

Asanka Perera

# Dilemmas of Intellectual Property Discourse in Sri Lanka

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*This book is dedicated to my late parents  
Eric Perera and Rohini Perera as a testament  
to their unconditional love.*

# Foreword

This book is a marvellous empirical insight into Sri Lanka's inconclusive, uncertain intellectual property lawmaking. It pays reading both as a country study and a socio-legal studies practice.

The book captures the dilemmas Sri Lanka's lawmakers face. The basic dilemma is whether to move intellectual property law from low to high technology support in key areas of the economy.

While Asanka is in a position to make her own expert recommendations, her main objective is to set out the choices Sri Lanka is facing, identifying discourses and deciphering possibilities. As we know, the discourse disagrees about the best intellectual property settings for developing countries like Sri Lanka. Foreign companies would be expected to benefit from high technology settings, some local entrepreneurs too, and perhaps the economy overall. But that move might come at the expense of Sri Lanka's small firms, subsistence farmers and individual researchers. This quandary is compounded by the extreme volatility of Sri Lanka's political economy in recent years.

The author crafts a socio-legal studies methodology to capture empirically the nature of Sri Lanka's lawmaking. That methodology is guided by her choice of theory. Governance theory can encompass the pluralist mix of global and local actors and processes at work in this field. Asanka then settles on discourse analysis to identify the raw material for her studies. This methodology enables her to get at the dynamic, ambivalent discourse of lawmaking in Sri Lanka, including, crucially, the areas in which—and the reasons why—high technology intellectual property laws have not yet been enacted.

Such a methodology requires her to identify the discourses of global lawmaking surrounding all countries—now, in this field the emphatic discourse of the WTO TRIPS Agreement, to which Sri Lankan governments have subscribed. Her Sri Lanka case studies provided lessons for governance theory, especially the contingency attached to the transfer of global scripts to local circumstances. Through the case studies, this contingency can be seen in the reluctance to require substantive examination of patent applications, the baulk at instituting plant breeders' rights

(despite draft legislation), and the tentative nature of science and technology intellectual property policy. Meanwhile, the discourse entertains the promulgation of such low technology settings as utility patents, the stewardship of plant varieties, and basic public research.

It appears that the global discourses do not coerce Sri Lanka. Sri Lanka is not taken to task for failing to implement TRIPS. This finding encourages recognition of the quieter role that other international organisations and private agencies play, notably the technical assistance which WIPO has offered Sri Lanka. Most of all, these case studies, which are grounded in close examination of public documents and bold interviews with senior officials and executives, demonstrate the significance that should be attached to the local Sri Lankan discourses, to their ructions and their silences.

From my experience, this kind of research is demanding. A Ph.D. can be a helpful vehicle, but it depends on the person. Let me say Asanka brings many qualities to the task, an upbringing and initial education in Sri Lanka, the pursuit of a global education from an Australian base, and the honing of a capacity to conduct field research. Her studies showcase forensic skills, putting theory to work, finding documents, obtaining interviews, making trips, presenting papers, analysing laws, and reaching findings. All done while teaching full-time here at Monash University and raising a family.

For several reasons, this book is a very welcome contribution to our understanding of intellectual property lawmaking.

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of Business Law and Taxation, Monash  
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# Preface

The book examines the present state of Sri Lanka's intellectual property rights (IPR) lawmaking discourses. It explores the global lawmaking discourses that impinge such as the *Agreement on Trade-Related Aspects of Intellectual Property Rights* ('TRIPS') and the *Patent Cooperation Treaty* ('PCT'). It moves to the local level of lawmaking discourse when it analyses the patent administration system, intellectual property policy making for the areas of science, technology and innovation, and the plant variety rights regime in Sri Lanka. It characterises the dilemmas faced in Sri Lanka's current intellectual property (IP) and innovation eco system.

Within the present context, global and local lawmaking both contribute to fostering IP and innovation in Sri Lanka. However, the interplay between lawmakers' discourses—about how different strengths of intellectual property support or do not support the innovation ecosystem—creates a particular relationship between IPR and innovation, which varies across countries. This relationship between IPR and innovation is examined in this book through two competing discourses, that is whether Sri Lankan lawmaking favours protection of a low-level technology that supports local innovation or a high level of technology protection that embraces foreign innovations.

The methodology used to conduct this inquiry incorporates data from documentary sources and interviews in the field, in Sri Lanka and abroad, with policymakers, scientists, researchers, industrialists, research institutes, government and private sector functionaries, ministry officials and officials from the World Intellectual Property Organization and the United Nations. The analysis in this book is not limited to 'black-letter' law, but with a socio-legal touch capturing how and why lawmakers continue to engage in extensive debates about what the law should be.

The present Sri Lankan economic status in general and IPR system in particular is in a state of flux. In 2022, Sri Lanka as a nation experienced the worst economic crisis, where millions of people clamoured into streets to ouster the former President campaigning against corruption, nepotism, maladministration and finally putting the country into bankruptcy without lack of financial reserves to run the country. The former President was outstared and a new President, without peoples' will was appointed two years ago, but the economic situation in the country remains the same. The present study on IPR discourses in Sri Lanka needs to be understood in



this context. Just as Sri Lanka as a nation does not have futuristic goals, most IPR laws are not clearly established or not implemented due to lack of political will or change in the government or policies. Hence, the future of Sri Lankan IPR lawmaking requires government will to look into IP as a driver for development and innovation rather than looking at IP as merely a ‘black letter’ term or ‘law on the books’.

In the above context, the present book would benefit the existing IPR lawmaking in number of ways: first, it identifies that development is a complex issue that is more than just treaty and legislation of law; second, it examines the failures in the modernisation of patent grant examination that have not assisted in high technology development of industry as indicated in international discourse but rather favoured local low technology; third, as a case study of a developing country reliant on agriculture, the failure to adopt plant breeder’s rights in 20 years indicates major local resistance, and the local alternative of a stewardship model, which is important considering the re-examination of IPR that is currently occurring internationally. Fourth, it provides an examination of the relationship between science and technology promotion and IPR in Sri Lanka, the problems experienced, but also the successes achieved. Fifth, this is the first case study approach on Sri Lanka in these specific areas. Sixth, though a case study on Sri Lanka, it also offers a model to approach similar situations elsewhere in the world.

It is my sincere hope that the legal scholarship and discourses underpins this book would spark an interest among the legal fraternity, policymakers, academics, students and interested stakeholders to transform Sri Lanka from lower-middle income economy to an upper middle-income economy, given Sri Lanka’s current economic circumstances.

Melbourne, Australia  
May 2024

Asanka Perera

# Acknowledgements

The present book *Dilemmas of Intellectual Property Discourse in Sri Lanka* stems from my Ph.D. thesis completed in 2023. While making changes to the Ph.D. thesis to align with my book publisher's guidelines, the focus of the original study is unchanged.

Ph.D. and academic publications are challenging tasks. In this process, I owe thanks and gratitude for many people. First and foremost, my sincere thanks are offered to my supervisors, Paul Sugden and Professor Christopher Arup for their unwavering confidence, support, and patience during my candidature at Monash University. Prof. Arup has been my research mentor at the early stages of my academic career and a guiding force behind my research career. During the publication of this book, he graciously gave me useful advice and recommendations on how to transform a Ph.D. into a book. Moreover, he has given a forward to this book, which provides a useful explanation of my study. Paul, on the other hand with his own brand of humour has put me on the right focus throughout my Ph.D. journey and as a researcher. Without both of their guidance this Ph.D. and the present publication would not have been accomplished.

Getting through an empirical study requires more than academic support. I would like to thank the interviewees, legal practitioners, stakeholders, policy makers, government and private sector officials, ministry officials, scientists, foreign diplomats, industrialists, business owners and experts in the field of intellectual property who found time amidst their busy schedule to participate in the interviews and share their views and opinions.

I wish to extend my sincere thanks to my colleagues Anne, Minu, Nicola, Aashish and Shafi at Department of Business Law and Taxation, Monash Business School for their continuous encouragement and support.

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Finally, this book has been dedicated to my late parents, Eric Perera and Rohini Perera for their constant inspiration for me to become a career academic.

**Ethical Approval** This study was performed in line with the principles of the Declaration of Helsinki. Approval was granted by the Ethics Committee of Monash University, Australia (Date 11/05/2017/No. 9107).

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## About the Author

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# Abbreviations

|        |                                                                  |
|--------|------------------------------------------------------------------|
| 10 PAP | 10 Point Action Plan                                             |
| ABS    | Access and Benefit Sharing                                       |
| BOI    | Board of Investment                                              |
| CBD    | Convention on Biological Diversity                               |
| CEO    | Chief Executive Officer                                          |
| CHC    | Commercial High Court                                            |
| CL     | Compulsory Licensing                                             |
| COSTI  | Coordinating Secretariat for Science, Technology, and Innovation |
| DG     | Director General                                                 |
| DoA    | Department of Agriculture                                        |
| EIE    | Enabling IP Environment                                          |
| EU     | European Union                                                   |
| FAO    | Food and Agriculture Organization                                |
| FDI    | Foreign Direct Investment                                        |
| FR     | Farmers' Rights                                                  |
| FTA    | Free Trade Agreement                                             |
| GATT   | General Agreement on Tariffs and Trade                           |
| GDP    | Gross domestic product                                           |
| GPPH   | Global Patent Prosecution Highway                                |
| ICT    | Information and Communications Technology                        |
| IP     | Intellectual Property                                            |
| IPR    | Intellectual Property Rights                                     |
| ISA    | International Search Authority                                   |
| ITI    | Industrial Technology Institute                                  |
| MIC    | Ministry of Industry and Commerce                                |
| MNC    | Multinational Corporation                                        |
| MSTR   | Ministry of Science, Technology and Research                     |
| NASTEC | National Science and Technology Commission                       |
| NDUS   | Novelty, Distinctiveness, Uniformity and Stability               |
| NGO    | Non-governmental Organisation                                    |
| NIPO   | National Intellectual Property Office                            |

|         |                                                               |
|---------|---------------------------------------------------------------|
| NIS     | National Innovation System                                    |
| NSF     | National Science Foundation                                   |
| PBR     | Plant Breeders' Rights                                        |
| PCT     | Patent Cooperation Treaty                                     |
| PGR     | Plant Genetic Resources                                       |
| PVR     | Plant Variety Rights                                          |
| R&D     | Research and Development                                      |
| RtD     | Right to Development                                          |
| SAARC   | South Asian Association for Regional Cooperation              |
| SLAAS   | Sri Lanka Association for the Advancement of Science          |
| SLFP    | Sri Lanka Freedom Party                                       |
| SLIC    | Sri Lanka Inventors Commission                                |
| SLINTEC | Sri Lanka Institute of Nanotechnology                         |
| SME     | Small and Medium-Sized Enterprise                             |
| ST      | Science and Technology                                        |
| STI     | Science, Technology and Innovation                            |
| STP     | Science Technology Policy                                     |
| TISC    | Technology and Innovation Support Centre                      |
| TMO     | Technology Management Office                                  |
| TRIMS   | Trade-Related Investment Measures                             |
| TRIPS   | Trade-Related Aspects of Intellectual Property                |
| TT      | Technology Transfer                                           |
| UK      | United Kingdom                                                |
| UN      | United Nations                                                |
| UNCTAD  | United Nations Conference on Trade and Development            |
| UNP     | United National Party                                         |
| UPOV    | International Union for the Protection of New Plant Varieties |
| US      | United States                                                 |
| USPTO   | United States Patent and Trademark Office                     |
| WIPO    | World Intellectual Property Organisation                      |
| WTO     | World Trade Organization                                      |

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# Chapter 1

## Introduction



**Abstract** This chapter outlines the purpose of this book, namely, to examine local and global lawmaking processes, discourses and actors related to the present state of Sri Lanka’s IP laws. To examine how the concepts of local and global lawmaking processes, discourses and actors are being understood, this chapter has incorporated theories such as networked nodal governance theory and systems theory as well as relevant discourses. By using three case studies, on patent administration, PVR and STI in Sri Lanka, this chapter identifies two competing discourses namely, high-technology versus low-technology IP protection that are applied in these case studies in order to find answers through interacting, indeed competing, discourses about what the Sri Lankan law should be.

### 1.1 Introduction

A country’s lawmaking contributes to fostering its innovation ecosystem and intellectual property rights (‘IPR’) in a country. However, lawmakers’ discourses—about how different strengths of intellectual property (IP) support or do not support innovation—create a particular relationship between IP and the innovation system.<sup>1</sup> Apart from these discourses, legal transfers of global scripts from the developed Northern hemisphere to the developing Southern hemisphere, such as the *Agreement on Trade-Related Aspects of Intellectual Property Rights* (‘TRIPS Agreement’),<sup>2</sup> the *Agreement on Trade-Related Investment Measures* (‘TRIMS’)<sup>3</sup> and the *Patent Cooperation Treaty* (‘PCT’),<sup>4</sup> shape the patent administration; the plant variety rights (‘PVR’); and the science, technology and innovation (‘STI’) sectors in Sri Lanka. Yet, the

---

<sup>1</sup> There is no one accepted causal relation between strong IP protection and economic development. For exposition of the discourses regarding this relation, refer to Drahos (2010) (‘Global Governance of Knowledge’), Maskus (2000), 471, 480 (‘Intellectual Property Rights’).

<sup>2</sup> *Agreement on Trade-Related Aspects of Intellectual Property Rights* (‘TRIPS Agreement’) (1994).

<sup>3</sup> *Agreement on Trade-Related Investment Measures* (‘TRIMS Agreement’) (1994).

<sup>4</sup> *Patent Cooperation Treaty* (‘PCT’) (1970), was concluded in 1970, amended in 1979, and modified in 1984 and 2001.

relationship between IP and the innovation system may also be constructed through economic and industrial policies, trade and competitiveness policies or social policies formulated at the national level by local actors.

Notably, the interaction between these discourses drives lawmaking. For the purposes of this research, IP refers mainly to patents and PVR. Patents provide monopoly protection to inventors/owners for a limited period to reward them for their useful inventions. During this period, others are prevented from infringing the patent for the invented product unless such right is given under exemptions from infringement, compulsory licensing ('CL') or parallel importation provisions. This research also examines other forms of IP lawmaking, such as PVR, because these are also used to protect IPR, similar to patents.

This book examines local and global lawmaking processes, discourses and actors related to the present state of Sri Lanka's IP laws. It explores the nature of, and seeks reasons for, Sri Lanka's apparent mismatch in Sri Lanka's commitment to implement international legislation, such as *TRIPS*, *TRIMS* and *PCT*, and the current states of implementation of such legislation in the country. It also explores the resultant international and local repercussions of this mismatch.

It seems that thus far at least, local laws have been implemented in the area of patent administration and STI sectors with the aim of fostering the innovation ecosystem in Sri Lanka, but considering the number of policies, the anticipated development goals have not been achieved, according to the data collected for this book. As will be discussed in the following chapters, the main reasons for this underdevelopment are the lack of alignment between the government's innovation policy and its industrial policies and the lack of discourse within sectors regarding development goals.

This indicates there is a lack of engagement between government, government agencies (such as the National Intellectual Property Organisation (NIPO) and industry which requires examination and explanation. The government ministries, government Representative to the United Nations UN representative, government agencies and industry are the central actors in the implementation, dissemination of information, and reaction to responses arising from industry. If these central actors do not communicate, failures occur in the system of implementation, as will be examined in Chap. 3 a failure to communicate exists between the NIPO and industry, but as will be seen in Chap. 5 actions by the UN representative and Coordinating Secretariat for Science, Technology and Innovation (COSTI) provide avenues of communication that enable development; whilst in Chap. 4 the implementation of PVR, which is required by TRIPS has not been achieved even though a Plant Variety Rights Bill has been under negotiation for 20 years. These highlights though indicate there is a need to untangle and explain the lack of engagement which provides the basis for the research inquiries.

The research inquiries posed in this research relate to how the concepts of local and global lawmaking processes, discourses and actors are being understood, used and interpreted in Sri Lanka's IP system. That is, this book attempts to answer the following research inquiries:

- 1 Has IP law discourse in Sri Lanka favoured low-technology rather than high-technology protection?
- 2 What are the reasons that Sri Lanka favours low-technology protection for IP law?

Having identified the questions, three case studies, on patent administration, PVR and STI in Sri Lanka, were conducted, which give substance to the competing discourses. For this book, two competing discourses have been identified, namely, high-technology versus low-technology IP protection.

To provide a theoretical framework for this inquiry, this researcher incorporated theories such as networked nodal governance theory and systems theory as well as relevant discourses. Using the pointers that this framework provides, the researcher then identified the global and local actors and the processes that are applied in these case studies in order to find answers through interacting, indeed competing, discourses about what the Sri Lankan law should be. At the conclusion, based on the two research inquiries and the theoretical framework, this book has concluded that as a result of low-technology protection adopted in areas of patents, PVR and STI and also due to the lack of expertise and cost in high-technology innovations have disabled Sri Lanka transforming from a middle income to an upper middle-income country, in the context of the three case studies.

The remainder of this chapter is organised as follows. Section 1.2 presents the theoretical framework of this book. Section 1.3 explains the case studies. Section 1.4 describes IP lawmaking process, Sect. 1.5 explains the study methods which includes, document analysis and interviews, Sect. 1.6 limitation of the research and Sect. 1.7 book structure.

## 1.2 Theoretical Framework

The theoretical framework of this book focuses on global and local lawmaking actors and processes and the possible ways in which they construct the discourses on IP based on three Sri Lankan case studies. This framework is built upon nodal governance theory, systems theory and discourse analysis.

## 1.3 Understanding Nodal Governance

According to networked nodal governance theory, a range of actors and processes, global and local, may become connection points in networks of governance; networks are a prime means through which such nodes exert influence.<sup>5</sup> The presence of networks means that influence can flow in many directions, vertically and horizontally, for instance, up and down and across the international landscape as well, or even

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<sup>5</sup> Burris et al. (2005). See also Shaffer and Halliday (2015).

within the global or local spheres. Hence, many lawmaking possibilities are open. Nevertheless, not all nodes are equal: Governance theory accepts to some extent the role of political power, legal order and economic coercion in shaping patent laws.<sup>6</sup>

Irrespective of the type of the node, a node has four essential characteristics. First, it should have a way of thinking (mentalities) that cognitively shapes how individuals and organisations see the world and act accordingly.<sup>7</sup> It is through these mentalities and purposes that nodes differ greatly from each other in terms of goals and legal conduct. Second, it should have a set of processes (technologies) for applying and exercising influence over the course of events at issue.<sup>8</sup> Third, it should also have resources to support and mobilise the operation of the node and fuel its influence.<sup>9</sup> Fourth, there should be a system (institution) that enables the directed mobilisation of resources, mentalities and technologies over time.<sup>10</sup> The superstructural node, conversely, can channel its resources to exert simultaneous influence at the local, national and global levels.<sup>11</sup>

Influence is exerted through ‘webs of dialogue’ or ‘webs of persuasion’. These describe the discourses in which superstructural nodes seek to alter others’ interest, which is a much more frequent catalyst for change.<sup>12</sup> By doing this, the superstructural nodes can bring together two or more networks for producing various types of action, such as lobbying the state for a favourable law or policy.<sup>13</sup> For example, during the *TRIPS* negotiations the multinational corporations (‘MNCs’) became a superstructural node because they were the command centres that could tie together more networks for the purposes of producing various types of actions, such as lobbying the US Trade Representative, monitoring the piracy of US IP abroad and seeking enforcement action globally and locally.<sup>14</sup> Moreover, studies have shown that where MNCs from advanced economies have a dominant presence in a country’s innovation system, accession to full compliance with *TRIPS* is fast and without many alterations to the original regulations, implying stringent compliance with the original *TRIPS* text.<sup>15</sup> Further, the influence of MNCs for fast and stringent *TRIPS* implementation is stronger in countries that have a high dependency on supranational organisations, such as the International Monetary Fund.<sup>16</sup> If developing countries refuse to comply, they will have to face economic sanctions.

Moreover, as the study on Sri Lanka shows, all nodes are not created equal and vary in their accessibility, their efficacy, the extent to which other nodes can influence

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<sup>6</sup> Ibid.

<sup>7</sup> Shearing and Wood (2003), 400 (Democracy and the New “Denizens”).

<sup>8</sup> Ibid.

<sup>9</sup> Ibid.

<sup>10</sup> Ibid.

<sup>11</sup> Ibid.

<sup>12</sup> Sell (2004), 363 (‘Quest for Global Governance’).

<sup>13</sup> Vanni (2019), 53 (*Patent Games in the Global South*).

<sup>14</sup> See Shearing and Wood (2003), 13.

<sup>15</sup> Brandl et al. (2019), 826 (‘Foreign Actors and Intellectual Property’).

<sup>16</sup> Ibid.



them and the way in which that influence is exerted. In other words, technologies, mentalities and resources will differ depending on how powerful the impact is on the status and efficacy of the node. For example, an individual node could be rather narrow in terms of knowledge and capacity to interact with and influence or regulate, compared with a group of nodes. That is, an individual node will be less influential in fostering an IP ecosystem in a country than a group of nodes that could achieve the task by pooling resources and expertise. However, the capacity of a node to exert influence and the potency of influence depends on resources, technologies in use and the institutional structure.<sup>17</sup> The factors include financial capacity, ability to mobilise networks and mobilising political pressure or economic coercion to achieve regulatory goals.<sup>18</sup>

For example, 12 US corporations, according to Sell, were primarily responsible for the lobbying that brought the *TRIPS Agreement* into being.<sup>19</sup> It was the intense lobbying activities from these companies in the US that laid the foundation for linking IP protection to trade in the multilateral context.<sup>20</sup> In contrast, a small NGO can exert influence at the local, municipal or national levels of governance. However, owing to limited financial capacity, such organisations are unable to exert influence simultaneously and at multiple sites.

From these characteristics of nodes, it is important to note that within a system, the hierarchy is contested among nodes because some nodes are more influential than the others that shape the IP discourse in Sri Lanka. This aspect will be discussed in the case studies.

## 1.4 Systems Theory

On systems theory, Teubner contended that ‘law’s contemporary ties to the society are no longer comprehensive but are highly selective and vary from loose coupling to tight interwovenness’.<sup>21</sup> He further explained: ‘Since contemporary legal rule production is institutionally separate from cultural norm production, large areas of law are only in loose, non-systematic contact with social processes.’<sup>22</sup> However, there are also areas of law, he noted, ‘where legal and social processes are highly tightly coupled’. In these cases, ‘legal rules are formulated in ultra-cyclical processes between law and other social discourses which bind them closely together while maintaining at the same time their separation and mutual closure’.<sup>23</sup> A transfer of law is comparatively easy to accomplish in the loosely coupled areas, but will encounter extensive resistance

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<sup>17</sup> Shearing and Wood (2003). See also Sorenson and Torfing (2003), 609.

<sup>18</sup> Brandl et al. (2019), 14.

<sup>19</sup> Sell (2003).

<sup>20</sup> Ibid.

<sup>21</sup> Teubner (1998), 18–19 (‘Legal Irritants’).

<sup>22</sup> Ibid.

<sup>23</sup> Ibid.