ETHICS WATCH

Patently paradoxical? 'Public order' and genetic patents

How heavily should ethical considerations weigh in allowing or disallowing genetic patents? In European patent law, the concept of *ordre public* does allow moral issues to have some weight. Article 53(a) of the European Patent Convention and Article 6 of the EC Directive on the Legal Protection of Biotechnological Inventions both rely on the concept of 'public order' to draw the line on what to patent in genetics. A European patent might not be granted for an 'invention' if its exploitation would be contrary to *ordre public*[1].

Assuming that public order is more than a 'fig leaf' but less than a declaration of moral absolutism, what might the concept mean? Beyleveld and Brownsword argue that it must be seen within the context of the European Convention on Human Rights, which is now also part of UK domestic law through the Human Rights Act 1998 (REF. 2). On this reading, human rights would 'trump' or outweigh any other considerations, such as public benefit or utility of the invention. A utilitarian perspective would be ruled out — one in which human rights are dismissed as 'nonsense on stilts', in Jeremy Bentham's phrase — in favour of weighing up probable advances in public welfare versus possible harms.

So far, however, legal precedents indicate that utility trumps all other considerations, putting public order nearer the fig-leaf end of the spectrum. In part, this might be because early biotechnology patent law cases, such as the Harvard onco-mouse, led to no immediate human rights concerns. The balancing that had to be done under the public order clause lay between pain and suffering that is inflicted on the mice versus beneficial consequences for humanity. Another reason for the comparatively limited understanding of 'public order' has been the tendency to limit it merely to threats to the embryo — ignoring other moral wrongs, such as possible exploitation of women who supply ova in the cloning technologies[3–5].

The concept of public order is inherently non-utilitarian, in my view. If it is too easily equated with public utility, it might as well not exist, as the research community and commercial sponsors will almost always be able to point to some supposed overriding benefit or utility of their research. We need to strengthen the content of 'public order', protecting it from collapsing into utility while maintaining the breadth of its applicability. So far, consultative commissions have not provided us with much guidance: the Nuffield Commission report on genetic patenting, for example, says surprisingly little about what guidance the concept of 'public order' can offer[6].

In fact, exclusion on public-order grounds is rare, provided some benefit of the invention can be shown[7]. From a policy-making and a philosophical point of view, this situation is unsatisfactory: for policy-making because of the concept's weakness in the face of powerful commercial interests; for a philosopher because of the internally paradoxical nature of the utility argument. Only the most extreme utilitarian would argue that the most minimal benefit is always sufficient to decide in favour of allowing patenting of the invention, not least because a utilitarian, like any other moral philosopher, has to believe that ethics is indeed something more than a fig leaf, and that moral considerations count.

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