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The Registrar of the Plant Breeders' Rights Act
Department of Agriculture, Forestry and Fisheries
Harvest House
30 Hamilton Street
Arcadia, Pretoria 0001

Submission on the Plant Breeders' Rights Bill

Thank you for the opportunity to comment on the Plant Breeders' Rights Bill.

Our submission follows below and consists of:

- Background on Biowatch South Africa
- Plant Breeders' Rights and Development objectives
- Context to the draft Plant Breeders' Rights Bill (2013)
- Key challenges for South Africa
- Comments on specific provisions in the Plant Breeders' Rights Bill:

Yours sincerely

A handwritten signature in black ink that reads 'Rose Williams'. The signature is written in a cursive, slightly slanted style.

Director

Trust No. IT 4212/99

Board Members: Dr David Fig (chairperson), Prof. Loretta Feris, Ms Thoko Makhanya, Dr Nombulelo Siqwana-Ndulo,
Ms Beni Williams, Ms Rose Williams, Prof. Rachel Wynberg

Biowatch South Africa

Biowatch is a non-governmental organisation established in 1997, and strives for social and ecological justice through challenging industrial agriculture and demonstrating ecologically sustainable alternatives by supporting small-scale farmers, working with civil society to create joint understanding and action, and constructively engaging with government in implementing policies and practices that promote, facilitate and actively support agro-ecology and that safeguard people and land. We have a long track record of working on issues concerning seeds and indigenous knowledge systems, not only with farmers but also internationally. Our contribution to this draft Bill thus stems from this experience and also a vision for the future.

Plant Breeders' Rights and Development objectives

There are a few overarching policy considerations in designing a Plant Breeders' Rights (PBR) regime. On the one hand is the rationale behind PBR legislation that by putting in place a proprietary reward system for breeders and seed companies, it will hopefully stimulate the kind of plant breeding and access to new plant varieties that will benefit the country. It is however critically important to consider and determine the impact that PBR systems developed for industrialised countries will have on the developmental and conservation objectives of South Africa. But preceding any consideration of a law that gives private ownership to what used to be commonly held, is the recognition that private commercial rights can never override the *a priori* rights of farmers and humankind to save seed and to grow food which feed communities. It is self-evident that the informal and traditional system has an inalienable right to exist and a responsibility to maintain a process that is critical to ensuring food-security, and upon which the development of short-lived new commercial plant varieties is completely dependent.

Plant Breeders' Rights raise a number of critical debates around which policy positions needs to be clarified in the drafting of legislation:

- PBRs protect private rights for commercial purposes, a system that gives no recognition to the status of farmers' varieties, or the importance of commonly held genetic resources. An important sector of South African agriculture is based on cultural and communal values, embedded in a system of customary rights where communities save, share and exchange seeds. The individualistic and proprietary nature of PBRs is a foreign concept to traditional communities and undermines customary rights.
- The development of new plant varieties has always relied on farmers' breeding efforts, followed by public research and variety release to farmers. The granting of PBRs to varieties that were originally developed by farmers or publicly funded research efforts, without recognition to those contributions, is unjust. A PBR regime must always ensure that materials and knowledge enter the public domain as soon as possible.
- The role of public breeding and public agricultural research is declining for a number of reasons. As the drive to grant PBRs to new plant varieties increasingly dominates breeding programmes, public institutions are also under pressure to be commercially viable and to form partnerships with the private sector. This means that research tends to prioritise the commercial value of a narrow selection of crops and neglects

research on orphan crops, which are important for food security and genetic diversity.

- The erosion of genetic diversity is a direct result of narrow breeding priorities and commercial interests. The inherent diversity in plant varieties makes it impossible to apply the strict criteria of the DUS (Distinct, Uniform and Stable) system and still breed for diversity.
- Another outcome of strict PBRs is the weakening of the domestic seed sector because smaller companies cannot compete with large companies in the acquisition and development of new varieties. PBRs and patents are fostering the development of a monopolistic seed sector, dominated by multinational companies with vast capacity. In such a system there is no equal access.

Context to the draft Plant Breeders' Rights Bill (2013)

South Africa has no obligation to accede to UPOV 1991 and should not do so.

South Africa is only bound to the 1978 text of UPOV and even though it has signed the 1991 text, this does not create an obligation to implement UPOV 1991. The only obligation is not to undermine the signed text. This amended law will not need approval by the UPOV Council. The 1978 text does not include restrictions on seed saving or non-commercial seed exchange among farmers. Therefore, in the drafting of these amendments, South Africa should make full use of these flexibilities to ensure that PBR does not undermine the rights farmers currently have or further erode the little bit of genetic diversity that remains in farmers' fields.

South Africa is not a party to UPOV 1991 so compliance with its requirements is therefore not relevant for the purpose of these amendments. The starting point for the discussion of this law should not be UPOV 1991, as South Africa has not acceded and should not accede. South Africa is a developing country with a diversity of agriculture systems, and it should therefore refrain from UPOV 1991 compliant legislation in order to meet its commitments towards plant genetic conservation and smallholder farmers. There are flexibilities within UPOV that must be appreciated and taken advantage of to meet our specific priorities and to also take the priorities of our neighbouring countries into account.

The South African government is committed to the conservation of plant genetic resources, support to small farmers and putting in place a strategy for agro-ecology. These commitments should not be undermined by PBRs.

The mission of the Department of Genetic Resources is to:

- *Develop and implement policies, legislation, strategies and norms and standard on the management of genetic resources for food and agriculture.*
- *Regulate and promote the availability of propagating material of genetic resources for food and agriculture.*
- *To provide a risk mitigating system in support of agricultural biodiversity.*

The Department is thus clearly committing itself to ensure the availability of good propagating material for farmers by providing to breeders and seed companies protection for their investment. On the other hand, is there a clear commitment to promote agricultural biodiversity and to ensure the future availability of genetic resources for food and agriculture.

The Department published and submitted to Parliament, a Plant Breeders' Rights Policy in 2010, in which gives recognition to the important role of small farmers' seed systems in the conservation of genetic resources.

Agro-ecological systems are based on access to a diversity of plants animals and therefore needs access to such varieties. Agro-ecology has huge potential for all farming communities, but to be viable, it must have a sustainable and integrated seed conservation system in place.

Key challenges for South Africa:

1. Lack of recognition and protection of the role of farmers' varieties and knowledge systems in legal instruments.

The important role smallholder farmers and traditional communities play in the conservation and improvement of Plant Genetic Resources (PGR) is not recognised in national policy or legislation. International instruments such as the CBD (Convention on Biodiversity) and ITPGRFA (International Treaty on Plant Genetic Resources in Food and Agriculture) requires that a resolution be found on the national level. There is also very poor recognition of the importance of traditional knowledge systems in agriculture. While PBR legislation gives detailed protection to innovation by private breeders, there is no legislation protecting and enhancing the innovation farmers have brought to agriculture over centuries and supporting what they can bring in the future.

2. Continued access to Genetic Resources is key for progress in research and development and breeding by public and private institutions.

It is widely acknowledged that Plant Variety Protection (PVP) has made a significant contribution to the erosion of genetic diversity and disappearance of farmers' varieties. Access to PGR for breeding is obtained via *ex situ* collections or *in situ* from communities. There is no legislation on Access and Benefit Sharing in agriculture in South Africa as South Africa is not a party to the ITPGRFA and does not yet formally recognise Farmers' Rights.

The PBR and PI (Plant Improvement) Acts should defend the right of researchers to have access to protected varieties for research and breeding while ensuring that the contribution of traditional communities is recognised. Italian law, for example, makes provision for the inalienable and unrestricted rights of conservation activities. Participatory Breeding where farmers are supported by scientists and NGOs to enhance their own varieties has been implemented in a number of developing countries and is also something happening now in South Africa. The current PBR Bill should create space for such breeding efforts.

The seed industry argues that stringent PBR is important for food security in that it increases access to varieties for farmers and researchers, but in practice this is not true. The Directorate of Genetic Resources stated in a 2010 presentation to Parliament, that the increase in the granting of PBRs is dominated by ornamentals. A concern about the declining research focus on orphan crops was also raised in Parliament.

3. *South Africa's current PBR system is mostly for the benefit of the flower industry and foreign seed companies.*

While PBRs are meant to encourage plant breeding and innovation, research has shown that most PBRs are granted to foreign owned companies and most PBRs are for ornamentals. In a 2010 presentation to Parliament, the Directorate of Genetic Resources stated that at that time, 70% of PBR was foreign owned. Since the takeover of Pannar by Pioneer Hi-Bred in 2012, this percentage could be substantially higher.

A five-country UPOV study¹ suggests that PBR increased the range of varieties made available to farmers. But the above statistics clearly shows that it is in fact ornamentals and foreign-owned varieties that dominate, not local innovation focused on food security. Another study by the World Bank confirms this trend and a review of PVP grants in all UPOV member countries showed that ornamental and other horticultural species account for over 70% of PVP grants worldwide. This study also concludes that while PVP may provide incentives for investment, it does not necessarily lead to new seed sector activity.²

4. *South Africa has a diverse agriculture with diverse seed and cropping systems and farmers.*

A one-size-fits-all PVP system will not serve the interest of the country and will favour bigger, foreign-owned companies at the expense of farmers, biodiversity and the local seed industry. The PBR legislation should be designed in such a way that it reflects and protects the diversity of cropping systems, farmers and breeders.

It is important to differentiate between sectors, i.e. crops for export, ornamentals, horticulture, small farmers, heirloom seed, commercial farmers and the public breeding sector.

5. *Capacity to administer such an act is costly to the taxpayer.*

Policy makers must also consider cost-effectiveness and not put in place a PBR regime with onerous and expensive monitoring and enforcement measures. It must be in line with national and local capacity. It must also be kept in mind that putting in place expensive systems to protect industry means diverting capacity that could be used for other developmental and conservation efforts.

6. *GMOs are having double protection, by both patents and PBR.*

Under the current system, companies can submit Genetically Modified Varieties for PBR and registration under the Plant Improvement Act, while still under evaluation of the GMO Act of 1997. Even though these plants behave very differently in the field and are often unstable, actual distinctness can only be determined at the genotypic level.

¹ The Plant Breeders' Rights Policy refers to this study

²Tripp, R. 2006. Intellectual Property Rights. Designing Regimes to Support Plant Breeding in Developing Countries. World Bank Report No.35517-GLB

Comments on specific provisions in the draft Plant Breeders Rights Bill:

Definitions

1. In Section 1(a) **'breeder' is defined as a person**. This narrow definition excludes the collaborative efforts of communities, and also collaboration that may exist between scientist and farmers. It should include communities and partnerships.

If a commercial breeder takes a traditional variety and through selective propagation develops a new plant variety, those persons should be taken together to be the joint breeders of the new variety. This will allow for recognition of farmers' contributions, and make space for participatory breeding efforts.

Plant Breeders' Right

2. In some respects these provisions expand the rights of breeders and **implement UPOV 1991 (which is not obligatory)** and in some cases go beyond UPOV 1991, which is not defensible in the South African context.
3. **Essentially derived varieties**. Section 6.3 extends PBR to essentially derived varieties, which is a UPOV 1991 requirement but NOT a UPOV 1978 requirement. This provision is supposed to discourage cosmetic breeding, but the danger is also that it limits the use of any protected varieties in breeding programmes. To ensure that public and private plant breeding in South Africa can make effective use of protected germplasm, it would be much more appropriate in the South African context to **limit undue restrictions and exclude EDV's** (Essentially Derived Varieties). In Biowatch's previous submission (June 2012) we highlighted the fact that the protection of EDV's is in conflict with the traditional practices of small-holder farmers who often blend seed to maintain vitality and this may put them in a vulnerable position. Depending on the discretion of the Registrar, this traditional practice may be considered as producing an EDV. The concept of EDV is highly ambiguous and open to abuse. Our recommendation is that it is excluded from the Bill since South Africa is under no obligation to implement it.
4. **Duration of PBR**: UPOV 1991 extends the duration of plant breeders' rights from 15 and 20 years to 20 and 25 years. Section 7 in this draft Bill extends this period to 30 years, going beyond what UPOV 1978 and 1991 requires. We disagree with any provisions which go beyond UPOV 1991 in terms of expanding PBR.
5. **Period of sole right**: Section 8 provides for a period of sole right for plant breeders, which is understood to be a period during which the breeder has no obligation to grant licenses. This provision is in conflict with the spirit of the breeders' exemption which is the main difference between PBR and patents and as such do not belong in this Bill. It is also an anti-competitive practice.

Exception to plant breeder's right

Section 9, aims to give farmers some legal space to practice what farmers have always done – the saving and exchanging of seed. We have the following recommendations for this important Section:

6. To ensure that Section 9 is correctly interpreted in the drafting of the Regulations, we recommend the ***inclusion of a definition for both private purposes and non-commercial purposes*** in the Definitions.
7. We also recommend that the text of Section 9(1)(a) be changed to say: ***“Any act done in respect of that variety for private, communal or non-commercial purposes”***
8. We support the provisions of section 9(1)(b) but would prefer a clear definition of “experimental” as it is also a term that can be open to very wide interpretation.
9. To ensure that this clause does not only take into account the interests of the breeder, but make very sure that smallholder and conservation activities are exempted, we recommend a clause between section 9(1)(b) and 9(1)(c) that adds ***“any act done in respect of that variety for the promotion of food security or the conservation of genetic resources among smallholder farmers.”***
10. Section 9 (1) (d) (i) and (ii) refers to the need to establish the farmers privilege within ‘reasonable limits ‘and to safeguard the ‘legitimate interests of the breeder’. The interpretation of these two clauses is entirely subjective and very open to wide interpretation. This text is also derived from the UPOV 1991 text, to which South African law does not need to comply. We would recommend that it is clearly defined what the parameters for this “legitimate interests” would be and that it does not go beyond what UPOV 1978 prescribes.
11. Section 9 (2) is problematic in that it leaves the scope wide open for a very narrow definition of farmers, crops, uses, conditions of payment and labeling. The intention is obviously to limit this category to smallholder farmers and this will exclude the 70 – 80% of commercial wheat, soya and bean farmers whose traditional practice it is to save some of their seed. We propose that PBR does not extend this far, and that no seed saving activities can be made a criminal offence. We also recommend that the customary practice of selling of seed on a small scale in communities’ and farmers’ markets be excluded from this Act.
12. Section 15(1) of UPOV 1991, prescribes guidelines that limit seed saving to the exclusive use of the farmer on the farmers’ ‘own holdings’. We appreciate the fact that the Department did not include these iniquitous guidelines in the South African legislation. This would have been inappropriate for our context where land is often communally used and it would also make the customary practices of local seed exchange and farmers’ markets illegal.

Include a clause that will protect the exception clause in Section 9.

13. To ensure that contracts between seed companies and small scale farmers cannot undermine/sidestep the intention of Section 9, it would be very important to **add a clause that states that no contract or other agreement can annul these exceptions.**

In the Swiss law, there is the following example

Nullity of Agreements (Article 8 in Swiss Law) : “Any agreement which restricts or annuls the exceptions to the right to protection for the varieties referred to in Article 9 shall be deemed to be null and void. “

Application for Plant Breeders’ Rights

14. Section 14 extends PBR to any variety of all plant genera and species, excluding fungi and algae. This is another example where the Bill goes further than it needs to in terms of its current obligations towards UPOV. It is recommended that South Africa uses the flexibility it currently has and to change this provision to allow for **an incremental increase in plant genera and species** to be covered by PBR.

Increasing penalties: Criminalisation of infringement

15. In terms of the enforcement of PBR, it must be kept in mind that it is a private right and that the right holder should be responsible for collecting royalties and detecting violations. The PVP office should at most be called upon to be an expert or witness in a case of infringement.

The current Bill, Sections 31, 32, 45 and 50 holds the government responsible for detecting and enforcing PBR. These provisions make the infringement of PBRs a criminal offence and require the government to police and enforce these private rights. Apart from these provisions blurring criminal and civil law, we also believe the penalties in 49(g) (2) to be draconian and un-constitutional.

The enforcement provisions do not distinguish between different types of infringements and puts seed-saving farmers and large breeders in the same boat.

PBR Advisory Committee

16. We recommend that the Advisory Committee proposed in Section 41, at all times be balanced in terms of different interest groups and that in particular the interest of genetic conservation and smallholder farmers be represented in a balanced and adequate manner.

Transparency, disclosure of origin of PGR and Access and Benefit Sharing.

17. A number of countries have adopted a disclosure requirement and access and benefit sharing requirement in patent law. PBR generally does not have this requirement and this loophole has over the years been used to hide various cases of appropriation of African germplasm by foreign companies without any recognition or benefit sharing. This historical precedent and the fact that PBRs increasingly approaching patent law in its restrictiveness requires a higher level of transparency

in disclosing the origin of plant material. Therefore, in the spirit of benefit sharing that should follow access; any application for PBR must be accompanied by a disclosure of origin as well as proof of any benefit sharing if the knowledge or resources were obtained from local communities, farmers or breeders.

Conclusion

We appreciate the efforts of the Department of Genetic Resources for organising workshops and opportunities to contribute to discussions on this Bill. We are hopeful that the Department and the Minister, in considering our comments, will not bow before the interest of short term commercial gain and foreign-owned seed companies, but will keep in mind the long term importance of enhancing agro-biodiversity and farmers' rights to save and share seeds and in this way make their continued contribution to food security.