Delineation of Local Patent Legislative Jurisdiction: Principles and Methods

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Abstract. Local patent legislation has contributed to supplement, refine central legislation and accumulate legislative experience for it, but it often suffers from unclear legislative jurisdiction. In order to give full play to the function of local patent legislation, the scope of local legislative competence needs to be further explored. Therefore, local patent legislation should adhere to local characteristics, abide by inconsistency principle and follow encouraging invention direction, promoting patents application, protecting patent rights and interests and paying attention to patent services. Rationally adjust the proportion of different legislative models, such as executive legislative model, autonomous legislative model and antecedent legislative model to realize the flexibility and cheapness of local patent legislation.

The Origin of Research

The patent system is the intellectual property right system which gives the right holders the exclusive right to implement the industry to stimulate the technological innovation by the law. In the era of knowledge economy, patent has become the most effective means of competition for the company and even the country. Countries all over the world regard the ownership of invention patents as an effective indicator to measure the comprehensive national strength. The patent system not only pays attention to the protection of patent rights, but also emphasizes the operation and management of patent rights. Under the background of this trend, China began to implement the intellectual property strategy and the construction of innovative national strategy. In the national intellectual property strategic system, the improvement of laws and regulations system is one of the most important strategic measures.

Since the implementation of the patent law in China, it has played an important role in encouraging and protecting invention and creation, improving the ability of technological innovation and independent innovation and promoting economic and social development. The latest data show that during the 12th Five-Year Plan period, the number of patent applications for inventions in China was the highest in the world and compared with the end of the Eleventh Five-Year Plan, the number of patents per 10,000 people reached 6.3 which has a threefold increase. The number of patent applications submitted through the "Patent Cooperation Treaty" (hereinafter referred to as PCT patent applications) has reached 30,000 with an increase of 2.4 times which is ranking among the top three in the world and the status of our country as a big intellectual property power has been further consolidated. It should be noted that these achievements have also benefited from the implementation of local patent legislation. On the one hand, in order to carry out the legal system of patent field and promote the rapid development of patent cause in this region, more than 2/3 provinces, autonomous regions and municipalities in China have formulated local laws and regulations on patent in combination with the actual situation of their respective localities. On the other hand, under the background of increasingly fierce
regional economic competition, patent has become the core competitiveness of regional economic development which also has become the driving force for local provinces and cities to legislate for local patents. Local patent legislation in China is mostly enacted in form of regulations. As far as its role is concerned, local patent legislation is conducive to supplementing and perfecting central patent legislation, solving problems that central patent legislation cannot solve independently or temporarily and accumulating legislative experience for the revision of central patent legislation. At the same time, the local patent legislation is convenient for the local independent solution of local unique patent matters that need to be resolved through legislation.

As the development of the local economy, culture and society is not balanced, there are obvious differences in local self-existence and competitiveness in the market economy environment. Accordingly, the particularity and heterogeneity of local patent legislation in demand, goal, orientation and content are greatly enhanced and the quality level of local patent legislation also presents a uneven gradient state. The main common problems are that the jurisdiction of local patent legislation is not clear, the local authorities can legislate on which patent matters is always a difficult problem for the main legislation body. And some local legislation is more conservative which is in keeping with the central patent legislation or even copying the superior law, it is impossible to give full play to the role of local legislation in promoting the patent cause in the region. Some local legislation is more radical, with one-sided emphasis on local characteristics and experimental legislation. The conflict with the upper law destroys the coordination of the whole patent law and regulations system. To a large extent, the above situation stems from the vague understanding of the local patent legislative jurisdiction produced by the local legislative body. As a result, the phenomenon of legislative omission and misbehavior in the field of local patent legislation occurs from time to time. In view of this, in order to give full play to the function of local legislation, this paper will try to clarify the scope of local patent legislation and will focus on resolving the jurisdiction boundary between the central patent legislation and the local patent legislation.

The Principle of Dividing the Jurisdiction of Local Patent Legislation

The division of local patent legislative jurisdiction needs to adhere to the holistic thinking and from a macro perspective on the determination of the scope of jurisdiction, so we need to grasp the two fundamental principles.

The local characteristics of patent legislation

Local characteristics are the soul and life of local legislation. Without local characteristics, local legislation loses its existence value. The complexity of social relations, the difference of different regions and the concreteness of legal objects determine that local legislation must have distinct characteristics of the times and regions. Different places in the level of economic development, geographical resources and environment, historical and cultural traditions, legal environment, cultural background, customs and other aspects are showing different characteristics which have their special problems need to be adjusted and standardized by local legislation. This requires the main body of legislation to carry out patent legislation to be based on the actual needs of the region, the national needs and the degree of tolerance to enact local legislation. It should be noted that the emphasis on local characteristics does not mean that local laws and regulations cannot be similar, nor does it refer to differences in the style of language and writing, but rather to laws and administrative regulations. Local laws and regulations must have significant local applicability in terms of the specific conditions and actual needs of their respective localities. As far as local patent legislation is concerned, the principle requires that the main body of the legislation must take the actual situation of the development of local patent undertakings as the basis for patent legislation. In particular, we should pay attention to the outstanding problems of the application for invention and creation in local patent work, patent infringement and protection, government management and services and handle the relationship between the stability of local patent legislation and the
variability of the development of patent undertakings and combine local patent legislation with solving local special problems.

**Insisting that local legislation does not conflict with central legislation**

According to Article 72 of the Legislation Law of our country, the formulation of local laws and regulations must follow the principle that does not conflict with its superior law and the legislation Law does not give a clear definition of non-conflict principle. So it is resulting in differences in the understanding of the principle application. For example, some local legislators think that not in conflict with the laws of the Central Committee is not directly in violation of the Central Committee laws. The Central Committee legislator believes the consistency principle with the laws of the Central Committee is essential. When local legislators believe regulations are not in conflict with them and the central legislator may consider them to be in conflict with each other.[1]In fact, how to correctly interpret the meaning of non-conflict principle can be interpreted from the legislative purpose. The first opening of the Legislative Law emphasizes the importance of giving full play to the leading and promoting role of legislation. In general, the basic attitude of the legislative law to the local legislation is encouraged. On the premise of ensuring the quality of the local legislation, there is no need to restrict the local legislation too much. Only in this way can the local legislation be fully guided and promoted. Therefore, we should take into account the expectation of local legislation in leading local reform and promoting system innovation when we grasp the non-conflict principle between local legislation and the central legislation so as to make a judgment that conforms to the purpose of legislation. In this regard, local patent legislation shall not conflict with the laws and administrative regulations on patents, such as the Constitution, the Patent Law, the detailed rules for the implementation of the Patent Law, the Law on the Progress of Science and Technology and the Law on Tort liability, etc. The local patent legislation should be consistent with the basic principles and spirit of the superior law in the aspect of value orientation, especially when there is no specific superior law provisions. As long as it is conducive to the protection of the legitimate rights and interests of patentee, the encouragement of invention and creation, the promotion of application of invention and creation, the enhancement of innovation capacity and the promotion of scientific and technological progress and economic and social development, the main body of local legislation can make patent legislation with local characteristics according to the specific conditions and actual needs of the administrative region to solve the problem that it is not suitable for the central legislation to regulate or the central legislation can not be regulated for the time being.

**The Method of Dividing the Jurisdiction of Local Patent Legislation**

After defining the principle of division of local patent legislative jurisdiction, it is necessary to standardize the division between the central patent legislation and the local patent legislation. The basic idea of this paper is to analyze the adjustment scope of the central patent legislation in the first place, because the local legislation has the attribute to the central legislation and also has the autonomy and the locality at the same time. The jurisdiction of local patent legislation depends on the adjustment scope of central patent legislation. Therefore, we need to divide the jurisdiction of local patent legislation on the basis of defining the scope of adjustment of central patent legislation. Based on the changing reality of patent legislation in our country, this paper will also carry on the corresponding system history investigation on the analysis of the division of legislative jurisdiction.

**Scope of adjustment of central patent legislation**

Since the Patent Law was adopted by the fourth standing Committee of the sixth National people's Congress in 1984, the Patent Law has been amended for the first time in 1992, the second revision in 2000 and the third revision in 2008. The main purpose of the first two revisions is to further integrate China's patent system with international intellectual property rights and to serve the
needs of our country in promoting international trade and joining the World Trade Organization of China.

The third revision in 2008 is more out of the needs of our own system improvement, but also make full use of the flexibility allowed by the TRIPS agreement. [2] In general, the central patent legislation mainly adjusts two categories of matters. The first category is legal affairs between the patent holder (including patent applicant and patentee) and the patent administrative department under the State Council. It mainly focuses on the examination and authorization of patent application and its administrative relief, including the condition of granting patent right, the condition of patent application, the examination and approval of patent application and the corresponding administrative remedy. The second type of matter is after patent authorization, the legal affairs between the patentee and the third party are mainly discussed around the exercise of patent right and remedy of patent infringement including the licensing and utilization of patent right and administrative and judicial remedies for patent infringement (protection of patent rights) and other matters.

The definition mode of local patent legislative jurisdiction

The local patent legislative jurisdiction mainly solves the problem of which patent-related matters can be legislated by the local legislative body. The scope of local patent legislative matters includes both central and local common legislative matters and also local legislative matters of their own. The legal status of local legislation determines that local legislation should be consistent with central legislation to a certain extent in form and content and without conflict with it. However, this does not mean that the local legislative activities blindly mechanically and passively from the central legislation, not to say the local legislation is completely reduced to the central legislation appendage. Decided by the macro and basic characteristics of the central legislation, the central legislation generally solves the basic problems of the state, society and civil life with the overall situation and there are always some vacuum areas that are not suitable for the central legislation to fill. This has won a certain legislative space for the local legislation. Specifically in the field of patent legislation, the whole Patent Law is basically a patent examination law in terms of content and it is very difficult to meet the legislative needs of local administrative organs and enterprises in such aspects as the use and encouragement of patents. The main body of local legislation in our country has made corresponding local patent legislation according to their own reality and needs. In order to ensure the legitimacy of the local patent legislation, it is necessary to define the legislative jurisdiction of the local patent legislation subject that is through the local legislation adjustment of patent matters. We believe that the specific local patent legislation matters vary widely, but mainly through three legislative models to determine the corresponding legislative jurisdiction.

Executive legislative model. Executive legislation is a clear definition of the precise meaning and scope of application of the legal norms in the superior law and applies the general provisions of the superior law to individual and specific cases. Executive legislation means that there must be enforceable central legislation, but it does not have to be explicitly authorized by the central legislation. Of course, the existing provisions of the superior law can only be refined which is not in the superior law without the provisions of their own provisions, nor beyond the superior law of the scope and extent of the provisions. In view of the more detailed provisions of the superior law on the judicial protection of patents, the local patent legislation supplements and refines the measures of patent administrative protection from the angle of administrative protection according to the relevant provisions of the superior law. For example, there are specific measures to stop patent infringement which include ordering the infringer to stop manufacturing the infringing product or using the patent method, ordering the infringer to destroy the special mould and equipment and ordering the infringer to stop selling or promising to sell the infringing product, etc. [3] In addition, in cases where the types of patent infringement disputes in administrative mediation are not clear enough and local patent legislation provides for more specific types of patent infringement, etc. [4]
Autonomous legislative model. Autonomous legislation means the local legislative body must legislate on matters that the central authorities do not need or have the ability to resolve according to the powers conferred by the law. From the perspective of legislative development trend in the future, autonomous legislation for local characteristic affairs is bound to become the mainstream of local legislation. The existence of autonomous legislation is not to carry out the superior law, but to enable local government to deal with local affairs according to local conditions and times. It should be noted that the construction of local legislation needs to unify execution and autonomy. If too much emphasis is placed on enforcement, local legislation will become rigid and lose the existence meaning which is not conducive to giving full play to the enthusiasm of local legislation. If too much emphasis on autonomy, it is easy to view blind legislation, beyond the scope of legislation or even into the quagmire of local protectionism. In the field of local patent legislation, many legislative bodies have introduced some regulations with local characteristics combined with the reality of local patent enforcement. For example, with the arrival of "Internet +" era, the booming rise of electronic commerce makes Zhejiang become a big province of e-commerce. The situation and characteristics of the development of electronic commerce put forward a new demand for the protection of intellectual property rights. Copyright infringement and counterfeiting has also brought a new test to the grass-roots patent administrative law enforcement. "Zhejiang Province Patent regulations" makes detailed provisions on the network, television and other trading platforms on the type of patent infringement and tort relief and tort liability for the undertaking. [5]

Antecedent legislative model. Leading legislation means on the premise of abiding by legal reservation principle where other matters countries have not yet formulated laws and administrative regulations, the local authorities may first formulate local laws and regulations and through the practice of local legislation they can continuously accumulate experience. After the legislative time is ripe, the central government can formulate laws or administrative regulations. What needs to be clear is whether the local government should legislate first and still take into account the specific conditions and actual needs of the localities. It should be said that local patent legislation has made great efforts in this respect and played an experimental role in legislation at a certain level and accumulated rich legislative experience for the revision of the central patent legislation. In order to encourage the local innovators to actively promote the use and transformation of patents and to make the local people occupy more space in the field of technology at a high level, only the relevant regulations to promote the use and transformation of patents are taken as an example, all localities have legislated on the basis of summing up the practice of promoting technological innovation and patent implementation in their respective regions and mainly made specific provisions from the patent special fund protection, patent award setting, patent contract registration to enjoy tax preferences and government procurement policy support. [6]

The choice and application of different legislative models

The definition model of the above local patent legislative jurisdiction broadly delineates the scope of local patent legislative matters. Of course, such matters are more abstract and general. It cannot provide specific guidance for local patent legislation directly. This paper only analyzes and classifies the provisions of local patent legislation. Moreover, the angle of this analysis is taken from the normative relationship between the central patent legislation and the local patent legislation. Compared with the central patent legislation, the scope of the local patent legislation depends on the proportion between the three defining modes. In other words, if the proportion of executive legislation norms is larger than the scope of local patent legislation has a smaller scope. If the proportion of autonomous legislative norms and leading legislation norms is larger than the scope of local patent legislation own matters will be larger. However, due to the different characteristics of different places in economic development level, geographical resource environment, historical and cultural tradition, legal environment and humanistic background and so on, the demand for patent legislation is not consistent. The content of local patent legislation also presents a variety of features. Therefore, it is very difficult for us to determine the reasonable proportion of each local patent legislation whether it is mainly executive legislation, or autonomous
legislation or leading legislation. To a certain extent, this also reflects the flexibility and cheapness of local patent legislation. However, it is worth affirming that the “National intellectual property Strategy outline” issued by the State in 2008 provides a macro policy basis for the determination of the scope of local patent matters. Through comparison we can know that the chapters contained in the local patent legislation that have been enacted since 2008 except for individual provinces which are basically constructed according to the four parts of encouraging creation, promoting the use of law, protecting according to law and scientific management. The content mainly focuses on the use, protection, management and service of patents and extends the scope of adjustment to incentives for invention and creation. Such content arrangement is more comprehensive than central patent legislation. It is more conducive to the realization of patent legislative purposes of protecting the legitimate rights and interests of patentees, encouraging invention and creation, promoting the application of invention and creation, improving innovation ability and promoting scientific and technological progress and economic and social development.

References
[5] See Articles 33 and 34 of the “Patent Regulations of Zhejiang Province”
[6] See Article 8 of the “Regulations on Patent Promotion of Jiangxi Province”, Article 11 of the “Regulations on Patent Promotion of Jiangsu Province”, Article 20 of the “Regulations of Tianjin Municipality on the Promotion and Protection of Patents” and Article 34 of the “Regulations of Beijing Municipality on the Protection and Promotion of Patents”.