

Contribution of the European Coordination Via Campesina (ECVC) on the implementation of the exception of acts done privately and for non-commercial purposes in relation to smallholder farmers

(a) Experience on the implementation of the exception of acts done privately and for non-commercial purposes in relation to smallholder farmers

As an observer in UPOV representing 31 farmers' organisations of **smallholder farmers and peasants¹ in Europe** and as a regional section of Via Campesina, representing the voice of 200 million farmers, the European Coordination Via Campesina has valuable data on the experience of smallholder farmers in Europe and the rest of the world. We are therefore in a position to state that peasants around the world have historically practised and still practise *de facto* and overwhelmingly the use, exchange and sale of their harvested seeds, without complying with the "*the exception of acts done privately and for non-commercial purposes in relation to smallholder farmers*" provided for in the UPOV 91 Convention.

Indeed, from our point of view, this exception, as well as the interpretation proposed by, for example, a recent report by Oxfam, Plantum and Euroseeds (2019), does not take into account the reality of the peasants. Both in the North and South, peasants who consume all the products of their farms themselves and do not sell any part of their harvest constitute a tiny minority, and possibly even a romanticised image of agriculture in the so-called "developing" countries, far from the reality of farmers everywhere in the world². While this exception is certainly useful for "hobby gardeners" who want to use and exchange their seeds, it is of no practical use for smallholder farmers who want to use, exchange and sell the seeds they have selected on the farm as part of their agricultural crops for the market.

For small-scale farmers, who make up more than 90% of the world's farmers, this practice is essential: for the majority of them, the harvest is as much for feeding their families and communities, for sale in the market, as it is for use on the farm as reproductive or vegetative propagating material. Informal seed systems, which mostly use part of the harvest as reproductive material, now provide more than 70% of the world's available food using only 25% of the cultivated land³ (FAO, 2012). Peasants who use these informal seed systems often lack the financial means to buy commercial seeds and the inputs they need to grow their crops.

Self-production of seeds is therefore as much a tradition and a financial necessity as it is for adapting commercial varieties to local growing conditions and climate change. Seeds selected in the laboratory or at experimental stations and produced off the farm, often in other countries, are not adapted to the local territories and growing conditions of each farm. Rather, these growing conditions have to be adapted to these seeds by means of many inputs and pesticides that are rejected by people because of the many health and/or environmental damages they generate. On-farm production of reproductive and vegetative propagating material intended for on-farm cultivation is, on the contrary, the best way to adapt it through successive multiplication to the growing conditions for which it is intended. This local adaptation is an essential factor in the resilience of agrosystems in the face of the scale, increasing frequency and irregularity of climate change. The other essential factor of resilience is the intra- and inter-varietal diversity of the reproductive material used. Farmers regularly renew this diversity through

¹ The United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas (UNDROP), adopted on 28 September 2018 by the United Nations General Assembly, defines "peasants" as follows: "*any person who carries out or seeks to carry out, alone or in association with others or within a community, small-scale subsistence and/or market-oriented agricultural production activity that relies heavily, but not necessarily exclusively, on family or household labour and other non-monetary forms of work organization and that has a special bond of dependence and attachment to the land*" (Art. 1.1.).

² Indeed, according to the FAO, "the vast majority of family farms in the world are very small. The area of farms managed by women is on average two-thirds less than that of farms managed by men" (FAO, State of Food and Agriculture 2011). Moreover, family farming is the "main modality of food production in both developed and developing countries", and "provides more than 80% of the world's food in terms of value" (FAO, SOFA 2014). In: FAO. (2018). *FAO's work on family farming: Preparing for the Decade of Family Farming (2019-2028) to achieve the MDGs*. Available online: <http://www.fao.org/3/CA1465FR/ca1465fr.pdf>

³ It should also be noted that, 'perhaps because of its local specificity in terms of needs and preferences, the informal system provides most of the seed used by farmers around the world, i.e. 80-90% of the stocks' (CIAT et al.(s.d)).

informal seed exchange systems (Mula, 2013). In order to cope with global warming and challenges such as the phasing-out of pesticides, agriculture therefore needs seeds that have been selected by farmers under the growing conditions for which they are intended. In this context, limiting, hindering and criminalising informal seed systems is a threat to global food safety.

It should also be remembered that the commercial varieties in the UPOV system were selected using varieties grown by millions of peasants - collected free of charge from fields all over the world. Therefore, the equitable sharing of benefits required by the CBD means that farmers too can freely re-use the commercial seed they have bought from seed companies. The payment of licence fees for the use of harvested seed is a backwards, unfair and unjust benefit-sharing. It is also important to remember that seeds selected and produced by peasants, who adapt to climate change every year, also constitute an important stock of new plant genetic resources needed by the industry.

For peasant communities, the use, exchange and sale of selected and farm-produced seeds is part of a collective organisation of the self-production of the means of production and is not a market activity that constitutes the peasant's income, which comes mainly from the sale of crops on agricultural markets. This collective organisation does not, of course, include peasants who multiply seeds under contract on behalf of seed companies that the latter have provided them with for this sole purpose. By applying the same regulations to seed companies, who earn their income from the sale of seeds, and to farmers, for whom this is an integral part of their agricultural production activity, the UPOV 91 system penalises and weakens farming communities and their know-how, which is essential for the resilience of food production systems.

In addition, under pressure from free trade agreements, many countries are adopting legislation that follows the UPOV 91 Convention and then criminalise the exchange between farmers of seeds that are not certified as meeting the criteria of distinctness, uniformity and stability. They then criminalise the self-production of reproductive material from the only commercially available seeds in order to make their monopoly not only on the market but also in the field absolute. As a result, farmers are deprived of any supply of freely reproducible seed.

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

First of all, the European Coordination Via Campesina would like to recall that in 2018, through the adoption of the United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas (UNDROP), the UN Member States have committed themselves to respect the rights of peasants as defined by this declaration. Articles 19 and 20, in particular, deal with the rights of peasants to seeds and the obligations of States regarding the conservation and sustainable use of biological diversity, and provide, among other things, that peasants and other persons working in rural areas have the right to "*save, use, exchange and sell farm-saved seeds or propagating material*" (UNDROP art. 19.1.d.). These commitments must be respected by UN member States, including those that are members of UPOV, and thus by UPOV itself.

Taking into account this recent obligation and the reasons given in point (a) of this contribution, the European Coordination Via Campesina therefore reiterates its position on the impossibility for farmers to enjoy their right to seeds, as a right guaranteed by UNDROP, within the framework of the exception that is the subject of this contribution. The proposed interpretation of the exception for acts done privately for non-commercial purposes in the Oxfam, Plantum and Euroseeds report cited above, limits farmers' rights to the non-commercial use of the harvest. It only applies to non-professional gardeners and therefore violates farmers' rights to seeds as guaranteed by UNDROP.

Furthermore, regarding the issue of contracts addressed by this report by Oxfam, Plantum and Euroseeds, the European Coordination Via Campesina wishes to recall that a contract that is contrary to public law (national, European or international) has no legal value and that the person who does not

respect it cannot be prosecuted. Thus, the prohibition on farmers to use a variety covered by a plant breeder's right to select new varieties according to the classical peasant mass breeding processes, based above all on dynamic management, free pollination and/or a few directed crosses and progressive local adaptation as successive multiplication takes place, should not be open to challenge by contract. Moreover, if we examine the case law of Italian legislation⁴ concerning the current rules governing contracts for the purchase of goods, we note that "*sale is the contract which has as its object the transfer of ownership of a thing or the transfer of another right against consideration of a price*" (art. 1470 Civil Code). The wording of this article eliminates any doubt: the seller must transfer ownership of the thing he is selling. Thus, the seller of seeds cannot impose obligations on the use of the seeds by the buyer, the farmer, who can freely dispose of the uses, including reseeded by selecting cereals for re-use on the farm. This is why seed companies say they do not only sell seeds, but seeds accompanied by a right of use limited to a single use.

Therefore, in order to ensure that the rights of farmers are fully respected, and in light of all the elements outlined in part (a) of this contribution, we call for an amendment to the UPOV 91 Convention allowing for the establishment of two distinct seed systems: a formal seed system, for seed companies whose main economic activity is the sale of commercial seed, and an informal seed system, for peasants who wish to use, exchange and sell their propagating material within the framework of a collective organisation of their agricultural production. A peasant, unlike a seed company, does not have the sale of seeds as their main activity. It is necessary to distinguish between a *commercial seed business* and a seed business integrated into *agricultural* production, which aims to use, exchange and sell selected seeds on the farm as part of a peasant activity.

There is an urgent need to provide a legal framework for peasants' seed systems so that they can continue to renew seed biodiversity: the formal and commercial system was indeed born by drawing all its resources from all the interstices of the informal system. The current pool of plant genetic resources is not inexhaustible. The FAO estimates at 75% the loss of cultivated biodiversity that has accompanied the spread of homogeneous and stable commercial varieties. Moreover, the current dematerialisation of genetic resources generates an invaluable loss of all non-numerable genetic information. The hundreds of millions of farmers who reproduce their seeds every year create far more new diversity than a few thousand researchers with sophisticated equipment. The multiple polygenic traits that adapt each plant to climate change do not appear in the test tubes of laboratories that can only select a few monogenic traits. This constant renewal of the biodiversity cultivated in the fields is essential, not only for its adaptation in each locality to changing growing conditions, but also to replenish the industry's pool of plant genetic resources.

Finally, many UPOV member countries have not ratified its 1991 Convention with the sole aim of not criminalising peasant seed systems that ensure their food security and sovereignty. By amending the Convention so that it fully respects farmers' rights to seeds, UPOV would gain many new members.

⁴ <https://www.altalex.com/documents/codici-altalex/2015/01/02/codice-civile>

References

Assemblée générale des Nations Unies. (2018). *Déclaration des Nations Unies sur les droits des paysans et des autres personnes travaillant dans les zones rurales*. Available online (French source) : https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGPleasants/A-HRC-WG-15-1-2_Fr.pdf

CIAT et al. (s .d.). *Aide semencière pour une sécurité semencière*. Available online (French source) : https://cgspace.cgiar.org/bitstream/handle/10568/53008/fp1_5.pdf?sequence=1&isAllowed=y

FAO. (2011). *State of Food and Agriculture 2010- 2011*. Available online (French source) : <http://www.fao.org/3/i2050e/i2050e00.htm>

FAO. (2012). *Coping with the food and agriculture challenge: smallholders' agenda. Preparations and outcomes of the ;2012 United Nations Conference on Sustainable Development (Rio+20)*. Available online (French source) : http://www.fao.org/fileadmin/templates/nr/sustainability_pathways/docs/Coping_with_food_and_agriculture_challenge_Smallholders_agenda_Final.pdf

FAO. (2018). *Le travail de la FAO dans le domaine de l'agriculture familiale : se préparer pour la décennie de l'agriculture familiale (2019-2028) pour atteindre les ODD*. Available online (French source) : <http://www.fao.org/3/CA1465FR/ca1465fr.pdf>

Mula, M. (2013). Community Seed System: The Case of Pigeonpea in India (Seed System ICRISAT). Dans: *Expert Consultation Workshop on Community Seed Production*. FAO, Addis Ababa, Ethiopia, 5-7 December 2013.

Oxfam, Plantum & Euroseeds. (2019). *L'échange ou la vente de semences autoproduites peuvent-ils être autorisés conformément à l'UPOV 1991 ? Rapport et recommandations du projet « Options pour interpréter la notion d'usage dans un cadre privé et à des fins non commerciales » comme prévu à l'Art.15.1.i de la Convention de l'UPOV de 1991*. Available online (French source) : <https://oxfam.app.box.com/s/tf38ntxlmo0huuj47fiv0a7lk74lpu3w>