



Updates on Plant Variety Protection

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New Report: “Owning Seed, Accessing Food: A Human Rights Impact Assessment of UPOV 1991 Based on Case Studies in Kenya, Peru and the Philippines”

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A New Report published by a group of international NGOs presents evidence that stronger plant variety protection based on the 1991 Act of the Convention for the Protection of New Varieties of Plants (UPOV 1991) threatens the Right to Food.

Developed countries regularly put pressure on developing countries to introduce stringent plant variety protection (PVP) regimes modeled on UPOV 1991, without duly considering the consequences on the enjoyment of human rights of vulnerable groups such as small-scale farmers and in particular women.

In a pioneering research endeavor, a group of NGOs carried out a Human Rights Impact Assessment (HRIA) of stronger plant variety protection laws based on UPOV 1991. The Research reveals worrying results. The impact assessment of UPOV 1991 styled PVP laws provides convincing evidence of the threat to the right to food of small-scale farmers. Their widespread practice of freely saving, replanting, exchanging and selling seeds clashes with UPOV 1991 provisions, to the extent such seeds are “protected” by plant breeders’ rights. Consequently, plant variety protection in line with UPOV 91 will make it harder for small-scale farmers to access improved seeds, as shown by the case studies in Kenya, Peru and the Philippines. Access to seed, is a key feature of the Right to Food of small-scale farmers.

The Report warns governments that introduction of stringent plant variety protection based on UPOV 1991 restricts small-scale farmers’ access to seeds and puts their Right to Food at risk.

Based on the findings, the report provides key recommendations to be urgently considered by governments. These include: (i) to undertake a human rights impact assessment before drafting or amending a national plant variety protection law or before introducing intellectual property requirements in trade or investment agreements in the area of agriculture; (ii) to use the flexibility provided by the TRIPS Agreement to draft PVP laws and related measures that reflects the needs and interests of the most vulnerable groups such as small-scale farmers; (iii) to promote implementation of other legal obligations such as realizing farmers' rights, the protection of the rights of indigenous people and traditional knowledge; (iv) to ensure national PVP laws allow small-scale farmers to freely save, use, exchange and sell all farm-saved seeds/propagating material; (v) to ensure that governments abide by a transparent and participatory process that includes all potentially affected stakeholders, especially small-scale farmers and public interest groups, when drafting, amending or implementing seed laws and related measures. Failing to do so risk the violation of the right to food of small-scale farmers and their families.

The Report also recommends that UPOV should review and revise those aspects of its rules and its workings (e.g., Articles 14 and 15 of UPOV 1991) that adversely affects the informal seed sector, and the interests of developing countries.

For the Full Report see:

[http://www.bernedclaration.ch/fileadmin/files/documents/Saatgut/2014_07_10_Owning_Seed - Accessing Food report def.pdf](http://www.bernedclaration.ch/fileadmin/files/documents/Saatgut/2014_07_10_Owning_Seed_-_Accessing_Food_report_def.pdf)

Executive Summary of the Report

The primary concern of this study is the lack of knowledge of potential human rights impacts of plant variety protection (PVP) laws that are based on the 1991 Act of the International Convention for the Protection of New Varieties of Plants (UPOV 91). The focus is on the impacts on vulnerable groups in developing countries. Thus, a human rights impact assessment (HRIA) was carried out to analyze the ways in which a UPOV 91-based PVP law could affect the realization and enjoyment of human rights, particularly the right to food. As part of this work, case studies were undertaken in three countries, namely Kenya, Peru and the Philippines.

The UPOV model was designed with the commercialized farming systems of the developed countries in mind. Developing-country farming systems differ from these in many respects, in many cases with fundamental differences. Perhaps most significantly, agriculture in developing countries is characterized by small-scale farming, which relies heavily on the informal – rather than the formal, commercial – seed system, and is the

basis for farmers' livelihoods and national food security in these countries. One of the primary features of the informal seed system is the wide-spread practice of freely saving, replanting, exchanging and selling seed. Unlike in more formal, industrial agricultural systems, purchasing new seed on a yearly basis is relatively rare. However, UPOV 91 partially restricts the use of farm-saved seeds/propagating materials of PVP-protected varieties and prohibits their exchange and sale by farmers. Concerns have therefore been raised that UPOV 91-type PVP laws overly restrict the traditions of seed management and sharing among farmers, thereby reducing the effectiveness and integrity of the informal seed system.

The small-scale farming sector and the informal seed system is crucial for many developing countries and since many of these countries are considering (often under external pressure) joining UPOV 91, the lack of information about the human rights impact of UPOV 91-like PVP laws, particularly on the right to food, is of serious concern. It is thus essential that governments in developing countries have clarity on the ways in which UPOV 91-based PVP laws might affect the development of their agricultural sector in order to design their PVP systems in a way that is most suited to their national needs.

The objective of this assessment is to raise awareness among actors in the North and South about the potential human rights impact of UPOV-like PVP laws. Related to this, the project sought to demonstrate the hands-on application of the HRIA approach, thereby further developing the methodology and enhancing the applicability of this policy tool. Finally, we hope that this assessment will help empower groups affected by PVP laws, by indicating the channels through which they can raise their concerns about new seed-related laws.

The value of this study lies in the use of a human rights lens in looking at PVP regimes in the context of plant breeding and the informal seed systems in developing countries.

The HRIA is a policy tool that has emerged over the last decade. Accordingly, United Nations human rights bodies, academics and civil society organizations alike have increasingly called on governments to carry out such assessments. HRIAs differ in three important ways from other types of impact assessments. First, they are firmly rooted in legal norms. Secondly, they focus on poor, vulnerable or otherwise disadvantaged groups whose human rights are most likely to be endangered by particular provisions or policies. It is important to note that from a human rights perspective it is not acceptable to make vulnerable groups worse off in a trade-off for an aggregate or sectoral positive impact. Thirdly, the very process of carrying out these assessments must respect human rights, for instance through an inclusive process.

While there is no single well-established methodology for conducting HRIA and each assessment has to be tailored to the specific case under consideration, a logical sequence of core methodological elements has emerged as a result of research and experience relating to HRIAs of public policies. The present study followed the seven steps suggested in the literature: preparation, screening, scoping, evidence gathering,

analysis, conclusions and recommendations, and monitoring and review.

Three country case studies were carried out to collect empirical evidence on the potential impacts of UPOV 91- like PVP laws on the right to food. All these case studies are *ex ante* as the current PVP system in the countries concerned, either is not in line with UPOV 91 (the Philippines), has only been amended recently (Kenya), or has not yet been fully implemented and enforced (Peru). Consequently, like many policy impact assessments, this HRIA is on potential, rather than actual, impacts of PVP laws on the right to food. The study focused on the potential impact of Article 14 of UPOV 91 on the scope of the breeders' rights, and Article 15 on the exceptions to breeders' rights, i.e., the extent to which UPOV 91 allows farmers to save, exchange and sell seeds and other planting materials.

The country study research framework was based on a set of initial working hypotheses that had emerged out of the preparatory work assessing the literature and prior studies relating to impacts of PVP in agriculture. The research framework was refined through expert workshops and consultations with the project team and advisors. In order to ensure that this HRIA study focused on the impacts of UPOV 91 on the right to food, causal chain analysis was used to trace the links between the UPOV provision under consideration and the potential effects on the determinants of the right to food. Pilot studies in each country served to identify suitable communities and crops to be studied, and to modify the set of research hypotheses. The field studies were carried out by local research teams. They reviewed the relevant country-specific literature, held consultations with a wide range of actors, and conducted key informant inter- views and focus group discussions with specific groups of farmers in the selected communities.

The following key findings emerged from the analysis of the empirical data collected in the three case studies:

Seed saving, replanting, exchange and sale. The informal seed system is by far the primary way for small-scale farmers to access seeds (including seeds of improved varieties and PVP varieties). Varying between communities and crops, the share of the informal seed system is often over 98% (e.g., for potatoes in Peru and Kenya). There is an important interaction between the formal and informal sectors whereby seeds from the formal sector are integrated into the informal sector by seed saving, exchange and sale of farm-saved seeds. Small-scale farmers also use "improved" varieties, which in some cases are protected by plant breeders' rights. From a human rights perspective, therefore, it will be essential to ensure access to seeds, including improved seeds, through the informal seed system and its interlinkage with the formal seed system.

UPOV 91 and access to seeds through informal channels. UPOV 91 restrictions on the use, exchange and sale of farm- saved PVP seeds will make it harder for resource-poor farmers to access improved seeds. This could negatively impact on the functioning of the informal seed system, because if implemented and enforced, UPOV 91 would sever the beneficial interlinkages between the formal and informal seed systems. 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. These restrictions could also affect other human rights, by reducing the amount of household income which is available for food, healthcare or education.

Traditional knowledge related to seed conservation and management. Traditional knowledge is applied by farmers in the selection, preservation and storing of seed. It is the basis of local innovation and *in situ* seed conservation. Women's knowledge is of particular relevance to local seed and food systems, as clearly evident in the Andean region. However, the wealth of practices that farmers use and develop at the local level goes largely unnoticed and unacknowledged by government institutions. From a human rights perspective, restrictions on traditional practices and seed management systems (e.g., by a UPOV 91-based PVP law) adversely impact on farmers' rights, cultural rights, minority rights, indigenous peoples' rights, women's rights, as well as on biodiversity and the right to food.

Seed choice, risk and household budgets. Restrictions on the use, exchange and sale of farm-saved seeds might lead to farmers becoming increasingly dependent on the formal seed sector. Improved varieties, however, often require more inputs compared to local farmers' varieties, pushing up production costs. In the case of protected varieties, seed costs drive production expenses further up. From a human rights perspective, higher production costs pose a risk for cash-strapped farmers as they affect the stability of their household budget and compete with other essential household expenditures, including for food.

Issues of concern when implementing PVP laws. Apart from the above findings, the study identified further issues of concern that should be taken into account when developing and implementing PVP laws. Some of these concerns might apply to all PVP laws, not only to UPOV 91-type laws. The country research teams found a lack of information and participation of small-scale farmers and other stakeholders in the process of adopting and reforming PVP-related laws, as well as a lack of assessment of the likely impacts of these laws. This is inconsistent with the State's human rights obligations to ensure adequate information regarding, and participation in, public policy-making. Furthermore, there have been indications that several instances of UPOV-related provisions could undermine other public interest policies and processes by negatively impacting on the State's ability to comply with other international legal obligations or national policies. The potential human rights impact differs from case to case. If a phytosanitary system cannot handle an increase in plant material imports, for example, the introduction of pests and diseases could have a direct impact on the farmers' harvest and the right to food. In other cases the impact is indirect, in that it reduces the scope to implement measures for the protection of traditional knowledge, biodiversity or farmers' rights.

The challenges in undertaking this HRIA were associated with two factors in particular. First, tracking the impact of specific UPOV provisions on the right to food required the

development of causal chains where the ultimate effects do not directly emanate from the provision under consideration but rather result from an intermediate impact. Secondly, the pioneering nature of the research necessitated a fair amount of innovative thinking and creativity as there was no pool of experience to draw from. Despite these methodological and procedural challenges, the research provided some clear evidence regarding potential human rights impacts and further areas of concern that should be taken into account when designing and implementing UPOV 91-type PVP laws. In particular, the findings of the impact assessment showed the strong dependence of small-scale farmers on informal seed systems and the resulting threat to the enjoyment of the right to food when access to seeds of protected varieties is restricted and the informal seed system is weakened by such laws.

In relation to the methodological approach, four main lessons can be drawn. First, being selective and focusing early on in the process on a narrow set of human rights and policy elements is key to the success of the exercise. Secondly, HRIAs are iterative processes implying some degree of procedural flexibility. Thirdly, particularly in the case of an *ex ante* assessment, the HRIA will have to extensively rely on expert judgments besides the findings from the field studies. Fourthly, involving field researchers at an early stage of the process and closely assisting them during data gathering is critical to aligning information needs with information collection.

The study offers specific recommendations to a range of stakeholders, including governments, the UPOV Members and Secretariat, providers of technical assistance, and civil society organizations. Key recommendations to governments are: (i) to undertake an HRIA before drafting a national PVP law or before agreeing to or introducing intellectual property provisions in trade and investment agreements in the area of agriculture; (ii) to improve the linkages between the formal and informal seed systems and to apply a differentiated approach regarding PVP for different users and different crops; (iii) to ensure that governments abide by a transparent and participatory process that includes all potentially affected stakeholders, when drafting, amending or implementing PVP laws and related measures; (iv) to inform governmental agencies and others involved in seed policy about their obligations concerning the right to food; (v) to identify what “flanking measures” to new PVP-related laws may be necessary, and implement these, including measures to mitigate and remedy any potential adverse impacts of the PVP-related laws on human rights or on the informal seed sector; (vi) for developing countries to use all the flexibilities available to them when drafting PVP-related laws, taking into account in particular the needs of the most vulnerable groups in their populations; (vii) to monitor the impact of PVP laws on the right to food, with particular attention to ways in which PVP-related laws or policies impact on different segments of the population.

Recommendations to other actors include the following: (i) UPOV Members and Secretariat to review those aspects of the UPOV rules and their workings that affect the informal seed sector, with a view to ensuring that in practice as well as on paper, these rules facilitate PVP systems that reflect the interests and needs of developing countries; (ii)

technical assistance providers to ensure that beneficiary countries undertake a thorough objective assessment of their agricultural situation covering the formal and informal sectors and their international obligations (e.g., human rights obligations and obligations under the Convention on Biological Diversity, the International Treaty on Plant Genetic Resources for Food and Agriculture, etc.) and draft a sui generis PVP law that is evidence-based and suitable for their respective conditions, needs and interests; (iii) all concerned actors to raise awareness of the important role of the informal seed sector in many countries and the possible human rights implications of UPOV 91-type PVP laws; and finally (iv) a call for civil society to get involved when governmental or regional bodies draft PVP-related laws.

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