national legislation; and secondly, it must be ensured that the minimum rights accorded to them by each convention are also accorded. This principle has been enumerated in Article 3 of the TRIPs Agreement, i.e 'each member should accord to the nationals of other members treatments no less favorable than that it accords to its own nationals with regard to the protection of intellectual property'.[14]

2. Reciprocity principle

However, the nationality principle is often contingent upon the reciprocity principle. The reciprocity principle has a fundamental role in international treaty making, and is defined as 'returning like favour with like'. It states that the right, favour and concessions that are granted by one state to citizens or entities of another state must be returned in kind. A state may not grant national treatment if its own citizens are not being granted similar rights as nationals in

[13] OXFORD ACADEMIC, https://doi.org/10.1093/jiplp/jpaa186 (last visited March 07, 2023).
[14] Agreement on Trade-Related Aspects of Intellectual Property Rights, Article 3.

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other countries. In the same vein, Indian PPV&FR Act has included sections 31 and 32. Section 31 gives rights to citizens of convention countries (which grant to the citizens of India similar privileges as granted to their own citizens) to claim priority from the application made in the convention country in regard of registration of any plant variety. He/she shall be entitled to the same breeders' rights as the nationals of India. Article 32 incorporates the reciprocity principle and elaborates that when a country 'does not accord to citizens of India the same rights in respect of the registration and protection of a variety, as it accords to its own nationals, no national of such country shall be entitled . . . to apply for the registration of a variety. . .'.Since India does not recognize patent protection to plants, it cannot grant the foreign breeders rights akin to a patent holder. However, such breeders can protect their patented varieties under the PPV&FR Act, and they would be granted the rights of breeders enumerated in section 28 of the Act. Section 28 (1) confers '. . . exclusive rights on the breeder or his successor, agent or licensee, to produce, sell, market, distribute, import or export the variety'.[15]The existence of these laws ensure that the breeders of the Gala Rose can claim exclusive rights to produce and export the protected variety of roses, as granted by section 28, if it is registered in India prior to the infringing act.[16]However, a counter argument relies on the overriding effect of section 39 (1), as mentioned above. The horticulturists can place reliance in the provision and claim that there has been no infringement of rights due to the supervening nature of farmers' rights and if the roses are not sold branded as the protected variety.

3. Infringement cases in brown-bagged seeds and subsequent produce

Under the Indian law, infringement includes selling, exporting, importing or producing a protected variety without the permission of its breeder.[17] While the farmers' rights reinforces the right to save, use, sow, resow, exchange, share or sell farm produce and seeds, it does not give the right to export or import such second generation seeds or their produce. Exporting or importing of protected variety without authorization of the breeder constitutes infringement under the act. Moreover, farmers are only protected from innocent infringement that is if at the time of such infringement, they were not aware of the existence of the right.[18]These provisions are important to build the case of the European breeders. First, they can claim that pursuant to the Act, the exportation of the Gala Roses from India to France constituted an infringing act as exportation is not a farmers' right enumerated in section 39(1)(iv) with regard to brown-bagged

[15] The Protection of Plant Varieties and Farmers' Rights Act 2001, § 28, No. 53 Acts of Parliament, 2001 (India).
[16] The Protection of Plant Varieties and Farmers' Rights Act 2001, § 31 (4), No. 53 Acts of Parliament, 2001 (India).
[17] The Protection of Plant Varieties and Farmers' Rights Act 2001, § 64, No. 53 Acts of Parliament, 2001 (India).
[18] The Protection of Plant Varieties and Farmers' Rights Act 2001, § 42, No. 53 Acts of Parliament, 2001 (India).

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seeds/produce. Secondly, the defense of innocent infringement may fall as it has been claimed by the breeders that they had sent prior notices to the floriculturists in Bangalore, warning them of their infringement. This implies that the exportation of flowers was done with full knowledge that an existing right of a breeder was being violated. A case of infringement may succeed on such grounds. The TRIPs Agreement also provides another remedy to the breeders. Article 51 imposes an obligation upon the states to enable any right holder suspecting importation of counterfeit goods that shall infringe his IP rights to apply to competent authorities, administrative or judicial, for redressal. The custom authorities can thus facilitate the suspension of goods from being released into free commercial circulation. Article 52 requires any right holder initiating such a procedure to produce evidence that there is a prima facie case of infringement according the laws of the country of importation. Breeders can seek enforcement of these rights by relying on these international safeguards. Unauthorized exportation usually amounts to infringement according to laws of the countries that allow plant protection. If France, as a country of importation, considers there is a patent infringement, the counterfeit flowers can be stopped from entering the commercial markets. They can even be destroyed so as to ensure that they do not enter any other product market.

VI. Conclusion & Recommendations

It can be said that the situation in India is in an impasse between plant breeders and farmers. Since it is not a party to UPOV, India does not have any obligation to hold breeders' rights paramount. Farmers have been recognized as contributors to development of various new varieties as well as key players in the conservation of biodiversity. It is primarily due to the contribution of agriculture to the Indian economy that farmers' rights have found a separate and important place in the Indian legislation. Of course, this has led to many difficult situations in the international community. India's reluctance to grant plant patents has also induced averseness on the part of breeders from other countries to export their varieties to India. The implied license that has been allowed to farmers can be interpreted as hampering the legitimate interests of the breeders to expand their production and gain profits from the same. With specific reference to the Rose Controversy, the breeders may only have recourse in case of exports from India. Unbranded sale within the country and exchange between farmers is not regulated or deemed to be infringing. If such exports continue under the veil of farmers' traditional rights, they could impair India's relationships with countries that give utmost protection and importance to the breeders' rights.

India can either yield to the pressures from the international community to strengthen the

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protection accorded to breeders, or it can continue the balancing act implemented by the PPV&FR Act. In either case, one party would feel the consequences on their occupation and business. For now, it is safe to assume that the Indian Gala Roses will not have such a gala time crossing borders.

The rights of farmers have received a lot of attention in South and Southeast Asian nations. The sui generis protection tool has been used extensively in India to strike a fair balance between the rights of farmers and plant breeders. However, many other Asian nations have used it to defend the rights of plant breeders rather than those of the farmers. The WTO's sui generis protection gives its members the freedom to enact regulations that meet their needs while defending their interests. However, it is up to the nations to choose how to acknowledge and deal with the advantages and/or drawbacks of the current IPR system.

Further, if I talk about the things I have mentioned in this research paper then in the Introduction part of the manuscript I have talked about the term sui generis and what is the legislature has done for the same in past few decades. Further the first chapter of the manuscript talks about the International steps taken by the International Organizations and what actually TRIPS and WTO did for the protection of unique plant varieties. Further the chapter talks about the International network and distribution of the same and I mentioned few countries in which sui generis protection is available and those countries are France, Italy, Spain and the United States of America.

Now, if I talk about the second chapter of the manuscript the it gives an history that how the law on protection of plant variety got framed in past few decades. In the chapter I talked about some conventions like The Paris Convention of 1883 then The on Biological Diversity then about the establishment of World Trade Organization and at last about the history of breeders' rights. These conventions played a very vital role around the globe to explain the countries about the importance of plant species especially about the unique plant variety generated by breeder or by farmer and around the globe they need to be protected and further they need to be a part of protection of IPR. Later it was the result of these conventions that the countries made law and signed treaties among themselves to save and protect unique species and so to save and protect farmers and breeders rights around the world.

The chapter number III namely 'Discussion' in detail talks about the protection of plant varieties in India. It talks about the history of same and also about the current position of same. It narrates the whole story since the first bill for the plant breeders rights were introduced in the parliament to the current situation of India on such laws. Then this chapter talks about the famous Rose

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Controversy and I wrote about the arguments and remedies of the same. And under this also I discussed about the various laws and Acts not only of India but even of different other countries and how counterfeit flowers can or should be stopped from entering in the market so that real breeder or farmer can get the credit and money generated from the same.

(A) Recommendations

Concerning the style of agricultural management that it intends to foster; the current international legislative framework is still only partially conclusive. Contrary to the TRIPS Agreement, which normally strives to encourage private ownership of inventions, the PGRFA treaty seeks to facilitate a free flow of plant genetic resources while recognizing the validity of intellectual property rights claims over altered material. This demonstrates that there is no inherent reason to emphasize improving IPR protection.

Due to the decentralized character of international law, several treaties with the same missions lack coordination mechanisms in their terms. Since the TRIPS Agreement and the biodiversity convention were negotiated separately by the member nations and have equal legal standing, they are on an equal footing. No environmental treaty is mentioned in the TRIPS Agreement, and any potential overlaps are not acknowledged. Although there is a general IPR provision in the Biodiversity Convention, there is no mechanism in place in the event of a conflict.

Given the fragmented stance of international law, it is crucial to conclude that intellectual property protection in agriculture and sustainable development are interwoven. The establishment of intellectual property rights is inextricably linked to the protection of agro - biodiversity, the broad protection of traditional knowledge, and the reach of life patenting, which influences the development of genetic engineering.

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