



Contribution in response to UPOV Circular E-20/246

The South Centre, as an intergovernmental observer to the UPOV Council, submits this contribution on views on the implementation of the exception of acts done privately and for non-commercial purposes in relation to smallholder farmers. The South Centre appreciates this opportunity to inform the possible development of guidance regarding the implementation of the exception of acts done privately and for non-commercial purposes in relation to smallholder farmers.

Objective of the guidance

The South Centre supports the discussion on options to interpret the UPOV 1991 exception for private and non-commercial use in such a way that it accommodates, to the largest possible extent, the needs of smallholder farmers and provides for greater legal certainty for farmers and breeders.

The guidance should also support the needs of governments to establish coherent policy and regulation with respect to the implementation of UPOV 1991, the FAO International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA), specially its article 9, and the UN Declaration on the Rights of Peasants and Other People Living in Rural Areas (UNDROP), for Parties of these international legal instruments.

In countries that have adopted the UPOV model as enshrined in the 1991 version of the Convention, farmers are faced with civil (and, in some cases, even criminal sanctions) for conduct that should be deemed legitimate and which is functional to society's interest in a sustainable agriculture and the attainment of food security.

While article 9 of the ITPGRFA stipulates that 'that the responsibility for realizing Farmers' Rights, as they relate to plant genetic resources for food and agriculture, rests with national governments', this task cannot be undertaken if the international legal system is incoherent and dysfunctional to the implementation of such rights. The protection of breeders' rights under the UPOV Convention 1991 should be made compatible with the recognition of Farmers' Rights, via interpretation and amendment of the relevant provisions.

An immediate step is for the UPOV Council to repeal the current guidance in the "Explanatory Notes on Exceptions to the Breeder's Right Under the 1991 Act of the UPOV Convention"- UPOV/EXN/EXC, adopted by the UPOV Council in 2009, and replace with a new guidance.

Comments

The purpose of the UPOV system is to protect the rights of breeders. While this objective is legitimate, it should be pursued taking broader public interests into account. The Preamble of the 1978 revision of the UPOV Convention noted that Contracting Parties were 'conscious of the special problems arising from the recognition and protection of the rights of breeders and particularly of the limitations that the requirements of the public interest may impose on the free exercise of such a right'. The application of the UPOV Convention, as revised in 1991, does not contribute, but can effectively undermine the implementation of Farmer's Rights. There is, thus, an incoherence in the international legal system which, on the one side, recognizes in the ITPGRFA and UNDROP the rights of farmers to save, exchange and sell seeds and, on the other, restrict such rights if a country is bound under the UPOV Convention in its 1991 version, as currently interpreted. Some aspects of this incoherence may be solved by way of a proper (and less restrictive) interpretation, consistent with the Vienna Convention on the Law of the Treaties, of the Convention's provisions that would allow to take into account the essential components of Farmers' Rights, by way of the issuance of a new guidance. Other aspects would require further discussion and an amendment of the Convention in order to make it compatible with the ITPGRFA, as *lex posterior*.

It is a generally accepted interpretation that under the UPOV Convention as amended in 1978, the breeder's right does not extend to the farmers' acts of saving and exchanging seeds, since the Convention only provides for exclusive rights in relation to acts entailing the marketing (or the offer for sale) of the reproductive or vegetative propagating material. At the time when UPOV as amended in 1978 was still open to accession, FAO Resolution 4/89 stated that "Plant Breeders' Rights, as provided for under UPOV (International Union for the Protection of New Varieties of Plant) are not incompatible with the International Undertaking" (Article 1. of the Agreed Interpretation).

The concept of Farmers' Rights, although well recognized by the international community at the time of the 1991 revision of the UPOV Convention,¹ was overlooked in the process of revision and ignored in the final text adopted by the diplomatic conference.²

The UPOV Convention, as amended in 1991, is more restrictive than the UPOV 1978 version regarding the rights of farmers. The breeder's exclusive rights conferred under article 14(1) would allow the breeder to prevent farmers' acts of saving seeds, unless

¹ FAO Resolution 5/89 on Farmers' Rights referred, in particular, to allowing 'farmers, their communities, and countries in all regions, to participate fully in the benefits derived, at present and in the future, from the improved use of plant genetic resources, through plant breeding and other scientific methods'.

² This revision was negotiated and adopted by 20 UPOV member countries, out of which only one (South Africa) was a developing country. See UPOV, Record of the Diplomatic Conference for the Revision of the International Convention for the Protection of New Plant Varieties, Geneva, 1991, p. 535-543.

an (optional) exception is established by the national law. The scope of the permissible exception is, in addition, limited by a number of conditions. *Article 15(2) stipulates that:*

‘Notwithstanding Article 14, each Contracting Party may, within reasonable limits and subject to the safeguarding of the legitimate interests of the breeder, restrict the breeder’s right in relation to any variety in order to permit farmers to use for propagating purposes, on their own holdings, the product of the harvest which they have obtained by planting, on their own holdings, the protected variety or a variety covered by Article 14(5)(a)(i) or (ii)’.

The UPOV explanatory note on exceptions to breeder’s rights adopted by the Council in 2009 further recalls that “the Diplomatic Conference recommended that the provisions laid down in Article 15(2) of UPOV 1991 should not be read so as to be intended to open the possibility of extending the practice commonly called ‘farmer’s privilege,’ to sectors of agricultural or horticultural production in which such a privilege is not a common practice on the territory of the Contracting Party concerned”.³

The explanatory note has elevated this recommendation, in practice, to the status of an additional condition. It adds another – ambiguously defined – restriction on the farmers’ ability to save and use protected seeds.

Amendments to the Explanatory Notes on the Exceptions to the Breeder’s Right under the 1991 Act the UPOV Convention - UPOV/EXN/EXC

The current Explanatory Note on Article 15(1)(i) contains several over-restrictive interpretations of this provision, not consistent with the interpretative rules of the Vienna Convention on the Law of the Treaties:

1) There is no reason why the exception should be limited to ‘food crops’ and not apply to all crops, as there is no distinction in the treaty provision. The exception should apply to all kinds of propagating materials.

2) *‘...to be consumed entirely...’* The Explanatory Note’s interpretation seems to assume that everything which is not ‘consumed’ should be disposed of. It excludes the traditional practice of saving seeds, one of the key elements of Farmers’ Rights. There is nothing in article 15(1)(i) supporting such limitation. Moreover, saving and planting seeds is allowed –under certain conditions- under article 15(2).

Further, the exchange of seeds with neighbours or in local markets is an extended farmers’ practice, which is key for food security. Exchanges of seeds are both private and non-commercial acts that should be explicitly recognized as legitimate under article 15(1)(i). Similarly, sales to other farmers of non-consumed seeds, including those resulting from an excess in production, is a common practice that does not encompass a ‘commercial purpose’ to the extent that the farmer does not act as a commercial entity and, for instance, the seeds are not branded.

³ UPOV, Explanatory Notes on Exceptions to the Breeder’s Right Under the 1991 Act of the UPOV Convention, UPOV/EXN/EXC https://www.upov.int/edocs/expndocs/en/upov_exn_exc.pdf para. 13 and 14.

3) ‘...by that farmer and the dependents of the farmer living on that holding’ would mean, for instance, that consumption by visitors, even if done on the holding, or by farmer’s family members who are not ‘dependents’ or who do not live on the same holding, would be prohibited acts. There is no rationale justification for these limitations.

4)The phrase ‘...activities, including for example “subsistence farming”, where these constitute acts done privately and for non-commercial purposes...’ improperly narrows down the concept of “subsistence farming” to systems where farmers act in total isolation, without any relationship with their neighbours and communities, particularly through exchanging seeds. This does not reflect the reality of subsistence farming systems in developing countries.

The flowchart in the report ‘Can the exchange or sale of selfproduced seed be allowed under UPOV 1991?’ provides useful elements for correcting the misinterpretation of article 15(1)(i). On the one hand, it refers to ‘growing a crop *substantially* for home consumption’ (emphasis added), which would allow for other uses not covered by the Explanatory Note ; on the other, it makes it clear that seeds could be exchanged and/or sold unbranded, uncertified and untreated by the farmer.

In summary, while noting that the Explanatory Notes should not be deemed to be binding on the UPOV members and that plant variety protection needs to balance the interests of breeders and farmers, **the South Centre recommends a substantial revision of the current Explanatory Note on article 15(1)(i) in order to i) make it clear that the exception applies to all crops and types of protected propagating materials, ii) drop the ‘consumed entirely’ rule and recognize that saving and further planting of seeds are a legitimate practice; iii)clarify that the exchange and sale of (unbranded) seeds produced in excess to consumption by subsistence farmers falls under the exception.**

The South Centre looks forward to providing further comments to the UPOV Council on subsequent draft for options or new draft guidance.