Commentary on the Brazilian seed law

Juliana Santilli

Registration waiver for local, traditional or Creole cultivars

Brazilian Law no. 10711 Regulating the National Seed and Seedling System, of 5 August 2003 (commonly known as the Seed Law) aims to ‘ensure the identity and quality of materials for multiplication and reproduction of plants produced, sold and used in the national territory.’ Despite focusing primarily on the ‘formal’ system of seeds in the country, this law creates some legal space for varieties developed by local farmers and adapted to the local socioenvironmental conditions – the ‘local, traditional and Creole’ varieties.

According to the Seed Law, varieties must be registered in the National Cultivar Registry before they can be produced, improved or commercialized. In order to be included in this registry, varieties must be distinct, uniform and stable. In addition, their cultivation and use value must be demonstrated. However, the Seed Law sets forth that ‘registration in the National Cultivar Registry of local, traditional or Creole cultivars used by family farmers, Agrarian Reform settlers or indigenous peoples is not mandatory,’ since it is very difficult for these local, traditional and Creole varieties to fit the requirements of the National Cultivar Registry (with respect to distinction, homogeneity and stability).

Local, traditional and Creole cultivars are varieties developed, adapted or produced by family farmers, agrarian reform settlers, or indigenous peoples with well-established phenotypical characteristics and recognized by local communities as such, and which, according to the Ministry of Agriculture, and considering also their socio-cultural and environmental descriptors (or traits) are not characterized as substantially similar to commercial cultivars.

This definition means that local communities of family farmers, agrarian reform settlers or indigenous peoples must recognize their varieties as ‘local, traditional or Creole’ and that the Ministry of Agriculture must also consider that they are not substantially similar to commercial cultivars.
The Seed Law does not specify which criteria will be used to distinguish local, traditional and Creole varieties from commercial cultivars. Many family farmers feel that it should be up to the local communities (with the support and participation of official government agencies) to define the necessary criteria for identifying and characterizing varieties that have been developed, produced or adapted to local and specific socioenvironmental conditions as well as the criteria to set them apart from commercial cultivars. After all, the Seed Law requires that sociocultural and environmental descriptors (or traits) be taken into consideration, in addition to the agronomical and botanical descriptors, precisely in order to take into consideration, at the time of defining and characterizing the local varieties, the sociocultural and environmental contexts in which these varieties were developed or adapted by means of natural selection and farmer management.

The Ministry of Agriculture has not issued any regulatory instruments regarding local, traditional or Creole varieties, and the question remains unanswered about whose responsibility it should be to decide which varieties can be considered local, traditional or Creole for the purpose of exempting them from the various legal requirements of commercial varieties. On the other hand, the Ministry of Agrarian Development, which is responsible for the implementation of policies aimed at family farming, issued Directive 51 on 3 October 2007 in order to establish a national register for organizations working with local, traditional or Creole varieties (discussed in more detail later in this chapter). The objective of this register is to provide insurance coverage for farmers who have used traditional, local or Creole varieties (in case there are crop failures) and it does not establish any rules concerning the production, improvement or commercialization of these varieties.

Due to the diversity of agricultural systems in Brazil (which includes agro-business, family farming, indigenous and other traditional farming systems), Brazil has two ministries responsible for agricultural and agrarian development policies: the Ministry of Agriculture (Ministério da Agricultura), which is dedicated to policies aimed at supporting agrobusiness, and the Ministry of Agrarian Development (Ministério do Desenvolvimento Agrário), which is responsible for the implementation of policies aimed at strengthening family and small-scale farming. Although both ministries are part of the federal public administration, they frequently promote contradictory public policies since they represent the political and economic interests of very different stakeholders and systems of agricultural production.

Waiver of registration for family farmers, agrarian reform settlers and indigenous peoples multiplying/distributing seed (of local or registered varieties)

The Seed Law also requires all persons (physical and juridical – that is, individuals or companies) that produce, improve, package, store, analyze, trade, import and export varieties to be registered in the National Registry of Seeds and
Seedlings (Renasem). The technical requirements for this registry are extremely burdensome and costly. (There are two registries: one for farmers’ varieties and the other one for persons who produce or commercialize the seeds from these varieties; both are legally mandatory.) However, the Seed Law makes an exemption for family farmers, agrarian reform settlers and indigenous peoples, who multiply seeds or seedlings for distribution, exchange or trade among themselves (i.e. with other family farmers, agrarian reform settlers and indigenous peoples). According to the Seed Law, ‘family farmers, Agrarian Reform settlers and indigenous peoples who multiply seeds or seedlings for distribution, exchange or trade with each others are not required to register in the National Seed and Seedling Registry.’ This mandate means that as long as the distribution, exchange and trade of seed takes place among family farmers, agrarian reform settlers, and indigenous peoples, there is no need for registration. This special treatment applies not only to local, traditional or Creole cultivars but also to registered varieties, as long as they are traded and exchanged among family farmers, according to the Seed Law.

These legal exceptions in favour of family farmers and in regard to local and Creole varieties were inserted into the Seed Law in response to pressure from various social movements and the mobilization of civil society organizations. Farmers’ organizations were successful in convincing many congressmen that the rules created to regulate the production, use and trade of commercial varieties should not apply to local/Creole varieties due to their very particular characteristics (dynamism and genetic heterogeneity). The idea of establishing a specific register for local, traditional or Creole varieties was rejected by most family farmers’ organizations when the Seed Law was first being discussed at the National Congress in 2002 and 2003. Farmers’ organizations felt that such a register could ‘freeze’ local seeds in time and space, since they are characterized by their evolution and are essentially ‘dynamic’ varieties. The register would only capture a certain moment or stage in their evolution. They were also afraid that the register could grant exclusive ownership rights (similar to breeders’ rights) to those people who registered a local variety, which rightfully should be shared and exchanged by local communities through social networks and according to local rules.

Decree 5,153 of 2004, which established the operational rules for the Seed Law, restricted the operation of this exception as far as family farmers’ organizations were concerned. It stated that family farmers’ organizations could only distribute (not sell) seeds of local, traditional or Creole cultivars, and that this distribution of seeds could only take place among farmers who are members of these organizations. It meant that, when seeds are distributed through farmers’ organizations (associations, cooperatives, unions and so on) and not through individual family farmers, the exemption (of registration) applies only for non-commercial purposes and only to local, traditional or Creole varieties. Family farmers, agrarian reform settlers and indigenous peoples can only exchange and trade seeds of registered varieties (among themselves) if they do it individually and not through their organizations. If they act individually, however, they
(family farmers, agrarian reform settlers and indigenous peoples) can distribute, exchange and commercialize local or registered varieties among themselves without having to be registered in the National Registry of Seeds and Seedlings.

Many family farmer organizations have argued that this restriction (to the activities that can be developed by farmers’ organizations) is illegal, since Decree 5,153 of 2004 is an administrative order and is creating restrictions that do not exist in the Seed Law. They also argue that such restrictions are violating the constitutional right to freedom of association. However, the Brazilian courts have not yet decided on this matter.

The Seed Law does not include a definition of family farmers, agrarian reform settlers or indigenous peoples. However, Law no. 11,326 of 2006, which establishes the National Family Farming Policy, considers a family farmer to be anyone who develops rural activities and meets all of the following criteria:

- does not hold, in any form, land that exceeds four fiscal modules (fiscal modules are established for each Brazilian region and municipality, and they can vary from 5 hectares in the northeast of Brazil to 100 hectares in the Brazilian Amazon);
- uses predominantly the labour of his own family in economic activities developed on his farm;
- has family income predominantly generated from economic activities connected with his farm;
- runs his farm with his own family. However, this definition does not apply to indigenous peoples because their traditional territories have a special legal status.

Some studies carried out in Brazil have demonstrated just how important these ‘local’ (or ‘informal’) seed systems are to the social, economic and cultural fabric of the country. According to the Brazilian Association of Seeds and Seedlings (Associação Brasileira de Sementes e Mudas [ABRASEM]), which includes Brazil’s largest producers of seeds, Brazilian farmers in the 2006–7 harvest used seeds produced by the ‘formal’ system in the following proportions: 49 percent in cotton farming; 43 percent in rice; 15 percent in beans; 85 percent in corn; 50 percent in soy; 74 percent in sorghum; and 71 percent in wheat. This data demonstrates that seeds produced in ‘local’ systems account for 51 percent in cotton farming; 57 percent in rice; 85 percent in beans; 15 percent in corn; 50 percent in soy; 26 percent in sorghum; and 29 percent in wheat. According to ABRASEM, in the 2007–8 harvest, the use of seeds produced by formal systems fell for nearly all crops (except for soy and sorghum: 44 percent for cotton; 40 percent for rice; 13 percent for beans; 83 percent for corn; 54 percent for soy; 88 percent for sorghum; and 66 percent for wheat. In other words, local systems (which are highly dependent on local, traditional or Creole varieties) are responsible for the supply of seeds for the vast majority of Brazilian crops, and the use of seeds produced in the formal system is rapidly growing smaller.
Publicly funded development programs and crop failure insurance schemes

The Seed Law forbids any restrictions on the inclusion of seeds and seedlings of local, traditional or Creole cultivars in publicly funded programs for family farmers. Article 48 of the Seed Law constitutes an important initiative in this regard, since the previous seed law (Law no. 6,570 of 1977) did not acknowledge local seeds, which were treated merely as ‘grains,’ and it made it difficult to get public support for initiatives aimed at the rescue, improvement and reintroductio
as well as the technical experts that are responsible for this information. The first stage of the process is for the organization to become registered, and once its registration has been accepted by the Ministry of Agrarian Development it can register the local, traditional or Creole varieties that it has been working with under a different register, the National Register of Local, Traditional and Creole Varieties (Cadastro Nacional de Cultivares Tradicionais, Locais e Crioulas). Thus, the National Register of Organizations must list all organizations working with local, traditional or Creole varieties as well as all local, traditional or Creole varieties with which each organization works. The same variety can be registered by more than one organization because the registration does not give the organization any exclusive right (property or ownership) over the varieties that it has registered, and these varieties can be registered, used and shared by several farmer organizations. The main objective of the register is to provide insurance coverage for those family farmers who use local, traditional or Creole varieties and who will eventually face crop failures.

The register was established by the Ministry of Agrarian Development because farmers’ organizations argued that the Seed Law was being violated by government policies. They argued that Article 48 of the Seed Law forbids any restrictions on the inclusion of local, traditional or Creole varieties in publicly funded programs for family farmers and that, if farmers who used local, traditional or Creole varieties were being denied insurance coverage, this provision of the Seed Law was being violated. Therefore, the Ministry of Agrarian Development (which is responsible for insurance policies for family farmers) decided to create a specific register for organizations working with local, traditional or Creole varieties so that they could indicate which varieties they were working with and get a certificate from the Ministry of Agrarian Development that would provide them with insurance coverage, even if the Creole varieties were not included in the zoning system established by the Ministry of Agriculture. That way, the Seed Law, which forbids any restrictions on the inclusion of local, traditional or Creole varieties in publicly funded programs for family farmers, would be more effectively enforced.

According to Directive 51 of 3 October 2007, local, traditional and Creole varieties must meet all of the following requirements in order to be registered:

1. they must be developed, adapted or produced by family farmers, agrarian reform settlers or traditional and indigenous populations and communities;
2. they must have phenotypical characteristics that are well established and recognized by the respective communities;
3. they must have been in use by farmers in one of these communities for more than three years;
4. they cannot be developed by means of genetic engineering or other industrial development processes or laboratory manipulation, be genetically modified or have evolved from hybridization processes that are not controlled by local family farmer communities.
Directive 51 further establishes that local, traditional or Creole cultivars are part of the sociocultural heritage of the local community and are not eligible for patents, ownership or any form of private protection for individuals, businesses or organizations. Furthermore, the directive sets forth that registration does not entitle the organization to any rights of property or ownership of the traditional, local or Creole varieties that the organization has registered in the National Register of Local, Traditional and Creole Varieties.

Many farmers’ organizations initially criticized the registration of local, traditional and Creole varieties because they believed it would serve to freeze local seed evolution in time and space, thereby considering these seeds as if they were static and not dynamic. However, most farmers ended up accepting the registration of their local varieties for the sole purpose of accessing insurance coverage. Most family farmers who access public funds desperately need insurance to protect them during difficult times. When natural disasters strike (droughts, floods and so on), farmers need to be sure that they will be provided with insurance coverage even if they use local, traditional or Creole varieties of seeds. In response to the concerns expressed by many farmers’ organizations, Directive 51 prevents local, traditional or Creole varieties from being privatized through intellectual property rights, thereby recognizing the collective (and nonexclusive) rights that local communities have over their varieties.

Government officials in Brazil also argue that the system of registration is also a way of producing more information/data on the use of local, traditional and Creole varieties in order to develop public policies aimed at strengthening local and traditional farming systems. The entire system of registration, however, is very recent, having just started in 2009; thus it is too early to say whether it will be effective or not. It has solved the specific problem of access to insurance by farmers who use local, traditional or Creole varieties. However, several issues remain unsolved. For instance, who decides which varieties are local, traditional or Creole and which are not for the purpose of being exempt from registration for produce, use and commercialization? What is the genetic distance necessary to separate a local/Creole variety from a commercial variety?

Most family, traditional and local, small-scale farmers feel that local, traditional and Creole seed systems (which are often called informal systems) should in fact remain out of the scope of the Seed Law, which should apply exclusively to commercial systems. They feel that locally adapted varieties that are used, distributed and traded at the local level, among family farmers, should simply be left out of the Seed Law. Those exceptions that are made for local, traditional and Creole seeds by the Brazilian Seed Law – despite representing an important victory for family and agroecological farming – tend to attenuate the negative effects that this law has on agrobiodiversity but do not alter the general principles and concepts that it is based upon, such as industrial sectorialization and the standardization of agriculture, the denial of the role of farmers as selectors and improvers and so on. These principles and concepts are, in essence, opposed to the environmental logic and sociocultural processes that generate and maintain agrobiodiversity at all of its levels.
Notes

2 Ibid., Article 11, para. 6.
3 Ibid., Article 2, para. 16.
4 Ibid., Article 8, para. 3.
6 Brazilian Association of Seeds and Seedlings, Semente: inovação tecnológica (Anuário 2008), Brasília, June 2008.
7 Law no. 10711, supra note 1, Article 48.