Biodiversity Act: incomplete advances for agricultural biodiversity

2016-07-29- Réseau Semences Paysannes.

Nota : the translation from French to English is not made by a professional knowing all the finesse of European law. Please take that into account if there are some details that seem strange to you.

After more than two years of debates, the French Parliament adopted on the 20th of July a new law on Biodiversity, which was indispensable to implement in France the Nagoya Protocol. The government had decided not to submit questions concerning agricultural biodiversity to the public parliamentary debate, resending them instead to future decrees[1]. However, alerted by the mobilization of civil society around new law proposals made by the collective "Let's sow biodiversity[2]", parliamentarians legislated on their own. They tried to find a solution for three unacceptable scandals: the patents on "native" traits of plants and animals; the prohibition of the diffusion of peasant and traditional seeds; and the toxicity of neonicotinoid insecticides. Unfortunately, they stopped on their way and will thus have to come back to it.

I. Limitation of patents on native traits

1) The Parliament decided to **prohibit the patentability of plants and animals "*exclusively obtained through essentially biological processes such as crossing or selection, including the elements that constitute these and the genetic information they contain*".** This article aims to prevent the circumvention of the European prohibition of patenting essentially biological processes by patenting:

- plants and animals obtained through such processes
- hereditary elements (protein , chemical or physical component...) and/or genetic information associated with certain characters which then permit to claim the extension of the patent to any plant or animal coming from essentially biological processes, containing these elements and/or genetic information and expressing their function.

This prohibition is primarily a strong political signal aimed at changing European rules. It does indeed apply directly only to patents issued by the French authorities and cannot revoke a patent granted by the European Patent Office (EPO). However, it makes possible to contest, on French territory, the claims of the holder of such a patent which would be contrary to the bill. The scope of the rights conferred by a patent is indeed a national competence, partially framed by European directives and not by the EPO.

2) Following this prohibition, the Parliament then decided that " *The protection conferred by a patent on a biological material possessing specific characteristics as a result of the invention shall not extend to biological materials possessing those specific characteristics, obtained independently from the patented biological material and through essentially biological process, neither to biological materials obtained from the latter through propagation or multiplication*". This decision affects all patents, whether national or European.

3) But pressures from the industry made it impossible to prohibit that "*the protection conferred by a patent on a product containing genetic information or consisting of genetic information*"

1 News laws that the Parliament cannot modify, but only accept or decline

2 http://www.semonslabiodiversite.com/

would also be extended "*to biological material obtained exclusively through essentially biological processes*" containing or consisting of the same genetic information[3]. They also blocked any attempt to regulate the new GMOs that result from recent genetic engineering techniques and bioinformatics (New Breeding Techniques). If those GMOs are not regulated nor labelled, the consumer will eat them without knowing. But, in addition, nothing compels the industry to label what differentiates plants and animals genetically modified, from plants and animals that are obtained exclusively by essentially biological processes, and which carry genetic information that are similar to those which are patented. **These hidden but patented GMOs allow a handful of multinationals to rely on Article 9 of Directive 98/44/EC to extend the protection of its patents to all "native" genetic information, which are essential for agricultural biodiversity, and to take control of the entire food chain**. It is urgent for the European civil society to mobilize in order to deal with such a scandal!

II – Farmers' rights to exchange their seeds

The Parliament also recognized **the farmers' rights to exchange their seeds and plants, in contexts of mutual aid**, as long as they do not belong to a variety protected by a Plant Variety Certificate. "*The mutual aid is carried out between farmers, through exchanges of work services and of means of exploitation*". It is "*a contract based on free sharing, even when the beneficiary reimburses the provider all or part of the costs incurred by the latter*"[4]. These exchanges thus escape marketing rules, in particular seed certification obligations, and the registration of the variety in the catalogue. **This is a major breakthrough towards achieving the objectives of peasant agro-ecology.**

III – Seeds for amateur gardeners

A multitude of proposed amendments have been spread on social networks on this topic, more or less far-fetched. This social networks campaign resulted in a new article of law, which not only misses the target, but also generates a significant regression of the rights of amateur gardeners.

The Parliament has indeed authorized to exchange and sell seeds and seedlings (excluding grape plants) noncompliant with industry standards concerning the certification and the official catalogue of varieties, as long as they are exclusively intended *"to non-professional final users"*.

For seeds and fruit tree seedlings, *th*is is a positive recognition in the law of a right that no French or European regulatory text prohibits. The obligations to certify the seeds and to register the variety in the catalogue do indeed only apply in Europe and in France to the commercialization "*aimed at commercial exploitation of the variety*". Amateur gardeners who do not commercialize their harvest do indeed no "*commercial exploitation*". The legal actions by the industry against those who commercialize seeds that do not belong to a variety registered in the catalogue are only based on their omission or refusal to indicate the exclusive use to which the seeds are intended.

Regarding the sale of vegetable seedlings to amateur gardeners - a sale which is currently not formally authorized, since these seedlings do not belong to a variety registered in the catalogue[5]-, this

3 Article 9 of the directive 98/44/CEE *: « "the protection conferred by a patent on a product containing or consisting of genetic information shall extend to all material, save as provided in Article 5(1), in which the genetic information is contained and performs its function. »*

4 Article L. 325-1 of the Rural Code

5 Directive 92/33/CEE

means a significant progress. Unfortunately, this will be of little use, since this new law article is restricted by **two deeply liberty-destroying setbacks.**

The right to sell these seeds and seedlings is in fact limited solely to non-profit associations. But the main sellers of non-industrial vegetable seedlings are truck farmers, who therefore cannot benefit from this new right. And most traditional seed sellers are seed artisans: the industry will find in this law a new pretext to try to question the application in France of a European regulation that does not prohibit their activity.

Regarding seed exchanges, this new article of law submits them all to the same sanitary obligations of traceability, risk management plans, internal self-checks, analysis from the beginning of the stage of production and, for internet exchanges, of registration of operators and delivery of phytosanitary passports. These obligations are of course essential for mass production and commercialization, but they are totally inapplicable for the huge majority of amateur gardeners. If some of the big associations that sell ancient seeds see in this law a positive safeguarding of their activity, the war triggered by the seed industry against the multiple seed exchanges and the small farmers and artisanal producers will unfortunately continue to shake the French countryside.

IV – Prohibition of bee-killers neonicotinoid insecticides

The Parliament then banned neonicotinoid insecticides, but only in 2018, while providing the possibility of various exceptions to this prohibition until 2020. We can only hope that the next assembly that will come to power after 2017's elections will not revoke this prohibition !