

INTELLECTUAL PROPERTY PROTECTION FOR FOOD SECURITY IN NIGERIA: AN OVERVIEW OF THE NIGERIAN PLANT VARIETY PROTECTION (PVP) ACT 2021*

Abstract

Food security is an aspect of security in Nigeria and the African continent that cannot be overlooked as it maintains not only the wellbeing of individual citizens but the very peaceful existence of the nation. In May 2021, the Plant Variety Protection Act 2021 was signed into law in Nigeria to protect plant breeders' rights in their new plant varieties, encouraging investment in plant breeding and crop variety development and established a Plant Variety Protection Office for the promotion of increased staple crop productivity for smallholder farmers in Nigeria. This piece of legislation has expanded the scope of intellectual property protection in Nigeria and promoted the concept of Farmers Rights or the Farmers' Privilege over novel or improved propagating and harvested materials. The innovative agribusiness man, scientist, researcher, business corporation, community etc. is rewarded for the time, resources and efforts he put in producing an improved variety while others have an incentive to introduce even more options into the food basket in diverse growing conditions. The Act also has the advantage of making Nigeria an investment destination for persons in agriculture where the provisions of the law are applied equitably and in accordance with international standards. This paper makes an overview of the basic provisions of the Plant Variety Protection Act, 2021, expounding on the legal requirements for protection for rights owners; analyzing portions of the legislation that may become tripping points in the system and advancing suggestions for the improvement of the present regime such as ensuring adequate appellate jurisdiction for grievances, support for small scale farmers in applying for protection, protection of traditional agricultural processes, encouragement of research in agricultural research, continued legal education inter alia. The Act is a veritable means of protecting national security in Nigeria and the African continent.

Keywords: Intellectual property, Plant variety, Infringement, Plant Variety Protection Act 2021

1. Introduction

Food security refers to availability, use, stability and access to diverse food options at all times by people. Food security buffers national security measures. Intellectual property law promotes the right to food¹ as a human right that is adjacent to right to life, dignity of the human person and to a good standard of living². Intellectual property are rights over the abstract products or assets of the human mind protected by the law subdivided into copyrights and industrial property; giving the holder exclusive rights to prevent others from using a work, sign, invention, product or design without compensation. They are rights resulting from intellectual activity in industrial, scientific, literary or artistic fields³. Intellectual property rights protect ideas that can be demonstrated as being novel and undiscovered at the time of its legal claim including Copyrights⁴, Patents⁵, Trademarks, Trade Dress, Trademark Utility Model, Trade Secret, Database Rights, Indigenous Intellectual Property, Industrial Designs, Integrated Circuit Layout Design, Geographical Indications of Source⁶, Performers' Rights⁷, Plant Breeder's Rights or Plant Varieties Rights Plant breeders' rights⁸ etc. Plant breeding is the science of changing the traits of plants to produce certain desired characteristics and improve the quality of nutrition in products with the goal of creating crop varieties that are unique or superior⁹. These new qualities may be for aesthetics of the plant as well as go to the substance of its yield. The "Breeder" means a person who bred or discovered and developed a variety; the employer of the person who bred or discovered and developed, a variety or who has commissioned the latter's work; or a successor-in-title¹⁰. Plant Variety Rights (PVR), are rights granted to the breeder of a new variety¹¹ of plant that give the breeder exclusive control over the propagating material (including seed, cuttings, divisions, tissue culture) and harvested material (cut flowers,

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¹ See Article 11 *International Covenant on Economic Social and Cultural Rights* 1966 on right to adequate standard of living. Special Rapporteur On The Right To Food in 2002 defined it as right to have regular, permanent and unrestricted access, either directly or by means of financial purchases, to quantitatively and qualitatively adequate and sufficient food corresponding to the cultural traditions of the people to which it belongs, and which ensure a physical, mental, individual, collective, fulfilling and dignified life free of fear.

² The right to food implies the right to water. See UN RESOLUTION 64/292, 28 July, 2010; McCaffrey, S.C. 'A Human Right To Water: Domestic And International Implications' (1992) in *V Georgetown International Environmental Law Review*, Issue 1. Pp. 1-24; Gleich, Peter H. 'The Human Right To Water' (1999) in *Water Policy*, Vol. 1, issue 5, pp. 487-503.

³ See *Convention Establishing The World Intellectual Property Organization*, 1967.

⁴ Copyright Act Cap C 28, Laws of the Federation of Nigeria, 2004.

⁵ Patents and Designs Act Cap. P2, Laws of the Federation of Nigeria, 2004.

⁶ Idih, Ngozi M. & Duaka Florence F. 'Geographical Indications of Source in Nigeria- Raising The Bar For Nigerian Traditional Products with Intellectual Property Law' in the *Juridica Law Review* JLR Vol 1 No. 1, 2019 pp. 46-69.

⁷ Idih, Ngozi M. & Nkwoh Jorge C. 'Operational Challenges in Protection of Performers' Rights as Copyright in Nigeria' in *IMSU Journal of International Law and Jurisprudence* IIJLJ Vol. 5, April 2021. p. 257- 278.

⁸ Sometimes referred to as 'breeders' privilege'.

⁹ Emereole Uzoamaka, Ogunlaja Eniola & Demola-Seriki Alimah, 'Intellectual Property Development in the Nigerian Agricultural Space: Plant Breeders' Rights' in *Dentons ACAS-Law* <https://www.dentonsacaslaw.com/en/insights/articles/2022/january/4/intellectual-property-developments-in-the-nigerian-agricultural-space-pnat-breeders-rights> January 4, 2022. Accessed 15th October, 2022.

¹⁰ Section 56 of the Act.

¹¹ 'variety' means a plant grouping within a single botanical taxon of the lowest known rank, which grouping, irrespective of whether the conditions for the grant of a breeder's right are fully met, can be:(a) defined by the expression of the characteristics resulting from a given genotype or combination of genotypes;(b) distinguished from any other plant grouping by the expression of at least one of the said characteristics; and(c) considered as a unit with regard to its suitability for being propagated unchanged. See Section 56 *ibid*.

fruit, foliage) of a new variety for a number of years¹². With these rights, the breeder can choose to become the exclusive marketer of the variety, or to license the variety to others. Schools of thought have developed on the necessity or otherwise for the protection of plant varieties as a form of intellectual property. Proponents of plant varieties laws point to finances, time, passion, skill and effort spent by the breeder¹³ while the opponents some believe that a more diverse approach than the imposition of intellectual property rights laws upon new plant varieties is required in view of the flux in science and technology.

Plant varieties rights are territorial in nature and need to be registered in the country in which protection is sought. It was developed as an alternative to patents. It was first internationally recognized in 1961 by the International Convention for the Protection of New Varieties of Plants. The UPOV was revised in 1972, 1978 and 1991. Under it was established The International Union for the Protection of New Varieties of Plants (*Union internationale pour la protection des obtentions végétales* (UPOV) with 76 member countries as at 2021. The 1978 version recognized farmer privilege to re-use propagating material and freely exchange seeds. Article 27 (3) (b) of the Trade Related Aspects of Intellectual Property...(TRIPS) places obligation on World Trade Organization (WTO) members to provide protection for plant varieties by either patents or an effective *sui generis* system or any combination thereof. Before now, the legal landscape in Nigeria did not have an IP regime for protecting plant varieties, either through patents, an effective *sui generis* system or a combination of systems. The only reference to it in Nigeria's IP architecture was in Section 1.4(a) of its Patents and Designs Act 1970, which expressly prohibits the patenting of plant varieties¹⁴. Nigeria is also not a party to any of two IP Organizations in Africa which have PVR instruments: the *Organisation Africaine de la Propriete Intellectuelle* (OAPI) and the African Regional Intellectual Property Organization (ARIPO). Despite this lacuna, Nigeria has two laws that regulate the registration, release and commercialization of plant varieties and seeds- the National Crop Varieties and Livestock Breeds Act, 1987 (NCVLBA) and the National Agricultural Seeds Act, 1992 (NASA). 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. These are non-IP laws however, so they do not provide exclusive rights over new varieties of plants as required under Article 27.3(b) of TRIPS. Attempts to introduce a plant varieties protection system in Nigeria commenced in 2006 with the National Intellectual Property Commission (NIPCOM) Bill¹⁵. The new Act was enacted due to efforts of a coalition led by the National Agricultural Seed Council (NASC) -an agency of the Federal Ministry of Agriculture and Rural Development (FMARD) involving both business and academic groups including the Nigerian Economic Summit Group (NESG), the National Assembly Business Environment Roundtable (NASSBER), the Partnership for Inclusive Agricultural Transformation in Africa (PIATA), Nigerian Plant Breeders Association (NPBA), Agricultural Research Council of Nigeria (ARCN), Association of Seed Scientist of Nigeria (ASSN), Genetic Society of Nigeria (GSN), All Farmers Association of Nigeria (AFAN), Alliance for a Green Revolution in Africa (AGRA), the Media, the Partnership for Inclusive Agricultural Transformation in Africa (PIATA), the Rockefeller Foundation, Bill & Melinda Gates Foundation and USAID; to provide a plant variety protection system that will incentivize national and multinational agribusiness investments among others¹⁶.

The Plant Variety Protection Bill was passed by the House of Representatives on the 17th of December 2020 and the Nigerian Senate on the 3rd of March 2021. The objects of the Act¹⁷ are for the protection of plant varieties; promote increased staple crop productivity for small holder farmers in Nigeria; promote increased mutual accountability in the seed sector; and protect new varieties of plants. to encourage investment in plant breeding and crop variety development; to establish a plant variety protection office; to promote increased staple crop productivity for smallholder farmers in Nigeria and encourage investment in plant breeding and crop variety as well as protect new varieties of plants¹⁸. In May 2021, the Plant Variety Protection Act 2021 was signed into law in Nigeria, and on August 27 2021, the UPOV reaffirmed Nigeria's conformity with the 1991 Act of the UPOV Convention, allowing Nigeria to become a UPOV member¹⁹. There are many advantages of the new law to Nigerian plant breeders including provision of a regulatory framework protecting IP in new plant varieties; pursuit of rights in Courts; bringing Nigerian IP law in line with international norms; promoting foreign collaboration and partnerships with plant breeders in Nigeria; increased research; promoting competition; reductions in the price of end-products for consumers; improved quality of products; increased marketability; improved health of consumers;

¹²Wikipedia The Free Encyclopedia, 'Plant Breeders' Rights'. [https://en.wikipedia.org/wiki/Plant_breeders%27_rights#:~:text=Plant%20breeders%27%20rights%20\(PBR\),fruit%2C%20foliage\)%20of%20a%20new.](https://en.wikipedia.org/wiki/Plant_breeders%27_rights#:~:text=Plant%20breeders%27%20rights%20(PBR),fruit%2C%20foliage)%20of%20a%20new.)

¹³ It can take more than 15 years to bring a new variety to the market. Intellectual property (IP) protection is therefore afforded to plant breeders as an incentive for the development of new varieties to contribute to sustainable progress in agriculture.

¹⁴ Titilayo Adebola 'Breaking the Silence on Plant Variety Protection in Nigeria' <https://www.afronomiclaw.org/2019/04/18/breaking-the-silence-on-plant-variety-protection-in-nigeria>. April 18, 2019.

¹⁵ Titilayo Adebola *ibid.* . However, the NIPCOM Bill along with its successors have all been unsuccessful. Reasons for the failure of the Bills include the government's non-prioritization of IP matters and an alarming lack of interested local actors (stakeholders, such as corporations in the industrial property industries and civil society activities).

¹⁶ See Phillip Olusegun Ojo 'The Plants Varieties Protection Act 2021' 22 October 2021 <https://guardian.ng/opinion/the-plants-varieties-protection-act-2021/>

¹⁷ Section 1(a), (b) and (c) of the PVP Act 2021. See also, https://www.upov.int/edocs/mdocs/upov/en/c_55/law_of_nigeria.pdf

¹⁸ Ifeanyi E. Okonkwo , Blessing Udo, Kayode Ikumelo 'Overview of Nigeria's Plant Variety Protection Act 2021 and the Impact of Section 43(2) on Plant Breeders' , https://lawprofessors.typepad.com/healthlawprof_blog/2022/06/overview-of-nigerias-plant-variety-protection-act-2021-and-the-impact-of-section-432-on-plant-breeders.html. June 25, 2022.

¹⁹ Margaret Le Galle, October 18, 2021 '*Nigeria's Plant Variety Protection: in Line with International IP Norms.*' <https://www.managingip.com/article/2a5d034hr8td8p0rej669/nigerias-plant-variety-protection-in-line-with-international-ip-norms#:~:text=In%20May%202021%2C%20the%20Plant,to%20become%20a%20UPOV%20member.>

better nutritional content of food, environmental protection with promotion of biodiversity; access to valuable foreign-bred varieties, export opportunities for domestic growers etc.

3. Overview of the PVP Act 2021

This Act applies to a breeder; and any plant genera and species²⁰. The Act is divided into eleven parts (1 – XI) and has a total of 57 operative Sections.

Establishment of a Plant Variety Protection Office:²¹ The Act established the Plant Variety Protection Office which is domiciled in the National Agricultural Seeds Council. Seed is submitted to the plant variety office, who grow it for one or more seasons, to check that it is distinct, stable, and uniform. If these tests are passed, exclusive rights are granted for a specified period. Annual renewal fees are required to maintain the rights. The office shall have a fit and proper²² Registrar appointed by the Board of the Council on the recommendation of the Director-General responsible for the day-to-day management and administration of the Office²³. The Registrar shall with the approval of the Minister, make guidelines for the proper implementation of the Act and Regulations. Functions of the office²⁴ are to:

- (a) Grant breeder's rights;
- (b) Facilitate transfer and licensing of plant breeder's rights;
- (c) Collaborate with local and international bodies whose functions relate to plant breeders' rights matters; and
- (d) Perform other functions as are necessary for the furtherance of the objects of the Act.
- (e) Maintain a Register of Plant Variety Protections' Rights to provide information on plant breeders' rights issued in Nigeria. 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 application²⁵. The information to be listed in the register for each registered variety shall include²⁶:
 - i) the species and denomination of a variety;
 - ii) 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, in case the person is different from the applicant or holder of the breeder's right;
 - iii) the date and time of inception of the breeders' right;
 - iv) any other matter which is required by this Act or any other written law to be entered in the register, and may affect the validity or ownership of plant breeder's rights; and
 - v) any other information which may be required by Regulations made under the Act.

The Register shall be open for inspection by any member of the public during business hours²⁷. The register shall be evidence of all matters directed or authorized by the Act to be noted in it²⁸. A certified copy²⁹ of an entry in the register or an extract from the register, shall be admitted in evidence in any court without further proof or production of the register³⁰. Rectification of notations in the Register is possible³¹.

Plant Variety Protection' Advisory Committee³² –An Ad-hoc Plant Variety Protection' Advisory Committee may be established with members appointed by the Director-General subject to gender consideration, composed of one representative each from³³ the Council, who shall be the Chairman of the Committee; the Ministry of 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 the Council shall be the Secretary of the Committee³⁴. The gender consideration in this Act is a notable pronouncement advancing not only women's rights and recognizing the large participation of Nigerian women in agriculture but also ensures balancing of gender roles between men and women in the Committee. The functions of the Committee³⁵ include advising the Minister on enforcement through the Director-General of National Agricultural Seed Council (NASC); receive reports of plant breeders' rights applications from the Registrar; receive information on the plant breeders' rights reports and on the Registrar's tests results and manage the operations of the Fund.

²⁰ Section 2 *ibid*.

²¹ Section 3 *ibid*.

²² By Section 4 (2), The Registrar shall 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.

²³ Section 4 (1)

²⁴ Section 5 (a)- (e)

²⁵ Section 15 (2)

²⁶ Section 6 (2) (a)-(e)

²⁷ Section 8 (1)

²⁸ Section 7(1). Section 7 (2) further provides that 'a certificate by the Registrar to the effect that an entry has or has not been made in the register or that any other thing authorized by this Act to be done, has or has not been done, shall be first evidence of the matters specified in that certificate'.

²⁹ By Section 8 (2), a certified copy of any entry in the Register shall be given upon request and payment of the fees prescribed in the Regulations made under this Act.

³⁰ Section 7 (3)

³¹ See the Australian case of *Elders Rural Services Australia & Anor. v. Registrar Plant Breeders Rights & Anor.* [2012] FCAFC 14 .

³² Section 9 (1)

³³ Section 9 (2)

³⁴ Section 9 (3)

³⁵ Section 10

The Committee has powers³⁶ 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.

Grant of Protection for Varieties:³⁷ The legislation sets out conditions and procedure for grant of protection as follows:

Conditions for protection

In order to qualify for these exclusive rights, a variety must be *new, distinct, uniform, and stable*³⁸ i.e. the (N-DUS test). The applicant will comply with the provisions of the Act and pay the fees prescribed³⁹. To satisfy the novelty requirement, a variety is 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 commercialized, 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 a territory other than Nigeria earlier than 4 years, or 6 years before the said date in the case of a tree or vine⁴⁰. However, the following acts shall not be considered to result in the loss of novelty:⁴¹

- (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) 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 recognized exhibition.

Where, according to Section 12, this Act applies to a plant genus or species to which it did not previously apply, varieties belonging to such plant genus or species shall be considered to satisfy the condition of novelty defined in Section 14 (1) even where the sale or disposal of, to others described in that paragraph took place in Nigeria within four years before the filing date or, in the case of trees or of vines, within six years before the said date⁴². 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 application⁴³ or if it differs from all other known varieties by one or more important botanical characteristics, such as height, maturity, color, etc. 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 varieties⁴⁴. The breeder must also give the variety an acceptable "denomination", which becomes its generic varietal name and must be used by anyone who markets the variety. The name should not be similar to other existing names, a generic scientific name or so common as to be used in everyday language⁴⁵. A variety is deemed to be 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. Uniformity means that the plant characteristics are consistent from plant to plant within the variety⁴⁶. It is also considered 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 cycle⁴⁷. Stability means the plant characteristics are genetically fixed and therefore remain the same from generation to generation, or after a cycle of reproduction in the case of hybrid varieties.

³⁶ Section 11

³⁷ Section 12

³⁸ Section 13 (1) See *Sungro Seeds Ltd v. Union of India & Anor.* 2020 SCC OnLine Del 591 <https://indiankanoon.org/doc/83237727/>; *Cultivaust Pty Ltd. v. Grain Pool Ltd.* [2005] FCAFC 223; *Fleming Nurseries Ltd. v. Hannaford* [2008] FCA 591.

³⁹ Section 13 (2) states that 'the grant of the breeder's right shall not be subject to any further or different conditions, provided that the variety is designated by a denomination in accordance with the provisions of s Section 19 of this Act'.

⁴⁰ Section 14 (1); Article 6 (1) UPOV.

⁴¹ Section 14 (2)

⁴² Section 51. (1)

⁴³ Section 15(1); Article 7 UPOV.

⁴⁴ Section 15 (2). Per Section 51(2) within 12 months from the date of commencement of this Act, the breeder of an existing variety of recent creation may apply to the Registrar in respect of that variety to benefit from the provisions under subsection (1).

⁴⁵ *Buchanan Turf Supplies Pty Ltd v. Registrar of Trademarks* [2015] FCA 756

⁴⁶ Article 8 UPOV. See generally, *SunWorld International Inc. v. Registrar Plant Breeders Rights* [1997] FCA 924.

⁴⁷ Section 16; Article 9 UPOV.

Application for Plant Variety Protection Rights

The breeder of an existing variety of recent creation (where sale or disposal of a variety took place in Nigeria within four years before the filing date or, in the case of trees or of vines, within six years before the said date) may apply for plant breeders' rights protection within 12 months of the date of commencement of the Act (i.e. by May 21 2022). The procedure involves filling an application, denomination; priority rights of 12 months; publication; objections; examination; and issuance of a certificate. A breeder of a new variety may apply for the grant of a breeder's right for that variety⁴⁸. The application shall contain:⁴⁹

(i) name and address of the Applicant. When the breeder is a non-resident or in the case of a corporation, does not have its registered office in Nigeria, he shall have an agent who is resident in Nigeria⁵⁰.

(ii) where the applicant is the successor-in-title of the person who bred, or discovered and developed the variety; 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 the name and address of the person who bred, or discovered and developed the variety;

(iii) samples of the propagating material in the quantities as the Registrar may require; and

(iv) any additional information, documents and material that may be required in connection with the application as may be prescribed in the Regulations.

(v) the proposed variety denomination and the description of the characteristics of the variety as the Registrar may require⁵¹.

The denomination shall enable the variety to be identified; without being misleading or causing confusion concerning the characteristics, value or identity of the variety or the identity of the breeder. It shall be different from every denomination which designates, in the territory of any member of an international organization 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 varieties⁵². The Registrar shall register the denomination submitted, unless he considers the denomination unsuitable within Nigeria; and direct the applicant to submit another denomination where the denomination is unsuitable⁵³. The Registrar shall in writing, inform the authorities of the members of UPOV on matters concerning the submission, registration and cancellation of the denominations⁵⁴. 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 use⁵⁵. When a variety is offered for sale or marketed, it shall be permitted to associate a trademark, trade name or other similar indication with a registered variety denomination and where such an indication is so associated, the denomination shall nevertheless be easily recognizable⁵⁶.

In considering an application, the file date of an application shall be the date which the application was filed at the registry by the applicant⁵⁷. However, a breeder who has filed an application for the protection of a variety in one of the members of an international organization dealing with plant breeder's right matters which Nigeria is a party shall enjoy a "right of priority" for a maximum period of 12 months⁵⁸. The Registrar may direct the applicant to furnish, within a period of at least three months from the filing date, a certified true copy of the documents which constitute the first application that was filed and samples or other evidence indicating that the variety which is the subject matter of both applications is the same⁵⁹. The applicant may submit to the Registrar any necessary information, document or material required in this Act for the purpose of the examination within a period of two years after the expiration of the period of priority or a period of six months where the first application is rejected or withdrawn⁶⁰. An applicant may amend his application at any time without affecting its filing date, provided that the amendment does not affect the variety which is the subject of the application⁶¹. The Registrar

⁴⁸ Section 17.

⁴⁹ Section 18.

⁵⁰ Section 53 (1). By Section 53 (2) the Registrar may, for any gross misconduct or prescribed cause or any other reasonable cause considered by the Registrar to be sufficient, refuse to recognize or to continue to recognize any person as authorized by the breeder to act in the capacity of an agent.

⁵¹ Section 19 (2) Subject to subsection (6), 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.

⁵² Section 19 (3). In Section 19 (4) Where the Registrar finds that the denomination does not satisfy the requirements of this section, 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 this Act. In Section 19 (5) The Registrar shall register the denomination at the time the breeder's right is granted. By 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. Under Section 19 (7) Where the variety is already protected by, a member of an international organization 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 organization, the variety denomination which has been proposed or registered in that other member of the organization shall be submitted by the applicant to the Registrar.

⁵³ Section 19 (8)

⁵⁴ Section 19 (9)

⁵⁵ Section 19 (10)

⁵⁶ Section 19 (11)

⁵⁷ Section 20 (1)

⁵⁸ Section 21 (1). The period referred to in subsection (1) shall be computed from the date of filing the first application and the day of filing shall not be included in the latter period. (See Section 21 (2)) The applicant shall, in order to benefit from the right of priority in the subsequent application in Nigeria, claim within 12 months the priority of the first application (Section 21 (3)).

⁵⁹ Section 21 (4)

⁶⁰ Section 21 (5)

⁶¹ Section 22 (1) .Where any amendment of an application occurs after publication of a notice under section 23 of this Act, the applicant shall be liable to pay the cost of re-publication (Section 22 (2)).

shall publish in the Federal Government Gazette or in two national daily newspapers of wide circulation, a notice of every filed application for plant breeder's right that satisfies the requirements of the Act.⁶²

A person may submit to the Registrar a written objection to the matter specified in the notice, within one month of its publication⁶³ stating the grounds⁶⁴ on which the objection is based with grounds such as a lack of entitlement to file, a material misrepresentation, and failure to comply with the Act or regulations etc. ; include a statement of the facts alleged in support of the grounds and be supported by an affidavit or other proof, where required by the Registrar. The Registrar shall, within two weeks from the date on which an objection has been filed notify the applicant where an objection has been made and provide the applicant with a copy of the notice of objection and all the supporting documents that have been submitted with the objection⁶⁵. The applicant may submit a written response to the objection to the Registrar within two weeks or such further period as the Registrar may allow from the date of the notification⁶⁶. The Minister may reply to any objection made against the Federal Government⁶⁷. The Registrar shall examine an application and reply upon completion of the notice requirements and the expiration of time limits for objections and replies⁶⁸. In the Indian cases of *Maharashtra Hybrid Seeds Co Ltd v. UOI and Ors*⁶⁹ and *Nuziveedu Seeds (P) Ltd v. UOI and Ors*,⁷⁰ the petitioner's application to register its novel variety of cotton was published in the Plant Variety Journal dated 01.09.2008. 3rd Respondent filed an opposition to the application, but beyond the stipulated period of three months as prescribed. The delay was considered and condoned by the Authority. The condonation of delay was challenged by Petitioner before the Delhi High Court on the ground that the condonation of delay was granted without notice to the petitioner. He also argued that there was no provision conferring power on the Registrar to extend the time for filing of notice of opposition. The court found that time for filing of notice of opposition should be computed from the date of dispatch of journal to the subscriber and the Registrar has the power to extend the time limit for filing notice of opposition.

Where any decision to grant a breeder's right requires an examination for compliance with the conditions specified under this Act, the Registrar may, in the course of the examination, grow or cause to be grown the variety or carry out other necessary tests, or take into account the results of growing tests or other trials which have already been carried out⁷¹. The Registrar may, for the purpose of an examination, direct the breeder to provide the necessary information, document or material⁷². The Registrar shall grant the breeder's right⁷³ where he concludes that the applicant is entitled to file the application; the application conforms to the requirements of this Act; no objection has been filed; and where an objection has been filed, there are no grounds for objection. For each variety for which breeder's right is granted, the Registrar shall: (a) issue a certificate of registration to the holder; (b) enter the variety in the register and (c) publish a notice of the grant of breeder's right and the approved denomination in the Federal Government Gazette⁷⁴. In *Prabhat Agric Biotech Ltd v. Registrar of Plant Varieties*⁷⁵ it was held that the rights of an applicant over a plant variety are inchoate and not crystallized till grant of a certificate of registration. Notwithstanding any other provision of this Act, the Registrar shall collect fees from the applicant or any other person filling a document or requesting access of administrative action under this Act, for each application, extension, filing, inquiry or other administrative process or service⁷⁶. The applicant may declare some portion of the application to be confidential, where declared so, the Registrar shall determine whether the application can be processed without the publication or other violation of that confidentiality, and give the applicant the option of altering his statement of confidentiality or withdraw the application⁷⁷.

Nullity, Cancellation and Surrender of Breeder's Right

The Registrar shall declare a breeder's right granted by him null⁷⁸ where it is established that:

- (a) the variety did not comply with the conditions specified in sections 14 or 15 at the time the breeder's right was granted;
- (b) where the grant of the breeder's right has been essentially based upon information and documents furnished by the applicant, the conditions laid down in section 16 of this Act were not complied with at the time of the grant of the breeder's right; or
- (c) the breeder's right has been granted to a person who is not entitled to it, unless it is transferred to the person who is so entitled.

⁶² Section 23. The notice will specify (a) the name and address of the applicant; (b) the filing date of the application; (c) the proposed denomination; and (d) such other information as may be specified in the Regulations.

⁶³ Section 24. (1)

⁶⁴ By Section 25, an objection submitted shall be based on the allegation that the grounds that (a) applicant is not entitled to file the application; (b) application contains a material misrepresentation; and (c) contents of the application do not comply with this Act or the Regulations.

⁶⁵ Section 26 (1)

⁶⁶ Section 26 (2) Where the applicant submits a response under subsection (2), he shall send a copy to the person making the objection. (Section 26 (3))

⁶⁷ Section 26 (4)

⁶⁸ Section 27 (1)

⁶⁹ on 22 March, 2013W.P.(C) 4527/2010

⁷⁰ WP (C) No.640/2012

⁷¹ Section 27 (2)

⁷² Section 27 (3)

⁷³ Section 27 (4)

⁷⁴ Section 27 (5)

⁷⁵ 2016 SCC OnLine Del 6236.

⁷⁶ Section 48

⁷⁷ Section 49 (2)

⁷⁸ Section 35

The Right may be cancelled⁷⁹ where the Registrar established that the conditions specified in Section 16 of this Act are no longer fulfilled or the holder of the breeder's right:

- (a) does not provide information, documents or materials deemed necessary for verifying the maintenance of the variety;
- (b) fails to pay the fees which may be payable to keep his right in force; or
- (c) does not propose another suitable denomination where then denomination of the variety is cancelled after the grant of the right.

The Registrar shall notify the holder of the breeder's right of any decision to nullify or cancel and the grounds for such decision⁸⁰. A person who receives the notice may send a written objection to the Registrar within 30 days from the date of receipt of the notification⁸¹. The Registrar may hold, within a reasonable time after receipt of an objection, a hearing or may decide the matter based on the written submission of the interested parties⁸². Where the Registrar nullifies and cancels any breeder's right, he shall publish the nullification or cancellation by a notice in the Federal Government Gazette or two national daily newspapers of wide circulation, after the expiration of 30 days from the date of the decision or following a decision made after considering objections⁸³. The holder of the breeder's right shall return to the Registrar any certificate of the grant of a breeder's right that has been nullified or cancelled⁸⁴. However, a holder of a breeder's right may, by written notice to the Registrar, surrender the right voluntarily⁸⁵. The Registrar shall, within one month from the date of receiving the notice of surrender, terminate the breeder's right and publish a notice in the Federal Government Gazette or two national daily newspapers of the termination⁸⁶.

Appeals

An appeal from the decisions of the Registrar made under this Act shall lie to the Minister⁸⁷. A person aggrieved by any of his decisions may submit 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 appeal⁸⁸. The Minister may confirm, set aside or vary any decision or action of the Registrar and may order the Registrar to carry out his decision. He shall provide the reasons for his decision in writing and give copies of the decision to the appellant, the Registrar and any other interested party⁸⁹. *A decision of the Minister shall be final*⁹⁰. In other jurisdictions however, decision of the Registrar is subject to appeal to an appeal board and then the court. In the South African case of *Agricultural Research Council v. Registrar of Plant Breeders Rights & Sunskit Growers*⁹¹, Appellant applied for a grant of Plant breeders rights in a Japanese plum variety bearing the denomination SUN KISS in 1997. After examination of the application, the Registrar issued a certificate and published a notice in the gazette. No objection was lodged in a 6 month period as prescribed the South African Special Plant Variety Journal. In 2019, the 2nd Respondent became aware of the Applicant's use of the name in the Hong Kong market and its Attorney wrote to the latter advising that it was the proprietor in South Africa of trademarks for SUNKIST with specifications including fresh fruits and natural plants. It also called on the appellant to apply to the Registrar for an alteration of the varietal denomination SUNKISS. The Registrar requested the appellant to submit a proposal for alteration in 60 days because of the similarity to its trademark. The appellant lodged an appeal claiming that the registrar was *functus officio* and the application did not satisfy jurisdictional requirements. The Appeal Board set aside the decision of the Registrar instructing the alteration in 2021.

Plant breeder's rights in Nigeria: For the duration or before the exhaustion of rights granted, the Plant Breeder has

i) *Moral Rights* to claim authorship and be recognized as the "author" or developer of the plant variety against persons who could be 'pirates' of the plant variety. Moral rights include the right against false attribution of his work to the credit of another person, anonymous publication, integrity of the work allowing him, to object to alteration or distortion of the work prejudicial to his reputation⁹². These rights end with life of the holder and are not transferrable.

ii). *Economic Rights* to multiplication and conditioning for the purpose of propagation; offering for sale, production, selling or marketing⁹³, exporting, importing or stocking for any of the above purposes; harvested material obtained through unauthorized use of propagating material, and products made directly from such harvested material Essentially derived varieties (EDVs).

iii). *Right to Equitable Remuneration* from any person who, during the period between the publication of the application for the grant of a breeder's right and the date of the grant of that right, has carried out acts which, once the right is granted, require the breeder's authorization as provided for under Section 29 of this Act⁹⁴.

⁷⁹ Section 36 (1)

⁸⁰ Section 37 (1)

⁸¹ Section 37 (2)

⁸² Section 37 (3)

⁸³ Section 37 (4)

⁸⁴ Section 37 (5)

⁸⁵ Section 38 (1)

⁸⁶ Section 38 (2)

⁸⁷ Section 42(1)

⁸⁸ Section 42 (2)

⁸⁹ Section 43 (1)

⁹⁰ Section 43 (2)

⁹¹ <https://www/adams.africa/intellectual-property/patents/appeal-board-decision-plant-breeders-rights-act/> 4th August 2021. Accessed 15th October, 2022.

⁹² See generally, Alin Speriusi-Vlad 'The Industrial Property Law and Moral Right of Publication' in *The Journal of MacroTrends in Technology and Innovation*, Vol . 2, Issue 1, 2014.

⁹³ *Golden Promise Spring Barley Case* [1981] FSR 562-577.

⁹⁴ Section 28.

iv) *Right to Exclusive Authorization* to allow use of s for any purposes mentioned above in respect of the propagating material of the protected variety.⁹⁵ This applies to protected variety is which is not itself an essentially derived variety⁹⁶; which is not clearly distinguishable in accordance with Section 15 of this Act from the protected variety; and whose production requires the repeated use of the protected variety⁹⁷.

v) *Assignment or Transmission of his interest*⁹⁸ by disposal of his interest or ownership by sale, license⁹⁹ or wills to his heirs or successors-in-title. In not more than 60 days from the effective date of the authorization the assignee or recipient shall notify the Registrar and submit a copy of the authorization agreement of the transaction for the purposes of making changes in the Register¹⁰⁰. The contents of any license or assignment shall be confidential unless both parties agreed to permit access to a third party and only to the extent of the permission so granted¹⁰¹. Correlative to existing rights is the duty of holders of plant breeders' rights to pay fees at times and rates specified in the Regulations made under this Act¹⁰². Both rights and duties commence when a grant of certificate is made. In the Spanish case of *Club de Variedades Végétales Protegidas v Adolfo Juan Martínez Sanchis*¹⁰³ application for a community plant variety right of clementine citrus variety called 'NADORCOTT' was made in 1996 and granted in 2005. Between the time of application and grant, defendant purchased trees of that variety from a Spanish public nursery and sold the harvest. In an action for infringement for commercialization without authorization, the CJEU ruled that it is from the time of grant of title that an owner can assert his rights. The sale of the trees by the defendant during the provisional period of protection cannot be regarded as unauthorized and under the 'cascade system of protection'¹⁰⁴ of primary protection of propagating material and secondary protection of harvested material, breeders will lose control to an extent over use of harvested material obtained.

Exceptions to the breeder's right: However, the Act allows person without authority of the rights holder, to use the variety for such as acts done for or in

i) *Public Interest*- The free exercise of a breeder's right shall, unless where expressly provided in this Act, not be restricted for reasons other than of public interest¹⁰⁵. This could include use of the protected varieties in furtherance of emergency powers of the government under the Nigerian Constitution for health, welfare, safety, national security or protection of rights of others¹⁰⁶.

ii) *Privately or Non-Commercial Purposes*- These exclusive rights do not extend to acts carried out for purposes that are private or non-commercial except where the provisions of Section 29 (4) - (6) of this Act apply, any act referred to in Section 29 (1) - (3) in respect of such other varieties.¹⁰⁷

iii) *Experimental and or Breeding any other Variety*- this is the farmer's privilege allowing a grower to propagate the product of his harvest on his own holding, the protected variety or a variety referred to in Section 29 (4) (a) or (b) of this Act¹⁰⁸.

iv) *Consent of Plant Breeder*- where varieties have been sold or otherwise marketed by him with his consent in Nigeria, or any material derived from the said material, unless the act involves.¹⁰⁹

⁹⁵ Section 29 (1). Section 29 (3) Subject to the provisions of sections 30 and 31 of this Act, the acts referred to in subsection (1) (a) - (g) in respect of: (a) harvested material, including entire plants and parts of plants, obtained through the unauthorized use of propagating material of the protected variety, shall require the authorization 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 unauthorized use of the said harvested material, shall require the authorization of the breeder, unless the breeder has had reasonable opportunity to exercise his right in relation to the said harvested material.

⁹⁶ Section 29 (5) states that a variety shall be deemed to be essentially derived from another variety when:

- (a) 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;
- (b) it is clearly distinguishable from the initial variety; and
- (c) 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.

By Section 29 (6) an essentially derived variety may be obtained through:

- (a) the selection of a natural, induced mutant or of somaclonal variant;
- (b) the selection of a variant individual from plants of the initial variety; and
- (c) backcrossing, or transformation by genetic engineering.

⁹⁷ Section 29 (4).

⁹⁸ Section 39 and 40.

⁹⁹ *Mosanto Technology LLC v. Nuziveedu & Ors.* AIR 2019 SC 559. (<https://legaldesire.com/tp-landmark-judgements-on-farmers-rights-in-india/>). In the *Cama Wheat Case* [1968] FSR 639-647 it was held that the burden of proof rests on the applicant to show that relevant conditions for grant of compulsory license were met.

¹⁰⁰ Section 41 (1). The Registrar may prescribe the form and manner of the notification to be made under subsection (1). See Section 40 (2).

¹⁰¹ Section 49 (1)

¹⁰² Section 34.

¹⁰³ Court of Justice of the European Union (CJEU) C-176/18 [2019]

¹⁰⁴ Crespo Velasco Adrian (2019) 'Plant variety rights: referrals to the CJEU stir up questions with far-reaching consequences' in *Journal of Intellectual Property Law and Practice*, Volume 14, Issue 3; Pages 197-205, Oxford University Press. <https://doi.org/10.1093/jiplp/jpy172>.

¹⁰⁵ Section 40 (1) When any such restriction has the effect of the Registrar authorizing a third party to perform any act for which the breeder's authorization is required, the breeder shall receive equitable remuneration (Section 40 (2)).

¹⁰⁶ In *Globe Spinning Mills Nig. PLC v. Reliance Textile Industries Ltd.* (2017) LPELR-41433 (CA) the court held force majeure is an unforeseen happening making nonsense of the real situation envisaged to parties to agreements and preventing the fulfillment of contractual obligations. For instance, COVID-19 pandemic was an unforeseeable circumstance and on March 29, 2020 the Nigerian President exercised powers under the Quarantine Act Cap Q 2 Laws of the Federation of Nigeria, 2004.

¹⁰⁷ Section 30 (1).

¹⁰⁸ Section 30 (2). By Section 30 (3), the reasonable limits and the means of safeguarding the legitimate interest of the holder of the breeder's right shall be specified in the regulations made under this Act.

v) *Research for development of new Plant Varieties*- scientists and technocrats using the variety in search of more knowledge need not defer to the rights owner before using it in the laboratories.

vi) *Expiration of Protected Period*- The breeders' rights granted under this Act shall expire after 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 grant¹¹⁰. The Registrar may extend the duration for an additional 5 years where he receives a six month written notice from the holder of the breeder's right before the expiration of the original term¹¹¹. Where the period of protection is exhausted, the rights fall into the public domain and can be freely used by anyone as intellectual property rights do not inure in perpetuity.

Infringement of breeders' rights: A suit by the holder of breeder's right against any person who infringes the breeder's right may be brought to the court in criminal or civil law. Civil action includes claims for damages, injunction, reputation, goodwill, passing off Destruction/Delivery Up and Anton Pillar orders. Subject to the existing law on institution of action against the State, this Act shall be binding on the Government with regard to its applications for breeder's right and other interests acquired or given in breeder's right to the same extent and with the same effect as its applies to any other person¹¹² but no claim shall lie against the State, the Minister, the Registrar or any other officer for anything done in good faith in the discharge of duties under the powers conferred by this Act¹¹³. In *Buchanan Turf Supplies Pty Ltd v. Premier Turf Supplies Pty Ltd*¹¹⁴ Plaintiff as the owner of a Plant Breeder's Right in 'SIR WALTER VARIETY OF BUFFALO GRASS', undertook proceedings seeking injunctions and damages in the Australian Federal Court alleging that Defendant was misrepresenting the turf it was supplying as being 'Sir Walter' when it was not. In their defense, Defendant did not challenge the validity of the Plant Breeder's Right grant in relation to 'Sir Walter' and the Court held there had been infringement and ordered that Defendant be restrained from representing that they were authorized to sell it and from representing to anyone that other grass turf sold by them was of the 'Sir Walter' variety. Justice Hely dismissed the claim for damages because in sufficient evidence was presented to assess the loss to Plaintiff. In *Mountain Blue Orchards v. Jason Chellew*¹¹⁵, plaintiff obtained plant breeders rights over the blueberry variety named 'RIDLEY III' that ripens early but remained firm. The Defendant- a farmer based in New South Wales obtained, grow and sold the blueberry variety without authorization. The Plaintiff utilized DNA tests of the plant to prove his claim. The court found in favor of the Plaintiff and ordered the destruction of the infringing plants in addition to damages.

Offences and Penalties are also provided for under the Act where any person knowingly¹¹⁶ (a) makes a false entry in the register, (b) makes a writing which falsely purports to be a copy of an entry in the register or of a document lodged with the Registrar, (c) produces or tenders a false entry of copy as evidence, (d) submits a false document or makes a false statement or representation to the Registrar in regard to any action described under this Act, (e) obstructs or hinders the Registrar or any officer in the exercise of his powers or the carrying out of his functions under this Act, (f) having been duly summoned to appear at any proceedings under this Act, fails without lawful excuse to appear, (g) having appeared as a witness at any proceedings under this Act, refuses without lawful excuse to be sworn or to produce any document or answer any question which he may be lawfully required to produce or answer, (h) contravenes the obligation to use the denomination as required by section 19 (10) of this Act, (i) gives false information in any application or makes any false statement in evidence, (j) violates breeders right, (k) violates the provisions of Section 29, and (l) contravenes any other provisions of this Act; commits an offence and is liable on conviction (a) as a first offender, to a fine of at least ₦1,000,000 or imprisonment for a term of at least one year; and (b) in the event of such person having been previously convicted under this section, liable to a fine of at least ₦2,000,000 or imprisonment for a term of at least two years or both¹¹⁷. The Act also provides that for breach of confidentiality and disclosure of any information made available except to:(a) the Minister, the Registrar or any other person for the purposes of carrying out his duties or the performance of his function under this Act,(b) a police officer for the purposes of an investigation or inquiry relating to the enforcement of the provision of this Act, or (c) any other person when required to do so by any court or under any written law, an offender is liable on conviction to a fine of at least ₦5,000,000.00 or to imprisonment for a term of at least 2 years or to both¹¹⁸.

Plant Breeders' Rights Development Fund

The Minister shall, after consultation with the Minister responsible for finance, establish the Plant Breeders' Rights Development Fund into which money realized under this Act shall be kept¹¹⁹ sourced from fees and any donation or grant from the Government or any other person¹²⁰. The Fund shall be applied for 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 data base; and any other activity relating to administration of this Act¹²¹. The Office shall cause to be kept and

¹⁰⁹ Section 31 (1)

¹¹⁰ Section 32 (1)

¹¹¹ Section 32 (2)

¹¹² Section 50 (1)

¹¹³ Section 50 (2)

¹¹⁴[2003] FCA 230 (March 2003). The detailed judgment is available at: <http://www.austlii.edu.au/cgi-bin/disp.pl/au/cases/cth/federal%5fct/2003/230.html?query=title+%28+%22buc%2a%22+%2>

¹¹⁵ Unreported FCA NO QUD184/2019 in October 2019 per Greenwood J.

¹¹⁶ Section 47 (1)

¹¹⁷ Section 47 (2)

¹¹⁸ Section 49 (3)

¹¹⁹ Section 44 (1)

¹²⁰ Section 44 (2)

¹²¹ Section 44 (3). Section 44 (4) provides that in addition to the functions entrusted to it under Section 10 of this Act, the Committee shall operate as the Fund Committee, whereby:

maintain proper books of accounts in relation to the Fund.¹²² The Registrar shall, submit to the Minister a copy of the audited accounts and annual report on the activities of the Office in respect of that particular year not later than 6 months after the end of each financial year¹²³. The Registrar shall, within a period of 6 months or such longer period as the National Assembly may by resolution prescribe after the accounts have been audited, lay the audited accounts and audit report before the National Assembly¹²⁴. The Minister may enter into bilateral or multilateral agreements with states and intergovernmental or non-governmental organizations in order to facilitate cooperation in testing¹²⁵.

4. Critique of the PVP Act 2021

Despite its laudable objectives, the legislation has some matters that call for attention by experts

Overlap with other IP

There is tension over the relationship between patent rights and plant breeder's rights. There has been litigation in other jurisdictions like Australia, the United States, and Canada decided on the principle that patents and plant breeders' rights were overlapping and not mutually exclusive. Exemptions from infringement of plant breeders' rights, such as the saved seed exemption, do not create corresponding exemptions from infringement of the patents covering the same plants. Likewise, acts that infringe the plant breeders' rights, such as exportation of the variety, would not necessarily infringe a patent on the variety, which only allows the patent owner to prohibit making, using, or selling (first sale, but not resale) the patented invention.

Appeals

One major concern of stakeholders is the implication of Section 43(2) of the PVPA on the rights of breeders to appeal any unfavorable decision by the Minister concerning their application or representation. By the provision of the section, any decision of the Registrar as regards refusal, nullification, or cancellation of a breeder's right can be appealed to the Minister of Agriculture, whose decision *shall* be final. The finality of such a decision deprives an appellant of the right to seek remedy in a court of law¹²⁶. The Registrar is also empowered to reject an application for a breeder's right, as well as nullify and cancel the breeder's rights. Where a party is aggrieved by the decision of the Registrar, Section 42 & 43 of the Act provide, essentially, that an appeal will lie to the Minister who would then give a final decision on the facts.

Indigenous varieties and endangered species

There is a real and present danger that indigenous species may be obliterated by improved plant varieties because the latter may be more bountiful in yield for profit purposes. Varieties in their original forms are still required to be in existence for biodiversity and as an index of cultural identity of the locations where they naturally occur. It is therefore necessary to amend the National Agricultural Seed Council Law to ensure that all seed breeders, formal or informal, private small or large corporations ensure full disclosure of information relating to improved varieties and Informal seed breeders are harmonized and empowered to sustain our indigenous varieties.

UPOV not home grown

The Nigerian government has been urged to develop its own indigenous plant variety protection laws that are suitable for the country's environment. Making their demands in the resolution they jointly signed, the group urged the government not to join the Union for the Protection of New Plant Varieties (UPOV 1991) but, instead, design a law to protect seeds, plants and farmer's right that will be relatively indigenous to the country's farming system and environment¹²⁷. No country in West Africa is yet to join the convention¹²⁸. The last revision was in 1991 and Nigeria was not part of the negotiation from its.

Human Rights

The circumscribing of appellate jurisdiction of the Nigerian court on executive action taken under the Act is ominous and may unduly affect the rights of persons.

5. Conclusion and Recommendations

The PVP Act 2021 as a new piece of legislation under the Nigeria's intellectual property regime present an exciting vista for security and national development. The Act will spur competitiveness in the international market, plant diversity, consumer protection, human rights, farmer's rights seed access, conservation, prevention of infringement on the rights of others etc.

(a) the Registrar shall be a member of the Fund Committee and shall serve as the Secretary of the Fund;

(b) the Fund Committee shall make rules and procedures for the operations and management of the Fund;

(c) separate books of accounts and other records in respect of the Fund shall be kept properly and maintained and be subject to audit.

¹²² Section 45 (1) The books of accounts of the Plant Breeders' Rights Office and the Fund shall be audited at the end of each financial year by the Accountant-General of the Federation and Auditor-General for the Federation. (Section 45 (3)).

¹²³ Section 46 (1)

¹²⁴ Section 46 (2)

¹²⁵ Section 52. See also https://www.upov.int/edocs/pubdocs/en/upov_pub_438_96.pdf

¹²⁶ Richmond Idaeho 'The Impact of Section 43(2) of The Plant Variety Protection Act 2021' <https://jee.africa/the-impact-of-section-432-of-the-plant-variety-protection-act-2021/> October 28, 2021.

¹²⁷ Ebuka Onyeji 'Why Nigeria Should Develop own Indigenous Plant Variety Protection Laws – Experts' April 16, 2019 <https://www.premiumtimesng.com/news/more-news/325638-why-nigeria-should-develop-own-indigenous-plant-variety-protection-laws-experts.html>

¹²⁸ A suitable system would be a *sui generis* system that accommodates both small-scale farmers and commercial plant breeders' interests including provisions such as farmers' rights and access-benefit sharing principles provided in the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA) and the Convention on Biological Diversity (CBD). Nigeria is a signatory to both the ITPGRFA and CBD (although it has not ratified the ITPGRFA).

however, the Act in itself presents with some pitfalls that needed to be filled in with amendments to achieve these goals. Every Nigerian needs safety but national security can only be fully ensured by a combination of military might and food security occasioned by a workable legal system. The following measures may be helpful: Agricultural research institutions should be well funded by the government to produce wholesome foods and to proffer sustainable, consumer-friendly solutions to challenges of agricultural productivity. There is need for rigorous training for small scale farmers on the implications of modern biotechnology, seed treaties and the threat to farmers' rights. Information and terminologies on genetic engineering technology and seeds issues should be simplified to aid thorough understanding. The Act should be amended to allow decisions of the Registrar to be subject to appeal. In an increasingly globalized economy, the justice system cannot afford to be a clog in the process¹²⁹. Farmer participation needs to be encouraged so farmers should be carried along in the formulation of policies and legislations concerning agricultural seeds and system. Nigeria can now participate in the multibillion-dollar global seed trade with the new Plant Variety Protection law in the country. Geographical indication, traditional IP and Seed sovereignty¹³⁰ laws need to be established as legal protection additionally to aid Nigerian communities control over their own seed stock, as a means to increase agricultural biodiversity, environmentalism, resilience, food justice and food security. These underscore the cultural value of certain seeds and plant varieties of indigenous communities. For instance, the Open Source Seed Initiative (OSSI) is a national attempt that has been introduced within the United States, and is the first of its kind to model its approach regarding plant breeders' rights upon the mechanisms implemented by openly sourced software mechanisms¹³¹. There should be synergy of PVP Act with patent laws in Nigeria as an instrument for ensuring food security and therefore national security. The systems of law can be at variance with each other. Integration of food/ national security objectives with IP regulations is imperative¹³².

¹²⁹ Nkwon Jorge C., Idih, Ngozi M. & Onyekwere, Nkechinyere T. 'Debates On Globalization: For And Against' in *Imo State University Journal of Private and Property Law IJPPL* Vol. 2, 2021 pp. 91-122.

¹³⁰ Seed sovereignty can be defined as the right 'to breed and exchange diverse open-sourced seeds.

¹³¹ Titilayo Adebola *op.cit.*

¹³² Uchenna Felicia Ugwu (2022) *Harnessing The Multilateral Patent And Plant Variety Protection Regimes To Advance Food Security: Implications Of The EU-ECOWAS Economic Partnership Agreement* , South Center International Environment House 2 Chemin de Balexert 7-9 POB 228, 1211 Geneva 19 Switzerland . TSBN 978-92-91262-056-2 (E-pub)