Commentary on the Zambian Plant Breeder’s Rights Act

Godfrey Mwila

The Zambian Plant Breeder’s Rights Act, 2007, requires that, to be protectable, varieties must be distinct, uniform and stable. It also requires that they have demonstrable value for cultivation and use. The act does not have any specific provisions on farmers’ varieties. This chapter provides an account of the very significant efforts made by a number of actors to include clauses in the act that would have created sui generis intellectual property protections for farmers’ varieties. Ultimately, these efforts were not successful. It is important, nonetheless, to learn from them.

The emergence of private sector interests and capacities

Prior to its independence, Zambia was not home to any plant breeding work, and hence no locally improved crop varieties were being produced. The small amount of maize seed that was produced locally consisted of one hybrid variety, SR-52, which had been brought in from Zimbabwe (then Northern Rhodesia). Otherwise, most of the seed requirement, especially for maize, was met using imports from Zimbabwe. Immediately after independence, a maize-breeding program was launched, which first focused on maintaining parent lines for SR-52 and increasing SR-52 breeder seed to start seed production in the country. Over the years, the breeding program has expanded, resulting in a number of locally produced maize hybrid and composite varieties. Gradually, this breeding work has extended to other crops, with new varieties of sorghum, groundnuts, pearl millet and cassava being developed throughout the 1990s. All of these efforts were made by breeders working within the public research institution, with no private sector involvement other than the School of Agricultural Sciences at the University of Zambia, which was involved in some collaborative work in breeding. Seed production and maintenance breeding for these varieties was at the time a responsibility of the Seed Services Section (now the Seed Control and Certification Institute [SCCI]), which then fell under the research branch of the ministry responsible for agriculture.

As the capacity for variety development grew, more varieties were made available for commercial use. Then, as the demand for seed increased, it became apparent that the institutional arrangement that was in place was going to prove
to be inadequate. This realization led to the creation of the first national seed company in 1981 – the Zambia Seed Company (Zamseed) – which became responsible for the production and marketing of all types of seed, with the exception of cotton and tobacco. Inherent in the establishment of this company was an agreement that provided Zamseed with exclusive rights to produce and market the seed of varieties developed by the Zambia Agriculture Research Institute (ZARI), which was then known as the Soils and Crops Research Branch. This exclusive relationship was maintained until around 1991 when other players in the formal seed sector began to appear.

Partly as a consequence of the overall economic and agricultural policy changes, crop breeding and improvement research underwent some major changes with the establishment of several institutions initiated by the private sector. No longer were crop breeding and research responsibilities the sole domain of the public research institutions. Two of these were agricultural research trusts created as public/private sector partnerships, while four were new seed companies, with active varietal development and improvement programs. Seed production and marketing was transformed from a monopolistic to a competitive market with the arrival of these new companies, leading to the broadening of the seed industry stakeholders covering both the formal and informal sectors.

**Development of plant variety protection laws**

In time, demands were made by the private sector players – mainly the seed companies – to protect plant breeders’ rights in order to encourage private initiative in these areas. In 1998, the government responded to these demands and began to initiate the process. The rationale for plant breeders’ rights was to ensure that the efforts of breeders were rewarded adequately in order to encourage further investment in the development of more varieties. The initial efforts made between 1999 and 2001 led to a draft plant breeders’ rights bill that was based on the 1991 model of the International Convention for the Protection of New Varieties of Plants (UPOV Convention). This bill, however, could not be approved by the government, reportedly because it did not take into account the interests of small-scale farmers. The decision was also influenced by issues arising from debates in the ongoing negotiations of the International Treaty on Plant Genetic Resources for Food and Agriculture (under the Food and Agriculture Organization’s Commission on Genetic Resources for Food and Agriculture) (ITPGRFA) and the African Model Law for the Protection of the Rights of Local Communities, Farmers and Breeders and for the Regulation of Access to Biological Resources (African Model Law) (under the Organization of African Unity). Further influence may have come from changes in the national agricultural policy (Ministry of Agriculture and Cooperatives in 2004), which provided the need to simultaneously recognize and reward plant breeders, farmers and farming communities for their contribution to variety development, although these changes made no specific reference
to farmers’ varieties. As a result, the Ministry of Agriculture and Cooperatives (MACO) sent the draft bill back to the SCCI for redrafting in order to incorporate farmers’ rights issues.

Once the bill had been referred back to the SCCI for revision, nongovernmental organizations (NGOs) got involved and put still more pressure on the government to incorporate *sui generis* intellectual property protections for farmers’ varieties in the bill. Technocrats attempting to follow up on these demands considered themselves to be implementing farmers’ rights as provided for under the ITPGRFA.

The process of preparing a new draft bill incorporating plant breeders’ rights and farmers’ rights began in 2002 with the constitution of a working group composed of technocrats from the SCCI, ZARI, the Ministry of Legal Affairs, which represents the public sector, and the Zambia Seed Traders Association, which represents the private sector. The SCCI, being the regulatory agency of the seed industry in the country, provided the secretariat. It is important to note that this process was preceded by the formulation of the National Seed Policy, which was expected to feed into the overall agricultural policy. The working group began the task of developing a new draft bill during a period of increased debate at the regional, subregional, and country levels over issues of intellectual property rights, biopiracy, farmers’ rights, community rights, and finally access and benefit sharing, which were arising from the introduction of the Convention on Biological Diversity (CBD), the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) and the ITPGRFA.4

As part of the process of coming up with the draft bill, the working group reviewed a number of related efforts to develop intellectual property rights protections at the international, regional and national levels. The working group agreed to come up with a broad draft based on a *sui generis* system, combining both plant breeders’ rights and farmers’ rights. Both the UPOV Convention model and the African Model Law were used as a basis for the new draft. The process attracted a lot of unsolicited external interest from foreign seed companies operating in the country, such as PANNAR Seed and from the regional seed regulatory bodies such as ARIPO (African Regional Intellectual Property Organisation) and the International Union for the Protection of New Varieties of Plants, before the new draft could go through the official review and approval process. The external pressure, which was particularly directed at the SCCI as the coordinator of the process, advocated for the separation of farmers’ rights from plant breeders’ rights. Added to this debate was the internal pressure from the relatively more powerful private-sector stakeholders in the seed industry, who urged that plant breeders’ rights legislation was more urgent than farmers’ rights and needed to be dealt with separately in order to hasten the process.

In 2003, a layman’s draft legislation based on a *sui generis* system that combined plant breeders’ rights and farmers’ rights was submitted to the Ministry of Legal Affairs to be drafted into a bill, before being circulated to other relevant ministries for their comments. As a result of the pressures cited earlier, the SCCI
withdrew this draft bill before it was completed and circulated to the ministries for comment. The follow-up preparation of a draft plant breeders’ rights bill was then based only on the UPOV Convention. The new draft bill, which dealt solely with plant breeder’s rights, was prepared and submitted for consideration and approval by the government and by the Cabinet before it went to Parliament for enactment. The bill was presented to Parliament in 2006 and was enacted as the Plant Breeder’s Rights Act in 2007.\(^5\)

The process of trying to come up with legislation that reflected a *sui generis* system revealed a number of challenges, the major one being the difficulty of harmonizing farmers’ rights with the existing seed and plant variety protection laws. Technical challenges included the decision of how to choose the alternative conditions for protecting farmers’ varieties. The drafting committee also considered whether the ownership of farmers’ varieties should be individual or communal, and if it would be appropriate and beneficial to treat farmers’ varieties in the same way as other improved varieties in terms of the procedures for registration, certification and protection. In looking at these issues, the individuals concerned examined some of the other national plant variety protection laws that had incorporated farmers’ varieties, with particular emphasis on the Indian Protection of Plant Varieties and Farmers’ Rights Act (see Chapter 12).

**Follow-up developments regarding *sui generis* intellectual property protections for farmers’ varieties**

There are no clear steps to follow when developing policy and law specifically addressing farmers’ varieties. What is generally considered to be the most successful avenue to follow involves the overall policy measures necessary to domesticate and nationalize the ITPGRFA. In particular, it is expected that farmers’ or local traditional varieties could be addressed within the context of implementing the farmers’ rights article under the treaty. In Zambia, it is understood that farmers’ rights, which may incorporate the protection of farmers’ varieties – including ownership recognition – would be dealt with in a separate piece of legislation. Such a process would be spearheaded by a different government agency, namely ZARI, which is the focal institution with the overall responsibility of implementing the ITPGRFA.

In 2008, a key stakeholder’s workshop was held, entitled ‘Awareness Creation on the Treaty and Farmers’ Rights,’ which was coordinated by the National Committee on Plant Genetic Resources. The participants of this workshop recommended that a working group be formed that would be dedicated to reviewing policy and legislation with the aim of realizing farmers’ rights in Zambia by including measures to promote farmers’ varieties as well as the protection of farmers’ rights. Membership in this working group will include representatives of farmers and farmer organizations. It will facilitate capacity building and awareness creation among farmers and farmer organizations by organizing a national forum on farmers’ rights. The key strategy will be to create a farmer-driven initiative to revive and encourage the process of developing...
policy and legislation on farmers’ rights. It is expected that these farmers and farmer groups will define farmers’ rights based on their own perceptions and will demand that the authorities formulate and enact appropriate legislation. It is unlikely, given past experiences, that there will be room for developing *sui generis* intellectual property rights for farmers’ rights. It is more likely that efforts will focus on the creation of legal space to promote farmers’ varieties and practices.

The developments outlined earlier illustrate the challenges that Zambia has faced in its efforts to integrate breeders’ and farmers’ rights into one piece of legislation. Similar challenges may be at play in other African countries and, indeed, in other developing countries trying to undertake similar initiatives. It is clear from this examination that in order to create the environment for enacting laws for the protection of farmers’ rights as a counterbalance to breeders’ rights, there has to be effective demand emanating from the actual beneficiaries – the farmers and farming communities. It is therefore no surprise that breeders’ rights legislation, because of the pressure from the formal seed sector players who are beneficiaries of these rights, was prioritized for enactment into law over farmers’ rights. These same formal sector players also create obstacles for the development of farmers’ rights legislation mainly due to their desire for self-preservation. Given these factors, although there is a desire and some kind of plan towards implementing farmers’ rights into national law in Zambia, and perhaps in other African countries, the prospects for achieving this goal may not be bright. The reality of the situation can be attested to by the fact that to date little or no progress has been made in implementing the process that was agreed upon during the stakeholder consultation workshop alluded to earlier in this section.

**Notes**