PREVENTING AN ECOLOGICAL "CLASS STRUGGLE": THE IMPLICATIONS OF AN IDEOLOGICAL READING OF THE KOKOPELLI CASE

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Abstract

The controversy raised by a judgment delivered by the Court of Justice of the European Union in the case *Kokopelli v. GrainesBaumaux* has much in common with traditional class struggles with environmental groups and seed companies acting as though they belong to competing classes within society. As such, it is an excellent opportunity to assess existing legislation in the field of agro-biodiversity and to emphasize that ideological interpretations are not helpful for the improvement of the normative framework.

Introduction

"The collisions between individual workmen and individual bourgeois take more and more the character of collisions between two classes". It might sound heterodox to use a quote from Karl Marx to introduce a paper on environmental law issues, but the notion of "class struggle" is not as misplaced as it seems when it refers to the radical reactions caused by a judgment of the Court of Justice of the European Union in a dispute between a not-for profit seed association and a seed distribution company for the commercialisation of traditional seed (case C-59/11, *Association Kokopelli v. GrainesBaumaux SAS*, 12 July 2012). The substitution of "not-for profit seed association" for "individual workmen" and "seed distribution company" for "individual bourgeois" describes how the judgment split commentators into "two classes": the self-proclaimed custodians of biological diversity and those who support European Union law tout court, leaving no room for a middle-ground.

Background Information

In January 2008, the Tribunal de Grande Instance de Nancy held that the Association Kokopelli was to pay damages amounting to €10,000 to the seed company Graines Baumaux for unfair competition. Both operated in seed supply and Kokopelli was found culpable for selling seed which was not registered either in the French or in the common catalogue of varieties established by European legislation on the marketing of vegetable

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seed or on the derogatory regime set up for "conservation varieties" and "varieties developed for growing under particular conditions". Kokopelli appealed to the Cour d'Appel, which on February 2011 referred the case to the Court of Justice of the European Union for a preliminary ruling. In particular, the validity of *Council Directives 98/95/EC, 2002/53/EC*, *2002/55/EC* and *Commission Directive 2009/145* was questioned in light of four fundamental principles of the European Union: freedom to pursue an economic activity, proportionality, equal treatment, and the free movement of goods. The French judge added another basis for the evaluation of validity: the commitments arising from the participation of the European Union to the 2001 International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA).[1]

On January 19, 2012 the Advocate General of the Court, Professor Kokott, presented her conclusions: first, the obligations contained in the ITPGRFA were too vague to invalidate the directives. Second, she invoked the power of the Court to dismiss European legislation inconsistent with the Charter of the Fundamental Rights of the European Union to invalidate provisions contained in Article 3(1) of *the Council Directive 2002/55/EC* which established criteria of distinctness, stability and sufficient uniformity to register a seed in the national catalogue. The justification for invalidating the provisions was that they conflicted with Articles 16 (freedom to conduct a business), 20 (equal treatment) and 34 (free movement of goods) of the Charter.

Judgment and Reactions

Unusually, the Court departed from the conclusion of its Advocate General. Although the vagueness of the obligations deriving from the ITPGRFA was confirmed, the proposal to declare Article 3(1) of *Council Directive 2002/55/EC* invalid was refused. The Court emphasized that the provisions contained in Article 3(1) meet the primary objectives of effectively improving agricultural productivity and establishing the internal market for vegetable seed by ensuring its free movement within the Union. In addition, the derogatory regime guarantees the conservation of plant genetic resources while at the same time taking into consideration the economic interests of those traders who offer for sale old varieties not included in the official catalogues. The Court also excluded any breach to the principles of equal treatment, the freedom to pursue an economic activity and the free movement of goods. The potential disadvantages for some were deemed justified in order to obtain the general benefit of increased agricultural productivity.

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[1] (adopted 3 November 2001 entered into force 28 June 2004) 2400 UNTS 303.

The judgment was immediately followed by radical reactions by environmental groups: the Réseau Sémences Paysannes denounced the decision as condemning biological diversity to death following life imprisonment, while other commentators accused the Court of having banned the sale of old seed and outlawed the associations of volunteers involved in the recovery of traditional seed. Those remarks seem however excessive, as an analysis of the sentence pursued without ideological prejudices reveals that if the Court had ruled for the invalidity of Article 3(1), it would have compromised the whole European normative approach to the commercialisation of vegetable seed and challenged the precarious balance found between market and environmental concerns. Thus it appears that the court was bound to make the decision it did.

Two critical remarks can, however, be made on the judgment: on the one hand, *obiter dictum* could have been used to open a debate on the need to modify the current legal framework in a more environment-oriented sense, putting the preservation from biodiversity loss on the same level of commercial interests. On the other hand, the judges should have consulted experts in the field of agro-biodiversity before peremptorily affirming that "the criterion relating to uniformity encourages an optimum yield". The Court's decision leaves no room for account to be taken of recent developments in agriculture showing, for example, that biological complexity helps sustainable development, adaptation to climate change and economic growth. Optimum yield may not, therefore, be the best goal to aim for and indeed it too may be more likely to be obtained through ensuring biological diversity.

Conclusion

Despite the critique above, a middle ground does exist. A non ideological reading of the judgment combined with a careful analysis of European and national legislation reveals a two pronged scheme of preservation for seeds: on the one hand, it is possible to trade in traditional seeds after a free and simple registration in the specific derogatory catalogue. On the other hand, no legislation can prohibit the exchange of seeds for self-cultivation and nourishment. This type of exchange has permitted a flexible, dynamic, non commercial management of agro-biodiversity for decades and it ought to be the main concern of any self-proclaimed not-for profit association. Thus it is possible to see that the Court's decision not only upholds European Union law and not only preserves the interests of agribusiness, but does leave room for preservation of biodiversity.