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Securing Crop Genetic Diversity: Reconciling EU Seed Legislation and Biodiversity Treaties.

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Content

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- Farmers' Rights in legal terms.
- The EU seed legislation.
- The Kokopelli case.
- The attempt to reform EU legislation.
- A national perspective: Norway between obligations to harmonize and provide diversity.
- Conclusion.



General overview of the problem

Conflicting interests and legal requirements:

- Industrialization of agriculture, harmonization, high yielding varieties and DUS requirements regulated by IPR and seed legislation.

versus

- Crop genetic resources to secure food security in the long term and Farmers' Rights regulated by the Convention on Biological Diversity (CBD) and the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA).
- Crop genetic is eroded at a serious scale - exacerbated by climate change.



What are Farmers' Rights?

- Emerged from the recognition of 'the past, present and future contributions of farmers in all regions of the world, particularly those in centres of origin and diversity, in conserving improving and making available these resources'.
- Concept developed in the 1980s as a response to the expansion of IPRs in plant varieties. Now included in the International Treaty on Plant Genetic Resources for Food and Agriculture. (2005).
- Not well defined and has been understood in different ways.
- Recurrent element: The right of farmers to save, use, exchange, and sell farmed-saved seed.
- Additional elements of Farmers' Rights in the International Treaty on PGRFA (Art.9):
 - protection of traditional knowledge;
 - the right to equitable benefits;
 - the right to participate in decision making.



Farmers' Rights in legal terms

- Weak rights if rights at all!
- The core of FR , the 'right' to save, use exchange and sell farmed-saved seed is 'affirmed' in the preamble as recognized in the treaty, but it is not reflected in the operative part.
- Art. 9. 2: Parties should', 'as appropriate' and 'subject to national legislation' protect FR.
- No legal 'defense' against IPR and seed laws.



EU seed legislation

- Regulates how seed is produced, used and marketed to ensure its identity and quality.
- Developed gradually after World War II to support modernization and industrialization. Farm diversification was replaced by crop uniformity. Responsibility for breeding and seed production shifted from farmers to professional sectors. Farmers became consumers of seed.
- Complex legislation: Two horizontal directives (establishing a Common Catalogue of varieties) and 11 vertical (on specific types of crops).
- Central requirements: Registration of varieties certification of seed lots.



EU seed legislation (2)

- To be registered a variety must be distinct, uniform and stable (DUS) and be of satisfactory value for cultivation and use (VCU) (agricultural crops).
- Certification shall ensure e.g. identity, varietal purity, germination capacity and freedom from diseases. Requirements on packaging, sampling, sealing and labelling.
- High compliance costs – the system thus favours large market actors.



EU derogation regime

- Increased attention to crop genetic diversity and "conservation varieties". Not compatible with the rigorous testing requirements.
- Directives in 2009 and 2010 introduced some derogations from the procedures.
- However, still obstacles to protect conservation varieties and crop genetic resources according to critics. Only some crops are covered and sale among farmers is still restricted. Still DUS requirements prevent many conservation varieties from being marketed. Marketing is mostly geographically restricted to regions of origin.
- Not much legal space for Farmers' Rights.



The Kokopelli case

- Kokopelli is a French non-profit association selling traditional vegetable and flower varieties not registered in the French catalogue. A commercial seed company brought Kokopelli to court to stop it from selling its varieties. The French court referred the case to the Court of Justice of the EU (CJEU).
- The CJEU Advocate General opined in favour of Kokopelli with reference to biodiversity concerns and stating that a prohibition against Kokopelli's marketing would be violating the principle of proportionality among other EU principles.
- CJEU overruled the opinion. Ruled that marketing prohibition – even if it would lead to economic consequences for some traders – would not be 'manifestly disproportionate in relation to the aim pursued.'
- No violation of Farmers' Rights. Provisions of the ITPGRFA on FR are too weak!



Reform of EU seed legislation

- 2007-08: Extensive evaluation process
- 2009: Action Plan.
- 2013: EU Commission proposal for a single regulation called the 'Plant Reproductive Material Law' to replace existing seed legislation.
- Rationale: Streamlining, consistency, less burdens for operators and citizens and better protection of agro-biodiversity. Wider derogation from DUS criteria for conservation varieties.
- 2014: The European Parliament rejected the entire proposal.
- 2015: EU Commission withdrew the proposal.



Why was the proposal for a Plant Reproductive Material Law rejected?

- Argument from the seed industry: Existing legislation is good enough.
- Arguments from small scale farmers and NGOs:
 - Broadened scope: All plant reproductive material practically covered – bureaucratic burden and de facto criminalisation of existing practices.
 - To little concern for agro-biodiversity;
 - To much centralization and power to the Commission – less flexibility, subsidiarity and ‘practical solutions’.
- How did the proposal’s prescriptiveness differ from existing prescriptiveness? Not much discussion!
- The Commission proposal as an eye-opener for the wider public on seed regulation.
- What is next?



Norway between biodiversity commitments and EU seed legislation

- Agriculture is a small economic sector in Norway – significant potential for conservation varieties.
- High profile in international negotiations on crop genetic diversity and Farmers' Rights'.
- Member of the European Economic Area (EEA) and thereby bound by EU seed legislation.
- Policies and legislation fall between to chairs: The Ministry of Climate and Environment deems crop genetic diversity to be outside its mandate and the Ministry of Agriculture and Food deems ITPGRFA obligations to be outside its mandate.



Norwegian legal responses

Crop genetic diversity:

- Broad aspirational provision in the Nature Diversity Act.

Release and marketing of seed.

- Very prescriptive EU rules implementation under the Food Act was passed unnoticed. No public attention to seed regulation before the EU derogation regime in 2009. Farmers were again allowed to save, use, exchange and sell seed on a 'non commercial basis' – without knowing it was illegal before!
- Only nine conservation varieties have been included in the Norwegian Catalogue.
- Lessons to be learned from Norway:
 - it is essential to bridge the gaps between the environmental and agricultural sectors on biodiversity concerns.
 - lax enforcement of rules and procedures to maintain business as usual is not sustainable in the long run.



General conclusion

- EU seed legislation has left few opportunities for farmers to save, use, exchange and sell farmed saved seed – a core elements of FRs – also after the derogation regime.
- Strict DUS requirements accomodate large scale farming and not small scale and organic farming using traditional varieties.
- Little awareness of seed legislation prescriptiveness before the Kokopelli case and the EU Commission proposal. De facto non-compliance in Member States?
- Some misperception of the Commission proposal when compared to existing legislation.



General conclusion (2)

- Norway as a mirror of the EU: Little awareness of seed regulation until regulation was relaxed , de facto non-compliance, inconsistency between regulation to protect biodiversity and release and marketing of seed.
- One-size-fits-all seed legislation for a diversified agricultural sector doesn't work. Differentiated legislation is needed to promote diversity and to respect the principles of proportionality and subsidiarity.
- More concern for crop genetic diversity also in conventional plant breeding?

