



Southern Africa Biodiversity Policy Initiative

Guidelines For

IMPLEMENTATION

OF

FARMERS RIGHTS IN

SOUTHERN AFRICA



GUIDELINES FOR IMPLEMENTATION OF FARMERS' RIGHTS IN SOUTHERN AFRICA

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- Cover Photograph: On the right: Farmers in a field of millet belonging to a fellow smallholder farmer. Traditionally apart from assisting each other to carry out land husbandry practices, farmers also share and exchange seed.
On the left: Farmers attending a sensitization meeting on farmers rights and right to food.

Pictures courtesy of Maybin Ng'ambi

This document provides guidance material prepared to support the process of promoting attainment of farmers' rights in Southern Africa. Comments on the document are welcome and should be directed to Centre for Environmental Policy and Advocacy, Tel. +265 (0) 1823 793, email: cepa@cepa.org.mw. The guidelines may be reproduced provided SABPI/CEPA is duly acknowledged.

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TABLE OF CONTENTS

ACRONYMS		5
ACKNOWLEDGMENTS		6
GLOSSARY		7
FOREWORD		8
ABOUT THESE GUIDELINES		9
Part I:	INTRODUCTION AND BACKGROUND TO FARMERS' RIGHTS	11
	Section 1.1 Genesis of Farmers' Rights	
	Section 1.2 International Context	
	Section 1.3 Regional Context	
	Section 1.4 National Context	
	Section 1.5 Why Farmers' Rights	
Part II:	SCOPE AND DEFINITION OF FARMERS' RIGHTS	18
	Section 2.1 What are Farmers' Rights?	
	Section 2.2 Key Aspects of Farmers' Rights	
	Section 2.3 How Can Farmers' Rights Be Realized?	
	Section 2.4 How Should Farmers' Rights Be Implemented?	
Part III:	THE NATURE OF FARMERS' RIGHTS	22
	Section 3.1 Introduction	
	Section 3.2 Community Rights	
	Section 3.3 What Should Farmers' Rights Consider?	
	Section 3.4 How Do Farmers' Rights Relate to Other Rights?	
Part IV:	FARMERS' RIGHTS AND PLANT BREEDERS' RIGHTS	24
	Section 4.1 Introduction	
	Section 4.2 Plant Breeders' Rights	
	Section 4.3 <i>Sui Generis</i> Policy and Legislation	
Part V:	POLICY RECOMMENDATIONS	27
	Section 5.1 Introduction	
	Section 5.2 National Level	
	Section 5.3 Regional Level	
	Section 5.4 International Level	
ANNEX I:	FARMERS' RIGHTS LEGISLATION IN COUNTRY A	30
ANNEX II:	FARMERS' RIGHTS LEGISLATION IN COUNTRY B	36
REFERENCES		39

ACRONYMS

CBD	Convention on Biological Diversity
CEPA	Centre for Environmental Policy and Advocacy
CTDT	Community Technology Development Trust
DUS	Distinct, Uniform and Stable
EED	Evangelischer Entwicklungsdienst
FAO	Food and Agriculture Organization
FR	Farmers' Rights
GMO	Genetic Modified Organism
IPR	Intellectual Property Right
ITPGRFA	International Treaty on Plant and Genetic Resources for Food and Agriculture
IUPGRFA	International Union for Plant and Genetic Resources for Food and Agriculture
OAU	Organization of African Union (now called African Union)
PBR	Plant Breeders' Rights
PIC	Prior Informed Consent
PVP	Plant Variety Protection
SABPI	Southern African Biodiversity Policy Initiative
TRIPS	Trade Related Intellectual Property Rights
UPOV	International Union for the Protection of New Plant Varieties
WTO	World Trade Organization

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Gracian Zibelu Banda, Executive Director
Centre for Environmental Policy and Advocacy

GLOSSARY

Biological diversity - also called biodiversity, means the variability among living organisms, the different plants, animals, microorganisms, the genetic information they contain and the ecosystems they form. This includes diversity within species, between species and ecosystems. *Agro-biodiversity* refers to diversity among species used for food and agriculture.

Convention on Biological Diversity - is a legally binding framework agreement for the conservation and sustainable use of biological diversity, and the fair and equitable sharing of benefits arising from the use of genetic resources therein. It was adopted in Rio de Janeiro in 1992.

Copyright - protects creative works such as books, films and music. It gives authors legal protection for various kinds of literary and artistic work.

Distinctness - means clearly distinguishable by one or more important characteristics from any other plant variety whose existence is a matter of common knowledge.

Intellectual Property Rights - a generic term used to refer to a group of legal and institutional devices to protect creation of the mind such as inventions, works of art and literature and designs.

Patents - a set of exclusive rights granted by a state to an inventor/discoverer or their assignee for a fixed time in exchange for a disclosure of the invention/discovery.

Stability (genetic) - means the relevant characteristics remain unchanged after repeated propagation.

***Sui generis* system of rights** - literary translates from Latin to “one that is of its own kind”. In the context of agro-biodiversity, it refers to creation of a new national law that would accord protection to intellectual property rights dealing with agricultural genetic resources or agro-biodiversity.

Trademarks - are marketing tools used to support a company’s claim that its products or services are authentic or distinctive compared with similar products or services of a competitor.

Uniformity (genetic) - the variety does not change in its relevant characteristics to permit accurate description and assessment of distinctness.

FOREWORD

Over ten thousand years of agricultural history farmers have saved, selected and improved seed. This has sustained agriculture to date ensuring food security and indeed food sovereignty. A key feature of this process has been the free exchange of seed from farmer to farmer, community to community, continent to continent. Seed, like knowledge, may be considered as common heritage. It belongs to all of us. Yet a few multinational corporations who improve some varietal traits claim private ownership of the resultant seed. This is a tragedy and the basis of the struggle for farmers' rights.

Farmers' rights seek recognition of the contribution of farmers across the globe to agro-biodiversity. This effort has met obstacles in the form of international instruments that negate farmers' rights such as WTO agreements in Trade Related Aspects of Intellectual Property Rights (IPR) and the International Union for the Protection of New Plant Varieties (UPOV). There are other more subtle but equally debilitating processes including bilaterals; agreements, food and financial aid conditionality between developed countries and developing countries that commit the latter to stringent IPR regimes than those agreed under multilateral instruments. There are also privatization processes that have wiped out national research capacity to improve seed and leaving multinational corporations to supply the seed even that which was previously improved by public research institutions.

Governments have been left with the hapless task of spreading good news of hybrids, even genetically modified organisms, while seed policy which should have been the basis of food security is dictated elsewhere. Governments are unable to undertake their regulatory functions as institutional capacities have been diminished. It is necessary that farmers take initiatives to do what is in their best interest. Advocating for their right to save, use and retain as the first step to prevent their total capture and enslavement by capitalist agriculture. These guidelines are intended to assist those who empathize with farmers and are concerned with the future of agriculture and its sustainability. I hope you will find these Guidelines inspiring and we look forward to getting feedback from you.

Andrew T Mushita, Executive Director
Community Technology Development Trust, Zimbabwe

ABOUT THE GUIDELINES

These Guidelines provide a comprehensive framework for the protection of farmers' rights in Southern Africa. It draws on extensive experiences in implementing farmers' rights in developing countries. In addition, a deliberate attempt has been made to examine major theories in the attainment of farmers' rights and the application of such theories to the day to day issues facing promoters of farmers' rights.

What the Guidelines intend to achieve

With improved understanding of key aspects of farmers' rights, policy makers and implementers will be better able to:

- Implement farmers' rights;
- Analyze and better understand issues regarding farmers' rights;
- Increase the chances for realizing farmers' rights;
- Promote indigenous agricultural systems; and
- Serve as a basis for developing and drafting legislation, administrative or policy measures.

Who is the target -audience of the guidelines?

These Guidelines aim to give guidance and support to everyone involved in promotion of farmers' rights, including:

- District and national government officials in the agricultural and environmental sectors;
- Policy makers; and
- Non Governmental Organizations.

How to use these Guidelines

You can use these Guidelines at every stage towards the promotion of farmers' rights. They will be especially useful at the initial planning stage, but also when you come to monitor and evaluate your own programmes. The Guidelines will help you to identify challenges when they are encountered, and come up with ways of overcoming them. For every guideline in this book, we need to ask ourselves: **“Have we covered this in our programme?”** If the answer is “NO”, do we need to include that particular aspect in our programme and how best to do this.

There are four parts to these Guidelines:

PART 1 is about appreciating the genesis of farmers' rights, international perspective and national contexts, and why farmers' rights. The aim of this section is to set up a solid foundation by establishing the background to farmers' rights.

PART 2 is about understanding farmers' rights. It gives the definition and scope of farmers' rights. The aim of this section is to provide a shared understanding of farmers' rights.

PART 3 provides the nature of farmers' rights. The aim of this section is to demonstrate the relationship between farmers' rights and other rights such as access to land.

PART 4 gives the similarities and differences between farmers' rights and plant breeders' rights.

PART 5 summarizes recommendations on farmers' rights in southern Africa with special emphasis on development of policy and legislation as a key step towards policy implementation.

PART I: INTRODUCTION AND BACKGROUND TO FARMERS' RIGHTS

1.1 Genesis of Farmers' Rights

The genesis of farmers' rights can be traced to the early 1980s when they were for the first time discussed as a reaction to the position of some developed countries that insisted that traditional crop varieties were a common heritage of mankind, while their improved varieties were not and should be protected by Plant Breeders' Rights (PBR). To counter the PBRs, developing countries wanted recognition of farmers' rights. While PBRs provide protection of plant varieties that fulfill the Distinct, Uniform and Stable (DUS) criteria, farmers' rights are meant to recognize the past, present and future contributions of farmers in conserving, improving and making available plant genetic resources (Bell, 2005).

The idea behind the introduction of farmers' rights was thus to ensure the equitable sharing of benefits arising from the use of genetic resources, and to give farmers incentives to preserve their genetic resources and share them with other farmers. Farmers' rights also aimed to assist farmers in all regions of the world, especially those in regions of diverse plant genetic resources, to protect and conserve their resources.

They also aimed to allow farmers, their communities and countries to participate fully

The concept of farmers' rights was introduced after it was realized that the formal Intellectual Property Rights (IPR) regime did not recognize farmers as innovators and consequently disqualified them from holding IPRs. This had led to inequitable distribution of benefits between the providers of germ plasm and the providers of technology.

in the benefits of agro-biodiversity.

1.2 International Context

Farmers' rights have gained recognition from a number of international instruments such as the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA), Convention on Biological Diversity (CBD), African Model Law on Protection of the Rights of Local Communities and the World Trade Organization (WTO) Trade Related Intellectual Property Rights (TRIPS). The Food and Agricultural Organization (FAO) is the major arena on discussions regarding farmers' rights.

1.2.1 The International Treaty on Plant and Genetic Resources for Food and Agriculture - The member states of FAO recognized farmers' rights for the first time in 1989 when the International Undertaking of Plant and Genetic Resources for Food and Agriculture (IUPGRFA) was adopted as a non-binding instrument recognizing farmers' rights. The ITPGRFA is the first legally binding international agreement that recognizes farmers' rights. It recognizes that farmers' rights are based on the historical and on-going contributions of farmers to global agriculture. Article 9 on Farmers' Rights leaves to parties to realize farmers' rights as they wish since the

responsibility to implement them rests with national governments according to their priorities and needs (Correa, 2002). They can consider not to implement farmers' rights at all, or consider other measures not suggested in the article. Even though the responsibility for realizing farmers' rights rests with national governments, the international community is arguably not totally without responsibility since the preamble stresses the importance of promoting farmers' rights at both national and international levels.

1.2.2 International Union for Protection of New Plant Varieties

UPOV was signed in 1961 and came into force in 1968. It seeks to protect plant breeders' rights among its member countries and transform plant variety protection to closely resemble other patent legislation. Most southern African countries are not party to UPOV. UPOV is not particularly suitable for small scale agriculture due to the restrictions it places on exchange and use of seed and therefore negates farmers' rights. Although the protection of plant varieties will depend on national legislation, developing countries are under pressure to first adopt stricter IPR regimes like under TRIPS. Adopting UPOV provisions will therefore exacerbate the erosion of farmers' rights and expose small scale farmers to dependence on seed companies for food security.

1.2.3 The Convention on Biological Diversity

The recognition of the contribution of local communities and indigenous peoples in conserving biodiversity in Article 8 (j) of the CBD is also supportive of farmers' rights. The CBD however deals with broad aspects of biodiversity conservation, its sustainable utilization and equitable sharing of benefits from genetic resources. The CBD also requires parties to diffuse knowledge, innovation and practice with the cooperation of the holders of that knowledge and encourage the sharing of any benefits that arise from such diffusion.

1.2.4 The African Model Legislation for Protection of Rights of Local Communities, Farmers and Breeders and Regulation of Access to Biological Diversity

The Organization of African Union (OAU) Model Legislation for the Protection of the Rights of Local Communities, Farmers and Breeders, and for the Regulation of Access to Biological Resources (African Model Law) is premised on the rejection of patents on life or the exclusive appropriation of any life form, including derivatives. Its provisions on access to biological resources make it clear that the recipients of biological resources or related knowledge cannot apply for any intellectual property right of exclusionary nature. The model legislation focuses mainly on the definition of the rights of communities, farmers and breeders.

The rights of farmers under the African Model Law are to a certain extent precisely defined. These include the protection of their traditional knowledge, an equitable share of benefits arising from the usage, the right to participate in decision making on matters related to the conservation and sustainable use of plant and animal genetic resources, the right to save, use, exchange and sell farm-saved seed or propagating material, and the right to use a commercial breeder's variety to develop other varieties.

1.2.4 The Trade Related Aspects of Intellectual Property Rights

The TRIPS Agreement does not say anything specifically about farmers' rights. However, members of World Trade Organization (WTO) may include such rights when implementing national *sui generis* systems. Of particular importance is article 27.3(b) of the TRIPS Agreement that requires WTO members to protect plant varieties either through patents; *sui generis* regime such as PBRs or through a combination of both. The article states that member countries can make patents available for any invention including processes in any field of technology without discrimination. The TRIPS requirement that all member states must provide patents or some *sui generis* system meant that farmer's rights had to be protected under some system.

1.3 Regional Context

The Southern Africa Development Community (SADC) acknowledges that the state of the environment, including biodiversity, is a major factor in the growth and development of the region. For this purpose, SADC developed a Regional Biodiversity Strategy (RBS) in 2006 as a framework for cooperation on biodiversity issues that transcend national boundaries. The RBS, like the national biodiversity strategies, sets out priorities for facilitating utilization of the biodiversity of the region and how SADC citizens and the world at large can mutually benefit from these.

Among the focus areas is the need to strengthen legal and institutional frameworks for equitable sharing of benefits from genetic resources including protection and promotion of indigenous knowledge systems through *sui generis* type of legislation. For this purpose a Regional Biodiversity Policy and Protocol will be developed. Hence though farmers' rights are not specifically provided for in the RBS their framework is included. However, a draft Protocol on the Protection of Plant Varieties in the SADC Region is being negotiated. There were no farmers rights' in the first draft.

In 2003, SADC developed Guidelines on Genetically Modified Organisms (GMOs). These urge Member States, *inter alia*, to develop national biotechnology policies and strategies and sign and ratify the Cartagena Protocol on Biosafety. They also urge Member States to develop a harmonized policy and legal framework based on the African Model Law and the Cartagena Protocol.

A harmonized policy and legal framework on biodiversity and biotechnology is essential for each country to be assured that its biodiversity will not be contaminated by trans-boundary movement of GMOs. Farmers' rights' are particularly threatened by proliferation of GMOs due to prospects for contamination of land races and the spread of monocultures that threaten diversity.

Finally the SADC Biodiversity Support Programme which ended in 2007 developed regional guidelines on access to and equitable sharing of benefits arising from use of genetic resources and traditional knowledge holders. Although these guidelines focus on biological resources of high commercial value such as "hoodia" and

”marula”, the principles could equally apply to farmers’ rights.

1.4 National Context

Most of the countries in southern Africa, Malawi and Zimbabwe inclusive have ratified the CBD, TRIPS and FAO ITPGRFA. These three instruments are the responsibility of different government agencies often with interests and priorities as diverse as the agencies themselves. The CBD is implemented by a government ministry or department responsible for the environment. Often these institutions address biodiversity and agro-biodiversity in general and specifically call for protection of farmers’ rights. The ministries responsible for agriculture implement the ITPGRFA and are therefore responsible for farmers’ rights. Most of the countries have developed Plant Variety Protection (PVP) Legislation, also called PBR. The PBR is granted by the state to plant breeders with the intention to exclude others from commercializing material derived from plant varieties they have developed. These rights can only be exercised within national boundaries and are generally effective for twenty years. The ministry responsible for trade and industry manages the implementation of TRIPS. This institution is expected to be responsible for developing intellectual property rights related legislation such as patents, copyright and trademarks.

The activities of all these three sectors affect agricultural products and therefore farmers’ rights. Hence each country is supposed to be clear about its policy direction. Most countries including Zimbabwe and Malawi lack proper legislation to fully implement farmers’ rights since there are no policy and legal frameworks that deal with the participation of farmers in decision making in issues that affect them.

1.4.1 National Policy and Legislation Instruments Which Affect Farmers’ Rights

The most important pieces of legislation that have a bearing on conservation and utilization of plant genetic resources and therefore farmers’ rights include the Plant Protection Act, the Seed Act, the Patents Act and Plant Breeders Rights Act.

The Plant Protection Act is intended to control pests and diseases that are destructive to plants and to prevent the introduction of such pests and diseases.

The control of plant pests and diseases is essential to biodiversity conservation. It may however be used to restrict innovation at local level.

The Seed Act provides the regulatory framework for production, sale, import and export of seeds as well as standards for seed germination.

By regulating the seed industry the Seed Act protects commercial seed companies at the expense of small scale farmers and therefore farmers rights.

These Acts seek to provide a conducive environment for conservation of plant genetic resources through ensuring appropriate standards and competencies of people responsible for seed production, sale or import and export as well as the need to protect plant genetic resources from harmful pests and diseases.

A Patent grants to the inventor certain rights which include the right to exclude others

from making, using or selling an invention for a given period. A patent holder can sue an infringer of his rights too and he can obtain compensation or recover damages.

It must be noted that the thrust of most of the legislation including those mentioned above is to encourage conventional science: hence seed producers and sellers must be registered and are obliged to comply with certain formalities before they can be allowed to participate in the seed business. The process therefore leaves out small-scale subsistence farmers that do not have the infrastructure.

Further, the small-scale farmers rely on incremental local knowledge passed from generation to generation that can easily be considered to be in the 'public domain'

In Malawi, for example, the National Seed Company which was wholly owned by Government was sold to a commercial company and with the sale the improved maize varieties such as MH17, MH18 and others went without benefits accruing to Government. Since these varieties were not protected under any legislation, it is difficult to trace their original materials and to claim benefits from continued use of the materials.

make inventions patentable under current legislation, even though such inventions may have arisen from prior knowledge acquired from local communities.

No mechanisms exist to protect local knowledge or indeed recognize its contribution to conservation and sustainable utilization of biodiversity. Some of these commercial seed companies have benefitted from publicly funded research and breeding programmes which produced improved varieties.

Plant Breeders' Rights is an independent *sui generis* system tailored for the purpose of protecting new plant varieties. It has certain features in common with other systems that protect intellectual property rights. PBR laws commonly include the farmer's privilege and the breeder's exemption. The farmer's privilege implies that a farmer is allowed to produce seed of a protected variety for non-commercial purpose without the consent of the breeder, i.e. For his own use or for the exchange of small quantities. The breeder's exemption means that any protected variety can be used by a breeder to produce a new variety.

1.5 Why Farmers' Rights?

The rationale behind farmers' rights is based on the premise of achieving equity regarding benefits, sustaining conservation and securing farmers' practices.

A Case Study of a Female Farmer

Ms. Florence Ngwenyama is a 60 year old female small scale farmer based in Neno District in southern Malawi. She only grows local variety of maize, groundnuts (local and improved varieties), soy beans and cow peas. She only uses animal manure from her cattle and does not apply any chemical fertilizers. She grows a local maize variety because when she compares it with hybrid seeds, the local maize has a hard dent, weighs more per unit seed, uses less flour during preparation of nsima and affords her to practice intercropping in the garden.

In addition, she stated that hybrid maize easily gets attacked by weevils even before it leaves the garden. In her area many people had harvested a lot of maize during the 2006/2007 farming season but most of them had lost their grain due to weevils. The area is now infested with different types of weevils which she feels have been brought about by hybrid maize. Hybrid maize matures early and harvests are higher compared to local maize but easily gets attacked by weevils. Seed has to be purchased every planting season. In essence she feels that hybrid seeds had not necessarily brought in food security in the area. She has a garden of about 2 acres from which she is able to harvest enough for her household through out the year.

Ms Ngwenyama has been using the local maize variety since she started farming. She got it from her parents. She says that farmers can maintain their local land races by not being easily taken by “zobwera” (meaning those seeds which have just been newly introduced into the country).

She stores her seed in a traditional way, by not removing the sheaths and stacking it on a wooden rack. She then puts a fire below and lets it get smoked for some time. She also makes sure that the maize is adequately dry before harvesting it in the garden. She selects her seed material for the next planting season during harvest time and keeps it safe.

In the discussions she stated that the media had played a big role in people shifting into hybrids because there were messages all the time promoting hybrid seeds because they mature fast and yields are substantial. She does not recall having heard any promotions of local varieties either through the radio or agricultural extension personnel. However she feels that the local variety of maize is superior because the seed companies themselves in their adverts urge farmers to use improved varieties because it is similar to local varieties. This means that the commercial seed producers realize the superiority of local maize varieties.²

²Source: Farmer consultations conducted in the Neno District, October 2007

and therefore not patentable under the Patents Act. On the other hand, large-scale commercial seed companies have the necessary technology and information to

1.5.1 Equity - While the crop varieties and animal breeds developed through modern breeding are protected through the formal system of IPR, the breeding work of local farmers in most developing countries remains informal and in the public domain, unless a parallel but equally effective *sui generis* system is established to protect traditional varieties and breeds. Breeders benefit from the conservation and protection of agro-biodiversity resources done by local farmers. Hybrid maize seed, such as MH17 and MH18 were developed in Malawi from local germplasm selected and bred by local farmers over a number of years. In addition, a large proportion of the samples in international gene banks were collected from farmers' fields in developing countries. In either case the farmers did not receive any compensation because the local varieties were considered as common heritage. .

1.5.2 Conservation - Local varieties of most of the crops are under serious threat of becoming extinct in southern Africa. Apart from natural disasters such as droughts and floods, one of the major reasons is the gradual replacement of local varieties with hybrids being aggressively promoted by private seed companies, plant breeders and the agricultural extension system. There has also been a growing gap between agricultural research and local farmers. Perhaps this has led to the breeders having a negative attitude towards farmers. Because of the lack of institutional attention to local varieties, it has mainly been the local farmers who have been conserving and protecting the local varieties

1.5.3 Secure farmers' practices - Since the beginning of agriculture, farmers have sourced seed informally through saving, sharing and exchanging. With modern times there have been other formal ways of acquiring seed like buying from profit oriented - private traders. The saving and exchanging of seeds is very essential for maintaining local varieties and more importantly facilitating farmers' breeding. In some cases researchers and breeders have worked with farmers in breeding; but this is mainly to enable breeders' access germplasm and related knowledge. The withdrawal of the state from the seed industry has restricted farmers' practices including the interaction between breeders and farmers since commercial seed companies are more interested in marketing their already developed varieties than building local capacity in breeding.

PART II: SCOPE AND DEFINITION OF FARMERS' RIGHTS

2.1 What Do Farmers' Rights Mean?

The IUPGRFA 1989 defined farmers' rights as "rights arising from the past, present and future contributions of farmers in conserving, improving and making available plant genetic resources, particularly those in the centres of origin/diversity". These rights could include the right to save, use, sell and exchange farm-saved seeds or the right to land.

There are varying definitions given by stakeholders of farmers' rights. See the definitions provided by local farmers in Malawi and Zimbabwe.

2.2 Key Aspects of Farmers' Rights

Here are some of the key aspects of farmers' rights:

MALAWI

Farmers need to be freely allowed to plant what they feel will satisfy their needs, without being forced to choose certain varieties". *Ms. Florence Ngwenyama, a 60 year old female small scale farmer based in Neno District in southern Malawi.*

ZIMBABWE

Farmers' rights are rights which farmers have and these are supported by legislation. Farmers' rights should be on the following:

- Access to land
- Inputs-access and implements
- Draught power
- Access to use water as a natural resource
- Access to technology to boost productivity
- Right to choose the correct variety/seed which suit our areas
- Right to sell our produce
- Right to expose ourselves to international markets
- Right to access government loans, banks, subsidies and incentives

Most plant breeders we interviewed question the need for farmers to have rights. They argue that farmers do not have rights over varieties but that the breeders themselves have rights because they develop these varieties. Ironically, breeders develop improved varieties from local land races or farmers' varieties, which farmers have a right to.

2.2.1 Recognition of local farmers' efforts

Farmers have been conserving and protecting agro-biodiversity resources through their local breeding work. However, unlike breeding work by plant breeders, this has remained informal and not protected through any IPR system. On the other hand breeders have benefitted from the efforts of the local farmer; they use local germplasm to develop new varieties. Yet the farmers do not receive any compensation because the local varieties are considered as common heritage.

2.2.2 Recognition of local land races as the basis of plant breeding

Breeders do not recognize farmers' local land races and genetic resources as varieties considering distinctness and stability. The characteristics for the protection of PBRs do not fit well into farmers' rights protection. The characteristics of distinctiveness, uniformity and stability negate the rights of farmers who would have sustainably conserved and improved their varieties. There is concern about the effect of uniformity on biological diversity and the inability it has to encompass local land races and traditional varieties. Replacing the requirement of 'uniformity' with 'identifiability' would encourage heterogeneity by making it possible to protect populations of local land races under a PVP system.

2.2.3 Access and benefit sharing

Local farmers have been saving local plant genetic resources over the years. These important resources are extensively used for research and a number of breeders have used them to develop new varieties. Farmers who contribute to the conservation and protection of plant genetic resources must receive benefits arising from improved varieties. However the challenge is on the negotiations of such benefits to ensure that there is fairness. Breeders often argue that they can not identify beneficiaries and entities to transact with since these are community rights. Traditional, community and government organizations can represent local communities in negotiating for access and benefit sharing of agro biodiversity resources.

2.3 How Can Farmers' Rights Be Realized?

The factors stated below are important for the promotion and protection of farmers' rights in southern Africa:

2.3.1 Develop policy and legislation - any state which wants to promote farmers' rights must have in place a policy and legal framework dealing with farmers' rights. The legal instruments are important for the administration of farmers' rights. These could stand above or be incorporated in existing or proposed legislation related to agro-biodiversity. All countries in southern Africa are parties to CBD under which each is expected to develop national biodiversity action plans. These *inter alia* propose legislation to be enacted to domesticate the CBD. These will include legislation governing agro-biodiversity; environment and natural resource management; intellectual property rights and technology transfer. Many of these will have a bearing on farmers and should therefore be developed together and in harmony.

2.3.2 Linkages with existing government policy and legal framework- agro-biodiversity conservation policies and legislation such as farmers' rights need to demonstrate linkages to existing government policies, legislation and strategies. This will ensure that farmers' rights are not implemented in isolation. Possible existing legal framework may include those related to the environment and national biodiversity action plans. So far debate on farmers' rights legislation has centred around whether it should be combined with plant breeders' rights legislation. There are advantages in combining these in that it will ensure farmers' rights receive equal technical and political attentions as PBR's.

2.3.3 Management of access and benefit sharing regimes- access and benefit sharing procedures need to be promulgated into rules or regulations under their appropriate legislation. Local farmers and technocrats need to have adequate knowledge regarding their national access and benefit sharing regimes. Debate so far has focused on how to provide benefits to local communities across the country. This may be through a subsidy on seed produced directly from farmers materials or any other appropriate mechanisms.

2.3.4 Market dynamics - demand of certain varieties on the market has tended to erode some local varieties. Farmers development agencies and government need to be aware of this and therefore make deliberate efforts to generate or sustain demand for local landraces.



Women selling a local tuber, “buye” at a produce market in rural Malawi, which often the formal market may not demand, unlike the carrots which the man is holding

2.3.5 Entrance of farmers into formal seed markets - at local level farmers enjoy the right to save, exchange, sale or share seed. In a number of rural areas across southern Africa with support from various development agencies, farmers have established their own community seed banks. This promotes local seed access. However, for farmers who want to enter the commercial market, they are constrained by prohibitive regulations enforced by their national seed legislation. Such prohibitive regulations need to be revised to ensure that local farmers are able to freely participate in the formal seed market.

2.3.6 Conservation of habitat - the habitat for most of the local land races needs to be properly managed to ensure that their existence is sustained. Some of the local land races do not do well where there has been a lot of disturbance of the habitat either due to settlement or modern farming practices. In addition, in the light of pressure on habitat for such local land races, there is need to intensify programmes on collection and management of most of the indigenous crop varieties so that farmers can access propagation materials.

2.3.7 Awareness and vision regarding farmers' rights-there is need to develop a reasonable understanding of farmers' rights and its ultimate goals amongst farmers and institutions providing services on agro-biodiversity and food security in general. Adequate awareness and a vision of the end results of attaining farmers' rights and the application of its principles should be strengthened.

2.3.8 Develop coordination amongst smallholder farmers-organization amongst small-scale farmers needs to be developed so that they are able to approach issues as a united front. This will enforce their capabilities to potentially challenge plant breeders and policy makers who deny their rights. This will then enable them to participate in the general campaign for recognition and protection of their rights.

2.4 How Should Farmers' Rights Be Implemented?

According to Torheim (2005), in order to implement farmers' rights at national level the following steps are necessary:

- There must be a commitment to promote the enactment of the corresponding legislation, respecting the sovereignty of each country to establish local laws based on principles as provided for in international instruments such as ITPGRFA;
- A country could develop its own *sui generis* system for the management and regulation of genetic resources that protect farmers' rights. In this way, farmers' rights can balance Plant Breeders' Rights; and
- Ratify the ITPGRFA and translate it to national legislation through an over-arching framework for farmers' rights (related provisions in some of the national policies are insufficient)

PART III: THE NATURE OF FARMERS' RIGHTS

3.1 Introduction

In this section we look at the nature of farmers' rights and how such rights relate to other rights. While historically farmers' rights should find easy recognition in the agricultural community, the intensification of agricultural commercialization and the global consensus about the supremacy of conventional science has made it difficult for informal knowledge systems to receive policy support. On the other hand it is widely acknowledged that for developing countries food security largely depends on small scale farmers, hence the need to promote systems that drive their productivity. Farmers' rights including the right to inputs and other factors of production, marketing and distribution is the key.

3.2 Community Rights

Community rights are for property resources which are owned in common rather than privately. Entitlements to use common-property resources may be formal, protected by specific legal rules, or they may be informal, protected by tradition or custom (Tietenberg, 2000). Farmers' rights seem to be falling under this classification of property rights. Consequently they call for robust policy intervention especially in the face of policies that promise privatization. They also call for innovative legal systems that transcend the usual rules.

3.3 What Should Farmers' Rights Consider?

Here are some of the important issues which farmers' rights should address:

- Farmers' rights should be recognized and protected as the rights arising from the past, present and future contributions of farmers in conserving, improving and making available plant genetic resources;
- Farmers' rights must be defined as a form of IPR with their rich characteristics promoting broader policy goals. These rights would cover the products of farmer selection and breeding, and the traditional resources that contribute to the conservation, development and sustainable use of plant and animal genetic resources;
- Inclusion of rights such as the right to use, exchange and market farm-saved seeds; protection of knowledge; benefit sharing and participation in decision-making at the national level. This could be attained through national farmers associations or unions; and
- Customary laws and practices of the concerned communities must be applied in the protection of farmers' rights.

3.4 How do Farmers' Rights Relate to Other rights?

Farmers' rights need to be considered within a broader context by taking into account other equally important rights. Some of these rights are discussed below:

- **The right to land:** Farmers' rights should first and foremost deal with the right of farmers to secure tenure on the land they till and that they should be entitled to a

- genuine land reform to ensure that ownership of land is not monopolised;
- **The right to farmers' varieties:** The recognition of local land races and genetic resources as varieties considering distinctness and stability. Also to be recognized is the right to receive compensation for damage caused by an act that results into destruction or reduction of genetic resources or plant variety and environmental conditions in the community. The right to receive royalty from the sale of seeds of the farmer bred variety.
- **The right to farm-saved seeds:** The right to save, select, store, use and exchange farm-saved seed/propagating material of farmers' varieties. This also includes the right to use a protected breeder's varieties to further develop their own varieties, including materials obtained from gene banks and other plant genetic resource centres.
- **The right to benefit from application of access and benefit sharing principles:** The right to have access to genetic resources and the right to fair and equitable share of the benefits that come with the use of such resources.
- **The right to marketing:** Right to market agricultural products which consists of their right to sell their produce at reasonable and equitable prices, to be involved in the determination of the price, which should not be left in the hands of traders and middlemen, including the right to establish alternative markets; and to have access to markets in terms of infrastructure and information.
- **The right to technology and knowledge:** Right to use whatever farming technology is appropriate, and not a technology imposed by the government and other formal institutions including multinational corporations with the support of government or donor agencies. This includes the right to be informed of the different methods and systems in farming and the right to choose from a wide range of choices. Farmers must also have the right to be recognized and rewarded on any discovery or innovation that they introduced and the right to have their indigenous knowledge recognized and protected.
- **The right to participate:** Right to participate in decision making including the right to form farmers' organizations and to obtain support from the government, the right to be represented in local and national decision making bodies, and the right to be heard in decisions that affect the country. They must also have the right to be involved in the decision and enforcement of government policies related to land conversion and the right to be consulted on discussion of national and global developments affecting farming communities; and
- **The right to information:** Right to be informed on the safety of agricultural products being imported into the country particularly those not available locally. In addition, this right will also ensure that farmers contribute effectively in any relevant decision-making process regarding importation and handling.

PART IV: FARMERS' RIGHTS AND PLANT BREEDERS' RIGHTS

4.1 Introduction

Knowledge on the similarities and differences between farmers' rights and plant breeders' rights is useful to the promoters of farmers' rights. There are some important elements of plant breeder' rights that define their relation to farmers' rights and have direct implication on their promotion .

4.2 Plant Breeders' Rights

As noted in Part 1 plant breeders' rights are granted by the state to plant breeders to exclude others from commercializing materials derived from plant varieties they have developed. These rights must only be exercised within national boundaries and are generally effective for twenty years.

PBRs constitute one particular kind of IPR applicable to plant varieties. For a plant variety to be eligible for PBR protection, it must be clearly distinguishable from other protected varieties. It must also be homogenous, uniform and stable. The main motivation behind PBRs is profit. They are designed to attract the private sector into plant breeding activities. More specifically, PBRs seek to provide a stimulus for the research and development of new varieties and to reward the creativity of successful plant breeders.

Plant Breeders' Rights have certain features in common with patents for industrial inventions. Both forms of protection grant to their holders exclusive rights as an incentive to innovative activity. Plant breeders' rights can also be compared to copyright, as it enables the reproduction (copying) of a protected plant variety to be controlled by the owner of such a variety. Plant breeders' rights are an independent IPR system tailored for the purpose of protecting new plant varieties. To be eligible for protection, varieties have to fulfill the DUS criteria.

Plant breeders' rights are challenged by same conceptual problems that plague IPRs generally. By recognizing only the last link in a long chain of biological processes, they ignore the contribution made by local farmers to plant breeding, which has provided much of the genetic stock used in crop improvement. Plant breeders' rights also have the potential to contribute to the erosion of diversity within agricultural systems, by introducing uniform, high-yielding varieties seeking to exploit a definable trait. This configuration fails to recognize the multiplicity of factors that affect productivity. It generally is not sustainable in the case of small scale farmers where livelihoods depend on such crops and have little or no other alternative of enduring sustainable livelihoods. Climate change and other socio-economic conditions will leave farmers depending on monoculture more vulnerable than those practicing diversity.

Plant breeders in southern Africa have focused their research on hybrid varieties, particularly maize. Even non governmental organizations working in sustainable livelihoods also promote use of hybrid seeds as this is perceived to be the only way to achieving food security. Hybrids are high yielding and if you use them you are perceived to be "modern" in the community. However, hybrids are gradually replacing local land races which are the basis for modern breeds.

4.3 *Sui generis* Policy and Legislation

According to Kameri Mbote (2002), the core elements of a *sui generis* national policy and legislation on plant breeders' rights should include the following:

- Recognition and protection of the rights of local communities (e.g. their prior informed consent) must be sought; there should be no creation of rights in favour of third parties in respect to local varieties; farmers' rights to produce and/or sell plants and propagation material of the protected variety on a non-commercial basis must be respected);
- Additional requirements such as value for cultivation and use (to provide incentives for innovations in the interest of local needs such as food security) and declaration of origin (to help establish whether PIC was obtained) may be set up;
- Recognition and protection of farmers' and community rights without the need for registration;
- Identifiability (and distinctness) of the new variety should be the only criteria of eligibility for recognition and protection. The requirements of uniformity and stability could be applied in a very flexible manner. This is in the interest of protection, compensation and conservation. Such a system would effectively cover the interest of both local communities and large scale commercial breeders. However, the plant grouping may still have to be distinct;
- Restriction of breeders' rights to exclude harvested crops and limit the concept of an essentially derived variety;
- Provision of a framework of non-monopoly rights. This will be conducive to the development of both small and large scale industries;
- Provision for compulsory licensing or limitation on the number or type of varieties in the public interest. Public interest should be broadly construed to prevail over plant breeders' rights but ensure compensation and due process of the law through provisions for the effective enforcement of IPRs, for example through a transparent judicial procedure;
- Limiting the duration of PVP for commercial breeders as much as possible to conform with the socio economic context and circumstances of each country;
- Ensuring full consideration of environmental and ethical concerns, e.g. exclude protection of certain varieties in order to protect plant life or the environment;
- Prohibition of the patenting of plants, animals and traditional knowledge;
- Inclusion of bio-safety provisions e.g. ban protection of varieties injurious to biodiversity; and
- Promotion of food and health security.

Access and benefit sharing

Access and benefit sharing is a concept which was created during international discussions on conservation and sustainable use of biological diversity. It is linked to the fact that many developing countries are rich in biological diversity but cannot fully utilise these resources due to lack of up-to-date technology, while many developed countries have such technology, but are poor in biological diversity.

Access should be subject to Prior Informed Consent (PIC) of the state and on mutually agreed terms. Hence a prospector has to ask permission from the state whether they can access genetic resources within the state's jurisdiction before they collect the resources.

This concept should devolve to the local farmers' level such that when breeders want certain local germplasm, they have to negotiate with the local farmers and agree to share the benefits which will arise from such a resource. The local agreement should stipulate how benefits arising from the germplasm will be shared. The agreement would not be effective until ratified by a competent national authority such as the ministry responsible for Agriculture or Science and Technology or local policy and legislation may stipulate.

PART V: POLICY RECOMMENDATIONS

5.1 Introduction

This part draws on the preceding sections to outline the approaches, concepts and principles that are important for implementing farmers' rights at national, regional and international levels. These recommendations have to be tailored to suit each country's policy and legal framework including the prevailing socio-economic conditions.

5.2 National Level

5.2.1 Policy Framework

- Development of a policy assists in clarifying goals, objectives as well as priorities. It also assists the various stakeholders including drafting professionals, internalize the key concepts, principles and objectives before a law is drafted.
- A policy is also important to inform the draftsman of the form and content.
- Farmers' rights could be incorporated into a policy on agro-biodiversity where one is proposed. In some cases, farmers' rights could be incorporated in agricultural policies, especially where issues of seed are dealt with.
- Since farmers' rights take inspiration from the CBD and ITPGRFA, they can be incorporated in any policy domesticating these multilateral agreements.

5.2.2 Legislative Framework

- A choice has to be made on whether to include farmers' rights in framework legislation such as that dealing with environment and natural resources or biodiversity or more sectoral pieces such as agriculture, agro-biodiversity or plant breeders' rights.
- The advantage of incorporating farmers' rights in more general pieces of legislation is that there is likelihood of political will and technical commitment to their implementation. A stand alone piece of legislation may be ignored by technocrats who are essentially plant breeders in departments responsible for agriculture research.
- The legislation must stipulate the general principles underpinning farmers' rights, their origin and relationship to related rights. These principles include recognition of small scale farmers and traditional knowledge to agro-biodiversity and the need for promoting access and benefit sharing of genetic resources in a manner that promotes diversity.
- The legislation must clearly define the scope of its application including its relationship to customary law and plant breeders' rights legislation. It must

stipulate the institutional framework for implementation of farmers' rights; the role of legislation and access to these institutions to small-scale farmers. Preferably the legislation should be decentralized for this purpose.

- The African Model Law and the Bonn Guidelines on access and benefit sharing provide a very good starting point for developing legislation on farmers rights including access and benefit regimes.

Definitions of key terms such as farmers rights', breeder, access and benefit sharing, community and community rights can be found in the African Model Law and the Bonn Guidelines. These can be adapted accordingly. In addition national legislation must stipulate approaches and strategies for promoting landraces. We have included in Annexes I and II examples of draft farmers' rights legislation for two southern African countries.

5.3 Regional Level

- The proposed Regional Biodiversity Policy and Protocol should specifically address farmers' rights in SADC.
- The draft SADC Protocol on Protection of Plant Varieties could incorporate farmers' rights instead of including these in the more general Protocol on Biodiversity if and when it is drafted.
- This will ensure that both farmers' rights and plant breeders' rights' receive similar attention and that a benefit sharing mechanism can be more easily implemented within the same instrument.
- The proposed protocol should specifically address the protection of farmers' rights from the contamination of GMOs by regulating trans-boundary movements and urging member states to develop requisite instruments to regulate the use of GMOs within their respective national boundaries.
- The proposed protocol should provide mechanisms for promoting use of landraces in regional trade through appropriate incentives.

5.4 International Level

- Farmers' rights have gained prominence due to strong voices of developing countries since the adoption of the IUPGRA in 1989. These voices need to continue through specific national and regional voices.
- In particular, each country must be urged to develop national positions for interventions at Conference of Parties and related subsidiary meetings of the ITPGRFA.
- The interventions at international forum must focus on urging the international community, especially developed countries and their multinational corporations, not to negate the implementation of farmers' rights through bilateral or regional

instruments outside ITPGRFA.

- Instruments that force or commit developing countries to more stringent IPRs than those agreed at multilateral level such as WTO, CBD or ITPGRFA must be exposed, resisted and denounced at international forum. Civil Society Organizations must cooperate among themselves to issue strong statements where Governments feel unable to intervene.
- In this respect, trade agreements, financial or food aid instruments should not contain preconditions intended to promote certain plant varieties, or seeds at the expense of others such as landraces.

Annex I: DRAFT FARMERS' RIGHTS LEGISLATION IN COUNTRY A

Ownership of biological and genetic resources

II. The biological and genetic resources of shall constitute an integral part of the natural wealth of the people of and-

..... shall be protected, conserved and managed for the benefit of the people of; And

(b) shall only be exploited or utilized in accordance with provisions in this Act and any other written law.

Rights of local communities over biological and genetic resources

II. (a) Each local community shall at all time be the custodian and shall control use of the genetic and biological resources on their land including any knowledge or innovation related to use of genetic and biological resources on such land.

(b) Local communities shall exercise their inalienable right to access, use, and exchange or share their biological or genetic resources in sustaining their livelihood systems.

(c) Local environment and natural resources committees shall have the right to refuse consent or access to their biological resource, innovation, practices, knowledge or technologies if such access will be detrimental to the integrity of their natural and cultural heritage.

(d) No biological or genetic resource and no intellectual and cultural knowledge and practices related to biological or genetic resources or innovations arising out of them shall be sold, assigned, transferred or dealt with in any way which shall adversely affect the resource rights of the local community.

(e) The local environment and natural resources committee shall have the right to enforce, monitor and further innovations and any matters in relation to utilization or exchange of biological or genetic resources in its area of jurisdiction.

(f) Local environment and natural resources committees shall have the right to withdraw consent orally or in writing or place restrictions on the activities relating to access where such activities are likely to be injurious or detrimental to their rights as stipulated in this Act.

(g) The Authority shall ensure that any ecological or environmental benefits that are lost either directly or indirect due to commercial use of the biological or genetic resources are transparently and accurately calculated and that the local communities concerned are compensated for those losses.

(h) The Authority shall take measures to:-

(l) promote awareness of the value of genetic resources, their uses and types of benefits that may accrue to the local communities.

(ii) promote effective participation of the local environment and natural resources committees in making decisions regarding grants of access to genetic resources and the benefits to be equitably shared;

(iii) define a system of collective biodiversity registration and specific rights and obligations of the local environment and natural resources committees that arise from the entitlement through consultation with the community;

(iv) in consultation with local environment and natural resources committees, identify the local communities to be recognized as residual title holders;

(v) identify the types of common and collective achievements and intellectual property rights of local communities that are recognized in each case;

(vi) identify and define the requirements and procedures necessary for the recognition of the collective achievements and intellectual property rights of local communities and the title to them.

(I) The rights and privileges granted to a local community under this part as a collective entity shall be administered in accordance with customary law and or through the local environment and natural resources committees or assembly representing such local community.

Provided that any individual who has custody or exercise stewardship over any genetic or biological resources or indigenous knowledge shall have the right to benefit from utilization of the resources and knowledge in his own capacity.

Recognition of farmers' rights

III. (1) Any local community engaged in crop and animal production, living in any agro-ecological zone, or a member of such community, shall be considered as a farmer.

(2) The Authority shall disseminate information to farmers on issues affecting access to biological and genetic resources or any part of the local indigenous plant variety or animal breed.

(3) Farmers shall have the right to:-

(a) claim in any proceedings any loss incurred by them where their rights either individually or collectively have been violated;

(b) receive just compensation for loss caused by any act of a person which causes destruction or reduction of biological or genetic resources or plant variety or animal breed and the environment in their area;

(c) receive support from government or non-governmental organisations for the maintenance of community gene banks and research related to conservation in normal household conditions;

(d) receive exemption or reduction of import and export tax for equipment and raw materials for use in experimenting or implementing non-commercial plant and animal improvement;

(e) Obtain necessary remedy regarding pesticides, herbicides or any chemicals, or any genetically modified seed or propagation materials detrimental to ecology, environment, health, sustainable livelihoods and safe food production of the community;

(f) save, use, exchange farm saved seeds and propagation materials of farmers varieties and breeds;

(g) receive royalties from the sale of seeds of the new farmers varieties and animal breeds, or if such farmers cannot be identified, the royalty shall be deposited to the Environment Fund established under this Act; and

(h) participate in plant variety and animal breed research and development.

Application of customary law

IV. In addition to this Act, Farmers' varieties and breeds are recognized and shall be protected under the rules of practice as found in, and recognized by, the customary practices and laws of the concerned local farming communities, whether such laws are written or not.

V. This Act shall apply only in respect of a plant or animal which has its origin or has been naturalized in, and which is a new farmers' variety or breed in that before the date of application:-

(a) it was not available in trade outside a restricted area or at community level;

(b) it was not generally known to the public;

(c) it is distinct but not necessarily uniform; and

(d) it is identifiable.

Registrar of farmers' rights

VI. There shall be appointed in the public service:-

(1) the registrar of farmers' rights, who shall exercise such functions as are conferred or imposed on him by this Act; and

(2) such examiners and other officers as may be necessary for the better carrying out of the provisions of this Act.

Register of farmers' rights

VII. (1) The Registrar shall keep a Register of Farmers' Rights in which shall be entered:-

(a) particulars of farmers' rights which are in force and of any licenses issued in

respect thereof; and

(b) notice of all matters which are required by or under this Act to be entered in the Register and of such other matters affecting the validity or ownership of farmers' rights as the Registrar thinks fit.

(2). The Register shall be prima facie evidence of any matters entered therein which are required or authorized by or under this Act.

Persons entitled to make application

VIII. (1) An application for the grant of farmers' rights in respect of a new farmers variety or animal breed may be made by a person or a local community who is the breeder or maintainer of the new variety or animal breed.

(2) An application in terms of sub-section (1) may be made by a village headman or traditional chief on behalf of a local community.

Form of application

IX. (1) An application for the grant of farmers' rights shall be made in the prescribed form and lodged with the Registrar in the prescribed manner.

(2) The effective date of application in terms of this section shall be the date on which the application is received by the Registrar.

(3) The Registrar may require:-

(a) that the plant or animal concerned be shown to him/her or to a person designated by him/her; and

(b) that any additional information or specimens which he considers necessary to determine whether or not the plant or animal concerned constitute a eligible variety or breed be furnished to him/her.

(4) The name of the plant or animal concerned shall be proposed by the person who applies for the grant of farmers' rights.

Refusal of application

X. The Registrar may refuse an application made in terms of this Act if *prima facie* it appears to him/her that:-

(a) the applicant is not entitled in terms of to make the application;

(b) the applicant does not comply with the requirements of this Part.

Provided that the applicant shall be afforded an opportunity to be heard by the Registrar and if aggrieved shall have the right to appeal to the Technical Committee on Biodiversity.

Grant of farmers' rights

XI. A variety or breed with specific attributes identified by a local community shall be granted farmers' rights protection through a variety or breed certificate issued by the Registrar, unless the application has been refused in terms section 56 of this Act.

Duty of holder of farmers' rights

XII. An individual or local community that holds farmers' rights shall ensure that throughout the period for which the rights are exercisable the farmer or individual is in a position to produce to the Registrar reproductive material which is capable of producing the variety or breed to which the rights relate.

Cancellation of a variety or breed

XIII. The registration of a variety or breed shall be cancelled when it has been found that the main characteristics of the plant or animal of the registered variety or breed have become different from the characteristics of the plant or animal at the time of its registration.

Rights of holder of farmers' rights

XIV. (1) A holder of farmers' rights shall during the period specified in sub-section (2) have the right to sell, reproduce and multiply reproductive material of the plant or animal concerned.

(2) The term of farmers' rights shall, subject to the provision of this Act be twenty five years from the date of grant thereof.

(3) It shall not be an infringement of the rights conferred by sub-section (1) for a farmer to:-

(a) use the variety or breed concerned as an initial source of variation for the purpose of creating any other new variety or breed;

(b) save, use and exchange farm saved seed or propagating material of farmers varieties or breeds;

(c) use a protected breeder's variety or breed to develop farmers' varieties or breeds, including material obtained from gene banks or plant genetic resource centers.

(4) Notwithstanding paragraph (b) of sub-section (3), the farmer shall not sell farm saved seed or propagating material of a protected variety or breed on a commercial scale.

Licenses

XV. (1) An individual or local community that is the holder of farmers' rights may apply to the Registrar for the rights to be registered as rights in respect of which licenses may be issued.

(2) On receipt of an application in terms of sub-section (1) the Registrar shall cause to be entered in the Register of Farmers' Rights notice that licences in respect of the

rights concerned may be issued by the holder and thereafter, if the holder grants to any person a licence to sell, reproduce or multiply reproductive material of the variety or breed concerned, the holder shall within three months of granting such licence, notify the Registrar in writing of the grant of the licences and of any conditions, limitations or restrictions imposed in terms of sub-section (3).

(3) In granting any licence referred to in sub-section (2), the holder of the farmers' rights may impose such conditions, limitations or restrictions as they think fit.

ANNEX II: DRAFT FARMERS' RIGHTS LEGISLATION IN COUNTRY B

1 Interpretation

In this part

“Farmers' variety” :

a) a botanical variety developed or maintained by farmers which can be differentiated from another of the same kind by one or more characteristics which is capable of definition and recognition (identifiable)

2 Recognition of Farmers' Rights.

(1) Farmers' Rights are recognized as stemming from the enormous contributions that local farming communities; especially their women members, of all regions of the world, particularly those in the centres of origin or diversity of crops and other agrobiodiversity, have made in the conservation, development and suitable use of plant and animal genetic resources that constitute the basis of breeding for food and agriculture production; and

(2) For farmers to continue making these achievements, therefore, Farmers' Rights have to be recognized and protected.

3. Application of Law on Farmers' Varieties

(1) Farmers' varieties and breeds are recognized and shall be protected under the rules of practice as found in, and recognized by, the customary practices and laws of the concerned local farming communities, whether such laws are written or not.

(2) This Act shall apply only in respect of a plant which has its origin in and which is a new farmers variety in that

a) before the date of application it was not available in trade outside a restricted area or at community level.

b) before the date of application it was not generally known

c) it is distinct

d) and identifiable

4 Registrar of Farmers' Rights and other officers

There shall be

a) an officer, to be styled the Registrar of Farmers' Rights, who shall exercise such functions as are conferred or imposed on the Registrar by this Act; and

b) such examiners and other officers as may be necessary for the better carrying out of the provisions of this Act.

5. Register of Farmers' Rights

(1) The Registrar shall cause to be kept a Register of Farmers' Rights in which shall be

entered

- a) particulars of farmers' rights which are in force and of any licences issued in respect thereof; and
- b) notice of all matters which are required by or under this Act to be entered in the Register and of such other matters affecting the validity or ownership of farmers' rights as the Registrar thinks fit.

(2) The registration shall be *prima facie* evidence of any matters entered therein which are required or authorized by or under this Act to be entered therein.

6. Persons entitled to make application

(1) An application for the grant of farmers' rights in respect of a new farmers variety may be made by any of the following persons.

- a) a person or a community who is the breeder or maintainer of the new variety.
- b) An application in terms of subsection (1) may be made by a village headman or traditional chief on behalf of the community.

7. Application for farmers' rights and effective date thereof.

(1) An application for the grant of farmers' rights shall be

- a) made in the prescribed form; and
- b) lodged with the Registrar in the prescribed manner.

(2) The effective date of application in terms of this section shall be the date on which the application is received by the Registrar

(3) The Registrar may require

- a) that the plant concerned be shown to him/her or to a person designated by him/her, and
- b) that any additional information or specimens which he/she considers necessary to determine whether or not the plant concerned constitute an eligible variety be furnished to him/her.

8. Naming of plant concerned

The name of the plant concerned shall be proposed by the person who applies for the grant of farmers' rights.

9. Refusal of application

The Registrar may refuse an application made in terms of section seven if *prima facie* it appears to him/her that

- a) the application is not entitled in terms of this Act to make the application
- b) the application does not comply with the requirements of this Part.

10. Grant of Farmers' Rights

A variety with specific attributes identified by a community shall be granted

intellectual protection through a variety certificate issued by the Registrar, unless the application has been refused in terms of section nine.

11. Duty of Holder of Farmers' Rights to maintain reproductive material

1) An individual or community that holds farmers' rights shall ensure that throughout the period for which the rights are exercisable he/she/they are in a position to produce to the Registrar reproductive material which is capable of producing the variety to which the rights relate.

(2) The registration of a variety shall be cancelled when it has been found that characteristics of the plant of the registered variety have become different from the characteristics of the plant at the time of its registration.

12. Rights of holder of Farmers' Rights

(1) A holder of farmers' rights shall during the period specified in subsection 2 have the sole right to sell, reproduce and multiply reproductive material of the plant or breed concerned

(2) The term of farmers' rights shall, subject to the provision of this Act be fifty years from the date of grant thereof. It shall not be an infringement of the rights conferred by subsection (1) for a farmer.

a) to use the variety concerned as an initial source of variation for the purpose of creating any other new variety.

b) to save, use and exchange farm saved seed/propagating material of farmers varieties.

c) use a protected breeder's variety to develop farmers varieties, including material obtained from gene banks or plant genetic resource centres.

Notwithstanding paragraph c) the farmer(s) shall not sell farm saved seed /propagating material of a breeders' protected variety in the seed industry on a commercial scale.

13. Issue of licences

(1) A community that is the holder of farmers' rights may apply to the Registrar for the rights to registered as rights in respect of which licences may be issued.

On receipt of an application in terms of subsection (1) the Registrar shall cause to be entered in the Registrar of Farmers' Rights notice that licences in respect of the rights concerned may be issued by the holder and thereafter, if the holder grants to any person a licence to sell, reproduce or multiply reproductive material of the variety concerned, the holder shall within three months of granting such licence, notify the competent authority in writing of the grant of the licence and of any conditions, limitations or restrictions imposed.

(2) In granting any licence, the holder of the farmers' rights may impose such conditions, limitations or restrictions as they think fit.

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