Role of Public Morality in Patent Rights

Author- Dipanwita Chatterjee

Swastik Sekhar Panigrahi

Abstract-

Public order and morality in Patents have been an important ground for exclusion of patent rights. The importance of natural laws and order in the society has been kept in mind while granting patents and this keeps the system and the law in a balanced position. While it is important to protect the rights of the inventor, it is necessary to prevent ambiguities as well. Both the European and Indian legal system have recognized the importance of public morality. The USA has also implemented some changes with a judicial approach to harmonize the interests of patent owners with public morality. This article provides a comparison between America, European Union and India and their laws pertaining to public morality in patenting. The need of public order and morality clause, its implementation and the necessary changes which should be adopted by countries all across the world for developing an efficient legal system on Patent rights.

INTRODUCTION-

Public morality is the moral and ethical standard which the state should adopt while framing laws in a society. With regard to the protection of intellectual property rights, this relationship between law and public morality is quite controversial. While patent is an exclusive right, a right which confers monopoly, it is important to understand that the scope of patentability is applicable only to the extent that it doesn't contravene public order and morality. This has been expressed in Section 3(a) of Patents Act[1], which says that an invention which is frivolous or which is against the well-established laws of nature is not considered as an invention.

Moral rights and obligations, according to the European standards mean a set of categorically binding impartial principle. As stated by Kant, moral rights and duties should not be

[1] Sec 3 of Indian Patent Act, 1970.

abandoned and both the agents and the non-agents have to respect these rights and cannot alienate themselves from categorically binding duties.[2]

Due to the flexibility of international treaties such as TRIP, which does not expressly provide public morality as criteria for inventions and vests this power on the countries instead, nations continue to exploit natural resources including plants and animal species for their benefit.

So, different countries have different standards and tests for morality. The members of European Union follow the principle of 'Ordre Public and Morality', which is also a utilitarian test of morality. In the USA, there are no such provisions to restrict inventions on the basis of morality, however, the courts have the power to give their interpretations where there is a moral concern. The Patent Law of the People's Republic of China under Article 5 of the Act states that patent rights shall not be granted for invention in cases where it violates law or social ethics or harm public interests. [3]

Implementation of "Public order and Morality" clause

Position in the United States of America (USA)

USA does not have an exception of public morality or order as part of their patent acts. Some necessities were fixed by the Courts but it's used occasionally. [4] In the mid-12th Century the USPTO initiated banning patents on gambling machine on morality grounds. The same finished in the 1980's when the Court observed that inventions and creations for gambling machines are not immoral as compared to inventions such as guns, which may be used for the assassination of people. The USPTO in the late nineties brought the "Moral Utility" principle to check the questionable applications identified with biotechnology innovations.[5]

Yet, the equivalent was scrutinized and criticized by the Courts in light of the fact that legislature and not the executive can characterize the limits of the law. Subsequently there are not many models where the quality exemption of Public Morality was raised by the USPTO.

[2] Immanuel K, Gregor M (1998) Groundwork of the Metaphysics of Morals. ed. (Cambridge: Cambridge University Press, 4: 426

[3] http://www.asianlii.org/cn/legis/cen/laws/plotproca440/

[4] John White, The Moral Dimensions of US Patents (Date Accessed: September 30th 2021 at 9.31 am) https://www.ipwatchdog.com/2020/04/09/the-moral-dimension-of-us-patents/id=120519/

[5] Kailash Chaudhary, Ordre public and morality exclusions from patentability, (Date Accessed: September 30th 2021 at 10.00 am) https://www.lexology.com/library/detail.aspx?g=e1eff8bb-ae9d-4b20-bc95-68dd27f5aa07

Position in the European Union (EU)

The EU embraced an alternate methodology by embedding the ethical quality i.e. public morality and public order provision in the patent regime since the beginning. Unlike TRIPS, the European Patent Convention mandatorily requires its members to provide for morality exclusions. Further the European Patent Office later on issued Biotech Directive – 98/44/EC which bars certain biotechnological invention derived from the destruction of human embryos or manipulation of genetic structures. EPO is extremely tough and stringent on morality and public order exclusion and unlike the US, it initially poses the inquiry prior to the award of controversial patents licenses. The current recognition[6] by patent offices and courts is the 'plausibility'[7] requirement. [8]

Art. 53(a) of the European Patent Convention[9] delivers that European patents '*shall not be granted in respect of inventions the commercial exploitation of which would be contrary to "order public" or morality' and that 'such exploitation shall not be deemed to be so contrary merely because it is prohibited by law or regulation in some or all of the Contracting states*'.

Rule 28 Exceptions to patentability: Under Article 53(a), European patents shall not be granted in respect of biotechnological inventions which, in particular, concern the following:

a. *processes for cloning human beings;*
b. *processes for modifying the germ line genetic identity of human beings;*
c. *uses of human embryos for industrial or commercial purposes;*
d. *processes for modifying the genetic identity of animals which are likely to cause them suffering without any substantial medical benefit to man or animal, and also animals resulting from such processes.*

In the case of Onco-Mouse[10] , the exclusion under Article 53(a) of the EPC was argued for the first time. In this judgement the subject matter of patent application was a mouse which

[6] T609/02 *AP-1 Complex/Salk Institute* ECLI:EP:BA:2004:T060902.20041027 (Tech. Bd App. 3.3.8, 27 October 2004) [10]
[7] *Warner-Lambert v. Actavis* [2018] UKSC 56 [17]–[40] (Lord Sumption), [178]–[184] (Lord Hodges).
[8] T939/92 AgrEvo/Triazole Sulfonamide [1996] EPOR 171 (Tech. Bd App. 3.3.1, 12 September 1995) [2.6].
[9] Article 53(a) of The European Patent Convention, 2000

[10] T 0315/03 (Transgenic animals/HARVARD) of 6.7.2004

was genetically modified to carry an oncogene in order to make the species more vulnerable to cancer.

The object of this developmental innovation was to utilize these modified mice in cancer research. After endless supply of the application and process of examinations, the EPO dismissed and rejected the application expressing that the creature or animal varieties are not patentable.

However, on appeal the Technical Board of Appeal applied the morality clause under Article 53(a). The Technical Board was of the opinion that genetically modifying a mammal and that too to ensure that it will develop cancer was highly challenging and problematic as it will cause suffering to the animal. However, the Board of Appeal progressed the application back to the examination division testifying that while in view of considering morality, the Office ought to balance the inventions' utility to the mankind with the distress caused to animals. The Board consequently held the genetically modified and adapted mouse to be patentable on the grounds that it was for the advantage of humanity.

Since then there are several cases like The Plant Genetic Systems Case,[11] The Transgenic Animals decision,[12] The Wisconsin Alumni Research Foundation (WARF) case[13] etc., where exclusion under Art. 53(a) has been discussed in detail.

Position in India

The Indian Patents Act, 1970 is responsible for a statutory provision concerning public order or morality exclusion. Section 3(b) states that "*an invention the primary or intended use or commercial exploitation of which could be contrary to public order or morality or which causes serious prejudice to human, animal or plant life or health or to the environment*".

[11] T356/93 *Plant Genetic Systems/Glutamine Synthetase Inhibitors (Opposition by Greenpeace*) [1995] EPOR 357 (Tech. Bd App. 3.3.4, 21 February 1995) 366–372.

[12] Aisling McMahon, David M Doyle, Patentability and de-extinct animals in Europe: the patented woolly mammoth?, *Journal of Law and the Biosciences*, Volume 7, Issue 1, January-June 2020, (Date Accessed: September 30th 2021 at 10.40 am) https://academic.oup.com/jlb/article/7/1/lsaa017/5835678

[13] Thomson JA, Kalishman J, Golos TG, Durning M, Harris CP, Becker RA, Hearn JP. "Isolation of a primate embryonic stem cell line." Proc. Natl. Acad. Sci. USA, (Date Accessed: September 30th 2021 at 11.00 am) https://www.pnas.org/content/92/17/7844

The draft manual of Licenses of patents additionally gives a few models which go under prohibition or exclusion on the grounds of public order or morality. Anyway the avoidance or exclusion as given under the law is yet to be examined and scrutinized by the Indian Courts.

Trade Related Intellectual Property rights (TRIPS)

The protection of public order and morality in International Patent law is expressly mentioned in the TRIPS Agreement to impose restrictions in order to protect human, animal as well as plant life.

Article 27.2 of TRIPs states that "*Members may exclude from patentability inventions, the prevention within their territory of the commercial exploitation of which is necessary to protect order public or morality, including to protect human, animal or plant life or health or to avoid serious prejudice to the environment, provided that such exclusion is not made merely because the exploitation is prohibited by their law".*

The words public order and morality exclusions as provided in Art. 27.2 are not easy to describe. As per one interpretation, public order means "expresses concern about matters threatening the social structures which tie a society together i.e. matters that threaten the structure of civil society as such" and morality means "degree of conformity of an idea to moral principles".[2] The social, cultural and values of religion of member nations form an inevitable part in establishing public order and morality.

The latter half of the Art. describes to some extent the characteristics of these exclusions as those innovations whose business double-dealing i.e. commercial exploitation is restricted to ensure human, creature / animals, vegetation and climate and not only on the grounds that the current law of the state prohibits exploitation of such developmental inventions.

Landmark judgements on public morality and patent rights-

In Molecular Pathology v. Myriad Genetics (Myriad)[14], the US Supreme Court held that naturally occurring DNA is not eligible for patents. The court categorically stated that the Patent Act permits patents to be issued to any new and useful composition of matter, but

[14] Molecular Pathology v. Myriad Genetics (Myriad), 569 U.S. 576 (2013)

keeping in mind, that it does not intervene with the laws of nature, natural phenomena or any abstract ideas which lie beyond the domain of patent protection. In National Automatic Device Corp. v. Lloyd, the District Court held that since the invention was used for exclusively in gambling establishments, it could not prove its utility and was in contradiction to morals, good health and order of the society. Hence it was denied under the patent law.[15] In Mayo Collaborative Services. v. Prometheus Laboratories[16], the US Supreme Court, reiterating the decision of the District Court, held that a newly discovered law of nature is un patentable and the application of that newly discovered law, being known in the art, is also un patentable.

The European Union rather than defining the subject matter unlike the USA has developed a legislative framework to define as to what cannot be categorized as inventions. In Harvard Coll. v. British Union for the Abolition of Vivisection, the claims on transgenic mice was allowed but not to rodents generally, balancing the need of humankind to treat disease and avoiding suffering to animals by protecting them against uncontrolled dissemination of unwanted genes.[17]

Conclusion

As per Louis Pojman, morality has five purposes which includes keeping the society from falling apart, ameliorating human suffering and promoting human flourishing, resolving conflicts of interest in just and orderly ways, assigning praise and blame and by rewarding the good and punishing the guilty.[18] Public morality defines the standard by which certain things are held acceptable in the society and certain things are discarded on the basis of concerns raised due to health, safety, public welfare, religion or morality.

In developing countries, the patent system not only increases the innovation but also takes into account, the concerns of **"**access" to technology most significantly. Hence it is clear that the patent regime cannot be segregated from other public policies, which includes moral values, conscience and public health. The existing conflict between patent rights and the public policies, social values and fundamental rights has been developed on the basis of

[15] Nat'l Automatic Device Co. v. Lloyd, 40 F. 89, 90 (C.C.N.D. Ill. 1889).
[16] Mayo Collaborative Services. v. Prometheus Laboratories,566 U.S. 66, 72, 73 (2012), https://www.supremecourt.gov/opinions/11pdf/10-1150.pdf
[17] Harvard Coll. v. British Union for the Abolition of Vivisection (Transgenic Animals/HARVARD), Case T-0315/03 – 3.3.08, Eur. Pat. Off. Tech. Bd. App. (July 6, 2004).
[18] http://www.sfu.ca/~etiffany/teaching/phil120/student_paper1b.html

public order and morality, in the cases of medical treatment, in developing plants and animal varieties, discoveries, mere combinations and derivatives etc

Patent naturally has an impact on industrial investments that takes place when there is no monopoly in the market. The limited monopoly granted to certain patent holders allows them to prevent others from independently investing and offering new products eg. Genetic tests and its associated technology. Because patents are considered essential and crucial part of the commercialisation process, they have also been implicated from concerns associated with genetic products and gene tests.

However, patents exist within a complex social and economic environment. It includes various social values, economic and environmental consideration, research practices and business pressure, modification of patent law can bring a solution to the modern problems.

The ultimate aim of patents is the progress of technology in the form of new products for public good, which has to be considered before enforcing any new law.