

Law Speak - Safeguarding farmers' seeds

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FARMERS in developing countries have been responsible for the creation of the global food basket. Over millennia farmers bred plants for food and agriculture. They improved them through their traditional practices. They bred out the unfavourable features and built in the more resilient traits. This was done on the basis of free use and exchange of seeds among themselves. Harvest festivals such as the Gawai in Sarawak, Sabah's Kaamatan and Kerala's Onam were, and are, characterised by farmers freely exchanging their most successful seeds of that season. These were created from the seeds exchanged at past annual festivals. The seed thus represents the cumulative genius of farmers over successive generations.

In this ethos of free use and exchange prevalent in developing countries no monopoly rights could be claimed for any new seed variety created. In short there were no intellectual property rights (IPRs) for new plant varieties and seeds. IPRs were only for machines and industrial products. The criteria for acquiring such rights simply could not apply to plants and seeds.

But commercial breeders changed this. Twelve European countries got together in 1961 and enacted the International Convention on the Protection of Plant Varieties (known as the UPOV Convention) which introduced new IPR rights over plant varieties bred - essentially from varieties improved by many different farmers over many generations.

These monopolies or "plant breeders' rights" were granted for new varieties of plants that were sufficiently distinct from others, uniform and stable. Farmers' varieties already existing at that stage could not be protected - they formed common knowledge. And the conditions for plant breeders' rights were such that farmers who continue to develop and improve their seeds will find it difficult, if not impossible, to obtain a plant breeders' rights. Because most farmers do not have the means to produce varieties conforming to the strict UPOV standards.

So although farmers breed and create new varieties which they can easily identify, they cannot claim rights for their innovation. Only commercial breeders who have the know-how to stabilise the seed in a uniform fashion can claim monopolies over their "creation": the exclusive right to market seeds of "their" varieties.

Then the essentially western commercial breeding corporations sought to universalise the UPOV Convention.

They finally succeeded in securing a provision in the Trade Related Intellectual Property Rights (TRIPS) agreement of the WTO (the World Trade Organisation). It obliged all member countries to provide for the protection of plant varieties. Malaysia, as a member, was required to enact a law to provide such protection. Significantly TRIPS provides flexibility to create a unique law of its own. Malaysia did not have to adopt the UPOV law.

So Malaysia enacted the Protection of New Plant Varieties Act in 2004. While it provides for rights to be given to commercial breeders for any new plant variety they create, it also protects seed varieties created through breeding by traditional farmers, local

communities or indigenous people. They only had to show that the variety they developed was new and distinct and identifiable. So the "uniform stability" requirement was not applicable to them. This balances the rights of all breeders - commercial as well as traditional farming communities.

The Malaysian law gives further rights to small farmers (those with less than 0.2ha): to propagate harvested material of the protected plant variety on their own farms, exchange reasonable amounts of propagating material among themselves, and sell farm-saved seeds which they could not use because of factors beyond their control.

UPOV has always been unhappy with our law. They want developing countries to adopt their latest UPOV 1991 law. This virtually prohibits farmers from freely saving, exchanging and selling their farm-saved seeds; especially as farmers use and co-mingle all kinds of seeds including those of protected varieties. This alters dramatically the age-old customary practice of traditional farmers. The informal sector relies on its farm-saved seeds for their livelihood. Whatever it produces it also exchanges and sells to others in village markets - our famed pasar malam.

The UPOV lobby has consistently demanded that no breeder's rights be given to farmers based on the "identifiable" criteria and much more; the deletion of provisions which favour small farmers such as that which allows for the exchange of reasonable amounts of propagating material among themselves; no compulsory licence of protected varieties where, for example, the needs of the farming community are not met for the propagating protected material, or, too much of the protected plant varieties are imported thus stultifying domestic breeding; and the deletion of the provision which denies the grant of breeder's right which may affect public order or morality, or where granting breeder's right may be detrimental to the environment; and making available a reasonable amount of the material for local use.

UPOV also wants the deletion of the provisions which require the disclosure of the source of the material, the prior informed consent of the local farming community whose material has been taken and an obligation to comply with our law on access to genetic resources as well as the biosafety law where the plant material is genetically modified.

Despite this Malaysia happily sailed along with our law - which incidentally does not prejudice commercial breeders. In fact 152 applications for the grant of plant variety protection have been made to-date, predominantly by foreign breeders.

However in the ongoing Trans-Pacific Partnership (TPPA) negotiations, the US insists that we replace our law with UPOV 1991. By most accounts the government seems poised to agree to the commercial breeders' lobby.

Adopting UPOV 1991 will wipe out the right of traditional, including small, farmers. It will give rights to commercial breeders at the expense of our farming community. It will narrow the genetic base of our agricultural biodiversity. Big companies tend to reproduce and promote the same kind of seeds promoting monoculture. This can affect food security in the long run. It disrespects the existing food supply systems generated by traditional and small farmers and is detrimental to their livelihood and their human right to food, as repeatedly emphasised by the UN rapporteur on the right to food.

Already farmers are being disempowered and becoming mere recipients, not breeder-innovators, of seeds developed by big seed companies. In the long term, local varieties will be gradually replaced by commercial varieties; and our seed market and agriculture will be controlled by multinational seed companies. With serious consequences for our country's food security.

Already the world's top 10 seed companies control 75.3% of the US\$34.5 billion global commercial seed market.

Studies by the UK Commission on IPRs, Bioversity International and the UNDP decry UPOV's "one size fits all" as antithetical to the needs of developing country farmers and their breeding creativity. A World Bank study in 2005 concludes that farmers' seed systems are the main source of seed generation and plant varieties.

It has been argued that unless the UPOV 1991 law is adopted, commercial breeders will not provide their seeds. This, it is suggested, will deprive farmers the opportunity to use these high quality imported seeds and increase their incomes.

First, relying on imported material will alter the crucial role of our farmers to breed and create seeds and new varieties to suit local conditions and circumstances. They then become mere users dependent on seeds "created" by commercial seed companies essentially from the fields of farmers. This also comes at a cost. Scientists also warn that the replacement of farmer varieties with a few genetically uniform modern varieties depletes genetic diversity and causes genetic vulnerability - ideal conditions for diseases and insect pests.

Second, the Malaysian law already provides protection for commercial varieties and commercial, mostly foreign, breeders have started making use of the system as indicated earlier. The case for a stricter law has not been made yet.

Surely before we jettison our law it is crucial to do a study of our existing seed system; followed by an assessment of the extent to which this system guarantees our farmers access to seeds and food security. And how this system can be further reinforced. Development, as the economist Joseph Stiglitz says, should transform people's lives not transform economies.

There is also a certain inequity underlying the UPOV system. It allows commercial breeders to freely access farmers' varieties to develop new varieties that it can then claim protection over and sell; but the farmer who accesses the protected variety for breeding has no similar right to sell any variety derived from the protected variety. Nor is he compensated for the use of his genetic resource that commercial breeders "develop".

It is important to recall that traditional farmers have been developing and adapting varieties to suit local needs and circumstances - a fact of special importance now given the potential adverse impact of climate change to agricultural systems of developing countries.

All this calls for a balanced integration of the formal and the informal sector - not a marginalisation or elimination of traditional farm systems and practices.

In sum, it will be a regressive step indeed for Malaysia to abandon our creative sui generis system in favour of UPOV 1991 as a result of trade pressure from the TPPA negotiations.

A Palestinian poem, *The Seed Keepers* - is emblematic of how precious a seed is to the regeneration of life itself, when all else is crumbling through oppressive foreign domination:

Destroy
our grass and soil
raze to the ground
every farm and every village
our ancestors had built

every tree, every home
every book, every law
and all the equity and harmony.
Flatten with your bombs
every valley; erase with your edits
our past,
our literature, our metaphor.
Denude the forests
and the earth
till no insect
no bird
no word
can find a place to hide.
Do that and more.
I do not fear your tyranny
I do not despair ever
for I guard one seed
a little live seed
that I shall safeguard
and plant again.

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