

Promoting the rights of farmers and their varieties under seed policies on the African continent



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Key messages

1. A variety of international treaties and instruments influence continental, regional and national seed policies and legislation levels in Africa. Their lack of clarity complicates finding a right balance between breeders' rights and farmers' rights to the use of seed.
2. Although UPOV 1991 does not explicitly recognize farmers' rights to save, use or exchange seed, the Arusha protocol and SADC protocol on Plant Variety Protection (PVP), as well as EU experience shows that exemptions to safeguard farmers' rights are possible to co-exist with breeders' rights. However, there is a current lack of coherent and well-defined criteria that would make such exemptions and co-existence actionable.
3. The AU Seed Harmonisation Guidelines recognize farmer-managed seed systems, providing an opportunity to give clearer guidance on the implementation of farmers' rights in regional and national seed laws, showcasing best practices of AU Member States.
4. Efforts should be made to have a continent-wide system of recognition and protection of farmer varieties, landraces and indigenous varieties in Africa. This could be addressed in the seed harmonisation guidelines and the African Common Free Trade Agreement (AfCFTA) at continental level, as well as in national seed policies and legislation.
5. The EU has long experience in balancing the rights of Plant Variety Protection (PVP) holders and those of small-scale farmers, as well as protection of indigenous crop varieties and landraces; this is a transferrable experience to the African continent where improving seed policy coherence is necessary.
6. The debate on farmers' rights to seed is confounded by unclear definitions and differing connotations of terms such as farmers' rights, farmer varieties, or breeders' rights. A common understanding of what farmers' rights, farmer varieties and breeders' rights are in Africa should be sought so that the rights and obligations that accrue to each term are also well understood.

Why this policy brief?

Access to seed in the African agricultural environment remains a challenge for many (small-scale) farmers despite numerous efforts to address the problem. Seed systems in Africa are viewed as being constituted by two parts: a formal system, and a farmer-managed seed system (also referred to as informal seed system). The development of new plant varieties requires long-term investments, and breeders' rights are considered essential to encourage investments in plant breeding. Society in general, and farmers specifically, benefit from breeders' rights by making use of a wide range of new and improved varieties that are resilient to environmental stressors (e.g. drought, salinity, diseases) and/or increase crop productivity. Farmers' rights¹, on the other hand, are understood to mean among others, the right to save, use, exchange and sell farm-saved seed/propagating material. Whether breeders' rights and farmers' rights to seed are in conflict or complementary is an ongoing discussion, and ultimately depends on the provisions in national legislation.

In a recent report [Seeds, right to life and farmers' rights \(2022\)](#), the UN Special Rapporteur on the Right to Food recommended that governments recognise, support, and reward smallholder farmers and indigenous peoples as stewards of seed systems for all of humankind.

¹ The term farmers' rights is used in the context of Article 9 of the Plant Treaty. This includes: (a) Recognition of 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; (b) protection of traditional knowledge relevant to plant genetic resources for food and agriculture; (c) the right to equitably participate in sharing benefits arising from the utilization of plant genetic resources for food and agriculture; (d) the right to participate in making decisions, at the national level, on matters related to the conservation and sustainable use of plant genetic resources for food and agriculture; (e) the right farmers have to save, use, exchange and sell farm-saved seed/propagating material.

In other words, their national laws should recognise farmers' rights to seed as human rights and establish farmers' rights as the cornerstone of their national seed system. Civil society actors have expressed ongoing concerns that new seed legislations threaten farmers' rights which play an important role in the availability of seed supplied by farmer-managed seed systems. It is generally acknowledged that farmer-managed seed systems are the source of 90% of seed on the continent, and harbour genetic diversity in the form of indigenous varieties and landraces, with the potential to combat biodiversity loss and support the agroecological transition of food systems to make them more diverse and thus resilient to shocks.

With a view to informing policy dialogue, DeSIRA-LIFT² commissioned a review of the main seed policy frameworks that affect farmers' rights to seed in Africa. This policy brief summarizes the findings of the review (Munyi, 2022³), and presents key recommendations for policy makers in Africa and in the European Union.

Key findings of the report

Changing seed policies in Africa

During the past decade, Africa has witnessed a remarkable change in the landscape of seed policies and legislation as a result of international trade agreements. This is mainly because of the need to harmonise regulations on Intellectual Property Rights (IPR) and phytosanitary measures for cross-border trade. Consequently, a variety of treaties and instruments determine policies and legislation that affect seed systems. Seed laws regulate activities such as seed certification, variety release, testing and registration, phytosanitary measures, and plant breeders' rights also known as plant varieties protection (PVP), mostly to guarantee the availability of good-quality seed within the formal seed system. Concerns have previously been raised that the existing and emerging regulations do not take into account the complex realities of African agriculture, which is highly dependent on farmer-managed seed systems. Understanding farmers' rights in a complex institutional environment

The discussion on farmers' rights, however, is complex as it intersects with multiple areas of legislation. First, the specification of Intellectual Property Rights (IPR) of plant breeders as rightsholders of new plant varieties, i.e. Plant Variety Protection (PVP), defines the exemptions that allow farmers' privilege – or the lack thereof. Farmers' privilege refers to whether a farmer may be allowed to save and re-use seed of protected material on their own holdings, and the conditions for doing so. Second, provisions for the conservation and sustainable use of plant genetic resources

for food and agriculture (PGRFA) such as the Plant Treaty protect farmers' rights in relation to plant genetic resources for food and agriculture, specifically their rights to traditional knowledge, benefit sharing, participation in decision making, and to save, use, exchange and sell farm-saved seeds. Third, regulations on seed certification, variety release and testing standards specify under what conditions seeds can be traded on domestic and international markets. For each of these three aspects there are multiple treaties and instruments at international, continental and sub-regional level, resulting in a diversity of practices on how these are translated into regulations implemented at the national level (see also Figure 1). The incoherence and unclarity at different levels and the difference in scope of each instrument all contribute to a complex institutional and regulatory landscape. This impedes common understanding and appropriate legislation to balance breeders' rights and farmers' rights.

Plant variety protection and farmers' rights

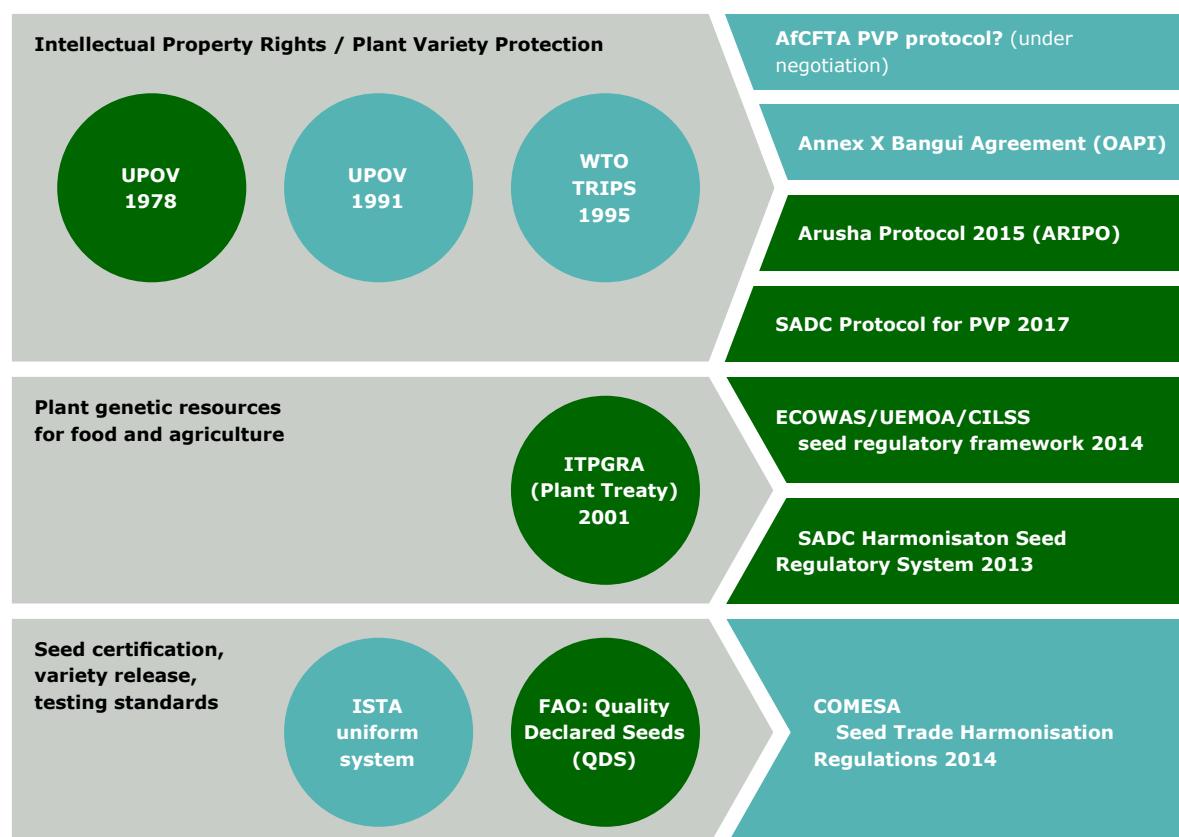
Four international treaties (UPOV 1978, UPOV 1991, ITPGRA and WTO TRIPS agreement) are of relevance. Though the ITPGRA (also called Plant Treaty) and UPOV 1978 recognise farmers' rights towards the use, saving, and exchange of seed, international discussions on the protection of farmers' rights within national seed policies and legislation are still inconclusive. Similarly, what constitutes acts that are private and non-commercial insofar as exemptions to breeders' rights are concerned, and how a farmer may save seeds on their own holdings, remains contentious at the International Union for Protection of New Varieties of Plants (UPOV). The two UPOV versions (1978 and 1991) co-exist, though UPOV 1978 is no longer open for signatory. The revisions in UPOV 1991 were partly motivated by a growing privatization of plant breeding research and an increase in size and specialisation of farm holdings in industrialized countries during the 1980s. Critics argue that UPOV 1991 is inappropriate for countries that have an agricultural sector with a large proportion of small-scale farmers, as is the case with most African countries. This is also the reason why some countries have chosen to adhere to UPOV 1978 rather than UPOV 1991 (Jefferson, 2015)⁴. In Africa, continental instruments and regional instruments are all at variance as to how to balance farmers' rights with breeders' rights when it comes to PVP and farmers' privilege, yet some countries even are signatories to these two instruments. The AfCFTA follows the UPOV 1991 model, and negotiations on Intellectual Property Rights and PVP are ongoing. ARIPO's Arusha Protocol provides explicit considerations for farmers' rights by broadening the farmers' privilege provisions, but definitions are missing. OAPI's Bangui agreement does not provide for such a scheme, while the SADC protocol potentially could.

² <https://www.desiralift.org/about/> ³ Munyi P. 2022. *Current Developments in Seed Laws Harmonisation in Africa. Report to the European Commission. DeSIRA-LIFT*. Available at: <https://www.desiralift.org/wp-content/uploads/2022/11/161122-DeSIRA-LIFT-Current-Developments-in-Seed-Laws-Harmonisation-in-Africa.pdf>

⁴ https://www.researchgate.net/publication/271138885_Development_Farmers%27_Rights_and_the_Ley_Monsanto_The_Struggle_Over_the_Ratification_of_UPOV_91_in_Chile

Figure 1. Overview of treaties and instruments defining seed policies in Africa.

Legend: green is (potentially) supportive of farmer rights, blue is not explicitly supportive of farmer rights. It should be noted that there is no uniformity of scope, and there are variances in the objectives of each of these instruments inasmuch as they all affect seed legislation in Africa.



Seed certification and farmers' rights

In the realm of seed certification, variety testing, registration and release, variance can be observed between the COMESA, SADC and the ECOWAS-UEMOA-CILSS instruments. SADC and ECOWAS provide for opportunities for the registration of landraces and indigenous varieties just like the EU does with conservation varieties⁵. SADC, in particular, has been able to achieve this objective by incorporating a Quality Declared Seed (QDS) scheme into its overall scheme, based on FAO work. COMESA on the other hand is very strict in this regard, following the International Seed Testing Association (ISTA) standards. The scope of the COMESA Seed Trade Harmonisation Regulations, however, is limited to certified seed of thirteen crops only to allow its cross-border trade and does not apply to other crop varieties. The ISTA standards include the Distinctness, Uniformity

and Stability (DUS) and Value for Cultivation and Use (VCU) tests which are mandatory for variety release and entry of varieties in national variety catalogues. But DUS and VCU tests are complicated and expensive, and therefore not appropriate for varieties traded in farmer-managed seed systems. ISTA does not recognize QDS, however, which is more appropriate for the testing of seed quality of indigenous varieties and landraces that are traded in farmer-managed seed systems. Note that neither the African Union nor the regional economic blocs in Africa have put in place regulations relating to the farming of organic plants something that the EU has provided for⁶, inasmuch as the African Union has recognised ecological organic agriculture as necessary by the endorsement of the Ecological Organic Agriculture Initiative⁷. It is expected that regulations relating to the farming of organic plants are likely to lead to quality standards of seeds of these plants being sought without necessarily relying on ISTA standards.

Table 1 provides an overview of the main international instruments that determine farmers' rights in Africa.

⁵ Commission Directives 2008/62/EC of 20 June 2008, 2009/145/EC of 26 November 2009 and 2010/60/EU of 30 August 2010. ⁶ Regulation (EU) 2018/848 of the European Parliament and of the Council of 30 May 2018 on organic production and labelling of organic products and repealing Council Regulation (EC) No 834/2007.

⁷ EOAI-AFRICA: eoai-africa.org

Table 1. Summary of international instruments affecting farmers' rights on seed.

Level	Instrument	Indications on breeders' and farmers' rights
International	International Union for the Protection of New Varieties of Plants (UPOV) 1978	Second revision of UPOV. System to grant plant breeders' rights, to which signatories (countries) are bound to conform their national laws; recognizing farmers' privilege. No longer open for signatures.
International	UPOV 1991	Third revision of UPOV. System to grant plant breeders' rights, to which signatories (countries) are bound to conform their national laws; farmers' privilege "within reasonable limits" but seed sharing is not allowed. Grants discretion to national governments to decide whether seed saving should be permitted.
International	WTO Agreement TRIPS 1995	Harmonization framework for intellectual property rights, including plant variety protection (PVP).
International	International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGR) 2001	Supports the conservation and sustainable use of all plant genetic resources for food and agriculture (PGRFA) such as seed and other planting material; recognizing farmers' rights.
Africa	African Common Free Trade Area (AfCFTA) 2019	Phase II ongoing negotiations of the AfCFTA cover protocols on several areas including Intellectual Property Rights (including PVP).
Sub-region	Annex X of the revised Bangui Agreement 2015 (OAPI)	Main legislation on PVP for OAPI Member States, based on UPOV 1991; farmers' privilege for non-commercial purposes only.
Sub-region	Arusha Protocol 2015 (ARIPO)	Follows UPOV 1991 for breeders' rights, but allows exceptions for agricultural crops and vegetables with the historical practice of saving, using, sowing, re-sowing or exchanging seed and acreage/tonnage that defines a small-scale farmer in each ARIPO Member State based on the criteria established at the national level. However, criteria for exceptions are still to be defined. Is yet to come into force.
Sub-region	SADC Protocol for PVP 2017	Follows UPOV 1991 for breeders' rights, but allows farmers to save, use or exchange seed for non-commercial purposes only. Is yet to come into force.
Sub-region	SADC HSRS 2013	The SADC HSRS establishes a variety release, seed certification and quality assurance, and a phytosanitary measures system; recognizes Quality Declared Seed (QDS). Rules for registration of landraces are still to be developed.
Sub-region	COMESA STHR 2014	The Regulations only cover thirteen crops. Varieties that are not tested (DUS and VCU tests), released or registered in the COMESA Catalogue cannot be traded between COMESA Member States.
Sub-region	ECOWAS/UEMOA/CILSS seed regulatory framework 2014	Recognizes landraces and local varieties (list A crops), which can be traded and exchanged domestically (national level only).

Farmers' participation in seed policy-making

As regards the participation of farmer organisations or civil society in seed policy-setting processes, the picture is also mixed. The ITPGRFA gives rights to farmers to participate in decision-making, and countries that ratified the ITPGRFA are thus obliged to accommodate such participation. Though provisions are in place on civil society's participation in policy setting in some institutions (e.g. African Union Commission, COMESA) these are not effectively used to include non-state actors in policy setting for the seed sector. ECOWAS and SADC seem to have included civil society organisations in their seed policy development process. The AUC has an elaborate institutional structure of taking on board views of non-state actors. However, it appears this structure is not always being used in a constructive and effective manner and more can be done to make the participation of non-state actors more constructive in seed policy-making. This includes providing support to farmer organisations to participate in seed policy-making processes. This is part and parcel of attaining farmers' rights. In order to facilitate the full utility of the institutional structures available for non-state actors at the AUC in voicing their views, the question of the mandate and legitimacy that these non-state actors have to represent farmers requires to be addressed in return.

Moving towards more policy coherence to balance breeders' rights and farmers' rights

Bringing more coherence into seed policies and legislation is necessary, given that the level of adoption and application of these different instruments varies between African countries and regions. The same applies to the continental policies for seed testing, certification, registration and varietal release. The African Union guidelines for the harmonisation of seed regulatory frameworks in Africa acknowledges farmers' rights and can be complemented with detailed recommendations on how they may be attained. The implementation of UPOV 1991 does not necessarily deny farmers' privilege to save, use, exchange or sell protected seeds as the experiences of SADC and ARIPO countries show. However, the ambiguity on the conditions needs to be clarified in regional and national policies and legislation with more clear and transparent recognition of farmers' rights and how they can co-exist with breeders' rights. USAID-funded seed programmes have contributed to the harmonisation of policies (including protection of breeders' rights) for the formal seed systems in the SADC and ECOWAS regions, but the recognition of farmers' rights and inclusion of farmers' privilege shows that local voices managed to influence the regional seed policies.

The AU, the African regional economic blocs and intellectual property institutions (ARIPO and OAPI) require support in making coherent the various seed laws and policies in place. All these laws and policies are intended to support, and not impede, food production in Africa. The EU may have an influential role in this regard by encouraging and supporting African countries through its trade policy programmes to

recognise farmers' rights and protect local varieties, in line with the European Green Deal. Clarity on the various rights that accrue to farmer varieties, indigenous varieties and landraces on one hand and to protected varieties on the other hand should be contained in all the instruments on seed laws.

Recommendations for the African Union (harmonisation guidelines):

- Harmonisation efforts need to address the protection of farmer varieties, indigenous varieties and landraces, maintained within farmer-managed seed systems, to preserve its biodiversity. This requires (1) the creation of a common understanding of what farmer varieties, indigenous varieties and landraces are and (2) harmonisation efforts on the implementation of the Plant Treaty, in conjunction with the Convention on Biological Diversity.
- AU Guidelines should be complemented by examples of good practices and clauses to protect farmers' rights that RECs and governments can adopt.
- AU should develop further guidelines in order to provide better understanding and clarity on how farmer-managed seed systems can be supported to provide quality seed to farmers without making the system formal and more specifically: a) the opportunities and limitations of Plant Treaty in guaranteeing farmers' rights; b) add detailed recommendations for harmonisation of Plant Treaty in relation to other treaties; c) position of guidelines in relation to the regional instruments.
- Develop guidance on the implementation of seed laws that recognize farmer-managed seed systems.

Recommendations for African policymakers:

- Align AfCFTA phase II negotiations and outcomes on IPRs (including PVP) to the farmer-managed seed systems.
- Harmonise IPR regulations on PVP and conditions farmers' privilege across the RECs with the aim to support small-scale farmers' agriculture.
- Recognise QDS system as a legitimate system for seed quality control for non-protected plant varieties (e.g. indigenous crops and landraces) in addition to seed certification standards (DUS and VCU) for protected varieties.
- Strengthening the capacity of non-state actors to be included in constructive policy consultations.
- Put in place policies and regulations that promote ecological organic agriculture and farmer-managed seed systems in order to maintain the genetic diversity of food crops and hence improve the resilience of African agriculture.

Recommendations for the European Union:

- EU to share good practices (e.g. policies on geographic indications, patent laws and regulations for organic production) on balancing farmers' rights and breeders' rights, and protecting local varieties.
- EU to be more explicit on the inclusion of farmers' rights and PGRFA in international and bilateral agreements.

Recommendations for civil society and farmer representatives:

- Concerted effort needs to be made to engage farmer representatives in seed policies by building capacities of farmer organisations and clarifying their mandates to represent farmers.
- Though UPOV 1991 does not explicitly recognize farmers' rights, other protocols on PVP show that exemptions can be specified. Civil society should use human rights-based approaches, campaign for the protection of farmers' privilege and recognition of indigenous crops and landraces in national seed policies and legislation in support of farmer-managed seed systems.
- Civil society and farmer representatives should provide clarity on the mandate they have to represent the interests of the farmers and the mechanisms they use to represent and inform their constituencies.

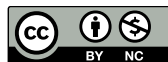
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