

**Preliminary Comments on the Plant Breeders' Rights (PBR) Bill  
[B 11B - 2015]**

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.

©The African Centre for Biodiversity  
www.acbio.org.za  
PO Box 29170, Melville 2109, Johannesburg, South Africa.  
Tel: +27 (0)11 486 1156

Contacts:  
Mariam Mayet: [mariam@acbio.org.za](mailto:mariam@acbio.org.za)  
Linzi Lewis: [linzi@acbio.org.za](mailto:linzi@acbio.org.za)



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## **1. Key points:**

- The justification put forward for the proposed changes are often flawed. The proposed changes are not required by the TRIPS Agreement. Many of the new changes goes even beyond the requirements of UPOV 1991.
- The framework favours the extension of control and power of multinational corporations over plant breeding and agriculture at the expense of farmers, especially smallholders, and the broader society.
- It is important for South Africa to invest in the development of diverse seed systems.
- Strengthening private PBRs and expanding already excessive exclusivity periods for PBRs stifle innovation and marginalise other economic actors.
- The extension of breeders' rights to cover all crops and genera including those of no commercial interest does not make sense and unnecessarily restricts farmers' activities to secure diverse seed.
- Cooperation and shared/pooled knowledge and resources are a strong and vibrant source of innovation, and should be encouraged and promoted through protection of Farmers' Rights to freely recycle and exchange plant materials and seed.
- Key Exceptions to PBRs are demolished and/or reduced by the Bill. It is critical to retain Sections 23(6) (e) and (f) of the existing Act to ensure that farmers have adequate freedom to operate in relation to the protected variety.
- Criminal sanctions and procedures Introduced by Section 55 (1) of the Bill are wholly inappropriate for dealing with PBRs. Intellectual Property are private rights that should be enforced by the right holder and not the State.
- The process of making must include broader consultations with small holder farmers and civil society organisations.

## **2. Introduction**

This briefing is divided into two parts. In Part I we provide some general comments, while in Part II we provide some specific comments on some of the provisions of the Bill.

### **3. Part 1: General comments**

Even though smallholder<sup>1</sup> farming is marginal in South African agricultural production, there are over 2 million people who produce some food crops. For poor households especially, this constitutes an important element of their household food security. South Africa faces the difficult challenge of widening the productive base to include smaller and more marginal economic actors in our food system in the context of current inequities and particularly in the light of the extent of the corporate concentration in the food system and economies of scale.

It is difficult for small scale farmers to compete effectively against these large scale economic actors. However, it is feasible to strengthen and expand their activities in particular areas, for

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<sup>1</sup> In this briefing 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). See Ben Cousins 2014 'What is a "smallholder farmer" in South Africa today?', paper for a workshop on 'Opportunities, constraints and innovative approaches in small-scale agriculture in South Africa', C3 Initiative on Strategies to Overcome Poverty and Inequality, Goedgedacht, Western Cape, 6<sup>th</sup> -8<sup>th</sup> August 2014

example decentralised production of fresh produce for distribution in local markets. Not only will this have a positive impact of widening the base of economic activity, it also has positive nutritional benefits in the form of dietary diversity, and ecological benefits in the form of widening agricultural biodiversity and building local economies.

Although a lot of seed smallholders use is purchased, research conducted by the ACB and partners in South Africa indicates that resource-poor smallholders also reproduce and use a wide variety of seeds which are not available on commercial markets. These include indigenous plants for food and medicine and a range of so-called 'orphan' crops and varieties. During planting time, farmers exchange, recycle or replant seeds and planting materials, 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 and livelihood security.

Market channels for certified seed do not always reach all farmers especially in more remote rural areas, and cost is an issue for many farmers.

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 generation nor identical to each other. The seeds obtained via mass selection contain heterogeneous individuals, which give them abilities of adaptation and resistance.

In this era of a corporate agro-food regime<sup>2</sup>, private interests have entrenched their ownership of technical knowledge for private gain, and to direct the orientation of further research and development (R&D) towards entrenching their control and profit. Already multinational corporations control the bulk of South Africa's seed supply. Pioneer Hi-Bred, Monsanto and Syngenta dominate ownership in the domestic seed system, and reap huge profits globally every year. Almost all national germplasm has been ceded to the control of these corporations through their acquisition of domestic seed companies and the capture of the genetic and other resources under their control. This includes all the main crops in South Africa, including maize, wheat, soya, vegetables, cotton, fodder and others. The increasing control of the seed sector by multinational corporations, further facilitated by the Bill, is not in the interest of resource-poor smallholder farmers in South Africa and threatens rural food security.

Against this background, the Bill, which is based on the International Union for the Protection of New Varieties of Plants (UPOV) 1991 model, gives rise to many concerns. It is tilted heavily in favour of commercial breeders to the detriment of smallholder farmers who will be restricted from engaging in their customary practices of freely using, selling and exchanging seeds. Overall, the aim of the Bill appears to intend on replacing local and farmer varieties with genetically uniform commercial varieties. This vision, we believe is extremely narrow and short-sighted.

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<sup>2</sup> Phil McMichael 2005 "Global development and the corporate food regime", *New directions in the sociology of global development: Research in rural sociology and development*, Vol. 11, pp.269-303

On this Olivier De Schutter, at the time the Special Rapporteur on the Right to Food, makes several pertinent findings in his report to the UN General Assembly<sup>3</sup>. De Schutter notes that while commercial varieties may improve yields in the short term, their performance is often linked to use of inputs (e.g. fertilizers) and water availability and thus farmers who acquire these inputs may find themselves eventually trapped in a vicious circle of debt as a result of bad harvest. This scenario is particularly likely when a farmer has switched to mono-cropping, and her/his revenue is very much dependent on how good the harvest is. He also observes that the focus on promoting only commercial varieties will in the end result in a progressive marginalization or disappearance of local varieties. This is particularly so, when farmers are encouraged to use commercial varieties with incentive packages that include access to credit, fertilizers and pesticides. This development is deeply problematic as farmer managed seed systems are particularly important to resource-poor farmers in resource poor agroecological environments. In addition, commercial varieties are simply less suited to the specific agroecological environments in which farmers work and for which farmers' varieties may be more appropriate.

De Schutter also stresses that the spread of commercial varieties also accelerates crop diversity erosion, adding that about 75% of plant genetic diversity has been lost as farmers worldwide have abandoned their local varieties for genetically uniform varieties that produce higher yields under certain conditions. Genetic diversity within crops is also decreasing. Wide-scale genetic erosion increases vulnerability to climate change, new pests and diseases.

On farmers' seed systems, De Schutter 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."

To amend the PBR law to strengthen the private corporate rights further does not do justice to the challenges facing our society, including widening and democratising the base of economic participation and responding with urgency to the impacts of climate change, especially for smallholder farmers. In the case of plant breeding, this includes opening opportunities for and supporting plant breeding experimentation and innovation amongst the wide base of farmers, on the farms. This does happen in the fields already, but the Bill is explicitly designed to close down these spaces. For corporations now to gain greater strength in preventing the free use and experimentation of seed to ensure adaptability to these

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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".

conditions is a threat to food sovereignty (including self-reliance in food supply) and the survival of a diverse base of food producers in our country.

These observations suggest that what is needed for agricultural development in South Africa is not the unbalanced restrictive regime of UPOV 1991. The country requires a more creative approach that supports and benefits farmers' seed systems, on which many livelihoods and long-term food security and nutrition depends.

#### **4. Part 2: Comments on certain provisions of the Bill**

The Plant Breeders' Rights Bill, [B 11B – 2015] seeks to amend the Plant Breeders' Rights Act 15 of 1976, inter alia to:

- Expand the Scope and Duration of Breeders' Rights;
  - Extend the coverage of plant breeders' rights (PBRs) to cover all crops;
  - Increase penalties for non-compliance;
  - Limit Exceptions to PBRs including farmers' privilege to save and reuse protected seeds on their own holdings;
- (Source: 'Memorandum on the objects of the Plant Breeders' Rights Bill, 2015', attached to Bill 11B)

In the sections below, we respond to these explicit objectives of the Bill, with reference to the content of the Bill, and make some proposals about smallholder farmer-oriented alternatives and the role of appropriate legislation in facilitating these.

##### **A. Expanding the Scope and Duration of Breeders' Rights**

Private breeders' rights are strengthened in the Bill in a number of ways:

- (a) By extending breeders' rights to products made directly from harvested materials from protected varieties (s. 7(2) (b)). In the current law, it is at the Minister's discretion to extend PBR protection to the products of harvested material (s. 23.2), whereas the Bill covers these products from the outset (s7.2). In other words, PBR protection will extend to seeds and the grain harvested, as well as products from the grain (e.g. meal or flour).
- (b) Section 8 of the Bill extends the possible duration of exclusive breeders' rights up to 30 years, from the current 20-25 years.

The Bill therefore proposes even greater restrictions than that required by UPOV 1991. The extension of breeders' rights to products made directly from harvested material is optional under UPOV 1991. UPOV 1991 also does not require a duration of up to 30 years. The TRIPS Agreement also makes no requirements concerning the scope and duration of PBRs.

There is simply no sound justification for the proposed extension of scope and duration of PBRs. Even developed countries with significant agricultural capacity do not provide such extensive protection. The proposed duration is an exceptionally long monopoly for the granting of PBRs given that innovation and access to knowledge and resources are critical in agro-food systems. Breeding technologies have improved in recent years with the effect of

reducing time to market<sup>4</sup>, so there is even less reason to extend the period of exclusive rights than there may have been in the past.

## **B. Extending PBRs to cover all crops**

The Memorandum of Objects argues that the existing Act only offers protection to a limited number of plant genera and species, erroneously stating that this is not in line with Article 27.3(b) of the TRIPS Agreement.

Article 27.3(b) of the TRIPS Agreement only requires WTO Members to provide “effective sui generis” protection to plant varieties. No other condition is set forth. Countries are not bound to follow any specific framework (e.g. UPOV 1991). The TRIPS Agreement does not require WTO Members to extend protection to all crops. In fact it is common practice for national PVP laws to limit protection to a list of genera and species. In India, for instance, the government is bound to notify through the Official Gazette the genera or species for the purpose of registration of varieties and may delete any genera or species in the public interest. Notably, UPOV 1978, to which South Africa is a Party, does not require protection for all genera/species. In fact UPOV 1978 also allows for the possibility to limit protection to varieties within a certain genus or species, thereby allowing for a differentiation in treatment, for instance, whether the end-use of the variety is food or non-food.

**It is important to preserve the possibility of restricting PVP to a limited number of genera and species. It simply does not make sense to allow the granting of PBRs in relation to crops that are of no commercial interest<sup>5</sup> and/or crops that might be needed for food security.**

## **C. Exceptions to Breeders’ Rights**

The Memorandum of Objects of the Bill states that globally farmer’s privilege is included in plant variety protection to provide for seed management practices of subsistence or smallholder farmers and the lack of clear definition of the targeted beneficiaries of the farmer’s privilege, has allowed commercial farmers to abuse this provision. Based on this flawed rationale, the right of a farmer to save the protected variety for purposes of propagation on his/her own holdings available in Section 23(6) (f) of the existing Act has been replaced with Section 10(2) in the Bill which requires the Minister to prescribe who might use the protected variety, for what purpose, and under which conditions.

The reason given for the change now reflected in the Bill is totally flawed. The right to save the protected variety for propagating purposes is crucial to safeguard Farmers’ Rights. It is critical not just for subsistence and/or smallholder farmer but also to commercial farmers. It is imperative to note that in Europe, commercial farmers are allowed to save and propagate a specified list of protected varieties on their own holding without having to pay remuneration. In Switzerland, a farmer has an average holding of 22 hectares and ALL farmers (small or large) are exempted from having to pay remuneration for saving and propagating seed of a protected variety on the farmers own holding.

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<sup>4</sup> Correa, C., et al. 2015. op cit., p.39

<sup>5</sup> Correa et al., 2015, p.29

**Accordingly, the right of a farmer to save the protected variety for propagating purposes by that farmer found in Article 23(6) (f) of the existing Act must be retained.**

**The new Section 10(2) of the Bill is simply inadequate to address this point, as it does not expressly recognize the right of farmers to save, and its operation is at the discretion of the Minister and may be subject to conditions and payment of remuneration to the right holder.**

In addition, the exception of “private *or* non-commercial” in the existing Act (Section 23(6) (e)) has been replaced with language from UPOV 1991 i.e. “private *and* non-commercial” in the Bill (Section 10(1) (a)). The change of “or” in the existing Act to “and” in the Bill is extremely worrying as it would suggest that the scope of exceptions has narrowed. Under the existing Act all non-commercial activities would be excluded, (for example exchanging of seeds). But under the Bill for an activity to be excluded, that activity would have to be “private *and* non-commercial”. According to UPOV, acts that might be covered by an exception of “private and non-commercial” would be 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), 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. Such a limited scope would not be appropriate for South Africa.

**It is important for South Africa to maintain a broader scope of private *or* non-commercial use as found in the existing Act. This will provide farmers especially smallholder farmers the freedom they need to operate.**

**It is also extremely concerning that the Bill does not reflect several other exceptions that are contained in the existing Act such as reselling of the propagating material (Section 23 (6) (a)); ad use for bona fide research. (Section 23(6) (e)). These should be maintained in the Bill.**

#### **D. Increased penalties**

One of the key objectives of the new Bill appears to be to increase in penalties. The Bill will introduce criminal procedures and sanctions in cases of possible infringement of PBRs (S. 55(1) of the Bill). Any person convicted of an offence is liable to a fine or imprisonment for a period not exceeding 10 years, or both. Royalties/compensation can be claimed in addition to s55.1b. (Section 45 of the existing law corresponds to Section 55(2) of the Bill).

The Preamble to the WTO TRIPs Agreement states “intellectual property rights are private rights”. As a private right, the right holder and NOT the state should enforce the right. The TRIPs Agreement does NOT require criminal sanctions for violations of PBRs. Should scarce public funds be used to police and enforce private commercial rights of breeders, many of which are multinational companies? We need to question whether this is constitutional.

The proposed criminal sanctions are likely to result in chilling effect in the use of the protected material even for further breeding. For example further breeding of a protected variety is allowed by the Bill and the newly bred variety may be commercialised without the consent of the right holder provided that the newly bred variety is not an essentially derived variety. However whether or not the newly bred variety is an essentially derived variety is usually a

matter of dispute and further analysis. If everyone that breeds another variety using the protected variety is threatened with criminal sanctions, it would have chilling effect on the use of the exceptions especially further breeding.

Criminal sanctions are NOT suitable for a subject matter such as PBR, a person using the protected variety (e.g. when breeding), may not be aware that he/she has infringed the PBRs of a right holder.

### **E. DUS criteria**

Clause 15.2 of the Bill deals with the Distinct, Uniform and Stable (DUS) requirements for eligibility to obtain a PBR. DUS refers to a global standard to decide whether a variety may apply for IP rights. Also Chapter 5 clause 26 deals with tests and trials for DUS. The DUS criteria are oriented towards genetically uniform, commercially bred varieties. In this regard, smallholder farmers in South Africa, seeking to develop or maintain their local varieties, will not be able to obtain breeders rights over these because these varieties may 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<sup>6</sup>. 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 without authorisation and they must get royalties. It may have relevance for large scale commercial farmers, but less so for smallholder farmers. In practice, many varieties are intermixed in farming systems, especially smaller and more diverse systems. 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

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<sup>6</sup> See for example 'Civil society concerned with the draft Protocol for the Protection of New Varieties of Plants (plant breeders' rights) in the Southern African Development Community (SADC) region'.

priority for smallholder farmers, who may prefer plasticity (local adaptation) than fixed features. The stability standard reinforces the trends towards uniformity and the erosion of the genetic base and genetic diversity. It is dictated by certain market demands rather than agronomic needs<sup>7</sup>.

The point here is not so much to say these criteria may not have validity within the context of commercial plant breeding. But to apply them in a blanket and uniform way to all seed does pose a direct threat to the ability of smallholder farmers to acquire seed and hence continue farming. Space must be made to allow for a diversity of practices, especially in the context of the need to widen the base of economic activities.

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<sup>7</sup> Correa et al., 2015, p.33