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SOUTH AFRICA biodiversity | food security | biosafety | social justice

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Parliamentary Committee on Agriculture, Forestry and Fisheries

Submission on the Plant Breeders' Rights Bill

Thank you for the opportunity to comment on the Plant Breeders' Rights Bill in writing. We would also like to thank you for the opportunity to give an oral submission to the Parliamentary Committee on Agriculture, Forestry and Fisheries.

Our submission follows below and consists of:

- Summary
- Background on Biowatch South Africa
- South Africa and international Agreements i.t.o. intellectual property on genetic resources
- Comments on specific provisions in the Plant Breeders' Rights Bill
- Conclusions

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

Summary

Biowatch makes this submission to Parliament based on its many years of experience with the conditions smallholder farmers operate under. Biowatch also makes this submission on behalf of future generations, as our generation is the custodians of their future.

It is the duty of the South African Parliament to approve seed policies that will benefit the majority of its population, its farmers and that will also ensure genetic diversity for future generations. It is therefore very important to remind ourselves of the fact that the purpose of the Plant Breeders' Rights Bill is to protect the private rights of a handful of companies to enable them to gain maximum benefit out of their investment. This private right (or privilege) is then of course based on restricting the rights of others, in these cases farmers, as well as our right to genetic diversity into the future. Seed and its genetic diversity have an overarching relevance for all humanity and is the product of the breeding of countless generations of farmers. It is therefore very short-sighted to grant exclusive rights to companies and in addition to make the reproduction and distribution of seed a criminal offence.

South Africa is a party to a number of international and regional agreements that all need to be considered when drafting this legislation. South Africa also has a strong Constitution that obliges Parliament to implement laws that are fair, protect the environment and ensure the health of its people.

The key provisions and our recommendations to consider are:

- 1. The draft Bill should not go further than it has to in terms of implementing Plant Breeders' Rights.** Several provisions of this draft Bill go further than it has to and in doing so, puts the private rights (privileges) of companies before the responsibility of the government to conserve and enhance genetic diversity; encourage public breeding and a diversity of seed companies; and to ensure food security by protecting the rights of farmers to save seed.
- 2. The Bill must give the Minister clear guidelines in terms of the exceptions to plant breeders' rights (Section 10)**

The draft Bill allows for a differentiated system and exceptions but then leaves the interpretation of these wide open. The Bill must give specific guidelines to the Minister to ensure the following:

- 2.1 Exemptions for different categories of farmers and specifically for smallholders.
- 2.2 For locally important food crops, allow smallholder farmers to use and exchange and trade farm-saved seed amongst themselves.
- 2.3 For locally important food crops, allow commercial farmers to use farm-saved seed on their own holdings.
- 2.4 Varied levels of protection of seed for food crops vs non-food crops.
- 2.5 Include a clause that states that no contract or other agreement can annul these exceptions.

3. The Bill must ensure equal access and benefit sharing and restrict biopiracy of genetic resources by foreign companies.

- 3.1 Any application for plant breeders' rights (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.
- 3.2 Any application must have proof of legal provenance in terms of access and benefit sharing (ABS) regulations.
- 3.3 Additional to the criteria in subsection 15(2) there should be a criteria that the application form should require that there is disclosure of origin and proof of legal provenance.

4. The Bill should not criminalise farmer practices, such as saving seed they bought for replanting.

Chapter 14 puts the obligation on the Registrar to police the private rights of breeders; it provides for the issuing of warrants; and makes provision for the imprisonment of offenders. These offenders could be breeders, but could just as well be farmers and in particular smallholder farmers saving seed they bought the previous year.

Introduction to 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 smallholder 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.

South Africa and international Agreements i.t.o. intellectual property on genetic resources:

Seed policies must put at the centre those who feed us. Intellectual property rights (IPRs) on seed are a threat to the public good. Genetic diversity has to remain a public good to ensure food security and equal access and benefit sharing. Farmers in South Africa and the region are excluded from having access to plant genetic diversity locked away in gene banks around the world. Companies on the other hand have easy access and can benefit through IPRs.

So, instead of giving in to pressure to join the International Union for the Protection of Plant Varieties (UPOV), our government should recognise farmers' rights and put measures in place to enhance and conserve genetic diversity in their fields.

The World Trade Organisation (WTO).

WTO members are all part of the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS), which declares that ‘...members shall provide for the protection of plant varieties either by patents or by an effective *sui generis* system or by any combination thereof’ (Article 27.3.b.). TRIPS thus require countries to implement plant variety protection (PVP) but it is flexible and there is no obligation to implement any specific regime. South Africa should not voluntarily penalise itself but should ensure it benefits from these flexibilities. This draft Bill does not make use of this flexibility and is imposing more rules than the WTO does.

UPOV 1978 and 1991.

South Africa is currently a member of UPOV ’78 and is under no obligation to join UPOV ’91. UPOV ’91 is problematic in that it restricts the re-use of protected seeds by farmers. ***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 Bill 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 current draft Bill goes further than it needs to in terms requirements set out by UPOV’78 and ’91.

Convention on Biological Diversity (CBD)

The South African government is a signatory to the CBD Convention and is therefore committed to the principles of this Convention. In this spirit the Department of Agriculture, Forestry and Fisheries has committed itself 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 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 clearly aware that a diversity of plant genetic material should be available to farmers and breeders to ensure food security. It is internationally recognised that farmers across Africa and also in South Africa generate this diversity on which all private and public breeding is based.

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.

The International Treaty on Plant Genetic Resources in Food and Agriculture (ITPGRFA)

In Africa, only Botswana, the Gambia, Mozambique, Somalia and South Africa have not signed. This means that South Africa does not recognise Farmers' Rights, a situation that must be urgently addressed. There is no legislation on ABS in agriculture in South Africa and it is not required by companies to disclose the origin of their breeding material.

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 and ITPGRFA 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.

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

1. Extent of Plant Breeders' Right and compliance to UPOV

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. The specific rights that are expanded include:

- a) **Harvested material.** Section 7.2 extends PBR so that it not only applies to seed but the harvested material, i.e. to the products of the seed, i.e. food products.
- b) **Essentially derived varieties.** Section 7.3 extends PBR to essentially derived varieties, which is a UPOV 1991 requirement but NOT a UPOV 1978 requirement. To ensure that public and private plant breeding in South Africa can make effective use of protected germ plasm, it would be much more appropriate in the South African context to **limit undue restrictions and exclude EDV's** (Essentially Derived Varieties). 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.
- c) **Duration of PBR:** UPOV 1991 extends the duration of plant breeders' rights from 15 and 20 years to 20 and 25 years. Section 8 in this draft Bill extends this period up 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.
- d) **Period of sole right:** Section 9 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 and not in the national interest.

2. Exceptions to Plant Breeder's Right

Chapter 2, Section 10 appears to give farmers legal space to practice what farmers have always done, to save and exchange seed. This section as currently drafted allows for a wide interpretation of the so-called 'farmers' privilege' under UPOV and as a legal framework has some scope to allow for the saving and informal exchange of protected seed by farmers, in subsection 1(d)

However, in respect of subsection 2(a) it is left up to the Minister to prescribe the categories of farmers, of plants, of uses, and for the payment of royalties and labelling. The only guideline the Minister has for these prescriptions is subsection 2(b) which requires the Minister to "ensure that the legitimate interests of the breeder are safeguarded."

We assume that the intention of subsection 1(d) is to allow for the legal space for farmers to save and exchange seed. But assuming this is not enough. This space can easily be lost because the way it is currently phrased, it relies completely on the assumption that the Minister will be aware of this unspecified intention. This intention must be clearly spelt out and it should be made clear that the Minister must balance the interests of the breeder with that of the smallholder farmer.

There is ample precedence of legal frameworks that is doing just that, including the draft SADC PVP Protocol that at least mentions smallholder farmers.

To ensure that section 10 is correctly interpreted in the drafting of the Regulations, we have the following recommendations:

This draft Bill allows for a differentiated system, but the Minister must be guided and given parameters to ensure that such a system is implemented and that it incorporates varied levels of protection. These should include:

- a) The draft Bill must allow for different categories of farmers, and specifically say that smallholders will be exempted.
- b) The draft Bill must allow for varied levels of protection of seed for food crops vs non-food crops.
- c) For locally important food crops, commercial farmers could be allowed to use farm-saved seed on their own holding.
- d) For local important food crops smallholder farmers could be allowed to use and exchange and trade farm-saved seed amongst themselves.
- e) To ensure that contracts between seed companies and farmers cannot undermine/sidestep the intention of Section 10, it would be important to add a clause that states that no contract or other agreement can annul these exceptions.

3. Application for Plant Breeders' Right

Plant Breeders' Rights and patents have in the past been used to appropriate African germ plasm by foreign companies without any recognition or benefit sharing and many cases of such biopiracy have been documented. In order to prevent biopiracy some countries have incorporated additional requirements for granting breeders 'rights that is in line with the

CBD Convention and Nagoya Protocols. These countries include India, Malaysia, Costa Rica and Thailand.

Therefore, in the spirit of South Africa's obligations in terms of the CBD and Nagoya Protocol, it is recommended that:

- a) 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.
- b) Any application must have proof of legal provenance in terms of ABS regulations.
- c) Additional to the criteria in subsection 15(2) there should be a criteria that the application form should require that there is disclosure of origin and proof of legal provenance.

4. General Provisions – Enforcement of PBR

Chapter 14 deals with the enforcement of PBR and currently holds the Registrar responsible for detecting and enforcing PBR. Provision is made for the issuing of warrants in Section 46 and Section 52(1) b states that any person that infringes on a plant breeder's right is liable to a fine or to imprisonment or both. This liability for imprisonment is repeated in subsection 3(a), (b), (c) and (d).

These provisions make the infringement of PBRs a criminal offence and require the government to police and enforce these private rights. 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.

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

Conclusion

We appreciate the efforts of the Department of Agriculture, Fisheries and Forestry for workshops and opportunities to contribute to discussions on this Bill. We are hopeful that Parliament, 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.

Preceding any consideration of a law that gives private ownership to what used to be commonly held for centuries, 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.