

Making a Case for Farmers' Rights for the Benefit of Farmers under the Malaysian Plant Variety Law

¹Murshamshul Kamariah Musa, ¹Zuhairah Ariff Abd Ghadas and ²Shahril Nizam Md Radzi

¹Faculty of Law & International Relations, Universiti Sultan Zainal Abidin,
Kuala Terengganu, Terengganu, Malaysia

²Faculty of Entrepreneurship and Business, Universiti Malaysia Kelantan,
City Campus, Pengkalan Chepa, Kota Bharu, Kelantan, Malaysia

Abstract: Farmers' Rights concept has been articulated under Article 9 of the FAO Treaty to be carried out by national governments as a measure towards strengthening the rights of farmers. The four core principles namely right to seeds, right to traditional knowledge, right to equitable benefit sharing and right to participate in decision making, should be given legal recognition either by adopting it as part of a legislation or policies benefiting the farming communities particularly for small subsistence farmers in developing countries such as Malaysia. Small farmers' link and pivotal role in ensuring continuity of food production and security is undeniably important, requiring urgent attention by national governments. This paper highlighted the significant contributions of small farmers in securing food production with its surrounding issues and further demonstrates the need to integrate the Farmers' Rights concept into Malaysia's plant variety law. Applying doctrinal analysis to relevant international treaty, statutory provisions and relevant government policies, this paper argues that the four core principles enumerated under Farmers' Right concept should be seriously considered as a mechanism to protect the interests of small farmers under the intellectual property law regime.

Key words: Farmers' Rights • International Treaty on Plant Genetic Resources • The Protection of New Plant Varieties Act 2004 • Small farmers

INTRODUCTION

Two of the most important genetic resources in the agricultural field are of plants and animals. Both resources have been utilised by farmers for breeding purposes since the start of the agrarian and recent developments in modern biotechnology, particularly via genetic engineering methods; have significantly increased the use and value of these genetic resources [1]. Plant genetic resources (henceforth referred as PGR) value in the world's economy is incalculable as they constitute the main source of genetic material for development of food crops and medicinal plants, towards the betterment of global nutrition and health [2]. Highly regarded as the most essential category of biological resources, PGR provides foundation for all food production and the key to feeding unprecedented number of people in times of climate and environmental change. Being an important

part of world biological diversity, plants provide stability to the world's ecosystem as habitat for humans and animals as well as essential resources of economic and cultural importance for mankind - providing food, fuel, fibres for clothing and shelter, fodder for animals and high medicinal values. Nutritionally, PGR provides the source of all the carbohydrates (wheat, rice, maize, legumes) and 75 per cent of protein required for human dietary consumption [3]. The value of PGR to farmers are not only for their obvious benefits to humans but most importantly, for their inherent genetic traits. For food security purposes, every nation depends on food crops domesticated either locally or elsewhere and the interdependence levels between countries for agricultural PGR are high [4]. Farmers globally, be them small subsistence group or large scale industrialist, developed, enhanced and conserved a variety of PGR and these particular communities remains as stewards

of PGR through their own methods of selection, refining, maintaining, sharing and trading these particular genetic resources throughout their farming activities [5].

Importance of Plant Genetic Resources for Food and Agriculture: Plant genetic resource for food and agriculture (henceforth referred as PGRFA) is a term referring to food crop plants and is an important class of human-developed PGR. The diverse group of PGRFA is highly valued in plant breeding as it assists in developing new and better varieties of crops [6]. The diversity of genetic materials contained in PGRFA either from traditional farmers' grown varieties, modern breeds of crops or wild relatives of these PGRFA, constitute an important component of agro biodiversity [7]. Traditional farmers (as opposed to modern industrialist farmers) have contributed to the creation, conservation, exchange and knowledge of genetic and species diversity of PGRFA through knowledge and expertise passed on from one generation to another. These farmers have built up genetic diversity of crops with increased quality in terms of palatability and storage quality by their practises of seed selections for re-planting purposes. Seeds selected for breeding purposes fulfil specific characteristics deemed suitable by farmers for their farming environment, with high economic value, displaying agronomic stability and tolerance to disease and pests. These seeds are acquired by farmers either from the harvest of their own fields or through sale or exchange with neighbouring farming communities [8].

Farmers' efforts at maintaining genetic diversity of PGRFA, particularly of the major staple crops of subsistence farmers, have helped in food security by offering greater defences against vulnerability to diseases, pests and environmental changes as well as enhancing harvest security [9]. Majority of subsistence and resource-poor farmers in developing countries continue their reliance on the traditional practices of saving, exchanging and selling the seeds from their own harvest to ensure continuous food security for their households. Farmers are able to gain access to different genetic varieties of crops through this informal seed system, allowing them to select desired traits and improve their traditional crop varieties to better suit the local environment. The informal communal seed system, which values agricultural biodiversity created and preserved such diversity to be in tandem with local agricultural environments [10].

Biotechnology Innovation and its Impact:

Biotechnological innovation involving PGR is an evolutionary process of agriculture which has directly affected the farming community. The revolution and growing knowledge in genetics engineering have consequently changed plant breeding into a more complex, scientific processes involving a greater degree of strategic manipulations presently resembling modes of industrial innovations and production. The breeding of new varieties of plants has shifted from farmers' field to scientists' laboratories [11]. The expansion of intellectual property rights (henceforth referred as IPRs) particularly plant varieties rights and patents into PGR, has created controversies about the traditional farmers-centred practices. The private and individual nature of the IPRs is at odds with the traditional farming practices which are deeply rooted in communal good. The farmers may be considered as committing criminal acts of piracy when they continue with their millennium-old practices of saving, selecting, selling and exchanging seeds from their own field with others where the seeds are protected under the IPRs [12].

Oguamanam posits that two primary approaches to tackle food security concerns are these traditional agricultural practices combined with modern day agricultural biotechnology. The farmers' practises boost genetic diversity of PGRFA; ensuring continuous supply of raw materials for modern plant breeding. The most advance biotechnology techniques will then utilise these raw materials to the fullest to create new varieties of crop plants for agricultural uses. Both methods are mutually beneficial and contribute to global food production. He also points out that despite the mutual beneficial relationship between traditional farming practises and modern agricultural biotechnology, issues of reward and protection between the two camps remains contentious from both legal and policy perspective. He further argues that IPRs, in the form of plant breeders' rights (hereinafter referred as PBR) and patents, which are used as mechanism for reward and protection of knowledge, is unable to provide the proper balance of rights and responsibilities between the two camps. He concludes that supporting legal framework which undermines the role of traditional farmers and their agricultural practises, in favour of modern agro-biotech practitioners, may hamper efforts of food security and sustainable agriculture as it would result in farmers depending upon corporate seed producers and monopolies of the biotechnology proprietors [13].

Plant variety protection (PVP) or also known as plant breeders' rights (PBR) is a form of IPRs which grants exclusive rights to breeders of new varieties of plants to exploit their varieties. This particular right enables the holder of such right to restraint others from reproducing a new plant variety which has been protected under it, an exclusiveness of ownership subject to similar limitations which are quite common to other IPRs. It has been described as an independent *sui generis* form of protection specifically tailored for the purpose of protecting new plant varieties [14]. The exclusive rights granted to breeders are to ensure the breeders of their opportunity to recoup the expenses of their research into a new or improved plant variety. It was argued that the exclusive rights granted to the breeders should be balanced with a society's legitimate rights – the rights of its farmers and agricultural communities, to be recognised in any plant variety protection legislation. The opening to do so, present itself through the concept of Farmers' Rights [15].

The importance of PGRFA's diversity and farmers' contributions towards agricultural diversity and food security is recognised by the Food and Agriculture Organization of the United Nations [16] (henceforth referred as FAO). The International Treaty on Plant Genetic Resources for Food and Agriculture (henceforth referred as FAO Treaty) acknowledges [17] the enormous role of PGRFA in achieving the goals of Rome Declaration on World Food Security [18]. The FAO Treaty which focuses exclusively [19] on PGRFA promotes conservation and the sustainable use of PGRFA to ensure genetic diversity and food security. In order to achieve these aims, the FAO Treaty proposes implementation mechanisms in the form of Farmers' Rights concept, a multilateral system of benefit sharing and a funding strategy [20].

The role and contribution of farmers globally towards the conservation and development of PGRFA diversity, is affirmed in Paragraph 7 of the Preamble to FAO Treaty which also introduces the concept of Farmers' Rights.

Affirming that the past, present and future contributions of farmers in all regions of the world, particularly those in centres of origin and diversity, in conserving, improving and making available these resources, is the basis of Farmers' Rights.

Such affirmation is again confirmed in Article 9.1 of the FAO Treaty [21], emphasising the importance of PGRFA as a source for food and agricultural production globally and the role played by farmers in conservation and development of PGRFA.

Farmers' Rights: Farmers' Right is a concept which seeks to recognise the contributions of traditional farmers, particularly in the developing world towards the preservation, improvement and conservation of plant genetic resources in the agricultural field. This concept called for a recognition and reward to farmers for their effort in conservation of plant genetic diversity and protection of farmers' traditional farming and seed-saving practises from the ambit of breeders' exclusive rights. These rewards can either be monetary and non-monetary through benefit-sharing mechanisms or by enabling farmers to claim exclusive rights over plant varieties which they cultivate traditionally [22]. Four core principles of Farmers Rights concept has been articulated under Article 9 of the FAO Treaty to be carried out by national governments as a measure towards strengthening the rights of farmers. The four core principles namely right to seeds, right to traditional knowledge, right to equitable benefit sharing and right to participate in decision making should be given legal status either by adopting is as part of a legislation or policies benefiting the farming communities particularly for small subsistence farmers in developing countries such as Malaysia. The undeniable link between the pivotal role which farmers particularly subsistence farmers play in ensuring continuity of food production and security is undeniable. Thus, there is an urgent need for national governments particularly from developing countries of which Malaysia is one of them to pay greater attention to these farmers.

Under the FAO Resolution 5/89, the international community was vested and entrusted, to support farmers for their continuous contributions to the conservation and sustainable use of PGRFA by providing funds and assistance to these farmers and ensuring full benefit-sharing from commercial uses of any these resources [23]. Despite this appeal to the international community, responsibility for implementing the Farmers' Rights concept, as officially recognised by the FAO Treaty [24] rests upon national governments. The biggest challenge at present is translating Farmers' Rights into practical realisation due its broad definition under the FAO Treaty, as it has proven to be quite difficult to enact despite being widely discussed at international fora. Suggestions of measures for the protection and promotion of rights of farmers have been made in the FAO Treaty, nonetheless they are not legally binding, leaving governments with the freedom to choose the most appropriates measures they deem fit and appropriate to suit their needs and priorities. Being voluntary measures which can be subjected to a country's national legislation,

the furtherance of these measures namely the rights to protection of traditional knowledge, benefit sharing and participation in decision-making processes are dependent on the political will within the governments and demands from civil society organisations and interested groups [25].

Farmers' Rights as a Mechanism: There is a need to address the ability of farmers to continue their farming practices of seed saving, exchange and to have autonomy over their own seeds to ensure continuing and security of food production and crop genetic diversity. It is reiterated that through the implementation and/or strengthening of Farmers' Rights concept by each individual country such possibility is heightened.

Farmers' traditional seed saving practises have been increasingly delegitimised due to the enlargement of IPRs into agricultural field. Borowiak views the Farmers' Rights concept as a 'strategy of resistance' against the perceived inequities of IPR regimes for PGRFA. He postulates that the concept should be recognised as a unique form of right - different from PBR to avoid the possibility of the concept from succumbing to the same fallacies and inequities which have triggered it in the first place. The Farmers' Rights concept can provide a platform whereby farming communities can demand and seek better recognition for their contributions, together with increased autonomy over their seeds and traditional agricultural practices. This Farmers' Rights concept is viewed as better suited than the conventional IPR to encourage innovations in farming communities and for registering innovations which are communally-owned knowledge [26].

The vital role of small farming communities in food security as the conservers and stewards of plant genetic diversity especially PGRFA, should be legally recognised and rewarded for their continuous efforts. The support and recognition through Farmers' Rights means that besides monetary rewards, other non-monetary sharing benefits such as support in conservation efforts, facilitating access to better seed varieties and cooperation between breeders and farmers can be achieved. Such efforts are crucial in providing an incentive and for the development of PGRFA, which constitute the basis of food and agriculture production throughout the world. It is evident that there is a strong need to maintain appropriate legal framework to tackle the imbalances in the exchange and usage of PGR between farmers and breeders, particularly traditional farmers to ensure their efforts and interests are not marginalised under the intellectual property law regime.

Although a framework is already in place for the realisation of the Farmers' Rights as perceived under Article 9 of the FAO Treaty, it has not created a deep impact at international level. Regardless of the slow process at the global level, individual states should play a more active role towards the realisation of Farmers' Rights especially in the developing countries to ensure the continuous livelihood of the large population of rural farming communities in those regions. Instead of competing or trying to be IPR-like, Farmers' Rights should reflect the particular needs and address the concerns of each particular country as echoed throughout the FAO Treaty. Thus it is essential to guarantee that the small resource farmers are not left out for equity reasons by creating policies which recognises their essential role in food production. These policies may include the empowerment of farmers by including the four core rights as enumerated under Article 9 of the FAO Treaty in Malaysian legislations namely the rights of farmers to their saved seed, right to traditional knowledge, their right to equitable benefit-sharing and their right to participate in decision making processes. Small farmers who are the first link to conservation of crop diversity and continuous food production may have a bigger say through this concept. The advocates for empowerment of small farmers in Malaysia presently, stress more on the economic improvement of small farmers' [27] but leave out their legal empowerment which can be argued for under the Farmers' Rights framework.

Malaysia has acceded to the International Treaty on Plant Genetic Resources for Food and Agriculture (FAO Treaty) on 5 May 2003 as part of its international commitments [28]. As expounded above, the Treaty recognises the contributions of farmers to the development and conservation of plant genetic resources for food crops and agriculture through a concept known as Farmers' Rights [29]. Malaysia is also a member of the World Trade Organizations (WTO) which regulates international trade between governments. In compliance with the requirement of Article 27.3(b) of Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) which is a trade instrument under the auspices of WTO; Malaysia has enacted the Protection of New Plant Varieties Act of 2004 which grants exclusive intellectual property rights, the plant variety protection (PVP), to plant breeders. The question remains as to what extent Malaysia as a signatory to both FAO Treaty and member of WTO, has integrate the Farmers' Right concept as a mechanism to benefit farmers into the plant variety protection law. In order to answer the above question, it is imperative to examine the provisions of the Malaysian

Protection of New Plant Varieties Act 2004 and identify relevant provisions which confer protection or safeguard the four core rights of the Farmers' Rights concept to ensure continuous source of livelihood for the farming community and towards crop genetic biodiversity conservation for the nation.

Protection of New Plant Varieties Act 2004: The Protection of New Plant Varieties Act 2004 (PNPV Act 2004) is an intellectual property legislation that specifically regulates farmers' rights and new plant variety in Malaysia. The Act was gazetted on 1 July 2004 and came into operation since 20 October 2008. This Act is supplemented by the Protection of New Plant Varieties regulations 2008 [30]. The Malaysian PNPV Act 2004 was based on India's Protection of Plant Varieties and Farmers' Rights Act 2001 (PPVFR 2001) and slightly departs from UPOV 1991 [31]. This Malaysian statute contains specific provisions for protecting the rights of the small farmers and traditional farming communities although its main objective is to protect plant breeders' rights over their newly created varieties [32]. In similar manner to Malaysia, India's Protection of Plant Varieties and Farmers' Rights Act in 2001 (PPVFR 2001) also contains specific provisions which integrate the rights of breeders of plant varieties and address the concerns of farming communities of India in the agricultural industry [33]. India's plant variety legislation has been lauded as a model which has successfully created a *sui generis* system which takes into account the agricultural biotechnology processes and their impacts on farmers and seed industries of India [34]. The four core principles enumerated under Article 9 of the FAO Treaty (right to seed, right to traditional agricultural practises, right to benefit sharing, right to decision making) has been encapsulated in India's plant variety law for the benefit and to ensure continuous food security and production for the whole India's farming community [35].

An initial examination of the provisions in the PNPV Act 2004 indicates that there has been inclusion of certain core principles of the Farmers' Rights into the plant variety law. The right to save seed has been included in Section 31(1)(d),(e) and (f) of the Malaysian plant variety law. The section allows small farmers in Malaysia, whose land holding did not exceed 0.2 hectares, to use, save, exchange and sell farm-saved seeds from their own field, subject to certain limitations. The right to save and deal with protected seed, according to this section is only available to small farmers who are having difficulty to continue farming for the season and allowable only to the extent of the amount of seed he normally used on his

holdings. As Singh and Manchikati point out, in contrast to India, Malaysia's recognition of the rights of farmers to save seed and related rights are more in the nature of exceptions to a breeder's rights rather than a stand-alone right [36].

Right to traditional agricultural practises can be gathered from Section 12(1)(e) of the Act which requires an applicant for a new variety to disclose information relating to the source of genetic materials used in the breeding of a new variety. Paragraph (f) of the same section necessitates the inclusion of any written prior informed consent if the genetic materials used are from traditional varieties. Section 23 provides a non-compliance to provide necessary documents and relevant information under Section 12 is subjected to rejection of the application. Section 13(2)(d) and 14(2) enable farmers to apply for registration of their traditional variety or any variety of plant that they develop similar to a breeder. This is a way to give recognition to farmers' right to traditional agricultural practises.

The PNPV Act 2004 has no specific provision on benefit sharing mechanism or system between farmers as contributors of plant genetic materials for any registered plant variety. Though there is a requirement to obtain written consent if a commercial breeder make use of traditional varieties in a new plant variety in Section 12 (f) and (g) of the Act, the whole Act is silent on the methods or implementation of benefit sharing between farmers and commercial breeders.

The Malaysian Act does not have formal provisions for involvement of any farmers' organisations in the Plant Varieties Board. Section 5 (1)(a) to (l) of the PNPVA 2004 outlines membership of the Board as thirteen, which, among others, includes the Directors General from the Department of Agriculture in Peninsular Malaysia, Sabah and Sarawak and from the Malaysian Agricultural Research and Development Institute (MARDI). The composition of the representatives to the plant variety board are not selected by farmers' organisation but rather appointed by the governments. This raises the pertinent question as to whether the right of farmers to participate in decision making processes in matters concerning them are legally recognised under the plant variety law of Malaysia.

Being an exploratory legal study on the legal safeguard on the Farmers' Right concept, this paper recommends further empirical research be carried out in order to ascertain the true extent or any other strategy which have been employed as mechanisms to carry out Malaysia's obligations articulated under Article 9 of the FAO Treaty.

CONCLUSION

Undisputedly, small farmers have given significant impact to the development of biodiversity and food security all over the world. These contributions should be recognised at domestic as well as international level, to ensure their sustainability in their continuous effort. An acknowledgement to their four core rights as stated in Article 9 of FOA Treaty and Malaysian PNPV 2004 are insufficient to accord meaningful legal protections for small farmers in developing countries such as Malaysia, if such legal frameworks are not strongly supported along with commitments and cooperation from national governments and their respective agencies regulating and overseeing agriculture and farmers' interests.

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16. As a specialised agency established in 1945 under the auspices of United Nations, FAO is an intergovernmental organisation, which is linked to the UN Economic and Social Council. FAO efforts are all aimed towards achieving food security for all, ensuring people regular access to enough and quality to sustain healthy lives. Among its main objectives are increasing levels of nutrition, improving agricultural productivity and conditions of rural populations and thus contributing towards expansion of world economy. See www.fao.org for details on the organisation.
17. See paragraph 4 of the Preamble (Appendix 1).
18. This particular declaration was adopted in 1996, together with the World Food Summit Plan of Action during the World Food Summit held in Rome. The Summit was an event discussing on issues of food security and on measures to tackle the problem of food insecurity globally. Both of these documents form the initial framework for ongoing efforts to eliminate hunger. The World Summit Plan also recognises the need for farmers and farming communities to have easy access to PGRFA as a measure to combat food insecurity under paragraph (f) of Objective 2.1 of its Plan of Action. See Gibson, M., 2012. The Feeding of Nations: Redefining Food Security for the 21st century, CRC Press Inc., pp: 284-285.

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21. Article 9.1: “The Contracting parties recognise the enormous contribution that the local and indigenous communities and farmers of all regions of the world, particularly those in the centres of origin and crop diversity, have made and will continue to make for the conservation and development of plant genetic resources which constitute the basis of food and agriculture production throughout the world.”
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- 28 See under List of Multilateral Treaty entered by Malaysia under the official website of Ministry of Foreign Affairs, Malaysia at www.kln.gov.my
29. See Article 9 of the FAO Treaty.
30. See the Department of Agriculture, Malaysia website information on the plant variety protection system in Malaysia at <http://pvpbkkt.doa.gov.my> (31 Jan 2013).
31. UPOV is the acronym for the Convention's French name –L' Union internationale pour la Protection des Obtentions Vegetales and was entered into force in 1968. International Convention for the Protection of New Varieties of Plants (UPOV Convention) is an international treaty which provides recognition to the rights of commercial breeders of new plant varieties through plant breeders' rights (PBR). It was constituted in 1961 and at its earliest stage the member state was mostly European countries. It was subsequently revised in 1972 and 1978 and with further revision in 1991; the Convention strengthened the rights of commercial breeders as against the farmers. The rights of farmers were diluted and made optional pursuant to these amendments. See Sexton, C. 2008. A Review of the Enforcement of Plant Breeder's Rights. *Intellectual Property Forum (75)*, p: 2.
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