

# **Are there contradictions between Farmers' Rights and Plant Breeders' Rights? A view from civil society**

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## Article 9, ITPGRFA

- *Art. 9.1* **recognizes the enormous contribution** that the local and indigenous communities and farmers of all regions of the world
- *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, on matters related to the conservation and sustainable use of PGRFA;
- *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.**”

## Some Concerns with UPOV

- UPOV presents a “One size fits all” regime.
- Restrictive & inflexible UPOV PVP regime.
  - New members joining UPOV 1991 have very little room to maneuver as Article 34(3) of the 1991 Act requires a new member to submit its legislation for scrutiny by UPOV which will object to any legal provisions which in its view is inconsistent with its understanding of the 1991 Act.
- Lack of safeguards/mechanisms to prevent misappropriation.
- Lack of recognition of farmers’ contribution and seed systems.
- Limits Farmers’ Rights

- UPOV 1991 requirements in Article 15(2) allows a farmer using a PVP protected variety to save seed and replant on the farmer's own holdings.
  - According to UPOV guidance, this exception is aimed only at specific crops, where the product of the harvest is used for propagating purposes and may be subject to remuneration.
  
- UPOV does not freely allow the exchange and sale of seeds or propagating material when using PVP protected material even among small-scale farmers.
  - This conclusion is also supported by country experiences as well as UPOV's Guidance on its exception on "acts done privately and for non-commercial purposes" (Article 15(1)(i) of UPOV 1991)
  
- **Compare the provisions of UPOV with other sui generis PVP systems such as that of India, Malaysia, Thailand. Article 27.3(b) of the WTO-TRIPS Agreement gives countries flexibility to implement alternative PVP systems that reflect Farmers' Rights.**

# Examples of Alternative (to UPOV) Sui Generis PVP Systems

## Indian Plant Varieties and Farmers' Rights Act 2001

**Section 39(1)(iv) of the** states: “a *farmer* shall be deemed to be *entitled to save, use, sow, re-sow, 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.”

**Section 18 (1)** Every application for registration:

(e) *contain a complete passport data of the parental lines from which the variety has been derived along with the geographical location in India from where the genetic material has been taken and all such information relating to the contribution, if any, of any farmer, village community, institution or organization in breeding, evolving or developing the variety;*

(h) *contain a declaration that the genetic material or parental material acquired for breeding, evolving or developing the variety has been lawfully acquired;*



## Malaysia 2004 PVP Law (Exception to Breeder's right)

*Section 31(e) any exchange of reasonable amounts of propagating materials among small farmers [0.2 hectares]; and*

*(f) the sale of farm-saved seeds in situations where a small farmer cannot make use of the farm-saved seeds on his own holding due to natural disaster or emergency or any other factor beyond the control of the small farmer, if the amount sold is not more than what is required in his own holding.*

In 2005 Malaysia submitted its legislation to the UPOV Council for assessment of conformity with UPOV 1991

**UPOV's response:** "It is recommended to delete Section 31(1)(e) of the Act as the exchange of protected material for propagating purposes would not be covered by the exceptions under Article 15 of the 1991 Act."

"It is recommended to move Section 31(1)(f) of the Act to Sections 36 and 37 concerning compulsory licenses, as the situation described seems to fall within cases of restriction to the breeder's right for reasons of public interest."

## Malaysia 2004 PVP law (Requirements for Application of PBRs)

12.(1) An application for the registration of a new plant variety and a grant of a breeder's right shall be made to the Board in the prescribed manner and shall-

- (e) contain information relating to the source of the genetic material or the immediate parental lines of the plant variety;
- (f) be accompanied with the prior written consent of the authority representing the local community or the indigenous people in cases where the plant variety is developed from traditional varieties;
- (g) be supported by documents relating to the compliance of any law regulating access to genetic or biological resources; and

**UPOV's Response:** Considered these elements as being “contrary” to the requirements of UPOV 1991.

## Philippines PVP law (Exception to Breeder's Right)

The Certificate of Plant Variety Protection 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. The Board shall determine the condition under which this exception shall apply, taking into consideration the nature of the plant cultivated, grown or sown. 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.... exchange and sell of seeds among and between said small farmers would constitute an infringement to the breeder's right”



## 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 in the Philippines, Peru and Kenya 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.*”

- **Adverse Effects on Protection of Traditional Knowledge (Article 9.2(a))**
  - HRIA Study: “Evidence from all three countries, particularly the Philippines, clearly suggests that if PVP laws modelled on UPOV91 were introduced and restrictions on saving, exchanging and selling PVP seed were imposed, farmers would gradually lose their know-how related to seed selection and seed preservation, to the extent that protected varieties play a role in their seed system.”
  
- UPOV has taken position that requirements of disclosure of origin and evidence of prior informed consent and compliance with access and benefit sharing are incompatible with UPOV 1991. **Reduces countries’ ability to effectively realize farmers’ right to participate in sharing benefits and to safeguard against misappropriation. (Article 9.2(b)).**

## **Farmers' Right to Participate in Decision-Making (Article 9.2(c) of the Treaty)**

In January 2016, the Alliance for Food Sovereignty Africa (AFSA) wrote a letter to all UPOV Members expressed outrage at the deliberate exclusion of smallholder farmers and civil society in key meetings negotiating a PVP Arusha Protocol based on UPOV 1991 for the ARIPO region (made up of 19 member states, 13 of which are LDCs) despite their numerous requests.

The letter asserts the Arusha Protocol has major implications on Farmers' Rights at the national level for the ARIPO members that are also members of ITPGRFA. "And yet no effort was made to operationalize Article 9.2(c) of ITPGRFA, which is about Farmers' Rights to participate in decision- making on matters"

"Even worse is that international organizations such as UPOV and WIPO have intentionally enabled the non-fulfillment of Article 9.2(c) of the ITPGRFA and the undermining of farmers' rights as these organizations have supported this flawed and illegitimate ARIPO process."

**Note: Implementation of this right is a prerequisite to implementation of Farmers' Rights**

# Conclusions

- There are contradictions in the implementation of Farmers' Rights & Plant Breeders Rights (e.g. PBR laws based on UPOV 1991)
- If there is to be realization and promotion of Farmers' Rights, it is critical to address these contradictions.