Preliminary Comments on Plant Improvement Bill [B 8B – 2015]
January 2017

On 7 April 2015 the African Centre for Biosafety officially changed its name to the African Centre for Biodiversity (ACB). This name change was agreed to by consultation within the ACB, to reflect the expanded scope of our work over the past few years. All ACB publications prior to this date will remain under our old name of African Centre for Biosafety and should continue to be referenced as such.

We remain committed to dismantling inequalities in the food and agriculture systems in Africa and to our belief in peoples' rights to healthy and culturally appropriate food, produced through ecologically sound and sustainable methods, and to define their own food and agriculture systems.

We call for broader consultation and further disclosure on this Bill in the future.

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Contents

1. Background/introduction

The Plant Improvement Bill (B 8-B - 2015) seeks to adjust and update the Plant Improvement Act 53 of 1976 (PIA). The purpose of Act 53 is to ensure minimum standards for plant material and business operations to secure sustainable agricultural production and participation in global markets. These are based on standards of the International Seed Testing Association (ISTA) and the seed schemes of the Organization for Economic Cooperation and Development (OECD).

The Bill aims to bring the existing Act in line with the South African Constitution and related legislation in the agricultural sector. According to the Memorandum on the objects of the Plant Improvement Bill 2015, "plant improvement activities should be recognised to provide support to strengthen existing commercial production while simultaneously improving the participation of new entrants and facilitating smallholder farmers to make the transition to mainstream agriculture".

A primary purpose of the law is to ensure quality controls. This is important and relevant so that farmers can have confidence that seed they receive will produce to expectations (e.g. it germinates as expected, it is disease free, and it is of the crop and variety expected). However, the law focuses exclusively on commercial sector requirements. There is evidence, even in South Africa where smallholder[1] farming operates on the margins, that rural local trade in farm saved seed is an important source of seed for smallholders. This is especially the case for indigenous and other crops where there is little commercial interest. These activities are central to maintaining and reproducing agricultural biodiversity and diffusing risk by offering farmers different options. However the commercial focus of the law forces these diverse and necessary activities into inappropriate and inflexible procedures. Ultimately the Bill attempts to impose a blanket set of regulations for all seed producers regardless of whether they are multinationals in large markets or individual farmers reproducing seed on their own land.

The Plant Breeders' Rights (PBR) Bill [B 11B-2015] makes this recycling, exchange and local rural trade of varieties protected by plant variety protection (PVP) illegal. The Plant Improvement Bill deepens this by criminalising farmer sales of seed that has not gone through formal certification processes and does not meet standardised regulations for seed production. Imposing a standardised legal model onto long histories of local saving, recycling, exchange and trade is inappropriate. Small-scale farmers need to be adequately catered for to ensure livelihood, seed and food security.

The Bill covers:

- Business registration and quality standards for the cultivation and sale of plants and propagating material;
- National plant varietal list;
- Variety evaluation and testing;
- Import and export control;
- Different scheme types for plants and propagating material.

The Bill also deals with institutional and governance issues (Chapters 1, 2, 10, 12, 15-17).

Key points:

- There is a major problem with the inclusion of any kind of exchange in the definition of 'sell'. This goes against long-held practices of sharing and exchange of plants and seeds between

[1] We follow the distinction Ben Cousins from PLAAS at the University of the Western Cape makes between smallholders (land size measured in area) and small-scale farming (business size measured in turnover).

farmers, especially smaller and less commercial producers, and should be removed from the definition.

- There are no clear definitions on 'business' or 'commercial' which makes it difficult to know to whom exemptions will apply. Exemptions from the law are crucial for a diverse range of smallholders and small enterprises to allow local innovation and adaptation to flourish,
- There are questions about what happens to varieties that do not appear on the National Varietal List, i.e. those that are not registered. There are many less commercial crops and varieties, including indigenous, that serve an important role in the circulation of planting material for smallholder farmers and in maintaining agricultural biodiversity. Diversity is essential to diffuse risk and to offer alternative options to reduce dependency.
- The Distinct, Uniform and Stable (DUS) criteria for listing a plant on the national varietal list is too static and is inappropriate for accommodating farmer varieties. The criteria are too inflexible and exclusive in the face of the need to maintain and protect agricultural biodiversity, respond adequately to climate change, and to diffuse risk.
- We recognise the importance of quality control. However, we propose that more flexible and locally negotiated, participatory quality control protocols (e.g. quality declared seed, participatory guarantee schemes) are required to accommodate smallholder farmers and small-scale enterprises for production and exchange of seed, plants and propagating material, variety registration and listing, and cross-border trade.
- Overall we have concerns that the Bill goes further than the existing Act in penalising farmer to farmer exchange of seed and planting materials. Although there are exemptions, their application needs to be firmly stated. Inclusion of exchange in the definition of sale, as mentioned, suggests a severely restricted space for farmer to farmer exchange and sharing in future.

Definition of 'sell'

There is a major problem with the definition of 'sell' in the Bill (s1):

'''Sell'' includes—
(a) agree to sell or to offer, keep, expose, send, convey or deliver for sale; and
(b) to exchange or to otherwise dispose of to any person in any manner' (s1)

In the current Act, part (b) of 'sell' is worded: "to exchange or to dispose of in any manner for a consideration". So the Bill aims to widen this definition to include any exchange of plant and propagating material whatsoever. It serves no good purpose to widen the definition of 'sell' beyond clearly defined commercial boundaries. It goes against long-held practices of sharing and exchanging materials in one's possession with others. We should assert fundamental rights to free exchange at this level. Part (a) of the definition in the Bill adequately defines the meaning of 'sell' and there is no need to usurp all exchange under this definition.

Specific proposal

- We strongly urge that part (b) of this definition is removed in its entirety.

2. Business registration and quality standards

Chapters 3 and 4, 12

The Bill covers businesses with premises involved in:

- Cleaning and conditioning, pre-packaging and selling of seed (tubers are excluded s9.5);

- Running of a nursery or other multiplication facility, or a laboratory;
- Import and export of plants and propagating material.

All businesses and premises involved in these activities must register according to the law. However, it is not clear where the dividing line is for activities that must be registered and those that do not need to register.

The Bill does make provision for the Minister to exempt business or premises with or without conditions, with an application process for exemptions (s19). There is also provision for the Minister to make regulations on "requirements and standards relating to the facilities for the types of business and premises and the requirements relating to qualifications for the person in control of the premises" (s58.1e). Exemptions are thus a Ministerial prerogative. It may be better to build minimum exemptions into the law itself in order to protect the interests and activities of smallholder farmers and small-scale enterprises to provide legal clarity and obviate the necessity of relying on Ministerial discretion and requiring farmers and small producers to apply for these exemptions.

The Bill does not address farmer seed systems and it is not obvious what the legal implications would be for non-compliance, for example, on the part of smallholder farmers or informal seed trading where the exemptions do not apply, or how these will be enforced. By failing to differentiate between different types of seed enterprises, or between farmer and commercial seed sectors, farmer-managed seed systems are ultimately criminalised as a whole. Thus significant questions remain, particularly with regard to the sale and production of unlisted varieties in quantities that exceed what will be permissible, under the exemptions, and/or which do not comply with packaging and labelling requirements. The implications of these and other questions for the future of farmer-managed systems and indigenous varieties remain unclear.

Registration and quality control

The overall objective of quality control is important, because farmers must receive what they have paid for, and seeds should meet certain minimum quality standards (e.g. germination rate, disease free, accurate description of what is being sold). Properly enforced regulations can also reduce unethical business behaviour like cheating or lying. From this point of view, registration requirements are positive.

However, flexibility for different contexts is required. It is good to regulate quality controls in these ways for commercial production, but for informal and farmer production (which may include some sale or exchange of seed or plant material, but not as a core part of the business), more flexible, locally negotiated, participatory quality controls may be more appropriate. These can be negotiated between farmers and consumers (farmers themselves are the main users of seed so in farmer seed systems they are both producers and users, and farmers can therefore discuss negotiate amongst themselves about quality controls, with a possibility of external oversight and support, e.g. from the public sector).

Chapter 4 lays out conditions for sale of plants and propagating material, including exemptions to the terms of the Bill.

s22.1 Any plants or material for sale must be varieties listed in the national varietal list (see Ch 5) and must comply with requirements;
s22.3 The Registrar may grant exemptions on application;
s22.4 The plants or material must be sold from a registered business and premises unless exemption is granted in terms of s9.

As it stands this means unregistered varieties may not be exchanged, which puts farmer seed in immediate danger. s22.1 restricts any seed exchange to varieties on the national varietal list. There may be quality control motivations, but this is a very blunt approach and excludes significant agricultural biodiversity including indigenous crops. Farmers must apply for exemptions to be allowed to exchange without having a registered business. These are onerous requirements in the context of marginal small-scale farming in South Africa.

There is provision for the Minister to make regulations "on requirements and standards for plants and propagating material and the marking of containers and labels" (s58.1i). As with business premises above, we advocate flexible regulations and differentiated standards between more formal commercial operations and smaller operations to allow for informal, local and small-scale activities.

Section 23 on variety and use exemptions – which are specified for the first time in the Bill (with s23.1b related to the exemptions in s10 of the Plant Breeders' Rights Bill 11B, 2015) - does cover part of the farmer seed system:

s23.1 includes exemptions for:
a) Propagating material not for cultivation;
b) Private and non-commercial purposes by the producer for own use;
d) Non-commercial varieties of plants regulated in the Act.

s23.2a defines non-commercial in s23.1d to mean "an unprotected variety of any kind of plant regulated by this Act that is available for cultivation and sale on such non-commercial scale as may be prescribed"
s23.2b includes open pollinated varieties (OPVs) of any kind of plant of which seeds are regulated by this Act.

There are exemptions within the PIA, where any uncertified and unprotected OPV is sold for cultivation and sale on a non-commercial scale, is exempted from the provision of the law. The exception regulates the number of seeds that may be sold per year, and the size of the packaging in which it is sold. This exception is intended to allow the trade of small quantities of seed, mainly to accommodate small seed sellers of heirloom and OPV seed.

In light of the fact that seed trade regulations are highly onerous and complicated, the intended exemptions in the Bill provide an avenue for trading experimental, organic and heirloom seeds without regulation. Small seed companies who benefit from these exemptions tend to focus on household and amateur gardeners, and therefore are not seen as competition for the larger seed companies, or significant in terms of national food security. In these exemption cases, seed quality, germination rates, etc., are not monitored. Many of these companies are well-resourced and tap into a niche market, which allows for market/self-regulation. However, farmer to farmer exchange and local rural trade is not similarly recognised.

These are very important clauses because they permit the sale on a non-commercial scale of unprotected and uncertified seed varieties and OPVs governed by the Act. However, s23.1b limits reuse of protected varieties to farmers' own holdings for private and non-commercial use. This is of concern because it prevents farmers from selling the product of recycled protected varieties. This relates directly to the Plant Breeders' Rights Bill [B 11B-2015] and plant variety protection, and provides unbalanced rights in favour of commercial breeders.

Specific proposals

- Clarify definitions on 'business' or 'commercial' to know to whom exemptions will apply. Exemptions from the law are crucial for a diverse range of smallholders and small enterprises to allow local innovation and adaptation to flourish but these must be specified;
- Specific provisions are needed to allow for the development of more flexible, locally negotiated, participatory quality controls for seed production and exchange for economic actors outside the commercial core;
- s23.1b on variety exemptions – we propose incorporating exchange into the exemption so the clause reads "b) private and non-commercial purposes by the producer for own use and exchange" with reference to exemptions for all activities.

3. National plant varietal list, and variety evaluation and testing

Chapters 5 and 6, 7-11
The national varietal list must contain all varieties registered after having complied with Distinct, Uniform and Stable (DUS) tests and trials (s27 and s35) and value for cultivation and use (VCU) (s38) approval processes. Varieties may be removed from the national list if it is in the public interest to do so (s26.1c).

In order for a variety to appear on the national list, there is a detailed procedure to follow, including an application form, technical questionnaire and fees. This is onerous and inappropriate for smallholder farmers who may wish to register their own varieties on the national list as a way of limiting biopiracy and privatisation of farmer varieties.

s35.1 is on DUS tests and trials, including those obtained from an appropriate authority in another country, with a regionalisation of standards. To the extent that plants and propagating material do not meet these rigid and uniform standards, this poses a threat to farmer systems of plant and propagating material production and exchange, which many or even most farmers do for at least some of their product except for the most industrialised producers.

As with the PBR Bill, we have concerns regarding the inflexibility of DUS tests to respond to farmer needs in diverse contexts. The DUS criteria are oriented towards genetically uniform, commercially bred varieties. In this regard, small holder farmers in South Africa, seeking to develop or maintain varieties, will not be able to obtain breeders rights because these varieties will not fulfill the requirements for distinctness, uniformity and stability, Landraces or farmers' varieties usually display a high degree of genetic heterogeneity and are adapted to the local environment under which they were developed.

Civil society including smallholder farmer associations and networks have voiced longstanding concerns with the DUS criteria. It is an example of how the framework is designed for private commercial interests.

Distinct means able to distinguish clearly from another related variety. This is important for breeders to make claims that their varieties are being used and they must get royalties. It is not so useful for farmers as users of seed. In practice, many varieties are intermixed in farming systems, especially smaller and more diverse systems. Farmer varieties are not always clearly distinguishable from one another, but may still be popular and useful because of local adaptations and intermixing.

Uniform means all seeds must produce the same result in a standard way in the same conditions. This criterion is designed for industrial production, because standardisation of crops and harvest times allows mechanisation of harvesting and processing. But it is not as important in diverse, mixed

and smaller-scale farming systems. Diversity diffuses risk, e.g. the use of multiple varieties with different harvest times or continuous harvests (even if lower yields at a given time) can strengthen household and local food security because it spreads the food supply in time, rather than cyclical glut and then hunger which is the tendency for rigid, standardised crops that are all harvested simultaneously.

Stable means a variety must reproduce in a similar way over time. Hybrid varieties are not stable; the highly unstable genetic combination breaks down after just one harvest. The consequence is a sharp reduction in yield on further use of harvested material as seed even in ideal conditions. Yet these seeds pass the DUS test, so it clear that the framework is manipulated in the interests of hybrid breeders. Stability is also not necessarily the top priority for smallholder farmers, who may prefer plasticity (local adaptation) than fixed features.

Specific proposal

- More flexible standards are required to strengthen smallholder farmers' ability to register their own varieties if they want to choose this route;
- Develop options for supporting farmer to farmer exchange beyond registration on the variety list.

4. Import and export control

Chapter 13
Imports and exports are only permitted if the importer is a registered business with registered premises in accordance with the Bill; if the variety appears in the national varietal list or on the Southern African Development Community (SADC) regional varietal list; and if the material complies with all requirements. Again, there is need for flexibility and accommodation/exemption for smallholders and small enterprises, but also mechanisms for maintaining basic phytosanitary standards (e.g. plant material is disease free before it crosses the border).

A person who does not have a business and premises may import plants or propagating material for own use with the written authorisation from the Registrar and subject to such conditions as the Registrar may specify (s43.3ii). This is onerous and bureaucratic for informal cross border exchange within the same agro-ecological zones (e.g. along the Mozambican and Zimbabwean borders).

Specific proposals

- Exemptions to include small-scale scale cross-border trade for plant and propagating material used in the same agro-ecological zone;
- There may be need for the development of more local, context-specific quality control procedures to ensure minimum phytosanitary requirements are met.

5. Different types of schemes

The Minister may establish schemes "with the object of maintaining the quality of plants and propagating material of those kinds of plants and of ensuring the usefulness for agricultural or industrial purposes of the products" (s45.1). Public finance may be used to assist these schemes (s45.3). We do not have specific comments on this, although it would be a positive step for South Africa to adopt a quality declared seed scheme to enable smaller enterprises to participate in seed production.

6. Penalties

A person is guilty of an offence if they:

- Conduct a business in conflict with the provisions of the Act (s59f);
- Sell any plant or propagating material in contravention of s22 (s59g)
- Import or export any plant or propagating material in contravention of the Act (s59h, s59i).

A person convicted of an offence in any of the above is liable to a fine and imprisonment of a period up to 6 years (s60.1a).

This is an increase in the penalty from the current Act, which has a fine or imprisonment for a period up to 1 year, or up to 4 years for a second or subsequent offence. This works against farmers' rights to exchange varieties and propagating material, and further criminalises farmers' activities. It may not be used against all farmers engaged in these practices, but it can be used. This poses a fundamental threat to farmer seed systems. As indicated above, it is essential to remove exchange from the definition of sell, and to ensure good exemptions to enable especially smallholder farmers to freely exchange plant and propagating material in their possession.

7. Conclusions

Overall, the Bill fails to accommodate smallholder seed and farming systems and seed maintenance and exchange. Issues that are not covered in the Bill include:

- Hardly any recognition of farmers' ongoing seed reproduction practices;
- No recognition of role of farmers in maintaining seed diversity and no public support;

Nothing in policy speaks to:

- The role of farmers in plant breeding;
- Sources of public sector germplasm and farmer access;
- Seed selection, enhancement and production in the field;
- Seed storage, seed banks, and in situ conservation;
- Indigenous knowledge, farmer varieties and ways of resuscitating and building seed diversity;
- The role of extension services and farmer organisations in seed systems; seed exchange and sale.

There is need for a more equitable seed policy in light of ongoing corporate concentration, impending global mergers between corporations that dominate the South African seed and agrochemical sectors (Monsanto, Bayer, Syngenta, Du Pont and Dow in particular) and trends towards corporate-driven new technologies and private appropriation of genetic data placed in public trust.

Farmer-based experimentation, maintenance and reproduction of seed, as well as farmer to farmer exchange are core activities that ensure agricultural biodiversity and adaptation of varieties to local conditions (including drought and climate change). The Plant Improvement Bill not only fails to make provision for the protection and nurturing of these activities, but is an explicit move to criminalise these activities through including any kind of seed exchange in the ambit of the law, and through imposing inflexible requirements onto smallholder farmers and informal traders. This will lead South Africa down the path of eliminating smallholder production of diverse products.