

MEMORANDUM

TO: Maine Attorney General Aaron Frey

FROM: William Talley, Law Student Intern, University of Miami School of Law Human Rights Clinic, under the supervision of Prof. Denisse Cordova Montes

CC: The Honorable Jim Dill, Senate Chair
The Honorable Maggie O'Neil, House Chair
Joint Standing Committee on Agriculture, Conservation and Forestry

DATE: April 13, 2021

RE: Does the right to save and exchange seeds in the Constitutional Resolution regarding the right to food include a right to commercially produce seeds regardless of certification as defined by Title 7 §§ 2101-2103?

The Human Rights Clinic (HRC) at the University of Miami School of Law works for the promotion of social and economic justice globally and in the U.S. The HRC's Right to Food Team, under the leadership of Prof. Denisse Córdoba Montes,¹ HRC's Acting Associate Director, has analyzed right to food legal issues and presented submissions to international and regional human rights bodies, including the U.N. Special Rapporteur on the Right to Food, the U.N. Human Rights Council, the San Salvador Protocol Working Group of the Organization of American States, and the Inter-American Court of Human Rights.

This memo will examine an issue concerning the individual right to save and exchange seeds contained in the proposed Constitutional Resolution (CR). This issue came up at a hearing on March 23, 2021 on the proposed CR by the Maine legislature's Committee on Agriculture, Conservation, and Forestry (ACF Committee). On the basis of our analysis below, we conclude that the language in the CR completely excludes the commercial production of seeds.

I. QUESTION PRESENTED

Does the individual right to save and exchange seeds as stated in the proposed CR includes a right to commercially produce and sell seeds regardless of seed certification standards?

II. ANALYSIS

¹ Prof. Córdoba Montes received her B.A. from the University of Miami, M.P.H. from Boston University, and J.D. from the University of Pennsylvania. She is a subject matter expert on the human right to food. Her work has appeared in various journals including the Business and Human Rights Journal, the Right to Food and Nutrition Watch, the Journal of Health Politics, Policy and Law, and the American Journal of Public Health. Denisse also co-authored a chapter for the book Gender, Nutrition, and the Right to Adequate Food: Towards an Inclusive Human Rights Framework (Routledge, 2015).

The proposed amendment reads: “Rights to food and food sovereignty. All **individuals** have a natural, inherent and unalienable right to food, including **the right to save and exchange seeds** and the right to grow, raise, harvest, produce and consume the food of their own choosing **for their own** nourishment, sustenance, bodily health and well-being, **as long as an individual does not commit trespassing, theft, poaching or other abuses of private property rights, public lands or natural resources in the harvesting, production or acquisition of food.**” If adopted, the amendment will become Section 25 of Article I of the Maine constitution, “Declaration of Rights.”

This memo specifically concerns the phrase “[a]ll individuals have a . . . right to save and exchange seeds” and whether this language includes a right to save, exchange, and commercially grow seeds covered by the seed certification program, as defined by Title 7 §§ 2101-2103.

Title 7 § 2101, which establishes the program, reads:

The term “certified seed” as used in this Title shall be deemed to mean potato, vegetable, forage crop or grain seeds as shall have been grown and prepared for sale in accordance with regulations laid down by the commissioner and for which a certificate or tag has been issued as provided in section 2103. Authority to make, in a manner consistent with the Maine Administrative Procedure Act, all reasonable rules and regulations is given the said commissioner[.]

A. Certified seed program

Maine’s certified seed program allows the state to inspect and regulate the quality of seeds in order to prevent blights and the production of diseased crops. A “certified seed” under Maine law means “potato, vegetable, forage crop or grain seeds as shall have been grown and prepared for sale in accordance with regulations laid down by the commissioner [of the Department of Agriculture, Conservation, and Forestry] and for which a certificate or tag has been issued[.]”² The commissioner may issue these certificates and tags after the grower sends an application for inspection “of a crop growing or to be grown in [Maine].”³

B. Amendment language

The amendment states that “[a]ll individuals have a . . . right to food, including the right to save and exchange seeds[.]” Three terms seem potentially significant for the certified seed program: “individuals,” “save and exchange,” and “seeds.”

Individuals. The most relevant statutory use of this word comes in the Maine Food Sovereignty Act, which states that “[a]n individual who grows, produces, processes or prepares food or food products for purposes other than direct producer-to-consumer transactions [shall comply with state and federal regulations.]”⁴ Though this provision does not clarify the precise meaning of

² ME. REV. STAT. tit. 7, § 2101. “Commissioner” is defined by Title 7 § 1.

³ *Id.* at § 2102.

⁴ *Id.* at § 286.

“individual,” a plain reading of the proposed amendment suggests that companies, corporations, and other legal entities are not included in its protections.⁵ By choosing the word “individual” rather than “person,” the amendment avoids any discussion of legal personhood as it applies to corporations and other entities treated as persons by the law.⁶ Moreover, the proposed language states that “[a]ll individuals have a . . . right to food, including the right to save and exchange seeds . . . **for their own nourishment, sustenance, bodily health and well-being,**” which explicitly supports the interpretation that this right only applies to seeds and food for personal use as opposed to commercial production and sale.

Save and exchange. Relevant Maine statutes do not provide definitions of these words. However, statutes within Title 7 that use the word “exchange” tend to put it in a list of similar words, such as “sale, sell, exchange or barter,” “sale, sold, or exchanged,” and “sell or exchange or offer[.]”⁷ Significantly, all of these instances set the word “exchange” apart from synonyms like “sell” and “barter”—sell *or* exchange, not sell *and* exchange—which could mean that the Maine legislature thought that “exchange” covered a type of transaction that “sell” did not. Because the proposed amendment uses only the word “exchange,” it could be argued that it applies only to transactions not involving money. Regardless, these instances of the word occur in statutes not relevant to seeds. The first occurs in the Maine Commercial Feed Law of 1971, the second in the Animal Welfare Act, and the third in a provision about apples grown in controlled environments. These statutes would not control the meaning of a statute about seeds, much less a constitutional amendment. As for “save,” the word occurs only twice in Title 7, both times in a statute about growing hemp plants.⁸ The relevant line reads: “A grower licensee may save seeds from hemp plants that the person has grown and harvested and, [after inspection], may use those seeds for breeding and planting hemp.”⁹ The meaning here matches Merriam-Webster’s definition of the word as “to put aside as a store or reserve.”¹⁰ The amendment’s use of the word seems identical: individuals will have the right to *store* their own seeds.

Seeds. The amendment includes the right to save and exchange seeds as a subset of the right to food: “All individuals have a natural, inherent and unalienable right to food, *including* the right to save and exchange seeds[.]” This probably implies that the only “seeds” individuals have a right to save and exchange are those that can grow food-producing plants. Maine’s seed certification statutes

⁵ Legal dictionaries support this reading. Black’s Law Dictionary defines “individual” as “[o]f, relating to, or involving a single person or thing, as opposed to a group.” *Individual*, Black’s Law Dictionary (5th Ed. 2016).

⁶ Legal dictionaries define a “person” as “a human being,” but another possible use of the term is “artificial person,” which includes entities, “such as a corporation, created by law and given certain legal rights and duties of a human being[.]” *Person*, Black’s Law Dictionary (5th Ed. 2016). The term “individual,” however, does not apply to legal entities treated as persons, and it strictly excludes entities composed of many people. *See* Black’s Law Dictionary, *supra* note 10.

⁷ ME. REV. STAT. tit. 7, §§ 712(5), 3907(8)(A), & 539.

⁸ ME. REV. STAT. tit. 7, § 2231(2)(A).

⁹ *Id.*

¹⁰ *Save*, Merriam-Webster’s Dictionary, <https://www.merriam-webster.com/dictionary/save>.

say nearly the same thing: certified seeds include only “potato, vegetable, forage crop or grain seeds as shall have been grown and prepared for sale[,]” and this language explicitly excludes seeds for crops that do not grow food.¹¹ Because the amendment places “seeds” within a clause about food, and because related Maine statutes also distinguish between seeds for plants that produce food and seeds for plants that do not, the amendment seems to only include seeds for food-producing plants.

Finally, the amendment contains a limiting clause that constrains the rights granted by the rest of the amendment: “All individuals have a natural, inherent and unalienable right to food . . . as long as an individual **does not commit trespassing, theft, poaching or other abuses of private property rights, public lands or natural resources in the harvesting, production or acquisition of food.**”

C. The CR does not include a right to commercially produce and sell seeds regardless of certification.

Maine’s seed certification program applies only to specific kinds of seeds that farmers have “grown and prepared for sale.”¹² The amendment, on the other hand, is focused on individuals’ ability to save and exchange food-producing seeds. The seed certification program is aimed at the commercial sale of seeds, while the amendment is aimed at everyday people trading seeds between themselves.

The amendment differs in effect from the seed certification program in two ways. First, it applies specifically to individuals. Second, it does not grant a right to those individuals to purchase seeds from each other using money. The amendment paints a picture of neighborly exchange, while Maine’s statutes on seed certification are focused on economic activity between commercial growers, both individuals and larger entities, evidenced by its requirement that certified seeds are “grown and prepared for sale.”¹³

The amendment’s limiting language protects seed certification and ensures that individuals cannot sell seeds commercially. The amendment conditions the right to food, including the right to save and exchange seeds and the right to grow food for one’s own nourishment, on legality. An individual cannot trespass, steal, or poach. Importantly, the amendment also states that individuals cannot commit “other abuses of private property rights, public lands or natural resources in the harvesting, production or acquisition of food.” The prohibition against violating private property rights and public lands is particularly important for the right to food, as it ensures that individuals cannot use their right to food to the detriment of their neighbors or in a way that damages state property. With this limiting language, the proposed CR carefully constructs a human rights framework that protects the interests of the people while cautiously guarding against abuse.

¹¹ *Id.* at § 2101.

¹² *Id.*

¹³ *Id.*