

Policy Brief

Why Kenya Should Amend Section 3(3)(c) & (i) and Section 10(f)
of the
Seeds and Plant Varieties Act Cap 326

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Introduction

The Seeds and Plants Varieties Act Cap 326 provides the legal framework governing the Seed Sector in Kenya. The Seeds Act confers to the Kenyan Government, the power to regulate transactions in seeds, including provision for the testing and certification of seeds; for the establishment of an Index of names of plant varieties; to empower the imposition of restriction on the introduction of new varieties; to control the importation of seeds; to authorize measures to prevent injurious cross-pollination; to provide for the grant of proprietary rights to persons breeding or discovering and developing new varieties; to establish a centre for plant genetic resources for food and agriculture, including indigenous seeds and plant varieties; to establish a Tribunal to hear appeals & other proceedings and for connected purposes. The Act defines “Seed” as that part of a plant which is or is intended to be used for propagation and “Sell” to include barter, exchange, offering or exposing seeds for sale. This definition of “sell” includes forms in which smallholder farmers share seeds including “seed exchange practices” hence exposing them to criminal suits for using indigenous seeds.

Section 3(3)(c) of the Seeds Act provide that Seed Regulations may prohibit selling of uncertified seeds. This section should be amended, since it exposes Farmer Managed Seeds Systems (FMSSs) to criminal suits as FMSSs do not fit within the Standards of Distinctiveness, Uniformity and Stability (DUS) used to certify seeds thereby affecting the right of the smallholder farmers to use indigenous seeds.

Section 3(3)(i) provide that Seed Regulations may provide for the integration and harmonization of the seed industry. This section should be amended as it exposes FMSSs to criminal suits as integration and harmonization is based on DUS standards which FMSS do not conform to apart from aiming at creating a larger national seed industry and market at the expense of localized FMSS.

Section 10(4)(f) provide that any person who offers for sale, seed that fails to meet the requisite standards or has been rejected at any seed certification stage shall be guilty of an offence and upon conviction, shall be liable to a fine not exceeding one million shillings or to imprisonment for a term not exceeding two years, or both. This section should be amended as it exposes FMSSs to criminal suits as the Act defines “sell” to include barter, exchange, offering or exposing seeds for sale which are forms in which smallholder farmers share seeds including “seed exchange practices”

Kenya is a party to the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA) also known as the Seeds Treaty, the Convention of Biological Diversity (CBD) and the United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas (UNDROP) all that contain articles that recognize the Farmer’s rights to save, use, exchange and sell farm-saved seed and propagating materials. The article 2(6) of the Kenyan Constitution provides that any treaty or convention ratified by Kenya shall form part of the law of Kenya under the Kenyan Constitution implying that that Kenya is obligated to implement the provisions of the various Treaties and Convention that Kenya is a party to including the Seed Treaty, CBD and the UNDROP. Furthermore, article 11(3)(b) of the Constitution of Kenya 2010 obligates Kenyan Parliament to enact legislations that recognize and protect the ownership of indigenous seeds and plant varieties, their genetic and diverse characteristics and their use by communities in Kenya.

International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA)

The article 9.3 of the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA) also known as the Seeds Treaty obligates the Kenyan government to Commit to upholding the recognition of the Farmer's rights to save, use, exchange and sell farm-saved seed and propagating materials. This implies that if the Kenyan Government does not amend Section 3(3)(c) & (i) and Section 10(f) of the Seeds and Plant Varieties Act Cap 326 that criminalizes Farmer Managed Seeds System (FMSSs), then it will be acting in contravention of its obligation to upholding its international commitments to article 9.3 of the ITPGRFA due to the following reasons:

1. The article 2(6) of the Kenyan Constitution provides that any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Kenyan Constitution. Kenya Acceded the ITPGRFA on 27 May 2003 and the ITPGRFA entered into force on 29 June 2004 implying that Kenya has no option but to align the Seeds and Plants varieties Act Cap 326 to article 9.3 of the ITPGRFA.
2. Article 9.3 of the ITPGRFA confers to the smallholder famers the right to save, use, exchange and sell their farm-saved seed or propagating materials that are criminalized by Section 3(3)(c) & (i) and Section 10(f) of the Seeds and Plant Varieties Act Cap 326
3. Kenya, therefore needs to align the Section 3(3)(c) & (i) and Section 10(f) of the Seeds and Plant Varieties Act Cap 326 to article 9.3 of the ITPGRFA and if Kenya doesn't do so then Kenya risks facing more lawsuits challenging the conformity of the Seeds and Plant Varieties Act Cap 326 to article 9.3 of the ITPGRFA apart from being cast in bad light in Universal Periodic Review (UPR) processes which negatively affects Kenya's Foreign Policy and standing as a country that respects the rule of law

The Convention on Biological Diversity

The article 1 of the Convention on Biological Diversity (CBD) obligates the Kenyan government to ensure rights of smallholder farmers right to sustainable use of the seed components. This implies that if the Kenyan Government does not amend Section 3(3)(c) & (i) and Section 10(f) of the Seeds and Plant Varieties Act Cap 326 that criminalizes Farmer Managed Seeds System (FMSSs), then it will be acting in contravention of its obligation to uphold the international commitments to article 1 of the Convention on Biological Diversity (CBD) due to the following reasons:

1. The article 2(6) of the Kenyan Constitution provides that any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Kenyan Constitution. Kenya Ratified the CBD on 11 September 2003 and the CBD entered into force immediately implying that Kenya has no option but to align the Seeds and Plants varieties Act Cap 326 to article 1 of the Convention on Biological Diversity (CBD).
2. Article 1 of the Convention on Biological Diversity (CBD) confers to the smallholder famers the right to sustainable use of the seed components activities that are threatened by Section 3(3)(c) & (i) and Section 10(f) of the Seeds and Plant Varieties Act Cap 326
3. Kenya, therefore needs to align the Section 3(3)(c) & (i) and Section 10(f) of the Seeds and Plant Varieties Act Cap 326 to article 1 of the Convention on Biological Diversity

(CBD) and if Kenya doesn't do so then Kenya risks facing more lawsuits challenging the conformity of the Seeds and Plant Varieties Act Cap 326 to article 1 of the Convention on Biological Diversity (CBD) apart from being cast in bad light in Universal Periodic Review (UPR) processes which negatively affects Kenya's Foreign Policy and standing as a country that respects the rule of law

The United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas (UNDROP)

The article 19 of the UNDROP obligates the Kenyan Government to guarantee the farmer's rights to seeds including the rights to the protection of traditional knowledge relevant to plant genetic resources and to save, use, exchange and sell their farm-saved seed or propagating materials. This implies that if the Kenyan Government does not amend Section 3(3)(c) & (i) and Section 10(f) of the Seeds and Plant Varieties Act Cap 326 that criminalizes Farmer Managed Seeds System (FMSSs), then it will be acting in contravention of its obligation to uphold the international commitments to article 19 of the UNDROP due to the following reasons:

1. The affirmation by the Supreme Court of Kenya that non-binding agreements like UNDROP though not of binding force, are of persuasive value, functioning as interpretive tools aimed at breathing life into constitutional provisions imply that Kenya has no option but to align the Seeds and Plants varieties Act Cap 326 to article 19 of the UNDROP.
2. Article 19 of the UNDROP confers to the smallholder famers the right to seeds including the rights to the protection of traditional knowledge relevant to plant genetic resources and to save, use, exchange and sell their farm-saved seed or propagating materials, acts that are criminalized by Section 3(3)(c) & (i) and Section 10(f) of the Seeds and Plant Varieties Act Cap 326
3. Kenya, therefore needs to align the Section 3(3)(c) & (i) and Section 10(f) of the Seeds and Plant Varieties Act Cap 326 to article 19 of the UNDROP and if Kenya doesn't do so then Kenya risks facing lawsuits challenging the conformity of the Seeds and Plant Varieties Act Cap 326 to article 19 of the UNDROP apart from being cast in bad light in Universal Periodic Review (UPR) processes which negatively affects Kenya's Foreign Policy and standing as a country that respects the rule of law

The Constitution of Kenya 2010

The article 11(3)(b) of the Constitution of Kenya 2010 obligates Kenyan Parliament to enact legislations that recognize and protect the ownership of indigenous seeds and plant varieties, their genetic and diverse characteristics and their use by communities in Kenya. This implies that if the Kenyan Government does not amend Section 3(3)(c) & (i) and Section 10(f) of the Seeds and Plant Varieties Act Cap 326 that criminalizes Farmer Managed Seeds System (FMSSs), then it will be acting in contravention of its obligation to uphold article 11(3)(b) of the Constitution of Kenya 2010 due to the following reasons:

1. The article 3 of the Constitution of Kenya 2010 obligates every Kenyan including government officials and public servants to respect, uphold and defend the Constitution implying that Kenya has no option but align the Seeds and Plants varieties Act Cap 326 to article 11(3)(b) of the Constitution of Kenya 2010.
2. The article 11(3)(b) of the Constitution of Kenya 2010 obligates Kenyan Parliament to enact legislations that recognize and protect the ownership of indigenous seeds and plant varieties, their genetic and diverse characteristics and their use by communities in

- Kenya, rights that are criminalized by Section 3(3)(c) & (i) and Section 10(f) of the Seeds and Plant Varieties Act Cap 326.
3. Kenya, therefore needs to align the Section 3(3)(c) & (i) and Section 10(f) of the Seeds and Plant Varieties Act Cap 326 to the article 11(3)(b) and if Kenya doesn't do so then Kenya risks facing lawsuits challenging the conformity of the Seeds and Plant Varieties Act Cap 326 to article 11(3)(b) apart from being cast in bad light in Universal Periodic Review (UPR) processes which negatively affects Kenya's Foreign Policy and standing as a country that respects the rule of law.

Policy Recommendations

1. The Kenyan Government should amend Section 3(3)(c) & (i) and Section 10(f) of the Seeds and Plant Varieties Act Cap 326 which appears to criminalize Farmer Managed Seeds Systems (FMSSs) to align them to article 9.3 of the ITGPRFA, article 1 of CBD and article 19 of UNDROP and Article 11(3)(b) of the CoK

