CRITICAL ANALYSIS OF INDIAN PATENT LAWS IN THE LIGHT OF GLOBALIZATION & DEVELOPMENTAL POLICIES IN INDIA

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I. INTRODUCTION

Development is key agenda of every nation including India. Development is possible in various areas like Education, Research, Infrastructure, Technology, Intellectual Property Rights etc. Presently Intellectual Property Rights and especially Patent Laws are on forefront in any nation’s agenda while formulating developmental policies of the Nation. Innovation & research plays important role, importantly in maintaining exclusivity, nation development, and economic growth. However conducive environment

Economic activities are now increasingly driven by inventions and innovations. Each product is an outcome of several inventions. When we are paying for a product, a part of that payment goes to the inventor in the form of royalties. From an economy angle, it is the inventions that are deciding the progress of a country rather than traditional factors like land, capital and raw labour. Hence intellectual property matters more than it appears.

Intellectual property is a larger umbrella and patent is a genus thereof, and therefore it is pertinent to understand the concept of Intellectual Property and intellectual Property Rights to understand and appreciate the concept, application and effect including existing lacunas and issues in The Patent Act 1970. The existing Patent Act suffers from some defects and is not keeping in pace with the changing times, there are various sections that need amendment and whose scope needs to be widened.

The present research paper talks about the areas of the Act that need to be changes. The paper also discusses the issues relating to Patents in the fields of biotechnology, outer space, pharm industry, etc. Patent Act 1970 is always in controversy as to whether it gives patents to undeserving inventions or denies the same to deserving inventions. The objective of patent ability is promoting invention, research & sharing of information for greater growth but in today’s time in the age of information, the objective is no longer valid.

A patent is a form of industrial property or as it is now called intellectual property. The owner of the patent can sell this property. A patent being a creation of statute is territorial in extent. A patent granted in one state cannot be enforced in another state unless the invention concerned is also patented in that state. A patent is not granted for an idea or principal as such, but for some article or the process of making some article applying the idea. The object of granting a patent is to encourage and develop new technology and industry. An inventor may disclose the new invention only if he is rewarded, otherwise he may work it secretly. In consideration of the grant of monopoly for a limited period, the inventor discloses the details of the new invention and the method working it so that after the expiry of monopoly period others can use the invention or improve upon it.

In India the rights conferred on patentee are purely statutory rights. The law in British India regarding the patent was modeled on the lines of British Law. After various amendments and development in patent laws in India, the Patents Act, 1970 finally came into force. The object of the act is to consolidate the law relating to the patents and hence to achieve the following two objectives

1. The protection of individual’s interest of the patent
2. The protection of interest of the society unquestionably

The Patent law is one area which no nation across the globe can ignore. Both granting of too strong property rights or non-recognition of legitimate IP rights for innovations will undoubtedly be harmful to societies in the long run.
The key is clearly to understand the underlying principles, impact of choice of laws/rules, and design the laws to balance the need to incentivize innovations and yet ensure access to the fruits of innovation soon to all. It is shown that national laws can be designed more suited to the local conditions while being within the foundations of patent law principles and international agreements.

The institutions associated with enforcement and protection of right to health of human beings whilst upholding the rights of patent holders are faced with the daunting task and challenge of devising ways and means for fulfilling their defined, designed and desired roles so that the conflict in rights pertaining to rights of intellectual property owners and the right to health of human beings is minimized whilst balancing the prevailing hierarchy of human rights for achieving the social and economic objectives. With time the awareness of intellectual property rights has become path-breaking, acting like an incentive to stimulate inventive behavior and innovative activities of man along with supporting the economy.

Alongside conferring exclusive rights on the inventor, patents also help in returning the amount invested in the whole process of research, development, and production. It grants an inventor the benefit of enjoying a monopoly. Patents are given in exchange for new inventions. Though India has stepped into the field of product patent regime it still has a long way to go in case of managing the interests of the companies and maintaining a balance. India still has great hurdles to cross like that of implementing the TRIPS agreement to achieve institutional reforms, building technical capability, etc. TRIPS agreement promotes foreign direct investment, usage of genetic resources, environment protection, and so on. India must promote the formation of an association between the Convention on Biological Diversity and TRIPs to bring forth more opportunities for the patent offices. Patenting should involve an intelligent strategy working side by side with the inventions that are to be implemented.

In a sense patent have assumed an international character. The increasing number of applications for Patents from foreigners received in almost all countries in recognition of fact. Attempts are being made from time to time by international associations for the protection of individual property and to introduce more and more uniformity and harmonization among national Patent’s systems. The International convention for the Protection of Industrial property (Paris Convention) and GATT and TRIPS agreement are examples of attempts at harmonization of the law of patents & other forms intellectual property. Though India was not a member of Paris convention 1883, but having signed the TRIPS agreement, India is now obliged to recognize and implement the provision of national treatment to nationals of other members as has been incorporated in the TRIPS agreement. The law of patents has also become an important discipline of international trade and commerce due to great advancement in science and technology, revolutionary changes in computer software development and with the shift from process to product patent, the patent law has been striving to keep pace with the changes in technology.

Non-obviousness is an important consideration for grant of patent. Basically patent is granted to bring into this world something which is not obvious, hence grant of patent to too obvious improvements offends the free flow of information and creates unnecessary barriers. Further, the TRIPS agreement to which India is a signatory clearly states that there shall be grant of patents to all fields of technology which are an obvious but it has not defined what is an obvious and this has led to disagreements. Under section 3(d) the Patent Act 1970 improperly denies the grant of patent if a known substance is discovered in new form unless there is enhancement of known efficacy. The ever greening of patent monopoly is also creating hindrance against the growth of patents.

There is also a need felt for enhancing the post-grant protection of patent. In today's era section 3 of the Patents act 1970 needs major changes due to global technological developments and economic changes. Section 3(k) is relevant in case of computer related inventions which provides that mathematical and business methods, computer programs, algorithms are not patentable. As per section 8 of the Patents act 1970 applicants have to submit an updated list of all corresponding for an applications until the grant of patent this provision are reflective of the pre-internet era and caste legal duties on the applicant to periodically submit available information to the Indian patent office which could now be easily done through the internet.

Another burdensome provision of the Patents Act 1970 is section 146 which requires every patentee and licensee to voluntarily file a working statement every year this unnecessarily puts additional burden and costs on to the patents. Patent is the most important form of Intellectual Property. Thus, before proceeding further let’s know about IP. Intellectual property (IP) is a category of property that includes intangible creations of the human intellect. There are many types of intellectual property, and some countries recognize more than others. The most well-known types are copyrights, patents, trademarks, and trade secrets. The main purpose of intellectual property law
is to encourage the creation of a wide variety of intellectual goods. To achieve this, the law gives people and businesses property rights to the information and intellectual goods they create, usually for a limited period of time. This gives economic incentive for their creation, because it allows people to benefit from the information and intellectual goods they create and allows them to protect their ideas and prevent copying. Intellectual property rights are in different forms. WTO’s TRIPs Agreement classifies intellectual property rights into following groups.

- Copyright and related rights
- Trademarks, including service marks
- Geographical indications
- Industrial designs
- Patents
- Layout- designs (topographies) of integrated circuits
- Undisclosed information, including trade secrets
- Control of Anti-Competitive Practices in Contractual Licenses.

Based on their specific nature, intellectual property is often divided into two categories, Industrial property, which includes patents (inventions), trademarks, industrial designs, and geographic indications of source and Copyright, which includes literary and artistic works such as novels, poems and plays, films, musical works, artistic works such as drawings, paintings, photographs and sculptures, and architectural designs.

II. WHY DOES INTELLECTUAL PROPERTY NEED PROTECTION?

Society provides legal rights over intellectual property to encourage the production of inventions and creative works that benefit society and to help innovators and creators make a living from their work. These rights, which can belong to individuals or organizations are recognized by governments and courts. The system is designed to benefit society as a whole, in both developed and developing countries, striking a delicate balance to ensure that the needs of both the creator and the user are satisfied. This balance is maintained through checks within the intellectual property system itself and in the larger regulatory framework, to ensure that the system is sustainable and beneficial to all stakeholders.

Intellectual property (IP) rights don't protect ideas or concepts. They protect genuine business assets that can be vital to your products or services, or the success and profitability of your business. It is important to protect intellectual property rights because they can:

- Set your business apart from competitors
- Be sold or licensed, providing an important revenue stream
- Offer customers something new and different
- Form an essential part of your marketing or branding
- Be used as security for loans There are many advantages to securing/protecting your intellectual property rights. For example, protecting your IP can help you:
  - Enhance the market value of your business- IP can generate income for your business through licensing, sale or commercialization of protected products or services. This can, in turn, improve your market share or raise your profits. In case of sale, merger or acquisition, having registered and protected IP assets can raise the value of your business.
  - Turn ideas into profit-making assets- Ideas on their own have little value. However, IP can help you to turn ideas into commercially successful products and services. Licensing your patents or copyright, for example, can lead to a steady stream of royalties and additional income that can boost your business’ bottom line.
  - Market your business' products and services- IP is essential in creating an image for your business. Think trademarks, logos or the design of your products. IP can help you differentiate your products and services in the market and promote them to your customers.
  - Access or raise finance for your business- You can monetize your IP assets through sale, licensing or using them as collateral for debt financing. As well as this, you can use your IP as an advantage when applying for public or government funding, eg grants, subsidies or loans.
  - Enhance export opportunities for your business- IP can increase your competitiveness in export markets. You can use brands and designs to market goods and services abroad, seek franchising agreements with overseas companies, or export your patented products. Once the IPR are protected you can protect it against infringement by others and ultimately defend in the courts your sole right to use, make, sell or import it.
• Stop others using, making, selling or importing it without your permission
• Earn royalties by licensing it
• Exploit it through strategic alliances
• Make money by selling it

III. GLOBALIZATION & PARIS CONVENTION 1883-

Modern world is marked by Globalization and Liberalization. Hence economic reforms have been introduced by many countries like India which has to compete with other countries in the world market. Patent law plays a very significant role in the development of a country. More so because of the advent of the World Trade Organization in which India has to compete with developed countries like U.S.A. The Paris convention 1883 for the protection of industrial property, was the first convention for the protection of Intellectual Property.

The Paris convention sets out a range of basic rules relating to patents, and although the convention does have direct legal effect in all national jurisdictions, the principles of the convention are incorporated into all notable current patent system. The most significant aspect of this convention is the provision of the right to claim priority i.e., filing an application in any one-member state, and receive the benefits of the original filing date. Because the reference to a patent is intensely date driven, this right is fundamental to modern patent usage.

TRIPS Agreement -The WTO was established through the agreements known as 'MARKKESH' agreement establishing the WTO. Intellectual property was not a part of WTO until the Uruguay round. It was introduced in the Uruguay round especially by the developed countries to be a part of WTO and it got the status in the WTO in the form of an agreement which is known as trade related aspect of intellectual Property rights (TRIPS). Intellectual property was opposed by some developing countries to be a part of WTO as they argued that it is a tool used by the developed countries for exploiting the developing countries and colonizing them. However, their opposition failed and TRIPS agreements was finally signed on 15th April 1994 by nearly 125 member countries. However, it came into effect on 1st January 1995. A Conflict between Product and Process patent Under the WTO (world trade organisation) regime, one of the most debated issues in the international negotiations is the issue of standardizing and strengthening the patent systems across the world. The debate gathered momentum due to the DUNKEL proposal related to TRIPS.

The issue of similar patent standards across the countries led to a sharp division between the advanced developed countries (North) and the developing countries (South). In the southern countries in countries like India, the governments usually practice process patent regime and that too with varying degree of enforcements under their laws. The North, on the other hand always insisted on the product patent regime in the South as practiced in the North. The issue created lots of discussions since many southern countries has to comply with the product patent in near future under the current WTOregime. The conventional economic reason underlying the conflict of interest between Northern and Southern countries is easy to see. Northern countries are the major producers of newer technologies. Southern countries on the other hand depend a lot on the North for technologies needed for their growth and development. In case of process patent in the South, it is often be the case that the southern firm develops a different process of production that uses some of the cheap resources available in the South.

As a result, the Northern firm faces competition from the Southern firm in the Southern market and thereby it is derived of some of the monopoly benefits it could derive from selling the products in the south. On the other hand, if south practices product patient, Northern firm is protected from any competition in the same product in the southern market. Thus, product patent in the South would allow northern firm to get the monopoly benefit in the South. Hence, Northern firm would prefer product patent in the South. Transitional period TRIPS agreement came into effect on 1st January 1995 and was applicable to all member countries. However, the agreement allowed member countries different periods of time to delay applying its provisions in their respective countries. These delays define the transition from before the agreement came into force (before 1 January 1995) untilitsappliedinmembercountries.

It is said the nationals of the signatory country would have equivalent rights and status in all other signatory countries. A patent is a form of industrial or intellectual property. It is a right granted to a person who has invented a new and useful article or an improvement of an existing article or a new process of making an article. After the expiry of duration of patent, anybody can make use of it. The owner can sell the patent property, grant license. The law of patents in India is governed by the patent Act 1970 as amended by the patent Act 1990. A bill named patent
bill 1999 which had proposed substantial changes in the law was introduced in the parliament in December 1999, and was passed as the Patent Act 2002. A patent is a monopoly right granted to a person who has invented a new and useful or an improvement of an existing article on a new process of making an article. After the expiry of the duration of patent, anybody can make use of the invention.

IV. PROVISIONS IN U.S: HOW DIFFERENT FROM INDIA PATENTABILITY IN USA: NOVELTY:

The importance of the subject has grown due to lack of adequate legal literature. The Indian patent system has been modelled on British system to a great extent and the system of the U.S.A to some extent. A patent is a set of exclusive rights granted by a state to an inventor or his assignee for a fixed period of time in exchange for the disclosure of the invention. It refers to a grant of some privilege, property, or authority made by a government or the sovereign of the country to one or more individuals. The instrument by which it made is known as Patent. An invention is the creation of intellect applied to capital and labor to produce something new and useful. Such creation becomes the exclusive property of the inventor on the grant of patent. The procedure for granting patent, the requirements placed on the patentee and the extent of exclusive rights vary between countries according to the national laws and international agreements.

Typically, however a patent application must include one or more claims defining the invention which must be Novel, Inventive and Useful. In many countries certain subject areas are excluded from patents such as business methods and mental acts. A patent is a negative right which grants exclusive rights to a patentee to prevent or exclude others from making, using, selling, offering to sell or importing the invention. The patent law recognizes the exclusive right of a patentee to gain commercial advantage out of his invention. This is to encourage the investors to invest their creative faculties, knowing that their invention would be protected by law and no one else would be able to copy their inventions for certain period during which the respective investors would have exclusive rights.

Introduction of Pharmaceutical Product Patent in India Issue of pharmaceutical product patent as per TRIPS agreement was once again a cause of concerns for India and international community. India being a social welfare state, the Indian Patent act was framed in a manner that ensured that the patents rights relating to pharmaceuticals could be regulated by the government. The patent Act, 1970 also excluded agricultural products from patentability. Both the above provisions were aimed at keeping the prices low, ensuring adequate supply and growth of the Indian industries. Now, India being a member of WTO has to implement TRIPS agreement in totality. However, by virtue of Article 65(1), (2), (3) and (4) India has to provide within 10 years effective product patent in pharmaceutical industries. Principles Underlying the Patent Law in India the Indian Patents act, 1970 and the patent rule, 2003 regulate the grant, the operative period, the revocation and infringement, etc, of the patents.

The Patent Act was amended in 2005 and 2006 for the purpose of contemporary adjustment in patent laws. The principle upon which the Indian patent law is based is enumerated below: Novelty or inventiveness: The element of novel invention is dependent upon the state of prior art, i.e., the existing knowledge and similar inventions already known in the particular field. There would be no novelty if there has been prior publication and prior use of the same or an identical invention. E.g., The recent grant of patent in USA to Turmeric products was challenged on this ground, the Indian council of scientific and industrial research (CSIR) challenged the grant of patent on Turmeric by the US patent office on the ground that patent could not be granted since there was no novelty in the invention. Also, that what was patented was already published in Indian texts and use of Turmeric preparations has been made in our country since time immemorial.

The CSIR was successful in getting the grant of patent to an American company revoked. Usefulness or utility: The invention besides being new and non-obvious must also be useful. An invention which is new and also non-obvious but which cannot be put to any beneficial use of mankind cannot be patented. In some countries, not so useful inventions are protected as utility models. But that concept is not statutorily recognized in India. Non-obviousness: The invention must be non-obviousness to a person reasonably skilled in the art to which the invention relates.

In US novelty implies to absolute enquiry on the invention. A single reference can be made to all the elements of the applied claims. First to invent/first to file: In USA, a person who has invented first gets the priority i.e. novelty is established to that person over the one who invented later on but files the application before the first who invented. The prior art i.e., any predated reference available before filing is applicable in US. In case of two persons making an invention differently on the same day, the person who files first gets the seniority, this is called Striking
Interference. In India however, a person who files the application first, gets the priority. There is no concept of first to invent in India as far as it is concerned. Inventive entity (non-obviousness): Unlike India where patent is granted only for inventions, in US patent is granted for inventions as well as discoveries. Utility: In US invention has to useful to be patented.

The analysis points to the kind of investigations that can be undertaken and divergent positions that ought to be considered during formulation of patent policy for a jurisdiction.

V. CONCLUSION

The new patent regime in India touched the hornets' nest and has raised several contentious issues relating to right to health of the people, which is in conflict with the economic right of patent holders. It is also likely to restrict access of allopathic medicines to only the affluent, affordable and more privileged class of people in India and other countries in the immediate future. The institutions associated with enforcement and protection of right to health of human beings whilst upholding the rights of patent holders are faced with the daunting task and challenge of devising ways and means for fulfilling their defined, designed and desired roles so that the conflict in rights pertaining to rights of intellectual property owners and the right to health of human beings is minimized whilst balancing the prevailing hierarchy of human rights for achieving the social and economic objectives.

With time the awareness of intellectual property rights has become path-breaking, acting like an incentive to stimulate inventive behavior and innovative activities of man along with supporting the economy. Alongside conferring exclusive rights on the inventor, patents also help in returning the amount invested in the whole process of research, development, and production. It grants an inventor the benefit of enjoying a monopoly. Patents are given in exchange for new inventions. Though India has stepped into the field of product patent regime it still has a long way to go in case of managing the interests of the companies and maintaining a balance. India still has great hurdles to cross like that of implementing the TRIPs agreement to achieve institutional reforms, building technical capability, etc. TRIPs agreement promotes foreign direct investment, usage of genetic resources, environment protection, and so on. India must promote the formation of an association between the Convention on Biological Diversity and TRIPs to bring forth more opportunities for the patent offices. Patenting should involve an intelligent strategy working side by side with the inventions that are to be implemented.