



Research Article



Critical Analysis of Patent Laws in Pakistan Since Independence

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Abstract

Intellectual property is the creative expression based on which there is the public willingness to bestow the status of the property and a patent is a recognition of an invention, which satisfies the criteria of novelty, non-obviousness, and industrial application. This paper aims to discuss the evolution of Patent laws in Pakistan. It primarily looks into the transitional phases of the patent to remain in line with the international agreement i.e. Trade-Related Aspects of Intellectual Property laws. It then examines the extent to which safeguards have historically been used in patent laws for public interest and also to meet policy objectives. This research further aimed to trace out the discrepancies in the patent law, if any, to bring those issues into the limelight and thereafter to suggest recommendations to upgrade the law accordingly. For this purpose, the available literature was reviewed through a hand search method i.e. research articles, books and websites were explored and after in-depth analytical reading, the main themes were extracted for this study. The findings indicated that the Patent Law of Pakistan is at par with the set international norms, however, there is always space for improvement to keep at par with the set international standards.

Key Words

Intellectual Property Rights, Patent, invention, Constitution of Pakistan, Patent Convention, Patent Cooperation Treaty, TRIPs Agreement, WTO, Patent Ordinance 2000

Introduction

Intellectual Property is generally referred to those rights which are associated with intellectual activity in any of the industrial, scientific, literary and artistic works (Dubai customs, n.d.). Legally, these rights may either be in the form of Copyright, Patents, Design and Trademarks (thomson reuters, n.d.). However, amongst all these rights, patents are the strongest (Colston) which, in reality, is a bargain between the inventor and the general public via the medium of a state.

Legally speaking, a patent is a right granted by the State to an inventor excluding others from the commercial exploitation of the said invention for a limited period (Levin, A new look at the patent system, 1986) i.e. 20 years of protection from the date of filing of an application

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(uspto.gov, n.d.), in lieu of complete disclosure of the invention so that other likeminded may gain the benefit of such an invention.

The intellectual property of a patent has a mixed origin. However, it got recognition at the international level when the Paris Convention of 1883 got signed (M.G. Chaudhry, *The Intellectual Property Laws in Pakistan and International Treaties on IPRs*, 2005). Thereafter, an improvement in legislation was made at the national level. When Pakistan got independence, it already carried a set of Intellectual Property Laws including Patent Law i.e. "The Patent and Design Act 1911." which it inherited from the British era (PakistanLaw.pk, n.d.).

On the other hand, the internationalization of Intellectual Property Rights got tremendous hype through the TRIPs Agreement which was incorporated as one of the core agreements of the World Trade Organization (WTO) that came into effect on 1st January 1995 (Matthews, 2002)

In pursuance of that, it was made obligatory for all WTO member states to bring their national laws in conformity with the TRIPs Agreement (Law, 2008). Pakistan, being one of the signatories, was supposed to upgrade its Intellectual Property infrastructure. Therefore, the then-existing law i.e. The Patent and Design Act 1911 had been upgraded with the promulgation of revised laws with the title of "The Patents Ordinance 2000" (Ali, *The Constitution of the Islamic Republic of Pakistan as Amended by the Constitution 20th Amendment Act 2012*) which was amended by Patents (Amendment) Ordinance in 2002, then in 2007 and again amended in 2010 (The Global Innovation Policy Center, 2017). The Patent Law in Pakistan, at present, is governed by the Patents (Amendment) Act, 2010 along with a set of rules i.e. Patent Rules 2003 (IPO, n.d.) to regulate the procedure necessary for the grant of a patent.

With the passage of time, an autonomous organization i.e. Pakistan Intellectual Property Rights Organization (PIPPO) was established to accomplish the stated objectives (Khan, 2017) which were then replaced by the Intellectual Property Organization of Pakistan (IPO) under the Intellectual Property Organization Act 2012 (Intellectual Property Organisation of Pakistan, 2012) and are still working.

But Pakistan has remained on Priority Watch List for a longer period of time as there have not been significant improvements in its overall Intellectual Property Rights protection (Representative, 2012) Therefore, a need was felt to further update the national laws and to have an effective enforcement mechanism in order to curb activities of counterfeiting as well as piracy. The present study aims to look into the historical evolution i.e. gradual development vis a vis statutory amendments as well as the current status of patent laws in Pakistan.

Pakistan Intellectual Property Regime and its Protection

Pakistan's Intellectual Property Regime legally consists not only of constitutional provisions but also specific statutory provisions in accordance with the international conventions, agreements and treaties, for the governance of intellectual property rights in Pakistan. For the better enforcement of these rights and remedies, there have been various government agencies established to perform the task under prescribed rules and regulations. This *prima facie* shows that this right has sufficient legal protection at its back in black and white.

Constitutional Protection of Patents in Pakistan

Since independence, almost all three constitutions of the Islamic Republic of Pakistan did give recognition to intellectual property rights. The very initial constitutional document of Pakistan was in the form of the Government of India Act 1935, which expressly authorized the federal government to legislate on the matters of intellectual property rights, though the term "patent" was not explicitly used however, it was assumed to be covered under the head of an invention (J.N.Varma, *The constitutional law of India and England: together with the Government of India Act, 1927*). On the same lines, the Constitution of 1956 of Pakistan, too authorized the federal government to promulgate laws for the protection of intellectual property, however, it was for the first time that the term "patents" was expressly referred to in this constitution (fact focus,

1956). Thereunder, the Federal Government was empowered to decide, whether to join any international organization or to implement the decisions of such organizations, whenever asked for. Later, the Constitution of 1962 of the state of Pakistan, not only empowered the Central Government to legislate on matters of intellectual property rights but also to decide when to become a party to conventions or treaties with other states (fact focus, 1968)

Grant of Status of Fundamental Rights under the Constitution of the Islamic Republic of Pakistan 1973:

The right to acquire and hold property is one of those fundamental rights which has not only been guaranteed but has also been protected by Articles 23 and 24 of the Constitution of the Islamic Republic of Pakistan 1973 (Ali, The Constitution of the Islamic Republic of Pakistan as Amended by the Constitution 20th Amendment Act 2012). It is clearly stated that no one shall be deprived of his property nor its possession can be compulsorily acquired but for public purpose or authorization by law after the payment of a certain amount of compensation (khan, 1989) Article 24(a) and (d) of the constitution further supports the provision of compulsory license which was later on taken into consideration in the Patent Ordinance 2000.

Furthermore, to legislate on the matters of patents and inventions, and also to decide, if to become a party to any international convention, treaty or agreement, is the power which lies solely with the Federal Government as expressly ingrained in the 25th and 32nd clauses of the federal legislative list as identified in the fourth schedule of the constitution of Pakistan (Zafar, 2018)

Statutory Protection of Patent

The history of statutory protection in the field of patents can be traced back to the laws which were inherited by the Government of Pakistan from British India, the day she got independence. Therefore, the very first substantive law on patents that Pakistan had, was in the form of the Patents and Designs Act 1911, which was primarily based upon English principles and practices on patents and designs and the term of protection under this particular statute was sixteen years only (PakistanLaw.pk). This Act adopted its basic provisions from English Patents and Designs Act 1907 which succeeded the Inventions and Designs Act 1888 (ipindia, 2019). It was assisted by the set of rules i.e. Patents and Designs Rules 1933 which were framed in pursuance of the same Act (UAIPIT, 1946). For decades, the protection and registration of patents were regulated by this law i.e. Patents and Designs Act 1911. But with the passage of time, an enormous development started at the global level in the intellectual property regime. Therefore, the think tanks of the international community felt the need for the improvement of intellectual property laws not only at the global level, in the form of international agreements but also at the domestic level in the form of state legislation, for almost all of the states around the globe. Pakistan thereafter acceded to Convention Establishing the World Intellectual Property Organisation (WIPO Convention) on 6th Jan 1977 (WIPO, 1977) and later on signed the Paris Convention for the Protection of Industrial Property on 22nd day of July 2004 (WIPO, 2004)

Implementation of Trips Framework at the Global Level

For a greater span of time, the TRIPS framework, for its implementation did rely on WTO (World Trade Organisation) Dispute Resolution mechanism in order to sort out intellectual Property related issues between two or more two countries. Therefore, in case whenever an interstate IP-related dispute used to get arise and either of the states, if failed to have its own TRIPS compliant domestic laws, then in certain circumstances the other state used to be at liberty to invoke the jurisdiction of WTO in order to initiate its proceedings, which involved consultation between disputing parties and further to constitute a panel, to look into the matter, which then was authorized to issue a report which could either be accepted by both the parties or they can opt for appeal against it. Ultimately if a state was found at fault, it had to face trade sanctions till such

non-compliant laws are properly implemented and brought into conformity with TRIPS. In one way or another other, it was a kind of new obligation on signatory countries (Nair, 2009). It was also observed by the then intellectuals that the existing laws on patents had so many deficiencies and discrepancies due to which they couldn't be taken along to meet the challenges of the modern era.

International Patent-Related Treaties and Pakistan

Though Pakistan is a signatory to a number of international treaties, agreements and conventions on this subject and more importantly, it is a signatory to World Trade Organization (WTO), which aims to increase international trade, therefore it was made imperative on her vis a vis other signatory states round the globe to bring its domestic laws in conformity with Agreement on Trade-Related Aspects of Intellectual Property Rights. (Ammara Farooq Malik, 2019).

Trips and the Status of Pakistan

TRIPS Agreement is one of those international treaties which is administered by the WTO. It actually sets down minimum standards for most forms of intellectual property (the "IP") including patents, regulating within all member countries of the WTO (Correa, 2007).

Pakistan being a member state of the World Trade Organisation and World Intellectual Property Organization, is bound to bring its IP-related laws including patent laws, in conformity with the requirements of TRIPS Agreement. Though for a longer period of time, before this Agreement, Pakistan had Patents & Designs Act, 1911 but thereafter, in order to fulfil its international obligations and to make its patent laws TRIPS-compliant, the Government of the Islamic Republic of Pakistan took a firm stance on undertaking certain legislative measures. In pursuance thereof, an Ordinance was passed in the shape of Patent Ordinance 2000 with Patent Rules 2003 by replacing the old law of Patents and Designs Act 1911 and Patents and Designs Rules 1933. Therefore, the previous law stood repealed under section 106 of Patent Ordinance 2000 (Dewan, n.d.). Since then, patent-related matters in Pakistan are regulated well by Patent Ordinance 2000.

Paris Convention for the Protection of Industrial Property and the State of Pakistan

Paris Convention adopted in the year 1883, as revised at Stockholm on July 14, 1967 (BIRPI, 1967), and as amended on September 28, 1979, aimed to grant intellectual property protection to nationals of other contracting states at a parallel footing as it grants to its own nationals (Bodenhausen, 2007) The Convention basically lays down some common rules that all contracting states are bound to follow concerning patents, trademarks, industrial design trade names and an indication of the source.

The Government of Pakistan acceded to the Paris Convention for the Protection of Industrial Property of March 20, 1883, (Paris Convention) on July 22, 2004, and on the same day it became a member of the International Union for the Protection of Industrial Property ("Paris Union"), founded by the Paris Convention (WIPO, 2004). As per its requirement, the law of Pakistan is in line with the Paris Convention. The basic principles of the Paris Convention are too incorporated in the said Patents Ordinance 2000 and the Patents Rules 2003. Therefore, the concepts of "convention application," "convention country" and "priority date" are given due recognition in the Patents Ordinance 2000 now (Dewan, n.d.).

Patent Cooperation Treaty (PCT) and the State of Pakistan

The Patent Cooperation Treaty aims at facilitating the applicants in seeking patent protection at the international level for their inventions and facilitates public access to massive technical information relating to those inventions. With the help of a single international patent application under the PCT, applicants get an opportunity to seek protection for an invention in a

very large number of countries (Law S., 2016) Unfortunately Pakistan isn't a signatory to the said treaty till-date; therefore, the inventors of Pakistan are unable to avail multiple benefits under the umbrella of the said treaty (Seema S Mansoor, 2018).

Patent Ordinance 2000

In furtherance of the international treaties and conventions, this statute is made to contain certain new provisions while retaining many provisions of the previous law with certain modifications, in order to meet the present-day requirements and to achieve the objective of bringing the law in conformity with the international standards. The present Ordinance with its rules is *prima facie* a complete law on this subject. It came into force on 2nd December 2000, with an exception to certain provisions which were ordained to be brought into force on 1st January 2005 (M.G. Chaudhry, 2005). The constitution of this Ordinance is that it has been bifurcated into twenty-two Chapters. It is more voluminous as it contains a total of 108 sections. The major portion of this law regulates the registration procedure of patents (M.G. Chaudhry, 2005).

Patent Ordinance 2000 (IPO, 2002) precisely consists of provisions on the following terms:

1. Definition clause consisting of important terms fully defined therein (IPO, 2002).
2. In the law, it has been made explicitly clear what inventions can be given up with the status of patent i.e. the law requires an invention to be novel (state of the art), with an inventive step being involved and must be capable of industrial application in order to get a patent certificate.
3. Though this law doesn't grant patents for "animals or plants and essentially biological process for the production of animals or plants", however, it clarifies that this prohibition shall not apply to "micro-biological processes or products out of the result of such processes".
4. The mode of registering it i.e. the application Performa with the specifications, with the do's and don'ts has also been inculcated in the said Ordinance which has to be carefully examined by the relevant authority i.e. Controller and the assisting staff working under his supervision.
5. Keeping the law in consonance with the required international standards, this law has also provided the priority arrangement for all of the World Trade Organization member countries, if the application in Pakistan is filed within a period of 12 months of the priority country filing. Though the prescribed procedure has to be observed i.e. filing of the relevant documents otherwise priority will not be granted (S.S.Rana and Co, n.d.).
6. The term of the patent has been specified i.e. 20 years from the date of filing an application (Seema S Mansoor E. S., 2020).
7. The extensive rights of the patent holder and the remedies to which he will be entitled in case of infringement, if any, have been mentioned in detail.
8. The authorities i.e. the Controller Patent office and the relevant civil courts and tribunals, whose doors can be knocked at and the relevant courts to handle the said cases have been marked therein.

Timely Amendments in Patent Ordinance 2000 and Patent Rules 2003

The Patent Ordinance didn't remain constant but a very quick amendment was needed to be made just after two years of the promulgation of the said law i.e. in 2002 which added some wider and clear definitions in its Definition clause i.e. Section 2 and it further extended the scope of patentable inventions with amendments in various other sections of the Ordinance with the insertion of two new sections i.e. section 107 and section 108 (IPO, 2002).

It was further amended in 2006 i.e. Section 16 while taking the privilege of flexibilities of the TRIPs Agreement, whereby the mandatory timeline of 18 months to accept or reject an application if filed for the registration of patent vis a vis section 19 was omitted (IPO, 2002). In 2010 an Act was passed approving the amendments made by the Patent Amendment Ordinance 2006 i.e. waiver of the time frame for the acceptance/ rejection of the application (IPO, 2010). However,

The Amendment Act of 2016 introduced the electronic publication of “Patent Journal” on weekly basis at its official website with an intent to improve the timely circulation and easy access to patent information (IPO, 2016). To date, an amendment in 2019 is the recent legislation made in Patent Rules 2003 whereby a change was brought in the fee structure of patent, its registration and attached activities (ip-coaster, 2019)

If Patent Laws are Sufficient for the Adequate Protection of Patent Rights?

After an in-depth analysis of the available data, the researcher found that the current status of Patent Ordinance 2000 is *prima facie* at par with the set minimum international standards. However, it is found that the law would have been in a much better position if the optional international norms with regard to the flexibilities provided therein for developing countries like Pakistan, were incorporated into the national law. These are those flexibilities which have been adopted by countries like India and Bangladesh for their best public benefit as well as better industrial development (Nicol, 2013). The statistics show that in the year 2019, the Indian patent office appears to have done a remarkable job in disposing of patent applications. The number of filing applications was 19,454 of the residents only and the number of the patent granted over these applications was 3,690. The progress report of India is far better than the year 2010 as by then the number of applications filed by the residents only was 8,853 and the patent granted were 1,208 in number. (WIPO, 2021). In comparison to this, in Pakistan, in the year 2019, the number of patent applications filed by the residents was 313 out of which only 31 applications succeeded in getting the seal of the patent. Though the number of patent applications fluctuated substantially in recent years as in 2010 the number of applications filed, unlike the present scenario, were 135 out of which only 19 applications ended up getting patent (WIPO, 2021). This random comparison does give a hint that we are lagging behind in comparison with the states which once used to have alike standing. Though apparently there seems no problem in the written law, however, it was found that if certain changes are made in the said law, it may end up in better national industrial development.

Recommendations

The study found that though the present law is comprehensive still something has to be done in order not only to improve the status of national patent law but also the implementation of the said law. Therefore, if the following recommendations are taken into consideration, will to a greater extent, help to make the law more appropriate and enforceable.

- i. To create awareness of the law. It is one of the basic duties of the state to create awareness amongst its masses of the said law. There must be an express provision in this substantive law ie. The Patent Ordinance 2000 itself, prescribes it as the duty of the patent office to conduct a specified number of awareness sessions in a certain number of districts at rotation after every three months or like.
- ii. The provision of the law which relates to the registration of the patent application needs to be amended. It is recommended that a certain strict time frame (at least not more than two years) must be provided for the examination of the patent application, to keep a check and balance on the efficient working of the officials.
- iii. Certain provisions need to be incorporated which make the access of national research institutes, to pharmaceutical patent data in the public domain easy and feasible.
- iv. The provision of patentability is needed to be reconsidered in order to bring it to par with section 3 (d) of The Patent Act 1970 of India.
- v. The provision of the mailbox is needed to be deleted. The reason is that the need for the mailbox is no more at present and the same provision has become redundant after the year 2005.
- vi. There must be an express provision in the law which make it mandatory for the relevant authority to open regional offices in almost every region, with the purpose of facilitating the public at large.

- vii. Certain provisions must be incorporated for the improved system of parallel imports.
- viii. There is a need to use TRIPS as well as Doha Declaration flexibilities for the proper exhaustion of intellectual property rights.
- ix. There must be an express provision in the law with regard to external examination as well. For this purpose, a section must be incorporated in the law prescribing the panel of a defined number of personnel of prescribed qualification to be nominated by the prescribed authority.
- x. There must be a provision with regard to a quick and timely response from IPO, the purpose of which would be to keep officers under proper check.
- xi. In order to promote local research, certain provisions must be incorporated in the law, through which incentives be offered to the local industry if they take initiative to promote the local patent/ research and commercialize it.
- xii. At least there must be an express provision in the law prescribing the minimum number of patent examiners to be recruited to the patent office, in order to expedite the registration process.

Conclusion

The present study was conducted in three phases. In the first phase detailed literature review was carried out by using the authentic source of information including texts, articles and digital media at the same time. In the second phase, the accumulated data was sifted and the most relevant data was picked up. In the third and final phase, the collected data was duly analyzed on the basis of which conclusions and recommendations are made.

The researcher in this article made a slight effort to discuss the historical evolution of patent law and the phases which it passed through since 1947 at a greater length. Apparently, due to a lack of awareness amongst the masses, this law seems to be a new and present-day law. However, while going through the history, it becomes evident that it was a right which was protected by almost all three constitutions of the state of Pakistan. It had been considered of the utmost importance that it was placed in all the constitutions as a federal subject. On the other hand researcher after going through the relevant laws at greater length reached the conclusion that the patent Ordinance 2000 is at par with the set international norms but the law would have been much in a better position if the international norms were incorporated in the national law, with the flexibilities provided therein for developing countries like Pakistan as being adopted by countries like Bangladesh and the state of India. Side by side the time frame should be provided for the examination of the patent application for quick grant of patent thereby encouraging the patent holders. The provision of patentability in the said law should be reconsidered thereby expanding and interpreting it in more clear terms. Lastly, for the promotion of local research, certain provisions must be incorporated in the law, through which incentives be offered to the local industry if an initiative is taken by them to promote the local patent/ research and commercialize it.

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