

GENE CAMPAIGN'S PUBLIC INTEREST LITIGATION TO PROTECT FARMERS' RIGHTS.

Dr. Suman Sahai

India like many developing countries had rejected the patent option offered on plant varieties (seeds) in the WTO/ TRIPS. It selected the *sui generis* option (meaning 'of its own kind') of protection as an alternative to the utility patent model for plant variety protection (PVP).

TRIPS does not specify what constitutes a *sui generis* system, only that the rights granted to the plant breeders (which it does specify), are effective. Nothing in TRIPs prevents the grant of Farmers' Rights along with the Plant Breeders' Right. Gene Campaign has been spearheading a campaign in India for the incorporation of the rights of farmers alongside the rights of breeders in India's *sui generis* legislation. The campaign was successful when the Government enacted a *sui generis* plant variety protection law – the Protection of Plant Variety and Farmers' Rights Act, 2001 – granting a set of rights to farmers alongside the breeders' rights. (See Box 1)

The Indian PVP law, which has been hailed as a progressive, pro-developing country legislation, has some notable features. Apart from strong and proactive Farmers Rights, it has a well-defined Breeder's Right as well. The Indian legislation succeeds in balancing the rights of Breeders and Farmers and exploits the flexibility granted in TRIPS, in an intelligent manner. The Act incorporating the principles laid down in the 1992 Convention on Biological Diversity (CBD) recognises farmers' role as conservers, breeders and cultivators. It provides legal rights to farmers to "save, exchange and sell seeds of all varieties." The Act has provisions for registering farmers' varieties so that their ownership and innovation is recognised. Though the Indian legislation is far from perfect it is the first law in the world to grant formal, legal rights to farmers.

Sudden turnaround: India decides to join UPOV

After spending about eight years on wrangling, negotiations, consultations and an investigation by a Joint Parliamentary Committee, the Indian law with Farmers Right was finally enacted. There was a general consensus that India had broken new ground and deviated from the UPOV model of *sui generis* legislation by enacting a legislation that incorporated features of the CBD, and the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGR) under which India has also recognised and accepted Farmers Rights. Then suddenly, without any discussions in Parliament, the Cabinet decided to reject the developments of the last few years and its own legislation, and decided to join UPOV (International Union for the Protection of New Varieties of Plants)

This decision to join UPOV has stunned national and international experts, particularly when India has also been taking an independent position in the TRIPS Council, seeking greater national flexibility. Many are legitimately asking what elements in the government and for what reason have advocated this complete about turn in India's position. There are questions raised about how the Cabinet without seeking the approval of Parliament, can take a step that would be a grave setback for Farmers Rights. More so, since Parliament had enacted the legislation, only last year, sending a strong message that Farmers Rights must be protected in India.

UPOV, which is an international organization of plant breeders, was established by the large seed industries in 1961 to protect their market interests. UPOV member states are

predominantly wealthy developed countries with huge industrialized economies that are not dependent on agriculture. They certainly do not have food security concerns nor do they have small and marginal farmers that need protection. Developing countries with agrarian economies like India must oppose UPOV since it goes against their kind of agriculture, their vulnerability in food sector and their farmers' interests.

In India, farmers supply over 85% of the total seeds planted in the country because today they have complete right over seed. UPOV denies these rights and propagates strong rights in favour of plant breeders. If the UPOV model is accepted, it will lead to shifting the control over seed supply from the farmers to a handful of multinational corporations. This will lead to livelihood concerns for small farmers apart from posing threats to the national food security. The powerful multinational seed companies, which influence decisions taken in the UPOV, have clearly pointed out that the Farmers' Rights provision in the current PVP (Plant Variety Protection) law of India is not compatible with UPOV Convention and will have to go if India wants to become its member.

Gene Campaign has consistently opposed India joining UPOV and has proposed a developing country alternative called Convention of Farmers and Breeders (CoFaB), which has been discussed in national and international forums. In fact, the UNDP Human Development Report (1999) describes CoFaB as *"a strong and coordinated international proposal, which offers developing countries a far better alternative to European legislation, by focusing on the need to protect farmers rights and food and nutritional security goals of their people"*.

When India enacted the PVP law in August 2001, it was thought that the fight for Farmers' Rights had been partly won and that now India can provide other developing countries with an alternative to the UPOV model. Unfortunately, even before the ink was dry, the Union Cabinet decided to join UPOV on 31st May 2002.

Gene Campaign files Public Interest Litigation

Gene Campaign made several attempts to discuss the dangers of UPOV with officials of the Agriculture Ministry and appealed to them not to take this retrograde step. When there was no response, Gene Campaign filed a Writ Petition in the form of Public Interest Litigation in the Delhi High Court on 1st October 2002, to block the government's decision to join UPOV. The Court has accepted the PIL and asked the Indian Government to file a reply to the Petition. After

Gene Campaign has prayed to the Court to declare the decision of the Government dated 31.05.02 as illegal and unconstitutional being violative of the Protection of Plant Varieties and Farmers' Rights Act, 2001 as well as Articles 14, 21, 38, 47 and 48-A of the Constitution of India. It further requests the Court to direct the Government not to take any action which is not in the interest of protection of farmers' rights in the Act and that those rights are neither impaired nor diluted by any future act of the Government.

Government responds to PIL in favor of Breeders not Farmers

After failing to respond for six months, the Indian government finally filed a reply to Gene Campaign's PIL on 2 April, 2003. Revealing its anti-farmer stand, the GOI demonstrated in its reply that its intention is to defend Breeders Rights, not Farmers' Rights. And that its sympathy lies with corporate breeders like Monsanto and Syngenta whose interests it seeks to protect by deciding to join UPOV.

In its reply in the High Court, GOI lawyers stated that the decision to join UPOV was meant to achieve the following goals:

- Facilitate greater investment in plant breeding.
- Make recognition of Plant Breeders Rights in member countries easier
- Enable Indian plant breeders to get protection in all the member countries.
- Make it easy for the Government to establish “effectiveness” of its *sui generis* law in the TRIPS context.

Nowhere in its response has the GOI indicated what it intends to do, to defend the rights of farmers. It is in order to protect the Farmers’ Rights granted in the path breaking Indian legislation enacted in 2001, that Gene Campaign had filed the PIL against the decision to join UPOV. UPOV does not acknowledge Farmers Rights and if India becomes a member, it will have to do away with the Farmers Rights it has granted under its own law.

Government of India states in its reply to the PIL that it plans to join the UPOV 1978 Convention, not the far more damaging 1991 Convention. First, entry to the UPOV 1978 Convention was closed in 1995. All new members have to join UPOV 1991. But more importantly, it needs to be understood that whether it is the 1972, 1978 or 1991 version, the UPOV system grants only one right: the right to the Plant Breeder. There are no other rights in UPOV, only exemptions, to this one Breeders’ Right. Exemptions under UPOV could be given to farmers or researchers but these exemptions are not automatic, they have to be negotiated. They are provisional, conditional and constrained, and are accepted only “*within reasonable limits and subject to safeguarding of the legitimate interests of the breeder*” (UPOV) .

If India joins UPOV, even the 1978 convention, any exemptions that could be negotiated for Indian farmers, will be restricted only to using saved seeds from the previous harvest for replanting in their own land holding (UPOV). The distinct and extensive rights granted under the Indian law will have to be done away with.

The Indian law, the *Protection of Plant Varieties and Farmers’ Rights Act, 2001*, provides distinct and proactive farmers rights. These Rights include important features to secure food and livelihood security for farming communities under developing country conditions.

The major provisions of the Farmers Rights chapter (Section 39) are:

1. The farmer retains his traditional rights to sell seed locally, of any variety he grows, even of a variety on which a Breeders’ Right has been granted.
2. Varieties bred by farmers are given the same recognition and protection as given to varieties bred by breeders.
3. The contribution of farmers’ varieties to modern plant breeding is acknowledged. There is a provision that modern breeders will have to pay for using these varieties.
4. Farmers are protected against spurious or substandard seed. They are entitled to compensation if the Breeders’ seed does not perform as claimed.
5. Farmers are protected against the Terminator Technology, which is banned by the Indian law. Terminator is a sterile seed technology, which the MNC Syngenta owns, which would make the farmer dependent on the corporate breeder for seeds every season.
6. There are several other rights in the Indian law, like the protection against any infringement of the law which is obviously done out of ignorance.

None of these rights are permissible under the UPOV system. National and international experts, including UPOV itself concedes this fact.

GOI's response to Gene Campaign's PIL is anti farmer and self-contradictory. Its move to join UPOV and dilute Farmers Rights is in contravention of Article 86 of the *Protection of Plant Varieties and Farmers' Rights Act, 2001* which explicitly states that the provisions of the Act will be "*binding on the government*".

The decision to join UPOV goes against the other positions taken by the GOI in international agreements like the Convention on Biological Diversity (CBD) and the International Treaty on Plant Genetic Resources, (ITPGR). India's official position in the WTO is to reconcile TRIPS with the CBD, which acknowledge the rights of rural communities. India has also ratified the ITPGR, which makes it binding on the Government to implement Farmers' Rights.

Gene Campaign will argue this matter in the High Court at the next hearing on 7 July, 2003 and request the Court to direct the GOI to provide an undertaking that no step that it takes will in any way dilute the rights granted to farmers in the Indian law.