

International Contradictions on Farmers Rights:

The interrelations between the International Treaty, its Article 9 on Farmers' Rights and UPOV

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Article 9, ITPGRFA

- *Art. 9.1* recognizes the enormous contribution that local, indigenous communities, farmers have made and will continue to make to the conservation and development of PGRFA.
- *Art. 9.2(a)*, protection of traditional knowledge relevant to PGRFA.
- *Art. 9.2(b)*, the right to equitably participate in sharing benefits arising from the utilization of PGRFA.
- *Art. 9.2(c)*, the right to participate in making decisions, at the national level.
- *Article 9.3*, right to save, use, exchange and sell farm-saved seed/propagating material.
- *Preamble* “.....the rights recognized in this Treaty to save, use, exchange and sell farm-saved seed and other propagating material, and to participate in decision-making regarding, and in the fair and equitable sharing of the benefits arising from, the use of plant genetic resources for food and agriculture, are fundamental to the realization of Farmers' Rights, as well as the promotion of Farmers' Rights at national and international levels.”

CONFLICTS BETWEEN UPOV AND IMPLEMENTATION OF FARMERS' RIGHTS

Conflict with Farmers Right to save, use, exchange and sell farm-saved seed/propagating material

Concern: Right cannot be fully implemented in view of the obligations required by UPOV esp. UPOV 1991.

- *Exception:* Article 15.2 of UPOV 1991 ("Farmers' Privilege")
 - allows a farmer using a protected variety to save seed and replant on the farmer's own holdings, **however subject to certain conditions.**
 - UPOV Guidance: aimed only at specific crops, where the product of the harvest is used for propagating purposes and saving seeds may be subject to payment of remuneration to the breeder.
 - **Does not allow farmers to freely exchange and sell seeds/propagating material.**

Conflict with Farmers Right to save, use, exchange and sell farm-saved seed/propagating material (cont'd)

- *Exception*: Article 15(1)(i) which states breeders' rights shall not extend to "acts done privately *and* for non-commercial purposes":
 - defined narrowly
 - UPOV Guidance:
 - "non-private acts, *even where for non-commercial purposes* may be outside the scope of the exception"
 - "propagation of a variety by a farmer *exclusively* for the production of a food crop *to be consumed entirely by that farmer and the dependents of the farmer living on that holding*" falls within the exception (Subsistence farming understood by UPOV)
 - Even multiplication of the protected variety to produce food crop to be consumed by a neighbour (not living on the holding) would not fall within the exception.

Conflict with Farmers Right to save, use, exchange and sell farm-saved seed/propagating material (cont'd)

- **UPOV's FAQ:**

"within the scope of the breeder's right exceptions... UPOV Contracting Parties have the *flexibility to consider*, where the *legitimate interests of the breeders are not significantly affected*, in the *occasional case* of propagating material of protected varieties, *allowing subsistence farmers to exchange this against other vital goods within the local community*."

Critique

- Not supported by text of Article 15
- Not supported by practices of UPOV
- Covers "occasional" exchange...meaning exchange of seeds/propagating material as a regular component of farming practices is still not recognized by UPOV.
- Creates uncertainty as how is a farmer to know when the breeders' rights are not affected and exchange is allowed.

Conflict with Farmers Right to save, use, exchange and sell farm-saved seed/propagating material (cont'd)

Malaysia Protection of New Plant Varieties Act 2004

(a Party to ITPGRFA)

Section 31(1)(e) which contained the following exception:

“any exchange of reasonable amounts of propagating materials among small farmers.” (defined as 0.2 hectares)

UPOV’ Response: “the **exchange of protected material for propagating purposes would not be covered** by the exceptions under Article 15 of the 1991 Act” and on that basis **recommended deletion of the Section.**

Conflict with Farmers Right to save, use, exchange and sell farm-saved seed/propagating material (cont'd)

Philippines PVP law

Section 43(d) The Certificate of PVP shall not extend to:
d) *The traditional right of small farmers to save, use, exchange, share or sell their farm produce of a variety protected under this Act, except when a sale is for the purpose of reproduction under a commercial marketing agreement..... This provision shall also extend to the exchange and sell of seeds among and between said small farmers: Provided, That the small farmers may exchange or sell seeds for reproduction and replanting in their own land.”*

UPOV’s response: “if ‘exchange, share or sell of their farm produce of a variety protected under this Act’ is for the purpose of reproduction, those acts would constitute infringements to the breeder’s right [...] The exchange and sale of seeds among and between said small farmers [...] would constitute an infringement to the breeder’s right.”

UPOV found the Section to be incompatible with the 1991 Act.

Conflict with Farmers Right to save, use, exchange and sell farm-saved seed/propagating material (cont'd)

In Sum

- **Evident** there are **contradictions between farmers' right to use, save, exchange and sell seed/propagating material and the provisions of UPOV 1991.**
- A human rights impact assessment of UPOV (HRIA) that examined the potential impact of UPOV concludes:

*“UPOV 91 restrictions on the use, exchange and sale of farm-saved PVP seeds..... **negatively impact on the functioning of the informal seed system, as the beneficial interlinkages between the formal and informal seed systems will be cut off.** Moreover, **selling seeds is an important source of income for many farmers.**”*

*From a human rights perspective, **restrictions** on the use, exchange and sale of protected seeds **could adversely affect the right to food**, as seeds might become either more costly or harder to access. They could also affect the right to food, **as well as other human rights**, by reducing the amount of household income which is available for food, healthcare or education.”*

Conflict with Farmers' right to equitably participate in benefits arising from the utilization of PGRFA - Article 9.2(b) of ITPGRFA

Concern: Lack of mechanisms to prevent misappropriation and facilitate benefit sharing arising from the utilization of PGR developed by farmers

- *Disclosure of origin and evidence of compliance with access and benefit sharing requirements in IP applications* is widely seen as a *crucial tool* to prevent misappropriation of genetic resources and associated traditional knowledge and to facilitate implementation of prior informed consent and fair and equitable benefit sharing arising from the utilization of such resources and knowledge
- Elements are also important for advancing the objectives of the Convention on Biological Diversity (CBD).
- **Not acceptable to UPOV** as a condition for granting breeders' rights.
- **Requested Parties to the ITPGRFA to remove provisions** concerning disclosure of origin and compliance of ABS from national PVP legislations (e.g. Malaysia).
- Peru deleted from its draft legislation a disclosure-of-origin obligation in anticipation of UPOV's opposition.

Conflict: Recognition of the contribution of local and indigenous communities and farmers of all regions of the world have made and will continue to make for the conservation and development of PGR - Article 9.1 of ITPGRFA

Concern: the lack of recognition of the contribution of local and indigenous communities and farmers.

- **Criteria for protection:** novelty, distinct, uniform and stable. In most cases, Farmer varieties may not meet the criteria and so do not receive protection.
- **Inequality regarding Essentially Derived Varieties:** if a small change is made to a protected variety, breeders' authorization is needed for commercialization. However farmer varieties can be freely used for further breeding but a farmer has no rights.

Conflict: Protection of Traditional Knowledge relevant to PGRFA - Article 9.2(a) of ITPGRFA

Concern: Lack of recognition of traditional knowledge of farming communities and adverse effects on traditional knowledge

UPOV's restrictions on saving, exchange and selling protected seeds/propagating material could have a detrimental effect on the protection of traditional knowledge - **farmers gradually losing their know-how related to seed selection and seed preservation.**

Conflict: Farmers' Right to Participate in Decision-Making - Article 9.2(c) of the ITPGRFA

Concern: UPOV's activities e.g. technical assistance not supportive of this Right.

- In 2009, the then UN Special Rapporteur on the Right to Food **recommended** that governments put in place **mechanisms** for the **active participation of farmers** ...*"particularly in the design of legislation covering [...] the protection of plant varieties so as to strike the right balance between the development of commercial and farmers' seed systems"*
- UPOV is involved in national and regional processes for developing new pvp laws and is well-placed to advocate implementation of this Right.
 - However on the contrary **UPOV is known to support processes that are not participatory or inclusive of farmers or their representatives.** e.g. the development of the Arusha Protocol for the African Regional Intellectual Property Organization (ARIPO).

Conclusions & Recommendations

- **1st CONCLUSION: Non-UPOV sui generis PVP systems offers Parties to the International Treaty full freedom to put in place mechanisms to implement all aspects of Farmers' Rights.** And some countries have done just that. (Malaysia, India, Philippines, Ethiopia etc.)
- **Many reports consider the UPOV system to be an inappropriate option for developing countries** where farmer managed seed systems (informal seed systems) and the practices of freely saving, using, exchanging and selling seeds are prevalent and **have actually recommended that developing countries do not join UPOV 1991.**
- **Recommendation: Parties to the ITPGRFA should** learn from the experiences of countries that are implementing non-UPOV sui generis systems, and **design PVP systems that are more suited to their national agricultural systems and realities.**

The UPOV Convention, Farmers' Rights and Human Rights - An integrated assessment of potentially conflicting legal frameworks published by Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) on behalf of the German Federal Ministry for Economic Cooperation and Development in June 2015

A Key Finding:

- UPOV 91-based PVP laws were found to **not** advance the realisation of Farmers' Rights; **rather they are effective in the opposite direction.**

Recommendation:

- Developing countries **that have not yet joined UPOV should consider opting for alternative *sui generis* systems of PVP** that allow for more flexibility in meeting the obligations of different treaties, **for balancing the interests of diverse actors, and for protecting and promoting Farmers' Rights, compared with the UPOV system.**

WTO-TRIPS Agreement & Sui Generis PVP Legislation

Article 27.3(b) of the WTO-TRIPS Agreement:

"Members shall provide for the protection of plant varieties [...] *by an effective sui generis system.....*"

- "Sui Generis" means "unique", "of its own kind"
- **WTO Members have complete freedom to determine the modalities of protection.**
- UPOV Convention is not mentioned.
- **Several countries (e.g. India, Malaysia, Thailand, Ethiopia) have departed from UPOV's one size fits all"...**adopted innovative PVP laws that **balances different interests** (public, commercial and farmers); advances objectives of the ITPGRFA and the CBD.

India's Protection of Plant Varieties and Farmers' Rights Act 2001:

- **Grants exclusive rights** to varieties that comply with NDUS (Novelty, Distinctness, Uniformity and Stability) criteria
- Applications must **disclose of origin** including contribution of *any farmer, community, in development of the variety & declaration that genetic material lawfully acquired.*
- **Exception** (Section 39(1)(iv))
 - "a farmer shall be deemed to be entitled to save, use, sow, resow, exchange, share or sell his farm produce including seed of a variety protected under this Act in the same manner as he was entitled before the coming into force of this Act: Provided that the farmer shall not be entitled to sell branded seed of a variety protected under this Act."
- Several other provisions on Farmers: e.g. provisions on **recognizing and rewarding farmers' contribution** for engaging in conservation and improvement of genetic resources and wild relatives...used in varieties that have been registered.

- **2nd CONCLUSION:** There are conflicts between the requirements of UPOV and realization of Farmers' Rights by Parties to the International Treaty.
- **Recommendation: Conflicts need to be recognized and addressed *inter alia*:**
 - By allowing especially smallholder farmers to freely save, use, exchange and sell farm saved seed/propagating material;
 - By allowing governments to put in place provisions/mechanisms to recognize the contributions of farmers; to protect traditional knowledge and to implement fair and equitable benefit sharing, including disclosure of origin and evidence of prior informed consent and benefit sharing; advance objectives of CBD.
- With regard to **farmers' right to participate in decision-making.... UPOV should respect and promote its implementation** (e.g. in technical assistance) in line with internationally recognized principles of participation.

New FAO Voluntary Guide for National Seed Policy Formulation (2015)

In most developing countries, **the informal sector is the main source of seed. The ability to easily access, exchange and use seeds underpins the informal sector** and is a crucial practice for facilitating access to seeds.

The seed policy **should address the respective roles of the formal (public and private) and informal sectors in meeting its objectives,** ways in which each could be improved, as well as the need for **coordination** between both components of the seed system [...]

in order to ensure the production of the seeds of crop varieties that are useful for diverse and evolving farming systems.

THANK YOU

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