

RESEARCH BRIEF

THE RIGHT TO SEEDS AND INTELLECTUAL PROPERTY RIGHTS

KEY MESSAGES

- For over 10,000 years, peasants have freely saved, selected, exchanged and sold seeds, as well as used and reused them to produce food. Today, these customary practices remain essential to peasants' right to food, as well as to global food security and biodiversity. But the protection of intellectual property rights over seeds at the World Trade Organization (WTO) and the International Union for the Protection of New Varieties of Plants (UPOV), and the promotion of commercial seed systems have posed serious challenges to the protection of these customary practices, and to the maintenance of peasant seed systems and agrobiodiversity.
- In the great majority of states, seed laws and regulations have been designed with the aim to further develop the agricultural industry, and peasants seed systems have been largely neglected. In Europe, for example, national seed catalogues and the European Union (EU) Common Catalogue have been designed to promote industrial seeds and agriculture standards, largely excluding peasant seeds, and in a number of countries, peasant seed selling has been outlawed. This has discouraged, and in some cases hindered the continuation of peasant agricultural activities.
- To respond to these challenges, among others, the United Nations (UN) in 2018 adopted the UN Declaration on the Rights of Peasants and Other People Working in Rural Areas (UNDROP), in which the right to seeds is recognized. According to the UNDROP, all states shall, inter alia, 'support peasant seed systems, and promote the use of peasant seeds and agrobiodiversity'; and 'ensure that seed policies, plant variety protection and other intellectual property laws, certification schemes and seed marketing laws respect and take into account the rights, needs and realities of peasants'.
- The implementation of the UNDROP represents a unique opportunity to rebalance the lack of support given to peasant seed systems worldwide, compared to the support given to industrial seed systems in recent decades. This is essential for the protection of the lives and livelihoods of hundreds of millions of peasants, as well as in the interest of all for the preservation of crop biodiversity.
- In accordance with the priority to be given to human rights norms in international and national laws, reflected in the UNDROP, states shall ensure that their laws and policies, as well as the international agreements to which they are party, including on intellectual property, do not lead to violations, but to a better protection of peasants' right to seeds.

NOVEMBER 2020 | CHRISTOPHE GOLAY

International law offers a number of opportunities for and challenges to the protection of the right to seeds. This Research Brief begins with a presentation of the right to seeds and intellectual property in international law, as well as of their inherent tensions. It then outlines UNDROP's definition of the right to seeds and states' obligations under international human rights law, and explains why these shall prevail over other international instruments, as well as national and regional laws and policies.

THE RIGHT TO SEEDS

For over 10,000 years, peasants have freely saved, selected, exchanged and sold seeds, as well as used and reused them to produce food. At the end of the twentieth and the start of the twenty-first century, states affirmed these customary rights by adopting the Convention on Biological Diversity (CBD) and its Protocols, the International Treaty on Plant Genetic Resources for Food and Agriculture (Plant Treaty) and the UN Declaration on the Rights of Indigenous Peoples (UNDRIP).

In the Preamble of the Plant Treaty, states affirmed that 'the rights recognized in this Treaty to save, use, exchange and sell farm-saved seed and other propagating material (...) are fundamental to the realization of Farmers' Rights, as well as to the promotion of Farmers' Rights at national and international levels'. In its article 9, they recognized that provisions of the treaty shall not be interpreted to limit 'any rights that farmers have to save, use, exchange and sell farm-saved seed or propagating material'. The UNDRIP adopted in 2008 also recognized indigenous peoples' right to maintain, control, protect and develop their seeds and property over these seeds (article 31).

In defining the right to seeds, the UNDROP has built on a number of binding international instruments, including the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW Convention), the CBD and its Protocols, and the Plant Treaty. It has also built on the UNDRIP, the right to food guidelines adopted by states at FAO in 2004 and the reports presented by the UN Special Rapporteur on the right to food.

The UNDROP provides that states shall respect, protect and fulfil the key elements of the right to seeds, including peasants' rights to the protection of traditional knowledge,

innovations and practices relating to seeds; to equitably participate in sharing the benefits arising from the use of seeds; to participate in the making of decisions on matters relating to seeds; and to save, use, exchange and sell their farm-saved seed or propagating material (Art. 19.1 and 19.3). They shall also guarantee peasants' right to maintain, control, protect and develop their own seeds and traditional knowledge (Art. 19.2). The UNDROP also provides that states shall support peasants' seed systems and agrobiodiversity (Art. 19.6) and promote a system for the evaluation and certification of peasants' seeds, with the participation of peasants (Art. 11.3).

According to the UNDROP, other international instruments, including those relating to intellectual property, should not restrict but rather facilitate the realization of the right to seeds (Art. 2.4). At the national level, states should ensure the coherence of their agricultural, economic and development policies with the right to seeds and ensure that policies and laws relating to seeds, plant varieties and intellectual property respect and take into account peasants' rights, needs and realities (Arts. 15.5 and 19.8).

INTELLECTUAL PROPERTY AND SEEDS

Binding international treaties also protect intellectual property over seeds. The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS agreement), adopted at the World Trade Organization (WTO) in 1994, provides that WTO members must protect intellectual property over plant varieties either by patents, or by an effective sui generis system (a system of its own kind), or a combination of both (article 27). Some states have chosen patents. Yet the majority of WTO members have adopted a model of plant breeders' rights protection proposed by

the International Union for the Protection of New Varieties of Plants (UPOV). Developing countries which have adopted this model have usually done

so as part of a trade agreement with the European Union, the United States, Japan or the European Free Trade Association (EFTA).

A few states, such as Ethiopia, Malaysia, the Philippines or India, have chosen to develop their own sui generis systems, through which they protect both plant breeders' and peasants' rights. The 2001 Protection of Plant Varieties and Farmers Rights Act in India for example protects plant

The development, interpretation and implementation of international intellectual property instruments should not restrict, but facilitate the realization of the right to seeds

varieties and breeders' rights as well as peasants' rights to save, use, sow, re-sow, exchange, share and sell farm produce, including seeds of varieties protected by plant breeders' rights. The African Union developed an African Model Law for the Protection of the Rights of Local Communities, Farmers and Breeders, and for the Regulation of

Access to Biological Resources, with very similar provisions. The International Convention for the Protection of New Varieties of Plants (UPOV Convention) was first negotiated in 1961 by six Western European countries. It protects the rights of breeders who have created new, distinct, uniform and stable plant varieties. The criterion of novelty here does not mean that the varieties were not already known or used (e.g. by peasants); rather it means that the varieties had not previously been commercialized or registered in an official catalogue. The requirements of uniformity and stability mean that peasants are excluded from seeking UPOV protection for their varieties, as peasant varieties are by nature unstable and constantly evolving.

UPOV grants intellectual property rights to breeders for periods of up to 20 years or more. The UPOV system prohibits peasants from selling protected seeds, and a 1991 revision of the Convention, which already applies to some 30 developing countries prohibits them from exchanging such seeds. Peasants in member countries of UPOV 1991 can now not save or reuse seeds of protected varieties, except on their own farms, in a limited fashion and with due regard for the 'legitimate interests of the breeder', and only provided their government has adopted an optional exception to this effect.

TENSIONS BETWEEN INTELLECTUAL PROPERTY AND THE RIGHT TO SEEDS

Intellectual property poses serious challenges to the protection of peasants' right to seeds. While there is no tension when peasants use only peasants' seed, there is tension when they use farm-saved seed from varieties or plants protected by intellectual property. In some countries that have adopted laws conforming to UPOV 1991, peasants face civil and, in some cases, even criminal penalties for saving, reusing and exchanging farm-saved seed from commercial varieties. In other words, peasants are penalized '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'.¹

These tensions are exacerbated in developing countries where peasants make up a majority of the agricultural population. In such countries, sui generis systems of plant variety protection adapted to local specificities are better suited to protecting the right to seeds as established in the Declaration. Yet states of the Global North continue to put the UPOV 1991 model forward in their collaboration with developing countries, as if it were the only model for the protection of intellectual property relating to seeds.

THE PRIMACY OF HUMAN RIGHTS

In international law, in accordance with the UN Charter, international human rights instruments take precedence in the hierarchy of norms over other international instruments, such as those protecting intellectual property rights.

According to the UN Charter, the promotion and protection of human rights is one of the main purposes of the UN (Article 1(3)), and UN Member States pledged to take joint and separate action to promote universal respect for human rights (Articles 55(c) and 56). The UN Charter also provides that '[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail' (Article 103). It is also relevant to mention that in the Vienna Declaration and Programme of Action, all UN Member States reaffirmed that the promotion and protection of human rights is the first responsibility of governments.

The primacy of human rights over commercial interests protected through intellectual property rights is reflected in two articles of the UNDROP, which provide that states shall elaborate, interpret and apply relevant international agreements and standards to which they are party in a manner consistent with their human rights obligations as they apply to peasants (Article 2(4)), and shall ensure that seed policies, plant variety protection and other intellectual property laws, certification schemes and seed marketing

¹IR. Andersen, Some Considerations on the relation between Peasants' Rights, Plant Breeders' Rights and Legislation on Variety Release and Seed Distribution, Input Paper for the 2nd ad hoc Technical Committee on Sustainable Use of Plant Genetic Resources for Food and Agriculture, Rome, 2015.

laws respect and take into account the rights, needs and realities of peasants (Article 19(8)).

These two provisions reflect the fact that as higher order norms, human rights do not have to be adapted to trade agreements and national laws and policies. On the contrary, it is trade agreements and national laws and policies that must be adapted to ensure the ongoing protection of human rights.

CONCLUSIONS AND RECOMMENDATIONS

The UNDROP has been adopted to rebalance power relations in rural areas and to guarantee that states respect, protect and fulfil the rights of peasants who have been left behind in national and international policies. In its mission to strengthen the rights of peasants, the UNDROP addressed a number of questions, which are fundamental to all, including the preservation of biological and seed diversity.

The implementation of the UNDROP is therefore key for redressing legal and policy distortions that have negatively affected peasants' systems as well as agro-biodiversity.

RECOMMENDATIONS

In accordance with the UNDROP, and with the binding international treaties on which it is based, including the ICESCR, CEDAW, the CBD and its Protocols and the Plant Treaty:

- States shall promote the right to seeds at the UN and in the implementation of the CBD and its Protocols, the Plant Treaty, the UNDRIP and the UNDROP.
- States shall elaborate, interpret and apply international agreements and standards in a manner consistent with the right to seeds. This implies that they shall, inter alia, ensure that the negotiation, interpretation and implementation of WIPO, WTO and UPOV instruments do not violate, but facilitate the realization of the right to seeds, including peasants' right to freely save, use, exchange and sell farmed-saved seeds.
- States shall ensure that free trade agreements to which they are party do not lead to violations of the right to seeds of peasants in their countries or in other countries. This implies that they shall, inter alia, stop promoting the 1991 Act of the UPOV Convention as if it were the only model for the protection of intellectual property on plant varieties. Instead, states should encourage developing countries to use the possibilities offered by TRIPS to design sui generis systems of plant variety protection adapted to the agricultural and social specificities of each country, and which enable them to protect the rights of both plant breeders and peasants.
- States shall consult and cooperate in good faith with peasants, through their own representative institutions, before adopting and implementing international agreements that may affect their right to seeds.
- States shall engage in international cooperation and assistance to support national efforts aimed at implementing the right to seeds. They shall, inter alia, promote agrobiodiversity and the use of peasants' seeds, support the strengthening of peasants' seed systems and ensure peasants' full participation in the design of these as well as in the design of sui generis systems.

- At national level, states shall establish mechanisms to ensure the coherence of their agricultural, economic, social, cultural, and development policies with the realization of the right to seeds.
- States shall ensure that seed policies, plant variety protection and other intellectual property laws, seed marketing laws, variety registration and certification schemes – largely designed in many countries to meet the needs and interests of the agricultural industry by imposing industry-specific production standards – respect and take into account the rights, needs and realities of peasants.
- States shall take all appropriate measures to eliminate all forms of discrimination against peasant women, to promote their empowerment and to ensure that they enjoy the right to seeds without discrimination.
- States shall ensure the full and meaningful participation of peasants in decision-making on matters relating to seeds. They shall also respect and support the establishment and growth of strong and independent organizations of peasants.
- States shall respect, protect and fulfil peasants' right to seeds, including their rights to the protection of traditional knowledge relevant to seeds; to participate in the making of decisions on matters related to seeds; to equitably participate in the sharing of benefits arising from the utilization of seeds; and to save, exchange and sell farm-saved seeds or propagating material.
- States shall support peasant seed systems, promote the use of peasant seeds and agrobiodiversity, and guarantee the right of peasants to maintain, control, protect and develop their own seeds and traditional knowledge. They shall modify their normative framework so that peasants' seed systems not only exist, but also fully operate and thrive as production and conservation systems. They shall encourage equitable and participatory peasant-scientist partnerships, such as peasant field schools and participatory plant breeding. They could also promote a fair, impartial and appropriate system of evaluation and certification of the quality of peasant seeds, and promote peasants' participation in its formulation.
- States shall ensure that agricultural research and development integrates the needs of peasants, with their active participation. They shall, inter alia, invest more in research on and development of orphan crops, local varieties and seeds that respond to the needs of peasants, and they shall ensure peasants' active participation in the definition of priorities and the undertaking of research and development of these crops and varieties, taking into account their experience in such research and development.
- States shall take all necessary measures to ensure that the non-state actors that they are in a position to regulate, such as private individuals and organizations, and transnational corporations and other business enterprises, respect and strengthen the right to seeds. They shall, inter alia, prevent risks arising from the development, handling, transport, use, transfer or release of genetically modified organisms, including by protecting peasants against crop contamination.
- States shall recognize the rights of peasants to rely either on their own seeds or on other locally available seeds of their choice, and to decide on the crops and species that they wish to grow. They shall also ensure that seeds of sufficient quality and quantity are available to peasants, at the most suitable time for planting, and at an affordable price.

SELECTED REFERENCES ON THE RIGHT TO SEEDS AND INTELLECTUAL PROPERTY RIGHTS

[United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas](#)

[The Right to Seeds in Europe, Geneva Academy](#)

[Switzerland's Foreign Policy and the United Nations Declaration on the Rights of Peasants](#)

[International Treaty on Plant Genetic Resources for Food and Agriculture](#)

[Reports on Seeds presented by the Former UN Special Rapporteur on the Right to Food, Olivier De Schutter](#)

[The Farmers' Rights Project](#)

[Farmers' Right to Participate in Decision-making – Implementing Article 9.2 \(c\) of the International Treaty on Plant Genetic Resources for Food and Agriculture](#)

[Plant Variety Protection in Developing Countries. A Tool for Designing a Sui Generis Plant Variety Protection System: An Alternative to UPOV 1991](#)

[A Dysfunctional Plant Variety Protection System: Ten Years of UPOV Implementation in Francophone Africa](#)

[The Right to Seeds and Food Systems](#)

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THE RIGHTS OF PEASANTS AND THE RIGHT TO SEEDS

In 2018, the United Nations (UN) Human Rights Council and General Assembly adopted the UN Declaration on the rights of peasants and Other People Working in Rural Areas (UNDROP). After having provided academic support to UNDROP's negotiation for ten years, the Geneva Academy project on the rights of peasants promotes UNDROP's implementation through publications, conferences, expert seminars, and training courses. Another Geneva Academy project focuses on the protection of the right to seeds.

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