Can the Subaltern Speak? Nigeria's Untoward Path to UPOV

By:

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Until the middle of 2017, Nigeria appeared impervious to the increasing infiltration of the International Convention for the Protection of New Varieties of Plants (UPOV Convention) into Africa. That covertly changed on 23 June 2017 when Philip Olusegun Ojo, Director General, National Agricultural Seeds Council of Nigeria, tendered a twofold request to the International Union for the Protection of New Varieties of Plants (UPOV), for assistance to develop a plant variety protection law and guidance on the procedure to join UPOV. Following the first reading of its UPOV-assisted Plant Variety Protection Bill (PVP Bill) on 11 July 2019 at the National Assembly, Nigeria initiated the process of accession to the 1991 UPOV Convention. Through Press Release 121, the UPOV Council announced that it had taken a 'positive decision on the conformity of the Plant Variety Protection Bill of Nigeria with the 1991 UPOV Convention which allows Nigeria, once the Draft Law is adopted with no changes and the Law is in force, to deposit its instrument of accession.'

In this post, I argue that the 1991 UPOV Convention, which is the only UPOV Convention open for accession, is unsuited to Nigeria, principally because it provides a closed plant breeders rights system that favours (commercial) plant breeders, to the detriment of small scale farmers. Nigeria has over 70 per cent small scale farmers that stand to be side-lined by a UPOV-styled system. Accordingly, I urge the Nigerian Government to cease, or at the least delay, the ongoing legislative process. Crucially, I call on the Nigerian Government to commission a careful *ex-ante* human rights impact assessment (HRIA) to establish the effects of introducing a UPOV-styled plant variety protection law in the country.

What is UPOV Anyway?

UPOV, in brief, is an independent intergovernmental organisation with 76 members, covering 95 States. It was created via the 1961 UPOV Convention, adopted on 2 December 1961, by seven European countries: Belgium, Denmark, France, Italy, Germany, the Netherlands and the United Kingdom. The 1961 UPOV Convention entered into force in 1968 after the latter three countries ratified it. It has been revised three times, in 1972, 1978 and 1991, with each revision strengthening its plant breeders' rights system, which presents a one-size-fits-all rigid regime that overlooks the variations in its members' agricultural systems. In addition to harmonising the fragmented systems around Europe, UPOV seeks to encourage the development of new varieties of plants and promote plant breeders' rights in international markets. These plant breeders include dominant multinational corporations in the agribusiness sector like Bayer/Monsanto, Cargill, Du Pont/Pioneer and Syngenta, who produce and protect genetically uniform plant varieties developed from (mostly unattributed and uncompensated) farmers genetic materials. As commercially centred corporations, the multinationals vigilantly monitor and enforce the legal use of their protected plant varieties which often conflicts with small scale farmers' perennial practices of reusing, exchanging and selling plant propagating materials.

Forces Nigeria Confronts at the National and International Levels

Nigeria does not have a plant variety protection law. It, however, has no shortage of legal systems, norms or principles it could adopt, from the plethora

available at the international level. Drawing from international relations, law and politics, Professors Karen Alter and Kal Raustiala conceptualise the selection of systems, norms and principles embedded in distinct or even contradictory non-hierarchical institutions covering related subjects as regime complexes. Practical political outcomes of regime complexes include regime shifting and regime development through implementation. In fact, an often-cited reason for the introduction of plant variety protection laws is the implementation of obligations under the regime complex for plant varieties. The regime complex for plant varieties comprise interrelated innovation, equity and human rights instruments including the: Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS),UPOV Conventions, Convention on Biological Diversity (CBD), Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilisation (Nagoya Protocol), International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA), United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) and the United Nations Declaration on the Rights of Peasants and other People Working in Rural Areas (UNRPPWR).

Beyond obligations under international regimes, I have argued elsewhere, building on the brilliant body of scholarship from Professors Johnson Ekpere, Chidi Oguamanan and Graham Dutfield, that three factors contribute to the introduction of plant variety protection laws in Africa and the Global South. First, socialisation by international organisations such as UPOV through capacity building, conferences, courses, seminars and training. Second, pressures from multinational agribusinesses such as Bayer/Monsanto, Cargill and Syngenta that operate in these countries. Third, coercion by Global North countries and intergovernmental institutions such as the United States and European Union through trade and investment agreements.

A selected combination of the aforementioned reasons applies to Nigeria. It is a party to TRIPS and CBD; it is a signatory to the Nagoya Protocol and ITPGRFA; it voted for the adoption of the UNRPPWR. In the past decade, Nigerian officials have participated in conferences, courses, seminars and training that promote UPOV-styled laws as ideal. In the past decade, Bayer, Cargill and Syngenta have also commenced operations in Nigeria. Furthermore, Nigeria is a party to the G8 New Alliance for Food Security and Nutrition under which it broadly

commits to reform its seed system. This combination of factors inevitably precipitates the introduction of a UPOV-styled plant variety protection law.

Why is UPOV an Untoward Path?

While the 1991 UPOV Convention may be appropriate for the European countries where it was conceived, I highlight three provisions, that *inter alia*, raise grave concerns about its appropriateness for Nigeria. First, the conditions for protection in Article 5(1): novelty, uniformity, distinctness and stability alongside Article 5(2) that maintains the grant of breeder's rights cannot be subject to any other conditions. As earlier noted, 70 per cent of farmers in Nigeria are small-scale farmers. These farmers select, conserve and develop or discover varieties, which would fail to meet the conditions for protection set out above. Following the stringent provisions of Article 5(2), Nigeria would be barred from including provisions that protect small-scale farmers varieties in its plant variety protection law if it joins UPOV.

Second, the limitation on farmers' rights to save, reuse, exchange and sell farm-saved seeds in Article 15 (2). While national authorities can choose how to characterise this breeder's exemption, Article 15 (2) prominently points out that the provision is 'subject to the safeguarding of the legitimate interests of the breeder.' Small-scale farmers save, reuse, exchange and sell seeds as integral features of their traditional farming practices. This provision would prioritise the interests of the minority commercial plant breeders over the majority small-scale farmers in Nigeria.

Third, the strict compliance with the 1991 Act of the UPOV Convention and requirement for the UPOV Council's approval before accession. Article 34.3 mandates approval from the UPOV Council before a country or intergovernmental organisation deposits its instrument of accession. If Nigeria joins UPOV, it cannot incorporate relevant counterhegemonic legal norms and principles such as farmers' rights as well as access and benefit sharing from the CBD, ITPGRFA and UNRPPWR. While Nigeria can craft separate laws that enshrine these legal norms and principles, a more effective approach will be to introduce a comprehensive plant variety protection law that implements the different international obligations and balances the competing interests of commercial breeders and small-scale farmers.' Notably, the latter approach

should be preferred because Nigeria can employ and adapt provisions from the UPOV Conventions without joining UPOV as India and Thailand have creatively done. This way, Nigeria can enjoy the benefits of the technical template UPOV offers without being bound by the undue limitations it portends.

A Human Rights Impact Assessment

Nigeria has precedents of declining or delaying membership of intergovernmental organisations or initiatives to protect national interests. For example, Nigeria is not a party to either of the two intellectual property organisations in Africa, the African Intellectual Property Organisation and African Regional Intellectual Property Organisation. President Muhammadu Buhari delayed the signing of the African Continental Free Trade Area (AfCFTA) Agreement to commission a consultative committee that investigated the effects of Nigeria's membership. Considering the implications of plant variety protection not only on trade like the AfCFTA but on critical social and economic sectors that affect everyday lives like food, agriculture, environment, energy and employment, I urge the Nigerian Government to, at the least, delay the legislative process on the PVP Bill. I further implore the Nigerian Government to conduct rigorous research and informed consultations on the demerits and merits of UPOV membership for Nigeria.

The recommended research and consultation should include an *ex-ante* HRIA on the effects of a UPOV-styled plant variety protection law on stakeholders in Nigeria, particularly pertaining to the right to food, farmers' rights, breeders' rights, food sovereignty, access to genetic resources and fair/equitable benefit sharing. Indeed, the aforementioned AfCFTA underwent an *ex-ante* HRIA analogous to that recommended here. As Professor James Harrison argues, a HRIA measures the actual or potential impacts of policies, programmes and projects on human rights through evidence-based analysis. The evidence-based analysis illuminates human rights concerns, which can provoke public debates and prompt the accountability of lawmakers. Nigeria's plant variety protection law-making process is currently shrouded in silence. A carefully completed HRIA would amplify stakeholders' voices, foster transparency and clarify the contours of an effective plant variety protection law fit for Nigeria.

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