



The constitutional right to conduct business in South Africa – limitations imposed by a state of emergency or disaster

LLM DISSERTATION

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LIST OF ABBREVIATIONS

ACTU	Australian Council of Trade Unions
API	Active Pharmaceutical Ingredient
BASA	Beer Association of South Africa
BFAP	Bureau for Food and Agricultural Policy
CESCR	Committee on Economic, Social and Cultural Rights
COVID-19	Coronavirus disease
C-TAP	COVID Technology Access Pool
DMA	Disaster Management Act
DPME	Department of Planning, Monitoring and Evaluation
DNDi	Drugs for Neglected Diseases Initiative
ECHR	European Convention on Human Rights
EIPWL	East India Pharmaceutical Works Limited
EU	European Union
FM	<i>Force Majeure</i>
FWC	Full Court of the Federal Court
GI	Geographical Indications
HRA	Human Rights Act
IBC	The Insolvency and Bankruptcy Code, 2016
ICA	Indian Contract Act, 1872
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Commission of Jurists
ICU	Intensive Care Unit
IHR	International Health Regulations
IMF	International Monetary Fund
IP	Intellectual Property

IPID	Independent Police Investigative Directorate
IPRs	Intellectual Property Rights
LGBT	Lesbian, Gay, Bisexual and Transgender
LMICs	Low-to Middle-income Countries
NHI	National Health Insurance
NSW	New South Wales
OA	Open Access
OCP	Open COVID Pledge
PPE	Personal Protective Equipment
RMM	Regulated Market Model
RMM	Risk Minimisation Mandate
RTBA	Retail and Trade Brands Advocacy
SALBA	South African Liquor Brand Owner Association
SCA	Supreme Court of Appeal
SDG	Sustainable Development Goal
SOE	State-Owned Enterprise
SSF	Small-Scale Fisheries
TPA	Tobacco Products Agency
TRIPS	Trade-Related Aspects of Intellectual Property Rights
UHC	Universal Health Coverage
UK	United Kingdom
UNAIDS	United Nations AIDS Charity
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
UPR	Universal Periodic Review
USA	United States of America
WHO	World Health Organization

WIPO World Intellectual Property Organization
WTO World Trade Organization

ABSTRACT

It seems as if governments worldwide consistently act in the best interest of most of their civil and corporate citizens when a national crisis arises, resulting in minority groups not always being treated fairly. Governments often base their decisions on national interests, policy and political considerations. During the COVID-19 pandemic, it became evident that there is a greater need for measures to ensure that decisions made during a state of disaster or pandemic are based on rational grounds, failing which the constitutional and other rights of minority groups can be influenced.

Case studies of South Africa, India, Australia, and the United States of America (USA) have shown how complex crisis decision-making is. For example:

As shown in the tobacco and alcoholic beverage industries, South Africa prioritised healthcare over intellectual property (IP) rights, which raised doubts regarding the efficacy of the TRIPS Agreement on matters such as branding restrictions during a pandemic.

Australia's pragmatic approach, using common-sense regulatory reforms and working closely with trade unions, showed how pre-emptive measures protect employment, businesses, and the right to work. India's dependence on its pharmaceutical industry's capabilities despite international legal choices shows the relevance and importance of seeking local and pragmatic solutions, even more so if you are a developing country. Therefore, the legal analysis of the freedom to conduct business in Australia and India yielded valuable insights that can be used in South Africa to develop future legislation and legal considerations to manage such situations better.

The USA's choice not to exercise march-in rights or enforce patent waivers emphasised public safety and health over intellectual property rights. It seems the USA's approach worked best to advance science without compromising safety or job losses.

The dissertation acknowledges the importance of international collaboration in promoting economic progress and defending social interests. Although they address separate issues, the TRIPS Agreement and the draft Pandemic Treaty are fundamental advances towards a more sustainable and resilient global economy. These accords emphasise collaboration, readiness, and accountability for complex

global issues. Lastly, the dissertation emphasised the need for adaptive and collaborative approaches to pandemics and other crises.

CHAPTER 1

INTRODUCTION

1.1 INTRODUCTION

It seems as if governments worldwide consistently act in the best interest of most of their civil and corporate citizens when a national crisis arises, resulting in minority groups not always being treated fairly. Governments often base their decisions on national interests, policy and political considerations and other factors, leaving room for the alleged unfair treatment of some minority groups. During the COVID-19¹ pandemic (COVID-19), it became evident that there is a greater need to for measures to ensure that decisions taken during a state of disaster or pandemic are on rational grounds, failing which the constitutional and other rights of minority groups can be influenced.

1.2 RESEARCH PROBLEM

The research problem is that during a national state of disaster, such as COVID-19, governments do not necessarily act in the best interest of all their civil or corporate citizens when constitutional rights are severely limited through hastily promulgated regulations. In the recently ended state of disaster, trade and industry often challenged the South African government's unilateral actions in court.² Regrettably, many of these cases were settled outside of court or were withdrawn because the urgency disappeared when lockdown levels were relaxed. As a result, legal uncertainty remains with such unsettled cases. Hence, this attempt to find insight into balancing

¹ Coronavirus disease (COVID-19) is an infectious respiratory disease caused by the SARS-CoV-2 virus. World Health Organization "2023. Coronavirus disease (COVID-19)", <https://www.who.int/news-room/fact-sheets/detail/coronavirus-disease-%28covid-19%29> (accessed on 12 November 2023).

² Smith "SA Breweries to face off against government in court over alcohol ban", <https://www.news24.com/fin24/economy/sa-breweries-to-face-off-against-government-in-court-over-alcohol-ban-20210106-2> (accessed on 24 March 2022).

the rights of trade and industry with opposing government views explicitly about the right to conduct business.

In light of this, the research question is:

How can governments strike a balance between the need to defend corporate and civil citizens' constitutional rights to conduct business and engage in economic activities as enshrined in sec. 22 of the *Constitution of the Republic of South Africa, 1996 (the Constitution)*³ with the need to protect public health and safety during a state of disaster or emergency?

By answering this question, it will be determined what steps can be specifically taken by governments to guarantee that all citizens, including those in negatively affected trade and industry sectors, are fairly and equitably represented in decision-making processes connected to emergencies or states of disasters. The ultimate objective of this research is to offer perspectives and suggestions that may help guide governments to more equitable and effective disaster response procedures and policies.

During the dissertation sub-questions related to the research problem will be posed. Some of these questions are:

How does South African law protect the right to conduct business?

How does South African law regulate the position during a state of emergency or disaster?

Which aspects or protectable interests of IP may become relevant during a state of emergency or disaster, and in which way does IP law influence the constitutional right to conduct business during a state of disaster?

How do international legal instruments impact the conducting of business during a state of emergency or disaster?

³ *Constitution of the Republic of South Africa, 1996:Sec. 22.*
“Every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law.”

How did other countries legally regulate the right to conduct business during a state of disaster?

How did South Africa legally regulate the right to conduct business during a state of disaster?

Could South Africa improve on the aforementioned in future states of emergency or disaster?

To contextualise the research problem, the following paragraph will give examples of how some sectors were affected. After that, the difference between a state of disaster and a state of emergency is briefly explained. The latter is not necessarily affected by constitutional rights but could have been elected as the preferred way to deal with the pandemic. The constitutional right to conduct business is then briefly considered as to how it is impacted by IP because the sectors that are affected all heavily rely on IP, for example trademarks, for advertising their products and to conduct business.

1.3 THE ALCOHOLIC BEVERAGE AND TOBACCO SECTORS

Limitations to the constitutional right of trade and industry to conduct business, to use trade marks in advertising, or sell products in such cases where the products in question pose a potential or actual health risk to consumers, for example, alcoholic beverages or tobacco, have become the norm in South Africa long before COVID-19. The recent state of disaster took this established principle to a more advanced level when the South African government prohibited those companies from trading, manufacturing, advertising, distributing, or stockpiling their products.⁴ The impact of

⁴ Different levels of “alert” were introduced by the State to monitor trade during COVID-19, From 1 March 2021 to 30 May 2021, the adjusted alert level 1 was in effect. The modified alert level 3 was in effect from 29 December 2020 until 28 February 2021. The first alert level was in place from 21 September 2020 to 28 December 2020. From 18 August to 20 September 2020, alert level 2 was in force. Note that COVID-19 regulations imposed on the alcoholic beverages sector were not the first and only limitations. For many years tax on these products increased, and advertisement bans were imposed. South African Government “COVID-19/Coronavirus”, <https://www.gov.za/Coronavirus> (accessed on 21 April 2023).

this limitation on the local and global economy is well-reported in the press and other social media platforms.⁵

The examples below illustrate how the alcoholic beverage sector was not spared any controversies during the pandemic and after the lockdown regulations were published.⁶ For example, South Africa's largest beer maker, South African Breweries (SAB), instigated litigation after President Ramaphosa announced the country's third and most contested ban on liquor sales in 2020.⁷ As a result of the prohibition, SAB, Distell and Heineken cancelled expansion investments worth billions of Rands, leaving 415 000 jobs at risk of being lost because of the alcoholic beverages sector's inability to conduct business and employ people.⁸

The regulations used during COVID-19 to institute the lockdown ban and restrictions consisted of eight stages with overlapping responsibilities, as depicted by Karim.⁹ In the first stage, the primary emphasis was placed on preparations for the COVID-19 conference, including establishing testing capacity.¹⁰ When there were 51 cases, ten days after the first patient in South Africa was diagnosed, stage two of the outbreak began. The government proclaimed a national state of emergency, which resulted in the suspension of all international travel, the shutdown of schools, the limitation of public gatherings, and the encouragement of social distancing and proper hand cleanliness.¹¹ A high-level advisory council of 51 doctors, virologists, epidemiologists, mathematical modellers, public health practitioners, and other professionals produced

⁵ Egbe & Ngobese 2022.

⁶ From 1 March 2021 to 30 May 2021, the adjusted alert level 1 was in effect.

⁷ Mashego "Don't surprise us again, pleads liquor industry as Ramaphosa lifts sale ban", <https://www.news24.com/fin24/companies/travelandleisure/end-of-boozeblues-as-president-cyril-ramaphosa-lifts-alcohol-sale-ban-20210201> (accessed on 2 May 2021):2.

⁸ Mashego "Don't surprise us again, pleads liquor industry as Ramaphosa lifts sale ban", <https://www.news24.com/fin24/companies/travelandleisure/end-of-boozeblues-as-president-cyril-ramaphosa-lifts-alcohol-sale-ban-20210201> (accessed on 2 May 2021):3-4.

⁹ Karim 2020:1.

¹⁰ Karim 2020:1-2.

¹¹ Karim 2020:1.

evidence-based policy guidelines.¹² It offered strategic counsel to the Minister of Health. After that, further stages were implemented.¹³

These bans led to several outcries from industry spokespersons such as Mngadi, the South African Liquor Brand Owners Association (SALBA) chairperson.¹⁴ Mngadi demanded that the government interacts with businesses more systematically so that sudden restrictions would not come as a surprise.¹⁵ Those outcries resulted in the government interacting with businesses more systematically. For instance, those who produced and traded alcoholic beverages should have had a voice in the consultation process on restrictions and prohibitions placed on alcohol. In a separate statement, the Beer Association of South Africa (BASA) noted that the situation among craft brewers and owners of small businesses remained extremely precarious.¹⁶ An estimated 7 400 jobs, R14.2 billion in sales income, and more than R7.8 billion in lost

¹² Karim 2020:2.

¹³ Karim 2020:1-3. Note that the abstract that follows provides some detailed insights: "Stage three's nationwide lockdown was gradually lifted. The lockdown hurt the poor and the economy. Economic downturns can last. Due to travel restrictions and COVID-19 in hospitals, HIV, TB, and chronic noncommunicable disease patients had lost continuity of treatment. Stage four, which began on day 33, sent 28 000 community health professionals to high-risk neighbourhoods to aggressively detect illnesses. South African community contact-tracing teams monitored quarantine compliance and contact-tracing. Community health professionals visited disadvantaged populations door-to-door. Providers served the world's HIV burden. 11 114 600 persons (20 per cent) were tested for COVID-19 using this community-based method. To map screening coverage, a mobile phone app distributed the symptom checklist and uploaded household data and phone locations to a central database. COVID-19 patients were tested at mobile or adjacent health facilities. Fifth stage: hot areas and localised epidemic prevention. Stage 6 creates medical field hospitals at convention centres. Funerals, burials, and grief-related mental health difficulties were stage seven. The last stage involved case-finding and serosurveys to estimate population immunity for future epidemic waves. This level warranted caution. The administration wanted to increase the 9.6 per 1,000 cumulative testing rate. Private clinics and hospitals performed 80 per cent of testing due to rigorous standards. After one month, public sector testing increased. Health staff lacked testing supplies and personal protective equipment (PPE)."

¹⁴ SALBA is a non-profit organisation that represents manufacturers and distributors in the liquor industry.

¹⁵ Mashego " Don't surprise us again, pleads liquor industry as Ramaphosa lifts sale ban", <https://www.news24.com/fin24/companies/travelandleisure/end-of-boozeblues-as-president-cyril-ramaphosa-lifts-alcohol-sale-ban-20210201> (accessed on 2 May 2021).

¹⁶ Mashego " Don't surprise us again, pleads liquor industry as Ramaphosa lifts sale ban", <https://www.news24.com/fin24/companies/travelandleisure/end-of-boozeblues-as-president-cyril-ramaphosa-lifts-alcohol-sale-ban-20210201> (accessed on 2 May 2021).

taxes and excise duties were lost in the beer business due to the previous two alcohol bans, devastatingly impacting the industry.¹⁷

These are only a few examples that form the tip of the proverbial iceberg regarding regulations issued during the pandemic without being tested against the *Constitution*.¹⁸ Some of these regulations challenged in our courts will be analysed to understand the research question better. However, it is recognised that there are not many constitutional cases related to sec. 22 of the *Constitution*, the right to do business, because many cases were withdrawn or settled before judgment.

At this early stage of the dissertation, it should be mentioned that section 36 of the *Constitution* is designed to balance and limit constitutional rights entrenched in the *Constitution*. A deeper understanding thereof is required to understand the research problem and contextualise sec. 22 of the *Constitution*, which will be done in chapter 4.

With these introductory remarks, the discussion will move to the constitutional right to conduct business.

1.4 THE CONSTITUTIONAL RIGHT TO CONDUCT BUSINESS

As mentioned above, one of the rights entrenched in the Bill of Rights of the *Constitution* pertains to business, namely the “right to choose their trade, occupation or profession freely.”¹⁹ In addition to this constitutional right, businesses can rely on other legislation, such as the *Companies Act*,²⁰ the *Advertising Act*,²¹ and the *Liquor Act*.²² These acts aim to provide a conducive environment for business within the limitations provided for in the *Constitution*.²³

¹⁷ Mashego "Don't surprise us again, pleads liquor industry as Ramaphosa lifts sale ban", <https://www.news24.com/fin24/companies/travelandleisure/end-of-boozeblues-as-president-cyril-ramaphosa-lifts-alcohol-sale-ban-20210201> (accessed on 2 May 2021).

¹⁸ *Constitution of the Republic of South Africa*, 1996.

¹⁹ *Constitution*:sec. 22.

²⁰ *Companies Act* 71/2008.

²¹ *Consumer Protection Act* 68/2008.

²² *Liquor Act* 59/2003.

²³ *Constitution*:sec. 36.

The right to trade is often limited by other constitutional rights, such as the right to an environment that is not harmful to one's health.²⁴ Another example is the *Tobacco Products Control Act 83 of 1993*,²⁵ which restricts or prohibits smoking in public places, regulates the sale and advertising of tobacco products and prescribes what is to be reflected on packages, thereby limiting the proprietary rights of trade mark owners.

Within this context, the constitutional right of South African citizens to conduct business and the limitations to such rights are analysed. The research will draw on case studies in the alcoholic beverages industry and, to some extent, the tobacco industry because these sectors were severely impacted by the South African government's regulatory actions to restrain them from conducting business during COVID-19. At the same time, national health and safety concerns were prevalent. In this regard, specific reference will be made to India, a developing country with many challenges similar to South Africa.²⁶ The joint endeavour of India and South Africa to have certain rights of patent holders waived regarding COVID-19 vaccines will also be considered as a case study.²⁷

1.5 DIFFERENCE BETWEEN STATE OF EMERGENCY AND STATE OF DISASTER

It is necessary to briefly explain the difference between a “State of Emergency” and a “State of Disaster” because the legal approach varies for each of them, and this difference impacts how the right to conduct business is further analysed.

²⁴ *Constitution*:sec. 24.

“Everyone has the right (a) to an environment that is not harmful to their health or wellbeing.”

²⁵ *Tobacco Products Control Act 83/1993*.

²⁶ Dailey "Pharmaceutical industry. Encyclopedia Britannica", <https://www.britannica.com/technology/pharmaceutical-industry> (accessed on 8 April 2022).

²⁷ See par. 2.2, where this matter is analysed.

1.5.1 State of emergency

A State of Emergency has legal authority in sec. 37 of the *Constitution*,²⁸ read together with the *State of Emergency Act* 64 of 1997.²⁹ The president can declare a State of Emergency in terms of the following legal instruments:

- i) the life of the nation is threatened by war, invasion, general insurrection, disorder, natural disaster or other public emergency, and
- ii) if the declaration is needed to restore peace and order.³⁰

Once this is declared, the State may make laws that deal with the current emergency.

Furthermore, sec. 37(4) of the *Constitution* states that:

Any legislation enacted in consequence of a declaration of a state of emergency may derogate from the Bill of Rights only to the extent that (a) the derogation is strictly required by the emergency.³¹

However, Minister Lamola from the Department of Justice and Correctional Services stated that the government would only implement a state of emergency in response to the COVID-19 pandemic as a last resort.³²

In 2020, Lundgren *et al.* published data on 180 nations from 1 January to 12 June 2020, where he and his co-authors analysed whether or not these nations declared COVID-19-related states of emergency.³³ They found that 101 nations declared states of emergency and 79 nations did not.³⁴ A small subgroup of nations, such as Egypt, had pre-existing states of emergency.³⁵ Their findings also implied that internal and external factors influence how nations declare a state of emergency. The

²⁸ *Constitution*:sec. 37.

²⁹ *State of Emergency Act* 64/997.

³⁰ *State of Emergency Act*.

³¹ *Constitution*:sec. 37(4).

³² South African Government News Agency "Government to implement state of emergency only as last resort", <https://www.sanews.gov.za/south-africa/government-implement-state-emergency-only-last-resort> (accessed on 20 September 2022).

³³ Lundgren *et al.* 2020: 305, 306.

³⁴ Lundgren *et al.* 2020: 306, 311.

³⁵ Lundgren *et al.* 2020: 305, 306, 311.

reputational and political costs of using emergency powers may be reduced in a tolerant regional climate, defined by numerous and concurrently declared states of emergencies, making it more acceptable for a wider range of governments to do so. Governmental policies were also influenced by internal factors, particularly democratic institutions and pandemic preparedness. One of the findings of these authors was that strong dictatorships and robust democracies with better preparedness were much less likely to choose states of emergency than weak democracies with lower preparedness. Another finding of this study was that no significant correlation between the timing of declaration of a State-Owned Enterprise (SOE) and mortality rates exists, a measure of pandemic impact, indicating that many states adopted states of emergency proactively before the disease spread locally.³⁶

1.5.2 State of disaster

A State of Disaster does not have a specific section in the *Constitution* but is governed by the *Disaster Management Act* of 2002. This Act defines a disaster as follows:

Natural or human-caused occurrence which (a) causes or threatens to cause – (i) death, injury or disease; (ii) damage to property, infrastructure or the environment, (iii) disruption of the life of a community;

(b) is of a magnitude that exceeds the ability of those affected by the disaster to cope with its effects using only their own resources.³⁷

According to this Act the following institutions, namely the Intergovernmental Committee on Disaster Management, the Disaster Management Centres (on the National, Provincial and district levels) and the National Disaster Management Advisory Forum, are obliged to help manage a disaster.³⁸

In South African law, there is a fundamental difference between a State of Disaster and a State of Emergency.³⁹ In a State of Emergency, certain rights are suspended – it does not need a sec. 36 of the *Constitution* limitation; it must just be necessary to

³⁶ Lundgren *et al.* 2020:306. For example, Mozambique declared a SOE before any COVID-19 related mortality was reported.

³⁷ *Disaster Management Act* 57/2002.

³⁸ *Disaster Management Act* 57/2002.

³⁹ Note that this was pointed out in par. 1.5.1.

deal with the emergency. A State of Disaster is not so restrictive, and it is subject to the provisions of sec. 36 of the *Constitution* on how rights are balanced.⁴⁰ Because of the South African government's choice to opt for a State of Disaster, this dissertation will mainly refer to it, and only when relevant, to a State of Emergency.

1.6 INTELLECTUAL PROPERTY

Companies with substantial IP rights portfolios were also affected by the pandemic.⁴¹ Pharmaceutical companies, for example, developed vaccines during the pandemic just to be confronted by certain governments who threatened to exercise their walk-in rights on IP.⁴² The South African government's walk-in rights are entrenched in sec. 6 of the *Patents Act*,⁴³ as well as the Agreement on Trade Related Aspects of IP Rights (TRIPS Agreement)⁴⁴ of which South Africa is a signatory. Walk-in rights and patent waivers are reluctantly accepted by diverse sectors in trade and industry, such as the armaments, tobacco and pharmaceutical sectors, mainly because national health and safety will always be a priority for national governments, leaving these sectors exposed to the governments of the day. For example, India, a developing country, attempted to exercise this walk-in right mainly because its pharmaceutical industry arguably has the technical ability to produce vaccines without negating the intrinsic IP rights of the patentee. In South Africa, on the other hand, walk-in rights or patent waivers are not necessarily effective because South Africa cannot always manufacture the drugs or import it from other countries where patent protection is in place.⁴⁵ Indecently, there was eventually no need to impose patent waivers or walk-in rights, as will be shown when the TRIPS Agreement is analysed.⁴⁶

⁴⁰ *Constitution*:sec. 36.

⁴¹ Note that IP is inclusive of patents and trade marks, the two most relevant genus of IP for this dissertation. There are more genus of IP, for example, copyright.

⁴² *Patents Act* 57/1978:sec. 4. A "walk-in right" is a right that enables the government to, in favour of the public, effect corrective action in the event of abuse, misuse or non-use of IP rights.

⁴³ *Patents Act*:sec. 4.

⁴⁴ Agreement on Trade-Related Aspects of Intellectual Property Rights Annex 1C to the WTO Agreement 1994:art. 30 and 36.

⁴⁵ Merry "South Africa: Push vs. Pull: Patents and access to medicines." <https://www.mondaq.com/southafrica/patent/1243754/push-vs-pull-patents-and-access-to-medicines> (accessed on 28 April 2023).

⁴⁶ See par. 2.2 where walk-in rights are discussed.

Walk-in rights on IP are very serious intrusions or violations on property rights. IP is recognised as property in terms of sec. 25 of the *Constitution*, with reference to the following court rulings: In the *First National Bank of SA Ltd t/a Westbank v Commissioner, South African Revenue Services* case it was confirmed that "property was not limited to land."⁴⁷ In the *Laugh it Off Promotions CC v South African Breweries International* case trade marks were recognised by the Constitutional Court as property.⁴⁸ In the *Moneyweb (Pty) Ltd v Media 24 Ltd and Another* case the court confirmed that "Copyright is an IP right. It is protected by section 25(1) of the *Constitution*."⁴⁹ To exercise a walk-in right can therefore be seen by figure of speech as government walking onto a farm when the crops are ready to be harvested – this after the farmer ploughed the field, planted the seeds, and diligently irrigated the land, just to hand over the proverbial fruits of his labour to government. It is for this reason that a special effort is made in this dissertation to ascertain how walk-in rights in respect of IP and the related right to work are adequately balanced in terms of sec. 36 of the *Constitution*.

Walk-in rights, patents waivers and open access to IP are furthermore three distinct concepts, although there are overlaps. Whereas walk-in rights are mostly associated with IP that emanated from research that was conducted with tax payers' money in a country - the government of that country then takes certain national measures; patents waivers are not country-specific and often relates to TRIPS-imposed waivers. With open access⁵⁰ the IP rights of the owners remain intact, but certain concessions need to be made.

⁴⁷ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Services*:par. 133 (FNB case).

⁴⁸ *Laugh it Off Promotions CC v South African Breweries International (Finance) BV 2006 (1) SA 144 (CC)* par 17 (*Laugh it Off* case).

⁴⁹ *Moneyweb (Pty) Ltd v Media 24 Ltd and Another*:par. 108 (*Moneyweb* case).

⁵⁰ Open Access (OA) works embody IP that are freely available, free of charge, and free of most copyright and licencing restrictions and can be reproduced and distributed. The consent of the author or copyright holder is required before the works can be classified as OA.

1.7 METHODOLOGY

This dissertation will use a combination of normative and doctrinal research. Normative research is applicable because this research explores international legal instruments and existing national legislation regarding the constitutional right to conduct business and gives possible solutions for future development and improvement. Doctrinal research is relevant because it involves an analysis of existing government policies, legislation, and potential shortcomings, not only in South Africa but also in other parts of the world. In this regard, the TRIPS Agreement's relevance during this time of a pandemic will be very useful.

International legal instruments, such as the TRIPS Agreement and some of those endorsed by the WHO, will be analysed. Court cases of the last two years (settled and withdrawn) will be studied to distil the most relevant arguments and develop a sound answer to the legal question. All this will be executed within the framework of the South African *Constitution*. However, it is recognised that there are not many constitutional cases on sec. 22 of the *Constitution*, the right to conduct business. There are, however, many cases where sec. 36 of the *Constitution*⁵¹ is applied to balance and limit constitutional rights as entrenched in the *Constitution*. These cases will be advantageous to formulate possible legal solutions for the legal problem at hand.

The review of the countries in chapter three was done in an analytical manner and chapter three was not approached from a comparative legal study approach, which has a distinct methodology.

⁵¹ *Constitution*:sec. 36.

1.8 STRUCTURE OF CHAPTERS

The chapters are aligned with the aims and objectives in the paragraphs above. This approach starts with international legal instruments, the legislation of selected countries, and the South African *Constitution* as a basis for research. The research in South Africa can then be conducted within a framework of international best practices. The chapters are structured accordingly, with chapter one setting the scene and contextualising the legal problem.

In chapter two international legal instruments, and how other countries adhere to these legal instruments to which they are signatories to during a pandemic, are considered.

Chapter three considers how other countries, such as Australia, India and some African countries, responded to the pandemic. The *Bayh-Dole Act*, which is a very important piece of IP legislation in the USA will also be touched on. This chapter is not approached as a formal comparative legal study – country specific approaches are considered and analysed.

Chapter four reviews the South African government's response to the pandemic.

Chapter five concludes with recommendations on pro-actively balancing constitutional rights to avoid unnecessary litigation and provide legal certainty regarding the right to conduct business.

CHAPTER 2

INTERNATIONAL LEGAL INSTRUMENTS

2.1 INTRODUCTION

This chapter will analyse international legal instruments relevant to the constitutional right to conduct business. This will give a perspective on how the international community dealt with the pandemic, which could be considered for application in South Africa. The recent pandemic has affected all countries worldwide. International legal instruments and how countries adhere to treaties and other legal instruments they are signatories to are considered, notably the TRIPS Agreement and the draft Pandemic Treaty, as endorsed by the World Health Organization (WHO). These treaties guide human rights and IP-related aspects of the topic of this dissertation. The United Nations (UN) Human Rights Charter⁵² will also be considered, and it will be investigated whether the right to conduct business can be limited by other rights, such as the right to access health services.

In this dissertation, it will be assumed that South Africa is compliant with the TRIPS Agreement. Also, the South African government endeavours to act in the best interest of all citizens, whether ordinary or corporate citizens. However, despite the government's good intentions, it is hypothesised that the government does not always strike the correct balance between the competing interests of corporate and ordinary citizens, or minorities for that matter. More specifically, during COVID-19, many of the government's regulatory responses to contain the pandemic led to legal uncertainty and economic losses in many sectors, which could have been prevented had there been more legal certainty regarding the correct application of sec. 36 of the *Constitution*.⁵³

⁵² UN "Universal Declaration of Human Rights", <https://www.un.org/en/about-us/universal-declaration-of-human-rights> (accessed on 08 April 2022).

⁵³ Bertscher & London "Analysis, we tested claims that limiting alcohol advertising in South Africa would violate rights", <https://www.news24.com/news24/analysis/analysis-we-tested-claims-that-limiting-alcohol-advertising-in-south-africa-would-violate-rights-20210324> (accessed on 30 November 2021).

As a result of these questionable regulations imposed and decisions made by the government, many jobs were lost.⁵⁴ Commentators like Writer even argued that this caused more skilled people to leave South Africa.⁵⁵

2.2 TRIPS AGREEMENT

2.2.1 Introduction

The TRIPS Agreement was concluded in 1994 in Marrakesh and came into effect in January 1995.⁵⁶ The agreement covers various forms of IP, including patents, trade marks, and copyright. It aims to promote innovation and technological advancement by providing incentives for creating and disseminating new ideas and inventions.⁵⁷ The TRIPS Agreement is the most multifaceted and comprehensive international agreement on IP to date. This agreement sets out the minimum standards of IP protection to be provided by each member state, which is administered by the WTO in terms of the WTO Agreement.⁵⁸ The TRIPS Agreement guarantees trade and industry protection, including a time-limited monopoly on marketing their products. The agreement aims to liberalise international trade and protect IP rights, promoting nutrition, public health, and economic and technological development.⁵⁹

Although South Africa has been a member of the WTO since 1995, it only signed the 2005 amendments of the TRIPS Agreement as late as 2016.

A better understanding of the TRIPS Agreement is important to this dissertation because South Africa and India, two developing countries, used the provisions of the

⁵⁴ BusinessTech "New law will push more skilled people to leave South Africa", <https://businesstech.co.za/news/business/533666/new-law-will-push-more-skilled-people-to-leave-south-africa/> (accessed on 16 November 2021).

⁵⁵ BusinessTech "New law will push more skilled people to leave South Africa", <https://businesstech.co.za/news/business/533666/new-law-will-push-more-skilled-people-to-leave-south-africa/> (accessed on 16 November 2021).

⁵⁶ Agreement on Trade-Related Aspects of Intellectual Property Rights Annex 1C to the WTO Agreement 1994: art.7.

⁵⁷ Agreement on Trade-Related Aspects of Intellectual Property Rights Annex 1C to the WTO Agreement 1994: art.7.

⁵⁸ Article 27, Agreement on Trade-Related Aspects of Intellectual Property Rights Annex 1C to the WTO Agreement 1994.

⁵⁹ Chaudhary 2021:448.

TRIPS Agreement in an attempt to gain access to vaccines during COVID-19.⁶⁰ It will be carefully analysed how the South African government balanced the rights of IP holders within the context of this research. Before this analysis, a few essential articles of the TRIPS Agreement are highlighted. First, article 7 states the objectives of the TRIPS Agreement and provides as follows:

The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.⁶¹

Article 7 is critical because it aims to balance the competing interests of producers and users of IP while balancing the rights within the context of social and economic welfare, as stated above.

2.2.2 The public good and access to medicines

IP rights waivers are not asked for by developing countries as a charity but rather to control their right to make their own vaccines without the fear that patent holders will sue them for infringement.⁶²

Each nation should have the right to produce its own vaccinations during pandemics. That's the basis for temporarily waiving coronavirus vaccine IP protection. India and South Africa started the measure, supported by over one hundred countries and international organisations like the WHO and UNAIDS. Their goal is to make vaccine production easier, especially for low-income countries. US governments have created and enforced IP regulations alongside industry, universities, and other research-intensive nations for decades, most recently through the WTO, where the IP waiver idea is being reviewed. Initially, the USA taking this position seemed unimaginable.

⁶⁰ *Patents Act*:sec. 4.

⁶¹ Agreement on Trade-Related Aspects of Intellectual Property Rights Annex 1C to the WTO Agreement, 1994, as amended in 2017 (1994): art.7.

⁶² Nature 2021:478. "Africa imports 99 per cent of its vaccines and African countries lack the pre-order purchasing capacity of richer nations."

After this, Japan, South Korea, the UK, and EU member nations follow suit. One of the significant worries concerning IP waivers is that they give competitors a shortcut to expensive technologies. Companies also argue that IP relief will not speed vaccine production because active compounds are scarce and human resource and infrastructure capacity building takes years. Countries supporting the patent waivers want the right to develop and make vaccines without fear of patent lawsuits. COVID IP waiver supporters grasp this fundamental and therefore leaders of countries opposed to the patent waivers must also acknowledge it.⁶³

Chaudhary contributes to the TRIPS debate by arguing that public partnership is crucial for vaccine development, integrating public and private sectors into a unified entity. Access to pharmaceuticals is improved regardless of country status, whether developing or developed. Not only will this promote the public sector, but it will also assist the private sector. This alliance can help the private sector with public relations, training, data, and new markets. Public and private institutions can manage IP to develop new medications. These incentives encourage innovation and research in medical development. Regardless of population size, public sector or philanthropic institutions must bridge the purchasing power divide for customers. The business sector should supply capital and workforce to transfer from fundamental research to stock medicine. The magnitude of developing countries' financial pledges should not determine their access.⁶⁴

Within this context Article 27 of the TRIPS Agreement will be analysed.

Article 27 of the TRIPS Agreement, which addresses the patentability of inventions, is one of its most important clauses regarding this dissertation. The article establishes a baseline standard of protection for all member nations and lays out the requirements under which patents may be granted. Article 27(1) states that inventions in all technological domains, whether goods or processes are eligible for patent protection as long as they are novel, entail an innovative step, and have a practical industrial application.⁶⁵ Certain inventions are exempt from the TRIPS Agreement's patentability

⁶³ Nature 2021:478.

⁶⁴ Chaudhary 2021:451.

⁶⁵ Agreement on Trade-Related Aspects of Intellectual Property Rights Annex 1C to the WTO Agreement 1994:art. 27(1).

requirement under Article 27(2). According to this article, patents cannot be granted for inventions whose economic exploitation would be against the public good or morality, including those intended to safeguard human, animal, or plant life or health or to prevent major environmental harm. This article ensures that no patents are issued for innovations that harm people or the environment.⁶⁶

Furthermore, the subject of compulsory licensing of patents is covered by Article 31 of the TRIPS Agreement.⁶⁷ A government-issued license (walk-in right)⁶⁸ allowing a third party to manufacture and market patented goods without the patent owner's permission is known as a compulsory license. The article outlines the requirements for granting forced licenses and provides the process for their issue. Compulsory licenses are only permitted under Article 31(b) in certain circumstances, including when efforts have been made to secure a voluntary license on reasonable commercial terms and when the intended use of the patented product will be primarily for the member's domestic market.⁶⁹ Article 27 and Article 31 are two of the TRIPS Agreement's most important clauses that ensure that patents are only issued for inventions that benefit society as a whole and that compulsory licenses are only issued under specific circumstances, also to benefit society as a whole.

It then happened that, in 2020, during the pandemic, South Africa and India presented a proposal to the WTO for the suspension of TRIPS-imposed IP rights connected to COVID-19 based on articles 27 and 31. This was done to ensure that vaccines, medicines, and other new technologies are available and accessible to all countries, not just developed countries.⁷⁰ De Gama, who assisted with drafting that proposal, stated that this waiver proposal created space for more collaboration, technology

⁶⁶ Agreement on Trade-Related Aspects of Intellectual Property Rights Annex 1C to the WTO Agreement 1994:art. 27(2).

⁶⁷ Agreement on Trade-Related Aspects of Intellectual Property Rights Annex 1C to the WTO Agreement 1994:art. 31.

This article covers compulsory licenses which, when used, remove a WTO Member from its general obligation to recognize exclusive patent rights before a patent period has expired.

⁶⁸ *Patents Act*:sec. 4.

⁶⁹ *Patents Act*:sec. 4.

⁷⁰ Usher "South Africa and India push for COVID-19 patents ban", [https://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(20\)32581-2/fulltext](https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(20)32581-2/fulltext) (accessed on 07 April 2022).

transfer, and producers to ensure that the international community has scalability in a much shorter period.⁷¹

The proposal argued that, during a pandemic, every country should be able to produce its vaccines.⁷² This campaign aims to lower the hurdles for countries to develop their vaccines, especially for low-income and developing countries. President Ramaphosa and the Prime Minister of India have persuaded 63 WTO member countries to approve the proposal to waive IP rights for COVID-19 vaccines, while 50 other countries have expressed their interest. Subsequently, more than 100 countries, as well as international institutions such as the WHO and the United Nations AIDS charity (UNAIDS), have joined the campaign which India and South Africa started.⁷³ At the time of these two countries' proposal, the number of vaccines provided for Africa amounted to about 2 per cent of the continent's population (1.2 billion people).⁷⁴

Legally, one of the most severe issues concerning IP waivers is that they negate the competitive advantage of IP holders with respect to expensive technologies to develop and commercialise. Companies also claim that IP relief will not accelerate vaccine production because raw materials are in low supply, and building capacity in developing countries may take many years.⁷⁵ This point is debatable because India has more established technical capabilities to manufacture generic medicine than South Africa, although South Africa has world-class capabilities. More importantly, as was argued against the South African and Indian cases, vaccines are complex biological products that can only be developed if adequate scientific and financial resources are available.⁷⁶ For example, when Kenya embarked on a similar project,

⁷¹ Usher "South Africa and India push for COVID-19 patents ban", [https://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(20\)32581-2/fulltext](https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(20)32581-2/fulltext) (accessed on 07 April 2022).

⁷² Nature "A patent waiver on COVID vaccines is right and fair", <https://www.nature.com/articles/d41586-021-01242-1> (accessed on 07 April 2022).

⁷³ Nature "A patent waiver on COVID vaccines is right and fair", <https://www.nature.com/articles/d41586-021-01242-1> (accessed on 07 April 2022).

⁷⁴ Note that this is due to several contributing factors, including the fact that the continent imports 99 per cent of its vaccines, and the fact that African governments lack the pre-order purchasing power of wealthier nations. For this reason, the African Union has established a plan to manufacture 60 per cent of Africa's vaccinations on the continent by 2040.

⁷⁵ Nature "A patent waiver on COVID vaccines is right and fair", <https://www.nature.com/articles/d41586-021-01242-1> (accessed on 07 April 2022).

⁷⁶ Usher "South Africa and India push for COVID-19 patents ban", [https://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(20\)32581-2/fulltext](https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(20)32581-2/fulltext) (accessed on 07 April 2022).

the Kenyan government eventually had to outlaw the manufacture of pharmaceuticals because alarming evidence was found “of substandard and counterfeit drugs, and experienced problems with customer confusion over multiple brands of the same product.”⁷⁷ Another example more encouraging is Biovac, a South African government-owned entity with internationally accredited facilities. Biovac only obtained a license to produce COVID-19 vaccines one year after they were commercially available. The provisions of the TRIPS Agreement were never in play, though – only biosafety.⁷⁸

In conclusion, it seems as if the TRIPS Agreement never threatened the constitutional rights of IP rightsholders because governments worldwide realised that safe and clinically tested vaccines are more important than exercising walk-in rights to vaccines with patent protection. This is not necessarily the case in other sectors, such as tobacco and the alcoholic beverages industries.

2.2.3 Tobacco and alcoholic beverage industries

The tobacco and alcoholic beverage industries are good examples of how the TRIPS Agreement can impact balancing rights during a pandemic. In this regard, Liberman and Clough have presented various arguments about the likely illegality and certain immorality of many of the practices now employed in the tobacco industry. They present a convincing case that many of the tactics used in the sector may not only be subject to civil punishment but may even violate criminal laws. For example, in Australia, this refers to laws that prohibit behaviour that poses a risk to human life and corporate manslaughter.⁷⁹ It serves this dissertation well to first analyse these sectors and to ascertain if Liberman and Clough’s extreme views are justifiable before applying that to these sectors’ regulatory measures in relation to the TRIPS Agreement.

⁷⁷ Nash 2000:499.

⁷⁸ Becker "South Africa's Biovac produces first Pfizer COVID-19 vaccine doses: report", <https://www.fiercepharma.com/vaccines/south-africas-biovac-produces-first-pfizer-covid-19-doses-bloomberg-reports> (accessed 28 July 2023).

⁷⁹ Borland 2003:374.

2.2.3.1 Self-regulatory measures in the tobacco sector

Liberman and Clough⁸⁰ argue that the fundamental problem with the tobacco sector is the nexus between profitability and the harm caused by tobacco. They are of the view that this nexus needs to be broken by changing the incentive structures for the tobacco business,⁸¹ by arguing that the more you sell, the more profit you make, and the more people you harm. They then propose that it would be desirable for the government to control retailers and manufacturers.⁸²

A comprehensive tobacco control strategy aims to reduce the harm caused to the population due to tobacco use. This can be accomplished by controlling the form and contents of tobacco products, as well as the information available about them, to reduce the amount of exposure the population has to toxins related to tobacco use.⁸³

In theory, the adverse effects of tobacco products can be mitigated in one of three ways: by making the product less toxic per unit of use, by making the product less addictive per unit of use, and by making the product less pleasant.⁸⁴ The first of these decreases harm directly unless it is compensated by greater use; the latter two should diminish the incentive to use and maintain use, thereby reducing exposures throughout a lifetime; the first reduces harm directly unless there is compensation by increased use.⁸⁵ The regulatory structure needs to be able to accommodate advances on all three fronts.⁸⁶

As it is known, the Australian regulated market model (RMM) is the model that Borland is suggesting regulating tobacco marketing. Free enterprise businesses would still be allowed to manufacture under the RMM, but a monopolistic agency would be established to promote tobacco products. This organisation, referred to as the Tobacco Products Agency (TPA), would require a charter that outlines its commitment to serving the current market while reshaping it to minimise harm. Manufacturers and

⁸⁰ Liberman & Clough 2002.

⁸¹ Liberman 2003.

⁸² Borland 2003:374.

⁸³ Borland 2003:375-6.

⁸⁴ Borland 2003:376.

⁸⁵ Borland 2003:376

⁸⁶ Borland 2003:374-6.

importers now have only to deal with the TPA. To make educated decisions, the TPA would need to be able to evaluate product performance parameters. Growers operating of their own volition would sell to authorised manufacturers competing for market share from the TPA. Distribution to merchants at wholesale would be under TPA control. The TPA could permit the continuation of for-profit private merchants entering into contracts with the agency rather than the producers.⁸⁷

A government monopoly is significantly different from the approach of Liberman and Clough. It resembles alcoholic beverage marketing in Scandinavia, most Canadian provinces, and several USA states, where the government regulates distribution and sales in many ways. The TPA's main distinction from the monopolistic alcoholic beverage distribution systems in the USA and Canada is that it emphasises controlling marketing strategies more than distribution and does not necessarily necessitate that the government manage retail establishments. This difference is crucial. Control over marketing entails the TPA managing all aspects of product-related communication, including branding.

It seems as if South Africa could have benefited from an RMM and TPA system where the tobacco industry applied self-regulatory measures during COVID-19.⁸⁸ This is said without making a premature conclusion, as the self-regulatory nature of RMM and TPA made it easy for those governments to impose less stringent COVID-19 regulations on these sectors. Finally, it seems as if self-regulatory measures are more effective than applying the TRIPS Agreement's provisions on the tobacco and alcoholic beverage sectors is, which is not necessarily a solution to protect the right to conduct business.

⁸⁷ Borland 2003:374.

⁸⁸ Borland 2003:375-377.

2.2.3.2 Limitations on Branding and Marketing

The TRIPS Agreement includes rules to safeguard copyrights and trade marks. For instance, Article 16 on trade mark protection mandates that member nations give interested parties the legal tools to stop the use of any sign that is identical to or similar to a trade mark in connection with goods or services that are identical to or similar to those for which the trade mark is registered. For businesses to safeguard their brands and creative works, the TRIPS Agreement also includes rules protecting trade marks. The TRIPS Agreement fosters economic growth and development while safeguarding societal interests.⁸⁹

It would appear that there is no fundamental ban against monopolies as long as they do not favour national suppliers over non-national suppliers when purchasing products - but branding seems to be problematic. The goal of genuinely generic packaging may run into issues with the TRIPS Agreement, particularly if it is to be done without remuneration. However, the specifics of this situation are not known. A lot of work still needs to be done in this area. Still, it is important to remember that trade marks associated with tobacco and alcoholic beverages have monetary worth since they value items that are already dangerous to consumers.⁹⁰ Some countries may experience more difficulty with trade mark removal than others. In some, it might be sufficient to elevate tobacco from a commodity to a regulated substance, taking it out of the mainstream.⁹¹

Other options include trade mark forfeiture, either voluntarily, as a defence against potential liability for future hazardous product production, or forcibly, as a result of successful legal action against such practices.⁹²

The limitation of using trade marks might be more of a challenge in certain nations than in others. In certain jurisdictions, this may be sufficient grounds for classifying tobacco and alcoholic beverages as controlled substances and placing these products beyond the scope of normal commercial activity. Tobacco products sold by the TPA

⁸⁹ Agreement on Trade-Related Aspects of Intellectual Property Rights Annex 1C to the WTO Agreement 1994.

⁹⁰ Borland 2003:375-381.

⁹¹ Borland 2003:376.

⁹² Borland 2003:381.

would be the only ones legal for consumers to possess under such law. Other routes involve relinquishing trade marks, which may be done willingly as insurance against potential future liability for producing dangerous products or forcibly through the successful prosecution of legal action against such business practices.⁹³

In conclusion, Australia's Risk Minimisation Mandate (RMM) concept was proposed to minimise the damage caused by tobacco products and reduce the incentives to use them. Although the RMM effectively reduces commercial incentives to use tobacco products, it is not a complete solution. Consequently, retail controls, prevention and cessation programs, and stricter restrictions on when and where tobacco products are used are also required. The tobacco industry has consistently undermined these efforts, making adopting RMM even more crucial. To reduce the harmful effects of their products, the alcoholic beverages industry may need to consider instituting similar strategies.⁹⁴

It seems as if governments should strongly consider adopting the Australian RMM or adding it to the combination of strategies when implementing more comprehensive control over all aspects of the tobacco market, as opposed to stringent regulatory interventions during a pandemic. This is because the right of trade to conduct business is not done in haste during a pandemic but within the context of limiting the branding (marketing) of these potentially harmful products during a pandemic. Ultimately, it is essential to reduce the damage caused by tobacco and alcoholic products, was based on a study that people who smoke has a higher chance to be hospitalised for Covid. Effective strategies must therefore be implemented to achieve this objective.⁹⁵

2.2.4 Final remarks on the TRIPS Agreement

Despite the provisions of the TRIPS Agreement, the South African courts ruled in two court cases that tobacco is not an “essential good”⁹⁶ and that despite the right to conduct business as entrenched in sec. 22 of the *Constitution*, the government’s

⁹³ Borland 2003:375.

⁹⁴ Borland 2003:375-381.

⁹⁵ Borland 2003:381.

⁹⁶ *Fair Trade Independent Tobacco Association v President, RSA and Another* 2020 6 (SA) 513:2.

enforcement of the tobacco ban was rational.⁹⁷ No evidence was found in the two mentioned cases that the government ever considered the TRIPS Agreement. This leads to the preliminary conclusion that although South Africa is a signatory to the TRIPS Agreement, where substantial protection for IP rightsholders is entrenched, local healthcare realities were prioritised. At the same time, the tobacco and alcoholic beverages industries' rights were limited. Further attention will be given to these two cases when South Africa is analysed in chapter four.

The question now arises whether the TRIPS-imposed limitations on branding are appropriate during the pandemic. As argued with the healthcare industry above, existing branding limitations should have made it easier for governments to impose less stringent COVID-19 regulations on these sectors. Although it is too early to answer the question decisively, it could be argued that by applying the provisions of the TRIPS Agreement to tobacco and alcoholic beverage sectors, governments would not necessarily find a solution to protect the right to conduct business. Rather, the self-regulatory lessons learned from the Australian RMM or North American TPAs seem workable. The caveat, though, seems to be that self-regulatory measures during a pandemic can only work in a sophisticated regulatory environment, as will be shown in the next chapter when Australia is analysed.

2.3 DRAFT PANDEMIC TREATY

2.3.1 Background to the Draft Pandemic Treaty

The Pandemic Treaty⁹⁸ is still in draft form, and therefore, only selected articles of the draft treaty will be analysed against the backdrop of the research question.

Under international law, a convention, agreement, or other international document is legally binding. The WHO could strengthen global capacities and resilience to upcoming pandemics if a legal instrument on pandemic prevention, preparedness, and

⁹⁷ *Minister of Cooperative Governance and Traditional Affairs and Another v British American Tobacco South Africa (Pty) Ltd and Others* 2022 JDR 1641 (SCA):paras. 24 and 112.

⁹⁸ World Health Organization 2023.

response were adopted.⁹⁹ In this regard, the President of the European Council of World Health, Michel, stated, "We need to create an environment where every scientist, health worker, and government can band together for a common cause. Working together to build new solutions to protect what is most precious - our health and our lives."¹⁰⁰

The purpose of the draft pandemic treaty is to set out objectives and fundamental principles to structure the necessary collective action to fight pandemics, focusing on early detection and prevention of pandemics, resilience to future pandemics, response to any upcoming pandemics, specifically through guaranteeing equal and widespread access to medical treatments such as vaccines, medications, and diagnostics, a more robust worldwide health system with the WHO serving as the coordinating body for issues of global health and the "One Health" approach, connecting the health of humans, animals and our planet. More specifically, such a legal instrument can improve global cooperation in several important areas, including surveillance, warnings, and response, and boost confidence in the global health system.

In 2020, the European Council approved a resolution authorising the start of negotiations on a global pandemic preparedness, prevention, and response framework.¹⁰¹ The resolution also makes it possible to negotiate additional International Health Regulations modifications. Veran, the EU's Minister for Solidarity and Health, mentioned that the necessity of worldwide collaboration in the fight against the world's health challenges had been made clear by COVID-19. He further mentioned that this new international instrument is crucial to enable the EU to respond more effectively in the event of another pandemic. The international community must collaborate to guarantee prompt data and information exchange, promote equal

⁹⁹ Council of the EU and the European Council "An international agreement on pandemic prevention and preparedness", <https://www.consilium.europa.eu/en/policies/coronavirus/pandemic-treaty/> (accessed on 12 June 2022).

¹⁰⁰ Council of the EU and the European Council "An international agreement on pandemic prevention and preparedness", <https://www.consilium.europa.eu/en/policies/coronavirus/pandemic-treaty/> (accessed on 12 June 2022).

¹⁰¹ Véran "Council gives green light to start negotiations on international pandemic treaty", <https://www.consilium.europa.eu/en/press/press-releases/2022/03/03/council-gives-green-light-to-start-negotiations-on-international-pandemic-treaty/> (accessed on 24 April 2023).

access to vaccines and medicines, and address human, animal, and environmental health connections.¹⁰²

This draft treaty came at a welcoming time since the lack of accountability mechanisms to assess and monitor compliance and incentivise or penalise countries that do not comply with agreed-upon norms is a key deficiency in existing international health agreements independently and objectively. Faviero, for example, said that for global agreements to be effective in avoiding and managing pandemics, standards must be established, and countries and international organisations must be held accountable for their promises and responsibilities under these standards.¹⁰³

Accountability mechanisms are measures that ensure all stakeholders continue to be responsible for their responsibilities. The selection of the most useful accountability measures for a global health agreement will rely on the substance of what countries negotiate. Countries select how seriously they will take normative instruments by incorporating accountability systems. To maintain equity, countries must have access to the necessary technical, financial, and technological resources to comply with the agreement.¹⁰⁴

Accountability must include openness, monitoring, and supervision procedures to promote compliance. Transparency necessitates that member nations exchange information while independent monitoring and oversight permit verification and provide a clear picture of compliance with international law.¹⁰⁵ From the selected articles analysed below, it seems that the draft Pandemic Treaty will ensure that a system of common standards and accompanying accountability will be achieved once the treaty comes into force.

¹⁰² Véran "Council gives green light to start negotiations on international pandemic treaty", <https://www.consilium.europa.eu/en/press/press-releases/2022/03/03/council-gives-green-light-to-start-negotiations-on-international-pandemic-treaty/> (accessed on 24 April 2023).

¹⁰³ Faviero *et al.* 2022:730.

¹⁰⁴ Faviero *et al.* 2022:730-732.

¹⁰⁵ Faviero *et al.* 2022:731.

2.3.2 Selected articles of the Draft Pandemic Treaty

2.3.2.1 Article 14 – Health Care and Human Rights

In the event of a public health emergency, Article 14¹⁰⁶ of the draft treaty describes steps that can be taken to protect human rights. The parties involved must implement non-discriminatory measures into their pandemic prevention, preparedness, response, and recovery strategies, with a particular emphasis on the rights of individuals who are in vulnerable situations. This entails bringing constraints on human rights into conformity with international law, as well as ensuring that such restrictions are not discriminatory, are required to protect public health, and are the least restrictive measures possible.¹⁰⁷

It is also anticipated of the parties that they will provide health services and social assistance programs that do not discriminate and that they will make sure persons who live in areas where their freedom of movement is restricted have access to essential medication and services. In addition, the parties are strongly encouraged to create an impartial and inclusive advisory group that may guide the government in protecting human rights during a public health crisis.¹⁰⁸

¹⁰⁶ World Health Organization "Zero draft of the WHO CA + for the consideration of the Intergovernmental Negotiating Body at its fourth meeting. A/INB/4//3", https://apps.who.int/gb/inb/pdf_files/inb4/A_INB4_3-en.pdf (accessed on 28 August 2023): a.14.

Article 14 of the Draft Pandemic Treaty states: "The Parties shall, in accordance with their national laws, incorporate non-discriminatory measures to protect human rights as part of their pandemic prevention, preparedness, response and recovery, with a particular emphasis on the rights of persons in vulnerable situations."

¹⁰⁷ World Health Organization "Zero draft of the WHO CA + f or the consideration of the Intergovernmental Negotiating Body at its fourth meeting. A/INB/4//3", https://apps.who.int/gb/inb/pdf_files/inb4/A_INB4_3-en.pdf (accessed on 28 August 2023): a.14.

¹⁰⁸ World Health Organization "Zero draft of the WHO CA + for the consideration of the Intergovernmental Negotiating Body at its fourth meeting. A/INB/4//3", https://apps.who.int/gb/inb/pdf_files/inb4/A_INB4_3-en.pdf (accessed on 28 August 2023): a.21.

2.3.2.2 Article 7 - IP and TRIPS-Related Articles

Article 7(3)(a-d)¹⁰⁹ of this draft treaty's goal is to create systems for the equitable and sustainable creation of technologies and transmission of knowledge during inter-pandemic periods. The participating countries intend to organise, collaborate with, facilitate, and incentivise the transfer of important technology and know-how to capable manufacturers on mutually agreed-upon terms and conditions. This will be accomplished, for example, through technology transfer hubs and product development partnerships. In addition, they will improve coordination with key international organisations to solve public health, IP, and trade issues. Additionally, organisations engaged in pre-pandemic and pandemic-related product research and development will be encouraged to grant licenses to competent manufacturers, especially those from developing nations, to make use of their IP and other protected substances, products, technology, know-how, information, and knowledge used in the research, development, and production of pandemic response products.¹¹⁰ These licenses will allow qualified manufacturers in participating countries to use proprietary IP and other protected substances, products, technology, know-how, information, and knowledge. The parties have also agreed to work together to ensure that everyone has access to health technologies that are both inexpensive and equitable. These technologies should help enhance national health systems and reduce social disparities. To be better prepared for future pandemics, the objective is to increase access to knowledge and technology in inter-pandemic times in a sustainable, egalitarian, and cost-effective manner.¹¹¹

¹⁰⁹ World Health Organization "Zero draft of the WHO CA + for the consideration of the Intergovernmental Negotiating Body at its fourth meeting. A/INB/4//3", https://apps.who.int/gb/inb/pdf_files/inb4/A_INB4_3-en.pdf (accessed on 28 August 2023): a.7. "The Parties recognize that inequitable access to pandemic-related products (including but not limited to vaccines, therapeutics and diagnostics) should be addressed by increased manufacturing capacity that is more equitably, geographically and strategically distributed."

¹¹⁰ World Health Organization "Zero draft of the WHO CA + for the consideration of the Intergovernmental Negotiating Body at its fourth meeting. A/INB/4//3", https://apps.who.int/gb/inb/pdf_files/inb4/A_INB4_3-en.pdf (accessed on 28 August 2023): a. 14.

¹¹¹ World Health Organization "Zero draft of the WHO CA + for the consideration of the Intergovernmental Negotiating Body at its fourth meeting. A/INB/4//3", https://apps.who.int/gb/inb/pdf_files/inb4/A_INB4_3-en.pdf (accessed on 28 August 2023): a. 14.

Article 7(4)(a-d)¹¹² of this draft treaty encourages the fair and sustainable distribution of technology by implementing appropriate procedures to guarantee the accessibility and affordability of products connected to pandemics when they are in circulation. The parties involved will support time-bound waivers of IP rights to scale up the manufacturing of such products, boosting both their availability and accessibility at more reasonable prices. In addition, the parties have agreed to use the flexibilities given in the TRIPS Agreement fully.¹¹³ This includes flexibilities recognised in the Doha Declaration on the TRIPS Agreement and Public Health in 2001 and articles 27, 30 and 31 of the TRIPS Agreement.¹¹⁴ The participating countries will oblige those receiving public money to do so and encourage holders of patents relevant to pandemic-related products to waive or manage royalties paid by developing nation producers. In addition, the parties will encourage research and development institutes to either manage royalties on the continuous use of their technology to create pandemic-related products or waive them entirely. This project aims to ensure that the transfer of technology and know-how is sustainable and equitable and helps increase the availability of pandemic-related products at reasonable prices.¹¹⁵

In addition, it is anticipated that IP rights (IPRs) concerns will be addressed within the final Pandemic Treaty. During a pandemic, it is necessary to rapidly develop and produce vaccines, therapies, and medical equipment to meet the situation's demands. Nevertheless, preserving IPRs might occasionally operate as a barrier to the swift distribution of such items. The treaty is anticipated to provide a framework for sharing

¹¹² World Health Organization "Zero draft of the WHO CA + for the consideration of the Intergovernmental Negotiating Body at its fourth meeting. A/INB/4//3", https://apps.who.int/gb/inb/pdf_files/inb4/A_INB4_3-en.pdf (accessed on 28 August 2023): a. 14-15.

¹¹³ World Health Organization "Zero draft of the WHO CA + for the consideration of the Intergovernmental Negotiating Body at its fourth meeting. A/INB/4//3", https://apps.who.int/gb/inb/pdf_files/inb4/A_INB4_3-en.pdf (accessed on 28 August 2023): a.14-15.

¹¹⁴ WTO "Ministerial declaration", WT/MIN(01)/DEC/1. https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=37246&CurrentCatalogueIdIndex=0&FullTextSearch= (accessed on 28 August 2023).

¹¹⁵ World Health Organization "Zero draft of the WHO CA + for the consideration of the Intergovernmental Negotiating Body at its fourth meeting. A/INB/4//3", https://apps.who.int/gb/inb/pdf_files/inb4/A_INB4_3-en.pdf (accessed on 28 August 2023): a.14-15.

knowledge and expertise relating to attempts to combat pandemics, allowing the problem to be resolved.¹¹⁶

The draft Pandemic Treaty is a multilateral agreement relevant to the constitutionally protected freedom to engage in commercial activity. The treaty acknowledges the significance of businesses to the functioning of the world economy and the requirement to safeguard their legal rights during a pandemic. The treaty is anticipated to cover various concerns about the continuity of corporate operations, such as providing financial support and preserving supply networks. Additionally, the treaty is anticipated to address concerns regarding protecting workers' rights and sharing technological information and expert knowledge regarding attempts to respond to pandemics.

In general, it could be concluded that the draft Pandemic Treaty is vital in boosting global collaboration and preparedness to avoid and respond to future pandemics while preserving the interests of corporations and individuals. The draft Pandemic Treaty is also a good example of how it is possible to prioritise health care during a pandemic without compromising the right of trade and commerce to conduct business. Therefore, the draft Pandemic Treaty could be seen as an international instrument that aims to balance the rights of not only countries but also corporate and civil citizens within countries. This positive development will assist South African lawmakers in appropriately balancing rights in accordance with sec. 36 of the *Constitution*.

2.4 ACCOUNTABILITY AND INTERNATIONAL TREATIES

Both the TRIPS Agreement and the draft Pandemic Treaty allude to measures to hold member states accountable. Without a robust system of incentives and disincentives, transparency, monitoring, and oversight, accountability of member states cannot be achieved. Non-monetary rewards for compliance may exist, such as goodwill, priority access to scarce resources, and voting rights in treaties. The ability of low-income and middle-income nations to avoid, prepare for, and respond to pandemics will also

¹¹⁶ Sekala *et al.* 2021.

require financial help. By attaching money for later years to significant accomplishments, as the Global Fund to Fight AIDS, Tuberculosis, and Malaria does, such cash can be utilised as incentives to boost compliance.¹¹⁷

Member states frequently refuse to accept a system that incorporates fines. Therefore, disincentives are difficult to implement. But existing procedures can be added to a system of accountability and have a comparable impact, for instance.¹¹⁸

Hoffman and his co-authors concluded, in a meta-analysis of 224 studies analysing 53 distinct legally binding international legal instruments,¹¹⁹ that international agreements lacking accountability do not accomplish their objectives. They argue that if sufficient accountability measures are implemented, a legally binding worldwide agreement on prevention and management will likely halt the subsequent pandemic. Although it is recognised that some nations won't agree to an accord that includes accountability, an agreement without it is unlikely to impact the world's future well-being significantly.¹²⁰ As this frequently happens in economic and commercial agreements, it is expected that when a few countries are prepared to sign an agreement with accountability, an advancing number of nations will join in due course.¹²¹

The inability of the current system to stop the spread of COVID-19 demonstrates the inadequacy of a worldwide system for pandemic prevention that solely depends on the goodwill of nations. A global public health system must hold nations and international organisations accountable to stop outbreaks from spreading and becoming pandemics.¹²²

¹¹⁷ Faviero *et al.* 2022:730.

¹¹⁸ Faviero *et al.* 2022:730-731.

¹¹⁹ Hoffman *et al.* 2022:32.

¹²⁰ Hoffman *et al.* 2015:53-64.

¹²¹ Faviero *et al.* 2022:730.

¹²² Faviero *et al.* 2022:731.

2.5 THE LANCET COVID-19 COMMISSION

The *Lancet* COVID-19 Commission's initiative shows how the private sector took initiatives and did not wait for governments to impose new legislative and regulatory frameworks to deal with the pandemic.¹²³

The work of the *Lancet* COVID-19 Commission articulates the crucial role of law in achieving global health through legal instruments, legal capacities, and institutional reforms.¹²⁴ The significance of the role that legislation plays in advancing global health and equity has been acknowledged by the *Lancet* Commission.¹²⁵ The purpose of the Commission is to broaden people's knowledge of how laws, rules, and the rule of law can be utilised as powerful tools to improve the health of populations and equity. It does this by bringing together influential people from health, law, and governance to push for improved linkages between health and the legal system. *Lancet* focuses on four legal determinants of health, each demonstrating how the law can influence health outcomes and address the underlying social and economic causes of injury and disease. The Commission offers specific suggestions for courses of action across various domains.¹²⁶ These proposals include creating standards for universal health coverage (UHC) and reviewing compliance with UHC, enhancing the governance of health institutions, implementing health interventions that are equitable and evidence-based, and building legal capacities for health.¹²⁷

To achieve global health with justice, Gostin (who analysed the work of the *Lancet* COVID-19 Commission) proposes a public health law action plan that includes legal tools, legal authority, and institutional changes.¹²⁸ The right to health is the cornerstone of the action programme based on human rights and good governance.¹²⁹ Overarching the precise objectives in each recommendation, these suggestions will hopefully encourage discussions among public health authorities, researchers, civil

¹²³ The *Lancet* "The *Lancet* COVID-19 Commission", <https://www.thelancet.com/commissions/covid19> (accessed on 31 July 2023).

¹²⁴ Gostin 2019:1857-185. Note that *Lancet* represent a group of journals and took the initiative to launch its own commission on COVID-19.

¹²⁵ Gostin *et al.* 2019:1857-1858.

¹²⁶ Gostin *et al.* 2019:1857.

¹²⁷ Gostin *et al.* 2019:1857-1858.

¹²⁸ Gostin *et al.* 2019:1899.

¹²⁹ Gostin *et al.* 2019:1899-1900.

society organisations, policymakers, and other global health professionals.¹³⁰ Seven recommendations were made below, with possible application to the South African situation, which applications will be mentioned after the seven recommendations were considered.

The first recommendation states that the UN, WHO, and the international community should establish criteria to aid in the fulfilment of the UN's Sustainable Development Goal (SDG),¹³¹ UHC, and impartially assess conformity with it.¹³² South Africa already subscribes to the SDG, and this recommendation, read together with the envisaged Pandemic Treaty, can entrench the right to work. – SDG number 8.¹³³

The second recommendation made by the Commission is to achieve a rights-based UHC based on the ideas of equity and non-discrimination.¹³⁴ The government should strengthen or create a legal system, such as a statutory or constitutional right to health.¹³⁵ South Africa is working towards achieving UHC by establishing National Health Insurance (NHI).¹³⁶ According to its definition, NHI is a health-financing system that pools resources to give all South Africans access to high-quality medical care regardless of socioeconomic background or individual health requirements. UHC ensures everyone has equal access to high-quality medical care without financial hardship. Realising UHC will lead to social fairness and human dignity.¹³⁷

The third recommendation is that the UN, WHO, and international partners use their influence and ability to create or adopt good governance norms to protect public health

¹³⁰ Gostin *et al.* 2019:1901.

¹³¹ United Nations Department of Economic and Social Affairs "Sustainable development", <https://sdgs.un.org/goals> (accessed on 28 August 2023).

Note that this is also referred to as the Global Goals, which were established by the United Nations in 2015 as a global call to action to eradicate poverty, safeguard the environment, and guarantee that by the year 2030, everyone would live in peace and prosperity.

¹³² Gostin *et al.* 2019:1900.

¹³³ UN, SDG 8:

"Promote sustained, inclusive and sustainable economic growth, full and productive employment and decent work for all."

¹³⁴ Gostin *et al.* 2019:1901.

¹³⁵ Gostin *et al.* 2019:1901-1902.

¹³⁶ Department of Health "Deputy Minister Sibongiseni Dhlomo: Universal health coverage in South Africa", South African Government. <https://www.gov.za/speeches/policy-dialogue-universal-health-coverage-south-africa-12-dec-2022-0000> (accessed on 18 August 2023).

¹³⁷ UHC2023 "South Africa's path to universal health coverage: a new Presidential Health Compact", <https://www.uhc2030.org/news-and-events/news/south-africas-path-to-universal-health-coverage-a-new-presidential-health-compact-555310/> (accessed on 18 August 2023).

and safety.¹³⁸ A country-appropriate mechanism should be established to advise on legal interventions with high health impact, and legislation requiring health impact assessments for policies, programmes, and projects that might significantly impact health should be adopted.¹³⁹

According to the fourth recommendation, governments should build legal frameworks that establish good governance standards throughout all national health systems and policy-making.¹⁴⁰ One of the measures taken by the South African government to maintain effective governance in the nation is the National Policy Development Framework 2020.¹⁴¹ Another policy, the National Digital Health Strategy for South Africa, 2019–2024, will improve the governance frameworks for digital health, build solid integrated platforms for the development of information systems, and establish the necessary broadband network infrastructure in collaboration with other government agencies.¹⁴²

The fifth recommendation is that the WHO should strengthen its legal capabilities to create a worldwide evidence base for public health legislation and assist in adopting and applying efficient and long-lasting national and international health laws.¹⁴³

According to recommendation six, governments should strengthen national capabilities to pass and successfully implement public health policies.¹⁴⁴ The *National Health Act* of 2003,¹⁴⁵ which mandates that the department create a framework for a structured and unified health system for South Africa, gives the Department of Health its authority. The *Act* outlines the three government tiers' roles in delivering healthcare services. Its goal is to promote healthy lifestyles and avoid illness and disease to improve health. By emphasising access, equity, efficiency, quality, and sustainability, it seeks to improve the healthcare delivery system continuously.¹⁴⁶

¹³⁸ Gostin *et al.* 2019:1900.

¹³⁹ Gostin *et al.* 2019:1901-1903.

¹⁴⁰ Gostin *et al.* 2019:1903.

¹⁴¹ National Policy Development Framework 2020.

¹⁴² National Digital Health Strategy for South Africa 2019-2024.

¹⁴³ Gostin *et al.* 2019:1901.

¹⁴⁴ Gostin *et al.* 2019:1902.

¹⁴⁵ *National Health Act* 61/2003.

¹⁴⁶ Tibane "Health", <https://www.gov.za/about-sa/health> (accessed on 19 August 2023).

Recommendation seven is to advance the health-related SDGs, WHO and The *Lancet* should work with legal and health experts to establish an independent standing commission on global health and the law. This commission would recommend changes to international law and global health architecture and strategies to build and strengthen national and international health law capacities.¹⁴⁷

In conclusion, these recommendations are all beneficial. They could serve as a tool to be deployed by developing countries such as India and South Africa to influence legislative and regulatory developments. For example, and as already mentioned in recommendation two, South Africa works towards an NHI. More important though, recommendation one that endorses the UN's SDG is encouraging from this dissertation's perspective, because the right to work is entrenched in SDG 8, which states "Promote sustained, inclusive and sustainable economic growth, full and productive employment and decent work for all."¹⁴⁸

2.6 SIRACUSA PRINCIPLES

The Siracusa Principles were developed in 1984 through a consensus-building effort among international law experts co-convened by the International Commission of Jurists (ICJ). The Siracusa Principles are a collection of criteria that guide state behaviour in response to national risks to public welfare and security.¹⁴⁹ The Siracusa Principles, which prohibit measures that infringe human rights to the extent that they are proportionate to that aim and necessary, have been criticised for their inability to guide policy activities in response to the pandemic.¹⁵⁰ The Siracusa Principles sought "an effective implementation of the rule of law" in times of national emergency, preventing the government from restricting human rights in its responses.¹⁵¹ Although the IHR has been working for years to codify international legal duties to better direct responses to infectious disease threats, its legal constraints have been almost wholly disregarded amid the worst pandemic in a century. When responding to the COVID-

¹⁴⁷ Gostin *et al.* 2019:1901.

¹⁴⁸ UN, SDG8.

¹⁴⁹ American Association for the International Commission of Jurists 1985.

¹⁵⁰ Habibi *et al.* 2021:4.

¹⁵¹ Habibi *et al.* 2021:1-4.

19 pandemic, leaders worldwide have resorted to wartime metaphors to justify emergency health measures. However, states rarely consider corresponding obligations under International Human Rights Law when formulating their call to arms against an elusive new enemy. The Siracusa Principles have been developed to ensure that emergency response imperatives are met with human rights protections as an intrinsic component rather than a hindrance.¹⁵²

The Siracusa Principles, however, failed to adequately contemplate and provide for today's life experience, in which a global emergency has entered every continent. These principles fail to operationalise the international duty to collaborate and aid in confronting global health concerns. In other words, they are not prepared for today's life experience. Emergencies relating to global health require a focus on rights related to health, including the right to one's health. Governments have implemented policies of physical separation to restrict the spread of disease. However, such measures have seldom been accompanied by social assistance programmes such as income support and debt suspension.¹⁵³ These interventions have largely exacerbated racial, socioeconomic, disability, gender, and age disparities, aggravating the suffering of those who were already most at risk and failing to uphold the state's obligations to ensure that responses to public health emergencies don't have a discriminatory impact.¹⁵⁴

The International Health Regulations (IHR) stipulate that public health interventions must not be more limiting to international commerce and must not be more invasive or intrusive to individuals than reasonably available alternatives.¹⁵⁵ They have failed to direct governmental activities in reacting to the pandemic. Measures that are justified by public health concerns, such as travel restrictions, may lend themselves to being politicised, having public health impacts that are ineffectual or counterproductive, being used discriminatorily, and infringing on human rights. International health and human rights law must converge to consider restrictions on the economic, social, and cultural rights supporting public health in a global health

¹⁵² Harris 2022:40.

¹⁵³ Habibi *et al.* 2021:3-4.

¹⁵⁴ Harris 2022:59.

¹⁵⁵ Habibi *et al.* 2021:4.

emergency. Additionally, responsible parties must be held accountable for all unjustified human rights violations resulting from the response to the public health emergency.¹⁵⁶

These shortcomings were recognised, and the International Health Legislation Consortium and the Siracusa Principles are collaborating to improve the Siracusa Principles to ensure the harmonisation of public health and human rights evaluations across global health legislation.¹⁵⁷ These envisaged updates are supported by Habibi, who said that when state actors attempt to limit or derogate some human rights duties, particularly during times of exception, they must use the authoritative set of norms, such as the Siracusa Principles, as a compass to guide them in their decision-making.¹⁵⁸ Although there are shortcomings with the Siracusa Principles, as mentioned directly above, it must be noted that they endorse the International Labour Organization's (ILO) entrenchment of workers' rights, which is supported in this dissertation.¹⁵⁹

In summary, it can be said that despite the shortcomings of the Siracusa Principles, these principles have shown that the pandemic caused by COVID-19 presents a chance to clarify human rights law and build global health legislation in sync with pressing challenges to human dignity and flourishing in the current day. The ICJ and the Global Health Law Consortium are working together to produce a consensus-based restatement of principles, which will be derived from international legal norms. This will ensure that public health and human rights imperatives are harmonised.¹⁶⁰

Developing countries such as India and South Africa should use this opportunity to fast-track their respective legislative developments regarding pandemics. However, the findings of the Bertscher report cannot be denied, namely that alcoholic beverage

¹⁵⁶ Habibi *et al.* 2021:4.

¹⁵⁷ Harris 2022:44.

¹⁵⁸ Habibi *et al.* 2021:1.

¹⁵⁹ Art. 68 of the Siracusa Principles states: "The ILO basic human rights conventions contain a number of rights dealing with such matters as forced labour, freedom of association, equality in employment and trade union and workers' rights which are not subject to derogation during an emergency; others permit derogation, but only to the extent strictly necessary to meet the exigencies of the situation."

¹⁶⁰ Habibi *et al.* 2021:5.

restrictions led to dramatic decreases in violence, injuries and trauma-related hospital admissions.¹⁶¹

2.7 CONCLUDING REMARKS ON CHAPTER TWO

The TRIPS Agreement addresses the right to engage in commerce on a global scale. The agreement establishes minimum standards for protecting and enforcing IP rights to promote innovation and technological advancement. Article 27 and Article 31 are two of the most important provisions of the agreement, as they ensure that patents are only granted for inventions that benefit society and that compulsory licenses are only granted under specific conditions. The agreement includes trade mark and copyright protection provisions for businesses to protect their trade marks and creative works. The TRIPS Agreement is essential for promoting economic growth and development while safeguarding societal interests.

The question now arises whether the TRIPS Agreement-imposed limitations on branding are appropriate during the pandemic. As argued with the healthcare industry above, branding limitations should make it easier for governments to impose less stringent COVID-19 regulations on these sectors. Although it is too early to answer the question decisively, it could be argued that by applying the provisions of the TRIPS Agreement to tobacco and alcoholic beverage sectors, governments would not necessarily find a solution to protect the right to conduct business. Rather, the self-regulatory lessons learned from the Australian RMM seem workable. The caveat, though, seems to be that self-regulatory measures during a pandemic can only work in a sophisticated regulatory environment, as will be shown in the next chapter when Australia is analysed in-depth.

The draft Pandemic Treaty is a multilateral agreement that could play a crucial role in enhancing global collaboration and readiness to prevent and respond to future pandemics while also safeguarding the interests of corporations and individuals.

¹⁶¹ Bertscher *et al.* 2020.

In general, it could be concluded that the draft Pandemic Treaty is vital in boosting global collaboration and preparedness to avoid and respond to future pandemics while preserving the interests of corporations and individuals. The draft Pandemic Treaty is also a good example of how it is possible to prioritise health care during a pandemic without compromising the right of trade and commerce to conduct business. Therefore, the draft Pandemic Treaty could be seen as an international instrument that aims to balance the rights of not only countries but also corporate and civil citizens within countries. This positive development will assist South African lawmakers to balance rights in sec. 36 of the *Constitution* appropriately.

In conclusion, the TRIPS Agreement and the draft Pandemic Treaty both acknowledge the significance of international collaboration in fostering economic growth and development while protecting the interests of society. The draft Pandemic Treaty addresses the necessity of maintaining the continuity of economic operations and protecting workers' rights during pandemics, in contrast to the TRIPS Agreement, which is focused on protecting and enforcing IP rights.

Both accords reflect major steps towards developing a global economy that is more sustainable and resilient and underscore the significance of collaboration and preparedness in solving difficult global challenges. Both agreements also highlight the importance of addressing complex global challenges, with the need to keep members accountable. Chapters three and four apply these two treaties' principles to South Africa.

The seven recommendations made by the *Lancet* COVID-19 Commission are all beneficial. They could serve as a tool to be deployed by developing countries such as India and South Africa to influence legislative and regulatory developments, notably in respect of SDG 8, which entrenches the right to work.

The Siracusa Principles are equally essential to this dissertation, notably because this private initiative endorses the ILO's labour practices during a "Public Emergency Which Threatens the Life of the Nation."¹⁶² In summary, it can be said that despite the shortcomings of the Siracusa Principles, these principles have shown that the

¹⁶² Siracusa Principles: art. II. A.

pandemic caused by COVID-19 presents a chance to clarify human rights law and build global health legislation in sync with pressing challenges to human dignity and flourishing in the current day.

CHAPTER 3

LEGAL ANALYSIS OF THE RIGHT TO CONDUCT BUSINESS IN SELECTED COUNTRIES

Developed and developing countries responded differently to the pandemic and even in developing countries, there was no uniform approach. For example, during the first phase of the lockdown, tobacco sales were banned for 20 weeks in South Africa, 12 weeks in Botswana and six weeks in India.¹⁶³ This example, where India seems much more business-orientated than South Africa with its short banning period, illustrates why it is essential to understand how different countries approached the matter. The two countries that will be reviewed in more detail are Australia, a developed country, and India, a developing country. Both countries are common law countries, as is the case with South Africa, which will assist with the legal review of these countries and their relevance to South Africa. Other African countries will be touched on briefly. In the USA only the *Bayh-Dole Act* will be considered. Chapter three is not a comparative legal study of the countries, but rather an attempt to understand each of the countries' responses to the legal question at hand.

3.1 AUSTRALIA

3.1.1 Overview

With the *Australia Act* of 1986,¹⁶⁴ the powers of the United Kingdom's (UK) parliament to legislate for the Commonwealth of Australia (Australia) were terminated. However, the *Australian Constitution* of 1900,¹⁶⁵ as amended over the years, remained in force after independence, and this legal review will use the *Australian Constitution* as a point of departure. It will be argued that these legislative developments over the centuries arguably assisted Australia in acting promptly and decisively during the pandemic while considering human rights. Furthermore, as a developed country, Australia had the financial resources in the past to fast-track legislative measures to address legal

¹⁶³ Filby *et al.* 2020.

¹⁶⁴ *Australia Act* 142/1985.

¹⁶⁵ *Commonwealth of Australia Constitution Act* 1900.

challenges as and when they arise, which was indeed done during the COVID-19 pandemic.¹⁶⁶

The Australian government permits industry self-regulation, allowing alcohol companies to regulate themselves.¹⁶⁷ Despite self-regulatory measures, there was no evidence that the self-regulatory system effectively protects vulnerable groups of interest from exposure to advertising or prevents the promotion of harmful messaging.¹⁶⁸ If there was evidence, legislative measures during the COVID-19 pandemic could have been easier to implement. Therefore, it is no surprise that, according to the Foundation for Alcohol Research and Education, 20 per cent of households in Australia reported purchasing more alcohol during the pandemic.¹⁶⁹ Seventy per cent of these people reported drinking more alcohol, and almost a third reported being concerned about their drinking behaviour or the drinking habits of someone in their home¹⁷⁰ – reasons for this were not disclosed, but could possibly range from finances, boredom to anxiety.

During the COVID-19 pandemic, more than 26 advertisements referred to drinking alcohol in Australia.¹⁷¹ Twenty-five references to the pandemic were explicit, including six promotional displays that mentioned “COVID-19” and 19 references to pandemic-related terms such as isolation, lockdown, or confinement.¹⁷² Specific examples include encouraging Australians to work from home to “Wine from home.”¹⁷³ Other

¹⁶⁶ Biber-Klemm & Cottier (eds) 2006:96.
Note that as a developing country, South Africa does not have the same financial resources as Australia.

¹⁶⁷ WHO 2018:11.

¹⁶⁸ WHO 2018:11.

¹⁶⁹ FARE "Foundation for Alcohol Research & Education",
<https://www.cancerwa.asn.au/resources/2020-05-12-CCWA-FARE-An-alcohol-ad-every-35-seconds-snapshot-final.pdf> (accessed on 30 November 2021).

¹⁷⁰ FARE "Foundation for Alcohol Research & Education",
<https://www.cancerwa.asn.au/resources/2020-05-12-CCWA-FARE-An-alcohol-ad-every-35-seconds-snapshot-final.pdf> (accessed on 30 November 2021).

¹⁷¹ FARE "Foundation for Alcohol Research & Education",
<https://www.cancerwa.asn.au/resources/2020-05-12-CCWA-FARE-An-alcohol-ad-every-35-seconds-snapshot-final.pdf> (accessed on 30 November 2021).

¹⁷² FARE "Foundation for Alcohol Research & Education",
<https://www.cancerwa.asn.au/resources/2020-05-12-CCWA-FARE-An-alcohol-ad-every-35-seconds-snapshot-final.pdf> (accessed on 30 November 2021).

¹⁷³ FARE "Foundation for Alcohol Research & Education",
<https://www.cancerwa.asn.au/resources/2020-05-12-CCWA-FARE-An-alcohol-ad-every-35-seconds-snapshot-final.pdf> (accessed on 30 November 2021).

advertisements encouraged having a “Lockdown happy hour” or drinking cocktails while isolating.¹⁷⁴

According to the Managing Director of Retail and Trade Brands Advocacy (RTBA) based in Melbourne, Australia, black market tobacco syndicates exploited weak Malaysian borders and “while high tobacco excise duty is a key factor driving demand for illicit tobacco in Australia, the supply of these contraband goods mainly comes from source countries through Malaysia, although no evidence was found that weak borders made it easier to do.”¹⁷⁵

To restrict and stop the spread of the coronavirus, the Australian government enacted stringent social isolation measures, including mandating that all food and beverage establishments close and only provide home delivery and takeaway services.¹⁷⁶ In response to these measures, New South Wales (NSW) Liquor and Gaming Board temporarily relaxed licensing requirements to permit any licensed establishment, including eateries, cafes, and small bars that ordinarily lack the authorisation to sell or advertise alcohol for off-premises consumption, to sell alcohol for home delivery and takeout.¹⁷⁷ Similar measures were also introduced in other parts of Australia, including South Australia, Queensland, Western Australia, Victoria and the Australian Capital Territory.¹⁷⁸

Although the Australian government and state governments across the nation declared a human biosecurity emergency on 20 March 2022, it appears that the Australian government was aware of the pandemic's possible effects on the labour

¹⁷⁴ FARE "Foundation for Alcohol Research & Education", <https://www.cancerwa.asn.au/resources/2020-05-12-CCWA-FARE-An-alcohol-ad-every-35-seconds-snapshot-final.pdf> (accessed on 30 November 2021).

¹⁷⁵ Hefler "Malaysia: did the tobacco industry collaborate with media to defeat tax increase?", <https://blogs.bmj.com/tc/2021/01/26/malaysia-did-the-tobacco-industry-collaborate-with-media-to-defeat-tax-increase/> (accessed on 01 June 2021).

For example, the RTBA's illicit trade advisor, a former law enforcement officer from Australia, offered his opinion and raised his voice in the Malaysian press on how easy access to illegal cigarettes will increase youth smoking and “if products like illicit cigarettes can easily get into Malaysia and even be re-exported out to neighbouring countries, so can other dangerous items like weapons, drugs and diseases.

¹⁷⁶ Colbert *et al.* 2020:435.

¹⁷⁷ Nefedova 2022:19.

¹⁷⁸ Colbert *et al.* 2020:435-436.

force.¹⁷⁹ Forsyth¹⁸⁰ found that policies, including social distancing guidelines, a ban on Australians travelling abroad, limits on the return of foreign visitors, and enforcing the public to stay home, had a devastating impact on Australian firms and workers in the first few months of operation with 49 per cent of Australian enterprises having been negatively effect from the COVID-19 pandemic and 85 per cent expecting to be impacted in the future months.¹⁸¹ Work in other areas continued, albeit with significant changes to business procedures to maintain compliance with government regulations. Workers in crucial areas such as supermarkets, pharmacies, hospitals, transportation, distribution centres, and larger supply chains faced various challenges, including significantly higher workloads and the danger of coronavirus infection.¹⁸² Stringent lockdown measures achieved the expected effect of lowering the number of new coronavirus infections, allowing restrictions to be removed nationwide by late April or early May.¹⁸³ Australia's federal government announced a three-step structure for breaking free from limitations, with Victoria taking the most cautious approach. By early June, eating out at cafés and restaurants, going to the gym, visiting a museum or gallery, or travelling within the state for vacation was safe.¹⁸⁴ However, a resurgence of COVID-19 infections occurred in that state in the second half of June, prompting the re-imposition of even stricter measures than the first lockdown, including a return to stage three restrictions, a “hard lockdown” of nine public housing tower blocks in Melbourne's inner north for two weeks, and the mandatory wearing of masks when going out in public.¹⁸⁵ The Victorian outbreak significantly impacted Australia, with redundancies becoming more widespread in aviation, tourism, retail, banking, journalism, arts, sports, and higher education.¹⁸⁶

The examples above all assist with contextualising the impact of regulations on the labour market and the right to conduct business. It was, therefore, no wonder that the

¹⁷⁹ Forsyth 2020:1.

¹⁸⁰ Nefedova 2022:19, 32.

¹⁸¹ Forsyth 2020:2.

¹⁸² Forsyth 2020:1-2.

¹⁸³ Gan "How did Australia flatten its coronavirus curve? Restrictions easing as infection rate continues to fall", <https://edition.cnn.com/2020/05/01/asia/australia-coronavirus-success-intl-hnk/index.html> (accessed on 31 July 2023).

¹⁸⁴ Forsyth 2020:2.

¹⁸⁵ Forsyth 2020:1-2

¹⁸⁶ Forsyth 2020:3.

Grattan Institute¹⁸⁷ issued a warning in June that Australia was entering a globally synchronised deep recession, with the official unemployment rate climbing from 5.2 per cent in March to 7.1 per cent in May 2020. As a result, the focus turned to implementing COVID-19 safe return-to-work plans and ongoing assistance for people who had to continue to work from home.¹⁸⁸ During the early phases of the crisis, the Australian government introduced many economic stimulus programmes, notably the \$70 billion JobKeeper plan.¹⁸⁹ This scheme allow enterprises with a reduced turnover of at least 30 per cent to receive a pay subsidy of \$1 500 per fortnight for employees who continued to work, are stood down from their employment, or are re-hired if made redundant.¹⁹⁰ In addition, the government raised income support for unemployed Australians by \$550 to the weekly benefit payments JobSeeker¹⁹¹ level and made childcare¹⁹² free of charge.¹⁹³

On 21 July 2020, the government announced the extension and significant adjustments to JobKeeper, such as the \$1 500 pay-out dropping to \$1 200 per fortnight.¹⁹⁴ Australia's regulatory framework was modified during the pandemic to allow flexible involvement in various industries, including work-from-home options. The FWC changed 103 of the 122 industry awards, adding a new entitlement to two weeks of unpaid pandemic leave for employees who had to self-isolate.¹⁹⁵ Despite the Australian Services Union's objections, employers sought to extend the clerical award variations from 30 June to 30 September 2020. Still, the Full Bench of the FWC ruled in their favour, citing the second wave of COVID-19 infections in Victoria and rejecting

¹⁸⁷ Forsyth 2020:4.

¹⁸⁸ Forsyth 2020:5.

¹⁸⁹ Forsyth 2020:4-5.

¹⁹⁰ Henriques-Gomes "Australian jobseekers to get \$550 payment increase as part of huge coronavirus welfare package", <https://www.theguardian.com/world/2020/mar/22/australian-jobseekers-to-get-550-increase-as-part-of-huge-coronavirus-welfare-package> (accessed on 31 August 2023).

¹⁹¹ Henriques-Gomes "Australian jobseekers to get \$550 payment increase as part of huge coronavirus welfare package", <https://www.theguardian.com/world/2020/mar/22/australian-jobseekers-to-get-550-increase-as-part-of-huge-coronavirus-welfare-package> (accessed on 31 August 2023).

¹⁹² Morrison & Tehan "Early childhood education and care relief package. Joint media release", <https://www.australianbeverages.org/wp-content/uploads/2020/04/Joint-Media-Release-from-the-Prime-Minister-and-the-Federal-Minister-for-Education.pdf> (accessed on 29 August 2023).

¹⁹³ Forsyth 2020:5.

¹⁹⁴ Forsyth 2020:5-6.

The JobSeeker coronavirus supplement payment for the unemployed decreased from \$550 to \$250 per fortnight beginning in October 2021.

¹⁹⁵ Forsyth 2020:5-6.

the union's argument that JobKeeper was providing adequate support to affected businesses.¹⁹⁶

The *Australian Fair Work Act*¹⁹⁷ required companies to give employees seven days' notice of planned enterprise agreement amendments. Still, this revision was opposed by the Australian Services Union and was reversed by the Government.¹⁹⁸ In reaction to the recurrence of coronavirus, the Australian Council of Trade Unions (ACTU) advocated for paid pandemic leave to be implemented across Australia as a critical public health intervention.¹⁹⁹ A Full Bench²⁰⁰ of the Federal Court (FWC) rejected an appeal for paid pandemic leave rights to be offered to front-line healthcare and pharmacy workers in early July 2020, citing the financial burden of this new minimum standard for some employers.²⁰¹ Some state governments responded by instituting emergency payment programmes for self-isolating employees who did not have access to sick leave or special pandemic leave benefits.²⁰² The initial reaction to the pandemic was based on national interest cooperation among all levels of government, business, and labour unions.²⁰³

The federal government relinquished some of its historical hostility towards union leaders in exchange for severely weakening established employment law protections. Business organisations and the Prime Minister utilised the crisis to justify permanently extending some of these erosions of employee safeguards. In May 2020, the federal government initiated a consultation to examine industrial legislation revisions with company and union representatives. The ACTU agreed to participate but stated that unions would only support long-term workplace reform ideas. However, the COVID-19 pandemic has the potential to be leveraged by business groups and conservative politicians to accelerate a deregulation agenda.²⁰⁴

¹⁹⁶ Forsyth 2020:5-6.

¹⁹⁷ Fair Work Amendment (Variation of Enterprise Agreements) Regulations 2020, operative from 17 April 2020.

¹⁹⁸ Forsyth 2020:7-8.

¹⁹⁹ Forsyth 2020:7-8.

²⁰⁰ *Transport Workers Union of Australia v Prosegur Australia Pty Ltd* (2020) FWCFB 3655.

²⁰¹ *Health Awards – Pandemic Leave* (2020) FWCFB 3561, 8 July 2020.

²⁰² *Health Awards – Pandemic Leave* (2020) FWCFB 3561, 8 July 2020.

²⁰³ Forsyth 2020:7-8.

²⁰⁴ Forsyth 2020:8-9.

In summary, these proactive measures taken by the Australian national and state governments to protect jobs and businesses are commendable because Australia does not have a bill of rights where the right to work is entrenched – Australia merely applied common sense regulatory interventions while at all times making sure that the local workforce and businesses were allowed as much freedom as possible to conduct business within the constraints of the pandemic. Furthermore, Australia's government's close working relationship with the trade unions assisted with this pragmatic approach. When one applies these lessons learned to South Africa, it seems as if South Africa could have managed the pandemic better by allowing self-regulatory measures, while in cases where interventions were required, the right to conduct business should have been protected by some monetary support schemes such as the JobKeeper plan.

3.1.2 Human rights-related legislation in Australia

Evans²⁰⁵ considered the impact on the workforce from a global economic stagnation and death perspective. He mentioned that Australian laws and policies were promptly implemented to halt the virus's spread, relieve strain on healthcare systems, and improve ailing economies.²⁰⁶ Therefore, the response of this Commonwealth state and its territory governments has been considerable.²⁰⁷

Evans investigates how the *Australian Human Rights Act 2004*,²⁰⁸ the *Charter of Human Rights and Responsibilities 2006*²⁰⁹ and the *Human Rights Act 2019*²¹⁰ could respond to the COVID-19 pandemic reaction.²¹¹ He also assessed the one-of-a-kind Commonwealth approach to human rights protection.²¹² As shown, the *Australian Human Rights Act* (HRAs) and the *Parliamentary Scrutiny Act*²¹³ can investigate many

²⁰⁵ Evans & Petrie 2020:175.

²⁰⁶ Evans & Petrie 2020:176.

²⁰⁷ Evans & Petrie 2020:175-6.

²⁰⁸ *Australian Human Rights Acts 2004*

²⁰⁹ *Charter of Human Rights and Responsibilities 2006*.

²¹⁰ *Human Right Act 2019*.

²¹¹ *Human Right Act 2019*.

²¹² Evans & Petrie 2020:175.

²¹³ *Parliamentary Scrutiny Act 2011*.

COVID-19 laws and activities taken under them.²¹⁴ Although the COVID-19 pandemic required the eight Australian state governments to take rapid, decisive, and successful action, the author refrained from what the best measures were or should have been. He also did not determine whether such actions were in accordance with the human rights protection frameworks established by the Australian HRAs. Evans is correct. Because such decisions must consider legal, health, scientific, and economic issues,²¹⁵ a narrow legal solution to the pandemic is arguably inappropriate.

According to Evans, severe violations of human rights allegedly occur during crises. For example, the human rights implications of the COVID-19 measures of prime importance relate to the limitation on freedom of movement.²¹⁶ Furthermore, crisis measures may be extended. Australia's state administrations have relaxed certain restrictions, but others will likely remain. Evans looked at some legal processes that might be used to analyse such activities and guarantee that human rights are protected despite the need for an effective and ongoing viral response. COVID-19 measures have had little government oversight, including legislative sessions and human rights oversight processes.²¹⁷

According to Evans, the proportionality of the Australian Commonwealth, state, and territory governments' COVID-19 reaction will be judged.²¹⁸ Indeed, human rights law strikes a balance between public and private interests. All rights may be restricted under the Australian HRAs. This includes so-called supreme rights such as the right to life. In a free and democratic society predicated on human dignity labour law, equality, and freedom, the applicable restriction clauses in the Australian HRAs require legislative constraints to be reasonable and demonstrably justified.²¹⁹

The limitations clause jurisprudence of the Victorian Charter requires a proper proportionality between the limited rights or freedoms and the limitation's objective or purpose. This proportionality concept offers a tool for analysis to ensure appropriate

²¹⁴ Evans & Petrie 2020:176.

²¹⁵ Evans & Petrie 2020:175-176.

²¹⁶ Evans & Petrie 2020:176.

²¹⁷ Frenkel 2021:591.

²¹⁸ Evans & Petrie 2020:176.

²¹⁹ Frenkel 2021:591, 605. Frenkel refers to the Rana Plaza disaster in Bangladesh that tempers them to be pro-active with disaster management.

actions are performed under the *Human Rights Act*.²²⁰ Victoria and Queensland's measures are consistent with the rights guaranteed by their statutory instruments. Evans believes it will also assist us in analysing the behaviour of other Australian governments.²²¹

However, current and future legal actions must only violate rights and liberties in a manner proportional to the threat for some time. These measures must be applied proportionally and without undue discrimination by public agencies such as the police. All jurisdictions can use the proportionality standards of the Australian HRAs to analyse COVID-19 measures and their implementation for human rights compliance.²²² The Australian HRAs can be invoked in court proceedings in the *Human Rights Act*,²²³ Victoria, and Queensland when legal remedies or their application fall short of specific circumstances.²²⁴

In summary, although the Australian HRAs were never directly applied to labour and the right-to-work challenges, the above examples confirm that Australia always dealt with human rights to be proportionate and free of unjustified discrimination. This is encouraging because the Australian approach correlates with how South African courts interpret sec. 36 of the *Constitution*.

3.1.3 Preparedness during COVID-19

Mazerolle²²⁵ stated that the world has been on high alert to anticipate, plan for, and react to global events that could jeopardise civil society since the terrorist atrocities on 11 September 2001. The USA government made changes in the early 2000s to better plan and prevent terrorist attacks.²²⁶ The Department of Homeland Security changed interdepartmental security links and enhanced international security collaboration

²²⁰ *Human Rights Act* 2004.

²²¹ Evans & Petrie 2020:176.

²²² Evans & Petrie 2020:179.

²²³ *Human Rights Act* 2004.

²²⁴ Evans & Petrie 2020:179.

²²⁵ Mazerolle & Ransley 2021:315-316.

²²⁶ Clarke 2004:117.

during the most prominent USA government restructuring in 50 years.²²⁷ Government reforms were motivated by using biological agents as weapons of war to coordinate public health and safety initiatives better and stop chemical attacks.²²⁸ Before the COVID-19 pandemic, numerous crises sparked governmental changes to improve readiness and response to major disasters. However, despite improving readiness levels concerning law enforcement after 2002, the pandemic shocked the world. It sparked a new discussion on safeguarding people's rights and the public interest when dealing with international disasters. The main point of contention is which state-based police authority corresponds to community public health standards as legitimate, acceptable, and fair.²²⁹

In Australia, like other nations, the pandemic resulted in new legislative regulations, widespread uncertainty, challenges to civil liberties, extraordinary intrusions into people's private lives, disproportionate effects on disadvantaged groups, risks to police credibility, and doubts about police accountability. New problems could arise during the transition from emergency to containment.²³⁰

The COVID-19 outbreak, in a novel and unsettling way, exposed the fundamental contradiction in the police function. Police in Queensland, Australia, enforced limitations on the number of visitors to private residences, the physical separation between persons in public areas, the necessity for masks, and quarantine policies.²³¹ They looked at how these new positions, expectations from the public, and approaches have presented police in Queensland with previously unheard-of difficulties and what this new standard meant for democratic policing.²³²

Pandemics require rapid and extensive responses, as stated by Mazerolle.²³³ Therefore, rapid transmissions and a lack of knowledge regarding how, when, and why the disease spread led to novel countermeasures and worldwide norms for regulatory and law enforcement responses. These norms justified extraordinary

²²⁷ Clarke 2004:117-138.

²²⁸ Galva & Atchison 2005:20-27.

²²⁹ Mazerolle & Ransley 2021:315.

²³⁰ Mazerolle & Ransley 2021:316.

²³¹ Mazerolle & Ransley 2021:315-316.

²³² Mazerolle & Ransley 2021:316.

²³³ Mazerolle & Ransley 2021:315-316

limitations on individual liberty and increased police coercion, called securitisation. While there was disagreement over the form and breadth of these restrictions, public support for controls has been high in many nations. Protests in Australia have mainly focused on mask-wearing or right-wing conspiracy theories. However, if mass vaccination, herd immunity spread, and illness threats decrease, support for coercive securitised reactions should be provided.²³⁴

To maintain legitimacy and support, governments must reframe the pandemic response. Weinstock proposes a harm-reduction-based normative approach. Coercive enforcement has costs, including economic unemployment, business downturn, health, and socially disproportionate impact on vulnerable groups and displacement of other social programmes and needs.²³⁵ The response's harms must be weighed against COVID-19 transmission reduction benefits.²³⁶ Any increase in public opposition to continued coercive enforcement could harm police, including threats to their trust and legitimacy, physical risks from disease and public protest, and the displacement of other important policing tasks by health-related enforcement.²³⁷ As with other areas of law enforcement, a harm reduction approach would provide a framework for focusing less on regulation enforcement and more on promoting public well-being, perhaps through public education programmes, collaborative partnerships with other agencies, and less coercive enforcement methods.²³⁸

The second COVID-19 difficulty is the form of the regulations that have been the primary tool for governmental intervention. Many states have tried quick, dynamic, and chaotic regulatory innovations to lower transmission rates. This allows public inspection and debate by circumventing democratic law-making procedures. Non-elected officials, primarily state and territory Chief Health Officers, have delegated most new rulemaking in Australia. This prevents legislative oversight of legislation.²³⁹

The third potential adverse effect of the COVID-19 pandemic response is the impact of the new regulation on communities and police agencies. Communities have

²³⁴ Mazerolle & Ransley 2021:322-323.

²³⁵ Weinstock 2020:165.

²³⁶ Weinstock 2020:166.

²³⁷ Mazerolle & Ransley 2021:323.

²³⁸ Mazerolle & Ransley 2021:322-323.

²³⁹ Mazerolle & Ransley 2021:323.

suffered substantial infringements of individual liberties, including freedom of movement, public assembly and protest, expression, access to education, fair trials, and privacy. According to Weinstock, enforcement activities have targeted vulnerable groups.²⁴⁰ For instance, Victoria's initial harsh lockdowns targeted a few apartment structures with substantial migrant populations and more social housing.²⁴¹ This was based on minimal data, suggesting bias.²⁴² These effects may have secondary repercussions, such as increased support for far-right and conspiratorial organisations in Australia due to unjust enforcement.²⁴³ There are also questions about police accountability for enforcement actions like public space use and mask-wearing. Their discretion in these areas is hidden from view and oversight.²⁴⁴

Any pushback against enforcement hurts police forces, too. As COVID-19's most visible response, police forces have been criticised. Critiques of police brutality reinforce such claims. For instance, Human Rights Watch claims Victorian police engaged in abusive practices and jeopardised human rights Human Rights Watch.²⁴⁵ These critiques underline and fuel existing criticisms of police and policing as unfair, biased, and violent, making police the problem rather than the legal regime they enforce. Procedurally just dialogues²⁴⁶ may strengthen citizens' respect for legal rules. In other words, how police execute COVID-19 restrictions.

may be as essential as the rules themselves. A lack of procedural justice may undermine COVID-19 regulations and decrease public trust in policing, leading to widespread noncompliance.²⁴⁷

²⁴⁰ Weinstock 2020:166-165.

²⁴¹ McGowan *et al.* 2020:1.

²⁴² McGowan *et al.* 2020:1.

²⁴³ McGowan *et al.* 2020:1.

²⁴⁴ Mazerolle & Ransley 2021:323.

²⁴⁵ Human Rights Watch "Australia: Harsh police response during Covid-19", <https://www.hrw.org/news/2020/09/24/australia-harsh-police-reponce-during-covid-19> (accessed on 30 May 2023).

Note that they showed footage of the arrest and handcuffing of a pregnant woman on incitement charges for a Facebook-organised anti-lockdown rally. They also reported police harassment, racist abuse, and stereotyping in implementing the laws. Human Rights Watch reports that the poorest groups receive more fines.

²⁴⁶ Mazerolle & Ransley 2021:323.

²⁴⁷ Human Rights Watch "Australia: Harsh police response during Covid-19", <https://www.hrw.org/news/2020/09/24/australia-harsh-police-reponce-during-covid-19> (accessed on 30 May 2023).

These critiques apply to South Africa, too. But there is one difference. In Australia programs like the JobSeekerplan were in place. As a result, the labour force were stable and businesses were able to survive and prevent job losses. Under such circumstances the police can operate in a humane manner. In South Africa the right to conduct business was not prioritised and as a result many cases of job losses occurred. Under such circumstances any police officer would find it hard to keep law and order.

To put this in perspective, it is worth mentioning that the South African government is entrusted with looking into citizen allegations of police wrongdoing and bringing those officers accountable to the Independent Police Investigative Directorate (IPID).²⁴⁸ Throughout COVID-19 activities, it received 403 cases of misconduct and 152 incidents of police officers assaulting civilians in the context of excessive force.²⁴⁹ Nearly half of all cases investigated by the IPID are COVID-19 instances.²⁵⁰ The rules of necessity and proportionality must always be followed while using the police force. The COVID-19 pandemic must first and foremost be addressed as a public health emergency requiring evidence-based public health interventions rooted in Human Rights. It is also necessary to produce new legislation that is precise, decisive, and respectful of fundamental Human Rights and alter existing legislation to make it consistent with the abovementioned values.²⁵¹

Sections 13(3)(a) and 13(3)(b) of the *South African Police Service Act*²⁵² stipulate that when a police officer is performing an official duty, that duty must be done with due regard to their powers reasonably and that if force is used, it must be the least amount that is reasonable in the circumstances. However, during the nationwide lockdown, this was not the case.²⁵³

²⁴⁸ Du Plessis 2021:39, 44.

²⁴⁹ Du Plessis 2021:44.

²⁵⁰ Du Plessis 2021:44-47.

²⁵¹ Du Plessis 2021:47.

²⁵² *South African Police Service Act* 68/1995.

²⁵³ Du Plessis 2021:39.

3.1.4 Selected Australian court cases

McIntyre provides an overview of the Australian courts' response to the COVID-19 problem and critically examines several structures and systemic concerns due to the change to online justice delivery. The past crisis, it is argued, will help outline chances for future reform by studying these challenges.²⁵⁴

Australia's courts began postponing hearings in all but the most urgent matters by mid-March 2020.²⁵⁵ The High Court closed its registry for all in-person services one week later. At a time when there had been three deaths in Australia due to COVID-19, jury trials in South Australia were postponed on 16 March 2020, a whole week earlier than the equivalent decision in the courts of England and Wales."²⁵⁶

The majority of Australian courts have started to use digital tools to enable virtual hearings, which are sometimes referred to as remote emergency hearings. Even the High Court has adjusted to this situation. *Cumberland v The Queen*²⁵⁷ was the first case to be completely heard electronically. The judiciary and the profession have faced many obstacles, but it's remarkable how quickly they have adapted to exclusively digital transactions. There is already case law²⁵⁸ that addresses when it is proper to conduct virtual hearings, and the Judicial College of Victoria is collecting new case law and judicial institutions' reactions to the pandemic.²⁵⁹

However, there hasn't been much time during the current crisis to consider the limitations of online courts and how to resolve them. Now is an excellent time to think about the difficulties and possibilities presented by this new era of digital justice while

²⁵⁴ McIntyre *et al.* 2020:195.

²⁵⁵ McIntyre *et al.* 2020:196. The High Court decided on 17 March 2020 to postpone its next full sitting in Canberra until at least August 2020, and the Federal Court moved to dismiss all cases scheduled to be heard through June 2020.

²⁵⁶ Trask "High Court halts hearings until August", <https://www.canberratimes.com.au/story/6681872/high-court-halts-hearings-until-august/?cs=14231> (accessed on 26 May 2023). A week later, the ACT Supreme Court vacated a hearing because it could have been detrimental to the parties to hold the last hearing online due to the health hazards of in-person court attendance. The judge explicitly said that in making this conclusion, he "made without reference to the personal health attributes of the plaintiff's legal team." McIntyre *et al.* 2020:196. Also see *Talent v Official Trustee in Bankruptcy* (No 5) (2020) ACTSC 64.

²⁵⁷ *Cumberland v The Queen* (2020) HCATrans 49.

²⁵⁸ *Capic v Ford Motor Company of Australia Limited* (2020) FCA 486.

²⁵⁹ McIntyre *et al.* 2020:196-197.

COVID-19's adoption is slowing.²⁶⁰ This is also relevant with the introduction of artificial intelligence (AI) in legal services and processes.

McIntyre states that according to case law, it is a long-held principle that justice should not only be done but manifestly and unmistakably be seen to be done.²⁶¹ The Australian legal system's fundamental component of open justice has constitutional roots.²⁶²

It serves as an overarching principle and the foundation for numerous practical guidelines, such as the need for court hearings to be held in public. As Lord Shaw of Dunfermline once said, publicity is the soul of justice.²⁶³ It is the most direct catalyst for effort and the safest of all safeguards against improbability.²⁶⁴

At first, COVID-19 posed a danger to open justice in Australia. The quick transition to online courts challenged the public's and especially the media's access to court proceedings. With cases being heard online, viewers were not free to roam the halls of courthouses and attend courtrooms as they pleased. Although numerous Australian courts declared their commitment to respect the principle in their rapidly changing digital practices, their initial declarations lacked details.²⁶⁵

In reaction to the COVID-19 pandemic, the Supreme Court of Victoria, for instance, only said that principles of open justice had been an essential part of the Court's planning. On a case-by-case basis, the methods for achieving this will be examined.²⁶⁶

According to a practice note from the Federal Court published on 31 March 2020, the court was considering streaming and other methods to ensure the necessary degree of public access to hearings conforms to the open justice and open court principles. In its daily cause lists, the Federal Court started issuing a directive asking anyone who wanted to watch an online hearing to contact the appropriate Judge's Associate.²⁶⁷

²⁶⁰ McIntyre *et al.* 2020:197.

²⁶¹ *R v Sussex Justices; Ex parte McCarthy* (1924) KB 256, 259.

²⁶² See *Wainohu v New South Wales* (2011) 243 CLR 181.

²⁶³ *Scott v Scott* (1913) AC 417,477.

²⁶⁴ *Scott v Scott* (1913) AC 417,477.

²⁶⁵ McIntyre *et al.* 2020:197.

²⁶⁶ McIntyre *et al.* 2020:197-198.

²⁶⁷ McIntyre *et al.* 2020:198.

In a hearing held in late March, with findings made public in May, Perram considered such procedures. At the same time, it declared that the public would be kept out of the ongoing proceedings. His Honour also stated that anyone wishing to watch the hearing might contact a friend to request a videoconferencing hookup. If a virtual hearing of this sort is deemed not to constitute a hearing in open court, the hearing would be adjourned indefinitely, according to Perram, who spoke of the balance between open justice and practical necessity. The parties and the public are interested in the Court's work continuing.²⁶⁸

Australian courts have become more involved in the open justice and digital hearings conundrum as the pandemic has progressed. Rejecting a request for an adjournment, Lee²⁶⁹ noted that he had considered the demand and necessity of open justice and was ultimately convinced that appropriate arrangements could be put in place to ensure the proceeding is fully accessible and can be observed by the public. Orders will be made to facilitate such access.²⁷⁰

Several judges have shown a pragmatic attitude despite the possible barriers to open justice that digital hearings may present. In a different case,²⁷¹ Perram took into account submissions regarding a variety of factors that could affect a potential adjournment before stating: "If I could be sure that the crisis would have passed by October, I would not hesitate to adjourn all of the trials on my docket, except urgent cases, and I would then start the process of relisting my entire docket from October 2020."²⁷²

But there is no assurance that things will improve in six months. This situation could last for a year or more, it's possible. To shut down the courts for such a length of time is neither practical nor consistent with the general goals of the administration of justice.

²⁶⁸ *Quirk v Construction, Forestry, Maritime, Mining and Energy Union (Remote Video Conferencing)* (2020) FCA 664.

²⁶⁹ *Securities and Investments Commission v Get Swift Limited* (2021) FCA 1384.

²⁷⁰ *McIntyre et al.* 2020:198.

²⁷¹ *Capic v Ford Motor Company of Australia Limited (Adjournment)* (2020) FCA 486.

²⁷² *McIntyre et al.* 2020:198.

Those who can continue should try their hardest despite how uncomfortable and tiresome this will be.²⁷³

2020's events have created many legal system obstacles, and some of the concerns listed below may be essential to keep justice flowing. The preceding comments should not be taken as criticism of judges or court workers, who work under tremendous strain under challenging conditions.²⁷⁴

But there are short-term and long-term issues. How might traditional judicial norms and processes be reinstated in the digital realm now that the initial technological hurdles have been resolved? In the meantime, a partial reintroduction may be better than nothing. But how can we prevent current bad practices from being entrenched in the digital judicial movement long after the COVID-19 pandemic is forgotten?²⁷⁵

This pandemic might be a fantastic opportunity for the Australian courts if appropriately managed. Instead of a snap back to pre-COVID-19 practice, this might be the start of more digital innovation in Australian courts. Finding a medium ground that capitalises on possible advantages and avoids many hazards will need scrutiny, discussion, and thought.²⁷⁶

South Africa can learn from this experience that digital courts contributed to a safe environment to hear cases and proved to be more productive. Ironically, the Australian court cases also shed some light on how to deal with the right to work. This is because the public sector worldwide did not lay off staff due to the impact that COVID-19 had on the economy and related job losses. The courts embraced technology to ensure that service delivery stayed at acceptable levels. Another advantage that South Africa can take at heart from these digital courts is that many cases in respect of the right to work that were never heard in court due to the conventional court system that prevailed during the pandemic, could have been heard and rulings made.

²⁷³ McIntyre *et al.* 2020:198.

²⁷⁴ McIntyre *et al.* 2020:201.

²⁷⁵ McIntyre *et al.* 2020:201.

²⁷⁶ McIntyre *et al.* 2020:201.

3.2 INDIA

3.2.1 Overview

The pandemic caused by the COVID-19 virus has had a detrimental effect on the economies of several developing nations, including India. According to the International Monetary Fund (IMF), the negative economic repercussions of the COVID-19 pandemic are more severe than those of the global financial crisis.²⁷⁷ The pandemic has caused significant difficulties for small and medium businesses, which play an essential role in the economies of many developing countries such as India.²⁷⁸ As a result of the pandemic, many SMEs in India have had their financial precariousness brought to light, highlighting the necessity for government assistance to safeguard their survival. India realised it is essential to establish policies and instruments to help troubled SMEs during economic downturns such as COVID-19.

3.2.2 India's pharmaceutical industry and local job creation

Throughout the last half-century, the pharmaceutical business in India has witnessed substantial expansion on both the national and international fronts.²⁷⁹ Its percentage of medication consumption in the nation has expanded from 5 per cent in 1969 to a significant 80 per cent in 2020, establishing India as a prominent participant in the global generic pharmaceuticals landscape and earning it the moniker of "Pharmacy of the world."²⁸⁰

The pharmaceutical sector in India supplies more than 62 per cent of the world's need for vaccines and contributes more than 20 per cent by volume to the worldwide market

²⁷⁷ Iheme & Mba 2021:75.

²⁷⁸ Iheme & Mba 2021:75.

²⁷⁹ Basu & Chaudhuri 2022:3.

²⁸⁰ Basu & Chaudhuri 2022:3.

for generic drugs. In addition, exports of pharmaceutical products from India reached \$20 billion in FY20, representing an increase of 8.4 per cent year over year.²⁸¹

In this context, the right to work and conduct business is analysed in India. It comes as no surprise that difficulties have arisen for supply chains in the global and Indian pharmaceutical industries due to COVID-19. About 70–75 per cent of India's active pharmaceutical ingredients (API) and raw material requirements are met by China, the world's biggest manufacturer and exporter of APIs.²⁸² Additionally, the pandemic affected workers' availability, resulting in pharmaceutical units functioning at decreased capacity. Manufacturing and distribution activities, including the acquisition of raw materials for packaging, were further hampered due to restrictions placed on transportation and the movement of personnel.²⁸³

The pandemic has also substantially affected inventory management in the pharmaceutical industry, and this impact has been severe. The inability of pharmaceutical manufacturing plants in India to get APIs and other active ingredients has resulted in a 20 to 30 per cent decrease in the country's overall production capability. Because of panic purchasing and increased demand for drugs to treat chronic diseases, supply chains have been interrupted, and inventory holding periods have been negatively impacted. Due to difficulties in international shipping, shipment delays and increased prices are associated with purchasing APIs.²⁸⁴

The influence of the COVID-19 pandemic on inventory management was discovered through a case study that was carried out on a medium-sized pharmaceutical manufacturing business in the Indian state of West Bengal, named East India Pharmaceutical Works Limited (EIPWL).²⁸⁵ The research looked at the production levels and levels of sales for the company's most important contributing goods over

²⁸¹ Basu & Chaudhuri 2022:3. The size of the Indian domestic pharmaceutical market reached \$20.3 billion in 2019, representing a growth rate of 9.8 per cent over the previous year. Even though it got off to a slow start because of the COVID-19 pandemic, the domestic market nonetheless managed to grow by 2.2 per cent from April through September of 2020 compared to the same period the year before.

²⁸² Basu & Chaudhuri 2022:3. Medicines such as paracetamol, penicillin, and anti-asthma treatments have experienced price rises of between 40 and 50 per cent in India as a result of disruptions in the supply chain.

²⁸³ Basu & Chaudhuri 2022:3.

²⁸⁴ Kumar 2023:70.

²⁸⁵ Basu & Chaudhuri 2022:6.

several consecutive fiscal years. It was found that the pandemic had a detrimental effect on output, resulting in a lower level of performance in comparison to production objectives in the years 2020 and 2021.²⁸⁶ The difficulties the firm was experiencing were partly caused by several factors, including interruptions in the supply chain, a lack of raw and packaging materials, and increasing logistic expenditures.²⁸⁷

The COVID-19 pandemic highlighted the significance of having a robust healthcare system, efficient health management practices and protecting the sector's jobs and the right to conduct business. For the industry to thrive in the world after the pandemic, it must strengthen its resilience and implement new skills across all business areas to increase efficiency in the value chain. In addition to this, it is necessary to have a good business climate that is supported by policies implemented by the government to create development and stability.²⁸⁸

In this context, India and South Africa applied to produce vaccines in India and get relief in terms of the provisions of the TRIPS Agreement.²⁸⁹ India can produce vaccines, but it seems as if the TRIPS Agreement never threatened the rights of IP rightsholders because governments worldwide realised that safe and clinically tested vaccines are more important than exercising walk-in rights to vaccines with patent protection.²⁹⁰

According to Sekalala,²⁹¹ COVID-19 has drawn attention to the problem of vaccine apartheid, in which developed and developing nations have unequal access to vaccines because of tight IP restrictions despite the provisions of the TRIPS Agreement. As a result, the need to respect, safeguard, and uphold the right to health is violated. Sekalala says the best way to address these fundamental global imbalances is to approach human rights in global health from a decolonised perspective.²⁹² The importance of global healthcare has increased due to the COVID-

²⁸⁶ Basu & Chaudhuri 2022:6.

²⁸⁷ Kumar 2023:73.

²⁸⁸ Basu & Chaudhuri 2022:11.

²⁸⁹ See par. 2.2 where this matter was discussed. President Cyril Ramaphosa and Prime Minister of India, Narendra Modi, have persuaded 63 WTO member countries to approve the proposal to waive intellectual property rights for COVID-19 vaccines.

²⁹⁰ See par. 2.2 in chapter two where Kenya was discussed.

²⁹¹ Sekalala *et al.* 2021:1.

²⁹² Sekalala *et al.* 2021:1.

19 crisis's power imbalances.²⁹³ Sekalala's point resonates well with the intentions of the draft Pandemic Treaty that aims to address these power imbalances.²⁹⁴

The dominant form of global capitalism, which encourages businesses and governments to prioritise financial gain over the lives of their citizens, has led to the commercialisation of crucial medications such as vaccines. Sekalala continues to demonstrate how the high price of vaccinations increases national inequality and public debt through dual-track systems that disadvantage the poorest and marginalised people.²⁹⁵

Neocolonialism²⁹⁶ is the persistent reliance on multinational corporations by many developed and developing nations.²⁹⁷ Due to countries' urgent attempts to recover some of the costs by charging their citizens for vaccination access or by implementing complicated arrangements that prioritise specific individuals, the high price of vaccines also contributes to inequality within countries.²⁹⁸ In these nations, those with access to vaccinations frequently hold positions of power in line with existing global disparities, often to the detriment of marginalised groups based on gender, race, and other banned grounds of discrimination under international human rights legislation.²⁹⁹

Sperraza believes that the COVID-19 vaccine distribution through the COVAX³⁰⁰ programme and individual nations' vaccine diplomacy across the developing world is fundamentally neocolonial currently. Neocolonial practices are inherently oppressive systems. Today's development projects and programmes operate more like neocolonial systems because they primarily benefit the "donor" country rather than the "receiving" country, which flips the beneficiaries.³⁰¹ He argued that the COVID-19 pandemic could have been over within a few months if the vaccines had been

²⁹³ Sekalala *et al.* 2021:1.

²⁹⁴ See par. 3 in chapter two where the draft Pandemic Treaty is analysed.

²⁹⁵ Sekalala *et al.* 2021:2.

²⁹⁶ The control of developing countries by developed countries through indirect means.

²⁹⁷ Sekalala *et al.* 2021:2.

²⁹⁸ Vilizzio 2022:25.

²⁹⁹ Sekalala *et al.* 2021:4.

³⁰⁰ Vilizzio 2022:21.

COVAX is the abbreviation for COVID-19 Vaccines Global Access. One of the three pillars of the Access to COVID-19 tools initiative, which aims to offer fair and innovative access to COVID-19 diagnostics, treatments, and vaccinations, is COVAX.

³⁰¹ Sperraza 2021:7.

distributed effectively and fairly. However, given what is already known about how the efforts and programmes that want to distribute the COVID-19 vaccinations intend to function, this distribution could either prove to be a colossal failure or take on a purely neocolonial character. These programmes carry a significant risk because some nations want to improve their reputation on a global scale.

In contrast, others want to take control of a specific area for unknown reasons. However, if a nation lacks the power to purchase doses independently, it has few options. Given this dependence, there is a strong possibility that the distribution of vaccinations will develop into a neocolonial practice, and the ethics of this distribution should be seriously questioned.³⁰²

The true intentions of any nation engaging in vaccine diplomacy, whether through a bilateral agreement or a multilateral initiative, cannot be fully understood without published and complete transparency. Still, the trends show that all vaccine diplomacy efforts are motivated by goodwill, soft power, and neocolonial objectives. A certain amount of goodwill is necessary to engage in vaccine diplomacy. Still, the specific routes used highlight the desires of various nations and powers to use soft power or carry out neocolonial activities. Thus, it can be observed that all of these reasons for vaccine diplomacy's actions with COVID-19 vaccines are valid.³⁰³

The Serum Institute in India produces most vaccinations administered in developing countries. Yet, these vaccines were not included in the EU's introduction of vaccine passports in 2021 to enter the eurozone, resulting in India's ability to protect trade, industry and local job creation.³⁰⁴ India is not alone in the discriminatory practices of developed countries. In South Africa, non-governmental organisations filed a lawsuit to obtain vaccines from private suppliers, circumventing the government's national systems to guarantee fair vaccine access.³⁰⁵ However, this litigation was ultimately withdrawn after public pressure – Hassan said, "There should be no vaccine apartheid

³⁰² Sperraza 2021:13.

³⁰³ Vilizzio 2022:26. Also see Sperraza 2021:26.

³⁰⁴ Sekalala *et al.* 2021:5.

³⁰⁵ Sekalala *et al.* 2021:5. The organisations are Afriforum and Solidarity.

in South Africa.”³⁰⁶ Kenya has likewise favoured diplomats over healthcare personnel for the COVID-19 vaccination, and Indonesia has advised that the more productive elements of society be immunised first.³⁰⁷ In some nations, like Peru, political elites, their families, and friends secretly received vaccinations before the general populace.³⁰⁸ From the examples of the challenges faced by developing countries above, the author proposes that one of the ways developing countries could respond to COVID-19, is through vaccine diplomacy.³⁰⁹ This view is supported in this dissertation.

Recent changes in the UN Special Rapporteur on Health’s mandate, which have ramifications for both public health and human rights policy, have been made in the context of decolonising human rights. The experiences of individuals whose rights are infringed must be the foundation of a decolonised approach to human rights, and nations in the developing world should ensure that the COVID-19 vaccination is considered an important drug, one of the primary responsibilities of states under the UN’s declared right to health.³¹⁰ The authors contend that during COVID-19, human rights should be realised entirely, with equitable access to vaccines and an emphasis on health vulnerability instead of financial resources.³¹¹ They recommend decolonising human rights in global health to guarantee fair and open access to vaccines, particularly in developing countries.³¹² Additionally, this would assist in ending the pattern of regressive and rigid patent applications in manufacturing and marketing vaccines.³¹³ They also argue that we must use this opportunity to further conceptualise collective thinking on the right to health for all people because the COVID-19 vaccination process is a significant global health challenge.³¹⁴

³⁰⁶ HJI "Health Justice Initiative (HJI) statement on Afriforum and Solidarity withdrawing their vaccine procurement and allocation case against Minister of Health & 16 Others (HJI amicus curiae)", <https://healthjusticeinitiative.org.za/2021/03/03/afriforum-solidarity-case-amicus> (accessed on 17 August 2023).

³⁰⁷ Sekalala *et al.* 2021:5.

³⁰⁸ Sekalala *et al.* 2021:5.

³⁰⁹ Vilizzio 2022:26.

³¹⁰ Kumar 2023:70.

³¹¹ Sekalala *et al.* 2021:6.

³¹² Sekalala *et al.* 2021:6.

³¹³ Kumar 2023:73.

³¹⁴ Sekalala *et al.* 2021:6.

The impact of the pandemic on India's pharmaceutical industry highlighted that India always followed a pragmatic approach towards its local challenges and that it will continue to do so despite international legal developments and options to its disposal. This is because India already has the inherent capabilities to produce generic medicine and fiercely projects the pharmaceutical industry and related jobs. It uses this ability to great jobs and, despite the options at its disposal regarding the TRIPS Agreement, it does not rely on the international community, for example the WHO, to impose legal measures to mitigate the risks associated with a pandemic.

South Africa can learn from and adopt India's practical strategy for addressing the local difficulties brought on by the pandemic instead of merely relying on international legal sanctions. For example, South Africa might prioritise developing its pharmaceutical industry to secure self-sufficiency in medical supplies during emergencies. South Africa might also investigate ways to increase employment creation to combat the pandemic and assist its domestic businesses. South Africa can draw inspiration from India in managing complex international legal frameworks like the TRIPS Agreement and make decisions that align with its public health priorities by being aware of these agreements and their available options. To coordinate worldwide efforts during a pandemic, South Africa can learn the value of balancing independence and partnership with international organisations like the WHO. What remains of concern, though, is that only sectors such as the pharmaceutical industry will benefit from pandemics. At the same time, no evidence was found that India also promoted other sectors, such as the alcoholic beverage industry.

Without relying only on external legal measures, South Africa can evaluate India's strategies for reducing pandemic risks, where South Africa can be better prepared for a pandemic by learning how India handles possible hazards and public health issues.

South Africa can learn much from India's strategy for combating the pandemic, focusing on local resources, independence, and practical actions. South Africa can create a strong and efficient response to protect public health and safety during a state of an emergency by taking lessons from India's experience. However, to a certain extent, it was easy for India to project its pharmaceutical sector because healthcare was at the forefront of finding solutions to COVID-19. It remains unanswered whether

India would have done the same for industries such as the tobacco and alcoholic beverage industries.

3.2.3 Trade and commerce and *force majeure*

Choudhary reviewed trade and commerce in India, with reference to when Prime Minister Modi set the Janta Curfew in India on 22 March 2020 to prevent the spread of the virus.³¹⁵ After a few days, it was extended to months. This nationwide closure wreaked havoc on the economy, negatively impacting the commercial sector and the right to conduct business due to supply and demand chain disruptions. Some measures included the Indian Union Government's modification of existing laws to provide *force majeure* (FM) relief to the Indian population during periods of emergency.

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FM is an expressed agreement of circumstances under which execution of the agreement will be temporarily excused or suspended. For contracts without an FM clause, sec. 56³¹⁷ of the *Indian Contract Act* states:

A contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful becomes void when the act becomes impossible or unlawful.³¹⁸

The Government of India issued a Memorandum to state that FM clauses will cover supply chain disruptions caused by the COVID-19 pandemic.³¹⁹ The memo clarified that FM clauses would only cover the contracts if the parties complied with their contractual obligations as of 19 February 2020. Due to the advent of the devastating pandemic, the Indian government took several commercial law-related measures, such as suspending the *Insolvency and Bankruptcy Code* (IBC),³²⁰ and increasing the

³¹⁵ Choudhary 2021:533.

³¹⁶ Choudhary 2021:533.

³¹⁷ *Indian Contract Act* 1872:sec. 56.

³¹⁸ *Indian Contract Act* 1872:sec. 56.

³¹⁹ Department of Expenditure Procurement Policy Division, *Office Memorandum* (No. F 18/4/2020-PPD).

³²⁰ *The Insolvency and Bankruptcy Code*, 2016.

minimum amount required to file a Corporate insolvency resolution process (CIRP)³²¹ application from one Rupee (Rs100.000) to one Rupee 1 crore (Rs1million). This provided firms with respite during the COVID-19 period. The most crucial information regarding India, COVID-19, and FM is that the Indian government declared COVID-19 an FM event due to the pandemic's negative impact on the business sector. This included amending the IBC to include sec. 40C, adding Regulation 47A to the Insolvency and Bankruptcy Board of India Regulations, 2020 Amended, and extending the payment deadline for fees from 30 April to 30 June 2020.³²²

Due to the COVID-19 pandemic, the global closure of the economy and travel restrictions caused significant economic losses, and the non-fulfilment of contractual obligations was a primary concern.³²³ The Indian government exercised its authority and amended the IBC to relieve a million stakeholders. The most important aspects of the phrases COVID-19, FM and power Majeure are that, in the case of commercial contracts, the state should re-survey and audit the agreement, guarantee “all” or “any” notice system, break down the effect of the episode of COVID-19 on the agreement, initiate an opportunity to play out the agreement in a possible elective manner, collect confirmations from according to non-execution of the commitment to the sole FM event, and with the advent of vaccines and the administration of doses to the vast majority of individuals, the situation should soon be under complete control. It should be remembered that individuals can be relieved by amending existing laws.³²⁴

The innovative way the Indian government utilised the FM legal instrument at its disposal resulted in the saving of many jobs and is commendable. This was not the only way the Indian government utilised existing legislation. In this regard, Choudhary³²⁵ provides the following suggestions for the global crisis. For example,

³²¹ Singh *et al.* "India: COVID 19 | Relaxations Under Indian Insolvency Laws", Monday. <https://www.mondaq.com/india/operational-impacts-and-strategy/929810/covid-19-per-cent7C-relaxations-under-indian-insolvency-laws> (accessed 29 August 2023).

³²² Choudhary 2021:533.

³²³ Choudhary 2021:538.

³²⁴ Lipson 2022:1.

³²⁵ Choudhary 2021:538-539.

the state should consider legislation flexibility and commercial contracts as listed in the footnote.³²⁶

Singh indicated that contracts are the cornerstone of the market economy and a way to increase the social surplus associated with trading. Consider a sales contract as an example.³²⁷ For several parties, the cost of contractual performance has escalated due to the pandemic and related lockdowns.³²⁸ For instance, the restriction on the movement of non-essentials made it more expensive to provide industrial inputs as promised.³²⁹ This prompted the suppliers of those inputs to request that the contracts be terminated or suspended.³³⁰ Other times, FM occurrences may only cause a performance delay. For example, lockdowns stopped construction, which caused project delays.³³¹

FM occasionally makes the promise impossible to keep. The lockdowns and bans brought on by the pandemic, not COVID-19, prevented numerous contractual obligations from being fulfilled. For instance, airlines could not transport people as promised on tickets if flights were prohibited. It appears the cost of performance increases infinitely when performance becomes unattainable. The social surplus mentioned above will no longer exist in this case, notwithstanding the promise's ability to continue demanding performance at the agreed-upon cost.³³²

³²⁶ Choudhary 2021:538-539.

The list comprises of the following points: "Re-examine and audit the power majeure agreement and look at the significant factors and incidents that gave rise to the rule of pardon; Ensure the agreement's specified notice procedures, in whole or in part. Obey the notice guidelines; Talk about how the COVID-19 pandemic will affect the agreement's presentation at various events; Create a chance for the agreement to be carried out in a possible elective way. A failure will safely disqualify a future guard for a choice of execution method; Obtain confirmations to blame the pandemic, the only power majeure, for the commitment's failure to materialise; Keep a record of every government request and warning. Suitability and discretion could be equivalent; After the second COVID-19 wave, experts predict a third wave. With the widespread use of vaccines, the problem should soon be solved; For a variety of reasons, business damage is not entirely assessed. However, legal changes may be beneficial; Crisis law always functions. This study demonstrates how laws should be changed to assist pandemic victims."

³²⁷ Singh & Leo 2021:38.

³²⁸ Singh & Leo 2021:38.

³²⁹ Lipson 2022:3.

³³⁰ Singh & Leo 2021:38.

³³¹ Lipson 2022:5.

³³² Singh & Leo 2021:38.

Most contracts have an FM clause that lists occurrences that may make contractual performance impossible for reasons outside the parties' control to address such eventualities.³³³

An FM clause lists human-caused events like lockdowns and natural disasters like floods, earthquakes, and tsunamis. Depending on the agreement's specifics, the contract is terminated or paused if one of the FM events is experienced. When the promised performance is unattainable, the goal is to limit the scope of conflicts.³³⁴

Many contracts' intended purposes have been negated due to COVID-19 since they no longer serve those purposes. For example, the fundamental point of catering contracts to be able to host friends and family for weddings and other occasions was undermined for the hosts of these events when mass gatherings were prohibited during the lockdowns. In such a scenario, the hosts would wish to reject the contractually mandated delivery of the food and other services (such as decorating). When a contract is frustrated in this way, the buyer's value is reduced to zero, or almost nothing, and the contract stops producing social surplus. The issue is that COVID-19 is unexpected and cannot be anticipated to be covered by FM provisions.³³⁵

Furthermore, lockdowns and the COVID-19 pandemic impacts differ between industries and between contracts within an industry. Therefore, how should courts decide cases involving the pandemic?³³⁶

In response, Sing provides three ideas that combine legal and economic analysis:

The most critical component of the phrase "courts, COVID-19, contracting parties, obligation" is the sentence "obligations should be waived if COVID-19 and lockdowns have made performance impossible." According to economic research, a party shouldn't be released from a contract only because it has become more expensive for that side to uphold. Kaldor-Hicks efficiency is a well-liked efficiency criterion in both law and economics. It is difficult for a judge to reasonably analyse the cost and value in light of the parties' conflicting allegations. When evaluating ambiguous or catch-all wording in vague contracts regarding the risk at issue, courts should apply the *eiusdem generis* principle. For instance, the courts should only allow claims between mall and wedding venue owners and their insurance providers

³³³ Singh & Leo 2021:38.

³³⁴ Singh & Leo 2021:38.

³³⁵ Vilizzio 2022:32.

³³⁶ Singh & Leo 2021:39.

if an insurance contract specifies that compensation will be given during an outbreak.³³⁷

Using the four corners method, courts should follow the agreement's wording when a contract term is confusing because it is quiet about a risk. When a contract leaves a gap and is silent about a threat, courts can allocate risks using clearly stated and defined default standards. The law is more understandable and effective when there is a clearly defined default rule and strict contract interpretation. These factors reduce the likelihood that the court will assign a risk to the party least suited to bear it and discourage opportunistic behaviour and litigation that typically benefits the wealthy.

It is perfectly acceptable to change the terms of a contract if it violates the law, injures third parties' rights, or jeopardises the public interest. Nonetheless, the economic analysis advises judges not to change the language to assign gains and losses to the various parties. Public policy is the better course of action to overcome the challenges posed by the transfer of economic excess.

These pragmatic proposals are beneficial for South Africa because the underlying objective was to ensure that business (and, by implication, the right to do business) is not undermined. However, whether South African companies would benefit from reverting to FM remains a question. At best, such an approach protects companies from being liquidated too soon, but job losses in the short term remained a reality in South Africa. To put this in a different perspective, the following hypothetical question is posed: Would the South African court rule in favour of FM or the right to work in a case where a company applies for a liquidation order whilst its labour force trade union opposes such application based on sec. 22 of the *Constitution* and hope to see section 36 to come into play?

³³⁷ Singh 2021:39.

3.2.4 Selected Indian court cases on *force majeure*

The *Indian Contract Act 1872* (ICA)³³⁸ doesn't define FM. However, the Supreme Court in *Satyabrata Ghose v Mugneeram Bangur and Others*,³³⁹ *Energy Watchdog v Central Electricity Regulatory Commission*,³⁴⁰ and *National Agricultural Cooperative Marketing Federation of India v Alimenta SA*³⁴¹ have held that an express or implied FM clause in a contract is governed by sec. 32 of ICA³⁴², which deals with enforcement of contracts contingent on an event happening.³⁴³

An FM event must be evaluated based on the contract's facts, nature, and subject. If the invoking party proves that the occurrence is documented and has made performance impossible, it can request suspension or termination of the contract.³⁴⁴ For COVID-19-related disputes, the courts must determine whether the contract can be performed, whether COVID-19 or the lockdowns made performance impossible and whether appropriate steps were taken to avoid, overcome, or mitigate the event and its consequences. Indian courts interpret FM clauses using the principle of *ejusdem generis* when the list of FM events is inadequate. The contract specified a pandemic among FM occurrences in *Halliburton Offshore Services Inc. v Vedanta Ltd and Anr.*³⁴⁵ In the case, the Delhi High Court recognised COVID-19 as an FM event under *ejusdem generis*. Halliburton Offshore, the plaintiff contractor, had missed multiple deadlines before the COVID-19 pandemic. Therefore, the court declined to attribute its non-performance to the pandemic.³⁴⁶ The Supreme Court denied the plaintiff's non-performance.³⁴⁷

The ICA does not define the frustration of a contract. The Supreme Court ruled in *Boothalinga Agencies v V T C Poriaswami Nadar*³⁴⁸ that sec. 56 of the ICA³⁴⁹ covers

³³⁸ *Indian Contract Act 1872.*

³³⁹ *Satyabrata Ghose v Mugneeram Bangur and Others* (1954) SC 44.

³⁴⁰ *Energy Watchdog v Central Electricity Regulatory Commission* (2017) 14 S.C.C. 80.

³⁴¹ *National Agricultural Cooperative Marketing Federation of India v Alimenta SA* (2020) SC 381.

³⁴² *Indian Contract Act 1872:sec. 32.*

³⁴³ Singh & Leo 2021:39.

³⁴⁴ *Halliburton Offshore Services Inc v Vedanta Ltd and Anr* (2020).

³⁴⁵ *Halliburton Offshore Services Inc v Vedanta Ltd and Anr* (2020).

³⁴⁶ Singh & Leo 2021:39.

³⁴⁷ Singh & Leo 2021:39.

³⁴⁸ *Boothalinga Agencies v V T C Poriaswami Nadar* (1969).

³⁴⁹ *Indian Contract Act 1872:sec. 56.*

the frustration of a contract. This part of the ICA covers commitments to activities that have become impossible after the contract was established or that no longer fulfil the intended purpose due to an event ex-post. An agreement to execute impossible or illegal conduct after the contract is void under sec. 56 of the ICA.³⁵⁰ This part does not apply to self-inflicted frustration.³⁵¹

The Indian courts provide a remedy under sec. 56 of the ICA³⁵² if an ex-post event destroys the contract's purpose or premise. In *Satyabrata Ghose v Mugneeram Bangur and Others*,³⁵³ the Supreme Court explained:

If an untoward event or change of circumstances upsets the very foundation upon which the parties rested their bargain, it can very well be said that the promisor finds it impossible to do the act which he promised to do.³⁵⁴

The courts must determine whether an ex-post-event has disrupted the bargain's foundation by enabling a frustration claim.³⁵⁵

The Supreme Court, in *NAFED v Alimenta*,³⁵⁶ clarified the difference between frustration and FM by holding that sec. 32³⁵⁷ of ICA applies if the agreement provides for circumstances upon which the contract cannot be carried out. The contract is defective under sec. 56 of the ICA³⁵⁸ if an act becomes impossible later and is not allowed in the agreement. Finally, examine the dilemma of a contractual obligation being economically untenable after signing.³⁵⁹ The ICA does not explicitly address this issue.

In several notable judgments, including *M/S Alopi Parshad and Sons Ltd v the Union of India*³⁶⁰ and *Naihati Jute Mills v Hyaliram Jagannath*,³⁶¹ the Supreme Court has held

³⁵⁰ *Indian Contract Act 1872:sec. 56.*

³⁵¹ *Singh & Leo 2021:39.*

³⁵² *Indian Contract Act 1872:sec. 56.*

³⁵³ *Satyabrata Ghose v Mugneeram Bangur and Others (1954) S.C.R. 310.*

³⁵⁴ *Indian Contract Act 1872:sec. 56.*

³⁵⁵ *Singh & Leo 2021:39.*

³⁵⁶ *NAFED v Alimenta (2020).*

³⁵⁷ *Indian Contract Act 1872:sec. 32.*

³⁵⁸ *Indian Contract Act 1872:sec. 56.*

³⁵⁹ *Singh & Leo 2021:39.*

³⁶⁰ *M/S Alopi Parshad and Sons Ltd v the Union of India (1960) S.C.R. 793.*

³⁶¹ *Naihati Jute Mills v Hyaliram Jagannath (1968).*

that if a contractual obligation becomes economically unprofitable for a contracting party, this cannot be a ground for absolving the party of its commitment. A producer cannot renege on delivery only because their production costs have increased after the contract was signed.³⁶²

Singh argues that the COVID-19 pandemic is not FM in and of itself. Lockdowns, not the virus, have rendered it impossible for airlines, hotels, caterers, and other service providers to deliver as promised and for contractors to finish real estate and infrastructure projects on time.³⁶³

As a preliminary conclusion, it remains a concern that India allowed FM to be leveraged. In South Africa, with our *Constitution*, some companies will simply not allow others to hide behind FM.

3.2.5 Epidemic legislation in India

Nomani and Parveen say that some national laws were indeed changed by the Indian government, which was tasked with developing a public health plan under national laws and regulations in response to the new COVID-19. The government had to enact the voluntary public curfew rule and rescind the *Epidemic Diseases Act 1897*³⁶⁴ due to COVID-19.³⁶⁵

The four-section *Epidemic Diseases Act, 1897 & 1937*, is a short piece of legislation. The law's preamble prevents devastating epidemics, and sec. 1 of the *Epidemic Diseases Act*³⁶⁶ removes State government jurisdiction for exceptional acts and regulations statewide. Section 2 limits port transit and social segregation and grounds for significant epidemics.³⁶⁷ The *Epidemic Diseases Act* enhances the Indian Penal Code, 1860, namely quarantine law. Epidemic laws are interpreted with secs. 188,

³⁶² Singh & Leo 2021:39.

³⁶³ Singh & Leo 2021:39.

³⁶⁴ *Epidemic Diseases Act 1897*.

³⁶⁵ Nomani & Parveen 2020:131.

³⁶⁶ *Epidemic Diseases Act 1897 & 1937*:sec. 1.

³⁶⁷ *Epidemic Diseases Act 1897 & 1937*:sec. 2.

269, 270, and 271 of the Indian Penal Code, 1860.³⁶⁸ Forty years after the *Epidemic Diseases Act*, colonial authorities acknowledged the epidemic control dilemma. They responded with the *Epidemic Diseases Amendment Act*, sec. 2A,³⁶⁹ which allows the Central Government to inspect ships and detain those scheduled to depart and arrive at ports. This act allowed the Central Government to enforce social isolation and establish closures and travel restrictions in all Indian states and union territories to manage COVID-19.³⁷⁰

Section 3 of the Act³⁷¹ penalises quarantine and epidemic violators equally. Section 4 of the Act³⁷² shields epidemic control officers from civil and criminal liability. The *Epidemic Diseases Act* of 1897 was used to fight the COVID-19 pandemic after 123 years, startling the public. It eliminated bubonic plague, cholera, malaria, dengue, and swine flu in independent India, silencing critics.³⁷³

The government has carefully reviewed the *Epidemic Diseases Act*³⁷⁴ at a crossroads to fight the COVID-19 pandemic. It actively improved public health under Article 47³⁷⁵ of the Indian *Constitution*, 1950.³⁷⁶ Section 2(d) of the 2005 *Disaster Management Act*³⁷⁷ declared the COVID-19 pandemic a national disaster. The central government's sec. 2(e) of the *Disaster Management Act*'s³⁷⁸ emergency management plans justified the national Lockdowns of 2020.³⁷⁹ It used emergency prevention, mitigation, preparation, and capacity building in secs. 6–10 to handle disasters.³⁸⁰ The National Disaster Management Authority ordered all Indian states to comply with sec. 72 *Disaster Management Act* using its omnibus power and overriding effect on other laws sec. 38 *Disaster Management Act*.³⁸¹ The COVID-19 pandemic may have changed Indian legislation. The Centre can pass laws for port quarantine, marine hospitals,

³⁶⁸ *Epidemic Diseases Act* 1897 & 1937:sec. 188, 269, 270, 271.

³⁶⁹ The *Epidemic Diseases Amendment Act* 1937:sec. 2A.

³⁷⁰ Nomani & Parveen 2020:132.

³⁷¹ *Epidemic Diseases Act* 1897:sec. 2.

³⁷² *Epidemic Diseases Act* 1897:sec. 4.

³⁷³ Nomani & Parveen 2020:132.

³⁷⁴ *Epidemic Diseases Act* 1897.

³⁷⁵ *Constitution of India*, 1950:art. 47.

³⁷⁶ *Constitution of India*, 1950.

³⁷⁷ *Disaster Management Act* of 2005:sec. 2(d).

³⁷⁸ *Disaster Management Act* of 2005:sec. 2(e).

³⁷⁹ Nomani & Parveen 2020:132.

³⁸⁰ *Disaster Management Act* 2005:sec. 6-10.

³⁸¹ *Disaster Management Act* 2005:sec. 38.

inter-state migration, and inter-state quarantine under Entries 28 and 81³⁸² of the Union List annexed to the Seventh Schedule of the *Constitution* of India, 1950.³⁸³

Understanding the government's approach and actions in managing this public health crisis can illuminate how constitutional rights and public health concerns are balanced in the Indian context during times of emergency. This comprehension can serve as a valuable guide for future policymakers and legislators facing similar challenges in South Africa.

3.2.6 International health regulations

Developing nations need articles 5, 6, and 7 of the 2005 International Health Regulations for the effective management of disease outbreaks, public health emergencies, national surveillance, and response capabilities.³⁸⁴ The WHO Report on International Health Regulations, 2005³⁸⁵ contained various public health regulations to prevent, control, and reduce biological, chemical, and radio-nuclear hazards. These rules may restrict Indian territory access to air, sea, surface, and ground entry.³⁸⁶

International Health Regulations, 2005, became soft international health law in June 2007. Member States must actively revise regulations. These regulations reinforced pandemic and epidemic restrictions. Implementing international treaties and declarations is lawful under Article 252 and Item 14 in the Union List in Schedule VII of the *Constitution of India*, 1950.³⁸⁷ The Ministry of Health and Family Welfare created the 2009 National Health Bill³⁸⁸ in this context. The Bill provides health equity, justice, and a robust healthcare system. Schedule III of the Bill identified 71 health rights-promoting public health laws. The Bill creates a Centre-state public health emergency response system. National and state public health boards with community-based

³⁸² Nomani & Parveen 2020:132.

³⁸³ *Constitution of India*, 1950.

³⁸⁴ WHO 2005.

³⁸⁵ WHO 2005.

³⁸⁶ Nomani & Parveen 2020:132-133.

³⁸⁷ *Constitution of India*, 1950: art. 252.

³⁸⁸ *National Health Bill*, 2009.

monitoring, grievance mechanisms, and openness aid pandemics. The Bill protects human rights during quarantine.³⁸⁹

3.2.7 Discrimination against minorities in the Indian community during COVID-19

Ahmad³⁹⁰ states that many constitutions worldwide, like those of the United States and India, reflect the idea of majority rule and respect for minority rights. After the current traditionalist administration was re-elected in May 2019, religious freedom in India took a sharp turn for the worse, with religious minorities coming under growing attack. With a more significant legislative majority, the national government could enact laws that violated religious freedom across India, notably for the country's Muslim minority.³⁹¹

According to the Universal Periodic Review (UPR),³⁹² the Indian government, especially the current ruling political party, is to blame for acts of anti-minority violence. The free exercise of religion was declared a fundamental right during the late eighteenth-century French and American revolutions, and minority rights were partially recognised by the Congress of Vienna³⁹³ and the Treaty of Berlin.³⁹⁴

The *Indian Constitution* protects religious minorities' autonomy and the freedom to administer their religious affairs independently. Some governments have used the most recent worldwide pandemic to justify the tremendous persecution of religious communities by blaming minority religious groups for the coronavirus spread. Political leadership has been busy escalating tensions amongst religious groups, and COVID-19 has given a new dimension to the hate speech and misinformation directed towards Indian minority populations that the national media have spread.³⁹⁵

³⁸⁹ Nomani & Parveen 2020:133.

³⁹⁰ Ahmad 2021:1.

³⁹¹ Ahmad 2021:1. Als see Phakathi 2021:69.

³⁹² Ahmad 2021:2.

³⁹³ Congress of Vienna 1815.

³⁹⁴ Berlin Treaty of 1878.

³⁹⁵ Ahmad 2021:15.

Due to the coronavirus outbreak, Muslims in India are the target of attacks and boycotts, and many are accused of doing what some locals call "corona jihad"³⁹⁶ (a conspiracy accusing Muslims of purposefully spreading the virus), or corruption. The pandemic has given the Indian government an excuse to crack down on political dissidents. At the same time, lockdown tactics have abruptly forced migrant labourers to leave their jobs – an act that threatens these minorities' right to work or to conduct business. About a thousand persons were stranded in the Tablighi Jamaat, an Islamic reformist movement headquarters in New Delhi, in March 2020.³⁹⁷ The Indian government has come under fire for its inadequate planning for the 24 March 2020 nationwide lockdown, as they focused solely on the three-day Tablighi Jamaat assembly in Delhi in early March. 1023 cases in 17 states have been connected to the Tablighi Jamaat assembly in India, a meeting of Indian Muslims to discuss the coronavirus pandemic.³⁹⁸

Right-wing Indian nationalists have characterised the meeting as a diabolical plan by Indian Muslims to purposefully infect the rest of the community. The Home Ministry identified 960 foreign participants in the event on 2 April and blocklisted their visas due to violations of the *Disaster Management Act*³⁹⁹ and the *Foreigners Act*.⁴⁰⁰

The government administration prohibited Muslim vegetable merchants from selling their produce, and many Muslims were prevented from visiting hospitals before undergoing a coronavirus test. In the name of the COVID-19 spike, Muslims were assaulted throughout India, with cases being based more on anti-Muslim feelings than on facts or proof. Private and publicly funded hospitals have been charged with giving Muslim COVID-19 patients less care.⁴⁰¹

Ulema-Hind submitted A petition to the Supreme Court to bring attention to the fake news that blamed the community for the increase in COVID-19 infection rates. The

³⁹⁶ Phakathi 2021:80. Note that South Africa had similar challenges, but more in respect of corruption.

³⁹⁷ Ahmad 2021:16.

³⁹⁸ Ahmad 2021:16.

³⁹⁹ *Disaster Management Act* of 2005.

⁴⁰⁰ *Foreigners Act* of 1946.

⁴⁰¹ Ahmad 2021:16.

court charged the foreign nationals with violating secs. 188⁴⁰² and 269⁴⁰³ of the Indian Penal Code and sec. 3⁴⁰⁴ of the *Epidemic Act*.⁴⁰⁵ The non-Indian members of Tablighi Jamaat faced dozens of legal actions brought against them by various Indian states, and hundreds of them were banned from entering India for ten years. Due to the total absence of proof, on 15 December 2020, the court of the Chief Metropolitan Magistrate in Delhi dismissed all of the cases against the foreigners who were being held in custody.⁴⁰⁶

Religious minorities in India were progressively harassed after a right-wing administration was re-elected. In May 2019, the national government used its increased parliamentary majority to pass legislation restricting religious freedom, particularly for Muslims. The national administration tolerated hate speech and minority violence. Even during the COVID-19 pandemic, the country's 200 million minority, who felt threatened before the pandemic, has been made the scapegoat.⁴⁰⁷

The coronavirus outbreak is used to cover up crimes against minorities in Myanmar, Sri Lanka, and Pakistan. The COVID-19 pandemic in India has provided another opportunity to physically, verbally, and psychologically harass the Muslim minority.⁴⁰⁸

Furthermore, there is still considerable work to be done. Minorities experience severe and ongoing human rights violations. Unresolved minority grievances and conflicts highlight the need for novel conflict resolution techniques. Non-discrimination laws, special privileges, and UN resolutions and recommendations can all assist minorities in achieving their goals and cohabiting peacefully in a state. Tolerance, understanding, and pluralism should be promoted through human rights education, confidence-building, and dialogue.⁴⁰⁹

402 *Epidemic Diseases Act of 1897:sec. 188.*

403 *Epidemic Diseases Act of 1897:sec. 269.*

404 *Epidemic Diseases Act of 1897:sec. 3.*

405 *Epidemic Diseases Act of 1897.*

406 Mohan 2020 "Tablighi case: All foreigners freed, court slams police, says no proof", <https://indianexpress.com/article/india/tablighi-case-all-foreigners-freed-court-slams-police-says-no-proof-7106554/> (accessed on 31 August 2023).

407 Ahmad 2021:18-19.

408 Ahmad 2021:19.

409 Ahmad 2021:19.

There are many more examples where India continued to protect the right to work during the pandemic. While the debate on vaccines and patent waivers fiercely continued, innovators were encouraged to file patents on COVID-19 related devices to ensure that hospital workers can carry on with their work within a safe environment. Patents like oxygen cylinder trolleys are recognised in the Indian patent system and are examples of how COVID-19 led to innovative IP creation that protected lives and created work.⁴¹⁰

Although India is a secular, democratic democracy, anti-conversion and cow-protection legislation create an anti-minority sentiment. As communalism rises, lynch mobs divide and terrorise the working class and impoverished for political goals.⁴¹¹ India should remove legislative and social hurdles to protect human rights advocates better. This framework includes both legal and physical protections for victims of community violence. A witness protection law should be enacted to protect witnesses to communal incidents. Many witnesses turn hostile in court nationwide, and collaborative crime conviction rates are low. To achieve justice, statutory safeguards must be implemented to protect witnesses.⁴¹²

The above situation raises significant concerns about the Indian government's ability to balance constitutional rights to engage in business and economic activities and protect public health and safety, particularly in minority communities. Understanding how the pandemic affects minority communities and their rights will help us better understand the more significant questions of minority protection in emergencies, public health, and constitutional rights. Fortunately, South Africa has a good history of protecting minority rights within the framework of the *Constitution* concerned, notably when religion and private rights are concerned – the *MEC For Education, Kwazulu-Natal, and Others v Pillay* case comes to mind.⁴¹³ The question, however, arise if certain sectors, such as the tobacco and alcoholic beverage industries, were merely seen as a minority sector as compared to the whole trade and industry sector in South

⁴¹⁰ Indian Patent News 2022.

⁴¹¹ Ahmad 2021:19.

⁴¹² Ahmad 2021:19.

⁴¹³ *MEC For Education, Kwazulu-Natal, and Others v Pillay* 2008 (1) SA 474 (CC).

Africa. It would be hard to argue, though because of the evidence posed by health science practitioners, as will be explained in chapter four.

3.3 BAYH-DOLE ACT, USA

The USA is not one of the countries that was selected to analyse as part of this dissertation. The *Bayh-Dole Act*, however, deserves a brief discussion. The *Bayh-Dole Act* was put in place in 1980 to address the divide between academics and industry, and today the USA can rightfully claim that the public domain of scientific knowledge serves all Americans well.⁴¹⁴

Briefly, the USA passed two significant pieces of legislation in 1980: *The Stevenson-Wydler Technology Innovation Act*⁴¹⁵ and the *Bayh-Dole Act*.⁴¹⁶ These regulations significantly altered academic institutions' IP rights, promoting patenting, licencing, and technology transfer in research projects, eventually leading to biotechnology developments. Before these rules were passed, the USA government usually owned federally funded scientific discoveries, making it difficult to commercialise them.

Senators Adlai Stevenson, Bob Dole, Birch Bayh, and Congressman John W. Wydler introduced the *Bayh-Dole Act* and *the Stevenson-Wydler Act*, which were signed into law by President Carter. They tackled different facets of technical advancement with the shared objective of surmounting the standstill in patented technology. The *Bayh-Dole Act*⁴¹⁷ concentrated on patent rights for academic institutions receiving federal support, whereas *the Stevenson-Wydler Act*⁴¹⁸ encouraged cooperation between national government laboratories and commercial businesses.⁴¹⁹

Paradise⁴²⁰ states that the essential collaboration between the federal government, business, and academia drive innovation. These alliances have sparked calls for the

⁴¹⁴ *Bayh-Dole Act of 1980 (USA).*

⁴¹⁵ *The Stevenson-Wydler Technology Innovation Act of 1980.*

⁴¹⁶ *Bayh-Dole Act of 1980.*

⁴¹⁷ *Bay-Dole Act of 1980.*

⁴¹⁸ *The Stevenson-Wydler Technology Innovation Act of 1980.*

⁴¹⁹ Paradise 2020:5.

⁴²⁰ Paradise 2020:1.

federal government to activate the "march-in rights" (walk-in rights)⁴²¹ outlined in the *Bayh-Dole Act*.⁴²² The *Bayh-Dole Act* sparked a discussion on proper incentives for innovation and the limits of government power,⁴²³ which significantly changed the patent protections given to universities receiving federal funding. The COVID-19 pandemic offers an occasion to consider the historic legislation's goals and effects and the consequences for the future of public health. The cost and accessibility of life-saving discoveries will be significantly impacted by patent rights about medicinal substances, delivery systems, and medical diagnostics. Paradise furthermore looks at recent proposals for the USA government to use the right to governmental march-in to alleviate worries about product pricing and patent monopolisation in light of the ongoing pandemic.⁴²⁴

Federal support to academic institutions was accompanied by the grant of patent titles for innovations developed with that funding under the terms of the *Bayh-Dole Act*.⁴²⁵ This law presumed that the innovator, who was also the contractor, had legal ownership of the invention. The USA government held an irreversible, nonexclusive, and nontransferable licence to utilise the copyrighted innovation on behalf of the USA, even though it was not the proprietor. The inventor and the institution could grant additional licences to third parties under the statute.⁴²⁶

The USA government was granted "march-in" rights by the *Bayh-Dole Act*, allowing it to assert ownership of an invention under certain circumstances legitimately. These rights might be used when there was a need to resolve safety or health issues or if there was no attempt within a given period to commercialise the invention. The law did not, however, say whether or not commercialization was required to satisfy requirements for safety or health.⁴²⁷ The USA government seldom used these "march-

⁴²¹ Note that Walk-in rights in SA has a similar meaning to March-in rights in the USA.

⁴²² *Bay-Dole Act* of 1980.

⁴²³ *Bay-Dole Act* of 1980.

⁴²⁴ Paradise 2020:1.

⁴²⁵ *Bay-Dole Act* of 1980.

⁴²⁶ Paradise 2020:5.

⁴²⁷ Paradise 2020:6.

in" rights to assert ownership of innovations that came about due to research that the government-financed.⁴²⁸

Federal funding incentives and the prospect of patent rights for the resulting diagnostics, vaccines, and therapies are driving the rapid advancement of science to combat COVID-19. There is a growing demand for the federal government to use its "march-in" authority under the *Bayh-Dole Act*⁴²⁹ or to ensure affordable and universal access through other legal mechanisms like mandatory licencing.⁴³⁰

Two reforms are proposed to achieve this: congress should reduce the powers of the *Bayh-Dole Act* and subsequent legislation allowing government-funded technologies to be patented. Private venture capital now finances riskier research in the biological and medical areas, rendering the 1950s argument for taxpayer support for R&D in these sectors obsolete.⁴³¹

Secondly, Congress should prioritise research on drug manufacture rather than patentable inventions. Government funds should support clinical studies for treatments with high societal benefits, such as vaccinations. This can be done competitively using regular procurement processes.⁴³²

Regardless of the method chosen, proactive action is needed to address the impending obstacles to public health during the time of a pandemic. Examining the legislative background and practical application of the *Bayh-Dole Act*,⁴³³ the financial connections behind the initial Remdesivir patents, as well as other patents obtained with federal support, and the function of federal COVID-19 funding in relation to the federal government's current legal authority to assert ownership rights through the "march-in" mechanism are all crucial questions to ask. Paradise then concludes by asking the hypothetical question what use is a remedy if only the wealthy can afford it?⁴³⁴ The answer might be found in similar legislation found in South Africa, where

⁴²⁸ Paradise 2020:5, 6.

⁴²⁹ *Bay-Dole Act* of 1980.

⁴³⁰ Paradise 2020:6.

⁴³¹ Boldrin 2021:782.

⁴³² Boldrin 2021:782.

⁴³³ *Bay-Dole Act* of 1980.

⁴³⁴ Paradise 2020:13.

patent walk-in rights⁴³⁵ are legal and in Kenya, where this right was exercised but the negative results imploded to the extent that the public's right to safe vaccines proved to carry more weight.⁴³⁶

3.4 OTHER AFRICAN COUNTRIES

Obasa⁴³⁷ mentioned that over 4 million people have been affected by the global pandemic brought on by the COVID-19 infection, and African countries are not exempt. The COVID-19 guidelines from the WHO comprise 16 themes to educate nations about their preparedness and reaction. However, socioeconomic disparities and unequal healthcare systems present problems for African nations of which all are developing countries. The epidemic affects disadvantaged and vulnerable people differently from countries with abundant resources. Some COVID-19 prevention and control recommendations could potentially be hazardous in low- to middle-income countries (LMICs), as they put survival at risk.⁴³⁸

Containment measures for public health must be weighed against conditions including lack of income, access to essential services, and food security in various contexts. As a containment technique, some African nations have enacted strict national lockdowns with restrictions on local and international travel and calls for residents to self-isolate and quarantine at home. South Africa increased mass testing, community testing, and contact tracing while enforcing the requirement to wear face masks in public.

However, no proof exists of widespread community testing or required face mask use in Zambia or Uganda. Governments in the region have unavoidably adopted various policies, exposing the ethical issues that have emerged during the reaction in multiple nations.⁴³⁹

⁴³⁵ See par. 2.2 where South African walk-in rights are discussed.

⁴³⁶ See par. 2.2.2 where the Kenyan examples is discussed.

⁴³⁷ Obasa 2020:858.

⁴³⁸ Obasa 2020:858.

⁴³⁹ Obasa 2020:859.

3.4.1 Uganda's preventative measures

Before verifying COVID-19 cases, Uganda took preventative public health measures such as voluntary self-isolation, quarantine, and social seclusion. For businesses like factories, hotels, plantations, markets, and public transportation, the Ministry of Health has published standard operating procedures. However, suspending public and private transport and closing non-essential stores prompted questions about how easily patients with ailments other than COVID-19 problems might receive healthcare. The nation's lack of an ambulance system rendered people experiencing poverty who relied on public transportation defenceless.⁴⁴⁰

There were ethical dilemmas in Uganda because there was no established ethical framework or set of rules to manage or lessen the ethical problems brought on by COVID-19 public health activities. After fifty days of incarceration, the charges against 19 young people residing at a Kampala shelter for lesbians, gay men, bisexual women, transgender people, and intersex individuals were dismissed. Concern for refugee groups where physical separation is impossible grows as the number of COVID-19 cases in Uganda rises. The rapid spread of illness in refugee camps could have severe effects if the number of cases increases.⁴⁴¹

To effectively protect public health and individual rights in the face of unprecedented challenges, a comprehensive and ethical approach and strategies to address healthcare access disparities will be required moving forward.

3.4.2 Zambia

Under the *Public Health Act*,⁴⁴² cap 295 of the Laws of Zambia, Zambia has set rules to prevent COVID-19. Two statutory bills were filed by the minister of health, declaring COVID-19 a public health emergency and adding new rules to help manage and control the illness. To better combat COVID-19, the nation has taken measures to

⁴⁴⁰ Orinda 2020:96.

⁴⁴¹ Obasa 2020:860.

⁴⁴² *Public Health Act* 36/1919.

close schools and universities and prevent church gatherings. It has also hired over 2 000 health professionals. In two speeches to the nation, the President of the Republic reaffirmed his responsibility to safeguard Zambian residents throughout the pandemic and urged full compliance.⁴⁴³

Containment strategy execution, though, needs to be balanced against their adverse economic effects. The restriction of freedom of movement and the demand for remote employment have led to economic hardship, with some citizens experiencing financial difficulty. The virus's rapid spread might destroy Zambia's healthcare system, an LMIC with few healthcare facilities. Ethical issues include who can access ventilators and receive hospital medical care. Guidelines should be created to ensure that ventilators, intensive care unit (ICU) beds, and healthcare resources aren't given to wealthy political families and allies to solve these ethical concerns. To address concerns about prioritisation and equitable distribution of scarce resources, trust, openness, and accountability should be at the forefront of discussion.⁴⁴⁴

Zambia showed that an equilibrium between personal freedom and the needs of the public good and safety is necessary for the COVID-19 pandemic. These actions will probably have a long-term effect, but the social, political, economic, and psychological repercussions of letting the pandemic grow without them would be far more severe. Zambia's approach also shows that to address societal inequalities, government interventions in Africa should be contextualised and reflect the variety of skills required to help with an outbreak. However, scientific, legal, and social scientists should be represented on committees, and ethics and human rights should always come first in all recommendations.⁴⁴⁵

⁴⁴³ Obasa 2020:860.

⁴⁴⁴ Obasa 2020:861.

⁴⁴⁵ Obasa 2020:862.

3.4.3 African countries – clinical trials and the right to work

Okech *et al.*⁴⁴⁶ studied other African countries and their reaction to the COVID-19 pandemic. Kenya, Senegal, Rwanda, Chad, Ghana, and Botswana have implemented lockdowns and dusk-to-dawn curfews. However, informal economies and poor service availability have challenged these measures in places where most people cannot work from home because of a lack of infrastructure and internet connectivity challenges. These structural inadequacies make it difficult to follow social separation and curfew rules, and the political elite typically perpetuates social inequality.⁴⁴⁷

These limitations on the right to work are dwarfed if one considers the following example. Ledford⁴⁴⁸ notes that access to a critical COVID-19 antiviral medication has been withheld from researchers participating in a vital clinical trial in Africa. This has hampered efforts to test the treatment in African populations and with other medicines that may increase their usefulness there. The ANTICOV clinical trial, a large study in ten African countries that aims to find treatments for mild to moderate COVID-19, has requested supplies of Pfizer's anti-virus drug Paxlovid from the Drugs for Neglected Diseases Initiative (DNDi). The trial is particularly interested in finding treatments that work in resource-poor settings.⁴⁴⁹ The DNDi claims it requested enough Paxlovid to treat one thousand to two thousand participants in ANTICOV. However, Pfizer allegedly rejected the request, citing its plans to conduct comparable trials. The specifics of those trials are still under wraps, and when Nature questioned Pfizer about such projects or the DNDi's request, the company provided no further information.⁴⁵⁰

Should these clinical trials be allowed, it could have assisted with job creation in developing countries in Africa.

⁴⁴⁶ Okech *et al.* 2021:1.

⁴⁴⁷ Okech *et al.* 2021:1.

⁴⁴⁸ Ledford 2022:412.

⁴⁴⁹ Ledford 2020:412.

⁴⁵⁰ Ledford 2020:412.

3.4.4 African countries and security

Okech *et al.* said Presidents Kenyatta, Ramaphosa, Museveni, and Mnangagwa have emphasised COVID-19 securitisation. This "not business as usual" approach has been implemented by modifying laws to allow the military to participate in national policing, extending the state's surveillance power, and triggering curfew and lockdown powers through emergency laws. Securitisation succeeds when voters trust the political elite to act in the public interest. However, political elites' extraordinary powers are straining human rights.⁴⁵¹ Governments' COVID-19-related securitization has violated citizens' human rights in several African nations. Using force and opportunistic raids on lesbian, gay, bisexual, and transgender (LGBT) communities in Uganda concerned UN human rights experts. Five soldiers were jailed in Rwanda for allegedly raping women and assaulting civilians while imposing the lockdown. After organising anti-government protests in Zimbabwe, a legislator and three female political youth activists were reported missing for three days and recovered battered.⁴⁵²

Governing elites have laboured to create a narrative of mutuality and response mechanisms that guarantee equal rights. Even though COVID-19 threatens society, responding to it hasn't proven easy.⁴⁵³

Whether ruling elites are viewed as serving the interests of all members of society is the leadership test in response to COVID-19. Since elite and non-elite citizens have distinct starting places, the impact of COVID-19 is not felt in the same way by all citizens, nor are government mitigation efforts uniformly distributed. In Africa, informal employment predominates; it accounts for 79 per cent of women's work sources compared to 68 for men. Only 5.5 per cent of all employment is in formal jobs protected by labour and social laws.⁴⁵⁴

Because of the lack of mutuality between the political elite and the general public, they can perceive government mitigation efforts as efforts to save everyone. This lack of trust can be attributed to security services' past propensity to use coercive violence as

⁴⁵¹ Okech *et al.* 2021:2.

⁴⁵² Okech *et al.* 2021:2.

⁴⁵³ Orinda 2020: 100.

⁴⁵⁴ Okech *et al.* 2021:3.

a control tool rather than effective communication and non-coercive enforcement techniques. Security forces' dependence on violence has its roots in colonial history, when people were seen as threats that needed to be managed rather than as recipients of a good or service (safety and security). Securing COVID-19 suspends rules, providing the ideal environment for violating human rights. Instead of balancing constraints to unite citizens around common aims, political elites utilise them to escape being held accountable.⁴⁵⁵

Africans can review two main discussions with their leaders during the COVID-19 pandemic. They first invested in public amenities like health, education, water, and transit to assure citizens' obedience without coercion. Addressing structural inequities and security concerns can foster citizen-government relations. Second, governments' concept of security and citizens' insecurity. The COVID-19 pandemic causes insecurity, not an existential threat. Holding rogue officers accountable, providing sufficient police training and rules, and improving police-citizen relations are ways governments can establish trust.⁴⁵⁶

3.5 CONCLUSION ON SELECTED COUNTRIES

The legal analysis of the right to conduct business in Australia and India during the COVID-19 pandemic provides intriguing insights into how various nations responded to the crisis. As common law nations, Australia and India confronted significant difficulties in balancing public health measures with the rights and interests of enterprises. It comes as no surprise that Australia's response to the right to work draws on its developed nation status, while India's pragmatic approach draws on the realities it is confronted with as developing nation. These findings can be summarised as follows:

⁴⁵⁵ Obech *et al.* 2021:3.

⁴⁵⁶ Obech *et al.* 2021:5.

3.5.1 Australia

In summary, the proactive measures taken by the Australian national and state governments to protect jobs and businesses are commendable because Australia does not have a bill of rights where the right to work is entrenched – Australia merely applied common sense regulatory interventions while at all times making sure that the local workforce and businesses were allowed as much freedom as possible to conduct business within the constraints of the pandemic. Furthermore, Australia's government's close working relationship with the trade unions assisted with this pragmatic approach.

The affected industries, such as the alcoholic beverage and pharmaceutical industries, encountered disruptions and restrictions due to the government's anti-virus measures. In Australia, the alcoholic beverages industry was confronted with bar and restaurant closures, shortened sales hours, and marketing difficulties. They adapted by promoting themselves via online platforms.

3.5.2 India

In contrast, India temporarily prohibited the sale of alcoholic beverages to resolve societal issues related to alcohol consumption and COVID-19. However, the moratorium led to an increase in contraband and illicit trade. The impact of the pandemic on India's pharmaceutical industry highlighted that India always followed a pragmatic approach towards its local challenges and that it will continue to do so despite international legal developments and options to its disposal. This is because India already has the inherent capabilities to produce generic medicine and fiercely protects the pharmaceutical industry and related jobs. It uses this ability to great jobs and, despite the options at its disposal regarding the TRIPS Agreement, it does not rely on the international community, for example the WHO, to impose legal measures to mitigate the risks associated with a pandemic.

South Africa can learn from and adopt India's practical strategy for addressing the local difficulties brought on by the pandemic instead of merely relying on international legal sanctions. South Africa might prioritise developing its pharmaceutical industry to

secure self-sufficiency in medical supplies during emergencies. South Africa might also investigate ways to increase employment creation to combat the pandemic and assist its domestic businesses. South Africa can draw inspiration from India in managing complex international legal frameworks like the TRIPS Agreement and make decisions that align with its public health priorities by being aware of these agreements and their available options. To coordinate worldwide efforts during a pandemic, South Africa can learn the value of balancing independence and partnership with international organisations like the WHO. What remains of concern, though, is that only sectors such as the pharmaceutical industry will benefit from pandemics. At the same time, no evidence was found that India also promoted other sectors, such as the alcoholic beverage industry.

3.5.2.1 Force Majeure in India

As a preliminary conclusion, it remains a concern that India allowed FM to be leveraged. In South Africa, with our *Constitution*, some companies will simply not allow others to hide behind FM – regrettably, there is no case law to substantiate this yet.

3.5.2.2 Discrimination in India

The treatment of religious minorities in India is a severe concern that calls into serious doubt the government's commitment to respecting constitutional rights and safeguarding the interests of marginalised groups. Unfortunately, the COVID-19 pandemic has exacerbated harassment and discrimination against these communities, escalating already-present tensions. It is clear that new approaches to dispute resolution, strengthened anti-discrimination laws, and encouraging tolerance and understanding through discourse and education are necessary. By removing societal and legal barriers that impede the protection of human rights advocates and witnesses, India's secular and democratic values can be protected. Achieving a balance between economic endeavours, public health, and protecting minority rights is difficult. South Africa's experience of doing so under its *Constitution* serves as an excellent example. India must address these challenges to ensure a just and equitable society for all its residents, irrespective of their religious affiliation.

In conclusion, the legal analysis of the right to conduct business in Australia and India during the pandemic provides valuable insights into the challenges encountered by various industries and the varying government responses. These insights can inform future policymaking and legal considerations to better prepare for and mitigate the effects of similar crises.

3.5.3 USA

The USA never exercised its march-in rights to which it is entitled to, or imposed patent waivers. This is an important finding for this dissertation, since countries like South Africa, India, and Kenya that all tried to exploit these legal options to their disposal also refrained from doing so during COVID-19. One can therefore safely draw the conclusion that public safety and health will always carry more weight than the right to work or the right to walk-in on IP – this applies to developed and developing countries and is encouraging.

CHAPTER 4

SOUTH AFRICA'S LEGAL RESPONSE TO THE PANDEMIC

4.1 INTRODUCTION

South Africa's government were tested numerous times in court on how regulations were promulgated. Many of these cases were either settled outside court or withdrawn when regulations were changed during the stages of lockdown. This resulted in legal uncertainty. The effect of this legal uncertainty on trade and industry will be investigated in this chapter. More specifically, this chapter deals with South Africa's legal response to the pandemic and the impact thereof on the right to choose one's trade, occupation or profession. This will be done within the international legal considerations analysed in the previous two chapters, as well as a stronger focus on IP related aspects with respect to the right to work.

Since South Africa has a constitutional Bill of Rights, it is prudent to depart from a constitutional perspective, starting with sec. 36 of the *Constitution*, which deals with human rights limitations. This will become evident in the next paragraph as sec. 36 of the *Constitution* was developed during the interim *Constitution*,⁴⁵⁷ and drew on court cases that might seem to be irrelevant to this dissertation. Therefore, after sec. 36 of the *Constitution* has been explained, it will be applied to the constitutional rights relevant to this dissertation, specifically the right to work.

⁴⁵⁷ *Constitution of the Republic of South Africa Act 200/1993 (interim Constitution).*

4.2 SECTION 36 OF THE CONSTITUTION

Before applying the principles of sec. 36⁴⁵⁸ of the *Constitution* to the right to conduct work, it is essential to comprehend how the Constitutional Court developed and now applies sec. 36 of the *Constitution* when limiting constitutional rights.

Section 36 of the *Constitution* states:

Limitation of rights. (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including –

- (a) the nature of the right;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relation between the limitation and its purpose; and
- (e) less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.⁴⁵⁹

In general, sec. 36 of the *Constitution's* limitations are applied by considering relevant factors, whereafter the *Constitution* is applied indirectly. The rationality test is then used, as explained below. The factors that are considered stem from the *S v Makwanyane and Another* case.⁴⁶⁰ In this case, the constitutionality of the death sentence was considered under sec. 277 of the *Criminal Procedure Act* 51 of 1977. "Capital punishment was declared to be inconsistent with the Interim *Constitution* and, thus, invalid,"⁴⁶¹ and accordingly ordered to be invalid. When arguing the case, the judge identified five factors to justify the limitation and balancing of human rights that must be justifiable in an open and democratic society based on freedom and

⁴⁵⁸ *Constitution*:sec. 36.

⁴⁵⁹ *Constitution*:sec. 36.

⁴⁶⁰ *S v Makwanyane and Another* 1995 (2) SACR 1 (CC) (*Makwanyane* case).

⁴⁶¹ *S v Makwanyane and Another*:par. 151.

equality.⁴⁶² Section 36 of the *Constitution* now includes these five factors. These five factors are accordingly discussed.⁴⁶³

First, the nature of the right must be considered. Certain rights were discovered to be more critical than others. Secondly, the objective of the right must be assessed. In this perspective, limiting a right must result in a more constitutional state, which all sensible civil and corporate citizens would appreciate. Thirdly, the nature of the limitation must be evaluated. The proportionality test⁴⁶⁴ evaluates this factor, which states that the constraint should not be more than what is reasonably required. Fourthly, there must be a connection between the right's nature and purpose. Again, within the context of the proportionality test, the limitation should be reasonable and justifiable. The proportionality test, as outlined in the *S v Bhulwana*⁴⁶⁵ decision, must also be considered. Fifthly, less restrictive options for accomplishing the same goal must be considered.

The *Makwanyane* case involved the death penalty and sec. 10 of the *Constitution*,⁴⁶⁶ which protects human dignity. Section 10 and other human rights will be considered using the five considerations of sec. 36 of the *Constitution* to determine if the right to work is Constitutionally protected.

In the *S v Mhlungu*⁴⁶⁷ case, the accused was charged with murder and other offences in a Circuit Local Division of the Supreme Court. They had been issued with an indictment in Afrikaans. The defendants were given an English indictment at their request. However, the date on which the English indictment was served did not fall within the time frame specified by the *Criminal Procedure Act*.⁴⁶⁸ The accused's main contention was that their constitutional right to a fair trial had been violated.⁴⁶⁹ The

⁴⁶² *S v Makwanyane and Another*:par. 103.

⁴⁶³ *S v Makwanyane and Another*:par. 104.

⁴⁶⁴ *S v Makwanyane and Another*:par. 104, footnote 130. "Canadian, German, and European courts apply a proportionality test to basic rights limitations. Although these courts' approaches to proportionality differ, they all agree that it's important for any reasonable limitation of a fundamental right. Different levels of scrutiny by U.S. courts on government action are also proportional."

⁴⁶⁵ *S v Bhulwana*; *S v Gwadiiso* 1996 (1) SA 388 (CC) (*Bhulwana* case).

⁴⁶⁶ *Constitution of the Republic of South Africa*, 1997:sec. 11. "Life. - Everyone has the right to life."

⁴⁶⁷ *S v Mhlungu*. (*Mhlungu* case).

⁴⁶⁸ *Criminal Procedure Act* 51/1977:sec. 217(1)(b)(ii).

⁴⁶⁹ *S v Mhlungu*:par. 80.

court's decision on the indirect reading of the Interim *Constitution* is relevant to this argument. Kentridge J ruled that "existing statutes, while they may be judged in due course to be unconstitutional, prima facie continue to have effect until they are knocked down."⁴⁷⁰ Kentridge stated that "a provision with only limited and indirect relevance to the fundamental rights embodied in chapter three of the Interim *Constitution*"⁴⁷¹ does not imply that the Constitutional Court can be directly contacted. Currie and de Waal state in this regard:

In principle, and where possible, a legal dispute should be decided in terms of existing principles or rules or ordinary law, properly interpreted or developed with reference to the values contained in the Bill of Rights, prior to the direct interpretation of the Bill of Rights to the dispute.⁴⁷²

In *Zantsi v Council of State, Ciskei*,⁴⁷³ the courts approved⁴⁷⁴ the "indirect application" approach from *Mhlungu*.⁴⁷⁵ Chaskalson referred to the "salutary rule" employed in other nations,⁴⁷⁶ which permits the law to develop⁴⁷⁷ progressively. He said: "Given the far-reaching ramifications of Constitutional rulings, this and all other South African courts should normally adhere to it."⁴⁷⁸ He said a case must be referred to the Constitutional Court for compelling public interest. Currie and de Waal note that this "informs the notion of justiciability, particularly the principles that courts should not resolve moot matters or cases not ripe for judicial resolution"⁴⁷⁹ and that the legislature should be permitted to address a Constitutional issue before a court rule on it.

In the *Prinsloo v Van der Linde* case,⁴⁸⁰ a veld fire damaged the first respondent's farmlands. The Interim⁴⁸¹ *Constitution's* jurisdictional provisions submitted the case to the Constitutional Court. Before remanding⁴⁸² the case, the Constitutional Court ruled

⁴⁷⁰ *S v Mhlungu*:par. 62.

⁴⁷¹ *S v Mhlungu*:par. 82.

⁴⁷² Currie & De Waal 2013:56.

⁴⁷³ *Zantsi v Council of State, Ciskei* 1995 (4) SA 615 (CC) (*Zantsi* case).

⁴⁷⁴ *Zantsi v Council of State, Ciskei*:par. 8.

⁴⁷⁵ *S v Mhlungu*.

⁴⁷⁶ *Zantsi v Council of State, Ciskei*:par. 2, footnote 4.

⁴⁷⁷ *Zantsi v Council of State, Ciskei*:par. 5.

⁴⁷⁸ *Zantsi v Council of State, Ciskei*:par. 5.

⁴⁷⁹ Currie & De Waal 2013:69.

⁴⁸⁰ *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC) (*Prinsloo* case).

⁴⁸¹ *Constitution of the Republic of South Africa*, 1993.

⁴⁸² *Prinsloo v Van der Linde*:par. 42.

that "section 84 of the *Forest Act* 122 of 1984 is not contradictory with the interim Constitution."⁴⁸³ Section 84 of the *Forest Act*⁴⁸⁴ deals with fire responsibility beyond fire control areas and "presumption of negligence."

The way the Constitutional Court created the reasonableness test while weighing equality and the right to be considered innocent is significant. "In our judgment, there can be no dispute that a reasonable relationship is proven between the aim sought to be attained by sec. 84 of the *Constitution* and the means used," the judges stated.⁴⁸⁵ Or, in the words of Currie and De Waal, "if the differentiation does not have a valid purpose and if there is no rational connection between the differentiation and the purpose,"⁴⁸⁶ legislation or conduct of government will violate the equality requirements of the *Constitution*.

Now that sec. 36 of the *Constitution* is better understood, the reasonableness test to the right to conduct business and the associated impact on IP, the main topics of this dissertation, will be applied in the subsequent sections of this paragraph.

4.3 SECTION 22 OF THE CONSTITUTION

Section 22⁴⁸⁷ of the *Constitution* deals with the right to freely choose a trade, occupation, or profession. It remains crucial to understand how the courts balance the rights of trade and industry with sec. 36 of the *Constitution*. Some prominent court cases are briefly discussed to understand this right better before it is applied to the recent pandemic.

The case of *Medicines Trust v Minister of Health of RSA*⁴⁸⁸ gave the court a chance to provide instructions on how to apply the right in sec. 22 of the *Constitution*. The

⁴⁸³ *Prinsloo v Van der Linde*:par. 42.

⁴⁸⁴ Sec. 84 of the *Forest Act* 122/1984. "When the issue of negligence in relation to a veld, forest, or mountain fire that occurred on territory outside of a fire management area arises in any action pursuant to the provisions of this Act or the common law, negligence is inferred unless the opposite is proven."

⁴⁸⁵ *Prinsloo v Van der Linde*:par. 40.

⁴⁸⁶ Currie & De Waal 2013:219.

⁴⁸⁷ *Constitution*:sec. 22. "Every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law."

⁴⁸⁸ *Affordable Medicines Trust and Others v Minister of Health and Others* 2006 (3) SA 247 (CC).

context of the text, the behaviour and interests covered by the right, adherence to the obligations imposed by the right, its limitations, and the general legality principle established by the constitutional court are all explored below in relation to the court's application of sec. 22 of the *Constitution*.

In the case of *the Minister of Cooperative Governance and Traditional Affairs v De Beer and Another*,⁴⁸⁹ the Supreme Court of Appeal (SCA) of South Africa has set aside a judgment of the High Court of Pretoria pertaining to pandemic-related regulations. The respondents challenged the regulations⁴⁹⁰ because they were unlawful and unreasonable, among other things.⁴⁹¹ Almost all the regulations made by the appellant, the Minister of Cooperative Governance and Traditional Affairs, under sec. 27(2) of the *Disaster Management Act* were found illegal and unlawful by the High Court.⁴⁹²

According to Ferreira, the SCA overturned the criticised High Court ruling in the early days of South Africa's COVID-19 lockdown that struck down most of the restrictions imposed by the state as unconstitutional.⁴⁹³ The SCA found that the High Court was willing to see an argument where there was none and excused how the case was framed. In this regard, the SCA stated the following: First, the constitutional challenge to the regulations was too diffuse and inadequately specified to make a case for an infringement of the Bill of Rights.⁴⁹⁴ Secondly, the rationality challenge, was likewise not correctly pleaded, failed to observe the tight strictures of means and ends that found such a challenge.⁴⁹⁵ Thirdly, a generalised disquiet was that the regulations constrained liberty, lacked coherence, or may have been less restrictively formulated. Furthermore, it was held that the High Court struck down regulations that had not been

⁴⁸⁹ *Minister of Cooperative Governance and Traditional Affairs v De Beer and Another* 2021 3 All SA 723 (SCA):3 (*De Beer* case).

⁴⁹⁰ Note that the regulations are promulgated under sec. 27(2) of the *Disaster Management Act* 57/2002.

⁴⁹¹ *Minister of Cooperative Governance and Traditional Affairs v De Beer and Another*:7.

⁴⁹² *Minister of Cooperative Governance and Traditional Affairs v De Beer and Another*:4.

⁴⁹³ *Minister of Cooperative Governance and Traditional Affairs v De Beer and Another*:1-69.

⁴⁹⁴ Ferreira "SCA overturns ruling that held level-four lockdown regulations were unconstitutional", <https://mg.co.za/news/2021-07-01-sca-overturns-ruling-that-held-level-four-lockdown-regulations-were-unconstitutional/> (accessed on 30 November 2021).

⁴⁹⁵ Ferreira "SCA overturns ruling that held level-four lockdown regulations were unconstitutional", <https://mg.co.za/news/2021-07-01-sca-overturns-ruling-that-held-level-four-lockdown-regulations-were-unconstitutional/> (accessed on 30 November 2021).

challenged on a case not adequately pleaded and based on the reasoning that the invalidity of specific regulations must contaminate all the regulations.⁴⁹⁶ The SCA held that neither the challenge brought, nor the High Court's reasons for sustaining that challenge, could be allowed to stand.⁴⁹⁷

4.4 SECTION 25 OF THE CONSTITUTION - INTELLECTUAL PROPERTY AS PROPERTY

IP is recognised as property in terms of sec. 25 of the *Constitution*.⁴⁹⁸ In the *FNB* case, it was confirmed that "property was not limited to land."⁴⁹⁹ In the *Laugh it Off* case, the Constitutional Court recognised trade marks as property.⁵⁰⁰ In the *Moneyweb* case, the court confirmed that "Copyright is an intellectual property right. It is protected by section 25(1)⁵⁰¹ of the *Constitution*."⁵⁰²

These rulings are important because it will be argued in the next paragraph that the right to conduct business (sec. 22 of the *Constitution*)⁵⁰³ and the right of property owners (sec. 25 of the *Constitution*) go hand in hand. Ironically, the pandemic has led to trade mark applications in the USA for such terms as "Quarantine," "Social Distancing," and "Six Feet Apart."⁵⁰⁴ Most of these applications will most likely not be registered as they will face distinct legal challenges that may eventually lead to a refusal by the trade mark examiners.⁵⁰⁵ Registered or not, these entrepreneurs, if we may call them so, exercised their right to conduct business. At the same time, sectors such as the alcoholic beverage and tobacco industries were barred from advertising their trade marks, specifically property that is essential to conducting business.

⁴⁹⁶ *Minister of Cooperative Governance and Traditional Affairs v De Beer and Another*.4, 7.

⁴⁹⁷ *Minister of Cooperative Governance and Traditional Affairs v De Beer and Another*.4, 7.

⁴⁹⁸ *Constitution*:sec. 25.

⁴⁹⁹ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Services*:par. 133.

⁵⁰⁰ *Laugh it Off Promotions CC v South African Breweries International (Finance) BV 2006 (1) SA 144 (CC)*:par. 17.

⁵⁰¹ *Constitution*:sec. 25(1).

⁵⁰² *Moneyweb (Pty) Ltd v Media 24 Ltd and Another*:par. 108.

⁵⁰³ *Constitution*:sec. 22.

⁵⁰⁴ Calboli 2021:401.

⁵⁰⁵ Calboli 2021:451.

4.4.1 Trade Secrets

Trade secrets deserve special mention. Trade secrets are recognised as a distinct form of IP and recognised by the TRIPS Agreement in Article 39(2), which essentially identifies three requirements for trade secrets to be recognised: i) secrecy, ii) commercial value because of the secrecy, and iii) that reasonable steps are taken to ensure the continued protection of the information.⁵⁰⁶

A trade secret can be defined as the confidential and proprietary information crucial for developing COVID-19 vaccines, diagnostics, and treatments. These secrets encompass various types of data, including genomic information, manufacturing techniques, and research findings, which are not publicly disclosed and are kept confidential by the organizations or individuals developing them within this context.⁵⁰⁷

Trade secrets, including genomic information, manufacturing expertise, and research knowledge, are essential to developing COVID-19 vaccines, diagnostics, and therapies.⁵⁰⁸

Patent waivers are of no value unless the associated trade secrets are made available. Nationalism has impeded equitable distribution, resulting in wealthier nations obtaining the majority of vaccination doses. Rather than giving preference to developed countries amid the global pandemic, it is morally right to guarantee fair access to these trade secrets. It could be argued that trade secret licencing should be made mandatory to remedy this, even if it would require a complicated legislative procedure. In the short term, monopoly pricing under IP law can be challenged, and knowledge sharing can be encouraged to enhance global health and welfare by public officials, the general

⁵⁰⁶ Agreement on Trade-Related Aspects of Intellectual Property Rights Annex 1C to the WTO Agreement 1994:

Art. 39(2). "Natural and legal persons shall have the possibility of preventing information lawfully within their control from being disclosed to, acquired by, or used by others without their consent in a manner contrary to honest commercial practices so long as such information: (a) is secret in the sense that it is not, as a body or in the precise configuration and assembly of its components, generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question; (b) has commercial value because it is secret; and (c) has been subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret"; A 39 also makes direct reference to a 10bis of the Paris Convention that relates to unfair competition.

⁵⁰⁷ Levine 2020:849.

⁵⁰⁸ Levine 2020:849.

public, and civil society worldwide.⁵⁰⁹ However, the moral approach of Levine is problematic since developing countries still lack the inherent capacity to produce vaccines, as pointed out above.⁵¹⁰

Gleeson, an Australian author, has some interesting views on trade secrets. He proposes four actions on how the right to work can be protected, not by means of patent waivers, but by ensuring equitable global access to COVID-19 vaccines.⁵¹¹ He argues that Australia should produce, donate, redistribute, and fund more vaccines for low-income countries, support a broad and workable TRIPS waiver, invest in low- and middle-income countries' production capacity, and impose conditions on public funding for research and development for health products and technologies to share know-how and fair pricing.⁵¹² The COVID-19 pandemic has shown the significance of strengthening local production capacity in low- and middle-income countries to meet vaccine demand and assure equitable supply for future pandemics. This requires significant investment and exchanging vaccination formulas and technology. If technology and knowledge are shared, Indonesia and Bangladesh might produce millions of doses yearly.⁵¹³

Australia might help boost Asia-Pacific production capacity by supporting the WHO's South Korean biomanufacturing hub. Finally, the Australian Government should require open licencing and fair pricing for COVID-19 health products and technology research and development funding.⁵¹⁴

Gleeson's views correlate with earlier findings in respect of the ineffective way of exercising walk-in rights that may impact on the right to conduct business.⁵¹⁵

⁵⁰⁹ Levine 2020:849-850.

⁵¹⁰ See par. 2.2.2 where Kenya's inability to exploit patent waivers was discussed, notably because of the lack of know-how – access to trade secrets would not solve this challenge.

⁵¹¹ Gleeson 2022:424

⁵¹² Gleeson 2022:424.

⁵¹³ Gleeson 2022:424.

⁵¹⁴ Gleeson 2022:424.

⁵¹⁵ See par. 3.3 where the USA's approach is analysed.

4.4.2 Patents

Patents can be regarded as the opposite of a trade secret. Whereas trade secrets are what they are, namely a secret, a patent can only be granted if the inventive step becomes part of the public domain.⁵¹⁶ With trade secrets already discussed, it will be prudent to also have a brief oversight of how patents inform the COVID-19 discourse.

Two main advantages of patents for their owners are the temporary monopoly and the freedom to operate inside a specific market without competition. Patents confer the exclusive right to create, use, sell, and import patented products.⁵¹⁷ However, allocation and innovation are frequently the main topics of conversation regarding patent system legislation. In the discussion of COVID-19 and innovation policy, allocation factors, which have to do with how resources are divided among possible users, have taken centre stage.⁵¹⁸

Several widely reported events early in the COVID-19 pandemic raised concerns that patent and other IP holders might obstruct the creation, production, and distribution of vital medical devices, protective gear, and biomedical products. The WHO proposed a technology pool in response to these worries, and numerous national governments issued directives requiring licencing.⁵¹⁹ This resulted in a team of science, engineering, and law professionals developing a simple, transparent framework that allowed patent owners to freely agree not to use their legal rights as leverage against individuals reacting to the COVID-19 pandemic.⁵²⁰ Some of the biggest IP holders in the world have contributed significantly to this initiative, called the Open COVID Pledge (OCP), with almost five hundred thousand patents and patent applications and a sizable amount of copyrighted content pledged so far. The WHO's COVID Technology Access Pool (C-TAP), a global programme to increase accessibility to specific biomedical discoveries, has also included the OCP in its architecture.⁵²¹

⁵¹⁶ *Patents Act. Sec. 25.*

⁵¹⁷ *Patents Act. Sec. 45.*

⁵¹⁸ Contreras 2021:843-846.

⁵¹⁹ Contreras 2021:833-834.

⁵²⁰ Contreras 2021:833-834.

⁵²¹ Contreras 2021:833-834.

Additionally, it evaluates the OCP's uptake in various industry segments, including digital technologies, biopharmaceuticals, diagnostics, medical devices, and protective gear.⁵²² It concludes that although pledges in the biopharmaceutical industry have been few, through this and related pledging mechanisms, many other critical technologies in the fight against COVID-19 have been made widely available to users, fostering an environment that is conducive to open innovation, new market entry, and equitable access to technology. Consequently, the OCP could potentially aid in mitigating the ongoing pandemic and function as a valuable prototype for IP-sharing systems in the event of future public health crises.⁵²³

Authors such as Boldrin and Levine⁵²⁴ argued that many pharma patents emanated from taxpayers' money and, therefore, patent reforms should be put on a solid trajectory towards open access. In the case of the COVID-19 vaccines, the pharmaceutical industry's knowledge capital is nearly exclusively private, as all its Western producers are privately held businesses.⁵²⁵ Large pharmaceutical companies' legal and marketing departments account for a significant portion of this knowledge capital, their industrial production capacity and the human capital that powers it. They are necessary to negotiate the complex web of patents and other IP laws governing the medications and the manufacturing and distribution procedures for them.⁵²⁶ It is no secret that private capital enjoys above-average profits due to its intermediary role between developing new patented pharmaceuticals funded by taxpayers, government regulators approving their usage, and the final consumers who buy them.⁵²⁷

Dynamic factors, on the other hand, are concerned with the state of the market that will eventually lead to the ideal number of new technologies. Financial incentives are offered to individuals who produce discoveries and innovations with economic value, as patents grant their owners the exclusive right to utilise their creations for profit. Some contend that making patents more accessible and enforceable will probably

⁵²² Contreras 2021:833-834.
⁵²³ Contreras 2021:833-834.
⁵²⁴ Boldrin 2021:778.
⁵²⁵ Boldrin 2021:778.
⁵²⁶ Boldrin 2021:778.
⁵²⁷ Boldrin 2021:778.

boost innovation and socially beneficial technologies, especially during a public emergency.⁵²⁸

The World Intellectual Property Organisation (WIPO) has urged governments to adopt policies to encourage scientific innovation through solid IP rights in the COVID-19 pandemic rather than lowering IP barriers to access biomedical inventions.⁵²⁹ However, removing patent obstacles from the manufacturing process of a pharmaceutical product or gadget won't guarantee that it's given in large enough quantities or of a satisfactory calibre.

Roy⁵³⁰ argues that waiving patents is essential to boost global vaccination rates, slow mutation, and lower the likelihood of more contagious new variants. He furthermore argues that since the purpose of patents is to encourage innovation, they are economically justified. As a result, losses incurred by different economic sectors due to lockdowns and novel variant-induced mortality should be considered while making a case for their waiver.⁵³¹ The economic justification for patents is centred on encouraging innovation. To make a case for its waiver, it is necessary to consider the financial burden different economic sectors must bear due to lockdowns and new variant-induced fatalities. The WTO members' agreement on the IP waiver is merely the beginning. To achieve the necessary vaccination rate and lessen the likelihood and severity of additional SARS-CoV-2 variations, the negotiations over the scope and character of the waiver are crucial.

Although policymakers have implemented various solutions to find the correct balance between increasing access to patents and continuing to encourage future innovation,⁵³² one cannot deny that, as with trade secrets, more elegant solutions are available to policy makers who need to balance the rights of patents owners (namely the right to work) with general policy considerations.

⁵²⁸ Contreras 2021:843-846.

⁵²⁹ Contreras 2021:843-846.

⁵³⁰ Roy 2022:143.

⁵³¹ Roy 2022:143.

⁵³² Contreras 2021:843-846.

4.4.3 Trade marks & Geographical Indications

Another genus of IP that requires a brief discussion is trade marks and one of its sub-genus, geographical indication (GI). It has already been confirmed that trade marks are considered to be property.⁵³³ In terms of the *Trade marks Act*, geographical names or other indications of geographical origin are protected.⁵³⁴ Within this context, the right to work can draw on geographical indications (GI) as a form of IP protection.

For example, India realised this post COVID-19. Indian workers began to move back to their hometowns, and due to this, there is a mass unemployment rate due to the post COVID-19 economic crisis. India attempted to overcome this challenge in that these once-impooverished labourers started to sustain their families and generate jobs locally using their traditional skills.⁵³⁵ Traditional skill's secret weapon is the ability to utilise GI to your advantage. It is suggested that the government should take appropriate action to support geographical indications as a tool for policy to abet the rural economy in the current hard times.⁵³⁶

Various regions have experienced popularity for their products since ancient times. Due to their geographic origin, several items, such as basmati rice originating from India, coffee from Colombia, and whisky from Scotland, have had a unique reputation for generations. GI items are known for their superior quality and attract a higher price than comparable products.⁵³⁷

There are, however, costs associated with GI. Article 22(2)⁵³⁸ requires every member nation of TRIPS to grant GIs legal protection and recognition.⁵³⁹ Indian producers face challenges under the GI Act in domestic and international trade despite the potential benefits of GI products. Despite India's liberalisation post-1991, producers struggle to get fair market value for their products, particularly in developing countries like India.

⁵³³ *Laugh it Off Promotions CC v South African Breweries International (Finance) BV 2006 (1) SA 144 (CC);par. 17.*

⁵³⁴ *Trade marks Act. Sec. 43(2).*

⁵³⁵ Mishra 2021:57.

⁵³⁶ Mishra 2021:57.

⁵³⁷ Mishra 2021:57.

⁵³⁸ Mishra 2021:61.

⁵³⁹ Agreement on Trade-Related Aspects of Intellectual Property Rights Annex 1C to the WTO Agreement 1994:art. 22(2).

In *Tea Board, India v ITC Limited*,⁵⁴⁰ The High Court of Calcutta has rejected a case involving using the word "Darjeeling" as a GI and trade mark. The case involved the Tea Board of India, a statutory body under the *Tea Act* 1953, and the defendant company, ITC Limited, which owned a 7-star hotel in Kolkata. The court ruled that using the word "Darjeeling" was not an infringement of the plaintiff's rights under the GI Act and that using the word "Darjeeling" led to dilution of the brand.⁵⁴¹ The court also ruled that the word "Darjeeling" has been in use since before the GI Act was enacted and that using the word "Darjeeling" can lead to dilution of the famous GI.⁵⁴² GIs can significantly contribute to economic development, particularly in the rural sectors. GIs intersect with IP, trade, and socio-economic policy, providing benefits such as quality, income for underprivileged producers, and protection of local traditions. Government support is needed to promote GIs, especially in developing countries like India.⁵⁴³

There are many more examples of how to use GIs in India and other parts of the world. It is argued that during difficult times, governments should take adequate measures to promote GI as a policy instrument to help rural economies and to protect the right to work. This is easier said than done because the underlying need remains that during a pandemic these people will still need to work at a safe workplace, but for now, we need to move on.

Returning to trade marks, Calboli stated that many trade mark applications for sensational events are for clothing, hats, and mugs.⁵⁴⁴ As said, the COVID-19 pandemic has prompted many trade mark applications for "COVID."

These submissions' rationale is unclear, except for medical and pandemic management items.⁵⁴⁵ Many of these applications will be rejected because the terms as issued are found not to function as trade marks or because they are descriptive, generic, or misleading as to the origin or qualities of the products. Applicants may

⁵⁴⁰ *Tea Board, India v ITC Limited* (2011): p1.

⁵⁴¹ Mishra 2021:66.

⁵⁴² Mishra 2021:66.

⁵⁴³ *Tea Board, India v ITC Limited* (2011): 1-2; Also see Mishra 2021:67.

⁵⁴⁴ Calboli 2021:403.

⁵⁴⁵ Calboli 2021:403.

abandon many applications during the examination process.⁵⁴⁶ It is suggested that the United States Patent and Trade mark Office could utilise the data from Calboli to encourage more research on trade mark applications, especially phrases related to famous events.⁵⁴⁷ The relationship between these filings and the fact that the largest group of filers are frequently individuals and small businesses should be further analysed, as should the fact that a large percentage of these filings are for unrelated and promotional products. While it is essential to incentivize applications by individuals and small businesses to promote economic activity, the filings at issue rarely promote such activity and, as highlighted, are frequently destined to be rejected.⁵⁴⁸

4.5 ENFORCING RIGHTS AND/OR LIMITING THE RIGHT TO CONDUCT BUSINESS – SOME EXAMPLES IN THE ALCOHOLIC BEVERAGES INDUSTRY

The paragraphs that follow serve as an example of how the healthcare sector was protected while allegedly sacrificing the alcoholic beverage sector because of statistical data that supported the decision. This data is available following the government's senior COVID-19 task team that conceived South Africa's COVID-19 Country Report of the Department of Planning, Monitoring and Evaluation (DPME) under the leadership of the late Minister Mthembu, who recognised the need to document how the government, along with its social partners, responded to the unprecedented challenge posed by the COVID-19 pandemic.⁵⁴⁹ Nationwide, the high number of infections among healthcare professionals exacerbated the strain on the health sector, whereas lockdown arrangements prohibiting alcohol sales aimed to alleviate this load.⁵⁵⁰ Due to various factors, there was a significant decrease in street crime, residential burglaries, and road fatalities. However, there was a disturbing increase in illegal trade in alcohol and cigarettes and gender-based violence.⁵⁵¹ Additionally, the sale of tobacco and alcohol was prohibited from reducing the number

⁵⁴⁶ Calboli 2021:403.

⁵⁴⁷ Calboli 2021:475.

⁵⁴⁸ Calboli 2021:475.

⁵⁴⁹ Schwartz 2021:5.

⁵⁵⁰ Schwartz 2021:40.

⁵⁵¹ Klasing 2020: 377.

of emergency room visits for trauma. However, the evidence supporting these prohibitions has been called into question.⁵⁵²

On the other hand, even though 70 per cent of people believed that alcohol bans contributed to illegal trade, 64 per cent believed that alcohol bans were necessary,⁵⁵³ which data was used by the government to substantiate its decision as a rational decision. The government argued that the restrictions on alcohol consumption are likely associated with a decrease in the demand for emergency care (for example trauma and accidents).⁵⁵⁴

Since March 2020, the sale of alcohol has been prohibited intermittently and to variable degrees. These temporary restrictions prompted a natural experiment on the detrimental effects of alcohol addiction on the nation and the healthcare system. South Africa has traditionally had abnormally high rates of alcohol-related injuries and fatalities; before the alcohol ban, there were 34 615 trauma cases each week. Around 40 per cent of these were related to alcohol, which amounted to at least 13 846 individuals visiting hospitals per week nationwide.⁵⁵⁵

The alcohol ban was abolished on 1 June 2020, when alert level 3 came into effect. Within a day, the number of cases at the Chris Hani Baragwanath Hospital Trauma Centre in Soweto nearly doubled.⁵⁵⁶ Twenty-one women and children were slain in just a few weeks. A second alcohol ban was unintentionally implemented on 12 July 2020 due to increased trauma and violence against women and children.⁵⁵⁷

The Western Cape saw a 48 per cent weekend and 32 per cent daily decline in alcohol-related trauma under the second alcohol ban. Trauma admissions for injuries caused by alcohol use decreased by 58 per cent in the Western Cape and by 47 per cent on weekends.⁵⁵⁸ Trauma cases associated with alcohol usage decreased by 65 per cent on New Year's Eve and New Year's Day compared to the same period in 2019. The

552 Schwartz 2021:96.
553 Schwartz 2021:161.
554 Klasing 2020: 379.
555 Schwartz 2021:629.
556 Schwartz 2021:630.
557 Klasing 2020: 380.
558 Schwartz 2021:630.

trauma rescue area at the Chris Hani Baragwanath Hospital in Soweto saw no patients on the first day of the new year for the first time in its history, and some of the busiest hospitals in KwaZulu-Natal also had almost no patients.⁵⁵⁹

These disturbing examples provide enough evidence to support the government's firm stance on alleged discriminatory regulatory actions against the tobacco and liquor industries. No wonder the alcohol, business, tourism, and restaurant industries all opposed the alcohol sales ban, stressing the commercial aspect and potential revenue and job losses in a vigorous public relations effort.⁵⁶⁰ This included paying prominent national newspapers to write articles in which assertions were made regarding the alcohol ban and how it affected the industry and drinking customs. The industry successfully claimed that consumers must take personal responsibility for alcohol consumption, its consequences, and its relief. South African Breweries was particularly loud in this regard and took legal action to overturn the bans.⁵⁶¹

The prohibition on the domestic sale and export of alcohol imposed by the lockdown regulations devastated the wine industry. The government did not consult this sector and made no effort to comprehend how its decisions would affect the supply chain. For example, grapes and barley for wine and beer production had to be harvested, processed, and stored for extended periods. This cumbersome procedure could have been avoided if adequate consultation had been conducted beforehand. South Africa lost essential trading partners due to the export ban, and some of them sought wine from other wine-producing nations to fill the void. Many months of negotiations are required to secure an export market, and once lost, it is challenging to regain.⁵⁶²

This issue was exacerbated by the second alcohol sales ban imposed on 13 July 2020 and lifted in mid-August, five weeks later. During the four-week export ban, the wine industry lost R200 million per week in export revenue and R300 million per week in

⁵⁵⁹ Schwartz 2021:630.

⁵⁶⁰ Schwartz 2021:631.

⁵⁶¹ Schwartz 2021:631.

⁵⁶² Schwartz 2021:415.

local sales. At this stage, it was unclear whether the resumption of exports and domestic sales would compensate for the negative effect on cash flow.⁵⁶³

On the other hand, the alcoholic beverage industries took steps to aid the greater society and did not passively wait to see how regulations would destroy their business. For example, the industry donated 160.000 litres of pure alcohol for hand sanitisers, produced 45.000 litres of sanitiser for community distribution, and so on. The tobacco industry, however, was not as fortunate as the alcoholic beverage industry to find a different market for its products. This brings us back to the fairness of the regulations imposed on different industries. Here, the lessons learned from Australia are helpful in that Australia's self-regulated industries were able to soften the blow of the pandemic.⁵⁶⁴

Due to budget cuts, the marketing and advertising industry was also under pressure during this pandemic. The alcohol industry, however, adapted to this by using online platforms to promote its products. One example is in Canada, where a country music star "Jake Owen", performed a live virtual concert from his home. A cross-promotion with Bud Light⁵⁶⁵ gave viewers a 5-dollar discount code for purchasing tickets for the performance.⁵⁶⁶

⁵⁶³ Schwartz 2021:419, 427, 429.

A modelling exercise estimated that the cumulative impact of the 14-week ban on alcohol sales and a 5-week ban on imports would result in an annualised GDP loss of R30.4 billion or 0.7 per cent of GDP. The cumulative employment loss caused by the first and second alcohol bans was equivalent to 1 per cent of all jobs. The annualised loss in tax revenue, excluding excise tax, is R19.4 billion due to the prohibition on alcohol sales. This represents 1.6 per cent of national tax revenue (excluding excise taxes). The total loss in excise taxes amounts to R5.8 billion, or 14.1 per cent of national excise tax revenues. The total volume of sales lost amounts to 1 billion liters. The total sales revenue loss is R25.7 billion. The 2020 industry statistics corroborate the bleak picture painted by this modelling exercise. Following several years of decline, wine production increased by 6.7 per cent annually in 2020, primarily due to improved weather conditions. In contrast, domestic sales of still and sparkling wines decreased by 20 per cent year-over-year. This decline is a result of both sales restrictions and weak consumer spending power. Although export volumes remained stable year-over-year, it must be noted that 2019 volumes were already more than 25 per cent lower than 2018 volumes; consequently, 2020 volumes are significantly below average. The weaker exchange rate supported the value of exports, resulting in higher rand-based prices.

⁵⁶⁴ See chapter three.

⁵⁶⁵ Szabo "How bands and brands are innovating the concert experience amid Covid", <https://musebycl.io/music/how-bands-and-brands-are-innovating-concert-experience-amid-covid> (accessed on 29 August 2023).

⁵⁶⁶ Owen "Jake Owen", <https://www.jakeowen.net> (accessed on 29 August 2023).

As reported by Marquizo,⁵⁶⁷ the paradox is striking. The tobacco industry, for example, offered support to help governments during this pandemic.⁵⁶⁸ However, isn't this specific industry producing and marketing addictive products that kill its consumers? These products increase the incidence of non-communicable diseases that worsen the outcome of COVID-19 patients. This industry will follow the same game plan by claiming it supported governments significantly during the pandemic. Still, it will interfere with the efforts of the government to strengthen tobacco control. Marquizo also said that the best time to consider increasing tobacco taxes is now, especially in light of the current resource constraints and the negative health consequences of tobacco use.⁵⁶⁹

Sperkova said the WHO is developing a new alcohol action plan to re-energise a stagnant process and overcome a decade of little progress on alcohol policies.⁵⁷⁰ Most countries, deficient- and middle-income countries (LMICs), are affected by a heavy alcohol burden, and no comprehensive set of alcohol policies has been implemented.⁵⁷¹ Alcohol marketing regulation lags well behind technological innovations and e-commerce that stimulate alcohol consumption, including rapidly developing new delivery systems. Most of the countries that reported no alcohol marketing restrictions whatsoever across all media types were in the African or American regions – leaving their children, youth, and adults wholly unprotected from the alcohol industry's push to find ever more loyal consumers.

⁵⁶⁷ Marquizo "Tobacco control during the COVID-19 pandemic. Statement from the Head of the Convention Secretariat", <https://fctc.who.int/newsroom/speeches/tobacco-control-during-the-covid-19-pandemic-how-we-can-help> (accessed on 29 August 2023).

⁵⁶⁸ Marquizo "Tobacco control during the COVID-19 pandemic. Statement from the Head of the Convention Secretariat", <https://fctc.who.int/newsroom/speeches/tobacco-control-during-the-covid-19-pandemic-how-we-can-help> (accessed on 29 August 2023).

⁵⁶⁹ Marquizo "Tobacco control during the COVID-19 pandemic. Statement from the Head of the Convention Secretariat", <https://fctc.who.int/newsroom/speeches/tobacco-control-during-the-covid-19-pandemic-how-we-can-help> (accessed on 29 August 2023).

⁵⁷⁰ Sperkova "After a "Lost Decade" – New WHO alcohol action plan offers historic chance to address health risk to billions", <https://healthpolicy-watch.org/after-a-lost-decade-new-who-alcohol-action-plan-offers-historic-chance-to-address-health-risk-to-billions/> (accessed on 16 November 2021).

⁵⁷¹ Sperkova "After a "Lost Decade" – New WHO alcohol action plan offers historic chance to address health risk to billions", <https://healthpolicy-watch.org/after-a-lost-decade-new-who-alcohol-action-plan-offers-historic-chance-to-address-health-risk-to-billions/> (accessed on 16 November 2021).

According to Burci,⁵⁷² a valid argument was posed that it is time for a new international instrument, namely a Pandemic Treaty, to be supported by International Health Regulations (IHR) to be accepted by the WHO and member countries. Many opponents and proponents of such intervention are analysed in the article, which all distil the critical question of whether such measures are “easier and quicker” to eradicate pandemics in a diverse and fragmented international community.

4.6 THE RISKS POSED BY THE PANDEMIC IN THE ABSENCE OF PUBLIC HEALTH INITIATIVES

According to Durojaye, how a State responds to a widespread disaster like a pandemic is a crucial indicator of how seriously it takes the successful realisation of human rights.⁵⁷³ South Africa is the continent's hub, with over 1 million illnesses and around 21.000 fatalities. This offers a chance to evaluate the degree of human rights protection and the public health initiatives that have been implemented. According to some, the pandemic epidemic puts South Africa in a difficult situation when balancing public health initiatives with the defence and advancement of human rights. The four main points Durojaye refers to are the following:⁵⁷⁴

4.6.1 The promotion and protection of human rights in states of disaster

Organisations that have urged states to preserve human rights include Human Rights Watch, Amnesty International, the African Committee of Experts on the Rights and Welfare of Children, and the African Commission on Human and Peoples' Rights.

Their views can be summarised as follows:

The COVID-19 pandemic highlights the interdependence and indivisibility of all human rights, including health, shelter, food, and water, according to the Committee on

⁵⁷² Burci "A new pandemic treaty, revised international health regulations, or both? What is the actual roadmap?", <https://healthpolicy-watch.org/a-new-pandemic-treaty-revised-international-health-regulations-or-both-what-is-the-actual-roadmap/> (accessed on 16 November 2021).

⁵⁷³ Durojaye 2022:332.

⁵⁷⁴ Durojaye 2022:332.

Economic, Social, and Cultural Rights (CESCR). The CESCR says the COVID-19 pandemic disproportionately affects marginalised and vulnerable people. "No one should be left behind in taking the necessary measures to combat this pandemic."⁵⁷⁵

Human Rights Watch reiterates that International Human Rights Law guarantees everyone the right to the most significant possible standard of health and requires governments to prevent public health concerns and provide medical care.⁵⁷⁶ Human rights have been reconsidered due to public health threats and national disasters.

IHR allows limits and exclusions. This may protect public health, morality, or life. Hostage-taking, kidnapping, and abductions are unacceptable. No exceptional circumstances, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification for torture, according to the Convention against Torture, Cruel, Inhuman, and Degrading Treatment. Rights may be relative. This may limit them.

The International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) rights can be curtailed without infringing them. Communication can be restricted to protect national security, public order, health, or morals. ICCPR limits must be legitimate and necessary to respect others' rights or reputations.⁵⁷⁷ Article 19(3)⁵⁷⁸ of the ICCPR requires limits to meet exacting standards of necessity, proportionality, and aim. The State must demonstrate that restrictive measures are necessary to control infectious diseases.⁵⁷⁹

The Siracusa Principles⁵⁸⁰ limit liberties in emergencies. Interpreting limiting clauses and emergency derogations is notable. The State applies the limitation objectively using 14 principles. The principles advise on public health restrictions.⁵⁸¹

A state may limit its rights to confront a significant public health issue. These measures must prevent or treat illness or injury. WHO's IHR shall be followed. Thus, applying

⁵⁷⁵ Durojaye 2022:334.

⁵⁷⁶ Durojaye 2022:334.

⁵⁷⁷ Durojaye 2022:334.

⁵⁷⁸ International Covenant on Civil and Political Rights:art. 19(3).

⁵⁷⁹ Durojaye 2022:334.

⁵⁸⁰ See par. 2.7.

⁵⁸¹ Durojaye 2022:334-335.

objective concepts to subjective USA contexts requires a hybrid technique. This hybrid technique may comprise of considerations such as legal, based on a legitimate purpose, strictly necessary in a democratic society; the least restrictive and intrusive measures conceivable, which are not arbitrary, irrational, or discriminatory.⁵⁸²

For example, Ebola pandemics warrant restrictions as these rigorous national measures may not guarantee the continuous realisation of some rights, such as the right to food and access, public health, and socio-economic issues, including inflation, unemployment, and a high cost of living.⁵⁸³

These issues are state-related. Thus, the Siracusa Principles and the ICCPR, General Comment 34 cannot justify human rights restrictions due to pandemics because they affect the public. Public health measures must be taken while respecting human rights to contain the epidemic. Thus, the study assesses COVID-19 public health and human rights in South Africa.⁵⁸⁴

4.6.2 A functional evaluation of South Africa's interaction with the two poles using its national laws

The South African pandemic has shown the significance of balancing public health and human rights. An objective public health approach, for example, requires the strict enforcement of COVID-19 norms and regulations, while a subjective system evaluates the pandemic's practicalities and allows stakeholders to exercise discretion. In both cases, the government's response must be humane.⁵⁸⁵ Courts must be objective – the following two cases illustrate how the courts ruled.

In the *Karel Willem Van Heerden Ex Parte's* case,⁵⁸⁶ the Mpumalanga High Court denied the applicant temporary travel exemption because the court need not uphold the law. At that time, the law prohibited the applicants' actions. The *Disaster*

⁵⁸² Durojaye 2022:335.

⁵⁸³ Durojaye 2022:335-336.

⁵⁸⁴ Durojaye 2022:335.

⁵⁸⁵ Durojaye 2022:338.

⁵⁸⁶ *Ex Parte: Van Heerden* 2020 JDR 0566 (MN):7.

Management Act and the final lockdown Regulation apply to everyone within the borders of the Republic. The court did not assess whether the *Disaster Management Act's* provisions violate the Constitution's Bill of Rights, which might be defended under sec. 36.⁵⁸⁷

In the case of *CD and MD v Department of Social Development*,⁵⁸⁸ two children from Cape Town who visited their grandparents in Bloemfontein were involved. Level 5 regulations prohibited cross-province travelling for non-essential purposes. The Court concluded that a court order need not be in place at the time of the lockdown, and the silence of the updated directives on the pre-existence of an order or parenting plan might be legalised by seeking an order to legitimise the movement of children between provinces. This case exemplifies how courts prioritize the well-being of children, mainly their physical health, during these challenging and uncertain times.

In *Mohamed and Others, v President of the Republic of South Africa and Others*,⁵⁸⁹ Muslim leaders opposed the government's religion, movement, and dignity restrictions during the pandemic based on those being unconstitutional.⁵⁹⁰ The court upheld the status quo but evaluated the limitation provided under sec. 36 of the *Constitution*. It follows the Siracusa Principles.⁵⁹¹

*De Beer and Others v Minister of Cooperative Governance and Traditional Affairs*⁵⁹² shows the Court's forbearance towards public health interventions and justification of human rights restrictions for the general welfare. The applicants sought a declaration that the national state of disaster and related restrictions were unconstitutional, unlawful, and invalid and an alternative order declaring all meetings lawful under specific conditions.⁵⁹³ The Court employed the reasonableness test to assess the subjective impact of the laws, ruling that the ban on evictions, educational institution

⁵⁸⁷ *Disaster Management Act*:sec. 36.

⁵⁸⁸ *Du Toit v Department of Social Development* 2020 JDR 0595 (WCC):9.

⁵⁸⁹ *Mohamed and Another v President of the Republic of South Africa and Others* 2001 (3) SA 893 (CC):468.

⁵⁹⁰ Durojaye 2022:340.

⁵⁹¹ *Mohamed and Another v. President of the Republic of South Africa and Others* (2005) International Law Reports 127:468-500.

⁵⁹² *De Beer and Others v Minister of Cooperative Governance and Traditional Affairs* 2020 (11) BCLR 1349 (GP):1.

⁵⁹³ Durojaye 2022:340.

closures, and nightclub and fitness centre closures were passed. Levels 3, 2, and 1 regulations have touched most rules.⁵⁹⁴ In this case, the court's approach to public health interventions has shifted from leniency to the rationality test, ensuring that human rights are prioritised in pandemic mitigation measures, which supports the view that the correct application of sec. 36 of the *Constitution* will protect the right to conduct business, even though health care will always be prioritised. The Courts' stance on human rights has changed in advanced pandemic management.⁵⁹⁵

From the paragraph above, it seems clear that the Courts strongly endorse public health initiatives to contain the pandemic. Until the court case of *De Beer*,⁵⁹⁶ rules were evaluated using a rationality test to determine if they were reasonably connected to the goals. The Court finds it inappropriate to require the national assembly and the National Council of Provinces to approve the regulations. In the case of *De Beer*, the limiting clause debate is expanded to the rationality test. The government prioritised public health over human rights before *De Beer*. *De Beer* questions this and suggests returning to the drawing board to determine how the regulations were established.

The Court determined that the *Disaster Management Act*⁵⁹⁷ regulations were issued with little public consultation.⁵⁹⁸ The Minister of Traditional Affairs and the responsible Cabinet member for each functional area of jurisdiction consulted before enacting. The restrictions were created to help and safeguard the people and property.

De Beer and Others overturned many regulations issued in accordance with sec. 27 of the *Disaster Management Act*. It was discovered that the Court disregarded both the rationality test (the phrase "rationality" was used as a synonym for "constitutionality") and the threshold test for the limitation of rights in relation to recently imposed laws to stop the spread of COVID-19. As a result, it appears that the regulations put into effect lacked essential parliamentary scrutiny, contributing to the lack of clear controlling legislation. When implementing regulations, Parliament disregarded the procedure for limiting constitutional rights.

⁵⁹⁴ Durojaye 2022:340.

⁵⁹⁵ Durojaye 2022:340.

⁵⁹⁶ *De Beer and Others v Minister of Cooperative Governance and Traditional Affairs*:1-2.

⁵⁹⁷ *Disaster Management Act* 2002:sec.57.

⁵⁹⁸ *Disaster Management Act* 2002:sec.57.

Durojaye and Oluduro⁵⁹⁹ suggest asking the right question when intervening with a specific person or group. For instance, asking valid questions to African women rather than just women will help promote their rights. Thus, treatments would be tailored to improve African women. Based on this concept, the government must prioritise marginalised and vulnerable communities or affected interest groups such as trade and industry in its policies. They must be carried along and included in decision-making.⁶⁰⁰ This study should inquire about South African-specific issues, such as the nature of public health interventions, the impact on restricted human rights, the demographics most affected by lockdown restrictions, and the ways in which these rules influence these particular groups.

The COVID-19 pandemic has put South Africa in a tough spot when balancing public health and human rights, leading to several conclusions. First, the pandemic's fatality poses many risks. While public health programmes helped bend the curve, they damaged rights. Children, older people, and low-income people were significantly affected. International, regional, and national laws limit rights. For much of the lockdown, the courts have upheld public health efforts. *De Beer's* tone shifted as circumstances overtook most of the Courts' ideas, especially in amending laws. Based on the practical analysis, the next time there is an emergency, it is recommended that the impacted people should be at the centre of the suggested solutions to guarantee that they are addressed.

Given those mentioned above, the constraints should not be utilised as a blueprint to offset the impacts of COVID-19 but as a platform to promote human rights. The government should prioritise mass testing, rapid turnaround times, and public health systems outside public health clinics. Law enforcement must uphold order without violating human rights. International law must interpret the Bill of Rights to balance public health initiatives with a human rights approach. To balance rights, a subjective evaluation of the restrictions and limitations clause of the *Constitution* is best. To this effect, Spadaro⁶⁰¹ said that France has aggressively combated the COVID-19 pandemic. War-like responses have drastically reduced personal freedoms,

⁵⁹⁹ Durojaye 2022:340.

⁶⁰⁰ Durojaye 2022:340.

⁶⁰¹ Spadaro 2020:317.

unparalleled in democratic countries during peacetime. These strategies aim to reduce COVID-19 transmission through social distancing. Thus, billions of people worldwide are under lockdown.⁶⁰²

Finally, the COVID-19 pandemic has shown the interdependence of human rights, notably life and health. Many countries' measures have affected fundamental rights and highlighted the conflict between private and collective interests. According to the Human Rights Committee, the COVID-19 pandemic requires human rights restrictions.⁶⁰³

Public health is one of the legitimate goals that can be used to limit rights to allow a state to address substantial harm to public health. Conditions may also deviate from human rights law during national emergencies. Derogations suspend certain human rights only if they are strictly necessary and do not violate the State's other international law obligations, such as non-discrimination.⁶⁰⁴

The Human Rights Committee explained that if States purport to invoke the right to derogate from the Covenant⁶⁰⁵ during a natural disaster, a mass demonstration with violence, or a major industrial accident, they must be able to justify not only that such a situation constitutes a threat to the life of the nation but also that the difficulties strictly require all their measures derogating from the Covenant of the situation. The possibility of restricting Covenant rights under the terms of freedom of movement Article 12⁶⁰⁶ or freedom of assembly Article 21⁶⁰⁷ is generally sufficient during such cases, and the difficulties of the situation would justify no derogation from the provisions.

⁶⁰² Spadaro 2020:317.

⁶⁰³ Spadaro 2020:320.

⁶⁰⁴ Spadaro 2020:321.

⁶⁰⁵ A Covenant is a written promise or agreement between two or more persons, typically sealed, especially for the fulfilment of some activity.

⁶⁰⁶ Spadaro 2020:321-322.

⁶⁰⁷ Spadaro 2020:322.

Some scholars argue that states may employ derogations, even when limitations would suffice, when uncertain whether their actions violate human rights during natural disasters. However, states can deviate in public situations like pandemics.⁶⁰⁸

The Human Rights Committee concludes that the COVID-19 pandemic requires human rights restrictions. Derogations should not be used to encourage power grabs, stifle opposition, or persecute minorities. States should adopt a long-term strategy to manage the COVID-19 pandemic that does not impair fundamental freedoms. Limitations and derogations must be stated to prevent abuse of law.⁶⁰⁹

4.7 CONCLUDING REMARKS ON SOUTH AFRICA

It has been shown throughout this chapter that Intellectual property tools that are available to governments, for example patent waivers, walk-in rights, and similar interventions that may infringe on the right to work are not feasible, and that more optimal and elegant solutions are available. As was discussed, India and South Africa recommended a measure of last resort to WTO members. In this regard, a temporary waiver from certain TRIPS Agreement provisions (such as patents, trade secrets, copyright, and industrial designs) was requested in India and South Africa's proposal, which received support from many others, concerning goods for the prevention, containment, and treatment of COVID-19.⁶¹⁰ It was also found that IP rightsholders were indeed affected by the pandemic and that even though section 36 of the *Constitution* would protect them, that more elegant legal solutions are required. This dissertation, therefore, supports the view of Perehudoff *et al.*⁶¹¹ who promotes the

⁶⁰⁸ Spadaro 2020:322.

⁶⁰⁹ Spadaro 2020:323.

⁶¹⁰ Revised TRIPS Waiver Proposal at the WTO: "Waiver from Certain Provisions of the TRIPS Agreement for the Prevention, Containment, and Treatment of COVID-19 Revised Decision Text.IP/C/W/669.Rev1", <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/IP/C/W669R1.pdf> (accessed on 29 October 2023).

⁶¹¹ Perehudoff *et al.* 2022:141.

pandemic treaty as an alternative solutions to the shortcomings of the global response to the pandemic by means of intellectual property tools.⁶¹²

⁶¹² TRIPS Waiver Proposal at the WTO: "Waiver from Certain Provisions of the TRIPS Agreement for the Prevention, Containment, and Treatment of COVID-19. IP/C/W/669", <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/IP/C/W669.pdf> (accessed on 29 October 2023).

CHAPTER 5

CONCLUSION AND RECOMMENDATIONS

5.1 INTRODUCTION

The importance of differentiating a state of disaster from a state of emergency was explained earlier and it was indicated that the South African government's treatment of the pandemic as a State of Disaster was less restrictive and subject to the provisions of sec. 36 of the *Constitution* on how rights are balanced. It became clear that during a pandemic, there is a greater need to base decisions taken during a state of disaster or pandemic on rational grounds, failing which the constitutional and other rights of minority groups can be affected negatively.

It was also confirmed that IP is indeed regarded as property in terms of sec. 25 of the *Constitution*. This confirmation was essential to set the scene to further investigate walk-in rights, patent waivers and open access, three distinct concepts with certain overlaps. Whereas walk-in rights are primarily associated with IP that emanated from research that was conducted with tax payers' money in a country, and the government of that country then takes specific national measures, patent waivers are not country-specific and often relate to TRIPS-imposed waivers. With open access, the IP rights of the owners remain intact, but certain concessions need to be made.

Within this context, the constitutional right of South African citizens to conduct business and the limitations to such right were considered, notably with a brief review of the case studies in the alcoholic beverages industry and, to some extent, the tobacco industry because these sectors were severely impacted by the South African government's regulatory actions to restrain them from conducting business during COVID-19. These findings informed the research done in the chapters that followed.

5.2 INTERNATIONAL PERSPECTIVES ON THE RESEARCH PROBLEM

The early insights gained were needed to understand the research question from an international perspective, notably regarding international legal instruments. With the TRIPS Agreement, it was found that despite its provisions, the South African courts ruled in two court cases that tobacco is not an “essential good” and that despite the right to conduct business as entrenched in sec. 22 of the *Constitution*, the government’s enforcement of the tobacco ban was rational. No evidence was found in the two mentioned cases that the government ever considered the TRIPS Agreement. This led to the conclusion that although South Africa is a signatory to the TRIPS Agreement, where substantial protection for IP rightsholders is entrenched, local healthcare realities were prioritised. At the same time, the tobacco and alcoholic beverages industries’ rights were limited.

The question then arose whether the TRIPS Agreement-imposed limitations on branding were appropriate during the pandemic. As argued with the healthcare industry, branding limitations should make it easier for governments to impose less stringent COVID-19 regulations on these sectors. It was found that by applying the branding limitations provisions of the TRIPS Agreement to the tobacco and alcoholic beverage sectors, governments would not necessarily find a solution to protect the right to conduct business. Instead, the self-regulatory lessons learned from the Australian RMM or North American TPAs seem to be more workable. The caveat, though, seems to be that self-regulatory measures during a pandemic can only work in a sophisticated regulatory environment.

It was also found that the TRIPS Agreement addresses the right to engage in global commerce and establishes minimum standards for protecting and enforcing IP rights to promote innovation and technological advancement. Articles 27 and 31 are two of the most important provisions of the TRIPS Agreement, as they ensure that patents are only granted for inventions that benefit society and that compulsory licenses are only granted under specific conditions. In conclusion, it seems as if the TRIPS Agreement never threatened the constitutional rights of IP rightsholders because governments worldwide realised that safe and clinically tested vaccines are more important than exercising walk-in rights to vaccines with patent protection. This is not

necessarily the case in other sectors, such as the tobacco and alcoholic beverage industries.

The draft Pandemic Treaty (which was still a draft in November 2023) has the potential to play a crucial role in enhancing global collaboration and readiness to prevent and respond to future pandemics while also safeguarding the interests of corporations and individuals. In general, it could be concluded that the draft Pandemic Treaty is vital in boosting global collaboration and preparedness to avoid and respond to future pandemics while preserving the interests of corporations and individuals. The Pandemic Treaty is also an excellent example of how it is possible to prioritise health care during a pandemic without compromising the right of trade and commerce to conduct business. Therefore, the draft Pandemic Treaty could be seen as an international instrument that aims to balance the right to work of corporate and civil citizens within countries. This positive development will assist South African lawmakers to balance rights in sec. 36 of the *Constitution* appropriately.

In conclusion, the TRIPS Agreement and the draft Pandemic Treaty both acknowledge the significance of international collaboration in fostering economic growth and development while protecting the interests of society. The draft Pandemic Treaty addresses the necessity of maintaining the continuity of economic operations and protecting workers' rights during pandemics, in contrast to the TRIPS Agreement, which is focused on protecting and enforcing IP rights.

Both accords reflect significant steps towards developing a global economy that is more sustainable and resilient and underscore the significance of collaboration and preparedness in solving complex global challenges. Both agreements also highlight the importance of addressing complex global challenges, with the need to keep members accountable.

Private international instruments, namely the *Lancet* Commission and the Siracusa Principles, were also analysed. It was found that the seven recommendations made by the *Lancet* COVID-19 Commission are all beneficial to South Africa. They could serve as a tool to be deployed by developing countries such as India and South Africa to influence legislative and regulatory developments. The Siracusa Principles are equally essential to this dissertation, notably because this private initiative endorses

the ILO's labour practices during a "Public Emergency Which Threatens the Life of the Nation" and confirms the relevance of the SDG-8. In summary, it can be said that despite the shortcomings of the Siracusa Principles, these principles have shown that the pandemic caused by COVID-19 presents a chance to clarify human rights law, which includes the right to work, and build global health legislation in sync with pressing challenges to human dignity and flourishing in the current day.

5.3 COUNTRY SPECIFIC CONCLUSIONS

The international legal instruments that were analysed provide the necessary backdrop to conduct research in specific countries. The legal analysis of the right to conduct business in Australia and India during the COVID-19 pandemic provided intriguing insights into how various nations responded to the crisis. As common law nations, Australia and India confronted significant difficulties in balancing public health measures with the rights and interests of enterprises. The following findings we made in respect of the right to work in specific countries:

5.3.1 Australia

The proactive measures taken by the Australian national and state governments to protect jobs and businesses are commendable because Australia does not have a bill of rights where the right to work is entrenched. Australia merely applied common sense regulatory interventions while always making sure that the local workforce and businesses were allowed as much freedom as possible to conduct business within the constraints of the pandemic. Furthermore, the Australian government's close working relationship with trade unions assisted with this pragmatic approach to project the right to work.

5.3.2 India

The impact of the pandemic on India's pharmaceutical industry highlighted that India always followed a pragmatic approach towards its local challenges pertaining to the right to work and that it will continue to do so despite international legal developments and options to its disposal. This is because India already has the inherent capabilities to produce generic medicine and fiercely protects the pharmaceutical industry and related jobs. It was found that India used this ability to create jobs and, despite the options at its disposal regarding the TRIPS Agreement, India did not rely on the international community, for example, the WHO, to impose legal measures to mitigate the risks associated with a pandemic and related job losses.

Regarding recommendations regarding the research question, South Africa can learn from and adopt India's practical strategy for addressing the pandemic's local difficulties instead of merely relying on international legal sanctions. South Africa might prioritise developing its pharmaceutical industry to secure self-sufficiency in medical supplies during emergencies. South Africa might also investigate ways to increase employment creation to combat the pandemic and assist its domestic businesses. South Africa can draw inspiration from India in managing complex international legal frameworks such as the TRIPS Agreement and make decisions that align with its public health priorities by being aware of these agreements and their available options. To coordinate worldwide efforts during a pandemic, South Africa can learn the value of balancing independence and partnership with international organisations like the WHO. What remains of concern, though, is that only sectors such as the pharmaceutical industry will benefit from pandemics. At the same time, no evidence was found that India also promoted other sectors, such as the alcoholic beverage industry.

5.3.3 USA

The USA never exercised its march-in rights to which it is entitled in terms of the *Bayh-Dole Act* or imposed patent waivers. This is an important finding for this dissertation since countries like South Africa, India, and Kenya that all tried to exploit these legal options to their disposal also refrained from doing so during COVID-19. Therefore, it can safely be concluded that public safety and health will always carry more weight than the right to work or walk in on IP – this applies to developed and developing countries and is encouraging.

The legal analysis of the right to conduct business in these countries during the pandemic provides valuable insights into the challenges encountered by various industries and the varying government responses. These insights can inform future policymaking and legal considerations to better prepare for and mitigate the effects of similar crises.

5.4 INTELLECTUAL PROPERTY

The research on South Africa took a more focused approach towards IP. The most important finding is that IP is recognised as property in terms of sec. 25 of the *Constitution*. With this matter confirmed, it followed that the right to conduct business (sec. 22 of the *Constitution*) and the right of property owners (sec. 25 of the *Constitution*) are going hand-in-hand, and as a result, patent waivers and walk-in rights were reviewed as potential severe infringements on the right to work.

It has been shown that patent waivers, walk-in rights, and similar interventions infringe on the right to work and that more optimal and elegant solutions are available. As was discussed, India and South Africa recommended a measure of last resort to WTO members. In this regard, a temporary waiver from certain TRIPS Agreement provisions (such as patents, trade secrets, copyright, and industrial designs) was requested in India and South Africa's proposal, which received support from many others, concerning goods for the prevention, containment, and the treatment of COVID-19.

This dissertation, therefore, aligns with the perspective of Perekhodoff *et al.* advocating for the pandemic treaty as an alternative solution to address the deficiencies in the global pandemic response, particularly through the utilization of IP tools. As highlighted in the preceding chapter, it has been demonstrated that conventional IP mechanisms such as patent waivers and walk-in rights are not viable options due to their potential infringement on the right to work. Instead, more effective and refined measures have been proposed, such as the temporary waiver of certain TRIPS Agreement provisions suggested by India and South Africa. This proposal, endorsed by numerous stakeholders, seeks to address the issues surrounding IP rights concerning goods for COVID-19 prevention, containment, and treatment. Furthermore, it has been recognized that while IP rightsholders have been impacted by the pandemic, alternative legal solutions beyond constitutional protections are imperative. Although policymakers have implemented various solutions to find the correct balance between increasing access to patents and continuing to encourage future innovation, one cannot deny that, as with trade secrets, more elegant solutions are available to policy makers who need to balance the rights of patent owners (namely the right to work) with general policy considerations.

5.5 CONCLUDING REMARKS

The official responses to the COVID-19 pandemic in different nations reveal the delicate balance between public health, commercial interests, and individual and corporate rights. In pursuing national interests and public health, the main finding is that governments often struggle to treat all groups fairly, especially minorities. Case studies of South Africa, India, Australia, and the USA show how complex crisis decision-making is. As shown in the tobacco and alcoholic beverage industries, South Africa prioritised healthcare over IP rights, which raised doubts regarding the efficacy of the TRIPS Agreement on matters such as branding restrictions during a pandemic. However, the draft Pandemic Treaty is a positive development that could balance health concerns with corporate and individual rights in global collaboration.

Australia's pragmatic approach, using common-sense regulatory reforms and working closely with trade unions, showed how pre-emptive measures protect employment,

businesses, and the right to work. However, India's dependence on its pharmaceutical industry's capabilities despite international legal choices shows the relevance and importance of seeking local and pragmatic solutions, even more so if you are a developing country. Therefore, the legal analysis of the freedom to conduct business in Australia and India yielded valuable insights that can be used in South Africa to develop future legislation and legal considerations to manage such situations better.

The USA's choice not to exercise march-in rights or enforce patent waivers emphasised public safety and health over intellectual property rights. India and South Africa's WTO proposal that COVID-19 patents should be waived never materialised. It seems as if the USA's approach worked best, namely to advance science without compromising safety or job losses.

The dissertation acknowledges the importance of international collaboration in promoting economic progress and defending social interests. Although they address separate issues, the TRIPS Agreement and the draft Pandemic Treaty are fundamental advances towards a more sustainable and resilient global economy. These accords emphasise collaboration, readiness, and accountability for complex global issues.

Lastly, the dissertation emphasised the need for adaptive and collaborative approaches to pandemics and other crises.

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