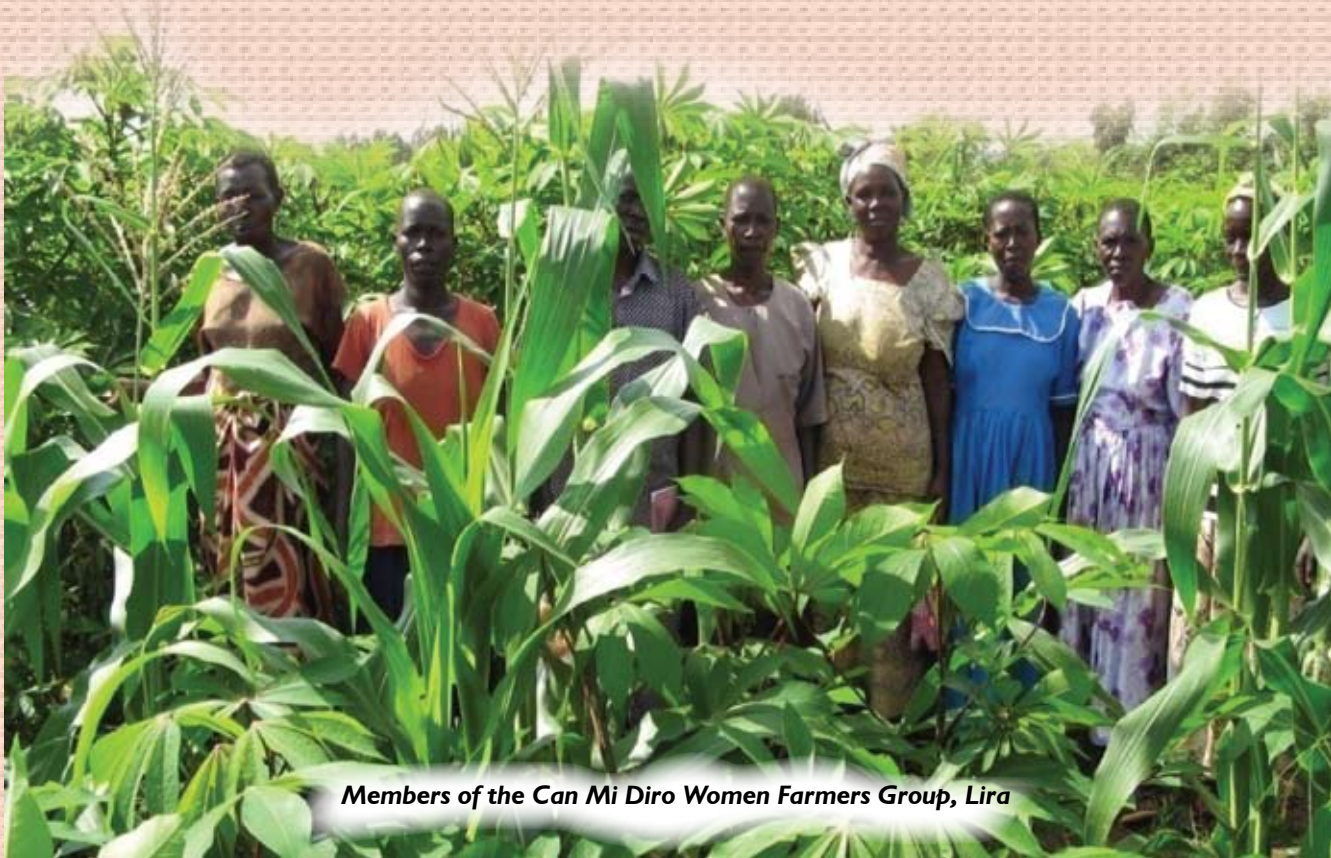




IN DEFENSE OF FARMERS' AND COMMUNITY RIGHTS

Justifying their Inclusion in Uganda's Plant Variety
Protection Legislation



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List of Acronyms

ACODE	Advocates Coalition for Development and Environment
AU	African Union
CBD	Convention on Biological Diversity
EDVs	Essentially Derived Varieties
FAO	Food and Agriculture Organisation
GDP	Gross Domestic Product
GURTs	Gene Use Restricting Technology
HIVOs	Humanist Institute for Development Cooperation
MTAs	Material Transfer Agreements
NARO	National Agriculture Research Organisation
OAU	Organisation of African Unity
PIC	Prior Informed Consent
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
UNFF	Uganda National Farmers' Federation
UPOV	Convention for the Protection of New Plant Varieties
WTO	World Trade Organization

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I. INTRODUCTION

In 2008, it was reported that President Museveni directed that issues of community rights (which in certain respects also include farmers' rights) should be removed from the draft Plant Variety Protection Bill. There is no convincing reason that was given for the President's directive. Apparently, in conformity with the President's directive, when the draft Plant Variety Protection legislation was finally gazetted as a Bill,¹ the substantive sections that had provided for the recognition and protection of farmers' and community rights had been removed.

In this paper, we provide the major justifications why the plant variety protection legislation should, in addition to protecting plant breeders' rights, also protect farmers' and community rights. We also make some recommendations on how farmers' and community rights can be protected in the proposed plant variety protection legal regime. While it is recognised that the plant variety protection law is not and should not be seen as the only legal instrument for the protection and realization of farmers' and community rights, in our view, it constitutes the most important legislation for the effective protection and realization of these rights.

Without recognising and protecting farmers' and community rights, instead of promoting "sustainability of cropping systems" and strengthening national food security as some of its major intended objectives,² the proposed plant variety protection legislation not only threatens to compromise household and national food security, but could also endanger the country's national security. The failure of the plant variety protection law to recognise and protect farmers' and community rights could also jeopardize the efforts of farmers and their communities to enrich and sustainably manage agricultural biodiversity which is the basis of agricultural production and livelihoods for many Ugandans. By not recognising and effectively protecting farmers' and community rights, Uganda would also miss out on the opportunity of using the plant variety protection legislation as an important instrument that could help the country in its fight against poverty.

It is our sincere hope that the justifications given for the need to recognise and protect farmers' and community rights and the recommended ways in which these rights can be protected will be given the necessary attention that they deserve when Parliament starts to deliberate on the proposed plant variety protection legislation.³

¹See the Plant Variety Protection Bill, Bill No.2, 2010, Uganda Gazette No.12 Vol CIII, 22 February, 2010.

²Ibid, Section 2 (d) and (e) respectively.

³The first reading of the Plant Variety Protection Bill, 2010 took place on 16th March 2010. See the official website of the Parliament of Uganda. http://www.parliament.go.ug/index.php?option=com_content&task=

2. BACKGROUND

For almost a decade, majorly in response to its international obligations under the World Trade Organization (WTO)'s⁴ Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs), Uganda has been trying to put in place a plant variety protection legal regime to provide for the protection of new plant varieties.⁵ It is important to note though that although the TRIPs Agreement is the main trigger for the introduction of plant variety protection in Uganda, it is not the only relevant international instrument with a bearing on issues of protection of plant varieties. Uganda is also party to key international instruments which as a counter balance to the introduction of intellectual property rights over new plant varieties recognize the need to protect and promote farmers' and community rights.

Key among these instruments is the International Treaty on Plant Genetic Resources for Food and Agriculture (hereinafter referred to as the International Treaty).⁶ In recognition of the enormous contribution that the local and indigenous communities and farmers of all regions in the world (*including Uganda*),⁷ have made and will continue to make in the conservation and development of plant genetic resources which constitute the basis of food and agricultural production throughout the world, Article 9 of the International Treaty recognizes farmers' rights.⁸ According to Article 9.2, the responsibility for the protection and realization of farmers' rights rests with national governments to determine in accordance with their needs and priorities and according to their national legislation. The important question to pose at this point is: According to Uganda's needs and priorities, is there need to protect farmers' rights? If so, how should they be protected? These are the major questions that the next sections of this paper address.

Suffice to point out at this point that according to the International Treaty, some of the measures that countries can take to protect and promote farmers' rights include: the protection of traditional knowledge relevant to plant genetic resources; the right to equitably participate in sharing benefits

view&id=605&Itemid=71 [Accessed on 25 March 2010].

⁴Uganda has been a member of the WTO since 1 January 1995. See the WTO official website <http://www.wto.org/> [Accessed on 10 February 2010].

⁵Article 27 (3) b of the TRIPs Agreement requires states party to provide for the protection of new plant varieties either by patents or by a *sui generis* system or by a combination of both.

⁶Uganda acceded to the International Treaty on 25/03/2003.

⁷Emphasis added.

⁸See Article 9.1 of the Treaty. According to FAO Conference Resolution 5/89, farmers' rights are defined as "...rights arising from the past, present and future contribution of farmers in conserving, improving, and making available plant genetic resources, particularly those in centres of origin/diversity." For a detailed discussion of the concept of farmers' rights, see Andersen, R (2006), *Realising Farmers' Rights under the International Treaty on Plant Genetic Resources for Food and Agriculture*, Fridtjof Nansen Institute. See also Naluwairo, R (2006), *From Concept to Action: The Protection and Promotion of Farmers' Rights in East Africa*, ACODE Policy Research Paper No. 15, 2006.

arising from the utilization of plant genetic resources and the right to participate in making decisions, at national level, on matters related to the conservation and sustainable use of plant genetic resources.⁹ In Article 9.3, the International Treaty emphatically states that nothing in Article 9 “...shall be interpreted to limit any rights that farmers have to save, use, exchange and sell farm-saved seed/propagating material, subject to national law and as appropriate.” Although the Convention on Biological Diversity (CBD)¹⁰ does not explicitly provide for the protection of farmers’ and community rights, it recognizes and calls for the protection of certain elements thereof. For instance, Article 8 (j) provides inter alia that contracting parties shall as far as appropriate respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities relevant to the conservation and sustainable use of biological diversity and encourage the equitable sharing of benefits arising from the utilization of such knowledge, innovations and practices.

Also, in 1998, the Organization of African Unity (OAU)-now African Union (AU) adopted the African Model Legislation for the Protection of the Rights of Local Communities, Farmers and Breeders and for the Regulation of Access to Biological Resources (herein after referred to as the “African Model Law”).¹¹ Uganda is one of the countries that endorsed the African Model Law. The African Model Law protects plant breeders’ rights on one hand, and farmers’ and community rights on the other. It is plausible to argue that although the African Model Law is not bidding, Uganda’s participation in its adoption and approval was an endorsement of the need to protect and promote farmers’ rights at the national level. Uganda is therefore morally bound to recognise, protect and promote these rights.

Regrettably though, in 2008, when Cabinet considered the draft plant variety protection legislation which had provided for the protection of both plant breeders’ rights on one hand and farmers’ and community rights on the other, President Museveni directed that the latter category of rights should be removed from the draft legislation.¹² The President is further reported to have condemned the local communities for “...sitting on resources without utilizing them.”¹³ It is not clear what the President meant in condemning the local communities and farmers for “sitting on resources without utilizing them.” What seems to be clear is that perhaps the President

⁹ See Article 9.2.

¹⁰ Uganda ratified the CBD on 8 September 1993. See <http://www.cbd.int/countries/?country=ug> (Accessed on 15 February 2010).

¹¹ The African Model Law was adopted by the 68th Ordinary Session of the Council of Ministers of the OAU and endorsed by the 34th OAU Summit held in Ouagadougou, Burkina Faso in June/July 1998.

¹² See Kwa, A (2008), “Uganda to debate the draft Plant Variety Protection Bill,” *The East African*, February 25- March 2, p.7.

¹³ *Ibid.*

was acting under pressure from the multinational seed companies which are said to be pressurizing Government to adopt strong intellectual property rights regimes.¹⁴ When the draft plant variety protection legislation was finally gazetted in February 2010 as a Bill,¹⁵ the substantive parts and sections that had recognised and protected farmers' and community rights had been removed.¹⁶

That Government would seem to succumb to external pressure against the rights and interests of its smallholder farmers and their farming communities whose contribution to the country's economy over the year has been enormous, is very unfortunate.¹⁷ The removal of farmers' and community rights from the plant variety protection legislation will have far reaching consequences not only for the conservation and the development of plant genetic resources for food and agriculture but also for national food sovereignty

Farmers' Rights Recognised and Protected in Section 41 (1) of the 2004 Draft Plant Variety Protection Bill

- a) Protection of traditional Knowledge relevant to farmers' varieties;
- b) The right to equitably participate in sharing benefits arising from the use of farmers' varieties;
- c) The right to participate in making decisions, at the national level, on matters related to the conservation and sustainable use of plant varieties;
- d) The right to save, use, exchange and sell farm-saved seed or propagating material; and
- e) The right to use a new breeders' protected variety to develop farmers' varieties.

Community Rights Recognised in Section 32 of the 2004 Draft Plant Variety Protection Bill

"Communities shall have the right over the following-

- a) Ownership of their plant varieties;
- b) the right to collectively benefit from the use of their plant varieties;
- c) their technologies, knowledge, innovations and practices acquired through generations;
- d) the right to collectively benefit from the utilization of their knowledge and technologies, innovations and practices
- e) their rights to use their knowledge and technologies, innovations and practices in the conservation and sustainable use of plant varieties;
- f) the exercise of collective rights as legitimate custodians, users of their varieties."

¹⁴Ibid.

¹⁵Supra note 1.

¹⁶ It was not possible to obtain the draft Plant Variety Protection Bill as was discussed by Cabinet. But according to the 2004 draft (on file) which we reasonably believe is what was discussed by Cabinet, Parts III, IV and V (Sections 32-54) were dealing with issues of farmers' and community rights.

¹⁷ The contribution of Uganda's farmers to the national economy can best be appreciated from the contribution of the Agriculture sector to the country's Gross Domestic Product (GDP). For a very long time, the Agriculture sector has been contributing the biggest percentage of the country's GDP. See Ministry of Finance, Planning and Economic Development (various years), Background to the Budget.

and national security. It is in the above context that as the Plant Variety Protection Bill awaits Parliamentary debate and approval, this paper has been prepared to provide the major justifications why that legislation should also recognize and protect farmers' and community rights. The paper also provides some recommendations on how farmers' and community rights can be protected in the proposed plant variety protection legislation.

3. WHY UGANDA'S PLANT VARIETY PROTECTION LEGISLATION SHOULD RECOGNISE AND PROTECT FARMERS' AND COMMUNITY RIGHTS

Although the plant variety protection legislation is not and should not be seen as the only avenue for the protection of farmers' and community rights,¹⁸ it constitutes the most important legislation for the effective protection and realization of these rights. It is important to recall in this regard that conceptually and historically, the concept of farmers' rights emerged as a counter balance to the protection of plant varieties through intellectual property rights like plant breeders' rights.¹⁹

It is notable that at least going by the media reports, the spirit in which farmers' and community rights were removed from the draft plant variety protection legislation was not so much that they are protected or can be protected in other legal instruments but that they don't deserve recognition and protection in Uganda.

Intellectual property rights compensate only for the latest innovations without taking into consideration the fact that, in many cases, these innovations are based on the accumulated knowledge and innovations carried out over millennia by generations of farmers and their communities.²⁰ In fact, many aspects of farmers' and community rights are best protected as either exemptions to plant breeders' rights, conditions for granting plant breeders' rights or grounds for revocation of plant breeders' rights. That is why among other reasons, it is critical that if at all Uganda is to effectively protect and realize farmers' and community rights, it must first and foremost provide for their protection in the plant variety protection legislation. But why should a country like Uganda recognize and protect farmers' and community rights in the first place? This is essentially for the following major reasons.

¹⁸ It is for instance recognized that many provisions in the National Environment (Access to Genetic Resources and Benefit Sharing) Regulations, Statutory Instrument No.30, 2005 dealing with issues of Prior Informed Consent (PIC), accessory agreements, Material Transfer Agreements (MTAs) and benefit sharing are very important for the effective realization of farmers' rights.

¹⁹ See Correa, C. M (2000), *Options for the Implementation of Farmers' Rights at National Level*, South Centre, p.5. See also Andersen (2006), supra note 8.

²⁰ Naluwairo (2006), supra note 8, p.3.

3.1 Agro-biodiversity Considerations

One of the major reasons why Uganda should protect farmers' and community rights lies in the very reason for the international recognition of these rights. The basis for the international recognition of farmers' rights lies in the enormous contribution that the local and indigenous communities and farmers of all regions of the world have made and will continue to make in the conservation, sustainable use and development of plant genetic resources which constitute the foundation of agriculture production and development throughout the world.²¹ Uganda's smallholder farmers and their farming communities are undoubtedly part of those world farmers that have enormously contributed to nurturing, enhancing and making available plant genetic resources which are the foundation of modern plant breeding and agricultural development. It is not in dispute that over the years, through their various farming techniques, innovations and practices, Uganda's farmers and their communities have developed and continue to develop many plant varieties and adapt existing ones to suit different environments and climatic conditions. In this way, the farmers enrich and contribute to the sustainable management of agricultural biodiversity which is key in guaranteeing food and livelihood security of many Ugandans. The assertion that these farmers and their communities "just sit on resources without utilizing them" is therefore not correct.

Through the protection of their traditional knowledge relevant to plant genetic resources and ensuring that farmers' and their communities benefit from the utilization of plant genetic resources, farmers' and community rights therefore represent a strategic instrument for ensuring the continuation of the farmers' practices of nurturing, maintaining and enriching agro-biodiversity.²² This is very important for ensuring the future availability of diversity of plant genetic resources which are the foundation of agriculture development and food production. Future availability of diversity of plant genetic resources is critical given that Uganda's biological resources are getting lost and eroded at very alarming levels,²³ moreover at a time when the country's population is also growing at frightening rates.²⁴

²¹ See Article 9.1 of the International Treaty. See also FAO Conference Resolution 5/89, supra note 8.

²² Reknown senior researcher on Farmers' Rights - Andersen put it succinctly that "...the realization of Farmers' Rights is a precondition for the maintenance of crop genetic diversity which is the basis of all food and agricultural production in the world." For this reason, she rightly argued that realization of farmers' rights is also a precondition for achieving the objectives of the International Treaty i.e. the conservation and sustainable use of crop genetic resources to ensure sustainable agriculture and food security. See Andersen, R (2009), *Information paper on Farmers' Rights* submitted by the Fridtjof Nansen Institute to the Third Session of the Governing Body of the International Treaty on Plant Genetic Resources for Food and Agriculture, p.2. Available at http://www.farmersrights.org/resources/global_articles_19.html (Accessed on 10 March 2010).

²³ Naluwairo, R and Mulumba, W (2006), *Towards a National Policy on Plant Genetic Resources for Food and Agriculture: The Need and Justification*, NARO Policy Briefing paper, p.2.

²⁴ Uganda's population in 2009 was estimated to be 30.7 million people compared to 24.2 million persons in 2002. See Uganda Bureau of Statistics (2009), Statistical Abstract. Available at the Uganda National Bureau of Statistics website: http://www.ubos.org/onlinefiles/uploads/ubos/pdf%20documents/2009Statistical_%20Abstract.pdf [Accessed on 5 February 2010].

3.2 Food Security Considerations

Perhaps the most important justification why Uganda's plant variety protection legislation should protect farmers' and community rights lies in the need to ensure food security. Since majority of Uganda's farmers and their communities are very poor people who cannot afford to buy commercial seeds every planting season, they rely on their traditional system of seed saving, reusing and exchange as the most important source of seed supply for agricultural production. This system, backward as it may be branded, has been very instrumental in contributing to household and national food security.²⁵ In particular, the farmers' system of seed saving, reusing and exchange has helped to ensure that farmers and their communities maintain sovereignty and control over their systems of food production, distribution and supply.

With the advent of genetic engineering techniques, which are monopolistically controlled by the big multinational companies based in the industrialized countries,²⁶ the protection of plant breeders' rights without the effective protection of the farmers' right to save, reuse, exchange and sell their farm saved seed and propagating material threatens to remove local and national control over seed and food production and place it into the hands of multinational corporations.²⁷ This would be disastrous in terms of ensuring household and national food security which is apparently one of the major objectives of the proposed plant variety protection legislation.²⁸ It is therefore essential that the plant variety protection legislation recognises and protects farmers' rights as an important mechanism for ensuring that farmers and their local communities maintain control over their systems of seed and food production, distribution and supply.

3.3. National Security Considerations

Closely linked with the need to ensure food security as a major justification for protecting farmers' and community rights, is the question of national security. Food sovereignty/security is one of the most important guarantees for ensuring national security. A nation that does not produce its own seed and food cannot be considered a secure country.²⁹ By ensuring that

²⁵ According to the Uganda Food and Nutrition Policy, it is acknowledged that subsistence farmers produce most of the food in the country. See, the Republic of Uganda (2003), *The Uganda Food and Nutrition Policy*, Ministry of Agriculture, Animal Industry and Fisheries and Ministry of Health, Section 1.3, p.3.

²⁶ Ekpere, J. A (2000), *The Protection of the Rights of Local Communities, Farmers and Breeders, and for the Regulation of Access to Biological Resources: An Explanatory Booklet*, Organization of African Unity, Lagos, p.14.

²⁷ Already, these multinational corporations are positioning themselves through different "collaborative" arrangements with Uganda's agricultural public research institutions to take over the seed industry in Uganda.

²⁸ See Section 2 (e) of the Plant Variety Protection Bill, 2010.

²⁹ See Sahai, S, *The TRIPS Agreement: Implications for Farmers' Rights and Food Security*, p.5. Available at <http://www.genecampaign.org/Publication/Article/IPR/tripsagreementImplicationFor%20FarmerRights>.

farmers and the local communities maintain control over their systems of seed and food production, distribution and supply as highlighted above, the protection of farmers' and community rights in the plant variety protection legislation would therefore also simultaneously contribute to ensuring national security.

3.4 Poverty Reduction Strategy

Over 80% of Uganda's poor live in rural areas and depend on farming to meet their every day needs and survival. Despite their enormous contribution to the country's economy,³⁰ Uganda's farmers remain undoubtedly the poorest and most vulnerable group in society. One of the major objectives of farmers' and community rights is to ensure that farmers and their communities fairly and equitably share in the benefits derived from the utilization of plant genetic resources. These benefits can be monetary or non monetary.³¹ They range from access to and transfer of technology to exchange of information, capacity building and sharing of monetary and other benefits arising from commercialization.³² The protection and effective realization of farmers' and community rights to the fair and equitable sharing of benefits arising from the utilization of plant genetic resources can therefore immensely contribute to the fight against poverty in Uganda. Also, the protection and effective realization of the farmers' right to save, use, exchange and sell their farm produce and other propagating materials means that the farmers can save a lot in terms of not having to buy commercial seeds and the necessary inputs from the market each planting season. This can therefore also be one important way in which the protection of farmers' rights can help in the fight against poverty which remains one of Uganda's major development challenges.

4. SOME KEY WAYS OF PROTECTING FARMERS' AND COMMUNITY RIGHTS

According to Article 27 (3)b of the TRIPs Agreement, which is the main trigger for the introduction of plant variety protection legislation in Uganda, states party are required to provide for the protection of new plant varieties either by patents or by a *sui generis* system or by a combination of both. The *sui generis* option gives countries like Uganda considerable flexibility and space to develop a plant variety protection legislation that not only fulfills its international obligations, but most importantly, one that helps the

pdf [Accessed on 3 February 2010].

³⁰Supra note 17.

³¹ The non monetary benefits can be quantified into monetary terms or can result into monetary benefits.

³² See Article 13 of the International Treaty. Although the benefits highlighted in this provision relate to the Multilateral System, the Article is instructive in understanding the benefits that can be envisaged under Article 9.2 (b) which provides for benefit sharing as one of the ways of realising farmers' rights.

country to achieve some of its major development objectives and priorities. Because of their potential contribution to achieving some of Uganda's major development goals including poverty reduction, food security and sustainable agriculture, the preceding analysis provided the major justification why the plant variety protection legislation should protect farmers' and community rights. The major question that remains is: How should the plant variety protection legislation protect these rights? This section provides some of the major ways in which farmers' and community rights can be protected in Uganda's proposed plant variety protection legislation.

4.1. Protection of the Right to Save, Use, Exchange and Sell Farm Saved Seed

Uganda's plant variety protection legislation should explicitly recognise and protect the farmers' right to save, use, exchange, share and sell their farm saved seed and propagating material including those from protected varieties as long as the sale is not for the purpose of reproduction under commercial marketing arrangements. In this regard, the law should render null and void any transaction that requires the farmers to give up their right. Although it is recognised that the exemptions to plant breeders' rights provided for in section 15 of the Plant Variety Protection Bill are important for the realization of the farmers' right to save, use, exchange and sell seed, this inherent entitlement of farmers must be recognized and protected in its own right not merely as an exemption to plant breeders' rights.

4.2. Prohibition Against Use of Sterile Seed Technologies

The farmers' right to save, use, share, exchange and sell seed and propagating material would be substantially weakened and would be of little value if plant breeders are allowed to use sterile seed technologies in the development of new plant varieties and seeds. The plant variety protection legislation should therefore make it an offence for any plant breeder to use sterile seed technologies. In this respect, applicants for plant breeders' rights should swear affidavits to the effect that the plant variety over which they seek protection does not contain Gene Use Restricting Technologies (GURTs)/terminator technology.³³

³³ Terminator technology refers to plants that have been genetically modified to render seeds sterile at harvest. The ultimate aim of this technology is to enable the seed companies to maximise profits by preventing farmers from saving and re-planting harvested seed as a way of forcing them to buy seeds from the commercial market every planting season. See Ban Terminator (2006), *Terminator Technology and Farmers' Rights*, available at www.banterminator.org [Accessed on 5 February 2010].

4.3. Protection of Farmers' Knowledge, Innovations and Practices

Uganda's plant variety protection legal regime should also explicitly recognize and protect farmers and their communities as innovative plant breeders. It is not disputed that the bounty of seeds that form the basis of our food and agriculture have been carefully selected, improved and developed by generations of farmers and their communities. Through their different farming techniques and practices, these farmers and their farming communities have helped to develop many plant varieties to suit many different environments and climatic conditions. It is these varieties that form the basis of modern plant breeding. Farmers are therefore also innovators who deserve to be recognised and rewarded for their innovations in nurturing and developing new plant varieties.

The law should therefore recognize and protect the knowledge, practices and innovations of farmers and their communities with respect to the conservation and development of plant varieties. One major way of doing this is by recognizing and protecting farmers' varieties under less stringent and limited requirements compared to those required of the scientific plant breeders.³⁴ For instance, because farmers' varieties are not genetically uniform, uniformity should not be a requirement for recognition and protection of such varieties. It is worth observing that the non uniform nature of farmers' varieties is instrumental in maintaining and enriching agro-biodiversity. It ensures the availability of genetically diverse plant varieties unlike the varieties bred by the modern scientists which are genetically uniform.

4.4. Register for Land races / Farmer's varieties

Another important way in which farmers and community knowledge can be protected especially from misappropriation and loss is by establishing a register for landraces and farmers' varieties. This register would be used to document farmer's varieties and their related knowledge. Documentation of farmers' varieties and their associated knowledge is very important in as far as establishing prior art for purposes granting intellectual property rights over new varieties is concerned. Documenting farmers' varieties and the associated knowledge would therefore help to ensure that no one can claim intellectual property rights over those varieties. This would help to ensure that the documented varieties and the associated knowledge remain available for farmers to share and use.

³⁴ Under the Plant Variety Protection Bill, for a plant variety to qualify for protection, it must be new, distinct, uniform and stable.

4.5. The Use of Farmers' Varieties in Breeding New Varieties

The law should also ensure that the use of farmers' varieties by the scientific breeders to breed new varieties including Essentially Derived Varieties (EDVs) is paid for. In this respect, when applying for plant breeders' rights, the applicants must disclose in the passport data the parentage of the new variety or EDV and in particular whether any farmers' variety was used. This is important for ensuring the equitable sharing of benefits arising from the use of farmers' varieties. Although the current use of farmers' varieties by commercial breeders is very limited, Andersen has rightly observed that as the genetic base for commercial plant breeding gets increasingly narrow, coupled with the effects of climate change, the need for landraces and farmers' varieties with the associated knowledge-is going to become very important in the near future.³⁵

4.6. Farmers' Use of Protected Varieties in the Development of Their Varieties

Further, the plant variety protection legislation should allow farmers to use a breeder's protected variety in the development of their varieties. This would not be unfair, because in the first place, it is generally accepted that most, if not all, protected varieties are developed from varieties that have been developed and made available by generations of farmers and their local and indigenous communities.

4.7. Joint ownership of Plant Breeders' Rights

Where the farmers and/or their communities provide the scientists/modern plant breeders with the germplasm used in the development of a new variety, the law should make it possible for them and the modern plant breeder(s) to co-own the resulting plant breeders' rights. This can be one of the ways in which the plant variety protection legislation ensures the fair and equitable sharing of benefits arising from the use of plant genetic resources. However, for this option to be successful, the farmers or their farming communities should have the capacity to monitor the commercial exploitation of such varieties and should have capacity to enforce their rights under the joint ownership arrangements.³⁶

4.8. National Farmers' Conservation and Development Fund

It is also hereby proposed that the plant variety protection law should establish a National Farmers' Conservation and Development Fund to support farmers' programmes, projects and other initiatives related to

³⁵ See Andersen R (2009), supra note 20, p.7.

³⁶ Naluwairo (2006), supra note 8, p.13.

the conservation, management, sustainable use and development of plant genetic resources. This fund should be in addition to other government initiatives supporting the farmers and should largely be managed by the farmers for instance through their umbrella organization i.e. the Uganda National Farmers' Federation (UNFF). The Fund would be managed in trust for all Ugandan farmers and the local farming communities.

Financial resources for the Fund could come from Government levies on sale of seed of new varieties, development partners, and the International Treaty financing mechanisms among other sources. Regarding the International Treaty financing mechanisms, it is important to note that Article 18 establishes a funding strategy for the treaty. In Article 18.5, the Contracting Parties agreed that priority of the funding strategy will be given to the implementation of agreed plans and programmes for farmers in developing countries, especially in least developed countries, and in countries with economies in transition, who conserve and sustainably utilize plant genetic resources for food and agriculture. Establishing the National Farmers' Conservation and Development Fund would therefore provide a mechanism where Uganda's farmers could benefit from such international financing mechanisms.

4.9. Participation of Farmers in Decision Making Processes

As one way of ensuring effective participation of farmers in decision making processes of relevance to the conservation and sustainable use of plant genetic resources as one of the major elements of farmers' rights, the plant variety protection law should ensure that farmers are adequately represented on all major decision making bodies that it establishes like the Plant Variety Protection Committee. Although the Plant Variety Protection Bill makes provision for a representative of farmers on the Plant Variety Committee, our view is that on a committee of twelve persons, farmers should be represented by at least three persons. Farmers' representation to these bodies should also be gender sensitive and should in particular ensure that the women farmers are adequately represented.

4.10. Compulsory Licensing

As one important way of ensuring that farmers and their farming communities get enough protected seed varieties at reasonable prices, the plant variety protection legislation should also provide for the possibility of compulsory licensing especially where the plant breeder of the protected variety cannot produce enough seed or where he/she sells the seeds at exorbitant prices.

5. CONCLUSION

In the process of enacting the plant variety protection legislation to fulfill Uganda's international obligations under the TRIPs Agreement, it is very important not only to be cautious of other international instruments with a bearing on the subject of plant variety protection but most important, it is critical to ensure that any legal instrument adopted contributes to the achievement of some of the country's major development goals and objectives. Plant variety protection can only make sense if it contributes to achieving the national development goals and objectives. This paper has highlighted how the protection of farmers' and community rights in the plant variety protection legislation can help in terms of achieving agro-biodiversity conservation and enrichment, food security, national security and poverty reduction. The paper has also highlighted some of the major ways in which the farmers' and community rights can be protected in the proposed Plant Variety protection law.

In Uganda's current circumstances, the protection of plant breeders' rights without the recognition and protection of farmers' and community rights will not mean much for the country. In fact, Uganda would be better off not having a plant variety protection legislation than having one which provides for protection of plant varieties through intellectual property rights without protecting farmers' and community rights. This is not to say that we do not appreciate the value of intellectual property rights in plant breeding in particular and agricultural development in general. Rather, we emphasise the point that in Uganda's circumstances, if the plant variety protection legislation is to help the country achieve some of its development goals and objectives like ensuring food security, sustainable agriculture and poverty reduction, it must also recognise and effectively protect farmers' and community rights.

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