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**PLANT BREEDER'S RIGHTS UNDER
NIGERIA'S PLANT VARIETY
PROTECTION ACT 2021**

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Introduction

Modern plant breeding and improved agricultural techniques have enabled impactful yields in the agricultural sector, which were previously not recorded. Conversations have been had on how developing countries can key into opportunities associated with plant variety breeding, of which establishing regulatory and institutional frameworks that support plant breeding and protection of new varieties of plants have been at the fore.

Since the adoption of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement), plant variety protection has become a reverberating aspect of intellectual property rights in Africa. The TRIPS Agreement mandates Member States to provide a patent, sui generis or, combination of both system for the protection of plant varieties, but it also gives Member States the liberty to exclude from patentability, biological processes for the production of plants or animals other than non-biological and microbiological processes [1].

Nigeria's Patents and Designs Act shares similar provisions of excluding plant and animal varieties from patent protection [2]. However, this exclusion does not extend to a variety developed through a microbiological process, such as plants modified through genetic engineering [3].

In May 2021, the president of the Federal Republic of Nigeria, President Muhammadu Buhari assented to the Plant Variety Protection (PVP) Act 2021, which grants exclusive intellectual property rights to plant breeders over new plant varieties ("Plant Breeders Rights"). This article analyses the pace of agricultural development in Nigeria before the enactment of the PVP Act in comparison with other African countries. This article also highlights key provisions of the Act and its prospects for enhancing innovation in the agricultural sector, attracting foreign direct investments, and contributing to Nigeria's economic growth.

Before the Enactment of the Act

The agriculture sector contributes immensely to economic growth in Nigeria and its resilient nature has transcended infrastructural neglect and inadequate regulation. One of the ways through which the agricultural sector contributes to economic growth is through plant breeding.

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[1] Article 27 of the TRIPS Agreement

[2] Section 1 (4) (a) of the Patents and Designs Act

[3] Genetic engineering, also called genetic modification or genetic manipulation, is the direct manipulation of an organism's genes using biotechnology, that is, the use of biology to solve problems and make useful products. Such a process, carried out with human intervention, is not considered to be an essentially biological process, so its product could be the subject of patent or both under certain legislation.



Although the concept of deriving new plant varieties through plant breeding process is not entirely new in Nigeria, there was no effective regulatory or institutional framework for the protection, regulation and enforcement of plant breeders' rights, as Nigeria is not a signatory to the International Union for the Protection of New Varieties of Plants (UPOV) Convention [4].

This, to a large extent, impeded the exploitation of such rights; it even deprived plant breeders in Nigeria access to high-quality new varieties from foreign countries, as such relations may be discouraging to foreign plant breeders where their new plant variety cannot be protected. These lacunae had surreptitiously deprived Nigeria of innovative opportunities in this sector unlike her counterparts – Uganda [5], Kenya [6], South Africa [7].

Meanwhile, the TRIPS Agreement, which Nigeria is a signatory to, recognizes and provides for the patentability of inventions in all fields of technology, and specifically calls for the protection of plant varieties either by patent or by an effective *sui generis* system or by any combination thereof. Member states of the TRIPS Agreement are obligated to comply with this mandate, although they may take any approach they wish. Some African countries have opted for the adoption of the International Convention for the Protection of New Varieties of Plants (UPOV Convention) while others have enacted a *sui generis* plant variety protection law. South Africa is one of the few African countries that had a plant variety protection regime in place before the adoption of the TRIPS Agreement. As a member of both the TRIPS Agreement and the UPOV Convention, South Africa has taken legislative measures to protect plant varieties in addition to the protection of patents.

A comparative analysis with other countries with systems for plant varieties indicates that for breeding activities to be fully exploited, there must be regulatory and institutional frameworks regulating such activities and providing rights to the breeders as new varieties of plants requires a substantial investment of skills, labour, material resources, money, and time. Intellectual property (IP) protection is, therefore, necessary to serve as an incentive to plant breeders, for the development of new varieties to contribute to sustainable progress in agriculture.

[4] The UPOV system of plant variety protection came into being with the adoption of the International Convention for the Protection of New Varieties of Plants by a Diplomatic Conference in Paris on December 2, 1961. This was the point at which there was recognition of the rights of plant breeders on an international basis. The UPOV Convention provides a *sui generis* form of intellectual property protection which has been specifically adapted for the process of plant breeding and has been developed to encourage plant breeders to develop new varieties of plants. Nigeria is a signatory to the Convention on Biological Diversity (CBD), which does not strictly provide for plant variety but the conservation of biological diversity; the sustainable use of its components; and the fair and equitable sharing of benefits arising from genetic resources.

[5] In 2014, Uganda passed the Plant Variety Protection Act

[6] Seeds and Plant Varieties (Amendment) Act, 2012

[7] Plant Breeders' Rights Act, 1976 (Act 15 of 1976)



Highlights of the Act

(a) Establishment of the Plant Variety Protection Office

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. The Office would facilitate transfer and licensing of plant breeders' rights, collaborate with local and international bodies whose functions relate to plant breeders' rights as well as perform other necessary functions.



(b) Conditions for Plant Variety Protection

The Act provides for the Registrar to grant protection to plant varieties that are new (novel), distinct, uniform, and stable.

- i. **Novelty** – a plant variety would be considered new if at the date of filing there has been no propagating or harvested material of the plant variety commercialized with the consent of the breeder earlier than one year before filing in Nigeria and four years in any territory other than Nigeria and six years for trees and vines in such territories.
- ii. **Distinctness** – the requirement of distinctness is fulfilled if such variety is easily identified and differentiated from other known existing varieties at the time of filing.
- iii. **Uniformity** - uniformity is deemed, where aside from the variation that may be expected from the features of such propagated plant variety, it is sufficiently uniform in its relevant characteristics.
- iv. **Stability** – the requirement of stability is fulfilled if after repeated propagation or after a particular cycle of propagation, the relevant characteristics remain unchanged.

(c) Priority Claims

The Act recognises the right of priority for a maximum of 12 months to any breeder who has duly filed an application for the protection of a plant variety in one of the members of an international organisation dealing with plant breeders rights to which Nigeria is a party and every filed application that fulfils the requirements of the Act will be published by the Registrar in the national gazette or 2 national daily newspapers, which would be open for objection within 1 month of its publication.

(d) Nature of Plant Breeders' Rights

A plant breeder has exclusive rights to propagate materials of a protected variety. Authorisation must be obtained from such breeder for the production and reproduction, conditioning for propagation; offering for sale; selling or marketing; exporting; importing and stocking in relation to any of the mentioned purposes.



Any authorisation given by the plant breeder may be subject to conditions and limitations.

However, such exclusive rights of a plant breeder cannot impede the doing of the following acts by a third party without authorisation:

- Private and non-commercial purposes
- Experimental purposes.
- For the purpose of breeding any other variety, except it is essentially derived from an initially protected variety.

(e) Procedure for obtaining Plant Breeder's Rights

- The Breeder makes an application to the Registrar. This application shall contain all the relevant particulars of the plant variety as well as the details of the applicant and the breeder, where the plant variety was not discovered or developed by the applicant. Samples of the variety must also be provided alongside the Application. The Breeder will also designate its variety under a denomination, which shall be stated in the application. This denomination must be unique and not affect prior third-party rights in order to be registrable.
- Where the Application satisfies the requirement of the Act, the Registrar will publish a notice of the application in the Federal Gazette or in any two national dailies of wide circulation.
- Within one month of the publication, a person may submit a written objection to the Application, stating the grounds upon which the Application is made, as well as a statement of facts and an affidavit and other proof where required. The Registrar will then notify the Applicant within two weeks of the filing of the written objection. The Applicant may then file a written reply to the objection within two weeks of notice.
- The Registrar will grant Breeder's Rights to the Applicant where the Application conforms with the requirements of the Act and there has not been any objection to the application; or where there has been an objection without grounds for the objection. It is to be noted however that a regulation on the procedures is expected to be published soon by the Registrar under the authority of the Director General, NASC and the Minister of Agriculture.



(f) Grounds for Objection

Objection against the grant of a plant variety must be based on the following grounds:

1. That the Applicant is not entitled to file the application;
2. That the application contains a material misrepresentation;
3. That the contents of the application do not comply with the provisions of the Act or Regulations.

It appears from the wording of the Act, that any or a combination of the grounds is enough to make a claim against non-registration.

(g) Duration of Plant Breeder's Rights

A plant breeder's right will expire after 20 years from the date of grant except for trees and vines whose breeder's right shall expire 25 years after the date of 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.

The Act makes provision for the holder of a plant breeder's right to assign or authorise any activity in relation to a registered plant variety. The assignee shall notify the Registrar of the assignment for record purposes.

- A combined look at the provision on the grant of a plant breeder's right and grant of a 'priority' claim, shows that the application date is taken to be the date of registration.

Benefits of Plant Variety Protection to Plant Breeders and Nigeria's Economy

- The introduction of the PVP Act would create access to collaboration and access to high-quality new varieties from foreign plant breeders. Hitherto, the absence of regulatory framework protecting new plant varieties had discouraged foreign collaboration and partnerships with plant breeders in Nigeria because of the lack of IP protection for plant breeders.
- IP protection granted to plant breeders will result in increased investment in plant breeding and the development of new plant varieties capable of increasing yield and productivity. This is because investors are now assured of a structured IP protection system to underpin the commercialisation of new plant varieties.
- Given that the PVP Act confers IP rights on registered plant breeders, this would serve as an incentive to plant breeders for the development of new varieties and encourage more farmers to engage in plant breeding, thereby leading to an increase in the availability of more improved crop varieties with better yielding potentials.
- The signing of the PVP Act will eradicate existing scepticism in investing in plant breeding by private companies and encourage more investment from the private sector.



- The PVP Act will encourage applications from non-residents or foreign plant breeders, as plant breeders are unlikely to release valuable varieties into a country without adequate protection of their plant varieties, and this will enhance access to foreign plant varieties.
- During the evaluation of new plant varieties, breeding entities get to collaborate with farmers and local institutions. This would serve as capacity building for local farmers and institutional staff involved and create employment opportunities.
- International plant breeders will be encouraged to incorporate their companies in Nigeria to produce and market their varieties locally.
- It is expected that the proper implementation of the provisions of the PVP will encourage research and development by breeders, thereby leading to higher agricultural productivity, and a boost in the agricultural sector would have a reverberating effect on Nigeria's economy.
- The Act stipulates that harvested material or products obtained through the unauthorised use of a protected variety would require the authorisation of the holder of the breeder's right unless there has been a reasonable opportunity to exercise such right in relation to the referenced plant variety. However, it is ambiguous what reasonable opportunity to exercise right entails, as a plant breeder might have exercised such right by declining the offer and the user goes through to use such propagated or harvested material, this certainly would not automatically be seen to be justified just because the breeder had reasonable opportunity to exercise his right.
- By the provisions of the Act, any decision of the Registrar as regards refusal, nullification, or cancellation of a breeder's right can be appealed to the Minister of Agriculture. However, the Act provides that any decision emanating from the Minister is final. The finality of such a decision deprives an appellant of the right to seek remedy in a court of law.



Conclusion

The passing of the Plant Protection Variety Act heralds' numerous opportunities in the agricultural sector as plant breeders can commercialise their intellectual property by assigning or authorising any activity in relation to any registered plant variety. This also opens investment opportunities for investors seeking to explore this aspect of agriculture and further create job opportunities for people skilled in agriculture. This development would serve as a catalyst in the agricultural sector to enable high yield by stakeholders in the sector and to further result in massive contribution to Nigeria's GDP [8]. However, the Registrar is expected to make guidelines for the effective implementation of the Act, it is hoped that the guidelines will be published soon.

The PVP Act has and should garner positive reception among players in the Agro-based Sector. Industry regulators and experts believe that the Act has the potential to catalyse local and foreign investments into the country's Agric Sector. It is also predicted that the introduction of breeder's rights could translate into an increase seed production and exports, and food production within the Country.

Plant Breeder's Rights Under Nigeria's Plant Variety Protection Act 2021

[8] Agriculture contributed 21.42% to nominal GDP in the first quarter of 2021. See Nigerian Gross Domestic Product Report (Q1 2021)

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