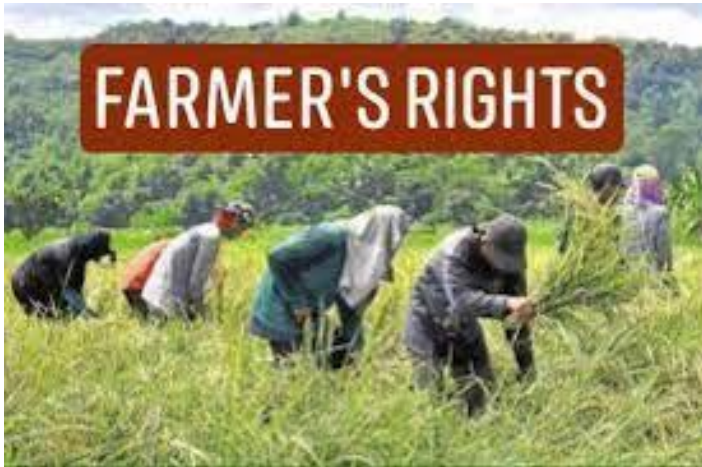




# FARMER'S RIGHT IN MALAYSIA: REVISITING THE IMPLEMENTATION OF PROTECTION OF NEW PLANT VARIETIES ACT (PNPVA) 2004



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# Outline



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# Intro (background)



- Role of farmers towards food security
- Improved crop varieties
- Farmers in Malaysia (esp) small-scale farmers, are still depending on some traditional agricultural practices
- Legislation - patents and plant breeders' right - legal implications towards those traditional agricultural practices of the farmers.



# Objectives

→to examine the existing legislation governing farmer's right in Malaysia with special emphasis on relevant provisions of Protection of New Plant Variety Act 2004 (PNPVA).

→embraces current issues in relation to PNPVA's implementation and the proposed amendment which is in progress

# Implementation of PNPVA in Malaysia: An Overview & Some Issues

- Realizing the importance of protecting new varieties of plant, Malaysia has enacted a specific legislation to protect plant varieties in 2004 by opting for a *sui generis* framework:
  - the Protection of New Plant Variety Act 2004 (PNPVA) 2004 came into operation on 20<sup>th</sup> October 2008 via the Protection of New Plant Varieties Regulation 2008.
- Plant varieties are not protectable under patent law as Patents Act 1983, via Section 13(b) expressly excludes plant variety from being patented:
- “Notwithstanding the fact that they may be inventions within the meaning of section 12, the following shall not be patentable: (b) plant or animal varieties or essentially biological processes for the production of plants or animals, other than man-made living micro-organisms, micro-biological processes and the products of such micro-organism processes.”



# Overview...



- Being a member of World Trade Organization (WTO) and a signatory to the TRIPS Agreement, PNPVA 2004 is instrumental in fulfilling the country's obligation *vis-a-vis* Article 27.3 (b) of the TRIPS Agreement:
- “Members may also exclude from patentability: (b) plants and animals other than micro-organisms, and essentially biological processes for the production of plants or animals other than non-biological and microbiological processes. However, Members shall provide for the protection of plant varieties either by patents or by an effective *sui generis* system or by any combination thereof.”
- Article 27.3(b) mandates the member countries to provide for a legal protection of plant varieties, by way of patent or alternatively, via an effective *sui generis* system which is generally interpreted as ‘unique’ or ‘of its own kind’

# Overview- Protection of farmer's rights under PNPVA 2004

- In **the interpretation section**, '**farmer**' means
- "any person who; (a) cultivates crops by cultivating the land himself; (b) cultivates crops by directly supervising the cultivation of land through any other person; or (c) conserves and preserves, severally or jointly, with any person any traditional variety of crops or adds value to the traditional variety through the selection and identification of their useful properties"
- '**small farmer**' means "a farmer whose farming operations do not exceed the size of holding as prescribed by the Minister."
- **s 31(1) PNPVA 2004** provides for the limitations of breeder's right:
- "The breeder's right shall not extend to
- (d) any act of propagation by small farmers using the harvested material of the registered plant variety planted on their own holdings;
- (e) any exchange of reasonable amounts of propagating materials among small farmers; and
- (f) the sale of farm-saved seeds in situations where a small farmer cannot make use of the farm-saved seeds on his own holding due to natural disaster or emergency or any other factor beyond the control of the small farmer, if the amount sold is not more than what is required in his own holding.

# Overview-

## Protection of farmer's rights under PNPVA 2004

**Section 14(2)** of PNPVA 2004, these farmers are required to prove that the variety they developed and cultivated satisfies the conditions of new, distinct, and identifiable. Notably, the usual conditions of a new PVP which is the 'uniform stability' is not applicable in this circumstance.

It is argued that the requirement of 'identifiable' is considered as **a lower threshold** as compared to 'uniform stability' (Musa, 2020).

This is in fact a significant feature of PNPVA 2004 as it really **balances the rights** of both categories of breeders - commercial ones as well as those traditional farming communities.

# Implementation of the PNPVA 2004

Whether the above provisions have afforded adequate protection for small, traditional farmer's and indigenous farming communities in Malaysia?

Do these provisions serve as a motivation and encouragement towards the filing and registration of a new plant variety?



# Stats from the official website of the Malaysian Department of Agriculture (DOA)

a substantial percentage of the registered varieties were made and thus belong to those commercial companies rather than individual farmers or indigenous farming communities.

The applications were ranging from new varieties of fruits, ornamentals, industrial crops, forest plants to cereals, vegetables, and mushroom.

from the year 2009 until 2018, a total of one hundred and eighty-four applications of breeder's right were received and seventy-four varieties have been published in the official gazette of the Malaysian Attorney-General's Chamber.

Out of this total number of applications,

67% was submitted by foreign companies,

27% by government agencies and public universities,

while only 3% came from private local companies and

another 3% from local individual farmers.

# Views and data from DOA (Crop Quality Control Division)



- local research and development (R&D)s in particular the public sectors, focus their breeding program on three main categories of plant, ie staple crops such as rice, sweet potato, tapioca; fruit tree crops such as durian, rambutan, carambola; and commodity crops such as oil palm, rubber, cacao, forest species.
- All these plants take longer time before a new variety could be successfully produced and then only they could be filed for registration of new plant variety.
- these plants possess a longer growing period, as compared to those foreign applications which cover mostly the annual ornamentals and vegetables.
- time-limited research grants which were allocated to public sector and this insufficiency of time and funding gave a negative impact and hindrance on the successful development of a new variety, as researchers cum breeders were not able to finish their R&D project within a short time frame.

# Views and data from DOA (Crop Quality Control Division)

local farmers and breeders have yet to fully exercise their rights and scopes as provided under the PNPVA;

local protected varieties failed to meet market demand;

the varieties that are developed as F1 hybrid seeds (*i.e.* the selective breeding of a plant by cross pollinating two different parent plants) were biologically self-protected.

→ DOA's current emphases in relation to the implementation of the PNPVA is to encourage more international companies to register and then release their new, protected varieties in Malaysia

## Malaysia: not yet a member of the International Convention for the Protection of New Varieties of Plants (UPOV)

- even though a substantial part of PNPVA 2004 provisions is in compliance with UPOV, comparatively, the former deviates from the latter in few aspects, notably, the Act incorporates specific provisions to recognize traditional variety, as well as some significant aspects of farmer's rights.
- Malaysia has always aimed high in boosting its agricultural sector and to provide strongest protection possible to the plant breeders.
- The legislation was hoped to open wider opportunities for local farmers and growers to have access to new and improved varieties, in particular for commercial farming industry.



# Towards UPOV Accession: The East Asia Plant Variety Protection Forum (EAPVP) Forum

- Malaysia has taken a significant effort in harmonizing and aligning its PVP legislation by being a member of the East Asia Plant Variety Protection Forum (EAPVP) - the official website is <http://eapvp.org/>.
- The Forum which has been established since 2007, aims to accomplish two important objectives, i.e., "(i) Strengthen national PVP system consistent with the UPOV Convention to encourage investment in plant breeding, (ii) Contribute to support achievement of UPOV membership, to facilitate harmonization of application and examination procedures, and to enhance efficient PVP cooperation in the region."
- All the East Asia countries are members of this Forum, in addition to ASEAN Plus three countries, namely China, Japan and Korea.
- The Forum holds its annual meeting, and the country reports of the meeting are conveniently available and accessible at the website.

# Towards UPOV Accession: The East Asia Plant Variety Protection Forum (EAPVP) Forum



- Malaysia has presented its individual implementing strategy during the latest round of the Forum held in November 2020- a very detailed plan towards accession of UPOV.
- in between the year 2016 to 2018, there was a series of legal consultation organized with UPOV representatives & stakeholders.
- Some of the important objectives of the legal consultations are "to seek harmonization and alignment with UPOV Convention 1991 and strengthened good relationship between Malaysia and UPOV."
- Based on the legal consultation, there was internal discussions between UPOV representatives and Malaysian Ministry of Agriculture (MOA) relating to some provisions as highlighted by UPOV Legal Advisors.
- the MOA has been organizing some consultation sessions with stakeholders since 2019 but the plan was suspended in 2020 due to pandemic outbreak.



## Towards UPOV Accession: the latest position

- DOA: the amending bill has been presented during six rounds of stakeholders' consultation sessions which involve the plant breeders' representative, NGOs and representatives from farmers' associations as mentioned above, growers, exporters, seed companies and state governments and agencies since the year 2018.
- DOA: issues concerning farmers' rights, traditional varieties and biopiracy were among the topics raised by stakeholders and those issues have been thoroughly discussed and deliberated during the sessions.

## Conclusion & recommendation



the PNPVA 2004 is unique in the sense that the provisions are enacted in such a way that they would delicately balance the different interests of commercial breeders, farmer's right and indigenous people, while implementing it as part of Malaysia's obligation under WTO

Malaysian government should always prioritize the protection given to those marginalized small farmer, local farming communities and indigenous people as they have played an important role and consistently contributed to the country's agricultural sector.



Their rights under the farmer's right concept should not be threatened or denied despite the country's effort to harmonize the law with UPOV and PVP legislation of other neighboring countries, while optimizing access of Malaysian farmers to new crop varieties and plant technologies.

After all, the enactment and implementation of PNPVA 2004 via sui generis system is allowed and recognized under TRIPS.

# Conclusion & recommendation

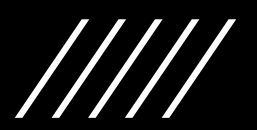


## CONCLUSION



there is always room for improvement to increase the number of varieties submitted for registration by local companies and individual farmers.

Arguably, if Malaysia proceeds towards UPOV accession by amending the relevant provisions as required by UPOV secretariat, such a step could be a regressive decision as the current protection of farmer's right will need to be sacrificed.



*The End*