

## Intellectual property rights

# Farmers' rights in South Asia's IPR regime

*Farmers' right must be ensured for the conservation of agrobiodiversity and fostering innovations in agriculture.*

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Small farmers in South Asia have made unique, evolutionary and historical contributions for the conservation and development of genetic resources for food and agriculture.



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Crop varieties and animal breeds were selected, domesticated and nurtured by small farmers. Over generations, farmers have developed traditional knowledge, skills and practices to grow and use local varieties, or their wild relatives, to meet various household, social, economic and cultural needs. They do so by retaining seeds, recycling them for the next planting seasons and exchanging them with their neighbours. It is estimated that 70- 90 per cent of the seeds required in developing countries, including in South Asia, are met through this type of informal seed system.<sup>1</sup>

### Tradition needs defenses

Such traditional practices of saving and exchanging seeds are essential for preserving the dynamics of the seed system and conserving agrobiodiversity. Such practice contributes to developing diverse varieties while ensuring the livelihood and food security of resource-poor farmers. Preserving of farmers' rights to traditional knowledge is essential as they play a vital role in selecting, continuously improving, conserving and ensuring availability of agricultural genetic resources.<sup>2</sup> But, in the changing context of the global economy with the development and

promotion of intellectual property rights (IPR) systems under the rubric of free trade farmers loose control and ownership of, and access to their own genetic resources that they have developed over millennia. Restricting this age-old traditional right of farmers to control, own and access their own seed varieties and other genetic resources jeopardizes the possibility of continuously improving farm varieties and conserving agro- biodiversity, and compromises the welfare of resource-poor farm families.

Producers of commercial varieties are protected by patents and IPRs though their 'inventions' are very much derived from the open access traditional seeds and propagation method already in existence. Commercial breeders earn from such practices of farmers but the farmers but the latter hardly receive any reward or incentive. Moreover, the IPR restrictions imposed on commercial varieties could also limit farmers' ability to continue with those practices.

The farmers' right must be ensured also for the conservation of agrobiodiversity and fostering innovations in agriculture. This implies developing means of ensuring benefits to farmers and farming communities.

The literature currently discusses two forms of farmers' rights concepts—as a form of IPR and as a simple recognition of their past and present contributions to conserving, developing and making available crop genetic resources available.<sup>3</sup> The first approach focuses on operationalizing farmers' rights by awarding them some form of IPRs for 'traditional' varieties. This is generally seen as a method of addressing the imbalance between farming communities and plant breeders through a 'straight-forward' extension of IPRs to past innovations of farmers.

However, the existing IPR regime is not sufficient to acknowledge that the traditional knowledge is the product of inter-generational improvement within a community without an inventor. The IPR system is largely individualistic, that recognizing ownership based on the resources devoted to the new invention. Also, such practices are not eligible for a patent. Thus, protecting farmers' right over to their traditional knowledge contributing to germplasm needs a separate regime of its own.

### **Global farmers' rights**

The issue of farmers' rights garnered attention in international agricultural circles following a series of debates that started in the Food and Agricultural Organization of the United Nations (FAO) in 1979 about unequal distribution of benefits obtained from the sharing of germplasm. This led to the adoption of three FAO Conference resolutions (4/89, 5/89, 3/91) simultaneously recognizing the rights of plant breeders as well as farmers. The concept of farmers' rights was then included in the FAO Undertaking on Plant Genetic Resources and, later, in the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA), which evolved from the FAO's international undertaking in 2001.<sup>4</sup>

The ITPGRFA recognizes the rights of farmers and emphasizes the need for promoting and protecting farmers' rights at both national and international levels. Article 9 of the Treaty recognizes the enormous contribution that farmers and local communities have made to the conservation and development of plant genetic resources for food and agriculture (PGRFA) and identifies measures to protect and promote farmers' rights.<sup>5</sup> It also recommends national governments to take national measures to realize farmers' rights. Similarly, the Nagoya Protocol on Access to Genetic Resources and Benefit Sharing, under the Convention of Biological Diversity (CBD), supports and protects farmers' rights by seeking prior and informed consent of related communities for access to genetic resources and traditional knowledge. It makes provisions for equitable sharing of benefits accruing from the use of genetic resources and associated traditional knowledge.<sup>6</sup>

*There are two concepts of farmers' rights as a form of IPR and as a recognition of their contributions in making crop genetic resources available.*

Taken together, these provisions call for a broad interpretation of farmers' rights, which go beyond the right to benefit-sharing. They include the right of farmers to continue the practices which contribute to the conservation and sustainable use of PGRFA and to sustain the traditional knowledge and livelihood systems needed for this.

IPRs are essential incentives for promoting technology transfers and increased investment in agricultural research and development. The Trade-Related Aspects of Intellectual Property Rights (TRIPS) under the World Trade Organization (WTO) compels member nations to provide IPR protection to new plant varieties either through patent or a *sui generis* system or both for promoting investment and innovations. TRIPS *sui generis* provision has been used by interested countries to recognize farmers' rights.

The International Convention for the Protection of New Varieties of Plants (UPOV Convention) has provided one of the most accepted *sui generis* systems for plant variety protection, vis-à-vis recognition of the plant breeder's right. It recognizes farmers' interests as an optional exception to the plant breeder's right.<sup>7</sup> For instance, the third amendment of UPOV Act, in 1991, made the farmers' privilege optional to the member countries<sup>8</sup>, indicating that national legislation formulated according to this provision may not provide for the rights of farmers to save, use and exchange part of the protected seeds with other farmers locally. However, IPRs that promote commercialization of agriculture may hinder the rights of farmers to the genetic resources and traditional knowledge that they have been controlling over many generations

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Therefore, in order to foster both innovation and conservation, some countries have developed *sui generis* legislation under the WTO's TRIPS, with provisions for farmers' rights in plant variety protection laws. Countries that are party to the CBD, the ITPGRFA and the Nagoya Protocol are obliged to draft laws that include provisions of both plant breeders' and farmers' rights. The table below provides the membership status of South Asian countries in the WTO, the ITPGRFA and the Nagoya Protocol. Except Sri Lanka, all South Asian countries are party to the ITPGRFA, while only Bhutan, India and Pakistan have ratified the Nagoya Protocol of the CBD. All are party to CBD and most of them are the WTO members, except Bhutan, which has a status of an observer member. However, none of the South Asian countries are UPOV members. India is the first South Asian country to formulate and enact plant breeders' and farmers' rights in a balanced manner. India formulated Plant Variety Protection (PVP) and Farmers' Rights (FR) Act (2001) as a *sui generis* law to meet TRIPS requirements. The Act, which aims to balance breeders' rights with farmers' rights, includes a total of ten individual farmer rights and one community right.<sup>9</sup> The act is functioning and actively issuing plant variety certificates (PVCs), including granting IPRs to farmer-breeders.

Table South Asian countries' membership of international policy agreements				
Countries	ITPGRF	CBD	Nagoya	WTO
Afghanistan	Yes	Yes	No	Yes
Bangladesh	Yes	Yes	No	Yes
Bhutan	Yes	Yes	Yes	Observer
India	Yes	Yes	Yes	Yes
Maldives	Yes	Yes	No	Yes
Nepal	Yes	Yes	No	Yes
Pakistan	Yes	Yes	Yes	Yes
Sri Lanka	No	Yes	No	Yes

Source: Author's compilation

But despite its formulation in 2001 and the announcement of its implementation in 2005, it is yet to come into full force. Although there is an increasing evidence of registration of farmers' varieties (FVs) with the enactment of the law, there are no evidences of inclusion of these FVs in the official seed supply chain and commercialization process.<sup>10</sup> Similarly, cases of benefit-sharing from the FVs are not given due importance in spite of the fact that several such varieties may have been used to develop commercially marketable varieties.

### **South Asian farmers' rights**

South Asian countries have the obligation to develop plant variety protection laws that meet international commitments. Sri Lanka has drafted a plant breeder's rights legislation, known as Protection of New Plant Varieties (Breeders' Rights) 2001(draft), which follows the UPOV model of 1991. This legislation does not recognize farmers' rights.<sup>11</sup> The PVP laws are still not officially approved and enacted in other South Asian countries, e.g. Bangladesh, Bhutan, Pakistan and Nepal. As a result, provisions and issues regarding farmers' rights and IPRs are either absent or partly dealt with through existing Biodiversity Acts or seed laws. Bhutan has approved its Biodiversity Act (2003) with provisions for breeders and farmers' rights.<sup>12</sup> Nepal, as a member of the WTO, is committed to implement a *sui generis* system to protect plant varieties. Nepal has yet to approve and implement the draft Plant Variety Protection (PVP) and Farmer's Rights Bill (2005).<sup>13</sup> The draft bill also has provisions to balance farmers' and breeders' rights. At the moment, seed development, certification, registration and release are being administered through the Seed Act (1988) amended in 2008 and the Seed Regulation (2013). These Seed Act and Regulations deal with various aspects of IPRs such as seed ownership, marketing and distribution.

Many countries of South Asia have in place IPR laws which were formulated long ago. They have yet to form a comprehensive IPR policy as that of India. India has already made a significant policy shift towards a pro-intellectual property (IP) position in the seed sector. The recently approved National Intellectual Property Rights Policy (2016) of India envisages national development by promoting creativity, innovation and entrepreneurship.<sup>14</sup> It aims to integrate IP as a policy and a strategic tool of national development plans. Farmers' rights are an important part of the new IPR policy of India. It recognizes the rich traditional knowledge of farmers and their role in conservation. Considering the low awareness of farmers about their rights over genetic resources and traditional knowledge, the new IPR policy focuses on promotional tools and incentive mechanisms to encourage the farmers to register varieties and file for IPRs. However, the focus of the Indian IPR law is more on commercialization of traditional genetic resources and knowledge. Since, genetic resources are a shared intellectual heritage of local communities, the focus on commercialization without adequate conservation focus would hinder the collective efforts of communities to promote their *in situ* conservation and sustainable use.

Nepal recently drafted a national Intellectual Property Rights Policy. The policy recognizes IPRs as an important mechanism for national development and prosperity. One of the components of the policy focuses on IPRs on new plant varieties and agricultural genetic resources.<sup>15</sup> However, farmer's right is not an important component of the draft policy, even though it recognizes traditional knowledge and collective community contribution to varieties.

The proposed IPR Policy focuses on patents and plant breeders' rights without provisions for strong farmers' rights, which may erode the use of diverse plant genetic resources by discouraging traditional farming activities that promote community exchange and use of genetic resources.

Farmers' rights play an important role in the conservation and sustainable use of agrobiodiversity and fostering innovations in agriculture. Some countries of South Asia incorporate both plant breeders' and farmers' rights in their *sui generis* mechanism to protect IPRs in agriculture. However, many countries in South Asia lack officially approved legislation on farmers' rights even though they do have the related provisions in policies and some form of draft laws. Limited human resource capacity, low political commitment and lack of awareness among planners, policy makers and stakeholders are major obstacles and challenges to the formulation and implementation of farmers' rights and appropriate *sui generis* legislation in South Asia.

*Sui generis* legislation, which has provisions for both plant breeders' and farmers' rights, similar to that of India, may be suitable for many agrarian countries of South Asia. A legal framework is essential to provide incentives for investment in plant breeding and seed industry development, not to mention promotional activities, to ensure the rights of farmers over their genetic resources and traditional knowledge. A suitable national level institutional mechanism is needed to cope with the changing context while protecting farmers' rights. Their access to agriculture needs facilitating, benefits from it need sharing and innovations in the sector need fostering.

***IPR regime should not discourage local sharing of genetic resources and traditional knowledge in biodiversity conservation.***

### **Farmer-friendly IPR**

Considering the low level of awareness among farmers on their rights to genetic resources, the new IPR policies that are coming up in South Asia may not witness significant support to farmers' rights and agrobiodiversity conservation. The situation can be improved with a strong emphasis on promotional tools and incentive mechanisms that encourage farmers to register varieties and file for IPRs. Furthermore, IPR laws that focus on commercialization of traditional genetic resources and knowledge will hinder collective efforts of the communities in safeguarding their genetic resources. And, this could stymie future innovation in agriculture. Therefore, care is to be taken while enforcing farmers' rights. The IPR regime should not discourage local sharing of genetic resources and traditional knowledge in biodiversity conservation. Disruption of the local seed system could disrupt the livelihoods of small rural farmers.

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## Notes

- 1 Development Fund. 2011. "Banking for the future: Savings, security and seeds". *A short study of Community Seed Banks in Bangladesh, Costa Rica, Ethiopia, Honduras, India, Nepal, Thailand, Zambia and Zimbabwe*. Oslo: Norway
- 2 Gauchan, D. 2011. "Protection of Farmers' Rights and Conservation of Agrobiodiversity in Nepal". *Agronomy Journal of Nepal*. Vol. 2 (2011):12-23.
- 3 Andersen, R. and T. Winge. 2009. *The Plant Treaty and Farmers' Rights: Implementation Issues for South Asia*. VI+48. Kathmandu: South Asia Watch on Trade, Economics & Environment (SAWTEE).
- 4 FAO. 2001. *International Convention on Plant Genetic Resource for Food and Agriculture*. Food and Agricultural Organization (FAO) Nov 3, 2001 FAO Press Release 01/81 C5 [http://www.fao.org/WAICENT/OIS/PRESS\\_NE/PRESSENG/2001](http://www.fao.org/WAICENT/OIS/PRESS_NE/PRESSENG/2001).
- 5 FAO. 2004. *International Treaty on Plant Genetic Resources for Food and Agriculture*. Rome: Food and Agriculture Organization (FAO) of the United Nations.
- 6 CBD Secretariat. 2011. *Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits arising from their Utilization to the Convention on Biological Diversity: Text and Annex*. Canada: Secretariat of the Convention on Biological Diversity.
- 7 Singh, A.P. and P. Manchikanti. 2011. "Sui Generis IPR Laws vis-à-vis Farmers' Rights in Some Asian Countries: Implications under the WTO". *Journal of Intellectual Property Rights* (16) 107-116.
- 8 Article 15 (2) of UPOV 1991, <http://www.upov.int/en/publications/conventions/1991/act1991.htm> (20 October 2010).
- 9 Rangnekar, D. 2016. "Commentary on the Indian Protection of Plant Varieties and Farmers' Rights Act 2001". In *Farmers' Crop Varieties and Farmers' Rights, Challenges in Taxonomy and Law* edited by M. Halewood. Bioversity International. Routledge and Earth scan.
- 10 Bhutani, S. 2016. "Intellectual Property Rights Policy Fails to Address Farmers' Rights and Needs". *The Wire*, May 30. <http://thewire.in/39353/intellectual-property-rights-policy-fails-to-address-farmers-rights-and-needs/>
- 11 Government of Sri Lanka. 2001. *Protection of New Plant Varieties (Breeder's Rights)*. Colombo: Government of Sri Lanka.
- 12 National Biodiversity Centre. 2014. *National Biodiversity Strategy and Action Plan of Bhutan*. Thimpu: Ministry of Agriculture and Forestry, Royal Government of Bhutan
- 13 Ministry of Agricultural Development. 2005. *Plant Variety Protection and Farmers' Right Draft Act (2008 amendment)*. Kathmandu: Ministry of Agricultural Development, Government of Nepal
- 14 Department of Industrial Policy and Promotion. 2016. *National Intellectual Property Right Policy Ministry of Commerce and Industry*. New Delhi: Government of India.
- 15 Ministry of Industry, Government of Nepal, 2016. *National Intellectual Property Right Policy of Nepal, Revised Third Draft*. Kathmandu: Government of Nepal.