

PROTECTION OF FARMERS' RIGHTS CoFaB: a developing country alternative to UPOV

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After the conclusion of the Uruguay Round, India as well as other developing countries have accepted the sui generis option for the protection of new plant varieties. India has already passed a Plant Variety Protection and Farmers Rights Act. In order to implement the law concerned with the protection of new varieties in each other's countries, nations need to work through an international platform. UPOV (Union for the Protection of New Plant Varieties) is such a platform through which the industrialised nations regulate the implementation of plant breeders rights. UPOV came into being in 1961 with its headquarters in Geneva and it is the only platform of its kind today. There are 50 members in UPOV, almost all are developed countries. The reluctance of Asian countries to join UPOV is seen in the fact that today only three countries are members, Japan, South Korea and China. China's case is different to the other two since it was not left with much choice. At the time China was negotiating its entry into the WTO (a process that took almost 10 years), it had to make several concessions, specially in the field of IPR. Apart from radically amending its patent laws, China brought in other changes to comply with the demands made on it, one such compliance was joining UPOV.

UPOV started as a flexible system, which apart from granting breeders rights was not particularly concerned about restricting the exemptions it provided to the other players, namely farmers and other researchers. This began to change as the corporate breeders consolidated their hold on the plant breeding and seed producing industry. Amendments to the UPOV convention were brought in 1972, 1978 and 1991. All these amendments had one goal, to further strengthen the hold of the breeder and reduce any exemptions that were granted in early versions of the convention. The valid treaty of today is the 1991 treaty which has almost exclusive rights of breeders, no exemptions for farmers or researchers. In fact UPOV has moved to accept the patents system now so that it is not only a platform for breeders rights but also for patents on plant varieties.

Gene Campaign has opposed India joining UPOV because UPOV does not address our needs. The Campaign has been promoting that India must rise to the challenge of crafting an alternative treaty to UPOV that will meet the needs of developing countries. We need to provide a forum that will grant apart from Breeders Rights, also Farmers Rights and be geared to work towards food and nutritional security.

There is no concept of Farmers Rights in the UPOV system; rights are granted only to the breeder. The UPOV system does not need to protect the rich farming community of Europe and America in the way that our seed laws will have to protect our farmers. It is clear that we have other goals than it is possible for UPOV to fulfill. UPOV conditions are good for the countries where it was developed but not for us.

The UPOV system is not suited for us because it embodies the philosophy of the industrialised nations where it was developed and where the goal is to protect the interests of powerful seed companies who are the breeders. In India the position is very different. We do not have big seed companies in essential seed sectors and our major seed producers are farmers and farmers cooperatives. Logically, our law will have to concentrate on protecting the interests of the farmer in his role as producer as well as consumer of seed.

Once we are in the UPOV system, we shall be forced to go in the direction that UPOV goes. It is a system headed towards seed patents. Starting with its first amendment in 1978 when limited restrictions were placed on protected seed, the 1991 amendment which is now

ratified, brought in very strong protection for the plant breeder. In this version, breeders are not exempt from royalty payments for breeding work and the exemption for farmers to save seed has become provisional. UPOV now also permits dual protection of varieties that means in the UPOV system, the same variety can be protected by Plant Breeders Right (PBR) and patents. It would seem obvious that UPOV is ultimately headed towards patent protection for plant varieties. It would be wise for India to stay out of a system which has plant patents as its goal since that is neither our goal nor our interest.

UPOV laws are formulated by countries which are industrial, not agricultural economies. In these countries the farming community is by and large rich and constitutes from 1 to 5% of the population; their agriculture profile is completely different to ours. These countries do not have the large numbers of small and marginal farmers like we do yet subsidy to agriculture is of a very high order. Because they produce a massive food surplus, farmers in industrialised countries get paid for leaving their fields fallow.

In Europe agriculture is a purely commercial activity. For the majority of Indian farmers however, it is a livelihood. These farmers are the very people who have nurtured and conserved genetic resources. The same genetic resources that breeders want to corner under Breeders Rights. We must protect the rights of our farmers and these rights must be stated unambiguously in our sui generis legislation.

Almost all agricultural research and plant breeding in India is financed with the taxpayers money. It is conducted in public institutions like agricultural universities and institutions of the Indian Council of Agricultural Research (ICAR). This research belongs to the public. The laws of UPOV on the other hand are formulated by societies where seed research is conducted more in the private domain than in public institutions; where private capital finances plant breeding. Because they invest in expensive breeding methods and need to secure returns on their investments, seed companies in Europe and North America seek market control through strong IPRs. These conditions do not apply in India.

Another feature that makes the UPOV system unsuitable for us is its sheer cost. At the seminar organised jointly by the ICAR and UPOV in Delhi, the figures that were presented for obtaining an UPOV authorised Breeders Right certificate could be several thousands, even lakhs. Such rates will effectively preclude the participation of all but the largest seed companies. There certainly will be no space in such a system for small companies, farmers co-operatives or farmer/breeders.

In developing countries, farmers play a significant role as breeders of new varieties. They often release very successful varieties by crossing and selection from their fields. These varieties are released for use as such. In addition, in almost all cases, these varieties are taken up by agriculture research stations as breeding material for producing other varieties. Such farmer/breeders would not be able to participate in an expensive system like UPOV. Their material along with their labour and innovation would be misappropriated by those with the money to translate such valuable germplasm into money-spinning varieties registered in UPOV. Poor farmers unable to pay the costs of getting an UPOV certificate would tend to sell their varieties for small sums to larger seed companies. This will be the ultimate irony, creating an institution that will snatch away from the farmer his material and his opportunities.

Convention of Farmers and Breeders (CoFaB)

Gene Campaign and the Centre for Environment and Development have prepared an alternative treaty to UPOV to provide a forum for developing countries to implement their Farmers and Breeders Rights. This treaty is called the **Convention of Farmers and**

Breeders, CoFaB for short. CoFaB has an agenda that is appropriate for developing countries. It reflects their strengths and their vulnerabilities. It seeks to secure their interests in agriculture and fulfil the food and nutritional security goals of their people.

This treaty designed for interaction between developing countries seeks to fulfil the following goals:

- * Provide reliable, good quality seeds to the small and large farmer
- * Maintain genetic diversity in the field
- * Provide for breeders of new varieties to have protection for their varieties in the market, without prejudice to public interest.
- * Acknowledge the enormous contribution of farmers to the identification, maintenance and refinement of germplasm
- * Acknowledge the role of farmers as creators of land races and traditional varieties which form the foundation of agriculture and modern plant breeding,
- * Emphasise that the countries of the tropics are germplasm owning countries and the primary source of agricultural varieties
- * Develop a system wherein farmers and breeders have recognition and rights accruing from their respective contribution to the creation of new varieties

The salient features of COFAB are as follows

1. **Farmers rights:** Each contracting state will recognise the rights of farmers by arranging for the collection of a Farmers Rights fee from the breeders of new varieties. The Farmers Rights fee will be levied for the privilege of using land races or traditional varieties either directly or through the use of other varieties that have used land races and traditional varieties, in their breeding program.

Farmers Rights will be granted to farming communities and where applicable, to individual farmers. Revenue collected from Farmers Rights fees will flow into a National Gene Fund (NGF) the use of which will be decided by a multi-stakeholder body set up for the purpose. .

The Rights granted to the farming community under Farmers Rights entitles them to charge a fee from breeders every time a land race or traditional variety is used for the purpose of breeding or improving a new variety. Rights granted to the farmer and farming community under Farmers Rights are granted for an unlimited period.

2. **Breeders rights:** Each member state will recognise the right of the breeder of a new variety by the grant of a special title called the Plant Breeders Right.

The Plant Breeders Right granted to the breeder of a new plant variety is that prior authorisation shall be required for the production, for purposes of commercial and branded marketing of the reproductive or vegetative propagating material, as such, of the new variety, and for the offering for sale or marketing of such material. Vegetative propagating material shall be deemed to include whole plants.

The breeder's right shall extend to ornamental plants or parts of these normally marketed for purposes other than propagation when they are used commercially as propagating material in the production of ornamental plants or cut flowers.

Authorisation by the breeder shall not be required either for the utilisation of the new variety as an initial source of variation for the purpose of creating other new varieties or for the marketing of such varieties. Such authorisation shall be required, however, when the repeated use of the new variety is necessary for the commercial production of another

variety. At the time of application for a Plant Breeders Rights, the breeder of the new variety must declare the name and source of all varieties used in the breeding of the new variety. Where a land race or farmer variety has been used, this must be specially mentioned.

In order to promote a more sustainable kind of agriculture and without any prejudice to the quality and reliability of the new variety, CoFaB enjoins breeders of new varieties to try to base the new variety on a broader rather than a narrower genetic base, in order to maintain greater genetic variability in the field. Further, a variety for which rights are claimed must have been entered in field trials for at least two cropping seasons and evaluated by an independent institutional arrangement. The breeder at the time of getting rights will have to provide the genealogy of the variety along with DNA finger printing and other molecular, morphological and physiological characteristics. The right conferred on the breeder of a new plant variety shall be granted for a limited period, depending on the variety.

In the event of a variety becoming susceptible to pest attack, the normal period of protection may be curtailed to prevent the spread of disease. In order to monitor this, periodic evaluations will be undertaken. The breeder or his successor shall forfeit his right when he is no longer in a position to provide the competent authority with reproductive or propagating material capable of producing the new variety with its morphological and physiological characteristics as defined when the right was granted. The breeder will also forfeit his right if the "Productivity Potential" as claimed in the application is no longer valid.

To give primacy to the goals of food security, it has been provided in CoFaB that the right of the breeder will be forfeited if he is not able to meet the demand of farmers, leading to scarcity of planting material, increased market price and monopolies. If the breeder fails to disclose information about the new variety or does not provide the competent authority with the reproductive or propagating material, his right will be declared null and void.

Current status

After the progressive Indian legislation, with strong rights for farmers, the recent decision of the Indian government to join UPOV, has stunned the international community and those who have fought hard to keep open the flexibility provided in TRIPs for countries to draft a *sui generis* legislation to suit their needs. The Indian decision is even more perplexing, given that UPOV is not even mentioned in the WTO/TRIPs and joining it is not required.

The Indian government points out that India has applied to join the 1978 UPOV Convention, not the far more draconian 1991 version. In this context, it needs to be understood that a soft landing into UPOV via the 1978 Convention is only temporary in nature. Article 37(3) of the UPOV 1991 Convention clearly states that after December 31, 1995 all countries, including developing countries, who wish to join UPOV must accede to the 1991 Convention. Yet India has been allowed to join the 1978 Convention. The obvious benefit to UPOV in bending their own regulations (Article 37(3) UPOV 1991) is that in encouraging India, a large developing country with major public and private plant breeding sectors, to join, other Asian countries will follow suit rather than try and introduce their own *sui generis* legislation. To defeat UPOV's intentions, Gene Campaign has launched a full fledged social, political and intellectual campaign against the Indian government's decision and is trying to have the decision to become a UPOV member, overturned.