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Patentability and Morality

**A Comparative Perspective on How Legal Culture
Shapes Morality within Patent Law**

By

Stefan Papastefanou



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To Jake & Amir

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Preamble

The main impetus for undertaking a study of this research topic was the fact that it is, inherently, both complex and simple. Patent law regulation and patentability requirements are complex legal ideas. They raise difficult legal questions that have global relevance because intellectual property is not restricted by physical borders or even physical objects. Yet, being untethered from physicality, these complex constructs also lend themselves to easy and logical answers within their own legal systems. Simultaneously, moral questions are much simpler to ask. Framing a question about the morality of human enhancement or weapon technology is relatively easy and does not require a legal education. However, the answers to these questions can be extremely complex. Moral considerations originate from philosophical, religious and metaphysical viewpoints. As such, the topic of patent law and morality illustrates how different cultures take account of moral considerations in their own understanding of patent law. The beauty of this topic is that it combines difficult questions with arguably simple answers and simple questions with impossibly complex answers.

Once the research concept had been developed further, it became clear that there was virtually no limit to the extent of the different theoretical approaches. In addition, the implications of this for technological advancement and practical significance became apparent. As such, a decision was made to restrict the thesis to a specific theoretical approach. That approach was the cultural aspects of patent law systems and more specifically, the legal culture and its substantial influence on patent law. Therefore, the analysis was focused on the different national and supranational approaches towards morality in patent law. Selecting practically relevant but also culturally different legal regimes in a comparative analysis was chosen as the most promising approach.

The development of the academic discussion was not without challenges and dead ends. Organizing and structuring an analysis on various different cultural, legal and moral aspects of several national patent systems was much more difficult than anticipated. Language and translation issues represented another difficulty, especially in the context of Chinese patent law. Even attempts to identify consistent terms that adequately expressed each national understanding of “morality” or “ordre public” turned out to be futile. Parts of the thesis required countless rewrites to include shifts in academic perspective. Additionally, the fundamental approach of the thesis turned out to be academically underdeveloped in the existing legal literature and jurisprudence.

While these difficulties and challenges existed, it was possible to overcome them or to regard them as opportunities as the thesis developed. In the end, the project provided a result that had diverged significantly from the initial ideas. However, ultimately, the dynamic development of the thesis also substantially contributed to the fun and excitement of the entire endeavor.

A. Introductory Remarks

In many of the world's significant patent systems, the implementation of aspects of public policy relating to morality within the patenting procedures has been subject to substantial legal discussion and controversial development. Conventionally, the concept of an "invention" in patent law was defined according to the creation and alteration of inanimate matter.¹ However, morality concerns in patent law have been dealt with in many varying ways in past centuries. With the emergence of advanced biotechnology and controversies surrounding it, all major patent law jurisdictions have had to address the issue either by legislation or through case law. The recent development of CRISPR gene-editing remains one of the most controversial areas of research. Therefore, biotechnology has become the center point of legal discussion about morality in patent law. However, other areas of technology also raise moral concerns which have not been subject to a broader legal review or a discussion of the implications for patent law at all. Following on from the controversies around biotechnology, patentability requirements based on moral concerns have become more important. National and supranational patent patentability approaches differ significantly. Addressing the differences in the patent law regimes requires an overview of the different and, in particular, less well-established cases of moral ambiguity in technology. A review of recent controversies and developments would contribute to this as well.

In all the relevant patent law jurisdictions around the world, essential elements of patentability are much more similar than the essentials in other areas of law and even intellectual property law. Those elements of patent law usually include a decision on what kinds of inventions are patentable in general. Therefore, a comparative analysis of the aforementioned moral concerns is very pragmatic and could provide useful insights into patent law and fundamental principles in general. Once such elements are identified, the emphasis of each element in each national patent law will be analyzed.

The aim of this project is to showcase how legal culture influences morality within patent law regimes. It also provides insights into the challenges arising in the area of patent law and morality. Ultimately, the thesis suggests approaches to better understand the concept of morality in patent law and how to address moral issues in a more consistent manner.

¹ *Mills*, *Biotechnological Inventions: Moral Restraints and Patent Law 7*; *Peng*, *Patenting Stem Cell Inventions in China*, 21.