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The 1991 Act of the UPOV Convention and the Struggle for Seeds: the Resistance of Judicial and Legislative Activism*

El Acta de 1991 del Convenio de la UPOV y la lucha por las semillas: la resistencia del activismo judicial y legislativo

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Abstract

The purpose of this article is to study two cases of resistance that have been generated against agri-food hoarding promoted by the 1991 Act of the UPOV Convention, which imposed a plant variety regime that threatens food sovereignty and security, among other protected legal interests. Special emphasis is placed on the countries of the economic South, such as Colombia and India, where there were two acts of jurisprudential and legislative resistance. The chosen methodology is of a deductive and hermeneutic nature, based on a documentary analysis supported by systematic interpretation. The article concludes that this dynamic of agro-food hoarding, being a logical consequence of the privatization of the countryside, requires a real process of vindication, such as the one that occurred in the analyzed cases, which provides elements for a development model conscious of the realities of the peasantry and ethnic groups.

KEYWORDS

Plant varieties, judicial activism, legislative activism, seeds, food sovereignty, UPOV.

Resumen

Este artículo tiene por objetivo estudiar dos casos de resistencia que se han generado contra el acaparamiento agroalimentario que impulsó el Acta de 1991 del Convenio de la UPOV, el cual, impuso un régimen de obtenciones vegetales que atenta contra la soberanía y seguridad alimentaria, entre otros intereses jurídicos tutelados. Se hace un especial énfasis en los países del sur económico como Colombia e India, donde se produjeron dos actos de resistencia jurisprudencial y legislativa. La metodología escogida es de naturaleza deductiva y hermenéutica; ello, desde un análisis documental apoyado en una interpretación de corte sistemático. El artículo concluye que esta dinámica de acaparamiento agroalimentario, al ser una consecuencia lógica de la privatización del campo, requiere de un verdadero proceso de reivindicación, tal como el que se produjo en los casos analizados, los cuales aportan elementos para un modelo de desarrollo consciente de las realidades del campesinado y los grupos étnicos.

PALABRAS CLAVE

Obtenciones vegetales, activismo judicial, activismo legislativo, semillas, soberanía alimentaria, UPOV.

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INTRODUCTION

The purpose of this article is to analyze two resistance movements that have arisen as a consequence of the standards imposed by the 1991 Act of the International Union for the Protection of New Varieties of Plants (UPOV) Convention in the countries of the global South, which have massified certified seeds, mostly genetically modified varieties, which are now used by farmers, who have begun to see their food sovereignty threatened, finding themselves in a notorious situation of vulnerability.

The chosen methodological approach arises from a deductive and hermeneutic research process of a systematic nature. This applies documentary analysis techniques of the norms that have regulated plant varieties, as well as information that portrays the reality of peasants and indigenous peoples in the countries of the economic South. As sources, access was gained to books and book chapters resulting from research, articles published in journals indexed in databases, and documents published by civil organizations and public entities, which are taken as sources of work due to their importance in documenting the reality of the groups of special constitutional protection affected by this problem (Zamora, 1999).

Through the documentary and information analysis, it was possible to systematize the findings according to the context of the peasantry (Núñez, 2008) and the ethnic groups, both in the academic texts themselves, and in the social, cultural, and economic context documented in the referred reports. This compilation of sources of information was essential to carry out an interpretation that went beyond the data, also allowing for a systematic hermeneutic exercise.

Such interpretation makes the work of meddling in the sphere of the legal debate possible, and of the actors that are characterized not only in the norms but also in the analyzed jurisprudence; in this case, Judgment C-1051 of 2012 of the Constitutional Court of Colombia. This ruling is projected as a true case of judicial activism and, as the article intends to demonstrate, of resistance from the institutions to a norm that impacts the way of life and the territory of indigenous peoples and ethnic communities, such as the 1991 Act of the UPOV Convention.

As a result, it is evident that the standards imposed by the 1991 Act, in addition to failing to link innovation to traditional agriculture, have ended up hurting indigenous people and peasants, who in 2013 carried out a real resistance movement through de facto means with the National Agrarian Strike. The Colombian Constitutional Court, for its part, in 2012, laid the foundations for an act of judicial resistance employing a ruling that, although it was key to the non-application of this Act in Colombian legislation, did not prevent, like the national strike, these standards from being incorporated into Colombia's domestic legislation.

The article reflects on this dynamic of monopolization of the means of food production through the plant variety regime, which ignores the reality of the countryside in the countries of the economic South, being precisely a logical consequence of its privatization. India, instead, with its experience since the Plant Variety Protection and Farmers' Rights Act of 2001, has much to teach in realities such as Colombia. Therein lies a model that should be considered by developing countries, where food sovereignty and security take precedence over the interests of a few.

CONTEXTUALIZATION

In recent decades, food has acquired the status of a protected legal interest of a higher order. Its approach as a right, based on food autonomy, sovereignty, and security, allows it to be projected as a fundamental right of every citizen, without distinction, to have regular and permanent access to adequate and sufficient food, which meets not only their nutritional needs but also their cultural traditions.

This legal interest is projected both from the individual needs that a citizen may have, and from the socio-cultural and economic conditions of communities or groups with special constitutional protection —for example, peasants, indigenous peoples, ethnic or migrant communities— and, of course, from the needs of future generations. Thus, according to Martínez (2004), the diversity of elements that converge in the right to food, although interdependent, are linked to this set of conditions.

In developing the regulatory regimes for seeds, we must first address the Convention of the International Union for the Protection of New Varieties of Plants - UPOV, which has, as its immediate antecedent, the conference convened in 1956 by governments of countries of the economic North —among them: Germany, Denmark, France, the Netherlands, the United Kingdom, and Sweden —as well as companies involved in plant variety improvement. From this and subsequent meetings at which a road map was drawn up, the first version of the agreement was drafted in 1961.

With the ratification of this agreement, which was amended in 1972 and 1978, guidelines were established to protect conventional and non-conventional improvements in favor of plant breeders, who would acquire the denomination of plant breeders and would have exclusive rights to use, economically exploit, and prohibit third parties from using or economically exploiting the improved varieties of which they are the holders.

At the beginning of the 1990s, there were already fourteen member states of the Convention. Since then, with the advent of the 'green revolution' and the rise of an agricultural industry

based on plant breeding, several countries of the 'economic South' began the process of joining the Convention and the Union, pressured in some cases by free trade agreements or, in other cases, by negotiations to accede to the World Trade Organization Agreement on Trade-Related Aspects of Intellectual Property Rights - TRIPS (GRAIN, 2022a; Peschard, 2021).

However, it is important to point out at this point that, although the TRIPS Agreement did not require accession to the International Union for the Protection of New Varieties of Plants - UPOV, it did require the adoption of a ***sui generis*** system for the protection of new plant varieties, given the existing prohibition in some domestic legislation or supranational laws on patenting living beings.

From the point of view of the World Trade Organization, although protection through patents is the general rule, the other cases being the exception, with the UPOV Convention, plant breeding becomes one of those 'cases of exception' (Fakhri, 2022). In any case, both are appropriate regimes for intellectual property systems, which recognize the inventive activity of human beings based on the exclusivity granted in a given geographical area in the country where it is registered —and time— from 20 to 25 years in the case of plant varieties, and from 10 to 20 years in the case of patents.

According to the Report of the Special Rapporteur on the right to food, presented at the 49th session of the United Nations General Assembly, these two regimes "do not respond to a commitment to international cooperation nor to the reality of the practices of the majority of small farmers and indigenous peoples past or present, nor to their wishes for the future (...)" (Fakhri, 2022, p. 10), as they do to other types of commitments that governments of the economic North subscribe to with multinationals (Adebola, 2019; Grinberg, 1999).

However, not all States succumb to these dynamics of monopolizing the means of food production. This is the case of India, Thailand, and Malaysia, which, by not submitting to supranational norms, have managed to implement their standards and obligations, which they adopt from instruments such as the 1992 Rio de Janeiro Convention on Biological Diversity and its supplementary protocol signed in Nagoya in 2010, and even the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA).

This has allowed them to have ***sui generis*** protection systems different from the standards and obligations contemplated in the framework of the International Union for the Protection of New Varieties of Plants. As a result, they manage to balance the interests of large and medium-sized plant breeders with those of farmers. On the latter, Carlos Correa proposes the following radi-

ography based on four scenarios, in which he proposes the need to balance the rights of these two groups of actors:

> Some developing countries (e.g. India, Malaysia, Thailand) have developed sui generis PVP systems that respond to their own realities, but whose rules and operations are not sufficiently well known. There appears to be a knowledge gap regarding the design of a true alternative to the 1991 Act of the UPOV Convention. It is necessary to balance the rights of the breeder and those of the farmer and society in general, supporting the formal seed system, as well as the informal seed sector, led by small farmers, with the aim of realizing the right to food and the welfare of society; (...). (Correa, 2015, p. 2)

With the transition from the 1978 Act to the 1991 Act of the International Convention for the Protection of New Varieties of Plants of the UPOV[1], the balance between these two interests began to tip in favor of medium and large plant breeders thanks to the bargaining power they had (Helfer, 2005).

A difference that illustrates this, and that can be extracted after comparing the two Acts of the UPOV Convention, is that while the 1978 Act provides for the right to save, use, and exchange the parental material, i.e. seeds —only the farmer must have the authorization of the holder to market them—, in the 1991 Act this set of rights that farmers have to save, use, and exchange them, is redefined as an exception that may or may not be applied optionally by each State Party to the Convention[2].

THE 1991 ACT OF THE UPOV CONVENTION: BEFORE AND AFTER

The report of the Special Rapporteur on the Right to Food, presented at the 49th session of the United Nations Human Rights Council, shows that, among the countries of the economic North, the role played by the United States and the European Union has been to increase the pressure

1 To date, 17 member States of the International Union for the Protection of New Varieties of Plants remain party to the 1978 Act as a result of the refusal to subscribe to the 1991 Act, although since 1998, any State joining the Union may only subscribe to the 1991 Act.

2 An immediate consequence of the application of the standards of the plant variety protection regime is the de facto measures adopted by the affected groups, since the mechanisms of participation and the actions that they could bring —e.g. judicial protection action, group or compliance actions, among others— are inoperative in the face of supranational standards, since the decision to reverse these provisions does not even depend on the government in power unless it decides to withdraw from an international trade system that subjugates a large part of the economies of developing countries.

exerted on developing countries to sign up to the 1991 Act and to adopt standards that will enable this version to become fully operational.

> (...) For example, such conditions are contained in the Comprehensive and Progressive Agreement for Trans-Pacific Partnership; the bilateral agreements established by the European Union with Lebanon, Morocco, and Tunisia; the bilateral agreements of the United States with Chile, Colombia, Morocco, and Peru; and in the New Alliance for Food Security and Nutrition of the Group of Eight, in the case of the United Republic of Tanzania. (Fakhri, 2022, p. 7)

The Special Rapporteur points out in his report that, with this type of pressure, the countries of the economic South are left without alternatives for deciding on their food sovereignty and security. This is a great challenge facing the international community, since not only the social and economic development of these countries but also their future, depend on this decision-making forum.

The 1991 Act of the UPOV Convention ratified the exclusive right of plant breeders to improve plant varieties by conventional or non-conventional means. This was in response to the emergence of a large new industry of plant breeders, which, since the green revolution, was gradually beginning to position itself in the agro-industrial scenario (Pingali & Raney, 2005; Evenson & Gollin, 2003).

In the case of Latin America, countries such as Argentina and Mexico have decades of experience applying UPOV standards with the 1991 Act. This has led, on the one hand, to the large-scale expansion of monocultures such as soybean in Argentina (Richards, 2010), and on the other, to the extinction of native maize varieties, as has been happening in Mexico over the last thirty years (Gouttefanjat, 2021).

As can be seen, these are standards that have promoted the control of cultivable areas, production, and commercialization of modified seeds in favor of a few multinationals such as Monsanto, Syngenta, or Dupont (cf. Ribeiro & Shand, 2008), while the peasant population is diminishing (Holt-Giménez, 2009).

This is explained by the fact that a farmer cannot register a plant variety produced by conventional means, for example, through grafting or the technique of successive selection of seeds. To achieve this, he must make a major technical effort and have the economic resources to hire experts in the field to validate the uniformity or stability, among other attributes, of his plant variety. On the other hand, a medium or large company in this sector will have the means to carry out this process.

The case of Colombia is no exception, and there are important coincidences not only with the two aforementioned cases and other countries in the region, but also with other countries with similar social, cultural, and environmental conditions in other continents. Not in vain, when integrating into the international trade system, developing countries or those whose economies depend on bilateral or multilateral trade promotion instruments, acquired the commitment to subscribe to the 1991 Act of the UPOV (Peschard & Randeria, 2020a); or at least to adopt its standards in their internal norms, which extend the scope of plant breeders' rights, beyond a fair balance between them and Montenegro farmers (De Wit, 2019).

With the accession to the 1978 Act of the UPOV Convention on September 13, 1996, the Colombian State became a member of the International Union of New Varieties of Plants. Then, in order to maintain its commitments to the international trade system, Colombia adheres to the 1991 Act and, through Law 1518 of 2012, proceeds to integrate it into domestic law.

However, this norm was declared unconstitutional by the Constitutional Court in Ruling C-1051 of 2012, since, when integrating this Act into the domestic regulatory sphere, the Government of the day should have respected the fundamental right of indigenous peoples and ethnic communities to express their free, prior, and informed consent, i.e., it should have carried out a prior consultation.

> 9.10. Having reviewed the text of the International Convention for the Protection of New Varieties of Plants (UPOV), corresponding to the 1991 Act, and the differences introduced by it, the Court shares the position adopted by most of the intervening parties, in the sense of considering that the rules contained therein regulate aspects that may directly affect the various ethnic groups settled in the national territory. In the opinion of the Corporation, the measures that the aforementioned treaty intends to adopt are intended to be extended in a particular manner to the differentiated groups, taking into account their special social, economic and cultural condition. (Constitutional Court of Colombia, Ruling C-1051 of 2012)This is explained by the potential impact of the 1991 Act of the UPOV Convention on the territory and way of life of these groups of special constitutional protection. The law approving the Act could not disregard a fundamental right, whose basis was found in ILO Convention 169, which, in addition to being part of the constitutional block (cf. Constitutional Court of Colombia, Decision C-696 of 2008), generated a paradigmatic change in Colombian law, by resizing the understanding of the rights of indigenous peoples, while admitting the possibility of assuming control of their norms, way of life, and institutions (Sánchez-Botero, 2005).

And although this declaration of unconstitutionality could be celebrated as a triumph or vindication of the farmers, since the 1978 Act of the UPOV Convention has been in force in Colombia since then, in practice this right to prior consultation belongs to the indigenous peoples and the

five ethnic communities recognized by the Colombian State[3], not to the peasant communities. Furthermore, as indicated above, countries such as Colombia have undertaken to implement the 1991 Act or its standards in their legislation by other means.

The difference between the two versions of the Act reflects the private sector's interest in building a monopoly on plant varieties. Not in vain, according to Martín Uribe-Arbeláez, while the 1991 Act of the UPOV Convention "violates the rights of farmers and peasant communities, curtailing them and endangering the peasant economy" (Uribe Arbeláez, 2016, p. 145); with the 1978 Act, a balance between the rights of medium and large breeders and farmers could be seen (Sreenath, 2006). In fact, regarding the term 'breeder', the 1978 Act did not define it, while, instead, as this author points out:

> The 1991 UPOV version, Article 1, provides: "(iv) 'breeder' shall mean the person who has bred or discovered and developed a variety "100. Consequently, it would no longer be only the "design" of a new plant variety, "creation", which would give rise to the breeder's right, once the requirements analyzed have been fulfilled, but also "discovering" a pre-existing variety or natural mutation thereof and "developing" it, making it suitable for multiplication, provided that it passes the novelty, distinctness, uniformity, and stability tests. The "inventive level" has thus been lowered, using by analogy and for greater clarity the terminology required in patent law". (Uribe Arbeláez, 2016, p. 144)That said, in other words, from the 1978 version of the Act, which contemplated the meaning "to create", the 1991 version of the Act now includes the meaning "to discover and develop". In this sense, the green light was given to protect any modification of the plant variety, regardless of whether or not it adds value to the state of the art. Ultimately, this allows medium-sized breeding companies and large multinationals to exercise the right to prevent third parties, such as peasants, from replanting the varieties they have acquired, which have replaced native seeds, after a second cycle.

The 1991 Act removed the requirement for the distinctiveness of plant varieties in the examination for registration. This was something that was required by the 1978 version, which required that the varieties be 'significantly' different from others of the same genus. The problem, to explain it with an example:

> (...) in relation to vegetatively propagated species (...) the work of "fine-tuning" a variety is relatively simple, especially for ornamental plants (e.g. orchids), where the process is minimal. For example, with minimal technical input, the breeder could claim his right over any orchid extracted from the

3 Namely gypsy, Romany, Raizal communities of the archipelago of San Andres, Providencia and Santa Catalina, black Afro-Colombian and Palenquero communities of San Basilio de Palenque, Sur de Bolivar (see Parra Dussan & Rodriguez, 2005).

> Peruvian Amazon. (Lapeña, 2012, p. 25)In short, with the standards proposed by the 1991 UPOV Act, there may be scenarios of misappropriation of wild plant varieties, or of plant varieties originating from small farmers who develop them by conventional means. This is not to mention the problem of the deterioration of biodiversity in megadiverse countries, since, when this misappropriation occurs, by simply making a non-representative improvement in any of its characteristics, a breeder with the technical and economic capacity will be able to have absolute control[4].

RULING C-1051 OF 2012: BETWEEN RESISTANCE AND JUDICIAL ACTIVISM

The concept of 'judicial activism' is not a formally recognized concept in the legal system. The approaches that support it are mainly found in the doctrine, which cites, as an immediate antecedent (Maraniello, 2012; Sarmiento Cifuentes, 2022), the term "despotic behavior" that Thomas Jefferson attributed to the actions of certain judges, after the creation of the figure of the control of constitutionality in the case of *Marbury v. Madison* (*see* Van Alstyne, 1969).

Judicial activism is an ideological and philosophical current assumed by some judges in making decisions, based on their vision of law and justice. From another perspective, judicial activism implies assuming a proactive attitude with respect to a static legal system. Thus, the difference between a judicial decision and an activist judicial decision is framed in a model of judicial control removed from positivist postulates (Rivas-Robledo, 2022), and based on deliberative democracy. In the words of García-Jaramillo:

> The activist judge is interested in the purposes, principles and ideals of the law, as well as the real consequences of the decisions, in order to achieve an adjudication that is not merely formalistic, but contextual, realistic, and responsible. It seeks a social transformation within the respect for the rules and, thus, it conceives its function within the limits of what is constitutionally prohibited and what is constitutionally permitted or ordered. (García-Jaramillo, 2019, sp)

Following the approach of this author, for judicial activism, the meaning of the norms coexists within the social dynamics and reality. Likewise, the activist judge is "sensitive to the democratic

4 In the case of Colombia, with the implementation of the standards of the 1991 Act by another route, the government, with Resolution 970 of 2010 of the Colombian Agricultural Institute (ICA), finally complied with the demands of the United States for the signing of the Free Trade Agreement (FTA) between these two countries. In conclusion, 2010 marked a before and after for peasant communities in Colombia. With the plant variety protection regulations and the standards brought about by the 1991 version of the Act, these communities find themselves in a state of vulnerability due to the neglect of State institutions, which do not provide alternatives for peasants to integrate into this new business model under equal conditions.

values they seek to preserve", having a prominent role in the inter-institutional dialogue, harmonious collaboration between public entities, and in strengthening the division of powers.

The Constitutional Court, utilizing Ruling C-1051 of 2012, carried out an exercise in which it implemented the postulates of judicial activism, by controlling the constitutionality of the 1991 Act of the UPOV Convention, which was to be incorporated into the domestic legal system through Law 1518 of 2012. The magistrates of this high court had to analyze whether, in the terms of Article 241 of the Political Constitution of 1991, and the integrated mandate of Convention 169 of the International Labor Organization, ILO, this international instrument was in line with the postulates of the model of the Social State of Law in Colombia.

Before entering into the analysis of this judgment, two clarifications should be made. The first is that the Constitutional Court had already been showing a clear inclination to assume a leading role in the judicial branch, as the entity in charge of controlling the constitutionality of norms or as the closing body in substantive and contentious constitutional proceedings, that is, as a true activist judicial instance. This is explained in transcendental rulings such as the recognition of the rights of nature, to the right to the minimum subsistence wage or prior consultation (Constitutional Court of Colombia, Ruling T-622 of 2016; Ruling SU-039 of 1997; Ruling T-426 of 1992).

The second precision refers to the historical moment in which the aforementioned Ruling C-1051 of 2012 was issued. It should be recalled that it was in the transition period between the first demonstrations after the entry into force of Resolution 970 of 2010, which sought to implement some of the standards of the 1991 Act of the UPOV Convention, and the National Agrarian Strike in 2013. These standards were part of the commitment signed with the United States Government in the Free Trade Agreement, and they should not be subordinated to the 1991 Act in the legal system.

Therefore, it can be stated that the incorporation of these standards occurred in two ways: on the one hand, with the ratification of the 1991 Act itself, and on the other, with a domestic law norm regulating the certification of seeds under a phytosanitary argument. As mentioned in a previous section of this article, this occurred with Resolution 970 of 2010 of the ICA, i.e. before Law 1518 of 2012, which approved the aforementioned Act.

Thus, in the judgment analyzing the constitutionality of this international law norm, the Constitutional Court concluded that the right to prior consultation of indigenous peoples and ethnic communities had been violated, as their food sovereignty and security would be affected. The effects of updating the 1978 Act to the 1991 Act of the UPOV Convention hurt the territory and way of life of these communities (Oguamanam, 2006).

It is not in vain that the genetic improvement process they carry out is developed according to a set of traditional techniques, customs, and practices; not to the current status quo, whose applications are those that the 1991 UPOV Act adapts (González Merino, 2018).

In this way, the Court recognized that one of the determining factors in the task of updating the standards in the UPOV Convention is "precisely that related to the need to adapt it to the latest scientific and technological advances that have been implemented over time in plant breeding activities"[5]. These are aspects that depart from the protected legal interest of the traditional knowledge produced by these ethnic groups (Dutfield, 2010).

This was sufficient, in the opinion of the Constitutional Court, to declare the unconstitutionality of the law approving the 1991 Act of the UPOV Convention. As part of the activist role assumed in this case, it granted special protection to the set of practices, techniques, customs, and traditions that make up traditional knowledge, and which would be in a vulnerable situation in the face of the standards brought about by the Act. And, indirectly, it granted indigenous peoples and ethnic communities a reinforced constitutional protection of their food sovereignty and security.

As can be seen, it was a successful case of judicial activism, which, although it did not cover peasant communities, since they are not the beneficiaries of ILO Convention 169, did represent an important precedent for future strategic litigation seeking to equate the protected legal interest of traditional agricultural-peasant knowledge with traditional agricultural-ethnic knowledge.

WHEN STANDARDS ARE RESISTANCE: THE CASE OF INDIA'S PROTECTION OF PLANT VARIETIES AND FARMERS' RIGHTS ACT 2001

India, in addition to being considered a country with one of the largest and most important markets in the world, is in a political and economic scenario where there has been greater resistance to the standards of the plant breeders' regime promoted by the international trade system. In particular, it has also been the epicenter of peasant demands against the privatization of seeds and the commodification of the agrifood system.

5 In addition, this judgment states that "if the agricultural activity carried out by the differentiated communities is done in accordance with their specific worldviews and in accordance with traditional knowledge, that is, outside the majority concept of economic use in the activity and the scientific and technological advances in plant breeding, it is reasonable to think that such communities are not able to comply with the obligations established in the 1991 UPOV Convention, in order to benefit from plant breeders' rights" (Constitutional Court of Colombia, Ruling C-1051, 2012)

One of the most representative de facto avenues against the plant breeding industry occurred in that country at the end of the 1990s, with a peasant mobilization around a direct action campaign called *Cremation Monsanto*, which began in the village of Maladagudda, north of Bangalore, but spread throughout the state of Karnataka, in southern India[6].

Against this background, the protests spread throughout the country until they reached Monsanto's headquarters on August 9, 1998, under the slogan "Monsanto Out of India", a date that symbolically coincided with the anniversary of the call made in 1942 by its leader Mahatma Gandhi to the British crown to leave the country (Peschard & Randeria, 2020b). It was, therefore, a demand that also sought independence, this time not from the British Empire, but from the agribusiness that by the 1990s had a monopoly on seeds.

> In the late 1990s, the total seed market [in India] was estimated at US$500 million (the sector was still technologically underdeveloped, with 70 percent of sales coming from farmer-bred seed, 26 percent from public sector breeding, and only 4 percent from hybrids) with sales estimated at US$1.5 billion by 2001. At that time, out of an estimated 400-plus seed companies in the country, only 18 were in the public sector and 10 in the cooperative sector. The remaining units were established in the private sector, of which approximately 25 to 30 are in the larger private sector, while more than 300 are small and medium-sized units. (GRAIN, 2022b, sp)In a more recent context, India has become the axis of 'Seed Freedom' resistance movements with the 2012 Global Campaign for Seed Freedom led by Vandana Shiva, one of the most prominent activists in this field worldwide. This is a manifesto in which 15,000 signatories from 76 countries call on the international community to legislate in favor of the interests of small and medium-sized farmers, and against the monopolies that multinational plant breeders have been occupying (Peschard & Randeria, 2020b).

It is not for nothing that there have been resistance initiatives in the DNA of Indian society and public institutions, which have escalated to the regulatory and international spectrum, for example, with the decision not to join UPOV[7]. But of all the regulatory initiatives that have been

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6 This is reported by Roberto Verzola, Secretary General of the Green Party of the Philippines, in his text 'India: Smart Farmers Burn Monsanto's Genetically Modified Cotton': "The direct action campaign of Indian farmers Operation 'Cremation Monsanto' started today at 13:30 in the village of Maladagudda, north of Bangalore. Mr. Basanna, owner of the field where an illegal genetic experiment was being conducted without his knowledge, and Prof. Nanjundaswamy, president of KRRS (a Gandhian movement of 10 million farmers in the Southern Indian state of Karnataka), uprooted together the first plant of genetically modified cotton, inviting the rest of the local peasants to do the same. Within a few minutes, all the plants in the field were piled up and ready to be set on fire" (Verzola, 1999).

7 See UPOV (2021).

presented, the Plant Varieties Protection and Farmers' Rights Act of 2001, officially called 'Act No. 53 of 2001 - The Protection of Plant Varieties and Farmers' Rights Act', stands out.

This norm, in addition to valuing the contribution of peasant and indigenous communities for the preservation of native seeds, has also been "a paradigm to follow for developing countries and proves that with fortitude it is possible to balance private interest with social benefit, reconciling the fair protection of plant breeders with the peasant customary right to conserve, clean, save or store seeds and exchange and sell them in the local market" (Uribe Arbeláez, 2016, p. 160). It is a law that stands as a regulatory model that articulates economic development with sustainable development and the protection of traditional knowledge.

Although the Protection of Plant Varieties and Farmers' Rights Act of 2001 was enacted before the TRIPS Agreement, it is in line with the obligations that India would acquire in 2007, the year in which it formally joined this multilateral agreement. These obligations, regarding the protection of plant varieties, are outlined in Article 27.3 (b) of the aforementioned agreement, which deals with the protection of plant varieties and the patentability of inventions related to plants and animal species.

Despite this, this law is unique in that it adopts a *sui generis* system for the protection of plant varieties. For the legislator in this country, the effectiveness of the protection regime depended not only on complying with the standards proposed by the international trade system but also on taking into account all the involved actors and legal interests.

This includes the interests of plant breeders from the perspective of private property; of farmers from the perspective of food sovereignty and security; and, of course, of traditional knowledge and biodiversity.

Accordingly, Article 2(c) adapts the definition of breeder as the natural person, legal entity, farmer, group of farmers, or institution that has developed, bred, or improved a plant variety.

> (k) "farmers" means any person who - (i) cultivates crops by cultivating the land himself; or (ii) cultivates crops by directly supervising the cultivation or land through any otherperson; or (iii) conserves and preserves, severally or jointly, with any other person any wild species or traditional varieties or adds value to such wild species or traditional varieties through selection and identification of their useful properties (...). (The Protection of Plant Varieties and Farmers' Rights Act, 2001)The law even goes further by characterizing farmers as those who cultivate the land themselves, or under supervision, which may be either direct or indirect; or also as those who preserve a wild, native, or traditional variety, being able to add value to it through the selection and identification of its properties. In the case of the so-called 'farmer's variety', which was another novelty introduced

> in the Law, it is assimilated as a plant variety that was either cultivated and developed by traditional methods or is a wild or native plant variety on which the farmer has traditional knowledge.
>
> "(l) 'farmers' variety' means a variety which -(i) has been traditionally cultivated and 'evolved by the farmers in their fields; or (ii) is a wild relative or land race or a variety about which the farmers possess the common knowledge'". (The Protection of Plant Varieties and Farmers' Rights Act, 2001)

In this sense, the Law goes beyond the requirements of the 1991 Act of the UPOV Convention to protect a new plant variety —namely, novelty, stability, uniformity, and distinctness— as it provides for the registration of those varieties that already exist to safeguard varieties that have been preserved for generations by peasant communities, indigenous or tribal peoples. This is achieved by not demanding the novelty requirement to facilitate the incorporation of the standards of the Convention on Biological Diversity and the Treaty on Plant Genetic Resources for Food and Agriculture - ITPGRFA.

A relevant aspect of the Law is found in the clarifications made in the sections on definitions, as has been observed up to this point. These precisions are necessary to be able to materialize the rights of the farmers with respect to the conventional improvements they have made in each particular cycle, and from generation to generation. They also provide the necessary legal basis to guarantee fair and equitable participation in the benefits of the traditional knowledge associated with these improvements.

Thus, for example, with regard to farmers' rights, the Act states that a farmer "shall have the right to save, use, sow, replant, exchange, share or sell his agricultural product, including the seeds of a protected variety" under the standard, and on the same terms that granted him the right retroactively, that is, before the entry into force of the standard.

This provision represents a real act of resistance to the 1991 Act of the UPOV Convention, as it prefers to adopt the same roadmap as Article 9 of the ITPGRFA, but with the added value of specifying which rights are recognized, namely the right to re-sow, exchange, share, and even sell the seeds of a protected variety.

With similar reasoning, Uribe Arbeláez points out, "It is forbidden to sell the seed with the trademark or denomination of the seed protected under the plant breeders' rights regime". That said, in other words, "it is lawful to sell the "generic" seed, and its sale under the registered trademark or denomination is forbidden, thus reconciling the public interest with the private interest" (Uribe Arbeláez, 2016, p. 159).

This law was undoubtedly part of an important reform process that had begun in India in the early 1990s, and which, by the 2000s, had an impact on the agricultural sector. India is a state that is projected as a key player in geopolitics for the next century; its democracy has been prosperous thanks to the bridges that have been built between the administration and the citizens, and the issue of seeds is a clear example of this.

And, although it is an unresolved issue, between 2020 and 2021 a great controversy was generated in various sectors, including the peasant sector, as the Government of the day presented three bills on agricultural issues, —namely, the Agricultural Products Trade and Commerce Bill[8], the Farmers' Agricultural Price and Services Guarantee Agreement[9], and an amendment to a previous bill on essential products[10]—; the fact is that India is an example of peasant resistance to the dynamics that, driven by the economic North, seek to monopolize food production through seeds.

CONCLUSIONS

Seeds represent the beginning and the end. They are the symbol of life as we know it, for without them there is no food, no biological diversity, and no cultural diversity. Today, the human species is facing a massive extinction of this parental material, from which plant varieties that have accompanied it since it domesticated agriculture thousands of years ago derive.

This is the result of the model of monopolization of the means of food production through the privatization of seeds, which, in the first instance in the 1970s, sought to protect the rights of plant breeders through a plant variety regime, and, during the 2010s, to standardize a monopoly for agribusiness over native or conventionally modified seeds.

From a purely methodological approach, the importance of the documentary analysis technique used for this article lies in the apprehension of the dynamics of socio-environmental conflicts. Thanks to this, it was possible to provide a theoretical basis for these dynamics through their

8 See. " The Farming Produce Trade and Commerce (Promotion and Facilitation) Bill 2020," on PRS India Legislative Research website, accessed May 11, 2022, https://prsindia.org/billtrack/the-farmers-produce-trade-and-commerce-promotion-and-facilitation-bill-2020

9 See "The Farmers Empowerment and Protection Agreement on Price Assurance and Farm Services Act. 2000," on the PRS India Legislative Research website, accessed May 11, 2022, https://prsindia.org/billtrack/the-farmers-empowerment-and-protection-agreement-on-price-assurance-and-farm-services-bill-2020.

10 See. "The Essential Commodities (Amendment) Bill, 2020," on the PRS India Legislative Research website, accessed May 11, 2022, https://prsindia.org/billtrack/the-essential-commodities-amendment-bill-2020.

analysis. In the end, the reflections presented throughout the text were the result of a set of inferences made from criticism, reflection, and interpretation of information to present some theoretical explanations with epistemological significance.

The regime of plant varieties introduced by the 1991 Act of the UPOV Convention, meant an unnecessary control of the means of agricultural production in favor of multinational breeders, since not only the exclusivity of the parental material used in the sowing process is maintained, but also of fertilizers, pesticides, and, in general, inputs that must be acquired from the same holder, since they are only used for the genetically modified variety.

On the other hand, although the argument given for implementing these regimes is the guarantee that farmers would have more stable and homogeneous production lots, thanks to the sowing of genetically modified seeds, in practice this implies a social, economic, and even environmental impact, since these are varieties that do not have the same roots that native seeds have obtained through the cycles of propagation, multiplication, and reproduction.

In fact, at present, our species has reached a historical moment in which even life has become privatized and controlled by the private sector. Creole and native seeds have been replaced by farmers, and the sanctions that are contemplated for those who violate the regulations in this area; for example, from the second replanting, that is, once the farmer's exception that allows them to replant only once the seeds acquired in distribution centers has been exhausted. Thus, the 'creole' or 'native' parental material that is no longer sown, and which has accompanied human beings for millennia, is lost, leaving us without biological diversity and cultural memory.

In the case of Colombia, the 1991 Act of the UPOV Convention represents a before and an after, since the regulations of the International Union for the Protection of New Varieties of Plants, which were based on the 1978 Act, were updated. The reason is that the balance that existed, until then, between the interests of farmers and breeders was balanced, but, with the updating of the 1991 Act, it began to shift in favor of the latter group.

This is explained by the fact that, while the 1978 Act of the UPOV Convention contemplated the right to save, use, and exchange seeds —only the farmer must have the authorization of the holder to commercialize them—, with the 1991 Act these rights are redefined as an exception that may or may not be applied optionally by each State party to the Convention.

The 1991 Act of the UPOV Convention ignores the fact that native seeds cultivated by peasants are not only better adapted to local conditions, but they are also the basis of their food sovereignty and security. The standards of this norm, which are applied in Colombia by means other than the ratification of the Act —which, as could be observed, was declared unconstitutional by

the Constitutional Court, given the negative impacts it entailed and the lack of prior consultation—. This impacts biodiversity, traditional knowledge, and the socioeconomic conditions of the Colombian countryside and the countries of the economic South.

Another resistance documented in the article stems from the judicial activism exercised by the Colombian Constitutional Court, an instance that has played a leading role in safeguarding the rights of specially protected groups such as indigenous peoples with the extensive interpretation of ILO Convention 169, through which it recognized the fundamental right of indigenous peoples and ethnic communities to prior consultation, who must give their free, prior, and informed consent to any decision, project or action by the public administration or private parties that negatively impacts their way of life or their territory.

It is thanks to this extensive interpretation, and to the Government's failure to carry out a prior consultation, that the 1991 Act of the UPOV Convention was declared unconstitutional. Not surprisingly, this has not implied that its standards are not applied, as has been noted and demonstrated throughout the article. Although these standards are intended to stimulate innovation in plant breeding, they entail the granting of perverse incentives that place farmers in a state of permanent dependence on genetically modified seeds.

However, the current situation shows that the conservation of the rich and varied agrobiodiversity of countries such as Colombia takes second place. If innovation and the knowledge society are to be linked to agriculture in the countries of the economic South, a balance must first be struck between the rules that encourage the development of new plant varieties and the conservation of the varieties that farmers have used for generations.

In this context, the standards that the 1991 Act has brought to these countries also fail to link innovation to peasant agriculture, since they discourage or prevent peasants, who have traditionally been the innovators through conventional or traditional methods such as grafting or the successive selection of seeds, from becoming fully involved in the process of improving plant varieties, thus reducing their productive activity, and, ultimately, placing them in the status of workers dependent on private enterprise.

It is precisely this consequence that the law enacted in India in 2001 was intended to avoid. A law that became a true model for the developing world, and irrefutable proof that, with courage and political will, it is possible to safeguard the peasant economy, putting peasants first by respecting their right to save, exchange, and sell seeds, and by recognizing that their food sovereignty and security have always been the driving force of their lives.

REFERENCES

Adebola, T. (2019). Access and benefit sharing, farmers' rights and plant breeders' rights: reflections on the African Model Law, *Queen Mary Journal of Intellectual Property*, *9*(1), pp. 105-121. doi http://dx.doi.org/10.4337/qmjip.2019.01.06

Colombia, Constitutional Court of Colombia, Decision C-1051 of 2012.

Colombia, Constitutional Court of Colombia, Sentence C-696 of 2008.

Colombia, Constitutional Court of Colombia, Decision SU-039 of 1997.

Colombia, Constitutional Court of Colombia, Sentence T-426 of 1992.

Colombia, Constitutional Court of Colombia, Judgment T-622 of 2016.

Correa, C. (2015). *Plant variety protection for developing countries. A Tool for sui generis design of plant variety protection*. Alfter: Association for Plant Breeding for the Benefit of Society.

Dutfield, G. (2010). *Intellectual property, biogenetic resources and traditional knowledge* London: Earthscan.

Evenson, R., & Gollin, D. (2003). Assessing the impact of the Green Revolution, 1960 to 2000, *Science*, *300*(5620), pp. 758-762. doi http://dx.doi.org/10.1126/science.1078710

Fakhri, M. (2022). Seeds, the right to life and farmers' rights. *Report of the Special Rapporteur on the right to food" presented at the 49th session of the Human Rights Council*. General Assembly of the United Nations. A/HRC/49/43/2022.

García-Jaramillo, L. (2019). Judicial activism: an old concept for new challenges. Ámbito Jurídico, June 5, 2019. https://www.ambitojuridico.com/noticias/etcetera/constitucional-y-derechos-humanos/activismo-judicial-un-viejo-concepto-para.

González Merino, A. (2018). The intellectual property system on plant varieties.Does the current UPOV system infringe on farmers' rights and food security? *Alegatos - Revista Jurídica de la Universidad Autónoma Metropolitana*, *100*, 909-932. http://alegatos.azc.uam.mx/index.php/ra/article/view/674

Gouttefanjat, F. (2021). Green Revolution, neoliberalism and transgenics in Mexico: towards a subordination of maize to capital, *Forhum International Journal of Social Sciences and Humanities*, *3*(4), pp. 108-119. doi http://dx.doi.org/10.35766/j.forhum2021.04.03.9

GRAIN. (2022a). The new Seed Bill in India. https://grain.org/article/entries/1111-el-nuevo-proyecto-de-ley-de-semillas-en-la-india.

GRAIN. (2022b). UPOV: Getting a Free TRIPs Ride? https://grain.org/e/321.

Grinberg, M. (1999). *Ecofalacias: de cómo las multinacionales se apoderan del discurso del ambiente*. Buenos Aires: Editorial Galerna.

Helfer, L. (2005). *Intellectual property rights in plant varieties. International legal regimes and policy options for governments*. Rome: FAO.

Holt-Giménez, E. (2009). From food crisis to food sovereignty: the challenge of social movements. *Monthly Review*, *61*(3). https://monthlyreview.org/2009/07/01/from-food-crisis-to-food-sovereignty-the-challenge-of-social-movements/

India, Parliament of India. The Essential Commodities (Amendment) Bill, 2020. https://prsindia.org/billtrack/the-essential-commodities-amendment-bill-2020

India, Parliament of India. The Farmers Empowerment and Protection Agreement on Price Assurance and Farm Services Act. 2000. https://prsindia.org/billtrack/the-farmers-empowerment-and-protection-agreement-on-price-assurance-and-farm-services-bill-2020

India, Parliament of India. The Farming Produce Trade and Commerce (Promotion and Facilitation) Bill 2020. https://prsindia.org/billtrack/the-farmers-produce-trade-and-commerce-promotion-and-facilitation-bill-2020

India, Parliament of India. The Protection of Plant Varieties and Farmers' Rights Act, 2001 (Act No. 53 of 2001). https://wipolex.wipo.int/es/text/128109

Lapeña, I. (2012). Intellectual property over seeds and its implications for family farming in Peru. *Serie de Política y Derecho Ambiental [Working paper]*, 25. https://orgprints.org/id/eprint/25051/

Maraniello, P. (2012). Judicial activism, a tool for constitutional protection. *Tla-melaua: Revista de Ciencias Sociales*, *5*(32), pp. 46-83. doi http://dx.doi.org/10.32399/rtla.7.32.25

Martínez, L. (2004). The Andean peasant and globalization at the end of the century: a look at the Ecuadorian case. *European Journal of Latin American and Caribbean Studies*, *77*(1), pp. 25-40. doi: http://dx.doi.org/10.18352/erlacs.9676

Montenegro De Wit, M. (2019). Beating the bounds: how does open source become a seed commons? *The Journal of Peasant Studies*, *46*(1), pp. 44-79. doi http://dx.doi.org/10.1080/03066150.2017.1383395

Núñez, J. (2008). Peasant social practices: local knowledge and rural education. *Investigacion y Postgrado*, *23*(2), pp. 45-88. https://revistas.upel.edu.ve/index.php/revinpost/article/view/873

Oguamanam, C. (2006). Intellectual property rights in plant genetic resources: Farmers' rights and food security of indigenous and local communities. *Drake Journal of Agriculture Law*, *11*, pp. 273-305. https://aglawjournal.wp.drake.edu/wp-content/uploads/sites/66/2016/09/agVol11No3-Oguamanam.pdf

Parra Dussán, C., & Rodríguez, G.A. (2005). Ethnic communities in Colombia: culture and jurisprudence. Bogotá: Universidad del Rosario.

Peschard, K. (2021). *Searching for flexibility Why parties to the 1978 Act of the UPOV Convention have not acceded to the 1991 Act*. Zurich: Association for Plant Breeding for the Benefit of Society.

Peschard, K., & Randeria, S. (2020a). 'Keeping seeds in our hands': the rise of seed activism. *The Journal of Peasant Studies*, *47*(4), pp. 613-647. doi http://dx.doi.org/10.1080/03066150.2020.1753705

Peschard, K., & Randeria, S. (2020b). Taking Monsanto to court: legal activism around intellectual property in Brazil and India. *The Journal of Peasant Studies*, *47*(4), pp. 792-819. doi http://dx.doi.org/10.1080/03066150.2020.1753184

Pingali, P., & Raney, T. (2005). From the green revolution to the gene revolution: how will the poor fare. *ESA Working Paper*, *5*(9), pp. 1-15. https://www.fao.org/agrifood-economics/publications/detail/es/c/120918/

Ribeiro, S., & Shand, H. (2008). Seeding new technologies to fuel old injustices. *Development*, *51*(4), PP. 496-503, doi: http://dx.doi.org/10.1057/dev.2008.53

Richards, D. (2010). Contradictions of the New Green Revolution: A view from South America's southern cone, *Globalizations*, *7*(4), pp. 563-576, doi: http://dx.doi.org/10.1080/14747731.2010.505025

Rivas-Robledo, P. (2022). What is judicial activism? Part I. Desiderata for a definition of judicial activism. *Díkaion*, *31*(1), 70-92. https://doi.org/10.5294/dika.2022.31.1.4

Sánchez Botero, E. (2005). Reflexiones en tomo de la jurisdicción especial indígena en Colombia. *Revista IIDH*, (41), 225-251. https://www.corteidh.or.cr/tablas/r08062-9.pdf

Sarmiento Cifuentes, F. (2022). *Integración Latinoamericana y del Caribe: la Necesaria consolidación institucional*. Bogotá: Tirant Lo Blanch.

Sreenath, L. (2006). Impact of post-trips IP Regime on Indian agriculture. *CA Journal*, *54*(8), pp. 1178-1185. http://tapmi.informaticsglobal.com/429/

UPOV (2021). Members of the International Union for the Protection of New Varieties of Plants International Convention for the Protection of New Varieties of Plants, UPOV Convention (1961), as revised at Geneva (1972, 1978 and 1991) Status on November 3, 2021. https://www.upov.int/edocs/pubdocs/en/upov_pub_423.pdf

Uribe Arbeláez, M. (2016). Farmers' rights and the UPOV/91 convention. *Revista La Propiedad Inmaterial*, *21*(1), pp. 139-172. doi http://dx.doi.org/10.18601/16571959.n21.06

Van Alstyne, W. (1969). Critical Guide to Marbury v. Madison. *Duke Law Journal*, *18*, pp. 1-47. https://scholarship.law.duke.edu/faculty_scholarship/544/.

Verzola, R. (1999). India: Smart Farmers Burn Monsanto's GE Cotton. *Synthesis/Regeneration*, *19*(19). http://www.greens.org/s-r/19/19-19.html. http://www.greens.org/s-r/19/19-19.html.

Zamora, J. (1999). Determination of research needs to establish causes of resistance to peasant commercial associativity, *Agro sur*, *27*(1), pp. 37-42. doi http://dx.doi.org/10.4206/agrosur.1999.v27n1-05