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## **COMMENTS ON THE PLANT BREEDERS' RIGHTS BILL [B-2013]**

The African Centre for Biosafety is a non-profit organisation, based in Johannesburg. We provide authoritative, credible, relevant and current information, research and policy analysis on issues pertaining to genetic engineering, biosafety, seed sovereignty and biopiracy.

We are grateful to the Department of Agriculture, Forestry and Fisheries for allowing us the opportunity to attend the stakeholder workshop on the 22<sup>nd</sup> of May 2013 and for inviting us to submit our comments on the Plant Breeders' Rights Bill. We are also pleased to note that the DAFF has indeed taken on board several comments and contributions made by the ACB in previous submissions and consultations on the previous version of the Plant Breeders' Rights Bill.

### **Introduction**

Small scale farmers in South Africa-non unlike their counterparts on the rest of the continent, rely on farm saved seed, exchanges with relatives and neighbors, bartering with other farmers or local markets to access seeds. Reliance on informal seed sources is independent of whether farmers cultivate local or modern varieties.<sup>1</sup> The reasons for this include: inadequate access to markets; the market channels are unfavorable to farmer living in remote areas; limited access to financial resources or credit to buy seeds; the inability of formal system to provide timely and adequate access to quality seeds of improved varieties and to varieties that are specifically adapted to local conditions.<sup>2</sup>

Local varieties used are generally derived from mass selection. Mass selection consists of choosing those plants that seem the most interesting in a population and using their seeds to sow the following crop. The operation is repeated generation after generation, which makes it possible to improve crop performance progressively. The plants obtained are neither identical to the previous

<sup>1</sup> Louwaars, N.P., and De Boef, W. S., "Integrated Seed Sector Development in Africa: A Conceptual Framework for Creating Coherence Between Practices, Programs and Policies, *Journal of Crop Improvement* 26:39-59, 2012

<sup>2</sup> Louwaars, N.P., and De Boef, W. S., "Integrated Seed Sector Development in Africa: A Conceptual Framework for Creating Coherence Between Practices, Programs and Policies, *Journal of Crop Improvement* 26:39-59, 2012

generation nor identical to each other. The seeds obtained via mass selection contain heterogeneous individuals, which give them abilities of adaptation and resistance. Farmers generally practice mass selection even on commercial open pollinated varieties. Farmers' low purchasing power and other problems associated with the formal seed sector, does make the use of plant variety protection suited to food crops.

Farming communities, especially in communal areas, view saving seeds as a duty, and sharing them as a centuries-old cultural practice. As a result, these communities have managed to establish their control over seeds as a survival mechanism. During planting time, farmers exchange, recycle or replant seeds and planting materials without any restrictions, thus providing themselves with an economic opportunity to sustain their livelihoods. Farmers' rights to harvest, save, store, exchange and replant seeds without hindrance, make up the real basis for food security. The farmer-managed seed systems have also played an important role in developing, conserving and improving a diverse range of plant genetic resources.

Olivier De Schutter, the Special Rapporteur on the Right to Food, makes several pertinent findings in his report to the UN General Assembly on the issue of farmer's seed systems.<sup>3</sup> He notes that "Reliance by farmers on farmers' seed systems allows them to limit the cost of production by preserving a certain degree of independence from the commercial seed sector. The system of unfettered exchange in farmers' seed systems ensures the free flow of genetic materials, thus contributing to the development of locally appropriate seeds and to the diversity of crops. In addition, these varieties are best suited to the difficult environments in which they live. They result in reasonably good yields without having to be combined with other inputs such as chemical fertilizers. And because they are not uniform, they may be more resilient to weather-related events or to attacks by pests or diseases. It is, therefore, in the interest of all, including professional plant breeders and seed companies which depend on the development of these plant resources for their own innovations, that these systems be supported."

It is very important to note that farmers generally do not make any distinction between seeds from the formal system and traditional/local varieties as long as these are useful for their needs and adapted to their farm conditions. Farmers are rarely content to use the same variety every season, fully aware of the constantly changing agro-climatic conditions and also in a constant effort to spread the risks of failure due to pests, diseases and weather patterns. Thus, on-farm experimentation is a constant feature of farmer's crop improvement and selection practices, in the same way that seed exchange and sharing are lifeblood of traditional crop breeding.

These observations suggest that what is needed for agricultural development in South Africa is a balanced and flexible approach. South Africa needs to adopt a creative approach that supports and benefits farmers' seed systems, on which many livelihoods and the long-term food security and nutrition of people in many parts of the country depend.

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<sup>3</sup> See UN General Assembly Document A/64/170 titled "Seed Policies and the right to food: enhancing agrobiodiversity and encouraging innovation".

South Africa is a member of the 1978 Act of the Convention for the Protection for New Varieties of Plants (UPOV 1978) and not a member yet of UPOV 1991. South Africa is not bound by the provisions of UPOV 1991, and there is no legal reason for it to implement UPOV 1991. South Africa should fully utilise the flexibilities provided for in UPOV 1978 to contribute towards the socio-economic upliftment of small holder farmers in South Africa in particular and for a balanced approach when dealing with competing interests in the agricultural sector. It is worth noting that many countries with modern industrialized farming systems (e.g. in Latin America) are not members of UPOV 1991 and do not base their PVP systems on that model due to its restrictive nature and extremely strong intellectual proeprty protection provided for breeders.

## **Specific Comments**

### **Duration of plant breeder's right- section 7**

Section 7(1) states that a plant breeders' right is valid for a period of 20, 25 or 30 years depending on the particular kind of plant.

UPOV 1991 prescribes the duration of PBR protection to begin from the date of grant of the breeders' right for a period of 25 years for trees and vines and 20 years for all other genera and species. It further states that the Advisory Council may extend these periods by up to 5 years (optional 5-year extension). The provisions of the PBR Bill appear to be going beyond UPOV 1991. Since SA is bound only by the provisions of UPOV 1978, it should give effect to those provisions and not provide for what appears to be UPOV 1991 +!

### **Period of sole right-section 8**

It is important to ensure that these sole right provisions are limited to the issues concerning licenses and compulsory licenses and do not in any way, impact on, or restrict the exceptions set out regulations contemplated in terms of the provisons set out in section 9.

### **Exceptions to plant breeder's right-section 9**

Generally speaking, we are pleased to see a much more flexible approach taken to the exceptions to the plant breeder's right. Some of the UPOV 1991 style restrictive provisions have been removed (which are in the current Act). We strongly request that the formulation in section 9 of the PBRs Bill be kept, and that they be improved by taking into account our contributions below.

Having said this, we note that some elements of UPOV 1999 are still reflected in section 9. While we have severe reservations about the adoption of UPOV 1991 provisions, we deal with these in the spirit of making a constructive contribution to the discussions:

- “private and non-commercial purposes”

It would be wise to have a definition of private and non-commercial purposes. Here, we will be looking for a broad definition to cover at least, subsistence farmers.

In terms of the UPOV Guidance document, the following is noted in regard to subsistence farmers:

“The wording of Article 15(1)(i) [of UPOV 1991] suggests that it could allow, for example, the propagation of a variety by an amateur gardener for exclusive use in his own garden (i.e. no material of the variety being provided to others), since this may constitute an act which was both private and for non-commercial purposes. Equally, for example, the propagation of a variety by a farmer exclusively for the production of a food crop to be consumed entirely by that farmer and the dependents of the farmer living on that holding, may be considered to fall within the meaning of acts done privately and for non-commercial purposes. Therefore, activities, including for example “subsistence farming”, where these constitute acts done privately and for non-commercial purposes, may be considered to be excluded from the scope of the breeder’s right, and farmers who conduct these kinds of activities freely benefit from the availability of protected new varieties.”

A definition to include these sentiments expressed by UPOV will immediately ensure that subsistence farmers are clearly excluded from the breeder’s rights provisions in the legislation itself (the Act itself) and that a clear and unambiguous exemption is created.

- We strongly support the provisions of section 9(1)(b).
- Section 9(1)(d) sets out critically important guidance for the drafting of regulations to give effect to section 9(2). We would propose that the drafters re-look at subsection (d)(ii) and balance these provisions with the need to “ensuring food security and socio-economic upliftment and promoting the conservaiton and sustainable use of agricultural biodiversity.” As it now stands in the Bill, it adopts the UPOV 1991 language. If this is to be retained (SA is not bound by this language), then it must be balanced with promoting the interests of genetic diversity and small farmers who have been disadvantaged historically.

According to the UPOV Guidance document “subject to safeguarding the legitimate interests of the breeder means that “small farmers” with small holdings (or small areas of crop) might be permitted to use farm-saved seed to a different extent and with a different level of remuneration to breeders than “large farmers”.

However, the size of holding (or crop area) determining a small farm may differ when considering reasonable limits and safeguarding the legitimate interests of the breeder. We really do not want to regulate farm size in the regulations, taking into account the historical inequalities with regard to land-holding in South Africa, where such an interpretation may penalize small farmers who farm on communal land or who may wish to consolidate their landholdings.

Including the language suggested above:“ensuring food security and socio-economic upliftment and promoting the conservaiton and sustainable use of agricultural biodiversity, ”will enable the Minister when she is applying her mind when making the Regulations in terms of section 9(2), to be guided by and adopt a more balanced approach in favour of small scale farmers and that it is made clear in the law, that the intention is not to create any loopholes for the circumvention of section 6 of the Bill by other players in the sector but to provide specifically for the special circumstances of small farmers in South Africa and to fulfill our obligations in terms of the Convention on Biological Diversity to promote the

conservation and sustainable use of biodiversity.

- Section 9(2) is gingerly welcomed. It has the potential to provide flexibility for small farmers (beyond subsistence farmers-small emerging farmers for instance, family gardeners and so forth) but it also has the potential to fall back on the restrictive farmers' privilege provisions of UPOV 1991. In this regard, we are concerned that section 9(2)(c) may open the door for the UPOV style restrictions: "farmers to use for propagating purposes, on their own holdings, the product of the harvest which they have obtained by planting, on their own holdings, the protected variety". We strenuously oppose this formulation as it is extremely restrictive and we do not at any costs, want to see such provisions popping up in future regulations. These UPOV 1991 provisions do not even allow a farmer to share the harvest from the replanted seed with his family members who do not live on 'his or her own holding.' It is extremely euro-centric in nature and has not place whatsoever in South African law.
- We strongly recommend that a further section 9(3) be inserted to the effect that no contract entered into between the breeder and/or his or her agent with any person, that undermines the provisions of section 9 will be valid. There are such similar provisions that may be found in the Consumer Protection Act and other laws, that do not allow private law contracts to flout the provisions of legislation. We are extremely concerned that breeders or their agents will enter into private law contracts with small farmers –especially small emerging farmers to completely undermine the exceptions provided for by the law either in the Act when it is promulgated and/or the regulations.

### **Criminalisation of contravention of breeder's rights**

The ACB supports those who have raised strenuous objections to various provisions in the Bill that criminalise contravention of the breeder's rights. These provisions promote the protection of IPRs, - private rights- through publicly funded protection, institutions and measures. It is highly likely that such provisions are unconstitutional anyway, as they constitute an abuse of state resources. We would recommend the deletion of all provisions that criminalise infringement of breeders' rights. Breeders do have access to justice; to the courts and to other forms of dispute settlement fora. There is no reason why the criminal justice system should be put at the disposal of breeders.

### **Conclusion**

We are optimistic that the DAFF, who has made an effort to reach out to and consult with small farmers as well as to NGOs will continue to have an open approach to the concerns that we have raised in these submissions. We look forward to a much improved version of the law and also, to actively participating in the discussions with regard to the drafting of regulations.