

OPINION ON THE BINDING NATURE OF ARTICLE 9 ITPGRFA*

FIRST SECTION

1) The Treaty at a glance

International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA), 2001 (entered into force 2004);

Objectives:

- conservation and sustainable use of genetic resources for food and agriculture;
- fair and equitable sharing of the benefits derived from their use;
- plant genetic resources for food and agriculture, which form the basis of food worldwide, must be conserved and used in a sustainable manner;
- The contribution of farmers to the conservation and development of plant genetic resources must be recognised and the resulting rights (*Farmers' Rights*) must be respected;
- the global dimension of the agreements must facilitate access to plant genetic resources for farmers, breeders and scientists;
- the benefits arising from the use of genetic resources must be shared with the countries of origin of those resources and with the farmers who created and conserved the diversity.

2) Legal aspects of the Treaty

The Treaty is a multilateral international agreement which aims to ensure food security through the conservation, exchange and sustainable use of global plant genetic resources for food and agriculture (PGRFA), as well as the fair and equitable sharing of the benefits arising out of their use, in accordance with the Convention on Biological Diversity (CBD¹). The CBD has recognised the special and distinctive nature of plant genetic resources, as well as their special characteristics, and allows for their use at international level and their conservation and sustainable use, requiring *tailor-made* solutions given their importance for global food security. The conservation and sustainable use of plant genetic resources for food and agriculture are key to ensuring that the planet can produce enough food to feed the world's growing population in the future.

The international commitment on which the decision to adopt such a treaty was based stemmed from the principle that plant genetic resources are a heritage of mankind and for this reason must be obtainable without limitation. Over the next 10 to 15 years, two opposing trends developed: in the 1980s, the first plants and gene sequences were patented;

In response, the Convention on Biological Diversity was adopted in 1992, the main directive of which is to share the benefits arising from the use of genetic resources with countries of origin. With the adoption of the Convention, it was also established that access to seed banks needed to be re-regulated and the issue of Farmers' Rights addressed. The conception of genetic resources as an asset of humanity was also overcome and a different idea was affirmed that attributes to genetic resources the nature of an asset belonging to the intangible heritage of the local communities that produced, conserved and used them².

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¹ Convention on Biological Diversity (CBD), 1992 (entered into force in 1993). Objectives: conservation of biological diversity; sustainable use of its components; fair and equitable sharing of the benefits arising from commercial and other utilisation of genetic resources. Applies to all ecosystems, species and genetic resources.

² On this point, *The "farmers' rights" on genetic resources and local knowledge. A new model of collective property?*, in Petrucci (ed.), *Annals* 12/2010, Campobasso, 2011

At the moment, only *soft law* instruments have been prepared with regard to farmers' rights at the international level (The UN Declaration on the Rights of Farmers and Others Working in Rural Areas of 17 December 2018).

In Italy the Treaty was ratified in 2004 and applied with Law no. 101/2004, "Ratification and implementation of the International Treaty on Plant Genetic Resources for Food and Agriculture, with the Appendix, adopted by the 31st meeting of the FAO Conference on 3 November 2001"³". This ratification law entrusts the Regions and Autonomous Provinces with the competences regarding the implementation and execution of the International Treaty, while the Ministry of Agricultural, Food and Forestry Policies (MIPAAF) is assigned the task of monitoring the interventions carried out by the Regions and Autonomous Provinces and reporting on the international level on the state of application of the Treaty itself.

[In 2008, the MIPAAF produced with the Regions and Autonomous Provinces the National Plan on Biodiversity of Agricultural Interest with the general objective of: "coordinate the set of initiatives and relationships with national and international Bodies dealing with biodiversity in agriculture and as well as to give the Regions and Autonomous Provinces, called to the implementation of the FAO Treaty by Law 101/2004, concrete answers to the problems that have emerged in order to try to introduce a national system of protection of agricultural biodiversity, able to bring back to the territory in an effective way, much of the biodiversity that has disappeared or is at risk of extinction, for the benefit of environmental protection, sustainable agriculture and development."

The National Strategy for Biodiversity (SNB), approved in October 2010 on the occasion of the International Year for Biodiversity, dedicates specific areas of work to Genetic Resources and Agriculture, examining both aspects related to the knowledge, conservation and sustainable use of genetic resources present on our territory, and aspects related to the sustainable use of agricultural biodiversity and the protection and promotion of local and native species].

3) Provisions of particular interest

Article 4: (PART II - GENERAL PROVISIONS) - General Obligations - Each Contracting Party shall ensure that its laws, regulations and procedures conform to the obligations entered into under this Treaty.

Article 9: (PART III - RIGHTS OF FARMERS) - Rights of farmers -

9.1 The Contracting Parties recognize the enormous contribution that local and indigenous communities and farmers in all regions of the world, particularly those in centres of origin and crop diversity, have made and will continue to make to the conservation and enhancement of plant

³ published in the Official Gazette no. 95 of April 23, 2004 - Ordinary Supplement no. 73. The ratification law is composed of 5 articles. In particular, articles 2 and 3 read:

Art. 2 - Order of Execution -

The Treaty referred to in Article 1 shall be fully and completely executed as from the date of its entry into force, in accordance with the provisions of Article 28 of that Treaty.

Art. 3: - Regional competences -

1. The Regions and Autonomous Provinces of Trento and Bolzano shall ensure the implementation and execution of the Treaty referred to in Article 1, pursuant to Article 6, paragraphs 1 and 5, of Law No. 131 of 5 June 2003, within one year from the date of entry into force of the Treaty, within the limits of the financial resources available.

2. The Ministry of Agricultural and Forestry Policies shall have the task of reporting at international level on the state of application of the Treaty referred to in Article 1 and of monitoring the interventions carried out by the regions and autonomous provinces of Trento and Bolzano.

The regions and autonomous provinces of Trento and Bolzano shall communicate by 30 June each year to the Ministry of Agricultural and Forestry Policy and the Ministry for the Environment and Land Protection the measures which they have adopted or intend to adopt to implement the provisions contained in Articles 5, 6, 9, 11 and 12 of the Treaty referred to in Article 1.

genetic resources that form the basis of food and agricultural production throughout the world.

9.2 The Contracting Parties agree that the realization of Farmers' Rights with respect to plant genetic resources for food and agriculture is the responsibility of governments. In accordance with their needs and priorities, each Contracting Party shall, as appropriate, and subject to national legislation, take measures to protect and promote Farmers' Rights and to ensure, inter alia (a) the protection of traditional knowledge relevant to plant genetic resources for food and agriculture; (b) the right to participate equitably in the sharing of the benefits arising from the utilization of plant genetic resources for food and agriculture; and (c) the right to participate in decision-making, at the national level, on matters related to the conservation and sustainable use of plant genetic resources for food and agriculture.

9.3 Subject to national legislation, nothing in this Article shall restrict the right of farmers to save, use, exchange and sell seed or propagating material.

National standards that can implement the dictates of Article 9 ITPGRFA

Articles 80 and 87 of the Italian Constitution regulate the ratification of international treaties and the ITPGRFA was ratified by law **law no. 101 of 6 April 2004**, *Ratification and implementation of the International Treaty on Plant Genetic Resources for Food and Agriculture*, with the appendix, adopted by the thirty-first meeting of the FAO Conference on 3 November 2001, published in the Official Gazette no. 95 of 23 April 2004 - Ordinary Supplement no. 73. The law gives full and complete execution to the Treaty.

Other reference legislation useful for the application of Article 9 of the Treaty

Law no. 194 of 1 December 2015, *Provisions for the protection and enhancement of biodiversity of agricultural and food interest* (OJ no. 288 of 11-12-2015). In particular:

Article 11 Marketing of seed of conservation varieties

1. Paragraph 6 of Article 19-bis of Law No 1096 of 25 November 1971, as subsequently amended, shall be replaced by the following: '6. Farmers producing the seed varieties listed in the national register of conservation varieties, in the places where these varieties have evolved their characteristic properties, shall be granted the right to direct and local sales of seeds or propagating material related to these varieties and produced on the farm, as well as the right to free trade within the National Network of Agricultural and Food Biodiversity, in accordance with the provisions of legislative decree no. 149 of 29 October 2009 and legislative decree no. 267 of 30 December 2010, without prejudice to the provisions of the phytosanitary regulations in force'.

Article 2(3) in the part where it defines 'farmer-keepers': For the purposes of this law, "custodian farmers" are defined as farmers who undertake the conservation, within the farm or in situ, of local genetic resources of food and agricultural interest subject to the risk of extinction or genetic erosion, according to the modalities defined by the regions and autonomous provinces of Trento and Bolzano. For the purposes of this law, "custodian breeders" are defined as breeders who are committed to conservation,

on the farm or in situ, of local animal genetic resources of food and agricultural interest which are in danger of extinction or genetic erosion, in accordance with the following conditions provided for in the specifications for the keeping of herd books or registers referred to in Law No 30 of 15 January 1991 and Legislative Decree No 529 of 30 December 1992 and in the relevant regional provisions.

4) European legislation relevant to the implementation of Article 9 ITPGRFA

Council Regulation (EC) No 2100/94 of 27 July 1994 on Community plant variety rights (OJ 1994 L227/1). Consolidated in the 2008 version.

Article 14 Derogation from Community plant variety rights

By way of derogation from Article 13(2) and in order to safeguard agricultural production, farmers shall be authorised to use in the fields for propagating purposes, on their holdings, the product of

the harvest which they have obtained by planting, on their holdings, propagating material of a variety other than a hybrid or a synthetic variety which benefits from a Community plant variety right. However, this provision applies only to certain categories of seeds.

Directive 98/44/EC of the European Parliament and of the Council of 6 July 1998 on the legal protection of biotechnological inventions (OJEC L 213/13).

COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS *EU Biodiversity Strategy 2030 - Bringing Nature Back into Our Lives Brussels, 20.5.2020 COM(2020) 380 final.*

The document states: Biodiversity is also fundamental to safeguarding food security in the EU and across the planet, and its depletion poses a threat to food systems, jeopardising our food security as well as our nutrition. Biodiversity also underpins healthy, nutritious diets and improves both rural livelihoods and agricultural productivity: more than 75 % of the world's food crops depend on animal pollination.

5) The legal regime of ratification in the Constitution (brief overview)

The Constitution of the Italian Republic, approved by the Constituent Assembly on 22 December 1947 and promulgated on the following 27 December, came into force on 1 January 1948. The Constitution is characterised by a strong internationalist openness attested to by two articles, 10 and 11, located in Part One dedicated to "Fundamental Principles". The first is dedicated to the relationship between Italian law and customary international law and to the legal condition of the foreigner, while the second characterises Italy as a peace-promoting State and allows limitations of sovereignty aimed at ensuring peace and justice among Nations.

The exercise of foreign power, on the other hand, is not organically regulated by the Constitutional Charter and must therefore be deduced from a number of provisions placed in the various titles governing constitutional bodies. Ratification is therefore regulated by the combined provisions of articles 80 and 87 of the Constitution, which are found respectively in the titles dedicated to Parliament and the President of the Republic.

Republic. Similar to ratification is accession, relating to open multilateral treaties, which permit the entry of other States, even at a later date. It is believed that this hypothesis falls under the same constitutional provision.

The expression "treaties" is in fact to be understood in a broad sense. It includes any agreement between Italy and third States or international organizations aimed at regulating the life of international relations and providing rights and obligations for the parties. It matters little whether it is called treaty or convention, agreement, memorandum, protocol, act, statute, exchange of letters, declaration, pact, charter.

Political agreements are different from treaties in this sense, as they do not require ratification, do not legally bind the State and are at the disposal of the Government.

The other constitutional provisions relating to ratification are art. 72, paragraph 4, according to which "the normal procedure of examination and direct approval by the Chamber is always adopted for bills on the subject ... of authorization to ratify international treaties ...", or the "reservation of the Chamber" and art. 75, paragraph 2, according to which "the referendum is not admitted for laws ... of authorization to ratify international treaties."

The presentation of the ratification discipline would not be complete without an examination of the role of the Regions, which has been deeply innovated by the constitutional revision that rewrote article 117, carried out with the constitutional law of 18th October 2001, no. 3. According to art. 117 "(t)he legislative power is exercised by the State and by the Regions in respect of the Constitution, as well as of the constraints deriving from the community system and from

international obligations". This last reference includes the obligations deriving from ratification together with those deriving from general international law, where 'Community obligations' means both the European treaties and subsequent revisions and the related treaties as well as the whole *acquis communautaire* (founding treaties, secondary legislation, judgments of the Court of Justice, agreements concluded by the Union).

6) Possible path to be followed for the implementation of Article 9 ITPGRFA

6.1) RFGAAs as a collective good and the guarantee of the right to food

The international community has recognised food security as a priority objective in repeated documents. The lack of effectiveness of international and national policies to ensure food security, as well as the persistence of a condition of malnutrition experienced by a high percentage of the world's population, have promoted both a better understanding of the factors that contribute to food insecurity and the redefinition of the most appropriate legal instruments to be used to prevent its occurrence.

What oriented, in a different perspective, an intervention aimed at preventing food insecurity, was the acquired awareness of the persistence of this phenomenon in predominantly rural contexts, a fact to be charged mainly to the unequal distribution of titles useful for access to resources and capital necessary for the production, or rather for self-production, of food. If the lack of effectiveness of national and international policies put in place to pursue the principle of food security has prevented the achievement of a non-legally binding political objective, the unequal distribution of titles to access the resources necessary for food production has affected and continues to affect the concrete exercise of a fundamental right to food that States should, instead, guarantee.

On this premise, food security has been reinterpreted in the light of a *human rights approach*, with the aim of increasing its legal cogency. This phenomenon somehow shifts the focus of social change from a public intervention implemented on a voluntary basis by States in the exercise of their sovereignty, to a social conflict which, on the internal side, can be politically legitimated to claim a modification of both interprivate relations and the citizen-state relationship. In this sense, the subject considered capable of transforming the relations of force that produce inequality in the exercise of fundamental rights, including the right to food, is no longer the State - as a subject committed, on a voluntary basis, to achieving the objectives assumed before the international community - but the subjects of law of the individual national systems which, individually and collectively, claim the international standards of protection of fundamental rights that are legally binding⁴. Rarely does the self-evidence of fundamental rights appear as marked as that which characterizes the right to food. There are many references in the documents of international law which recognise this right. Among them, the following stand out:

- Article 25 of the Universal Declaration of Human Rights, which states that everyone has the right to sufficient food to ensure a state of health and well-being;
- Article 6 of the International Covenant on Civil and Political Rights, which recognizes the fundamental right to life;
- Article 11 of the International Covenant on Economic, Social and Cultural Rights which recognizes the right of everyone to be "free from hunger" and also recognizes the importance of technological development and efficient use of natural resources as factors affecting its exercise and guarantee.

A synthesis of these formulations can be found in the Preamble of the Rome Declaration on Food Security - a document which brought together the results of the World Food Summit, held in Rome in November 1996 - which reaffirms the right of everyone to have "access to safe and nutritious

⁴ From this point of view, the declarations of rights, despite their scarce effectiveness in legally obliging states to respect minimum standards of protection, at least play an important role in legitimizing the social conflict promoted, in a logic of demands, by the subjects that catalyze social transformation on the internal front.

food, consistent with the right to adequate food and the fundamental right of everyone to be free from hunger"⁵. The recognition of this right has been accompanied by a series of documents in which the standards of protection referring to it have been identified. The Committee on Economic, Social and Cultural Rights, commenting on art. 11 of the Covenant on Economic, Social and Cultural Rights⁶, stated that the right to food should not be interpreted in a restrictive⁷ way. Its protection implies the availability and accessibility of food of sufficient quality and quantity. The criterion of availability is supplemented when there is the possibility of accessing the resources necessary for the autonomous production of food or of having recourse to a distribution system within the market.

The normative content of Article 11 of the Covenant on Economic, Social and Cultural Rights also obliges the State to respect the right to food where it is already guaranteed, to protect it from acts by companies or private individuals that could undermine its exercise, and to satisfy (or facilitate) it by undertaking directly to strengthen everyone's access to the means and resources that guarantee their livelihood⁸. The Committee expressly notes a violation of the right to food when insufficient regulation of inter-subjective relations does not prevent private parties from violating its content. The factors hindering the exercise of the right to food, especially in rural areas, are mainly to be found in the absence of the necessary qualifications to access the resources needed for self-production of the food on which one's livelihood depends⁹. The factors that jeopardize such access can be objective, such as the scarcity of fertile land or limited availability of water, but also legal, such as inadequate regulation of interprivate relations that make productive factors inaccessible to the most vulnerable social segments because the price is too high.

6.2) RFGAAs and fundamental rights

In a report submitted to the General Assembly of the United Nations in 2001, exclusive rights on RFGAA were indicated as possible obstacles to the exercise of the right to food. In a subsequent report¹⁰, made public in 2009 and dedicated exclusively to the analysis of the impact of the seed trade system on the right to food, it was pointed out that it could be violated if appropriate measures were not adopted to ensure farmers reasonable conditions of access to seeds, an intervention complementary to a rebalancing of the relationship that has been consolidated in the agricultural production chain¹¹. The redefinition of the interprivate relationships existing between holders of

⁵ The document is available at <http://www.fao.org/docrep/003/w3613e/w3613e00.htm>.

⁶ COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS, The right to adequate food (General Comment No. 12, Art. 11 of the International Covenant on Economic, Social and Cultural Rights), 1999, E/C.12/1999/5. See also COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS, The right to water (General Comment n. 15, Arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights), 2003, E/C.12/2002/11 (both available at <http://www2.ohchr.org/english/bodies/cescr/comments.htm>)

⁷ COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS, The right to adequate food (General Comment No. 12, Art. 11 of the International Covenant on Economic, Social and Cultural Rights), 1999, E/C.12/1999/5, p.to 6.

⁸ COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS, The right to adequate food (General Comment No. 12, Art. 11 of the International Covenant on Economic, Social and Cultural Rights), 1999, E/C.12/1999/5, p.to 15.

⁹ See J. ZIEGLER, The right to food (Preliminary report transmitted by the Secretary-General to the members of the General Assembly), 2001, A/56/210, p. 20. This is one of the annual reports drawn up, starting in 2001, by the Special Rapporteur on the right to food, initially mandated by the Commission on Human Rights and subsequently prepared at the instigation of the Human Rights Council.

¹⁰ See O. DE SCHUTTER, The right to food, seed policies and the right to food: enhancing agrobiodiversity and encouraging innovation (Interim report of the Special Rapporteur on the right to food, submitted to the members of the General Assembly in accordance with paragraph 36 of General Assembly resolution 63/187), 2009, A/64/170.

¹¹ See O. DE SCHUTTER, The right to food, seed policies and the right to food: enhancing agrobiodiversity and encouraging innovation (Interim report of the Special Rapporteur on the right to food, submitted to the members of the General Assembly in accordance with paragraph 36 of General Assembly resolution 63/187), cit. p. 4. The statements contained in the document are particularly clear: "These obligations [to fulfil the right to food] apply both to the regulation of commercial seed systems and to the preservation and enhancement of informal or traditional farmers' seed systems. The separation of seed production and improvement from farming and the emergence of biotechnologies has led to a commercial seed system on which farmers are increasingly dependent. That system therefore has to be regulated in

exclusive rights on improved genetic material and farmers, desired in the documents mentioned, can be implemented by the States in the implementation of the UPOV or TRIPs system. Recognition, at European level, of the farmer's privilege already in EC regulation 2100/94¹² and in directive 98/44 EC¹³ demonstrates the political will to use this option in order to rebalance a relationship that may ultimately jeopardise the public interest in agricultural production. In this sense, the recognition of such prerogatives appears to be one of the discretionary instruments implemented within a public policy aimed at pursuing food safety. But the reinterpretation of this objective in the light of the *human rights approach* leads to a redefinition of the meaning and nature of the privileges attributable by the States to farmers, by leveraging on the rights that the ITPGRFA recognizes collectively. *Farmers' rights* are defined in the preamble as the right to "save, use, exchange and sell seeds or propagating material".

Article 9 mentions the right to 'share equally in the benefits arising out of the utilization of plant genetic resources for food and agriculture' and the right to 'participate in decision-making at national level on matters related to the conservation and sustainable use' of these resources.

The paradigm shift that has marked the evolution of the interpretation of the principle of food security has led to the reclassification of these rights among the contents ascribable to the right to food, thus useful for identifying the standards of protection in the light of which to evaluate state public policies. The redefinition of the conceptual framework through which to interpret farmers' rights and the function of the multilateral system established by the ITPGRFA contributes to delineating a complex regime inspired by the principle of attribution, which qualifies the RFGAA as a common, or rather collective, heritage, the object of institutional appropriation.

This is confirmed by the right of farmers to benefit directly from the use of the RFGAA, from which the existence of a collective position can be inferred. The principle of benefit-sharing has the function of compensating for the compression of collective rights in the face of exclusive appropriation of the benefits linked to the use of the resource reserved to them. It is because of this reservation that both the interprivate relationships between the holders of exclusive rights on the improved genetic heritage and farmers are redefined - recognizing to the latter the right to sell, plant, exchange seeds even if they are covered by patents or privative rights - and the legal position attributable to them before the public administration, including the rights of participation in decision-making processes related to the policies of conservation and management of the resource. This is a reservation which, besides appearing in its fullness with respect to the RFGAAs included in the multilateral system, also limits the faculties attributed to those who become holders of exclusive rights on improved genetic material.

In conclusion, the evolution which has affected the legal qualification of the RFGAA and the evolutionary interpretation of the right to food leads to two reflections. First of all, although the right to food is a fundamental right, therefore attributed on a universal basis, the terms in which it is articulated may differ depending on the individual's belonging to a particular social segment and on the context in which its exercise is claimed. Certainly, the exercise of the fundamental right to food by a farmer in a rural context includes a right to access the resources necessary for the exercise of agricultural activity aimed at food production. This differentiation of the contents of a fundamental right is all the more interesting if connected to the fact that the individual belongs to a group, that of

order to ensure that farmers have access to inputs on conditions which are reasonable, thus helping them to achieve an adequate standard of living; and they should ensure that the innovations leading to improved varieties and to new plant resources benefit all farmers, including the most vulnerable and marginalized among them".

¹² Council Regulation (EC) No 2100/94 of 27 July 1994 on Community plant variety rights (OJ 1994 L227/1).

Consolidated in the 2008 version. Article 14 Derogation from Community plant variety rights 1. "By way of derogation from Article 13(2) and in order to safeguard agricultural production, farmers shall be authorised to use in fields for propagating purposes, on their holdings, the product of the harvest which they have obtained by planting, on their holdings, propagating material of a variety other than a hybrid or synthetic variety which benefits from a Community plant variety right. However, this provision applies only to certain categories of seeds.

¹³ Directive 98/44/EC of the European Parliament and of the Council of 6 July 1998 on the legal protection of biotechnological inventions (OJEC L 213/13).

farmers, which collectively enjoys certain dispositive faculties over goods which are at the same time the object of exclusive rights, i.e. genetic material, whether it is the object of intellectual property rights due to manipulation or the object of the sovereign rights of a State. Belonging to a group thus becomes a condition for being able to exercise in practice, and in a differentiated manner, a right formally granted on a universal basis.

Secondly, the events taken into consideration demonstrate the gradual acquisition, even in the international arena, of a different awareness of the connection between the principle assumed to allocate a resource and the exercise of fundamental rights. In the Report presented in 2010 to the General Assembly of the United Nations¹⁴, the collective titling of land, attributed on a basically public basis and not privately transferable, was indicated as the most suitable instrument to guarantee, especially to the most vulnerable social segments, the right to food. This is the same model ultimately adopted for the RFGAAs, and which brings together the results of institutions consolidated in centuries of Western legal experience (such as civic uses) and alternative to the ideology established hegemonically with the celebration of individual property as the backbone of the entire modern legal system. Although the declared exclusive inappropriability of a resource has not automatically led to its accessibility and use inspired by the principle of equity, it can potentially be a useful tool to reduce the increasing inequalities that currently characterize the full and equal enjoyment of fundamental rights. It is in order to pursue this objective that farmers' rights on the one hand (as guaranteed legal positions that contribute to defining public and private relations gravitating on a resource that is reserved but at the same time susceptible to becoming the object of exclusive rights) and the multilateral system on the other hand must be interpreted as instruments implementing the right to food, and with it an international strategy for food security.

SECOND SECTION

Article 9 ITPGRFA and its binding scope

The International Multilateral Treaty on Plant Genetic Resources for Food and Agriculture is legally binding in its entirety on the countries that have signed it in accordance with existing rules of international law.

Article 4 of the same Treaty (General Obligations) states, moreover, that: "*Each Contracting Party shall ensure that its laws, regulations and procedures are in conformity with its obligations under this Treaty*".

In Italy the Treaty was ratified, as we have seen, with Law no. 101/2004, "Ratification and implementation of the International Treaty on Plant Genetic Resources for Food and Agriculture, with the Appendix, adopted by the 31st meeting of the FAO Conference on 3 November 2001"¹⁵.

¹⁴ O. DE SCHUTTER, The right to food (the interim report of the Special Rapporteur on the right to food, submitted by the Secretary-General to the Members of the General Assembly in accordance with General Assembly resolution 64/159), 2010, A/65/281, p. 7.

¹⁵ published in the Official Gazette no. 95 of April 23, 2004 - Ordinary Supplement no. 73. The ratification law is composed of 5 articles. In particular, articles 2 and 3 read:

Art. 2 - Order of Execution -

The Treaty referred to in Article 1 shall be fully and completely executed as from the date of its entry into force, in accordance with the provisions of Article 28 of that Treaty.

Art. 3 - Regional competences -

1. *The Regions and Autonomous Provinces of Trento and Bolzano shall ensure the implementation and execution of the Treaty referred to in Article 1, pursuant to Article 6, paragraphs 1 and 5, of Law No. 131 of 5 June 2003, within one year from the date of entry into force of the Treaty, within the limits of the financial resources available.*

2. *The Ministry of Agricultural and Forestry Policies shall have the task of reporting at international level on the state*

Article 2 (Order of Execution) of the above-mentioned ratification law gives full and complete execution to the Treaty: *"Full and complete execution shall be given to the Treaty referred to in Article 1 from the date of its entry into force, in accordance with the provisions of Article 28 of the Treaty itself"*.

With the ratification law, the Treaty in its entirety has therefore been incorporated into our legal system and is legally binding in all its elements and provisions¹⁶.

It follows that, like all the provisions of the Treaty, Article 9 is binding in its entirety. However, it is precisely the wording of the third paragraph of Article 9 that gives rise to some concern.

Article 9(3) states: *"Nothing in this Article shall be construed as restricting the rights of farmers to save, use, exchange and sell farm seed or propagating material, subject to the provisions of national law and as may be appropriate."*¹⁷

This wording is somewhat ambiguous and, as will be seen below, differs from that drafted in English (the official language of the Treaty) in that it may lend itself to an interpretation according to which State legislation may limit the rights recognised in the Treaty.

However, this interpretation, in our view, cannot be accepted for two main reasons:

- it departs from the explicit and implicit content and objectives of the Treaty in question
- does not take into account the guarantor formula that the international legislator in English has, instead, used precisely to reaffirm and strengthen the rights mentioned in the two previous paragraphs of art. 9.

The English text (official version of the Treaty) of paragraph 3 of Article 9 reads: *"Nothing in this Article shall be interpreted to limit any rights that farmers have to save, use, exchange and sell farm-saved seed/propagating material, subject to national law and as appropriate."*

Entering into the merits of the provision, it can be noted that the Italian translation (not official) differs from this formula both because it does not report the exact literal datum, and because it loses the guaranteeing scope that the English article manifests.

If, in fact, we literally translate the content of paragraph 3 we can read that: *"Nothing in this Article shall be construed as limiting the rights of farmers to save, use, exchange and sell farm-saved seed or propagating material, subject to national law where applicable"* (or as appropriate or relevant, as the case may be). This is an expression often used in a similar way by the international legislator within the Treaties in order to underline and reinforce the object of protection referred to.

In the case in question, the intention of the international legislator is clear: he wants to make sure that in no way the rights of the peasants, of which the law in question speaks and which it recognizes, can be questioned or limited; this must always happen, even in the presence of a national law, if any, which operates in this sense, that is, to protect the rights of the peasants.

The unofficial Italian translation may appear misleading, however, in the part in which, departing

of application of the Treaty referred to in Article 1 and of monitoring the interventions carried out by the regions and autonomous provinces of Trento and Bolzano.

3. The regions and autonomous provinces of Trento and Bolzano shall communicate by 30 June each year to the Ministry of Agricultural and Forestry Policy and the Ministry of the Environment and Land Protection the measures which they have adopted or intend to adopt to implement the provisions contained in Articles 5, 6, 9, 11 and 12 of the Treaty referred to in Article 1.

¹⁶ Article 117 of the Constitution. Paragraph 1, in the new formulation introduced with the Constitutional Law no. 3 /2001, establishes that the exercise of the legislative power of the State and the Regions is conditioned by the respect of international obligations: it is immediately evident how the innovative capacity of such disposition is grasped above all in relation to the introduction of the constitutional constraint, addressed to the ordinary legislator, State and Regional, of the respect of international obligations.

¹⁷ This is what is stated in the version of the Treaty translated and ratified in L. 101/2004.

from the English text, it uses the expression "*without prejudice to the provisions of national legislation*", thus limiting the further guarantee of protection of farmers' rights, which, on the other hand, the international legislator intends to strengthen in paragraph 3.

However, despite the fact that the ratification law contains the Italian text of the treaty (which, however, is not the official version and this is also stated in the body of the ratification law), the provision should be interpreted in the sense closest to what is written in English and bearing in mind the intent of the international legislator, which was to reiterate the guarantees for the protection of the rights of farmers contained in the entire Article 9, not to allow state legislation to limit the rights enshrined in the Treaty.

In addition, the wording of Article 9.3 as reflected in the English translation is closer to the very purpose and nature of the treaty.

From this it may be inferred that, even if there were a present or future national provision restricting the rights protected by Article 9, it could not be applied because:

Art. 9, in a hypothetical conflict with a domestic norm, prevails as a norm of international law superior to that of the State, unless it is a norm of Constitutional rank (and always within the limit of balancing the interests at stake).

The, in our opinion, ambiguous translation of the formula in question was also carried out at European level in the Council Decision of 24 February 2004 concerning the conclusion, on behalf of the European Community, of the International Treaty on Plant Genetic Resources for Food and Agriculture (2004/869/EC, G.U.E L 378/1 of 23.12.2004). A further step is implemented here because it reads: "*Without prejudice to national legislation and as appropriate, nothing in this Article shall be construed as restricting the right of farmers to save, use, exchange and sell seed or propagating material*". In this version, not only does the equivocal wording "without prejudice to national legislation" remain, but the perspective is reversed, giving greater emphasis to what in the English text is, by contrast, the final part of the provision.

Possible broad interpretation of Article 9(3)

Starting from the assumption that the text of paragraph 3 of article 9, as formulated by the international legislator, was conceived as a further guarantee for the protection of farmers' rights and that the doubts about the interpretation of the Italian translation subject to ratification can be overcome by interpreting the provision in the sense closest to what is written in the official text of the Treaty, if one wanted to try to overcome the equivocal wording in Italian of paragraph 3 of article 9, one could try to interpret it in an extensive way and in a more general context.

In other words, it seems appropriate to interpret this important provision with respect to the original intent of the international legislator, which was to better guarantee the rights of farmers, and in accordance with the general objective of the Treaty, which is to protect fundamental rights such as the right to food (recognized as such at the international level and (directly or indirectly) by the Constitutions of individual states).

In the light of this reconstructive framework, paragraph 3 can be read in this sense by reversing the perspective: *Nothing in this Article shall restrict the right of farmers to save, use, exchange and sell seed or propagating material, without prejudice to national legislation which shall not operate to restrict universally recognised fundamental rights including the right to life, health and food.*

A reading of the whole of Article 9 in terms of securing the right to food and material access to it can be correctly justified since both the preamble and the articles of the Treaty state that among the reasons for its adoption are: *the protection of resources for food and agriculture*. So food is an important aspect of the Treaty. In the title itself, "food" even comes before the word "agriculture".

Article 1(1) of the Treaty states: "*The objectives of this Treaty are the conservation and sustainable use of plant genetic resources for food and agriculture and the fair and equitable sharing of the benefits arising out of their use, in harmony with the Convention on Biological Diversity, for sustainable agriculture and for food security.*"

The preamble also states, as one of its aims, that the Treaty and the relevant international agreements should be complementary to each other in order to ensure sustainable agriculture and food security.

Despite the fact that the Treaty deals with plant genetic resources, one of the cornerstones of the Treaty can therefore certainly be food security, understood as the security of supply guaranteed only if biodiversity is preserved, including through the work carried out by farmers in the field and by safeguarding their right to exchange and conserve seeds and plant propagation material, the primary source of food production.