

# A Comparative Analysis of Farmers Rights under Ethiopian and Indian Law

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**Abstract:** *The protection of farmers' rights in international agricultural laws is based on the traditional roles which farmers have played and continuous to play in the conservation, improvement and making available of plant genetic resources. In view of the enormous roles they have, farmers' rights have been recognized under different international conventions such as the international convention on the protection of new varieties of plants/ the UPOV/, the international treaty on plant genetic resources for food and agriculture and other Food and Agricultural Organization's /FAO/ Resolutions. India has also incorporated in the course of developing a sui generis system of plant variety protection, farmers' rights in the same bill and on equal state as plant breeders' rights. Farmers Rights are also incorporated in the Ethiopian Plant Breeders' Rights Proclamation. This study is aimed at making a comparative analysis of the Indian and Ethiopian plant variety protection regimes, particularly the Extent to which farmers' rights are granted sufficient protections in both legal systems.*

## 1. Introduction

The move for the protection of farmers' rights began in the 1980's as a response to the expansion of commercial plant breeders' rights. Farmers' rights emanate from and are based on the understanding that farmers have traditionally made enormous contributions in the development, conservation and making available of plant genetic resources, which today serve as a source of food and agriculture. Until the end of the last century plant genetic resources were considered as a public good and managed on the basis of the common heritage principle<sup>1</sup>. Accordingly, no one may claim ownership claims over plant genetic resources and were freely available to all<sup>2</sup>. Rather farmers who openly provide seeds expect to receive in the same manner and the same holds true for plant breeders<sup>3</sup>. The whole system was based on the rule of reciprocity, which in fact was implicit<sup>4</sup>.

However with the increasing value of genetic resources and the expansion of plant breeders' rights, the age old common heritage principle has come to be eroded and replaced by the principle of the sovereign rights of states over natural resources including the genetic resources and within their territory and the extension of Intellectual property rights in the form of patents and plant variety protection regime. This has triggered the move to introduce the concept of farmers' rights as a counteraction to the expanding plant variety protection regime. Accordingly farmers' rights was expressed in the FAO international undertaking on plant genetic resources, which considers plant genetic resources as a common heritage of mankind, which are accessible to all

without any restrictions. The protection of farmers' rights is also incorporated in the international conventions for the protection of new varieties of plants long before the FAO undertakings. However Farmers rights or privileges are provided under the UPOV convention as an exception to the exclusive rights of commercial plant breeders.

This study is aimed at making a comparative analysis of how farmers rights is incorporated in the Indian Protection of plant varieties and farmers rights act and the Ethiopian plant breeders' rights proclamation. The scope of the study is limited to the analysis of the legal instruments, and where appropriate secondary sources such as books, journal articles and other materials are also utilized.

## 2. The Concept of Farmers Rights

Unlike the plant variety protection regimes and other environmental issues, there is no autonomous international instrument that deals with the issue of farmers rights. There are provisions in the different international agreements and national laws that deal with the issue of farmers' rights and traditional knowledge in plant genetic resources. Especially the issue of farmers' rights was one of the contentious issues in the course of the negotiations that led to the adoption of the International treaty on plant genetic resources for food and agriculture. Both the international undertaking and the treaty on plant genetic resources for food and agriculture rather than defining what a farmer's right is and the scope of the right and the right holder both express the basis or the rationale for the protection of farmers rights.

Particularly, Resolution 5/89, which provides an agreed interpretation to the FAO international undertaking on plant genetic resources, tries to define farmers rights as 'rights emanating from the past, present and future contribution of farmers' in the development and conservation of plant

<sup>1</sup>Stephen B. Brush, Farmers' Rights and Protection of Traditional Agricultural Knowledge, CAPRI Working Paper No. 36, January 2005, USA: International Food Policy Research Institute, Page 3. Accessed on 10/02/2019, <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.163.507&rep=rep1&type=pdf>

<sup>2</sup>Ibid.

<sup>3</sup> Ibid.

<sup>4</sup>Ibid.

genetic resources, particularly those in the center of origin or diversity of the Plant genetic resources<sup>5</sup>.

The international treaty on plant genetic resources for food and agriculture, which was adopted in 2001, but entered into force in 2004, however desists from providing an explicit definition to what farmers' rights are, who the beneficiary is and how they are going to be implemented. Yet the treaty agreement begins by recognizing an enormous contribution of farmers in the conservation and development of plant genetic resources and leaves the responsibility for realizing the same on the national states. It also lays down certain guiding principles in relation to the protection of farmers rights. Four elements that constitute farmers rights have also been provided in the international treaty on plant genetic resources. These include the following:

- 1) Protection of traditional knowledge relevant to plant genetic resources for food and agriculture;
- 2) The right to equitably participate in benefit sharing arising from the utilization of plant genetic resources for food and agriculture; and;
- 3) The right to participate in making decisions, at the national level, on matters related to the conservation and sustainable use of plant genetic resources for food and agriculture

However despite the gap in the international legal framework in clearly defining the concept, some scholars have made some observations as to give the concept some practical meanings. Anderson has identified two approaches to understand farmers' rights<sup>6</sup>: namely, the ownership approach and the stewardship approach. The ownership approach refers to the rights of farmers to be rewarded for germplasm obtained from their field which is used in the development of commercial varieties and intellectual property rights<sup>7</sup>.

On the other hand the stewardship approach implies the rights that must be granted to a farmer in order to continue as a steward of agro biodiversity<sup>8</sup>. Accordingly farmers rights are defined as customary rights that farmers have as a steward of agro biodiversity since the dawn of agriculture to save, grow, share, develop and maintain plant varieties, of their legitimate rights to be rewarded and supported for their contributions to the global pool of GRS and to the development of commercial varieties of plants and to participate in decision making.

Farmers' rights are based in the customary practices of farmers, who were exchanging not only the seeds but

traditional knowledge relating to the plant genetic resources, which may be related to traditional medicine, food and nutrition, agriculture and crop breeding through crossing and selection.

### 3. International Legal Framework for the Protection of Farmers Rights

The idea of farmers' rights was formally expressed in the course of the adoption of a non-binding international undertaking in 1980's. The Undertaking was aimed at ensuring that plant genetic resources are conserved, developed and made available for plant breeding and other scientific purposes<sup>9</sup>. The undertaking was based on the principle that plant genetic resources are common heritage of mankind and should be made available to all without any restrictions<sup>10</sup>. However, the adoption of a broader definition of plant genetic resources under Article 2 of the international undertaking's as to include not only the wild variety but also elite varieties, urged some developed countries such as the US, Japan, Canada, Brazil, China and Malaysia to consider this definition as prejudicial to their interests and refuse to endorse the International Undertaking<sup>11</sup>. Therefore with a view to balance the competing interests of commercial plant breeders and traditional farmers' interpretative resolutions, namely Resolution 4/89 and Resolution 5/89 were adopted by the FAO Commission on Plant Genetic Resources.

While Resolution 4/89 Plant Breeders' Rights, as provided for under UPOV (International Union for the Protection of New Varieties of Plant) are not incompatible with the International Undertaking<sup>12</sup>, Resolution 5/89 explicitly defines farmers' rights as emanating from the past, present and future contribution of farmers' in the development and conservation of plant genetic resources, particularly those in the center of origin or diversity of the Plant genetic resources<sup>13</sup>. According to the International Undertaking farmers' rights is vested in the international community, as trustees on behalf of the present and future generation of farmers. The international fund is established with a view to support farmers' initiatives in the conservation of biodiversity.

<sup>9</sup> International Undertaking on Plant Genetic Resource, Annex to Resolution 8/83, Adopted on November 1983. Accessed on 10/02/2019. [http://www.fao.org/wiews-archive/docs/Resolution\\_8\\_83.pdf](http://www.fao.org/wiews-archive/docs/Resolution_8_83.pdf).

<sup>10</sup>Ibid.

<sup>11</sup> Gregory L Rose, The International Undertaking on Plant Genetic Resources for Food And Agriculture: Will the Paper be Worth the Trees?, Accessed on 11/02/2019. [https://www.researchgate.net/publication/30388837\\_The\\_International\\_Undertaking\\_on\\_Plant\\_Genetic\\_Resources\\_for\\_Food\\_And\\_Agriculture\\_Will\\_the\\_Paper\\_be\\_Worth\\_the\\_Trees](https://www.researchgate.net/publication/30388837_The_International_Undertaking_on_Plant_Genetic_Resources_for_Food_And_Agriculture_Will_the_Paper_be_Worth_the_Trees).

<sup>12</sup>Agreed Interpretation of the International Undertaking, Annex I, Resolution 4/89, Extract of the Twenty-fifth Session of the FAO Conference. Rome, 11-29 November 1989, Accessed on 11/02/2019. <http://lib.icimod.org/record/9792/files/344.pdf>.

<sup>13</sup>FARMERS' RIGHTS, ANNEX II (Extract of the Twenty-fifth Session of the FAO Conference. Rome, 11-29 November 1989.) Resolution 5/89. Accessed on 11/02/2019. <http://lib.icimod.org/record/9792/files/344.pdf>.

<sup>5</sup>Farmers' Rights, Resolution 5/89, Annex II (Extract of the Twenty-fifth Session of the FAO Conference. Rome, 11-29 November 1989.) Accessed on 11/02/2019. <http://lib.icimod.org/record/9792/files/344.pdf>.

<sup>6</sup>Regine Andersen, Realising Farmers' Rights Under the International Treaty on Plant Genetic Resources for Food and Agriculture Summary of Findings from the Farmers' Rights Project, Phase I, FNI Report 11/2006, Norway: The Fridtjof Nansen Institute June 2006. Accessed on 10/02/2019. <https://www.fni.no/getfile.php/132005-1469869987/Filer/Publikasjoner/FNI-R1106.pdf>.

<sup>7</sup>Ibid P. 4.

<sup>8</sup>Ibid.

The undertaking was however replaced by the International Treaty on Plant Genetic Resources for Food and Agriculture. The International treaty on plant genetic resources for food and agriculture, under Article 9 recognizes 'the enormous contribution that the local and indigenous communities and farmers of all regions of the world, particularly those in the centers of origin and crop diversity, have made and will continue to make for the conservation and development of plant genetic resources which constitute the basis of food and agriculture production throughout the world.' The treaty leaves the responsibility for realizing Farmers' Rights, as they relate to plant genetic resources for food and agriculture, with national governments.

However Article 9(2) of the treaty provides that each Contracting Party should, in accordance with their needs and priorities, and subject to its national legislation, take measures to protect and promote Farmers' Rights, including: (a) protection of traditional knowledge relevant to plant genetic resources for food and agriculture; (b) the right to equitably participate in sharing benefits arising from the utilization of plant genetic resources for food and agriculture; and (c) the right to participate in making decisions, at the national level, on matters related to the conservation and sustainable use of plant genetic resources for food and agriculture. As clearly indicated, Article 9 of the treaty only provides an indicative list of measures which contracting members may take in order to protect farmers' rights and it is up to each contracting states to define the scope of farmers' rights.

Farmers rights is also incorporated in the International Convention for the Protection of New Varieties of Plants /also called the UPOV/, which was first adopted by twelve Western European Nations in 1961 and revised three times, namely in 1972, 1978 and 1991. However under the current version of the UPOV convention<sup>14</sup>, farmers' rights, also known under the UPOV as farmers' privilege, is provided as a restriction on the exclusive rights given to a commercial plant breeder over a new plant variety which he developed. Farmers' privilege is optional under the 1991 version and includes the traditional right of a farmer to save, use, and exchange farm saved seeds of the protected plant variety. This has been made optional in the latest version of the UPOV. In other words, it is up to the parties to the UPOV convention to decide whether to provide farmers exemptions under its plant variety protection regime or not.

India has adopted a plant variety protection regime which incorporates both plant breeders' rights and farmers' rights in the same bill.

## 4. Protection of Farmers' Rights under Indian PPVFR ACT

The Trade Related Aspects of Intellectual Property Rights agreement (the TRIPS) to which India is a signatory requires member states to provide patents or a sui generis system of plant variety protection or a combination of both. Accordingly while many countries have acceded to the International Convention on the protection of New Varieties of Plants (also known as the UPOV) convention or adopted a UPOV modeled plant variety protection laws, India is one of the pioneer countries in adopting a legislation that incorporates both plant breeders' rights and farmers' rights in the same bill. Article 39 of the Indian Plant variety protection and farmers rights provides a set of rights which includes the following:

### 4.1. Registration and Protection of Farmers Variety

One of the rights granted to a farmer under the Indian PPVFR Act is the right to have his varieties registered and protected in the same manner as a breeder of any variety<sup>15</sup>. However the farmer breeder is required to declare that the genetic material or parental material is acquired in a lawful manner<sup>16</sup>. It is not clear

### 4.2. The Right to be Recognized and Rewarded

Again the India Plant Variety Protection and Farmers' Rights Act of 2001 provides that a farmer 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 for recognition and reward from the Gene Fund<sup>17</sup>. This right however is exercised if the material so selected and preserved has been used as donors of genes in varieties registrable under this Act. Article 45 of the act provides for the establishment by the central government of a gene fund the objective of which as provided under the act is to facilitate the benefit sharing arrangements and compensation.

### 4.3. Right to Save use, and Exchange Seeds of Protected Variety

The Indian PPVFR Act also provides for or recognizes the traditional rights of farmers to save, to save, use, sow resow, exchange, share or sell his farm produce including seed of a variety protected under the PPVFR Act, in the same manner as the farmer was entitled before the coming into force of the Act<sup>18</sup>. One restriction imposed on the rights of a farmer to save, use, exchange or sell, sow or resow his products is that the farmer is not entitled to sell branded seed of a variety protected under this Act. A "branded seed" is any seed put in a package or any other container and labelled in a manner indicating that such seed is of a variety protected under this Act<sup>19</sup>.

<sup>14</sup> Act of 1991 International Convention for the Protection of New Varieties of Plants of December 2, 1961, as Revised at Geneva on November 10, 1972, on October 23, 1978, and on March 19, 1991, Article. 14(3). Accessed on 11/02/2019. <https://www.upov.int/export/sites/upov/upovlex/en/conventions/1991/pdf/act1991.pdf>.

<sup>15</sup> Article 39(1)(i) of the PPVFR Act.

<sup>16</sup> Article 18(1) (h) of the PPVFR Act.

<sup>17</sup> Article 18(1) (iii) of the PPVFR Act.

<sup>18</sup> Article 18(1) (iv) of the PPVFR Act.

<sup>19</sup> Ibid.

#### 4.4. Farmers Right to Compensation for Failure of the Protected Plant Variety

The Indian PPVFR Act requires the breeder of a registered variety to disclose to the farmer or group of farmers, where the registered seed has been sold to the latter, the expected performance under a given condition of the protected variety and where such a variety fails to provide the expected performance under the said condition, the farmer is entitled to claim compensations from the breeder of the variety.

#### 4.5. Protection Against Innocent Infringement

Article 42 of the Indian PPVFR Act protects a farmer against a suit for an infringement of a right established under the act provided that the farmer proves that at the time of the infringement he was not aware of the existence of the right so infringer that he committed an infringing act being not aware of the existence of such a right.

#### 4.6. Prior Authorization for the Commercialization of Essentially Derived Varieties

A breeder of an essentially derived variety who has used a farmer's variety in order to develop an essentially derived variety may not authorize the commercialization of the later without having a prior authorization of the farmer. Such a process can allow farmers to negotiate the terms of authorization with the breeder, which may include royalties, one-off payments, benefit-sharing, etc.<sup>20</sup>.

### 5. Protection of Farmers Rights Under the Ethiopian Plant Breeders Rights Law

Ethiopia is not a member of the UPOV convention. The country has filed an application to join the WTO agreement. However, Ethiopia has not yet acceded to the WTO TRIPS agreement. Ethiopia has however adopted the first plant breeders' rights proclamation in 2006, which has now been repealed by proclamation No. 1068/2017. The current plant breeders' proclamation is aimed at promoting the economic contribution of the seed sector by ensuring the guarantee of plant breeders' rights by harmonizing it with international practice. The proclamation also recognizes in its preamble the centuries old customary knowledge and practice of saving, using and exchanging of seeds by farmers and pastoral communities of Ethiopia and their enormous roles in conserving the agro biodiversity resources used to develop new varieties. Besides the preamble, there are substantive provisions which deal with farmers rights.

#### 5.1. Definition of a farmer under the Ethiopian Plant Breeders Rights Proclamation

The Ethiopian Plant breeders' rights proclamation recognizing the enormous contribution of farmers and pastoral community provides certain rights to the latter in

lieu of their past, present and future contributions in the conservation and development of plant genetic resources which today are used as a source of food and agriculture. However the proclamation does not define the terms 'farmer or pastoral community'. It rather defines small holder farmer or pastoral community as "a farmer or pastoral community officially granted with a certificate of possession of land, not more than 10 hectares of land and engaged in agricultural development using predominantly his own and family labor and his livelihood is predominantly dependent on agriculture."<sup>21</sup>

Therefore for a person to exercise his rights as a farmer or pastoral community under Ethiopian law, he should be meeting the requirements of a small holder or pastoral community. In other words, the individual should have a land holding rights, size of land, actual engagement in the agricultural development, and he should be predominantly depend for his livelihood on agriculture. Therefore an individual who uses hired labor or develops land by hiring from others may not claim farmers' rights under the Ethiopian plant breeders' rights proclamation, even if the individual's livelihood is primarily dependent on agriculture. So what matters is not only the size of the land that he possesses. The definition article is very much stringent and exclusionist.

#### 5.2. The Scope of Farmers Rights under the Ethiopian Plant Breeders' Rights Proclamation

Although the preambular provisions of the plant breeders' rights proclamation present the contribution of farmers and the necessity to maintain century's old traditional knowledge, however in reality farmers' rights was not given equal attention with the exclusive rights granted to a commercial plant breeder. The following rights are granted to a farmer (small holder farmer) under the Ethiopian Plant breeders' rights proclamation:

##### 5.2.1. Recognition of Farmers' or Pastoral Communities varieties

The proclamation explicitly states that any plant breeder, including farmers or pastoral communities, may apply for a plant breeder's right in respect of a new plant variety that is bred either locally or abroad<sup>22</sup>. In the case of farmers or pastoral communities the application shall be made by a person representing the community. For strongest reason there is no reason why an individual farmer who has developed a new variety cannot apply for farmer's variety. The proclamation defines farmers or pastoral communities variety as a variety traditionally cultivated and developed by farmers or pastoral communities in their field, or a variety which is predominantly bred or selected by farmers or pastoral communities from various plant sources.

##### 5.2.2. The Right to Save, Use and Exchange Farm Saved Seed of Any Variety

<sup>20</sup>S.P. Bala Ravi, Farmers' rights, their scope and legal protection in India, accessed on 09/02/2019. [https://www.biodiversityinternational.org/fileadmin/user\\_upload/online\\_library/publications/pdfs/Community\\_biodiversity\\_management/6.3.farmers\\_rights\\_protection\\_India.pdf](https://www.biodiversityinternational.org/fileadmin/user_upload/online_library/publications/pdfs/Community_biodiversity_management/6.3.farmers_rights_protection_India.pdf).

<sup>21</sup> Plant Breeders' Rights Proclamation, Proclamation No. 1068/2017, *Negarit Gazette*, 24<sup>th</sup> year, No. 29, March 2018, Addis Ababa, Article 2(15)

<sup>22</sup> Article 11(1) & (2) of the Ethiopian Plant Breeders Rights Proclamation.

Article 7 (1) of the proclamations provides the right of a small holder farmer or a pastoral community to save, use, exchange and sell farm-saved seed of any variety on the non-commercial marketing. Commercial marketing is defined as any trade in seed other than the marketing conducted between small holder farmers or pastoral communities, or between small holder farmers, pastoral communities and their cooperative societies<sup>23</sup>. The sale of a farm saved surplus seed in a market or to a consumer constitutes a commercial marketing and therefore it's going to be an infringement to a plant breeders rights.

### 5.2.3. Farmers Right to Save and Use Farm Saved Seed

Besides the traditional rights of a farmer to save, use and sell or exchange farm saved seeds of a protected variety for reproduction or sell, the proclamation gives to any farmer or a pastoral community the right to save and use seeds of any variety of food crop and other species that directly supports his livelihood<sup>24</sup>.

## 6. Lessons for Ethiopia

Although the Ethiopian Plant breeders' rights proclamation uses broader expressions in its introductory part (the preamble), concerning the role of traditional farmers in the conservation and development of plant genetic resources, however that broader promise was not supported by specific provisions in the substantive part of the proclamation in such a way that the wider promises are translated into reality. Unlike the Indian plant variety protection regime, the Ethiopia's protection of farmers' rights under the Ethiopian law is only nominal. On the one hand it is only small holder farmers or pastoral communities who are entitled to claim farmers' rights under the Ethiopian law. Small holder farmers are those who have land holding rights and whose livelihood is primarily based on agriculture.

The Right to sell a farm saved seed is also restricted to non-commercial transactions. Accordingly sell a farm-saved surplus seed to a consumer in a market may be considered as commercial and subject the farmer to an infringement suit. Ethiopia is a signatory to the Convention on biological biodiversity and the international treaty on plant genetic resources, which requires member countries to take certain measures to ensure the protection of farmers' rights.

Besides that Ethiopia is one of the least developed and the most food insecure African country whose economy is primarily based on agriculture, in terms of contribution to the GDPO, foreign exchange and employment. Today the livelihood of 85 percent of the Ethiopian population is based on agriculture. 90 percent of the seeds are produced and supplied by the informal sector, i.e. the mall holder farmers. In short Ethiopia's farmers are playing an enormous role in the conservation and development of plant genetic resources.

Despite these the Ethiopian law does not provide sufficient guarantees to the protection of farmers' rights. Compared to

the Indian PPVFR Act of 2001, for instance the Ethiopian plant breeders rights law;

- 1) Does not provide the right of farmers to claim compensation in the occasion of the failure of the protected plant variety to meet the expected performance. After all the Ethiopian plant breeders law does not require plant breeders to disclose the expected plant productivity in a given condition and it is difficult for the farmer to prove that the productivity is below the expected performance.
- 2) There is no provision in the Ethiopian law that protects a farmer against a suit for an innocent infringement.
- 3) There is no provision in the Ethiopian plant breeders p[proclamation requiring a breeder of an essentially derived variety who intends to commercialize the same to require a prior authorization from the farmer when the farmers' variety is used as a source for the breeding. After all under the Ethiopian the exclusive rights of a plant breeder extend to a variety which is essentially derived from a protected variety for the breeding. After all under the Ethiopian the exclusive rights of a plant breeder extend to a variety which is essentially derived from a protected variety.

Therefore, compared to the Indian protection of plant varieties and farmers rights act of 2001, the Ethiopian plant breeders' rights proclamation does not provide sufficient guarantee for farmers' rights. The protection granted is only nominal than substantive and eventually it is subject to many inhibitive provisions.

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<sup>23</sup>Article 2(4) of the Proclamation.

<sup>24</sup> Article 7(2) of the Ethiopian Plant Breeders' Rights Proclamation.

- [6] Ethiopian .Plant Breeders' Rights Proclamation, Proclamation No. 1068/2017, *Negarit Gazette*, 24<sup>th</sup> year, No. 29, March 2018, Addis Ababa.
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