

RESEARCH BRIEF

THE RIGHT TO SEEDS AND INTELLECTUAL PROPERTY RIGHTS

KEY MESSAGES

- For over 10,000 years, peasants have saved, selected, exchanged and sold seeds, as well as used and reused them to produce food. These customary rights have been recognized in international law since 2001, in response to new challenges posed by the protection of intellectual property rights over seeds at the World Trade Organization (WTO) and the International Union for the Protection of New Varieties of Plants (UPOV).
- Today, the overwhelming majority of people living in rural areas in developing countries rely on peasant food and seed systems, which are essential to their own food security and to global food security and biodiversity. The recognition of the right to seeds in the UN Declaration on the rights of peasants and other people working in rural areas (UN Declaration) currently being negotiated at the UN Human Rights Council is therefore crucial for the realization of the human rights (HR) of peasants as well as of the majority of the world population.
- In drafting the UN Declaration, negotiators should define the core elements of the right to seeds, including peasants' rights over farm-saved seeds of peasants' varieties, states' obligations to respect, protect and promote peasant seed systems, states' obligation to support research and development that contribute to the realization of peasants' right to seeds, and peasants' rights over farm-saved seeds of varieties protected by intellectual property rights.
- Property rights over seeds protected at UPOV and WTO (in many cases held by corporations) are not HR. As HR are higher order norms, once the UN Declaration is adopted, states should revise national laws and trade agreements, to make sure that they do not infringe, but facilitate the realization of peasants' rights to food and seeds. The protection of the rights to health and access to medicines by the UN human rights system, and the solution found at WTO in 2001, offer a relevant precedent.

MARCH 2017 | CHRISTOPHE GOLAY

INTRODUCTION

Peasants face many challenges as a result of international intellectual property law, which provides enhanced protection for intellectual property rights over seeds. International law also offers a number of opportunities for peasant communities in relation to the recognition of their right to seeds, such as that provided by the draft UN Declaration on the rights of peasants and other people working in rural areas (UN Declaration).

This research brief summarizes key issues linked to the recognition of peasants' right to seed in international human rights (HR) law, and potential tensions with intellectual property rights. It presents their existing protection in international law, as well as unequal implementation at national level. It then defines the core elements of the right to seeds that should prevail in the HR system.

PEASANTS' RIGHT TO SEEDS AND INTELLECTUAL PROPERTY RIGHTS IN INTERNATIONAL LAW

Customary rights of peasants to save, select, exchange and sell seeds, as well as use and reuse them to produce food have been exercised for thousands of years. States recognized these customary rights in adopting the International Treaty on Plant Genetic Resources for Food and Agriculture (the Plant Treaty) in 2001. The UN Declaration on the Rights of Indigenous Peoples adopted in 2008 also recognized indigenous peoples' right to maintain, control, protect and develop their seeds and property over these seeds (article 31).

THE PLANT TREATY (2001)

In the Preamble of the Plant Treaty, states affirmed that 'the rights recognized in this Treaty to save, use, exchange and sell farm-saved seed and other propagating material (...) are fundamental to the realization of Farmers' Rights, as well as to the promotion of Farmers' Rights at national and international levels'. In its article 9, they recognized that provisions of the treaty shall not be interpreted to limit 'any rights that farmers have to save, use, exchange and sell farm-saved seed or propagating material'.

Binding international treaties also protect intellectual property rights over seeds. The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS agreement),

adopted at the World Trade Organization (WTO) in 1994, provides that WTO members must protect intellectual property over plant varieties either by patents, or by an effective sui generis system (a system of its own kind), or a combination of both (article 27). A model to protect plant

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varieties is proposed by the International Union for the Protection of New Varieties of Plants (UPOV) and its International Convention for the Protection of New Varieties

of Plants. The 1991 version of the UPOV Convention grants breeders at least 20 years of rights over plant varieties that are new (i.e. have not yet been commercialized in the formal market, or listed in an official seed catalogue), and meet the criteria of being distinct, uniform and stable (article 5).

The uniformity and stability requirements imply that the varieties that peasants often breed and use, which tend to be inherently unstable and in permanent evolution, cannot be protected. Earlier versions of the UPOV Convention banned peasants from selling protected seeds and the 1991 version also prohibits peasants from exchanging these seeds, providing that peasants may save and re-use protected seeds only in exceptional circumstances.

The protection of intellectual property rights over seeds under the TRIPS agreement and UPOV Convention, and the promotion of commercial seed systems have posed serious challenges to the protection of customary rights of peasants to seeds, and to the maintenance of peasant seed systems and agro-biodiversity.

FOR THE FORMER UN SPECIAL RAPporteur ON THE RIGHT TO FOOD, OLIVIER DE SCHUTTER

'[I]ntellectual property rights reward and encourage standardization and homogeneity, when what should be rewarded is agrobiodiversity, particularly in the face of the emerging threat of climate change and of the need, therefore, to build resilience by encouraging farmers to rely on a diversity of crops.'

UNEQUAL IMPLEMENTATION AT NATIONAL LEVEL

The implementation of peasants' right to seeds and of intellectual property rights at the domestic level is unequal. The 162 members of the WTO are obliged to follow the TRIPS agreement and have protected intellectual property on plant varieties in their national laws. In doing so, some states have opted for patents, while most of the others have adopted laws to protect breeders' rights that are UPOV-compliant, very

often on the basis of technical advice provided to developing countries, or as part of trade agreements they have concluded.

The Plant Treaty protecting farmers' rights, on the other hand, has not been interpreted as obliging states to protect farmers' rights at the national level, and the overwhelming majority of states have not adopted domestic legislation for that purpose. An important exception is the 2001 Protection of Plant Varieties and Farmers Rights Act in India, through which India protected plant varieties and breeders' rights as well as farmers' rights to save, use, sow, re-sow, exchange, share and sell farm produce, including seeds of varieties protected by plant breeders' rights. The African Union also developed a progressive African Model Law for the Protection of the Rights of Local Communities, Farmers and Breeders, and for the Regulation of Access to Biological Resources, but in most African states this was not followed by the adoption of national implementing legislation.

CORE ELEMENTS OF PEASANTS' RIGHT TO SEEDS THAT SHOULD PREVAIL IN THE HUMAN RIGHTS SYSTEM

Peasants' right to seeds is intrinsically linked to the right to food for billions of people, including the most vulnerable living in rural areas in developing countries. Its recognition in international HR law is therefore crucial. The protection

of the right to seeds as a human rights norm is of a different character than the protection of the commercial interests of plant breeders and patent-holders – in many cases corporations – through intellectual property rights.

Some states argue that the right to seeds should not be recognized in the UN Declaration, because it would be in contradiction with intellectual property rights. Others assert that the right to seeds should be defined in the UN Declaration, taking intellectual property rights into account. But the majority of experts and stakeholders involved in the negotiation support the idea that peasants' rights to food and seeds should be acknowledged in the HR system as norms that prevail over commercial property interests.

To provide clarity on the topic, it is recommended that in drafting the UN Declaration, negotiators should clearly distinguish the core elements of peasants' right to seeds that imply tensions with intellectual property rights, from those that do not imply such tensions. There are no tensions with intellectual property rights when peasants exercise their customary rights to save, select, exchange and sell farm-saved seeds of peasants' varieties, and use and reuse them to produce food. The same is true when states take measures to protect these rights, promote peasant seed systems, or support research and development that contribute to the realization of peasants' right to seeds.



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These rights and states obligations could therefore be included in the UN Declaration, without any reference to intellectual property rights. This would represent a major contribution to the protection of peasants' right to seeds, as the overwhelming majority of people living in rural areas in developing countries rely on peasant food and seed systems.

Another core element of the right to seeds is peasants' rights over farm-saved seeds of varieties protected by intellectual property rights. This does lead to potential conflicts with intellectual property rights. Using language taken from the Plant Treaty, the African Model Law of the African Union, and the 2001 Protection of Plant Varieties and Farmers Rights Act in India, negotiators could recognize peasants' rights to save, use, exchange and sell at local level (but not commercialize) farm-saved seeds of varieties protected by intellectual property rights.

This formulation would take intellectual property rights into account, as their main objective is to prevent unauthorized commercial production of protected varieties, which would be respected if peasants cannot commercialize seeds of protected varieties. Given that peasants are by definition active at the local level, this could represent a

wording on which many negotiators could agree.

In addition, states could resolve remaining tensions outside the human rights system. A useful precedent in this respect is the recognition of the rights to health and access to medicines by the human rights system, and the agreement that was found at the WTO, when states adopted the Doha Declaration on the TRIPS agreement and public health in 2001.

CONCLUSIONS AND RECOMMENDATIONS

It is hoped that the system of HR protection that has developed since the adoption of the Universal Declaration of Human Rights in 1948, will soon be enhanced by a new instrument to protect the rights of peasants and other people working in rural areas, some of the most vulnerable and marginalized people in the world.

Within the negotiation on the adoption of the UN Declaration it is imperative that stakeholders find a creative way to recognize peasants' right to seeds, a right that is central for the protection of the right to food of billions of people.



RECOMMENDATIONS FOR THE RECOGNITION OF THE RIGHT TO SEEDS IN THE UN DECLARATION ON THE RIGHTS OF PEASANTS AND OTHER PEOPLE WORKING IN RURAL AREAS

In defining peasants' right to seeds in the UN Declaration, negotiators should include the following core elements of this right, possibly using agreed language that can be found in other international instruments, in particular the International Treaty on Plant Genetic Resources for Agriculture, and the UN Declaration on the rights of indigenous peoples:

- Peasants' rights to save, exchange, donate, sell, use and reuse farm-saved seeds of peasants' varieties, and to maintain, control, protect and develop these seeds and property over these seeds (and states obligations to protect these rights in their national laws)
- States' obligations to respect, protect and promote peasant seed systems
- States' obligation to support research and development that contribute to the full realization of peasants' right to seeds, including by ensuring the active participation of peasants in research and development, and by investing more into research on and development of orphan crops and seeds that respond to the needs of peasants in developing countries
- Peasants' rights to save, use, exchange and sell at local level (but not commercialize) farm-saved seeds of varieties protected by intellectual property rights

SELECTED REFERENCES ON THE RIGHT TO SEEDS AND INTELLECTUAL PROPERTY RIGHTS

[Legal Analysis on the Right to Seeds and Intellectual Property Rights \(full research study\)](#)

[Negotiation of a UN Declaration on the Rights of Peasants and Other People Working in Rural Areas](#)

[International Treaty on Plant Genetic Resources for Food and Agriculture](#)

[Reports on seeds presented by the former UN Special Rapporteur on the Right to Food, Olivier De Schutter](#)

[The Farmers' Rights Project](#)

THE GENEVA ACADEMY

The Geneva Academy provides post-graduate education, conducts academic legal research and policy studies, and organizes training courses and expert meetings. We concentrate on branches of international law that relate to situations of armed conflict, protracted violence, and protection of human rights.

SUPPORTING THE NEGOTIATION OF A UN DECLARATION ON THE RIGHTS OF PEASANTS AND OTHER PEOPLE WORKING IN RURAL AREAS

In October 2012, the UN Human Rights Council decided to elaborate a UN Declaration on the rights of peasants and other people working in rural areas. Negotiation started in 2013. The Geneva Academy project on the rights of peasants aims to support this negotiation, by providing expert advice in relation to key challenges facing negotiators, such as the need to find solutions on the recognition of new rights, including the rights to land and seeds.

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