



APBRES

Association for Plant Breeding for the Benefit of Society

Reply by APBRES to the UPOV Circular E-20/246

Views on the implementation of the exception of acts done privately and for non-commercial purposes in relation to smallholder farmers.

APBRES welcomes the invitation to express its views on the implementation of the exception of acts done privately and for non-commercial purposes in relation to smallholder farmers.

Our views are the following:

1) The current interpretation is extremely narrow and therefore meaningless.

UPOV's interpretation of the exception's scope is extremely restrictive and narrow. The "Explanatory Notes on the Exceptions to the Breeder's Right under the 1991 Act the UPOV Convention" (UPOV/EXN/EXC) states that: "[...] Non-private acts, even where for non-commercial purposes, may be outside the scope of the exception [...]. Equally, for example, the propagation of a variety by a farmer exclusively for the production of a food crop to be consumed entirely by that farmer and the dependents of the farmer living on that holding, may be considered to fall within the meaning of acts done privately and for non-commercial purposes. Therefore, activities, including for example "subsistence farming," where these constitute acts done privately and for non-commercial purposes, may be considered to be excluded from the scope of the breeder's right, [...]."

This interpretation is extremely limited. It does not allow "any material to be provided to others" including a farmer's neighbour. Even the multiplication of the protected variety to produce a food crop to be consumed by a neighbor (not living on the holding) is not seen as falling within the scope of the exception. The interpretation applied by UPOV does not address the needs and realities of subsistence or smallholder farmers, who in their daily lives exchange seeds/propagating material with neighbors and sell their products and seeds at the local market. The rationale for exceptions like private and non-commercial in IP laws is to strike a balance between the interests of the IP holder, society in general and potential third party users of the protected subject-matter. This balance does not exist with the current interpretation.

2) The current interpretation including the Explanatory Note and the Frequently Asked Questions (FAQ) are not coherent or consistent.

In response to increasing criticisms over the adverse implications of UPOV's provisions for farmers' rights, in October 2014, UPOV's Council adopted an answer to "Frequently Asked

Questions” (FAQ) on this topic (Is it possible for subsistence farmers to exchange propagating material of protected varieties against other vital goods within the local community?). The APBEBES Report on the UPOV Autumn Session 2014 called the response “legally incorrect and deliberately misleading.” It argued that the response cannot be supported by either the interpretation of Article 15(1) that has been applicable thus far, nor by the practices of UPOV, which has consistently rejected national draft PVP legislation that allows even limited exchanges of seeds/ propagating material.¹ In addition, there are conditions incorporated in the FAQ (such as “the legitimate interests of the breeders are not significantly affected” or “in the occasional case”) that cannot be justified under Article 15(1) or under Article 15(2) of the Act and its scope is unclear.

3) Any adjustment of the interpretation of «private and non-commercial use» must be done by way of amendment of the Explanatory Note.

As the explanatory note is the main guiding document for interpretation and implementation of UPOV 1991, there is no other possibility than to amend UPOV/EXN/EXC “Explanatory Notes on the Exceptions to the Breeder’s Right under the 1991 Act the UPOV Convention”. As highlighted above, the UPOV FAQs has only resulted in more confusion especially given it is clearly inconsistent with the interpretation of Article 15 and the practices of UPOV today. Hence, any adjustment of the interpretation of «private and non-commercial use» must be done by way of amendment of the Explanatory Note.

As with all other Explanatory Notes and Guidance Documents it is evident that these are to be as guidance and are optional, with every member entitled to adopt its own interpretation of the UPOV 1991 provisions.

4) The proposal by Oxfam, Plantum and Euroseeds is a good starting point for an adaptation of the Explanatory Note, but needs further clarification and adaptation.

- It needs to be clarified that the Exception under Art. 15.1 of the UPOV Convention does not only cover seeds, but propagation material in general (e.g tubers, cuttings).
- In the flowchart presented by the project team there is a need to clarify the 3rd question “Is the excess of the production exchanged and/or locally sold as seed farmer to farmer?” Logically, in the vast majority of cases, a substantial part of the surplus is sold as a product for direct consumption and not only as seed or propagation material. Therefore, a formulation like “Is all or a part of the excess of the production exchanged and/or locally sold as seed farmer to farmer?” seems more correct to us.

¹ For example, in examining the conformity of the Malaysian national PVP legislation with UPOV 1991 (UPOV document C(Extr.)/ 22/2), the Secretariat expressly stated that «the exchange of protected material for propagating purposes would not be covered by the exceptions under Article 15 of the 1991 Act and on that basis recommended deletion of Section 31(1)(e) of the Malaysian Protection of New Plant Varieties Act which contained the following exception: «any exchange of reasonable amounts of propagating materials among small farmers». See UPOV document C(Extr.)/ 22/2 available at http://www.upov.int/edocs/mdocs/upov/en/c_extr/22/c_extr_22_2.pdf.

- The current flowchart only includes in the exception the exchange and sale of seeds, but not the use of farm-saved seeds. It makes no sense that selling and exchanging would in certain circumstances interpreted as private and non-commercial, but not the use of farm-saved seeds. Certainly, in most countries farm-saved seeds are dealt under Art. 15.2. But as this is an optional exception it should still included in the interpretation of Art. 15.1 (i).
- Certainly, small amounts of non-food crops (e.g. fiber crops) could also be used by smallholder farmers. It is therefore not clear why non-food crops should be excluded from the exception. They should certainly be included.
- Regarding parental lines the only question is, if they are protected by Plant Breeders' Rights. There is no legal basis in the UPOV Convention to differentiate parental lines in the exceptions from other protected propagating material. Therefore, the reference to parental lines must be deleted.

5) An adjustment of the interpretation of «private and non-commercial use» is necessary - but it will not solve the inherent contradictions between Farmers' and Breeders' Rights in the 1991 Act.

We would like to be clear that even a new, improved and expanded definition of private and non-commercial use will not fully address implementation of farmers' rights, in particular the right recognized in the Treaty and enshrined in the UN Declaration on the Rights of Peasants (UNDROP) to save, use, exchange and sell farm-saved seed and other propagating material. The implementation of these rights cannot be "provided for" under a "private and noncommercial use" exception, but would require a substantial revision of the UPOV Convention. As long as this is not the case, the application of other sui generis laws remains the only possibility for a mutual supportive implementation of the various international agreements and declarations.

6) There will only be a legitimate outcome of the revision with the active involvement of farmers' organisations.

The dominant role and influence of the seed industry in UPOV is well-known. However, on this issue, which will affect many smallholders in their very concrete living conditions, it is crucial to actively integrate those affected into the opinion-forming and decision-making process. This is a task for the UPOV Secretariat as well as for the individual member countries. The right to participate in decision-making is enshrined in the International Treaty on Plant Genetic Resources for Food and Agriculture as well as in the UN Declaration on the Rights of Peasants (UNDROP).