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**FARMER RIGHTS IN MALAYSIA: REVISITING THE
IMPLEMENTATION OF THE PROTECTION OF NEW
PLANT VARIETIES ACT 2004**

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ABSTRACT

Agriculture is crucial in guaranteeing food security all over the world. Essentially, farmers play a significant role in food security. Producing improved crop varieties is one of the ways to increase sustainable crop productivity. Farmers in Malaysia, in particular small-scale farmers, are still practicing and relying on some traditional agricultural practices. In order to protect new varieties of crops and plants, there exists some legislation vis-a-vis intellectual property rights (IPRs) in the field of agriculture. Patents and plant breeders' rights, for instance, bring with them some legal implications towards farmers. This paper aims to examine the existing legislation governing farmer rights in Malaysia, focusing on the relevant provisions of the Protection of New Plant Variety Act 2004 (PNPVA). The research also dwells on current issues pertaining to PNPVA's implementation and the ongoing proposed amendment. The research has employed doctrinal

analysis in its investigation and analysis, which has been based on the available data and materials, supported with input collected from an interview with the Department of Agriculture (DOA). The study has found that the concept of farmer rights should not be jeopardized amidst the Government's commitment in harmonizing the law with the International Convention for the Protection of New Varieties of Plants (UPOV), while optimizing the access of Malaysian farmers to new crop varieties and plant technologies. The present study has also come to the conclusion that the Government must balance the protection afforded to plant breeders with that granted to the local farming community in Malaysia.

Keywords: Food security, farmer rights, plant variety protection, traditional agricultural practices.

INTRODUCTION

Farmers play an important role in economic development, as well as a significant role in society, both in developing and developed countries. Their role in agrobiodiversity conservation and innovation is recognized worldwide. Undeniably, protecting farmer rights is crucial to ensure food security and sustainability. The concept of farmer rights has been propounded by the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA) (FAO, 2017). This concept emerged in the 1980s as a response to the growing demands for plant breeders' rights, basically to highlight the issue of the unremunerated innovations of farmers. Notably, this development could be traced back to the fact that farmers have been practicing the informal breeding process. This is on top of their role and important contribution to conserving and preserving biological and genetic resources from time immemorial. In this regard, farmers deserved to be recognized and rewarded in the same way the contribution of breeders in the development of new varieties was recognized and rewarded (Singh, 2011). The dynamic facet of intellectual property protection has led to the inclusion of plant varieties protection rights with its monopoly character on genetic resources via the International Convention for the Protection of New Varieties of Plants (UPOV), which was adopted in 1961. The adoption of UPOV has raised concerns as it affects the traditional rights of farmers. Although UPOV, which emphasizes the ownership and rights of breeders over plant

variety, originated from Europe, it has gained strong support from many developed countries. However, it is important to note that under UPOV, farmer rights have not been afforded a similar protection. As a matter of fact, in many developing countries, traditional farming is seen as an important component of the agricultural industry and seed supply, which is made possible through informal innovations by local farming communities.

ITPGRFA is seen as a significant milestone in the protection of farmers as it has managed to establish a full-fledged concept of farmer rights at an international forum (via Resolution 3/2001 of the FAO Conference) in November 2001. As far as Asian countries are concerned, some of them such as India, Thailand, Indonesia, Philippines, and Malaysia have enacted *sui generis* legislation with respect to farmer rights in order to protect their farmers, inclusive of small and traditional farmers. Having said that, it is to be noted that Malaysia enacted the Protection of New Plant Variety Act 2004 (PNPVA) in the year 2004. This Act came into operation on 20th October 2008 via the Protection of New Plant Varieties Regulation 2008.

The role of farmers and their rights in the agricultural industry could be explored in relation to ITPGRFA and the existing intellectual property protection laws for plant varieties (Musa & Ghadas, 2016). The authors of the present paper have focused on the protection as provided under Malaysia's PNPVA and compared it with those accorded to farming communities in India under the country's plant variety rights legislation. Most importantly, the authors deliberated on the issue of whether the existing legislation in Malaysia contributed to the welfare of small farmers, or did the said legislation held back these small farmers' rights in relation to their traditional agricultural ways. The role of the local smallholder farmers in the agricultural sector is indispensable as they have been and still are a vital source of seeds, and these could usually be traced to the local markets, the seeds saved at the farmers' own farm, as well as from their relatives and neighbours within the farming communities (FAO, 2019). It is to be noted that Malaysian plant variety legislation, to some extent emulated India's *sui generis* formula, with its aim of giving due recognition to small farmers, and the indigenous and traditional farming communities across the country (Musa, 2019). Musa (2020) was also of the view that PNPVA 2024 "focuses more on the process of registering and acquiring breeders' rights so that the above objectives on recognition

of farmers, local and indigenous communities are recognized more as an exception rather than as a stand-alone right”. Interestingly, the authors have conducted a critical analysis of the database on plant variety registration in Malaysia, made available on the Department of Agriculture’s official website and concluded that “most of the registered varieties are under the name of commercial companies rather than individual farmers” (Musa, 2020).

It is worth mentioning that despite the absence of reported case laws on the issues of farmer rights, a group of farmers known as the Malaysian Civil Society and Farmer Group has been vocal and proactive in submitting a memorandum on plant variety protection that emphasizes, *inter alia*:

“Recognizing as an exception to PBRs, the absolute right of small farmers to save seeds/propagating materials on their own holding, to exchange seed/propagating material among small farmers and to sell farm saved seeds in situations where a small farmer cannot make use of the farm saved seed on his own holdings due to circumstances beyond the farmer’s control. The average land holding for farmers is 1.32 hectares, and for smallholder farmers in Malaysia, the main source of seeds is often from local markets, farm saved seed, relatives and neighbours” (Malaysian Civil Society, 2019).

In light of the foregoing discussions, this paper is aimed at exploring and highlighting the relevant existing legislations which have been designed to govern farmer rights in Malaysia, focusing on the relevant provisions of the PNPVA. The present paper has also dealt with the issues and challenges surrounding the execution of the PNPVA, including the on-going revision and proposed amendment. The paper will now continue to discuss the literature review and the methodology adopted for the research.

LITERATURE REVIEW

In Malaysia, the PNPVA provides legal protection for plant breeders when they register their new plant variety. Most importantly, farmer rights are also incorporated in the Act by way of exception; the

provisions are substantially based on UPOV 1978. However, the Malaysian legislation on plant breeder rights differs from UPOV in the sense that the Act also provides recognition of traditional variety and some aspects of farmer rights. Malaysia has attempted to join UPOV by submitting the 2004 Act to the UPOV Council for assessment of conformity with UPOV 1991. In response to the submission, the UPOV Secretariat has responded by recommending substantial amendments to the entire text; the notable ones include the deletion of Section 31(1)(e) and the removal of Section 31(1)(f) from the list of exceptions. In essence, the changes, if adopted, would affect the legal protection of traditional plant variety and the provisions related to farmer rights (to exchange and sell farm-saved seeds, and equitable benefit sharing) (Shashikant & Meienberg, 2015). Malaysia has decided to put its intention to join UPOV in abeyance until 2016, while it gave its full focus on the implementation of PNPVA 2004.

According to the Food and Agriculture Organization of the United Nations (FAO), “in many developing countries, more than 80 percent of the seeds/propagating material is from the farmer managed seed system (informal seed sector) through practices of freely saving, using, exchanging and selling seeds among farmers” (FAO, 2019). During the FAO Global Consultation (2017), the issue related to farmer rights was highlighted by one of the participants; it was pointed out that the UPOV lacked recognition of the farmer seed system, and it limited the implementation of farmer rights. At this juncture, it is worth mentioning that India has been described as the leading proponent of farmer rights via the enactment and implementation of the Protection of Plant Varieties and Farmers’ Rights Act 2001. Charles Lawson (2015) pointed out that the government of India has managed to establish a scheme to cater for the needs and the rights of farming communities in the country, particularly via the specific rights to register a new plant variety, compensation from the Gene Fund for ‘conservation of genetic resources of land races and wild relatives of economic plants and their improvement through selection and preservation,’ and a right ‘to save, use, sow, re-sow, exchange, share or sell his farm produce’ that is not packed and labelled as a protected variety. The farmer rights feature in India, namely to seed is crucial in maintaining the livelihood basis of the farming community and the country’s self-reliance in agriculture. The Act was very much anticipated by the local farming community but some authors have written about the insufficiency of the legislation in certain aspects.

Chaturvedi and Agrawal (2011) in their analysis, emphasized that while farmers are important stakeholders in policymaking, there is a need for adequate direction to ensure that the farmer rights movement in the country achieves its objectives, as well as the need for an effective legal mechanism to implement those rights. All in all, the legislation of farmer rights in India remains significant and could serve as a useful model of a legal framework, in the sense that it manages to combine the aspects of stewardship (*i.e.*, rights to rewards and benefit sharing), ownership (rights to save, sell, re-use, exchange) and innovation (rights to register seeds that meet the distinct uniform stable (DUS) standards).

In Europe, farmer rights are legally recognized by way of privilege or exception to breeder rights, via the establishment of the UPOV Convention in 1961, and was later amended in 1972, 1978 and 1991. Plant breeder rights are classified as *sui generis* protection which are granted to plant breeders. These rights assure a monopoly. The exclusive and strong rights, akin to patent rights under intellectual property law, are bestowed on any plant variety that satisfies the requirements of being distinct, uniform and stable. These varieties are usually developed and owned by commercial breeders. Currently, 75 countries are members of UPOV, but many developing countries have yet to become a member. The UPOV Act 1991 for instance, requires UPOV member countries to ensure that farmer privilege be regulated ‘within reasonable limits and subject to safeguarding of the legitimate interests of the breeder.’ Obviously, farmer rights are not the focus under UPOV provisions, as the priority is to protect plant breeders, while many farmers in developing countries fall under the category of peasants or small-scale farmers.

To balance the rights of farmers and breeders, Correa (2017) for instance, has strongly proposed for a *sui generis* regime for the protection of plant varieties to be designed so that it would allow for the full realization of farmer rights, including the rights relating to seeds. It is to be noted that the farmer rights issue is gaining popularity in Europe. For example, DIVERSIFOOD, a project by a Norway research institute (funded by the European Union) has pointed out the critical need for a legal space for farmers to continue to save, use, exchange and sell seed and plant propagating material to maintain and enhance the diversity of cultivated plants. It is of the view that current legislation in the EU gives rise to severe restrictions on these

practices, hence affecting farmer rights as provided in the ITPGRFA. It is also worth noting that family farming is a key to the security of Europe's food supply as it represents the bulk of European agriculture. According to 2013 EU statistics, family farming accounted for more than 65 per cent of utilized agricultural land (Jacob, 2019). The apparent conflict between farmer rights and breeder rights was analyzed by Bruins (2017), who found that the conflict lies in the fact that UPOV seeks to encourage the development of new plant varieties, while the ITPGRFA aims for the conservation and sustainable use of plant genetic resources, and access and benefit sharing. Eventually, there is a real need for all countries to focus on balanced ways of implementing the obligations under both UPOV and ITPGRFA, and reflect on their national situations.

In other developing countries, such as Thailand, many provisions of the Plant Varieties Protection Act 1999 are quite similar to those in Malaysia. The 1999 Act, which was based on UPOV 1978, provides legal protection for breeders of new plant varieties. Farmer rights, which are known as farmer privileges, are recognized by way of exception, in the form of restriction on the rights of breeders. The exclusive rights granted to breeders do not apply concerning the cultivation or propagation by a farmer of a protected new plant variety using the seeds he has saved from his previous harvest. Nevertheless, this exclusion does not cover the situation where a farmer is exchanging or selling the materials with other farmers. In this regard, farmer privileges are placed under the discretion of the Minister of Agriculture, with the approval of the Commission, that is the National Committee on Plant Varieties who has the authority to allow for the cultivation or propagation of a promoted plant variety by a farmer, with the condition that it is made in a quantity not exceeding three times the quantity obtained. The Department of Agriculture, Ministry of Agriculture has proposed a Draft Bill on Plant Variety Protection to amend the 1999 PVP Act so that Thai law will comply with the UPOV 1991. The Bill has undergone a few revisions by the National Legislative Assembly and the latest changes demonstrate the effort to tackle a specific issue in recognizing the rights of local farmers in using local rice varieties. However, according to Piyaporn (2019), such an amendment was written in a way that led to the impact of excluding local varieties from obtaining the endorsement, and hence such varieties would never be on par with the ones developed and dominated by multi-national corporations. The PVP Act of Thailand

is, nevertheless, not free from criticism. Lertdhamtewe (2015) criticized that the Act does not manage to provide a comprehensive legal framework so that farmers and breeders can benefit from the system. The author argued that despite the Act giving preference to farmers and local communities, with most of the protection related to local domestic plant varieties, this preference has not been very helpful for both farmers and local societies. This is because farmers and local communities have not yet been able to claim the benefits of the generous provisions protecting local domestic plant varieties. At this juncture, there is a real need for a regulatory reform of the PVP law, with specific regulatory provisions to address local conditions, so that the mission of promoting innovation would not threaten the livelihood of farmers.

In the Philippines, the plant breeder rights legislation was enacted in 2002, via the Philippine Plant Variety Protection Act (GOVPH Official Gazette, 2002). The 2002 Act does not define the term 'farmer,' but it is defined in the Republic Act No. 6657 to mean all engaged in the cultivation of crops living within the territory of the Philippines (Section 3(f)). Another related legislation is the Magna Carta of Small Farmers which defines small farmers in terms of income. Similar to the Malaysian and Thai PVP laws, the Philippine Act of 2002 does not recognize the rights to farm saved seeds under farmer rights as such, but provides it as an exception to the breeder rights. The 2002 Act also provides for a framework for community registration of locally bred varieties. Farming communities and *bona fide* farmer organizations are highly encouraged to establish their respective local registry systems to register or build an inventory of locally bred varieties (Singh, 2011).

From the above literature review, it is observed that as far as Malaysian plant variety protection is concerned, there is still currently a lack of literature in this specific area, and there is yet any research paper discussing the implementation of the protection of farmer rights in Malaysia. Having said that, any legal study on this area would be beneficial to examine the adequacy of the current legislation aiming to protect farmer rights in Malaysia, after the implementation of PNPVPA which has been in effect since 2008. This paper also attempts to investigate the issues relating to the implementation and analysis of applications, and the registration of new plant varieties based on the database as published on the official website of the DOA. The findings

of this study will add new perspectives on farmer rights in Malaysia and contribute significantly to the current literature in this area.

METHODOLOGY

The present research employs a doctrinal analysis in its investigation of issues on farmer rights in Malaysia. It is an analysis of the available data and relevant materials on farmer rights in the country, and supported with inputs gathered from an important government agency that is, the Malaysian Department of Agriculture (DOA). Generally, a doctrinal analysis is the established and traditional genre of research in the legal field. This is because the analysis helps assess whether the content of a legal opinion was effectively reasoned or whether it has implications for future cases (Tiller & Cross, 2005). Specifically, the primary materials used for the study included statutes (PNPVA, PVP laws in Thailand and Philippines) and international treaties (UPOV, ITPGRFA), while the secondary data comprised reports and statistics made available on the official website of the DOA. The important primary data and information pertaining to the PVP implementation were collected from a semi-structured interview held with two officers from the Crop Quality Control Division, of the DOA. The main purpose of the semi-structured interview (via open-ended questions) was to seek the views of the DOA officials, and gather the necessary information from the primary agency that was directly involved with the administration and management of plant variety application and registration in Malaysia. The interview session was done online due to the recent pandemic situation. The input gathered from the interview has been incorporated in the following part of this article, under discussion and findings.

DISCUSSION AND FINDINGS

Implementation of the PNPVA in Malaysia: A Brief Outlook, Issues and Challenges

As has been mentioned in the preceding sections, this paper focuses on the current legislation governing farmer rights in Malaysia, in particular the relevant provisions of the PNPVA. This section will elaborate on some of the issues and challenges surrounding the

execution and implementation of the PNPVA, including the ongoing revision and proposed amendment. Generally, it is the consensus that provisions in the PNPVA are designed to protect the rights of small, traditional farmers and indigenous farming communities in Malaysia. In terms of filing and registration, it is also found that the applications for the new varieties of plant are largely dominated by commercial, foreign breeders, as compared to the meagre applications submitted by local companies and individual farmers.

(a) Legal Framework of Plant Variety Protection in Malaysia

Agriculture is one of the important economic sectors in Malaysia, with contributions made by both small, traditional farming communities as well as large, commercial agricultural companies. Since the early 19th century, new varieties of plants have played a significant role in improving the quality of crops, as well as increasing productivity. New varieties are also inevitable to ensure a better resistance against pests or diseases. With the main objective of providing legal protection for new varieties of plants, the Government has opted for a *sui generis* framework via the enactment of the PNPVA 2004. In this regard, it is to be noted that plant varieties do not qualify for protection via the patent law, as the Patents Act 1983, in Section 13(b) expressly excludes the patentability of plant variety:

“Notwithstanding the fact that they may be inventions within the meaning of section 12, the following shall not be patentable: (b) plant or animal varieties or essentially biological processes for the production of plants or animals, other than man-made living micro-organisms, micro-biological processes and the products of such micro-organism processes.”

As far as international treaties are concerned, Malaysia has been a member of the World Trade Organization (WTO) since 1995 and consequently acceded to the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement). The enactment of PNPVA 2004 is inevitable to fulfill the country's obligation under Article 27.3 (b) of the TRIPS Agreement (WTO, 2024):

“Members may also exclude from patentability: (b) plants and animals other than micro-organisms, and essentially

biological processes for the production of plants or animals other than non-biological and microbiological processes. However, 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(b) essentially obligates the member countries to ensure definite legislation to protect plant varieties. This could be done via patent laws or via an effective *sui generis* system. The term ‘*sui generis*’ generally denotes a legal framework which is ‘unique’ or ‘of its own kind’ (FAO, 2019). Malaysia has decided to opt for the second mode, with the enactment of PNPVA 2004. The 2004 Act officially came into force on 1 January 2007. However, the implementation only kick-started in 2008 with the promulgation of the PNPV Regulations 2008, which were gazetted on 20th October 2008. As expressly spelt out in its preamble, the Act is designed to protect plant breeder rights while at the same time recognize the role of farmers, local communities, and indigenous people who are responsible for creating new plant varieties. Besides, the Act also aims to spur investment and accelerate the development of new plant varieties both in the public and private sectors while facilitating much easier access to improved varieties of crops and plants, as well as plant genetic resources. In short, the Act has the objective of assisting commercial breeders and local communities to develop new varieties of plants for the country’s agricultural industry.

Coming back to the issue of farmer rights, in Malaysia, although there is no specific statute to protect farmer rights, such protection could be found under some relevant provisions of the PNPVA 2004, such as the interpretation section and section 31. In the interpretation section, ‘farmer’ is defined as “any person who; (a) cultivates crops by cultivating the land himself; (b) cultivates crops by directly supervising the cultivation of land through any other person; or (c) conserves and preserves, severally or jointly, with any person any traditional variety of crops or adds value to the traditional variety through the selection and identification of their useful properties” while ‘small farmer’ means “a farmer whose farming operations do not exceed the size of holding as prescribed by the Minister.”

Other than the interpretation section, it is notable that section 31(1) PNPVA Act 2004 provides for the limitations of breeder rights: “The

breeder's right shall not extend to - (d) any act of propagation by small farmers using the harvested material of the registered plant variety planted on their own holdings; (e) any exchange of reasonable amounts of propagating materials among small farmers; and (f) the sale of farm-saved seeds in situations where a small farmer cannot make use of the farm-saved seeds on his own holding due to natural disaster or emergency or any other factor beyond the control of the small farmer, if the amount sold is not more than what is required in his own holding". It is also worth noting that breeder rights are defined in section 30 of the 2004 Act to denote: "a holder of a breeder's right shall, in respect of the registered plant variety for which the right is granted, have the right to carry out all or any of the following acts on a commercial basis: (a) producing or reproducing; (b) conditioning for the purpose of propagation; (c) offering for sale; (d) marketing, inclusive of selling; (e) exporting; (f) importing; (g) stocking the material for the purposes mentioned in paragraphs (a) to (f)".

It is also observed that despite the PNPVA's provisions to cater for the rights of commercial breeders with regard to their creation of any new plant variety, the Act is also designed to embrace the protection of specific seed varieties which are invented and produced through breeding activities by traditional farmers, local communities, or indigenous people. Section 14(2) of the PNPVA 2004 specifically spells out the criteria of the variety created and developed by these farmers, that is, it must fulfil the requirements of new, distinct, and identifiable. In this regard, it is worth noting that the usual conditions of 'uniform stability' as imposed on a new PVP are irrelevant as far as the above provision is concerned. Arguably, the requirement of 'identifiable' could be seen as a lower threshold in comparison to the requirement of 'uniform stability' (Musa, 2020). Interestingly, such a requirement is meant to balance the rights of breeders from the commercial industry as well as those who are traditional farmers.

Therefore, these provisions, in particular Section 31, impliedly give recognition by way of an exception rather than stand-alone rights, yet nonetheless are parallel to the concept of farmer rights, as enshrined in the Food and Agriculture Organization of the United Nations (FAO) Treaty 2004. Article 9.1 of the Treaty which states:

"The contracting Parties recognize the enormous contribution that local and indigenous communities and farmers of all regions of the world, particularly those in

the centre of origin and crop diversity, have made and will continue to make for the conservation and development of plant genetic resources which constitute the basis of food and agriculture production throughout the world.”

It is worth noting that in the FAO Treaties Database, Malaysia is recognized as one of the countries which has already ratified the FAO Treaty 2004, that is the International Treaty on Plant Genetic Resources for Food and Agriculture. This clearly reflects the country’s strong commitment to safeguarding the interests of its citizens, especially the farmers and breeders, as well as the whole nation.

Despite all of the above provisions in the PNPVA 2004, which indirectly recognize farmer rights in Malaysia, the real challenge lies in the implementation of the Act. Although the Act has commenced since 2008, after the gazette of the PNPV Regulations 2008, it is still crucial to examine whether the above provisions are really designed to protect the rights of the small, traditional farming communities, as well as indigenous farming communities in Malaysia. Furthermore, the question arises as to whether the provisions under the Act could play a significant role in accelerating the filing and registration of a new plant variety. An analysis of the database available on the official website of the Malaysian Department of Agriculture (DOA) reveals that a majority of the registered varieties are owned by those commercial companies which have consistently filed such applications, in comparison to a very small number of applications that came from individual farmers or indigenous farming communities. In terms of the types of plants, the applications ranged from new varieties of fruits, ornamental, industrial crops, forest plants to cereals, vegetables, and mushrooms. The data as published on the DOA’s website show that from the year 2009 until 2018, a total of one hundred and eighty-four applications for breeder rights were received and seventy-four varieties have been published in the official gazette of the Malaysian Attorney-General’s Chamber. Out of this total number of applications, 67 percent were submitted by foreign companies, 27 percent by government agencies and public universities, while the remaining 3 percent came from private local companies as well as local individual farmers, respectively.

The above analysis of the data apparently reflects that the applications for new varieties of plant are largely dominated by commercial,

foreign breeders, as compared to the meagre applications submitted by local companies and individual farmers. Based on a semi-structured interview held with two officers representing the DOA (Crop Quality Control Division), the following views were expressed:

“From our observation, local R&D especially the public sector focusses their breeding programs on staple crops such as rice, sweet potato, and tapioca; fruit tree crops such as durian, rambutan, carambola; and commodity crops such as oil palm, rubber, cacao, forest species which take longer time in producing new varieties. Most of them possess a longer growing period, unlike foreign applications which cover mostly the annual ornamental and vegetables.”

Therefore, the demographic trend of application could be attributed to the fact that breeding programs under the purview of local research and development (R&D), particularly in the public sector, revolve around specific types of plant, i.e., staple crops, fruit tree crops and commodity crops. For staple crops, the focus is on rice, sweet potato, and tapioca. Popular local fruits among Malaysians, such as durian and rambutan are given special emphasis for research while oil palm and rubber are also treated equally for R&D purposes. The common trait of the above-mentioned plants is that they require a considerably long period before a researcher can succeed in producing a new variety. The next step, that is, to file for a registration of the new variety could only take place after the new variety is created. It is observed that comparatively, those plants require longer growing periods than those foreign applications which revolve around the annual ornamental and vegetables. The DOA has also pointed out that these slow-growing trends in local PVP applications were also due to the time-limited research grants that were awarded to researchers in the public sector. The officials from the DOA stated that:

“These slow-growing trends in local PVP applications are also due to the time-limited research grants causing the development of a new variety are not able to finish with insufficient time and funding.”

This time constraint is an impediment to the successful R&D of a new variety. In many instances, the researchers struggled to produce any

research outcome and eventually were unable to complete their R&D projects, nor yield the desired results within the relatively short time frame.

Other than the above reasons, there were also some other root causes which had led to the low percentage of local PVP applications. The DOA has identified several contributory factors, such as the fact that local farmers and breeders have yet to fully exercise their rights and scopes, as provided for under the PNPVA. Local protected varieties too, failed to meet the market demand. Besides, it was also revealed that certain varieties were developed as F1 hybrid seeds. F1 hybrid seeds denote a specific breeding process involving the selective breeding of a plant by way of cross-pollinating two distinct parent plants, and this process is apparently biologically self-protected.

Looking at the issue from another perspective, the data and statistics apparently resonate with the proposition made by Prof. Gurdial that local farmers are “being disempowered and becoming mere recipients, not breeder-innovators, of seeds developed by big seed companies” (Nijar, 2015). This state of affairs in the long run will lead to a situation where the commercial varieties, including the ones belonging to multinational companies, are replacing the countries’ local varieties. Eventually, it is not surprising that the seed market and agricultural sector will come under the control of those multinational corporations.

It was also confirmed by the DOA that it has been intensifying its efforts to attract more foreign corporations to file their application to register new plant varieties in Malaysia so as to enable protected varieties to be released and made available in the country. This focus seems to be on the right track, based on the number of applications of new varieties received by the DOA. Another important role of the DOA is to create and enhance awareness of PVP among local breeders, small farmers, local growers, and the public in general. To accomplish this aim, the DOA has from time to time carried out some programs and taken relevant initiatives such as outreach programs and awareness seminars for the benefit of the public and local breeders. These are important to create awareness and a better understanding of the benefit of plant breeder rights, the limitation of protected variety as provided under the law, as well as to explain the possible impact of infringement and the workings of the general PVP system. Besides,

the DOA also provides advice, relevant information and necessary guides to farmers on superior quality crop varieties, as well as the latest and modern plant technologies to be utilized to suit the soil and land, thus, helping to enhance soil fertility. For this purpose, farming specialists and the relevant experts as identified by the DOA are sent to carry out visits to farming sites. These nationwide visits are usually done based on requests.

The discussion on PVP would not be complete without a reference to UPOV, which aims to recognize the significant role of breeders of new varieties of plants by affording certain legal protection via intellectual property rights based on specific conditions. As far as UPOV is concerned, Malaysia is not yet a member of UPOV and hence, the country is neither obliged to enact its PVP legislation to comply with UPOV 1978 nor UPOV 1999. As has been mentioned in the earlier part of this research paper, even though the provisions of PNPVA 2004 provisions are generally similar to UPOV, it has to be admitted that the 2004 Act differs from UPOV in some respects, in particular the recognition given to traditional plant variety. This also includes the provisions designed to protect farmer rights, an issue that forms the basis of this paper. The country has always aimed to fly high in enhancing its agricultural industry and one of the ways is via a reliable protection of the rights accorded to farmers and plant breeders. The enactment of the PNPVA 2004 was aimed to provide and facilitate wider opportunities so that new and improved varieties would be accessible to local farmers and growers. For example, temperate flower growers in Malaysia such as in Cameron Highlands and other areas, were looking forward to obtaining new varieties from countries such as the Netherlands.

With that in mind, Malaysia seemed to have put in a serious effort to be a part of UPOV when the former submitted the 2004 Act to the UPOV Council for the assessment of conformity with UPOV 1991. The UPOV Secretariat responded to Malaysia's request by recommending significant changes to the entire text. Most significantly, the UPOV Secretariat, among other things, recommended the deletion of Section 31(1)(e) and removal of Section 31(1)(f) from the list of exceptions. As has been noted in the preceding discussion, if Malaysia agrees to adopt the proposed changes, it essentially will erode the statute's pan-Malaysian nature, thus affecting the legal protection of traditional variety and the provisions related to farmers rights (namely to exchange and sell farm-saved seeds, and equitable benefit sharing) (Shashikant

& Meienberg, 2015). Malaysia has initially put its intention to join UPOV in abeyance until 2016, while prioritizing the implementation of PNPVA 2004 which officially commenced in 2008. The effort to harmonize the PNPVA 2004 with UPOV was resumed sometime in 2016 via the preparation to draft a bill with the aim of amending the relevant provisions of the 2004 Act. The following part of this paper will delve into this issue.

(b) Towards UPOV Accession: The East Asia Plant Variety Protection Forum (EAPVP) Forum

To ensure the harmonization of PVP legislation with other countries, Malaysia has joined the East Asia Plant Variety Protection Forum (EAPVP). The Forum which has been established since 2007, is dedicated to achieving two crucial objectives, that is, “(i) Strengthen national PVP system consistent with the UPOV Convention to encourage investment in plant breeding, (ii) Contribute to support achievement of UPOV membership, to facilitate harmonization of application and examination procedures, and to enhance efficient PVP cooperation in the region”. All the East Asia countries are members of this Forum, in addition to the ASEAN-Plus Three (APT) (consisting of 10 ASEAN Member States, China, Japan, and the Republic of Korea). The Forum has been successful in holding its annual meeting and interestingly, reports of the meeting are conveniently available and accessible on its website. At this juncture, it is to be highlighted that Malaysia managed to present its individual implementing strategy report during the latest round of the Forum held in November 2020.

Based on the report, it can be deduced that Malaysia has laid out a comprehensive plan towards the accession of UPOV. For example, between the years 2016 to 2018, a series of legal consultation sessions were organized with UPOV representatives as well as stakeholders. Among the vital objectives of the legal consultations were “to seek harmonization and alignment with UPOV Convention 1991 and strengthened the good relationship between Malaysia and UPOV.” The consultation sessions paved the way for internal discussions between UPOV representatives and the Malaysian Ministry of Agriculture (MOA), focusing on certain provisions as pointed out by UPOV Legal Advisors. Another important point worth noting is that despite the fact that the MOA has been responsible in arranging for some consultation sessions with stakeholders since 2019, the plan to accede to UPOV was kept in abeyance since early 2020 due to the pandemic outbreak.

As far as the stakeholder consultation was concerned, the parties that were involved comprised plant breeders, PVP agents, the association of growers, the Genetic Society of Malaysia, and NGOs. As has been highlighted in its report, the objectives of the stakeholder consultation were “i) To get views, concerns and recommendations from various stakeholders on each clause in the draft of The Protection of New Plant Varieties (amending) Bill which has been drafted in line with UPOV Convention 1991; and ii) To provide opportunities to who will likely be affected or have an interest to fully understand the PVP system.”

With regards to the NGOs in Malaysia, it is worth noting that most of them are in the agribusiness sector such as farmer-based associations or organizations. There is a specific network of farmer organizations that come under the administrative jurisdiction of the Farmers’ Organization Authority, a statutory body under the purview of the DOA. These include the Federation of Vegetable Farmers Association of Malaysia; the Malaysian Fruit Farmers Association; the Roundtable on Sustainable Palm Oil and so forth. The role of the stakeholders, including these NGOs, is crucial because they are the ones who are directly involved in the industry and their views are instrumental in striking a balance between the need to have effective, feasible legislation to protect their rights and interests from being jeopardized and marginalized. The legislation is essentially meant to secure farmer rights and freedom to store, share, and sell their seeds.

In the interview with the DOA officials, they had informed that:

“The amending bill has been presented during six rounds of stakeholders’ consultation sessions which involve the plant breeders’ representatives, NGOs, representatives from farmers’ associations, growers, exporters, seed companies and state governments and agencies since the year 2018. Issues concerning farmers’ rights, traditional varieties, and biopiracy are some of the topics raised by stakeholders and have been answered and accepted during the sessions.”

Therefore, based on the input gathered from the interview, it was found that the bill to be amended was presented during six rounds of stakeholder consultation sessions. These sessions involved the plant breeder representatives, NGOs, and representatives from the above mentioned farmer associations, as well as growers, exporters, seed

companies, and state governments and agencies. The consultations have been going on since the year 2018. Most importantly, the hot topics and debates encompassing farmer rights and protection for traditional varieties were voiced out by stakeholders. These issues have undergone thorough deliberations among the participants.

All in all, based on the information received from the DOA and the country's report in the EAPVP Forum, it is observed that the effort towards UPOV accession is continuing based on the justification to strengthen Malaysia's PVP system. The MOA has been working hard towards finalizing it to ensure that the proposed amended provisions are in line with UPOV 1991 before the next step of presenting the system to be tabled in Parliament.

CONCLUSION AND RECOMMENDATION

The PNPVA 2004 is unique in that the provisions have been carefully drafted and designed to harmonize the distinct interests of commercial breeders, farmer rights, and indigenous people. The execution and implementation of the PNPVA 2004 is inevitable in order to fulfil Malaysia's obligation to the WTO and the ITPGRFA. The author fully agrees and echoes the suggestion by the FAO that the political will is the cardinal factor to ensure a successful *sui generis* PVP system which has the focus to "achieve the right balance between breeders' rights and those of farmers and the society at large, as well as recognize and support the farmer managed seed system." (FAO, 2019).

As pointed out by the DOA and reflected also in the statistics in the database of application and registration of new plant varieties, many Malaysian farmers have yet to adopt modern and advanced ways of farming, and a lot of them have limited knowledge, expertise and skills with regards to the latest crop varieties and plant technologies. Thus, the role of the DOA in undertaking continual efforts and initiatives in educating farmers by offering various first-hand assistance and advice pertaining to plant varieties and modern technologies should be intensified.

In terms of a legislative framework, the Malaysian government should always set its priority in protecting marginalized small farmers, local farming communities and indigenous people. This is because it is evident that these groups have a significant role to play, and contributions to make in the development and growth of the country's

agricultural sector. Their rights under the farmer rights concept should not be compromised despite the country's effort to align its current legal framework with the UPOV and PVP legislations of other neighboring countries, while facilitating access of Malaysian farmers to new crop varieties and plant technologies, in particular those new varieties from abroad. After all, the enactment and implementation of PNPVA 2004 via a *sui generis* system itself is permitted and acknowledged under TRIPS. Having said that, there is always room for improvement to accelerate the number of varieties submitted for registration by local companies and individual farmers. Arguably, if Malaysia proceeds towards full accession of UPOV by amending the relevant provisions as required by the UPOV secretariat at the expense of the existing PNPVA 2004, such an action could be seen as a regressive decision as the current protection of farmer rights would be sacrificed.

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