

# Plant Variety Protection: Yesterday, Today and Tomorrow; With Special Reference to UPOV Convention, 1991 and TRIPS Agreement

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**Abstract**— Plant variety protection has been identified by the industrialized countries for a long time. As a result of this identification plant variety protection became as an internationally identified protection system since 1991 by introducing the International Convention for the Protection of New Varieties of Plants (UPOV Convention). Further, this protection has been identified by the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) as a sui generis form of intellectual property protection. Sri Lanka has limited number of legislations such as Fauna and Flora Protection Ordinance, Forest Ordinance, Plant Protection Act, etc. on plant protection but, these legislations have identified only the physical protection of the plant resources not the protection of the genetic resources and as a result, this can be identified as a great weakness of our existing legal framework. As a solution for this loophole, Sri Lanka has taken steps to introducing a Bill on Plant Variety Protection (Breeder's Rights) which was drafted in 2001 and 2011, but still it remains as a failure endeavour. However, Sri Lanka, as a nation rich in bio-diversity, it is very much important to implement a law on plant variety protection to protect agriculture, food and bio safety indoors the country. Because Sri Lanka has lost number of worthwhile opportunities to use hers own plants for agriculture and medicine purposes due to the loss of patentability. Hence, protection of new plant varieties is a key topic to focus on. Therefore this research paper focussed the importance of introducing a new plant variety protection law based on UPOV Convention and TRIPS Agreement.

**Keywords**— Plant variety protection, intellectual property law, patent

## I. INTRODUCTION

“Humankind has not woven the web of life. We are but one thread within it. Whatever we do to the web, we do to ourselves. All things are bound together. All things connected.”

Chief Seattle

Plant varieties are protected under the International Convention for the Protection of New Varieties of Plants 1991 (UPOV Convention). Ultimate goal of commence of this convention was to establish a *sui generis* legal

framework for the protection of plant varieties under the framework of intellectual property protection in the world. Based on this purpose the state parties to the convention have formed an international union for the protection of new varieties of plants (Jordens, R, 2005). Therefore the state parties of this convention has right to introduced their own legal mechanism to protect new plant varieties indoors their country.

In this article the researcher wish to discuss the international legal frame work which encourage the breeders' to invent new plant varieties and the legal protection given by these mechanisms to the breeders'.

## II. INTERNATIONAL LEGAL FRAMEWORK

The international legal framework for the protection of plant varieties largely identified under two documents such as UPOV Convention, 1991 and the Agreement on Trade Related Aspects, 1994. (TRIPS Agreement)

Under UPOV Convention, 1991 a plant variety has been identified as a It is a plant group within a single botanical taxon of the lowest rank, which grouping, irrespective of whether the conditions for the grant of a breeder's right are fully met (Article 1 UPOV Convention, 1991). Furthermore it can be It can be defined by the expression of the characteristics resulting from a given genotype or combination of genotype or distinguished from any other plant grouping by the expression of at least one of the said characteristics or considered as a unit with regard to its suitability for being propagated unchanged ( Article 1 UPOV Convention, 1991).

Further according to UPOV Convention a breeder is, the person who bred , or discovered and developed a variety or the person who is the employer of the aforementioned person or who has commissioned the latter's work, where the laws of the relevant contracting party so provide or the successor in title of the first or second aforementioned person. (Article 1; UPOV, 1991)

Moreover A new plant variety must meet following criteria including novelty, distinctness, uniformity and stability in order to enjoy the plant variety protection. The novelty is a variety which has not been sold or disposed of, by or with the consent of the breeder

(Article 6, UPOV 1991). The distinctness is the variety which is clearly distinguishable from any other variety whose existence is a matter of common knowledge at the time of filing of the application. A variety that is of common knowledge does not have to be a protected variety (Article 7, UPOV 1991). The uniformity is The variety is sufficiently uniform in its relevant characteristics, subject to the variation that may be expected from the particular features of its propagation (Article 8, UPOV 1991). And finally the stability is the relevant characteristics of the variety remain unchanged after repeated propagation or, in the case of a particular cycle of propagation, at the end of each such cycle (Article 9, UPOV 1991).

Moreover according to the TRIPS Agreement Members shall provide for the protection of plant varieties either by patents or by an *effective sui generis* system or by any combination thereof. (Article 27 (3))

### III. SRI LANKAN LEGAL FRAMEWORK

Sri Lankan legal framework for the protection of plant varieties can be discussed under two steps. One major step was the first working document made by the National Intellectual Property Office in 2001 and other step was an extension of the working document in 2001 came into discuss in 2011. The working document introduced in 2001 is known as Draft Bill for Protection of New Plant Varieties, 2001.

In order to obtain the IP rights under the Draft Bill for Protection of New Plant Varieties, 2001, the breeder should present the features of novelty, distinctness, uniformity and stability of the new plant variety. (Draft Bill for Protection of New Plant Varieties; Section 2)

Moreover, according to the Section 8 of Draft Bill for Protection of New Plant Varieties, 2001, it provides provisions for entitlement to protection. As per the Section 8 it is provided that the breeder of the variety or his successor in title is entitled to apply for the protection under this Act.

In the second attempt made by the National Intellectual Property Office has introduced another aspect to the previous working document known as Breeder's Rights. The long title of the draft bill was "An Act to provide for the establishment of an effective system for protection of new plant varieties and of the rights of farmers, plant breeders and researchers, to encourage the development of new varieties of plants; and to provide for matters connected therewith or incidental thereto." (Draft Bill for

Protection of New Plant Varieties, Breeder's Rights; Long Title)

Part 1 of the working document provided provisions for the responsibility of administering the Act is shared jointly between the Directors-General of Agriculture and Intellectual Property. The reason for appointing the administrative power to these ministries because under this working document the breeder has the right to obtain a patent license from the National Intellectual Property Office and also the protected attempt encouraged by the Ministry of Agriculture. Therefore according to this document the working committee has identified the intellectual property and agriculture as a major branch under the document.

Part 2 of the draft bill interprets a "breeder" as "a person or government department, university, statutory body or public funded agricultural institute that has bred or discovered and developed a variety" (Draft Bill for Protection of New Plant Varieties, Breeder's Rights; Part 2).

Moreover, the draft also defines the word farmer in a comprehensive manner. A "farmer" means any individual who cultivates crops by cultivating the land himself; or gets crops cultivated in a land by any other person; or is a tenant cultivator in terms of the law relating to tenant cultivators or conserves and preserves, severally or jointly, with any person any wild species or traditional varieties or adds value to such wild species or traditional varieties through selection and identification of their useful properties (Kamardeen.N, 2013).

Further under this draft, it has identified a variety of farmers which define as the farmers who has been traditionally cultivated and evolved by the farmers in their fields; or is a wild relative or land race of a variety about which the farmers possess the common knowledge. (Kamardeen.N, 2013)

Part 3 of the draft provided provisions for that the 'Director General of Intellectual Property should establish and maintain a register known as the Register of New Plant Varieties in which all the qualified new plant varieties should be recorded. Such records should include, inter alia the name of each registered new plant variety, the name and address of the holder of rights, the name and address of the agent of the holder of rights, if any, and dates of application and registration, as well as the date of priority, if applicable' (Kamardeen.N, 2013; Draft Bill for Protection of New Plant Varieties, Breeder's Rights; Part 3). Therefore according to this draft it has mandate to maintain a document known as the National

Registry of New Plant Varieties. This should be located at the Plant Genetic Resources Center (Kamardeen.N, 2013). This registry will be under the administration and supervision of the Director General of Agriculture, and will exist for the collection and maintenance of information on extant varieties and the reception and maintenance of technical data and samples of new plant varieties. The head of the Plant Genetic Resource Centre shall act as the Registrar of the Registry of New Plant Varieties as directed and supervised by the Director General of Agriculture (Kamardeen.N, 2013).

According to Section 34 (1) the draft permits a farmer who has bred or discovered and developed a new variety to be entitled to the registration and other protection in like manner as a breeder (Draft Bill for Protection of New Plant Varieties, Breeder's Rights; Section 34 (i)). Furthermore, the farmers are also entitled to save, use, sow, re-sow, exchange, share or sell their farm produce including seed of a variety protected under the legislation in the same manner as they were entitled to, prior to the legislation coming into force (Draft Bill for Protection of New Plant Varieties, Breeder's Rights; Section 34 (ii)).

Moreover according to the draft provides that "any right established under this Act shall not be deemed to be infringed by a farmer who at the time of such infringement was not aware of the existence of such right" (Draft Bill for Protection of New Plant Varieties, Breeder's Rights; Section 35 (i)), and provides that "a relief which a court may grant in any suit for infringement referred to in section 41 shall not be granted by such court, not any cognizance of any offence under this Act shall be taken, for such infringement by any court against a farmer who proves, before such court, that at the time of the infringement he was not aware of the existence of the right so infringed." (Kamardeen.N, 2013; Draft Bill for Protection of New Plant Varieties, Breeder's Rights; Section 35 (ii))

Furthermore the draft also includes a section on researchers' rights under Section 36. According to Section 36 all researchers are given the exception to use registered varieties for experimentation and research, or as an initial source of variety for the purpose of creating other varieties: provided that the authorization of the holder of the rights to the registered variety is required where the repeated use of such variety as a parental line is necessary for commercial production of such other newly bred variety (Kamardeen.N, 2013).

#### V. CONCLUSIONS AND RECOMMENDATIONS

In accordance with UPOV Convention the National Intellectual Property Office has taken some several

attempts to introduce an implement a legal framework to protect new plant varieties with the intention of encourage the invention of new plant varieties by the breeders of Sri Lanka. With regarding to the history of these attempts and which is discussed in the Sri Lankan legal framework it can be identified two attempts taken by the National Intellectual Property Office in 2001 & 2011 which remains as failed attempts in the history. In the first attempt the National Intellectual Property Office appointed a working committee to draft a bill in relation to protection of new plant varieties and its second attempt was to implement a new plant variety protection act with special reference to breeders' rights and researchers' rights. Even though the National Intellectual Property Office together with Agriculture Ministry has identified the need of a proper mechanism to protect new plant varieties indoors the country, the national legislature still refuse to promote these working document as a law. Therefore it is the high time to introduce a national legal mechanism to protect the national breeder's indoors and encourage them for the further innovations which helps to bring a solution for the food safety as well.

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#### LIST OF REFERENCES

Agenda21; Earth's Action Plan. By- Robinson Nicholas A.; 1993; under the auspice of the Commission on Environmental Law of IUCN-The world conservation union; Oceana Publication;

A Worldwide Fight against Bio-piracy and Patents on Life; 1995; Khor Martin; Third World Resurgence No.63, Appropriations of Traditional Knowledge – the Patenting of sweetness inhibitors; Gunawardana Jagath (Attorney-at- Law) (Unpublished)

Bio- Piracy: an early case where a microbe from Jaffna became a property of a U.S. drug firm; Gunawardana Jagath (Attorney-at- Law)(Unpublished)

Bio-Piracy: The Plunder of Nature and Knowledge; 1999; Shiva.V; South End Press

Biodiversity, Bio-piracy and Benefits: What allegations of Bio-piracy Tell Us About Intellectual Property: Developing World Bioethics; Hamilton.C; (2006)

Bio-piracy : The Bio- Diversity of Sri Lanka Under Monopolies of others; Gunawardana Jagath (Attorney-at-Law) (Unpublished)

Biological Diversity Conservation and the Law – Legal Mechanism for Conserving Species and Ecosystems; 1993; Klemm Cyrille de in collaboration with Clare Shine; IUCN Environmental Policy and Law; paper no.29; IUCN

Biopiracy, the CBD and TRIPS- The prevention of Bio-piracy; 2004; Ragnar Johan; Master Thesis; Faculty of Law, University of Lund

Elements of The Intellectual Property Law of Sri Lanka; 2010; Karunaratna D.M..(LL.B(Hons),M.Phil,Ph.D.) Attorney-at-Law; 1<sup>st</sup> Edition Sarasavi Publishers.

“India may contest U.S Patent on Diabetic Remedy”; Sharma Devendes; New Delhi, India; August 27, 1999

Intellectual Property Law; 2005; Edenborough Micheal; MA (Cantab), D.phil (Oxon); Barrister; 1<sup>st</sup> Edition Cavendish Publishing Limited.

Intellectual Property Law; 1995 Holyoak Jon and Torremans Paul; Buttersworth; London, Dublin and Edinburgh; 1<sup>st</sup> Edition

Intellectual Property: Patent, Copyright, Trade Mark and Allied Rights; 1999; Cornish W.R.; Sweet and Maxwell; 4<sup>th</sup> Edition

Legal Protection of Traditional Knowledge; Gunawardana Jagath; (Attorney-at- Law) (Unpublished)

The Significance Of Plant Variety Legislation In Promoting Economic

Growth: An Analysis Of The Proposed Law In Sri Lanka; Camardeen.N; 2015

Agreement on Trade Related Aspects of Intellectual Property Rights, 1994

TRIPS: The impact on Plant variety protection and Bioiracy in Developing Countries; Special Reference to Sri Lanka; Galhena Chathra A.N. (Attorney-at-Law)

Traditional Knowledge of biodiversity in Asia-Pacific: Problems of Piracy and Protection’; GRDIN and Kalpavriksh; November 2002

International Convention for the Protection of New Varieties of Plants, 1991

Your Environmental Rights and Responsibilities; A Hand Book for Sri Lanka; Environmental Foundation Limited; 2009

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