Breaking the Silence on Plant Variety Protection in Nigeria

By:

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Unlike its West African neighbour, Ghana, where there is a flurry of debates around plant variety protection (PVP), there is silence on the subject in Nigeria. This silence is note-worthy because Nigeria has pending obligations under Article 27.3(b) of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) to introduce a PVP system. However, the silence should not be equated with absolute legislative inactivity around the subject in the country. Indeed, from 2006, there have been unsuccessful attempts to introduce a PVP system through intellectual property (IP) law reforms. The *silence* refers to the limited discourse, debates and engagements on PVP. This piece contributes to breaking the silence around PVP in Nigeria by discussing the current legal landscape for plant varieties, ongoing attempts to introduce a PVP system and suggestions for a suitable system.

Current Legal Landscape for Plant Varieties

Nigeria is yet to fulfil its obligation to introduce a PVP system as set out under Article 27.3(b) of TRIPS. In particular, Nigeria does not have an IP regime for protecting plant varieties, either through patents, an effective *sui generis* system or a combination of systems. The only reference to PVP in Nigeria's IP architecture is Section 1.4(a) of its Patents and Designs Act 1970, which expressly prohibits the patenting of plant varieties. Nigeria is also not a party to any of two IP Organisations in Africa which have PVP instruments: the Organisation Africaine de la Properiete Intellectulle (OAPI) and the African Regional Intellectual Property Organisation (ARIPO).

Despite this lacuna in its PVP governance, Nigeria has two laws that regulate the registration, release and commercialisation of plant varieties and seeds: the National Crop Varieties and Livestock Breeds Act, 1987 (NCVLBA) and the National Agricultural Seeds Act, 1992 (NASA). The NCVLBA establishes a national register for crop varieties and livestock breeds where names of old and new crop varieties and livestock breeds are permanently registered. While NASA oversees seed programmes and policies in the country. These are non-IP laws; therefore, they do not provide exclusive rights over new varieties of plants as required under Article 27.3(b) of TRIPS.

Ongoing Attempts to Introduce a PVP System

In a bid to fulfil its international obligations including Article 27.3(b) of TRIPS, attempts to introduce a PVP system in Nigeria commenced in 2006 with the National Intellectual Property Commission (NIPCOM) Bill. However, the NIPCOM Bill along with its successors have all been unsuccessful. Reasons for the failure of the Bills include the government's non-prioritisation of IP matters and an alarming lack of interested local actors (stakeholders, such as corporations in the industrial property industries and civil society activities).

Marking a watershed in the attempts to introduce a PVP system in Nigeria is the country's recent contact with the Office of the Union for the Protection of New Varieties of Plants (UPOV). The reasons for Nigeria's contact with the UPOV Office is not publicly available. Experiences from other Global South UPOV members, including its African members (such as OAPI), uncover the role of the UPOV Office in pushing for its Plant Breeder's Rights system as set out in its

International Convention for the Protection of New Varieties of Plants (UPOV 1991 Act). Notably, scholars such as Professors Johnson Ekpere, Chidi Oguamanam and Susan Isiko Istrba have raised questions around the suitability of the UPOV 1991 Act for African countries, primarily because of its failure to accommodate small-scale farmers interests and farming preferences. They argue that the Plant Breeders' Rights system as set out in the UPOV 1991 Act is mostly suited to countries with predominantly commercial and industrialised agricultural sectors.

Nigeria currently has an Industrial Property Commission (IPC) Bill which has passed its second reading in the House of Representatives and is with the House Committee on Commerce for further review and public hearing. Although Professor Ekpere was involved with drafting the plant variety protection provisions in earlier versions of the IPC Bill, pertinent provisions such as farmers' rights, private use/research exceptions to breeders' rights and compulsory licensing have been deletedfrom the current version at the National Assembly. There is also *silence* on the reasons for the deletion and indeed, the whole public hearing process. The outcome of the IPC Bill remains to be seen.

Suggestions for a Suitable PVP System

Although the Nigerian government's agriculture policy, the Agriculture Promotion Policy (2016 -2020) promotes private sector investment in agriculture, which has opened up the country to the proliferation of commercial and industrialised agriculture, a large population of farmers in the country are still engaged in small-scale farming and contribute substantially to the agricultural products and food consumed. Consequently, a PVP system that marginalises these small-scale farmers is unsuitable.

A suitable system would be a sui generis system that accommodates both small-scale farmers and commercial plant breeders' interests. This sui generis system would also include provisions that are beneficial both at the farming community and national levels such as farmers' rights and access -benefit sharing principles provided in the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA) and the Convention on Biological Diversity (CBD). Nigeria is a signatory to both the ITPGRFA and CBD (although it has not ratified the ITPGRFA). A template for the proposed comprehensive sui

generis system is set out in the ‘African 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), mainly conceived by Nigeria’s Professor Ekpere.

Considering Nigeria’s contact with the UPOV Office and the interests of investors engaged in commercial and industrialised agriculture, translating the proposed sui generis system into law could face resistance from these stakeholders. However, as the Ghanaian example shows, civil society activists contribute to the PVP law-making process by facilitating public discourse, debates and engagement on the contentious issues around the subject. Public engagement would break the silence on PVP in Nigeria and contribute to ensuring that the process of designing and introducing a system is both open and inclusive.

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