Layering Protection of the Rights of Plant Breeders in Kenya: A Contrast of Law and Practice

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While it may not be explicitly evident, several statutory tools are available to plant breeders to facilitate the protection of their creations in the market. The primary tool remains plant breeders' rights (PBRs). An examination of legislation available in Kenya illuminates other mechanisms as well, these being seed certification requirements and anti-counterfeiting legislation. PBRs are private rights, materialised at the option of the breeder, as a form of protection for their intellectual creations in improving plant varieties. Under the Seeds and Plant Varieties Act (1972) and the Seeds and Plant Varieties (Amendment) Act (2012), over 700 grants of PBRs have been made since 1999, when the law was put to effect (compared to the double number of applications). What is noticeable is that the majority of grants as well as applications for PBRs are for horticultural crops, especially cut flowers. Applicants and grants for food crops have remained low.

The existence of PBRs in Kenya's legislative regime pre-dates its obligation under the TRIPS Agreement of the WTO, where under article 27.3(b), it is required to provide for the protection of plant varieties either by patents or by an effective sui generis system, or by a combination thereof. While Kenya became a party to the WTO in 1995, its *sui generis* law on PBRs was already enacted, but only put into effect in 1999 after the country ratified the 1978 Act of the International Union for the Protection of New Varieties of Plants (UPOV). In 2012, the PBRs law was updated via the Seeds and Plant Varieties (Amendment) Act (2012) and in 2015, Kenya updated its UPOV membership by ratifying the 1991 UPOV Convention.

For certain improved varieties, a plant breeder may be under a regulatory obligation to apply for seed certification as a pre-condition to seed marketing, which is separate from PBRs. Here, the plant breeder has no option, unlike the case for PBRs, as the purpose of seed certification is to satisfy a regulatory condition. Unlike PBRs which take the form of private rights, certification itself enables the seed regulator to exercise police powers in the market over the certified variety, in the interest of the public. The effect of certification on enforcement is the transfer of the cost thereof to the state. The leading statute for certification is Crops Act (2013), which sets out the type of crops for which seed certification is compulsory, leaving the mechanism of the certification process primarily, to the Seeds and Plant Variety Act (1972). Over 900 varieties of crops are contained in the National Crop Variety List, having undergone certification, with a vast majority being food crops. This is not surprising because the prescription list provided by the law of the crops for which certification is mandatory is dominated by food crops, with a few cash crops, grasses and fodder crops. The availability of seed certification laws appears natural, with Kenya having a pre-independence membership to the International Seed Testing Association. Evidence abounds of seed testing and plant breeding activities going back to1911 when one of the early colonial settlers - Lord Delamare, employed an Australian breeder, to cross several varieties of wheat.

A final set of rights to a plant breeder lies in anti-counterfeiting legislation. Kenya's anti-counterfeiting legislation, the Anti-Counterfeit Act (2008), extends its scope of policing from trademark infringement and copyright piracy

to patents and PBRs. Availability of this option is premised upon the owner of PBRs having taken out the right, both in Kenya and beyond, as long as the goods and subject matter of infringement are in Kenya. Section 2 of the Anti-Counterfeit Act defines counterfeiting as actions against goods protected by intellectual property rights, a term which again is defined broadly to include PBRs. Similar to seed certification laws, the anti-counterfeiting legislation shifts the burden of policing the market from the owner of the intellectual property rights to the state. Inspectors under the anti-counterfeiting law as well as the seed laws have immense powers in their enforcement action. They can inspect places, premises or vehicles, where goods that are reasonably suspected of being counterfeit or infringing goods are found; and, even remove such goods from the market. Finally, it is worth noting that in both situations, enforcement action may be initiated either by a complaint by the owner of an intellectual property right or by the state through relevant agencies, such as the national revenue authority or seed regulator.

The Anti-Counterfeit Act (2008) was enacted during the era when IP enforcement schemes were being ratcheted up, beyond the minimum requirements under the TRIPS Agreement of the WTO. In any event, other treaties of relevance to which Kenya is a party to at the regional level, such as ARIPO and COMESA, do not oblige the country to make a legislation overkill as it has with its overarching anti-counterfeit legislation. However, it is notable that at the time the anti-counterfeit legislation was enacted, the East African Community, a regional economic bloc to which Kenya is a party had a proposal in place to enact similar legislation that was intended to have a direct effect on member states.

Despite the availability of the three layers of rights to plant breeders, the enforcement of their rights appears to be quite nominal. For PBRs, there is evidence of plant breeders, waiving their rights against potential infringers perhaps due to possible reputational repercussions that could arise. Furthermore, the farmers' privilege provision that exists in Kenya PBRs legislation adopted from the 1991 Act of the UPOV, remains unelaborated, and thus potentially, may provide leeway to (some of) the farmers who may be saving, reusing, selling and exchanging protected material. At the same time, Kenya's Constitution has given the International Treaty on Plant Genetic

Resources for Food and Agriculture (a treaty to which it is a party), the force of national law, meaning that the farmers' rights provisions cannot be ignored. In any event, being a party to the Nagoya Protocol has resulted in a national access and benefit sharing regime whose breadth appears to extend to plant genetic resources for food and agriculture, which creates opportunities for dilution of the extent to which PBRs may be asserted.

For enforcement through seed certification regulations, minimal action is usually seen during cereals planting season, and it is mainly concentrated in the large farming areas. As such, even when there is enforcement, it hardly concerns small holder farmers; it usually covers seed dealers and stockists in large scale farming areas. Finally, notwithstanding the broad approach taken by the anti-counterfeiting legislation, hardly any enforcement action has been executed for PBRs, which is mainly for two reasons. First, enforcement in the realm of trademark infringement and copyright piracy keeps the anti-counterfeit agency busy. Second, is perhaps a question of capacity to enforce PBRs, given the seed regulator's past experiences in dealing with other seed law related matters such as sanitary/phytosanitary procedures and seed certification.

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