E- Journal of Academic Innovation and Research in Intellectual Property Assets (E-JAIRIPA)

Vol. II (I), Jan-June 2021, pp. 83-98

PUBLIC MORALITY AND OBSCENITY IN THE GRANT OF PATENTS: IS IT BEING APPLIED IN THE INTENDED MANNER?

Divyakshi Jain[1]

Abstract

In this paper, I have tried to highlight the fact that the morality and public order exclusion found in the patent laws of most jurisdictions is not being used in the appropriate manner in India. It was intended to curb inventions that would cause social anarchy or to control the inventions which are so reprehensible that they cannot be condoned, eg. An invention involving experimentation on human embryos. However, in India, it is being used to reject patents on sex toys and not to analyse whether the biotechnology rules available in India are well drafted and cover all moral ambiguities that arise in the areas of biotechnology. Furthermore, it should be made clear what is moral or immoral according to law and it should not be left for determination up to Patent Offices who are not equipped for carrying such a heavy burden. Thus, I have analysed the morality exception scenario through the rejected sex toy patent and tried to suggest measures which would improve the manner in which the morality exception is being applied in India. I have also tried to show that there is a need to clarify the bounds of morality and how it would be enforced against inventors, not only in India but in other jurisdictions as well. Because even EU also does not have a clear-defined approach to regulation of morality. I have, for this purpose analysed Section 3(b) of Patents Act, 1970, Article 53(a) of the EPC and Article 27.2 of TRIPS.

INTRODUCTION

There are multiple theories provided by different people in order to justify the existence of the patent system. Among these different theories "incentive or reward theory" are the most widely accepted. To put it in simple words, patents were introduced as a reward in the form of monopoly being granted to the person who has put in an effort to invent new and useful

[1] 1st Year, B.B.A. LL.B. (IPR Hons.), National Law University Jodhpur

products or processes and it is also expected that the lure of such a reward would attract investors and foster their spirit of innovation, so they produce new products by applying the maximum of their knowledge and creativity. However, it has always been a contentious issue whether the patent system actually encourages innovation or not.

In developing countries, innovation is not the only criterion when taken in account the patent regime to be established, there are other concerns such as access to technology which need to be addressed, most significantly in the field of pharmaceuticals and public health. Hence it has always been accepted that the patent regime cannot be segregated from public policies such as moral values and health.

The main concern is to create a balance between conflicting and competing concerns that would come up when promoting innovation, does not detract from the other significant issues. We would be discussing how countries try to limit the grant of patents to certain categories of innovations. Broadly such exclusions include public order and morality, methods of treatment, new plant and animal varieties, discoveries, mere combinations, derivatives, etc. The exclusion in relation to public order and morality will be extensively discussed in this paper.

Obscenity which is defined as a crime under the Indian Penal Code (IPC) is an evidence of India's colonial past. Though its need has been debated, it is indisputable that the judiciary has sometimes interpreted it in an archaic manner, befitting the age of the provision in fact. The judiciary has, no doubt, evolved from the infamous Hicklin Test[2]to the contemporary community standards test[3] (testing the impugned material against contemporary national standards and not by the standards of sensitive people). However, the latter test has been criticized for its vagueness and subjectivity.

In 1957, the US court developed a new test for obscenity in *Roth v. United States*[4]. In this case, the Court laid down that only those sex-related materials which had the capability to generate prurient interests or lustful thoughts would be categorized as obscene. This was to be judged from the point of view of an average person as per community standards, unlike the previous tests which only targeted the susceptible readers such as the vulnerable sections namely children or weak-minded adults.

[2] R v. Hicklin, [1868] LR 3 QB 360; Ranjit D. Udeshi v. State of Maharashtra, 1965 AIR 881:1965 SCR (1) 65.
[3] Aveek Sarkar v. State of West Bengal, (2014) 4 SCC 257.
[4] Roth v. United States, 354 U.S. 476.

When the manner in which obscenity is adjudged under IP law is studied, it is very unsurprising that a similar lacuna, lack of clarity, skewed opinion of morality and confusion about the appropriate tests to be applied when studying obscenity, exists. The definition of "obscenity", is fuzzy at best and confounding at worst. Any material that is "lascivious or appeals to prurient interests" and tends to "corrupt or deprave" is considered "obscene", and its transmission in any form – physically or electronically – is liable to be criminally prosecuted.[5] The conception of obscenity is different in each nation and it is completely dependent on the moral and cultural values that shape the countries' society.[6]

Public morality, on the other hand, as a standard for declaring a wrong as a crime, is confined to very small area. Thus, it needs to be emphasized that the standard adopted is "public morality" and not "social morality". However, in the modern era, the line of distinction between public and social morality is too thin and a cause of confusion.

It needs little debate to understand the inherent inconclusiveness, relativity, and at times, contradictions in the definition of the term 'morality'. It is no different when we consider public or social morality. This is the reason why public morality is only used as a standard in only limited circumstances.[7]Thus, there is ambiguity in both obscenity and public morality as a ground of exclusion of grant of patents. We are going to address this ambiguity and try to see how and when the application of this exclusion is appropriate and how it can easily be misused and also cause grave injustice to inventors.

For this purpose, I would first analyse Section 3(b) of the Patents Act, 1970 which lays down morality as an exception to grant of patents. Then I would analyse the morality exception laid down in TRIPS. Then I would analyse a sex toy patent which was rejected on morality ground by the Indian Patent Office (IPO) that demonstrates the ultimate power held by the patent offices in such matters. There would then be a discussion on the implications of such use of morality and obscenity exclusion. Lastly, there would be a comparison with other jurisdictions and how they deal with morality as a patent exclusion. The paper would be concluded with

[5] Saurav Dutta, *Prosecuting Snapdeal for selling vibrators isn't about sex: it's about online censorship*, SCROLL (February 5, 2021), https://scroll.in/article/711726/prosecuting-snapdeal-for-selling-vibrators-isnt-about-sex-its-about-online-censorship.

[6] Sahana Chaudhari, *Obscenity & the Indian Law*, CYBER BLOG INDIA, (February 5, 2021), https://cyberblogindia.in/obscenity-the-indian-law/.

[7]K. Balakrishnan, *Constitutional Morality in India: the new kid on the block*, BAR AND BENCH, (February 5, 2021), https://barandbench.com/constitutional-morality-india-new-kid-block/.

certain suggestions that could streamline the process of determination of morality and reduce the ambiguities held within.

ANALYSIS OF SECTION 3(B) OF THE INDIAN PATENTS ACT, 1970

Right from its inception in 1911, the Indian Patent regime has always had a 'morality' exception. Section 3(b) of the Patents Act[8] articulates this exception as any invention, '*the primary or intended use of which would be contrary to law or morality or injurious to public health.*' Further the draft manual of Patents also provides some examples which come under exclusion on the grounds of public order or morality. However, the exclusion as provided under the law is yet to be scrutinized by the Indian Courts.[9]

There is only one unreported instance of the use of Section 3(b) by the Indian Patent Office. The invention in this case related to medicinal powder prepared from skeletal remains of dead bodies dug up within a week of burial. Digging up graves for earning profit was seen as morally objectionable by the patent office.

In the *Novartis* case,[10] the IPAB also denied the patent on the ground that the prices of the drug Gleevec were excessively high and out of reach of common man. And that considering all the circumstances of the appeals, the Appellant's alleged invention won't be worthy of a reward of any product patent for its possible disastrous consequences which would attract the provisions of section 3(b) of the Act which prohibits grant of patent on inventions, exploitation of which could create public disorder among other things.

Patent Application no. 1375/DELNP/2009 was also denied by the IPO due to contravention of Section 3(b). The invention in question was related to a method and device which aided in the controlling and positioning of numbering wheels of numbering devices as used in printing presses for carrying out numbering of printed documents, especially banknotes and securities. According to the applicant, the numbering devices was unique as it allowed each numbering wheel to be set in any position independent from the other numbering wheels. The Controller of Patents observed that the entire purpose of this invention was numbering banknotes and securities which is contrary to public order and morality. However, this seems a very vague

[8]The Patents Act, 1970 § 3(b), No. 39, Acts of Parliament, 1970 (India).
[9]Singh & Associates, *Ordre Public and Morality exclusions from Patentability,* LEXOLOGY, and (February 5, 2021) (last accessed on August 31, 2021).
[10] Novartis AG v. Union of India, Civil Appeal No. 2706-2716 of 2013.

ground to be discussed under Section 3(b) and also shows a narrow view taken by the Controller.[11]

In the light of the above examples, it might feel that the resort to the morality exception is a *non sequitur*. However, it is important to remember that this exception was dormant in most other regimes and triggered off mainly when confronted with biotechnology applications. The provision of the Indian Patents Act that deals with the 'morality' and public safety threshold closely mirrors the European Patent Convention. Thus, as per Section 3(b) of the Indian Patents Act, inventions whose primary and intended use would be contrary to law, morality and public health are non-patentable. Till date there are no significant cases in India about this exception, which according to some commentators is surprising.

The Indian provision is very similar to Art 53(a) of the European Convention[12] which prohibits the patenting of inventions that are contrary to '*order public*' or 'morality'. In Europe, there has been controversy regarding the provision as it has several contested meanings. Major decisions on this provision have included the Relaxin (gene patenting)[13], Oncomouse (Genetically modified animal)[14] and Stem cell (Enlarged board of appeal decision is awaited) decisions.

Looking into this issue also brings forth the debate of law as a reflection of morality or not. The positivist school of law believes that law should be divorced from morality and based on logical reasoning. On the other hand, the natural school of law argues that law should reflect the morality and prevailing social norms, that law is a social instrument and thus cannot be based purely on reason.[15] Following from this, a positivist would argue that a patent should be granted if it is novel, inventive as well as useful while morality should have no role in the grant at all. Natural law supporter would however feel that any invention that offends morality should not be granted a patent and a thing which offends morality cannot be given legal character.

ANALYSIS UNDER TRIPS

Article 27.2 of the Trade-Related Aspects of Intellectual Property Rights (TRIPS) agreement permits member states to exclude inventions from patentability using the exception of

[11] RNA Technology and IP Attorneys, *A case on Public Order and Morality*, LEXOLOGY, (February 5, 2021) (last accessed on August 31, 2021).
[12] Convention on the Grant of European Patents, art. 53(a), October 5, 1973, 13 INT'L LEGAL MATS. 268 (1974) [hereinafter cited as EPC].
[13] Howard Florey/Relaxin, [1995] EPOR 541 T 0272/95 (October 23, 2002).
[14] The President and Fellows of Harvard College v. British Union for the Abolition of Vivisection, et al., EPO, T 0315/03 (July 6, 2004).
[15] JOHN SALMOND, SALMOND ON JURISPRUDENCE, (Universal law Publishing, New Delhi 1966).

"morality."[16] The treaty states: "*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.*" [17]

States having a right to protect the public interest is an accepted general principle and patent law is no exception to it. Based on a long-established tradition in patent law (particularly in the European context), TRIPS allows (but not mandates) two possible exceptions to patentability, based on *ordre public* and morality. The implementation of this exception, which is at the choice of the nation itself, implies that a WTO member, in certain circumstances, may refuse the grant of patent when it finds it necessary to protect higher public interest.

The term "*ordre public*", derived from French law, [18] is not an easy term to translate into English, and therefore the original French term is used in TRIPS. It is supposed to express concerns about matters that threaten social structures which are the foundation of the society. "Morality" is "the degree of conformity to moral principles (especially good)".[19] The concept of morality is relative to the prevailing values in a society. Therefore, both of the above terms have a fluid connotation with changes with culture and time. Despite the fluidity of the terms, many jurisdictions recognize exclusions as permitted by Art. 27.

Such values are not the same in different cultures and countries and change over time. Some important decisions relating to patentability may depend upon the judgement about morality. It would be ill-advised if patent offices around the world granted patents without giving any consideration to morality.

Article 27.2 provides that protection of order public or morality includes the protection of "*human, animal or plant life and health and any invention which could cause serious prejudice to the environment*", thereby creating explicit exceptions when considering the grant of a patent. The concept of "health" may be deemed to encompass not only medical care, but also the satisfaction of basic requirements such as safe water, shelter, adequate food, warmth,

---

[16] 2, CARLOS M. CORREA ET. AL., INTELLECTUAL PROPERTY AND INTERNATIONAL TRADE: THE TRIPS AGREEMENT (Kluwer Law International, 1998).
[17] Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 3; 33 I.L.M. 1197 (1994) art. 27.1 [hereinafter TRIPS]; 4, DANIEL GERVAIS, THE TRIPS AGREEMENT: DRAFTING HISTORY AND ANALYSIS, 421 (Sweet & Maxwell, 2012).
[18] UNITED NATIONS CONFERENCE ON TRADE AND DEV. & INT'L CTR. FOR TRADE AND SUSTAINABLE DEV., RESOURCE BOOK ON TRIPS AND DEVELOPMENT, 375 (2005).
[19] *Moral,* Oxford English Dictionary, (2nd edn. 1989).

clothing, and safety. The "environment" refers to the "surrounding objects, region, or conditions, especially circumstances of life of person or society". Finally, it should be noted, that WTO Members can provide for the exceptions referred under Article 27.3 subject to one condition: non-patentability would only be established if the commercial exploitation of an invention would need to be prevented in order to protect the above-mentioned interests.

According to European Law, *ordre public* encompasses protection of public security and physical integrity of individuals which form part of the society. This concept includes also the protection of the environment but is deemed to be narrower than 'public order', which appeared in some drafts of the Agreement. Though European law seems to be yardstick that should be followed when interpreting "*ordre public*", however even in Europe there is no universally accepted interpretation for the WTO members to follow. Ordre public mirrors the patent exclusion on morality grounds. Morality, as discussed above, however depends upon the culture of a country or region.

The EPO jurisprudence has created a distinction between *ordre public* and morality.[20] Under the Guidelines for Examination of the EPO, "*ordre public*" is linked to security reasons, such as riot or public disorder, and inventions that may lead to criminal or other generally offensive behaviour. *Ordre public* is a term which has been associated with international private law traditionally, where it is the last resort when the application of international law leads to an outcome which would completely disrupt the national legal order.

Morality reflects customs and habits anchored in the spirit of a particular community. There is no clear objective standard of feeling, instincts, or attitudes toward a certain conduct. Therefore, specific prescriptions involving uniform evaluation of certain acts are extremely difficult.

While *ordre public* has been interpreted to mean "expresses concerns 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". Both morality and *ordre public* contain a reflection of the prevailing social, cultural and religious values of member countries thus it is not possible for an objective definition to be achieved. The Article 27.2, to some extent, defines the exclusions available when discussing morality and *ordre public*.

[20] Plant cells resistant to glutamine synthetize inhibitors, made by genetic engineering, (Plant cells), EPO, T 0356/93 (February 1995).

ANALYSIS OF THE SEX TOY PATENT REJECTION

This patent was another example of the misuse of the power granted to the Patent Office to decide on the matter of morality. In this patent application, the applicant, Standard Innovation Corporation (a Canadian entity) had claimed a patent on a creative vibrator, branded as "We-Vibe". The patent claiming this device (a unique vibrator) was denied on the ground that it was an "immoral" invention under section 3(b) of the Patents Act.

Patent Claim:

The technicalities of this allegedly pornographic patent are listed below. The patent was field in several countries including India and had even been granted the patent in some countries. Unfortunately, the Patent Office (speaking through an Assistant Controller in April last year) wasn't pleased by the patent and rejected the patent stating:

"*The subject matter claimed in the instant application relates to "sexual stimulating vibrator" and its intended use or commercial exploitation could be contrary to "public order" or "morality" and falls under section 3(b) of the Patents Act (as amended) and is not allowable…. Mostly these are considered to be morally degrading by the law*."[21]

Reasons given for the rejection of the patent:

1. **The law views sex toys negatively and has never engaged positively with the notion of sexual pleasure.**

The Patent Office claims that Indian legal system is at odds with the notion of sexual pleasure. They seem to forget that this is not the dark ages. The insinuation that sexual pleasure is something which is morally reprehensible is surprising and frankly archaic. And this is after the Supreme Court has ruled in the favour of freedom of sexual orientation and personal liberty in the case decriminalising Section 377 of IPC[22].

2. **These are toys that are not considered useful or productive.**

The requirement for productivity cannot be understood in a decent manner. The ITC complaint spells out the many splendored uses for this device.

"*Such devices are useful in a number of contexts, including improving relationships, increasing pleasure for a partner, sexual-disorder treatment, promoting monogamy and marital stability*

[21] Shamnad Basheer, *Sexual Pleasure is Immoral: So Says the Indian Patent Office!* SPICY IP, (February 6, 2021) (last accessed on August 31, 2021).
[22] Navtej Singh Johar v. Union of India, (2018) 10 SCC 1.

thereby reducing transmission of sexually-transmitted diseases, and increasing satisfaction of sex life of an individual and thereby contributing to an overall wellness/productivity gain for the individual."[23]

Thus, it seems that these sex toys do have their own particular uses, and cannot be deemed to be unproductive. Thus, this contention of the Indian Patent Office cannot be seen as anything but a hoax to reject the patent.

3. **Section 377 bans any sort of sexual intercourse that is termed to be unnatural biologically. Therefore, sex toys (sexual stimulation device), also known as adult toys are banned on the premises that they lead to obscenity and moral deprivation of individuals.**

Problematic as this provision is, its invocation here is tad bit surprising though, since the section is very specific in its application to only certain "subjects": "*Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with…"*[24]

As can be seen, the section applies only if there is a "person" (whoever) at one end who engages in "unnatural" sex with another person (man/woman) or animal. Clearly, a vibrator is outside the scope, for it is neither a person nor an animal. Unless of course the argument is that the use of this vibrator during the course of regular procreative sex renders the sex itself between two consenting adults "unnatural". This contention thus also cannot be allowed to stand.

4. **Importing and selling sex toys, considered as an 'obscene' object and hence illegal in India.**

Section 292 of the Indian Penal Code defines the term 'obscene' and provides for punishment for distributing any such object. Section 292 (1) defines 'obscene' as follows: "*a book, pamphlet, paper, writing, drawing, painting, representation, figure or any other object, shall be deemed to be obscene if it is lascivious or appeals to the prurient interest….*".[25]

[23] UNITED STATES INTERNATIONAL TRADE COMMISSION WASHINGTON D.C. Complaint, http://images.mofcom.gov.cn/trb/accessory/201301/1357799990084.pdf.
[24] Indian Penal Code, 1860 § 377, No. 45, Acts of Parliament, 1860 (India).
[25] Indian Penal Code, 1860 § 292, No. 45, Acts of Parliament, 1860 (India).

Here again, at least one court has made it clear that sex toys are not necessarily "obscene". In *Kavita Phumbra v. Commissioner of Customs (Port)*[26], the Calcutta High Court held as below:

"*In our opinion, an article or instruction suggesting various modes for stimulating the enjoyment of sex, if not expressed in any lurid or filthy language, cannot be branded as obscene. Acquisition of knowledge for enjoyment of sex through various means is not by itself a prohibited activity, provided it is not done through obscene language or pictures. The concerned items are meant for adults and as such their importation for restricted sale to adults only should not be considered to be on the wrong side of the law.*"

Thus, it can now be seen that the only reason why the Patent Office rejected the patent was because they felt that sex toys are against public morality and were trying to impose this morality on the society as a whole without valid legal reasons and this is not the way Section 3(b) was intended to be used. Further from a constitutional law perspective, any potential ban on goods has to be balanced against the fundamental right to free speech under Article 19(1) (a)[27] and the right to trade under Article 19(1) (g)[28].

We need to step back and ask: is it prudent to vest the Patent Office with the authority to make "moral" or immoral determinations of this nature? Do they have the required institutional competence to comment upon this thorny issue? Thus, the main problem arises when legal institutions attempt to blur the distinction between obscenity as an offense under the country's penal laws and their personal opinions on morality and public policy.[29]

IMPLICATIONS OF THE USE OF OBSCENITY AND PUBLIC MORALITY AS A GROUND FOR REJECTION OF PATENTS IN INDIA

Courts and IP officers should not be allowed to use the façade of law to force their opinions of morality on others. Surprisingly, the same has been done by the IPO in the above-described case of the rejection of patent grant to a sex toy in its interpretation of the term "obscene" and "useful". The IPO's decision only applies the bare interpretation of Section 292 and does not discuss any presently accepted contemporary standards to reach its conclusion of sex toys as "obscene". The IPO also tries to imply that law has a negative view of sexual pleasure in order to support their faulty order.

[26] (2012) 1 Cal LJ 157.
[27] INDIA CONST. art. 19(1) (a).
[28] INDIA CONST. art. 19(1) (g).
[29]Prarthna Patnaik, *Obscenity and Morality under IP Law*, SPICY IP, AND (February 8, 2021) (last accessed on August 31, 2021).

"*Why should the patents office handle moral decisions? Officials trained in technical science are not supposed to decide whether an invention is moral or immoral*," Prof Basheer said when asked about the autonomy of patent office's when deciding the question of morality.[30]Furthermore, the use of the morality provision was in context of stopping commercial exploitation of something which would affect the social fabric of the society itself. However, sex toys are openly sold online, and in a thriving black market in India. A survey conducted by an online sex toy store in India found that 62% of the buyers of such toys are men. And as far as is seen, the rejection of the patent has not affected the sale of such products and this sale has not affected the society in any adverse manner till now.[31]

This is not the first time that a patent had been rejected on morality grounds. In an instance, the patent office had rejected the application about a medical powder which was produced from the skeletal remains of dead bodies within weeks of burial. This was seen as objectionable by the office.[32]The above ground was now supported by the nebulous principles of morality which can be used as a legal weapon to justify the rejection of a patent.

While rejecting the patent in question, the said invention was said to be a "sexual stimulating vibrator" and thus held to be immoral. Here, if the underlying assumption is that "something related to sex/sexual intercourse is immoral" then there would be a long list of objects which should have been declared immoral and illegal. Going with the same analogy, a condom should also have been held immoral and obscene because of its seductive packaging. This particular incident sets an example for the moral-obscenity dichotomy.

Indian patent authorities have interpreted obscenity and immorality as one and the same thing. But there is a fallacy that flows with the above assumption because something which is obscene may not necessarily be immoral and vice versa for e.g. killing an innocent person may be immoral but not obscene and a condom advertisement may be obscene as it is likely to arise one's prurient interest but is not always immoral.

Apart from morality, public order was another reason given for justifying the rejection. The absence of the term public order has also led it to be open to be interpreted as per the wishes of the authorities.

---

[30] *India rejects Patent plea for 'Immoral' sex toy*, BBC, (February 9, 2021) (last accessed on August 31, 2021).
[31] Srijani Ganguly, *Is India experiencing increased sale and purchase of sex toys?* INDIA TODAY, (February 9, 2021) (last accessed on August 31, 2021).
[32] Shamnad Basheer & Pankhuri Agarwal, *A Moral Quarrel*, ASIA BUSINESS LAW JOURNAL, (February 9, 2021) (last accessed on August 31, 2021).

In furtherance of the same, it is to be understood that even if the said invention was granted patent, it would not have impacted public order because there is no proximate relationship between grating patent to a sex toy and public order because sex toy is part of one's private life and thus not a subject matter of public concern. Therefore, one's using "We-Vibe" would not have any proximate nexus with the public interest because a sex toy is not something which is used in public hence it is least likely to disturb public order.

Now, reading it in conjunction with Locke's Non-Waste principle (which says that a person should not produce a thing which yields no benefit) would make the situation even more questionable as the rejection disentitles the inventor from any benefit. Now shifting to the labour theory of Locke, he doesn't have any incentive to come up with such invention because his creativity is not appreciated hence ultimately impacts the fundamental objective of IP law i.e. to provide incentives to create and serve the interests of the public by promoting economic growth.

This discussion is pertinent not only to India as it highlights the morality-obscenity dichotomy prevalent in many jurisdictions. This dichotomy enables the authorities to use their own brand of morality as a yardstick for determination of the legality of an object or act. The relevancy of the case is not just for India but for the entire IP law regime. Because whenever a statute gives morality as a ground for determining the legality, it creates a broad leeway to the interpreting authority to use it as a tool. The concepts of morality are said to be determined by social or community standards, but the irony is that people determining are in no way eligible to determine the social standards by themselves.

This leads to the cropping up of certain questions such as if today X (an inventor) is denied a patent on grounds of morality and public decency but a similar invention or even the same invention is granted patent at a later date, who would be attributed with the fault? Would it be the fault of X to invent such thing in the wrong span? Or is it the society's inability to set inadequate standards? Should the standard setting authority be held responsible for treating the invention in different manners at different times? Or it is the inadequacy of intellectual property to resolve such matters? The question often remain unanswered. Thus, only moral reasoning should not be encouraged for giving a legal justification because doing so shambles the rudimentary premises of law.[33]

[33]Lokesh Vyas, *Morality-Obscenity Dichotomy: An Unfathomable Intellectual Property Law Approach*, BERKELEY JOURNAL OF INTERNATIONAL LAW (February 9, 2021).

COMPARISON WITH OTHER JURISDICTIONS

European Union

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*."[34]

In Europe, the approach to interpretation of the 'morality' exclusion takes either of two approaches. First is the 'patent first', 'regulate later' approach. The reasoning behind this approach is that even if a patent is granted on, for example, a GMO, it is not a license to use, manufacture and sell this organism.[35]Regulatory approval must then be obtained, and all biosafety preconditions met. The main objections against this position include that once a patent is granted, it makes regulatory approval more likely. Further, initial patentability quickly sets up expectations within industry both domestic and foreign, potentially creating further barriers to regulation.

The second approach has been for the EPO itself to make a decision on biosafety in order to conclude that such concerns need not be a threat to '*public order*' or morality. The obvious objection to this has been the legitimacy of patent examiners making sophisticated decisions on biosafety, a field outside of their normal expertise.[36]

To summarise, a combination of the above two approaches is used by the EPO when assessing biosafety of exploitation of an invention under the morality exclusion. But primarily the reliance is on post-grant regulatory bodies' efficiency in policing the dangerous aspects of the invention. The above approach has been criticised by academics as being overly dismissive of what could be developed into a strong legal doctrine that deals in a proactive rather than responsive way to dangerous or unsafe technologies. It must also be recognised that the approach of the EPO is fuelled by a generally expansive approach to patentability that interprets any exclusions in the law narrowly.

---

[34] *Supra* 12.
[35] Margo A. Bagley, *Patent First, Ask Questions Later: Morality and Biotechnology in Patent Law*, 45 Wm. & Mary L. Rev. 469 (2003).
[36] Shamnad Basheer, *Grave Diggers, "Immoral" Patents and the NBRA,* SPICY IP, (February 9, 2021) (last accessed on August 31, 2021).

The European Patent Office (EPO) once took the position that morality and patentability were unrelated. The European Directive on the Legal Protection of Biotechnological Inventions that denies patent protection to human embryos on the grounds that such patents offend human dignity relies on Art. 27.2.[37]

Under Article 53(a) EPC, inventions the exploitation of which is likely would be so abhorrent for the public that its patenting would be inconceivable. The analysis of the application of Article 53 (b) of the EPC is made on a case-by-case basis. The EPO has employed two methods for that purpose: the balancing of interests at stake and the opinion of the vast majority of the public. In all the cases where these methods were applied, the EPO affirmed the patentability of the inventions under examination including on morality grounds.

EPO is very stringent on the morality and *public order* exclusion. In the Cooperative Patent Classification (developed by the European Patent Office and The United States Patent Office) there are several classifications for sex toys which means that it is not found to be immoral or obscene under the EU jurisdiction.

United States

In the United States, some of the earliest intellectual property jurisprudence examined morality restrictions on patent registrations. In 1817, Justice Story had passed the judgement that granting protection to inventions intended to "*poison people, or to promote debauchery, or to facilitate private assassination*" was unacceptable.[38] This was the beginning of the "moral utility" doctrine. The United States Patent and Trademark Office (USPTO) and the courts relied upon this doctrine to exclude "immoral" inventions from protection using the theory that one of the results of an invention's moral turpitude was that it lacked usefulness.[39] This doctrine was thus used to deny protection to devices that could be used to commit fraud or for gambling purpose.[40] For many years, this doctrine served as a moral gatekeeper on patentable subject matter. In *Diamond v. Chakrabarty*,[41] the United States Supreme Court began a virtually unbroken string of decisions abandoning the moral utility doctrine.

[37] Directive 98/44/EC, of the European Parliament and of the Council of 6 July 1998 on the Legal Protection of Biotechnological Inventions, 1998 O.J. (L213) 13, 16; *See also*, Case C34/10, Brüstle v Greenpeace, 2011 E.C.R. I-9849.
[38] Lowell v. Lewis, 15 F. Cas. 1018, 1019 (C.C.D. Mass. 1817) (No. 8,568).
[39] Nat'l Automatic Device Co. v. Lloyd, 40 F. 89, 90 (C.C.N.D. Ill. 1889).
[40] Scott & Williams, Inc., 7 F.2d at 1004; Lloyd, 40 F. at 90.
[41] 447 U.S. 303.

United States of America never had a morality exception in their patent laws however such requirement was determined by the Courts but used rarely. In the mid-twentieth century the USPTO banned patents on gambling machines on morality grounds however the same came to end in 1980's when the Court held that inventions for gambling machines are no more or less immoral than invention such as a gun which may be used for killing people. The USPTO then in late nineties invoked moral utility doctrine in order to check the controversial applications related to biotechnology inventions. But the same was criticized by the Judiciary itself because according to them it was the legislature not the executive which can define the boundaries of the law. Hence there are very few examples where the morality exception was raised successfully before the USPTO.

CONCLUSION

If the IPO is called upon to make a decision on GMOs and their biosafety under the morality provision, it could result in contradictory approaches that are not in keeping with the latest information on biosafety. Further, the Indian Patents Act includes slightly different terminology to the European in that 'public health' is included. Public health concerns lend themselves to a wider range of biosafety concerns than 'public ordre' or 'morality' on their own. The Patent office must be steered to deal with 'biosafety' and its rightful legal relevance under S 3(b) of the Patents Act.

Moreover, morality-based prohibitions on patentability are generally targeted toward prohibitions on protection for inventions that could have a destabilizing effect upon society, or other such chaotic effects of measurable impact. None of these prohibitions seem to be aimed at free expression, and thus do not appear to negatively impact any Constitutional or human rights. Morality based restrictions on patentability are normally either divorced from cultural mores, or they are simply based in universal cultural traditions.

The issues of biotechnology and morality (as impossible as the latter term may be to define) are very much intertwined. With a patent system largely informed by the incentive theory, we must consider whether the granting of a patent is likely to encourage activity that is deemed to offend universal values.[42] If inventions cut against the notion of human dignity, as in (at least

[42] Sears, Roebuck & Co. v. Stiffel Co., 376 U.S. 225, 229 (1964).

arguably) research involving human embryos, we can at least see that it is the actual inherent in such activities, which we wish to discouraged.[43]

Today, these morality questions typically come up though in relation to genetic engineering and ethics. For example, should patents be allowed on human genes, or genetically-modified animals? In my opinion, these questions seem like much more trying questions of ethics than whether people should be allowed to use sex toys when being used consensually. Accordingly, sex toys are not prohibited patent protection on moral grounds in a vast number of developed countries, including the United States, European Union, Canada, Mexico, Australia, China, and others.[44]

As noted by Moufang, patent examiners "*are not specifically trained in ethics or in risk assessment. Since patents do not give a positive right to use the protected inventions, other bodies have to shoulder the responsibility for the decisions of society whether certain technology can and should be put into practice*."[45]

In a country like India, such issues arise because of the balance that needs to be maintained between tradition and modernity. Some sections of the society are not willing to let go of traditional way of life and they are justified in doing that, but they should be prepared to digest the fact that modernization is inevitable and not come in the way of others who want to practice it. Especially with the manner that biotechnology is becoming increasingly innovative and raising a lot of ethical questions. The focus of patent laws should be on defining the morality which could be used to combat these issues and not towards the rejection of trivial patents like sex toys.

****

[43] Marc. J. Rendazza, *Freedom of Expression and Morality-based Impediments to the Enforcement of Intellectual Property Rights*, 16 NEV. L.J. 107 (2015).
[44] *Patent Denied for "Immoral" Sex Toy in India*, SEX TECH LAW (February 9, 2021) (last accessed on August 31, 2021).
[45] RESOURCE BOOK ON TRIPS AND DEVELOPMENT, 380 (Cambridge University Press, 2005).