

PROTECTION OF BREEDERS' RIGHTS UNDER THE PLANT VARIETY PROTECTION ACT OF NIGERIA*

Abstract

Nigeria is rated as the most populated African country. The implication of this is shortage of food among other resources within the populace. Beyond population growth, there are other challenges that confront humanity that would spell doom for food supply if not tackled. Farmers and Plant breeders utilize their skills to give succour to the populace through plant breeding activities. Research institutes are also set up to improve on plants sequel to climate change and other forms of challenges. Plant breeding is therefore a form of innovation that deserves legal protection like other intellectual works. Though international agreements/law specifically the International Union for the Protection of New Varieties of Plants (UPOV) Convention exists to regulate plant breeding activities by giving exclusive rights to breeders upon fulfilment of required conditions, Nigeria is not a signatory to such international Convention which rendered breeders and researchers in Nigeria vulnerable to intellectual scavengers and economic saboteurs. Gratifyingly, in recent times, the country produced her first Plant Variety Protection Act, 2021 sequel to the TRIPS Agreement to which she is a party. This is a qualitative study that utilizes doctrinal method of research to explore the provisions of the Act vis-a-vis the international standard set with a view to assessing the worth of the Act. It further highlights the need to cater for local communities whose traditional knowledge may be utilized in plant research and development. It recommends access to UPOV and an intentional implementation of the Act.

Keywords: Plant variety, Breeders' Rights, Protection, Farmer, Plant Variety Protection Act, Nigeria

1. Introduction

As world's population increases, food shortage, climate change and other challenges are inevitable.¹ Nigeria is rated as the most populous country in Africa.² Since decades past, international forums have not ceased to draw up approaches to secure possible measures at tackling the challenges.³ Every tactical means to nip the challenge in the bud has to be deployed including scientific methods.⁴ Plant breeding is one of the ways to salvage imminent food scarcity/famine challenging mankind in the world.⁵ Plant breeding is the science based creative process of developing new plant varieties.⁶ It involves changing the traits of plants for the purposes of producing some desired uniquely superior characteristics as well as improving the quality of nutrition in the products for humans and animals. It is called different names including cultivar development, crop improvement, and seed improvement. Plant breeding is a fascinating field that plays an important role in improving crop varieties and also development of ornament plants. Further benefits of plant breeding include support for urban agriculture, increased yield, disease resistance, improved nutritional content, adaptation to climate change, enhanced flavor and taste, better shelf life, environmental sustainability, crop uniformity, preservation of genetic diversity and economic benefits. Plant breeding, thus, contributes significantly to global food security, environmental sustainability, economic improvements and human well-being in general. Skills, knowledge and resources are required to sustain involvement in plant breeding that would tackle food shortage.⁷ Thus, there is need for protection of success in plant breeding ventures like every other intellectual production or creation. This study looks into the new plant breeding legal framework promulgated in Nigeria in 2021 with the aim of bringing forth the requirements for protection with a view to assess its adequacy vis-à-vis internationally set standard. The introduced plant Intellectual Property terrain will also be assessed in relation to traditional knowledge in farming in Nigeria. How well does it align with international standard? How achievable is the objective for its promulgation? These are questions that the Act itself would reveal upon a careful perusal as sought to be done herein.

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¹ Matin Qaim, 'Role of New Plant Breeding Technologies for Food Security and Sustainable Agricultural Development' (2020) 42(2) *Applied Economic Perspectives and Policy* 129-150 <<https://doi.org/10.1002/aep.13044>> accessed 23 February 2024.

² Saifaddin Galal, 'African countries with the largest population as of 2023' <<https://www.statista.com/statistics/1121246/population-in-africa-by-country/>> accessed 21 February 2024.

³ Visit for instance <<https://www.worldbank.org/en/topic/agriculture/brief/food-security-update>> accessed 1 March, 2024.

⁴ See UNSDGs – particularly Goal 2 at <<https://www.un.org/sustainabledevelopment/hunger/>> accessed 23 February 2024.

⁵ Matin Qaim, 'Role of New Plant Breeding Technologies for Food Security and Sustainable Agricultural Development' (2020) 42(2) *Applied Economic Perspectives and Policy* 129-150; Saritha V. Kuriakose, Ravindra Pushker and Ebenezer M. Hyde, 'Data-Driven Decisions for Accelerated Plant Breeding' in S. Gosal and S. Wani (Eds) in *Accelerated Plant Breeding Volume 1: Cereal Crops* (Springer, Cham., 2020) 89-119.

⁶ Ju-Kyung Yu and Yong-Suk Chung, 'Plant Variety Protection: Current Practices and Insights' (2021) 12(8) *Genes* 1127.

⁷ WIPO, 'Achieving sustainability with Plant Variety Protection' <<https://www.wipo.int/ip-outreach/en/ipday/2022/toptips/upov.html>> accessed 21 February 2024

2. Importance of Agriculture to Nigeria

Before the boom of oil, agriculture has always (mainly crop production) played a vital role in Nigeria's Gross Domestic Production (GDP) and even at present, it is next to oil in GDP assessment.⁸ Nigeria generates about 19% of her GDP from agriculture making it next to oil.⁹ It is worth emphasising that the importance of plants to any economy cannot be overemphasized so is the position of farmers and breeders within the agricultural sector to improve food security.¹⁰ Though Nigeria had been involved in researches and plant breeding, it lacked the necessary framework for the protection of the product of such researches until the promulgation of the Plant Variety Protection Act, 2021 (the PVP Act) which is considered beneficial to the country as a whole.¹¹ However, agriculture generates a source of livelihood to more Nigerians than oil through production and sales. Hence, the importance of agriculture cannot be overemphasised. This explains the need for the emergence and sustained activities of research institutes dealing with seed and plant production¹² such as National Horticultural Research Institute (NIHORT), Cocoa Research Institute of Nigeria (CRIN), Nagari Seeds Nigeria Limited and Obafemi Awolowo University among others.

3. Meaning of Plant Variety Right

Plant Variety Right also known as Plant Breeders' Right is a form (*sui generis*) of intellectual property right that is specifically designed to protect new plant varieties.¹³ The right is an exclusive right over the commercial production and marketing of the reproductive or vegetative propagating material of the protected variety. These rights are assigned to the breeder of a new variety of plant which gives the breeder exclusive control over the variety in the form of seeds, flowers, fruits, foliage, or the likes. Plant variety rights are more like alternatives to patent and are aimed at giving incentives to seed industry. As hinted earlier, sustaining seed production requires knowledge and skills. Therefore, protecting breeders' investment in production is crucial to continued investment.¹⁴ It is worth emphasising that Plant Breeders' Rights (PBR) are rights granted to the Breeder of a new variety of plant that give the breeder exclusive control over the propagating material (including seed, cuttings, divisions, tissue culture) and harvested material (cut flowers, fruit, foliage) of a new variety for some years. With these rights, the breeder can choose to become the exclusive marketer of the variety or license the variety to others.¹⁵ To qualify for these exclusive rights, a variety must be new, distinct, uniform, and stable. Hence, farmers can claim the Intellectual Property Right, provided their varieties are novel, distinct, uniform, and stable and are given an exclusive right to produce, sell, market, distribute, import, or export the variety.¹⁶ Drawing from the aforesaid, part of the boost for agriculture sector and by extension, the economy is plant variety production. By this, small and medium scale farmers and breeders as well as the entire society benefit from plant production.

4. Requirement for Protection of Plant Variety

The Agreement on Trade-Related Aspects of Intellectual Property Rights (the 'TRIPS Agreement) by its Article 27 enjoins member States to protect inventions with patent law. It further provides in Article 27.3(b) that plant or animal varieties or essentially biological processes for the production of plants or animals (other than microbiological processes and their products) may be excluded from patentability. It further gives member States the obligation of providing 'for the protection of plant varieties either by patents or by an effective *sui generis* system or by any combination thereof'.¹⁷ Though the Nigerian Patent and Designs Act, 1970 predates the TRIPS Agreement, its provisions align with the requirements of TRIPs Agreement on patentable inventions and excluded inventions. Exclusion of plant variety left vacuum in the aspect of protection of inventions of plant variety especially in the face of the realities of research and development institutes that sprang up within and outside academic environments.

⁸Doris Dokua Sasu, 'Share of GDP by agricultural sector in Nigeria 2023' available at <<https://www.statista.com/statistics/1207940/share-of-gdp-by-agricultural-sector-in-nigeria>> accessed 21 February 2024.

⁹ *ibid.*

¹⁰ The World Bank, 'What is Food Security?' available at <[What is Food Security? There are Four Dimensions \(worldbank.org\)](https://www.worldbank.org/what-is-food-security)> accessed 19 February 2024.

¹¹ The Nigerian Economic Summit Group, 'NASC, NESG unveils the Plant Variety Protection (PVP) Act 2021' <<https://nesgroup.org/blog/NASC,-NESG-unveils-the-Plant-Variety-Protection-%28PVP%29-Act-2021>> accessed 20 February 2024.

¹² Though formal agricultural research in Nigeria started since 1893 when the first botanical research station was established by the colonial government.

¹³ Ju-Kyung Yu and Yong-Suk Chung, 'Plant Variety Protection: Current Practices and Insights' (2021) 12(8) *Genes* 1127

¹⁴ Sven JR Bostyn, 'Towards a Fair Scope of Protection for Plant Breeders' Rights in an Era of New Breeding Techniques: Proposals for a Modernization of the Essentially Derived Variety Concept' (2021) 11(8) *Agronomy* 1511 available at <<https://doi.org/10.3390/agronomy11081511>> accessed 24 May 2024.

¹⁵ Plant Breeders' Rights is a *sui generis* intellectual property system for plant. See Michael A Kock, 'Essentially Derived Varieties in View of New Breeding Technologies – Plant Breeders' Rights at a Crossroads' (2021) 70(1) *GRUR International* 11.

¹⁶ Discussed under.

¹⁷ Art. 27.3(b).

5. Birth of the Plant Variety Act, 2021 and the International Union for the Protection of New Varieties of Plants (UPOV) Convention as set standard

Realising the importance of protecting plant variety, the Nigerian Federal Government promulgated the Plant Varieties Protection Act (the 'PVP Act') in May 2021. The provisions of the Act are in accordance with the provisions of International Union for the Protection of New Varieties of Plants (UPOV) Convention 1991,¹⁸ though Nigeria is yet to be a part of UPOV Convention.¹⁹ The International Union for the Protection of New Varieties of Plants Convention (the 'UPOV Convention') established the International Union for the Protection of New Varieties of Plants Convention (UPOV), an intergovernmental organization, which is based in Geneva, Switzerland.²⁰ The UPOV Convention was adopted by a Diplomatic Conference that was held in Paris in December, 1961. It came into force in 1968 after being ratified by the United Kingdom, the Netherlands and Germany. Due to technological developments in plant breeding and the experiences that have been acquired with the application of the UPOV Convention, the Convention was revised on November 10, 1972, on October 23, 1978, and on March 19, 1991.²¹ The mission of the UPOV is to provide and promote an effective system of plant variety protection, with the aim of encouraging the development of new varieties of plants, for the benefit of society. Most countries and intergovernmental organizations which have introduced a plant variety protection (PVP) system have chosen to base their system on the UPOV Convention in order to provide an effective, internationally recognized system. The UPOV Convention provides the basis for UPOV members to encourage plant breeding by granting breeders of new plant varieties an intellectual property right: the breeders' right. To be able to obtain protection, the breeder needs to file individual applications with the authorities of UPOV members entrusted with the task of granting breeders' rights. The UPOV Convention provides that breeders' right is only granted where the variety is (i) new, (ii) distinct, (iii) uniform, (iv) stable and has a suitable denomination.²² Breeders' right does not extend to acts done (i) privately and for non-commercial purposes, (ii) for experimental purposes and (iii) for the purpose of breeding other varieties. Nigeria is one of the eighteen (18) States and one (1) intergovernmental organization that have initiated the procedure for acceding to the UPOV Convention.²³ The enactment of the PVP Act is a springboard to joining UPOV.²⁴

6. Background to Plant Breeding in Nigeria

As earlier stated, Nigeria's formal agricultural research is traceable to 1893 when the colonial government established the first botanical research station. Breeding activities started just in the 1970s and today, a lot of institutes, both public and private and universities are involved in plant breeding and plant biotechnology which necessitates a place for protection of their creations and inventions. As already stated, section 1(4) of Patents and Designs Act excludes plant variety from being patentable. There was also no *sui generis* law to protect plant breeding to the disadvantage of farmers and research institutes. Nigeria, however, has the National Crop Varieties and Livestock Breeds Act, 1987 (NCVLBA) and the National Agricultural Seeds Act, 1992 (NASA). Section 22 of NASA provides for formal registration as a condition for producing, processing, and marketing seeds for commercial purposes in Nigeria. The NCVLBA establishes a national register for crop varieties and livestock breeds where names of old and new crop varieties and livestock breeds are permanently registered, while NASA oversees seed programmes and policies in the country. However, as these are non-IP laws, they do not provide exclusive rights over new varieties of plants as required under Article 27.3(b) of TRIPS.

7. Nigeria's Plant Variety Act 2021

PVP Act is an Act of the National Assembly of Nigeria that 'protects plant varieties, encourages investment in plant breeding and crop variety development and establishes a Plant Variety Protection Office for the promotion of increased staple crop productivity for smallholder farmers in Nigeria.' It gives a form of intellectual property right to breeders over their inventions in plants. The PVP Act is not without specific objectives. Essentially, the objectives of the legislation are to: (1) promote increased staple crop productivity for smallholder farmers in Nigeria and encourage investment in plant breeding and crop variety development; (2) promote increased mutual accountability in the seed sector; and (3) protect new varieties of plants. The legislation applies to (1) a breeder; and (2) any plant genera and species. It establishes the Plant Variety Protection Office which is domiciled in the National Agricultural Seeds Council (NASC). The NIPPS emphasised the role of Plant Breeders Protection Offices in accessing the UPOV and also operationalizing the provisions of the PVP Act. The PVP Act contains very important segments that highlight the active participation of private sectors, multinationals, and inter-governmental agencies in the Nigerian seeds industry. These highlights include: Establishment of a Plant Variety Protection Office,²⁵ Plant Variety Protection Advisory Committee,²⁶ Conditions for Plant Variety

¹⁸ Though the Convention was adopted in 1961 (Paris), it was revised in 1972, 1978 and 1991 – visit <www.upov.int> accessed 27 February 2024.

¹⁹ *ibid.*

²⁰ UPOV <<https://upovlex.upov.int/en/convention>> accessed 20 February 2024.

²¹ *ibid.*

²² UPOV Convention, Article 5.

²³ International Union for the Protection of New Varieties of Plants, 'Overview of Upov' (UPOV, Publication No. 437, February 2, 2024) <https://www.upov.int/edocs/pubdocs/en/upov_pub_437.pdf> accessed 19 February 2024.

²⁴ National Intellectual Property Policy and Strategy, Para. 2.1.5.

²⁵ Section 3 - The Act establishes a Plant Variety Protection Office, through which breeders will be granted rights, and information on plant breeders' rights issued in Nigeria can be obtained.

²⁶ S 9

Protection,²⁷ Nature of Plant Breeders' Rights,²⁸ Procedures for Obtaining Plant Breeders' Rights, Grounds for Objection, Duration of Plant Breeder's rights²⁹ and Plant Breeders' Rights Development Fund.³⁰ Some of these highlights will be discussed hereunder.

Establishment of a Plant Variety Protection Office

The Act established the Plant Variety Protection Office which is domiciled in the National Agricultural Seeds Council (NASC) to be headed by a Registrar, who must be a fit and proper person appointed on the recommendation of the Director-General of NASC.³¹ The Registrar must have at least a master's degree in plant breeding, seed science, agronomy or in related fields with a minimum of seven years cognate experience and shall perform the functions assigned to him by the Director-General.³² He or she shall be responsible for the day-to-day management and administration of the plant variety protection Office and is answerable to the Director-General. By virtue of section 5 of the PVP Act, the plant variety protection office performs the following functions: (1) grant breeder's rights; (2) maintain a register and provide information on plant breeders' rights issued in Nigeria; (3) facilitate transfer and licensing of plant breeder's rights; (4) collaborate with local and international bodies whose functions relate to plant breeders' rights matters; and (5) perform other functions as are necessary for the furtherance of the objects of the Act. The Registrar is saddled with the responsibility of maintaining a breeders' rights register in which the information required to be registered under the Act will be entered. The information to be listed in the register for each registered variety includes: (a) the species and denomination of a variety; (b) the full name and address of the: applicant or holder of the breeder's right, and person who bred or discovered and developed the variety, where such person is different from the applicant or holder of the breeder's right; (c) the date and time of inception of the breeders' right; (d) any other matter which: is required by the PVP Act or any other written law to be entered in the register, and matters which may affect the validity or ownership of plant breeder's rights; and (e) any other information which is likely to be required by Regulations made under the PVP Act. The register serves as the first evidence of any matter entered in it.³³

Appointment of Plant Variety Protection Advisory Committee

Section 9(1) of the Act provides for the establishment of an Ad-hoc Committee to be known as the Plant Variety Protection' Advisory Committee ('the Committee') for the purposes of the functions contained in section 10 of the Act. The appointment of members of the Committee shall be done by the Director-General of NASC who is expected to give consideration to gender in making the appointment. The members of the Committee are to be drawn from the NASC, who shall be the Chairman of the Committee; the Ministry responsible for agriculture; a registered plant breeder association; a registered seed traders association; a registered farmers' association; a university offering a course on plant breeding; the Attorney-General of the Federation's office; the National Office for Technology Acquisition and Promotion; the National Quarantine Services; the National Biotechnology Development Agency; the National Biosafety Management Agency; the National Crop Variety Release Committee; Registrar of Trademarks; Registrar of Patents and Design; and the Registrar. The Secretary of NASC is recommended be the Secretary of the Committee.³⁴ The Committee has the responsibility to advise the Minister on enforcement of the PVP Act through the Director-General of National Agricultural Seed Council (NASC).³⁵ It is also saddled with the responsibility of receiving reports of plant breeders' rights applications from the Registrar and receiving information on the plant breeders' rights reports as well as on the Registrar's tests results. It is also to manage the operations of the Plant Breeders' Rights Development Fund.³⁶ The Committee is to make its own rules of procedure, give the Registrar directives of a specific and general nature and call on breeders and any other interested person for hearing on plant variety protection matters.³⁷

Conditions for Plant Variety Protection

Section 13(1) provides for conditions for grant of plant variety right. The breeder's right will be granted with respect to a variety that is new, distinct, uniform and stable. The grant of the breeder's right is not subject to any further or different conditions, provided that the variety is designated by a denomination in accordance with the provisions of section 19 of the PVP Act, the applicant complies with the provisions of the PVP Act and pays the fees prescribed in the Regulations

²⁷ S 12-16

²⁸ A plant breeder has exclusive rights to propagate materials of a protected variety.

²⁹ Section 32 - A plant breeder's right will expire after 20 years from the date of the grant except for trees and vines whose breeder's right shall expire 25 years after the date of the grant. Grant for the above breeders is extendable for an additional 5 years each, upon notice to the Registrar 6 months before the expiration of the original term.

³⁰ The Fund shall be applied for the development and promotion of the plant breeders' rights; training of plant breeders on matters concerning plant breeders' rights; establishment and maintenance of variety collection and database

³¹ S 3-4(1)

³² S. 4(2)

³³ See section 6.

³⁴ See section 9

³⁵ Sections 10 and 44.

³⁶ *ibid.*

³⁷ Section 11.

made under thereunder.³⁸ Proof of novelty is provided for under the PVP Act. The variety will be deemed to be new if, at the date of filing of the application for a breeder's right, propagating or harvested material of the variety has not been sold or otherwise disposed of to any person with the consent of the breeder, for purposes of exploitation of the variety in Nigeria, earlier than one year before the date of filing the application; and in a territory other than Nigeria earlier than four years, or six years before the said date in the case of a tree or vine.³⁹ However, novelty will be not lost under these conditions: (a) a trial of the variety not involving sale or disposal of, to others for purposes of exploitation of the variety; and (b) sale or disposal of, to: (i) others without the consent of the breeder, (ii) any person that forms part of an agreement for the transfer of rights to the successor-in-title, (iii) any person that forms part of an agreement under which a person multiplies propagating material of the variety concerned on behalf of the breeder, provided that the property in the multiplied material reverts to the breeder and the multiplied material is not used for the production of another variety, (iv) any person that forms part of an agreement under which a person undertakes field tests or laboratory trials, or small-scale processing trials with a view of evaluating the variety, (v) any person that forms part of the fulfillment of a statutory or administrative obligation concerning biological security or the entry of varieties in an official catalogue of varieties admitted to trade, (vi) any person of harvested material which is a by-product or a surplus product of the creation of the variety or of the activities referred to in subparagraphs (iii) - (v) above, provided that the said material is sold or disposed of without variety identification for the purposes of consumption, and (vii) any person due to or in consequence of the fact that the breeder had displayed the variety at an official or officially recognised exhibition.⁴⁰ As regards distinctiveness, Section 15(1) provides that a variety is deemed to be distinct where it is clearly distinguishable from any other variety whose existence is a matter of common knowledge at the time of the filing of the application. Section 15(2) states that the filing of an application for the granting of breeder's right or for the entering of another variety in the official register of varieties in any country, is deemed to render that other variety a matter of common knowledge from the date of the application, provided that the application leads to the granting of breeder's right or to the entering of the said other variety in the official register of varieties. On uniformity and stability, the PVP Act, in section 16, states that a variety is deemed to be (a) uniform if, subject to the variation that may be expected from the particular features of its propagation, it is sufficiently uniform in its relevant characteristics; and (b) stable, where its relevant characteristics remain unchanged after repeated propagation or, in the case of a particular cycle of propagation, at the end of each such cycle.

Scope of Protection

Subject to exceptions to the breeder's right provided in section 30 and exhaustion of the breeder's right contained in section 31 of the PVP Act, the following acts in respect of the propagating material of the protected variety requires the authorisation of the holder of the breeder's right: (a) production or reproduction(multiplication); (b) conditioning for the purpose of propagation; (c) offering for sale; (d) selling or marketing; (e) exporting; (f) importing; and (g) stocking for any purposes mentioned in (a) - (f) above.⁴¹ The authorisation may be done by the holder of the breeder's right, subject to conditions and limitations.⁴² Still subject to the provisions of sections 30 and 31 on exceptions to the breeder's right and exhaustion of the breeder's right, the acts referred to in section 29(1) (a) - (g) in respect of: (a) harvested material, including entire plants and parts of plants, obtained through the unauthorised use of propagating material of the protected variety, requires the authorisation of the holder of the breeder's right, unless the holder of the breeder's right has had reasonable opportunity to exercise his right in relation to the said propagating material; and (b) products made directly from harvested material of the protected variety falling within the provision of paragraph (a) through the unauthorised use of the said harvested material, requires the authorisation of the breeder, unless the breeder has had reasonable opportunity to exercise his right in relation to the said harvested material.⁴³ The provisions of section 29(1) - (3) apply to a variety: 'that is essentially derived from the protected variety, where the protected variety is not itself an essentially derived variety'; 'which is not clearly distinguishable in accordance with section 15 of the PVP Act from the protected variety'; and 'whose production requires the repeated use of the protected variety'.⁴⁴ In this regard, a variety is to be deemed to be essentially derived from another variety when: 'it is predominantly derived from the initial variety, or from a variety that is itself predominantly derived from the initial variety, while retaining the expression of the essential characteristics that result from the genotype or combination of genotype of the initial variety'; 'it is clearly distinguishable from the initial variety'; and 'except for the differences which result from the act of derivation, it conforms to the initial variety in the expression of the essential characteristics that result from the genotype or combination of genotypes of the initial variety'.⁴⁵ For the purpose of scope of variety protection, an essentially derived variety may be obtained through: the selection of a natural, induced mutant or of somaclonal variant; the selection of a variant individual from plants of the initial variety; and backcrossing, or transformation by genetic engineering.⁴⁶

³⁸ S. 13(2).

³⁹ Section 14(1)

⁴⁰ Section 14(2)

⁴¹ Section 29(1)

⁴² Section 29(2)

⁴³ Section 29 (3)

⁴⁴Section 29 (4)(a-c)

⁴⁵ Section 29(5)

⁴⁶ Section 29(6)

Exceptions to the breeder's right

Breeders' right conferred under the PVP Act is not absolute. There are exceptions to the operation of breeders' right as contained in Section 30. Subsection (1) provides that the breeder's right is not to be extended to acts done privately and for non-commercial purposes, for experimental purposes; and for the purpose of breeding any other variety, and, except where the provisions of section 29 (4) - (6) of the PVP Act apply, any act referred to in section 29 (1) - (3) in respect of such other varieties. For the list of agricultural crops specified by the Minister, the breeder's right does not extend to a farmer who, within reasonable limits and subject to the safeguarding of the legitimate interests of the holder of the breeder's right, uses for propagating purposes on his own holding, the product of the harvest which he has obtained by planting on his own holding, the protected variety or a variety referred to in section 29 (4) (a) or (b) of the PVP Act. The reasonable limits and the means of safeguarding the legitimate interest of the holder of the breeder's right is to be specified in the regulations to be made under the PVP Act.

Procedures for Obtaining Plant Breeders' Rights

It is open to a breeder of a new variety to apply for the grant of a breeder's right for that variety.⁴⁷ The application for breeder's right for a variety has to contain: (a) the name and address of the applicant; (b) where the applicant is the successor-in-title of the person who bred, or discovered and developed the variety: (i) proof of title or authority in the form and content satisfactory to the Registrar or as may be specified by Regulations establishing the existence and validity of the assignment or succession, and (ii) the name and address of the person who bred, or discovered and developed the variety; (c) the proposed denomination and the description of the characteristics of the variety as the Registrar may require; (d) samples of the propagating material in the quantities as the Registrar may require; and (e) any additional information, documents and material that may be required in connection with the application as may be prescribed in the Regulations.⁴⁸

Variety Denomination

Section 19(1) provides that the variety shall be designated by a denomination which shall be its generic designation and subject to subsection (6) on right of priority, the rights in the designation registered as the denomination of the variety shall not hamper the free use of the denomination in connection with the variety even after the expiration of the breeder's right.⁴⁹ The denomination essentially shall enable the variety to be identified; shall not mislead or cause confusion concerning the characteristics, value or identity of the variety or the identity of the breeder; shall be different from every denomination which designates, in the territory of any member of an international organisation dealing with plant breeders' rights matters to which Nigeria is a party an existing variety of the same plant species or of a closely related species, and may not consist solely of figures except where this is an established practice for designating varieties.⁵⁰ According to subsection 4 of section 19, the applicant shall submit the denomination of the variety to the Registrar and where the Registrar finds that the denomination does not satisfy the requirements of section 19, he shall refuse to register it and direct the applicant to propose another denomination within the period to be prescribed in the Regulations made under the PVP Act. The Registrar is duty bound to register the denomination at the time the breeder's right is granted.⁵¹ The priority right of third person over denomination is also protected. According to section 19(6), prior rights of third persons shall not be affected and where, by reason of a prior right, the use of the denomination of a variety is forbidden to a person who, in accordance with the provisions of subsection (10), is obliged to use it, the Registrar shall direct the applicant to submit another denomination for the variety.

Also, where the variety is already protected by, a member of an international organisation dealing with the plant breeders' rights matters to which Nigeria is a party or an application for the protection of the same variety is filed in a member of such organisation, the variety denomination which has been proposed or registered in that other member of the organisation shall be submitted by the applicant to the Registrar in Nigeria.⁵² The Registrar has the duty to register the denomination submitted, unless he considers the denomination unsuitable within Nigeria and direct the applicant to submit another denomination where the denomination is unsuitable.⁵³ The Registrar shall in writing, inform the authorities of the members of UPOV on matters concerning variety denominations, in particular the submission, registration and cancellation of the denominations.⁵⁴ Any person who, within Nigeria, offers for sale or markets propagating material of a variety protected within the said territory shall be obliged to use the denomination of that variety, even after the expiration of the breeder's right of that variety, except where prior rights prevent the use.⁵⁵ When a variety is offered for sale or marketed, it is at liberty to associate a trademark, trade name or other similar indication

⁴⁷ Section 17.

⁴⁸ Section 18.

⁴⁹ Section 19(2)

⁵⁰ Section 19(3)

⁵¹ Section 19(5)

⁵² Section 19(7)

⁵³ Section 19(8)

⁵⁴ Section 19(9)

⁵⁵ Section 19(10)

with a registered variety denomination and where such an indication is so associated, the denomination shall nevertheless be easily recognisable.⁵⁶

Duration and infringement of a plant breeder's right

By virtue of section 32 of the PVP Act, except as specified in Part VII of the Act, the breeders' rights granted is for the duration of 20 years from the date of the grant except for trees and vines whose breeders' rights shall expire after 25 years from the date of grant. The duration can be extended by the Registrar for an additional five years upon receipt of a six-month written notice from the holder of the breeder's right before the expiration of the original term.

Infringement of Plant Breeders' Rights

Both civil and criminal measures stipulated in any written law protect a Plant breeder's rights.⁵⁷ Suit for infringement may be brought to the court.⁵⁸ There is no specification of which court, but it may be inferred that that the Federal High Court would be the court, since it is the court vested with power concerning other IP matters.⁵⁹

Appeals

Part V made up of sections 20-27 contains provisions on consideration and disposition of application, part of which is objection to proposed grant of breeder's right. The decision of the Registrar on any matter is not the final. According to section 42(1) of the Act, an appeal from the decisions of the Registrar made under the Act lies to the Minister. An aggrieved person may appeal to the Minister by submitting a notice of the appeal within 60 days following the publication, or of the receipt, of the individual notice of such decision by the person whose interest is the source or subject of the appeal.⁶⁰ The Minister may conduct an investigation, if he deems necessary to do so, and may hold a hearing of the appeal or make a decision based on written submissions; may confirm, set aside or vary any decision or action of the Registrar and may order the Registrar to carry out his decision; and shall give the reasons for his decision in writing, and copies of the decision shall be given to the appellant, the Registrar and any other interested party.⁶¹ The decision of the Minister is final.⁶² The finality of the Minister's decision is doubtful as right of the aggrieved party to pursue his matter in court or any other tribunal as guaranteed in the constitution is being contravened.⁶³ The legality of the provision is in fact being challenged in a suit filed against the Federal Republic of Nigeria, the Attorney General of the Federation, and the Honourable Minister of Agriculture and Rural Development at the Federal High Court Abuja by the Registered Trustees of Health of Mother Earth Foundation (supported by other organisations).⁶⁴ The provisions of the PVP Act show the resolve to accord regard to breeders' intellectual and economic investment in the course of production. Having considered the provisions of the Act, there is need to consider how this law impacts traditional communities where many rural farmers who engage in small scale farming are located.

8. Traditional Knowledge and Plant Breeding

The Convention on Biological Diversity in its preamble states that the recognition of the 'close and traditional dependence of many indigenous and local communities embodying traditional lifestyles on biological resources, and the desirability of sharing equitably benefits arising from the use of traditional knowledge, innovations and practices relevant to the conservation of biological diversity and the sustainable use of its components'. Article 8 thereof is about equitable sharing of benefits. Though the Convention is for biodiversity generally, it brings to mind the need of local communities to benefit from utilization of their resources in research and development as regards plant breeding. Also, if adequate attention is not given to the plight of local farmers and communities to have their local and traditional breeds preserved, the position of local communities in plant breeding is compromised by intellectual property as there may be loss of indigenous seedlings/crops to biotech and genetically modified breeds which may yield more than local plant breeds and which may be patentable. Such communities may be left seedless and may need to depend on the contemporary breeders for cultivation.⁶⁵ In other word, production of improved plants, seedless plants breeds and so on through the protection of PVP Act may hamper traditional plants cultivation by sending local varieties into extinction and leaving farmers at the mercy of contemporary breeders. This is of particular interest as plant breeding has engendered breeding of seedless plants.

⁵⁶ Section 19(11)

⁵⁷ Section 33.

⁵⁸ Section 33 (2).

⁵⁹ See The Constitution of the Federal Republic of Nigeria 1999 (CFRN), Section 251(1)(f), Copyright Act, 2022, section 108, Patent and Designs Act, Section 32, Trademark Act, section 67.

⁶⁰ Section 42(2)

⁶¹ Section 43(1)

⁶² Section 43(2)

⁶³ See CFRN, section 1(3) and 36, PVP Act, section 43 (2).

⁶⁴ Suit number FHC/ABJ/CS/815/2021 Visit <<https://www.floraip.com/2022/02/04/nigeria-plant-variety-protection-act-2021/>> accessed 27 February 2024.

⁶⁵ Md Moniruzzaman Et. Al. 'Seedlessness Trait and Genome Editing – A review' (2023) 24(6) Int J Mol Sci. 5660

9. NIPPS and PVP Act

Paragraph 2.1.3 of the NIPPS is on Plant/Animal variety rights. It recognises that the PVP regulations will need to be developed in order to operationalize the PVP Act 2021. It noted also that the Patents and Designs Acts also provide for the grant of patents for biotech inventions pertaining to plants and animals. Paragraph 2.2.4 noted that the Plant Variety Protection Office is still in its infant stage of establishment. In Paragraph 2.4.8, it is stated that Nigeria has eighteen research institutes, but much of the challenges with commercialization of new plant and animal varieties breeding is focussed on animal breeding. Notable challenges with commercialisation of plant breeding are: (1) Nigeria encourages importation from International Breeders rather than encourage Breeders within the country, (2) lack of awareness of possible IP rights is a major factor affecting growth and (3) cost of registration. Moreover, Paragraph 4.2 proposes that the PVP Regulations will need to be developed to operationalize the PVP Act. It proposes further that there is need to domesticate the TRIPs Agreement with special attention to Article 27.3(b), use of *sui generis* option and so forth for the protection of farmers' rights, new plant varieties as well as emerging IP rights issues embedded in the Convention on Biological Diversity (CBD) and its protocols.

10. Conclusion and Recommendations

Necessity is said to be the mother of invention. Imminent food scarcity necessitated plant breeding. But such activities cannot thrive without legal framework. The Nigerian IP space has greatly improved in comparison to decades past. It is clear that the provisions of the PVP Act align with the set standard in the UPOV Convention. What is left is the full operationalization of the Act. The development of the NIPPS is a worthy venture which has paved way for strategic planning on the way forward. This researcher therefore recommends that the strategies mapped out for attainment of the objectives of the PVP Act set out above be followed to the letter. All stake holders, including this researcher should join in bringing IP awareness on plant variety right to Nigerians. Also, the regulation sequel to the Act should be made and all necessary international agreements domesticated to aid further progress. Besides this, there is need to amend the section on appeal to remove the part that makes appeal to the Minister final - to remove its inconsistency with the CFRN.