

## **PERIOD OF VALIDITY OF PATENTS FOR INVENTIONS IN BRAZIL: AN ANALYSIS CONSIDERING RECENT LEGISLATIVE CHANGES**

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### **ABSTRACT**

This article addresses the validity of patents for inventions in the light of Brazilian legislation, given that there have been recent significant changes. The objective of this study is to understand the state of the art of the term of validity of patents for inventions in Brazil, for which the methodology of bibliographic research was adopted. Theoretically, it was possible to draw a complete and substantial framework of regulations and studies of patents for inventions as a subspecies of the Industrial Property species, which makes up the genus called Intellectual Property. The results show that, after twenty-five years of legislation in force in Brazil, the Federal Supreme Court considered the possibility of patents for inventions being valid for another twenty years as unconstitutional.

**Keywords:** Invention Patent. Validity. Legal norms.

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### **1 INTRODUCTION**

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This study addresses a kind of Intellectual Property (IP), patents for inventions, as a document that granted the holder the exclusive and temporary right of economic exploitation, as well as preventing other people, without their consent, from reproducing, using, placing for sale, import or export the products or processes covered by the patent (ADRIANO; ANTUNES, 2017).

In this sense, the study seeks to understand the current situation of the term of validity of patents for inventions in Brazil, this is justified because after 25 years of the enactment of the Industrial Property Law (IPL), Law n°. 9,279/1996, the Federal Supreme Court (STF) declared unconstitutionality (that is, the norm is incompatible com the Constitution of the Federative Republic of Brazil of 1988 (CF/88)) in the sole paragraph of art. 40, IPL, which provided for the possibility of extending the term of validity of patents for inventions for more than 20 years. Soon after this declaration, the parliament of Brazil enacted law n°. 14,195/2021, which revoked the provision. For this, the bibliographic research methodology was adopted.

The results show the need to analyze the validity of these patents for inventions in two periods, one that goes from the promulgation of the IPL, day 05/14/1996, to the declaration of unconstitutionality, day 05/12/2021, and the second after that date. In both periods, the term of patents for inventions is 20 years from the date of filing, however, in the first period, it is necessary to observe a minimum period of 10 years, counted from the granting.

### **2 METHODOLOGY**

The study makes use of bibliographical research, as it is suitable for the outlined objective (LAKATOS; MARCONI, 2019). Therefore, biographical research was carried out in which it was possible to search for scientific articles, books and other publications capable of providing elements to understand the state of the art of patents for inventions. The research also analyzed the international, constitutional and infra-constitutional norms that deal with the subject, as well as the recent STF judgment that addressed the matter.

### **3 THEORETICAL REFERENCE**

Inventions were the property of the sovereign State and this granted, by free will, to certain corporations, this began to change after the French Revolution. Only from the second half of the 18th century onwards did inventors acquire the right to exclusive exploration, for a fixed period, of the goods of the human intellect (MARTINS, 2017). Brazil recognized this right at the beginning of the 19th century with the permit of April 28, 1809, which recognized the privilege and exclusivity of use for a fixed period for authors of industrial inventions, which

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was followed by Brazilian constitutions from 1824 onwards. Studies point out that intellectual property, and in turn patents for inventions, is directly linked to innovation and development (MASCARENHAS NETO; CAMARGO, 2021; MASCARENHAS NETO; PONTE, 2020).

Invention patents are part of an Intellectual Property System (IPS) that includes a genus with several species and subspecies, with invention patents being Industrial Property species (Table 1).

CF/88 places intellectual property (art. 5, XXVII, XXVIII and XXIX, CF/88), and, consequently, the patent of invention, in the list of fundamental rights and not merely patrimonial (BASSO, 2008). Within the scope of infra-constitutional legislation, Brazil edited the IPL that regulates the rights and obligations related to the protection of industrial property through the granting of patents for inventions, in arts. 2nd, 6th to 93, IPL (BRAZIL, 1996).

**Table 1 - Intellectual Property System (IPS)**

<b>Intellectual Property</b>			
Industrial Property		Copyright	Protection <i>Sui Generis</i>
Patent	Invention	Copyright	Integrated circuit topography
	Utility model		
Registration	Trademarks	Related rights	Cultivate
	Industrial design	Computer programs	Traditional knowledge
Geographical indication	Indication of origin		
	Designation of origin		
Industrial secrecy and rebuke to unfair competition			

Source: Araújo et. al. (2010), Herscovici (2007), Matias-Pereira (2011) and Coelho (2016)

The protection of inventions provided by patents for inventions are, in addition to market protection instruments, important innovation tools, thus, Brazil, even being a signatory of the TRIPS Agreement (1994), is sovereign to legislate on forms of protection and validity period (BASSO, 2006), as it did through the IPL. At the beginning of the discussions the term "patent" was used with gender, but currently it is necessary to differentiate the concepts of invention, patented invention, invention patents, patent charter and patent privilege, in this sense, the patent recognizes the inventor's right the exclusive exploration of his invention (LABRUNIE, 2006). The patent, therefore, concerns a title that the holder obtains to ensure the right to exclusively exploit his invention (COELHO, 2016).

The patent can be, under the terms of the IPL, an invention or a utility model (ADRIANO; ANTUNES, 2017), the latter is not an objective of this study. Invention patent is a right legally granted by the State to inventors of certain products, manufacturing or improvement processes that guarantee exclusive economic exploitation for a certain time (MATIAS-PEREIRA, 2011). Invention patent is, still, conceptualized as being a legal institute,

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a title, granted by the State to confer protection and exclusivity of exploitation to the owner of an invention (LABRUNIE, 2006). Cerqueira (1982) clearly synthesizes the existence of three theories to define the legal nature of the innovation patent, namely: intellectual creations are types of personal rights; proposes a new category of rights, intellectual rights; and treats them as immaterial goods. The IPL adopted the second theory, that is, patents for inventions constitute a new category of law, intellectual rights (BRAZIL, 1996).

It should be noted that not all inventions can be patentable, as it is necessary to comply with some requirements (ADRIANO; ANTUNES, 2017). There are three requirements for patentability, novelty, inventive step and industrial application (BRAZIL, 1996). The novelty is related to the invention is not included in the state of the art, the inventive step is non-obvious, that is, it should not be obvious to a person skilled in the art and the industrial application is the insertion of the product or process in the production of an industrial school (ARAÚJO et al., 2010). The invention patent also relates to its utility, that is, for an invention to be patentable it is necessary for it to present a practical and commercial utility (HERSCOVICI, 2007). In addition to these requirements, there is no impediment or legality, situations in which the law prohibits, for technical reasons or in the interests of public interest, the patentability of certain inventions (COELHO, 2016; NEGRÃO, 2020).

The invention patent, as already said, guarantees the holder the right to exclusivity in the exploration for a determined period, it is common that, among the concepts of invention patents, some authors claim that the exclusivity rights of this exploration are temporary (TOMAZETTE, 2017; MARTINS, 2017). It is important to protect the inventions of health-related products, for example, to ensure exploitation by developers (BASSO, 2008). However, studies show that this protection cannot be infinite, as the end of the period of validity almost always leads to the development of similar products (SCHEINBERG et al., 2018). The IPL, when enacted in 1996, brought, in its art. 40, that the validity of an invention patent is at least 10 years and at most 20 years, counting from its granting, for the maximum period (BRAZIL, 1996).

Art. 40. An invention patent will be valid for a period of 20 (twenty) years and a utility model for a period of 15 (fifteen) years from the date of filing.

Single paragraph. The term of validity shall not be less than 10 (ten) years for the patent of invention and 7 (seven) years for the patent of a utility model, from the grant date, except if the INPI is prevented from proceeding to the examination of the merits of the request, by proven judicial pending or by reason of force majeure. (BRASIL, 1996)<sup>1</sup> (*our translation*).

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<sup>1</sup> Single paragraph declared unconstitutional by the STF and later revoked by law nº. 14,192/2021.

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It so happens that in mid-2021 the STF ruled unconstitutional the rule contained in the sole paragraph of art. 40, IPL, which established the possibility of an invention patent being valid for more than 20 years, in cases of delays by the agency responsible for granting the patent, the Brazilian federal agency National Institute of Industrial Property (INPI).

SUMMARY: Direct unconstitutionality action. Sole paragraph of art. 40 of Law no. 9,279/1996. Industrial property law. Extension of the term of validity of patents in the event of administrative delay for the examination of the application. Indetermination of the term for exclusive exploration of the invention. Offense to legal certainty, patent temporality, social function of intellectual property, reasonable duration of the process, efficiency of public administration, free competition, consumer protection and the right to health. Origin of the request. Modulation of the effects of the decision. (SUPREMO TRIBUNAL FEDERAL, 2021)

In this sense, the Brazilian parliament approved law n<sup>o</sup>. 14,195/2021, revoking the sole paragraph of art. 40, IPL, cited above. It should be noted that this decision of the STF has retroactive validity, *ex tunc*, for cases of patent of invention that have been granted with an extension of term related to pharmaceutical products and processes, as well as equipment or materials for use in health, for other invention patents will only be valid from the decision, that is, 05/12/2021 (SUPREMO TRIBUNAL FEDERAL, 2021).

#### **4 RESULTS AND DISCUSSIONS**

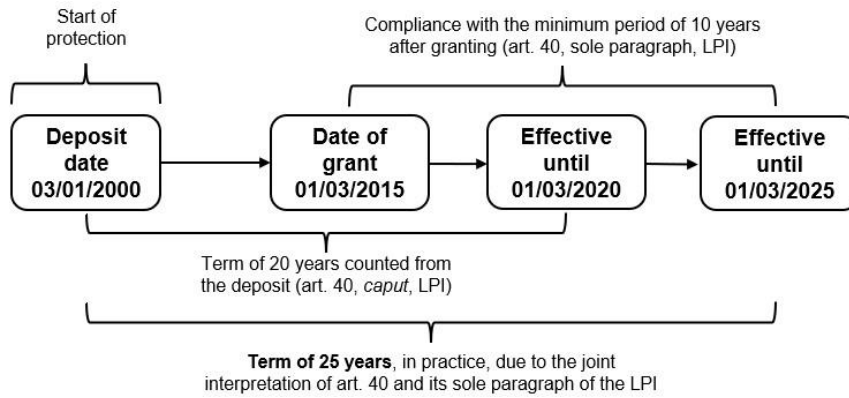
From the state of the art of patenting of invention, it is noticeable that this modality of protection of the assets of the human intellect is acceptably regulated in international normative devices, constitutional, bearing the status of fundamental right, and in the IPL. It also results that the invention patent is a genus of Intellectual Property, in the Industrial Property species. Many scholars challenge themselves in the mission to conceptualize an invention patent, and it is possible, based on these studies and the regulations, with the result that the invention patent is a title that protects the inventor against the use and exploitation by a third party and guarantees the exclusivity of use economic for a fixed period.

As for the term of validity of the invention patent, it is necessary to make a temporal division, that is, the analysis of the results should focus on the period of enactment of the IPL, 05/14/1996, until the declaration of unconstitutionality of the sole paragraph of the art. 40, IPL, 05/12/2021. Thus, in the first period, 05/14/1996 to 05/12/2021, the full rule of art. 40, sole paragraph, IPL. This rule stated that an invention patent is in force for 20 years from the date of filing, but it should respect the minimum period of 10 years after the grant. In practice, this

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could mean a period of validity longer than 20 years, if the INPI were excessively slow in the analysis (Figure 1).

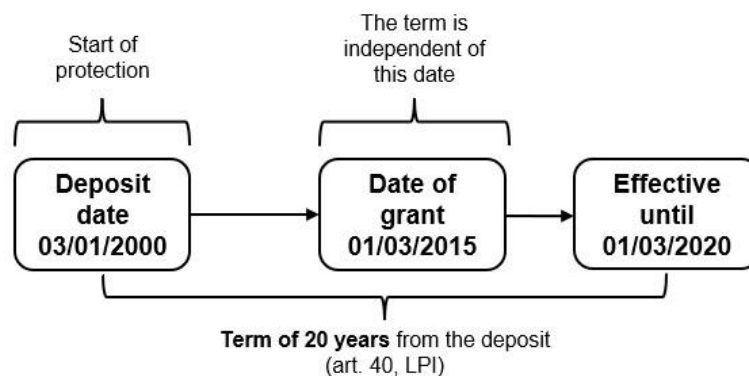
**Figure 1 Validity of the invention patent between 05/14/1996 to 05/12/2021**



Source: IPL

With the declaration of unconstitutionality of the sole paragraph of art. 40, IPL, and its subsequent revocation, ended the need to observe the minimum period of 10 years, after granting. Of this, patents for inventions granted after 05/12/2021 will be valid for exactly 20 years (Figure 2).

**Figure 2 Validity of invention patent after 05/12/2021**



Source: IPL

It is noteworthy that in the case of patents for inventions related to pharmaceutical products and processes, as well as equipment and/or materials for use in health, this rule of non-

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compliance with the minimum period of 10 years after the granting does not apply, this yes, these patents for inventions will be exactly 20 years old, regardless of the grant date.

### 5 FINAL CONSIDERATIONS

This study had as its main objective to understand the state of the art of the term of validity of patents for inventions in Brazil. For this, biographical research was used, in which literary production on the subject was sought and to analyze the Brazilian regulations that deal with the validity of patents for inventions. With that, it was possible to achieve the expected results to reach the outlined objective.

The validity period of patents for inventions in Brazil must be analyzed according to two periods: the first from the promulgation of the IPL, on 05/14/1996, until the declaration of unconstitutionality of the sole paragraph of art. 40, IPL, day 05/12/2021; and the second, after this same declaration, day 05/12/2021. In the first period, the term of patents for inventions is 20 years, counted from the filing date, having to observe the minimum term of 10 years for the concession. As of 05/12/2021, there is no longer a need to observe the minimum period of 10 years, being, in all cases, 20 years for patents on inventions.

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