

The Impact of
COVID-19
on the Future of
Law and Related
Disciplines

Murdoch Watney (Editor)



The Impact of Covid-19 on the Future of Law

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Contents

Preface	i
Wesahl Domingo	
Introduction	iii
Murdoch Watney	
1 Covid-19 regulations as overriding mandatory provisions in private international law <i>A comparison of regional, supranational and international instruments with the proposed African Principles on the Law Applicable to International Commercial Contracts</i>	1
Jan L Neels, Eesa A Fredericks	
2 The impact of the Covid-19 pandemic on international trade, with specific reference to the role of trade documentation	27
Charl Hugo	
3 Covid-19 related claims <i>The final nail in the coffin for international investment law?</i>	53
LJ Koen	
4 Legal uncertainty under the Protection of Personal Information Act during the pandemic <i>Exploring European case law as an interpretive guideline</i>	71
Jonas S Baumann, Nazreen Ismail	
5 No time to waste. Reflections on waste management in South Africa during Covid-19 <i>Lessons to be learned?</i>	97
Jenny Hall	

6	The impact of Covid-19 on domestic violence in South Africa	119
	AE Boniface	
7	Covid-19 and its impact on infant abandonment in South Africa	141
	W Rosenberg	
8	The psychological effects of Covid-19 and lockdown on parental alienation <i>Emotional harm as a remedy for an alienated parent?</i>	163
	Franaaz Khan	
9	Online dispute resolution: A Ferrari pulled by donkeys? <i>Considering access to court in an increasingly online age</i>	179
	Yvette Joubert	
10	Mandatory vaccination against Covid-19 <i>Implications for the South African workplace</i>	201
	Kgomotso Mufamadi, Katleho Letsiri	
11	Shifting of the academic landscape during Covid-19 and beyond	223
	Michele Van Eck	
	Bibliography	247



Preface

Wesahl Domingo 

*Executive Dean, Faculty of Law,
University of Johannesburg*

It is a great honour and privilege to write this preface as a Dean who joined the Faculty of Law at the University of Johannesburg in March 2021. The era of COVID-19 fast-tracked us into the realities of the Fourth Industrial Revolution and demanded resilience, strength, and agility to adapt to changing conditions. While the full impact of COVID-19 remains uncertain, it is generally accepted that it will continue to fundamentally transform all aspects of our occupational and personal lives. This was the backdrop to our discussions at our Dean's Committee when the idea was sparked to do a book project on the impact of COVID-19 on Law. At this Committee, the title of the book "*The Impact of COVID-19 on the Future of Law and Related Disciplines*" was birthed.


This book brings together a collection of 11 research papers dealing with the impact of COVID-19 across a span of different legal disciplines (international law, constitutional law, environmental law, law of persons and the family, law of delict, civil procedure, labour law, and legal research methodology). I am proud that this book not only reflects a range of legal disciplines but also reflects the work of legal academics across ranks, from junior lecturers to full professors. The authors of this book, each in their own way, critically analyse, challenge, and rouse us to think deeply about the future of law.

I want to thank all the authors who contributed to this book. My deep appreciation goes to Prof Murdoch Watney for taking up the leadership in running the project and bringing this book project to fruition.





Introduction

Murdoch Watney 

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COVID-19 fundamentally effected the way we live, work and see the world. Marija Buric, Secretary General of the Council of Europe, remarked that “while the virus is resulting in the tragic loss of life, we must nonetheless prevent it from destroying our way of life—our understanding of who we are, what we value, and the rights to which every European is entitled” (<https://www.coe.int/en/web/human-rights-rule-of-law/covid19>). Closer to home, at a meeting of African Ministers of Health to discuss the COVID-19 situation in Africa, an appeal was made to all AU Member States to “... leverage harmonized continental digital technologies for the response to COVID-19, including for addressing its socioeconomic impact, paying particular attention to digital inclusion, patient empowerment, data privacy, and security, legal and ethical issues, and the protection of personal data, which are values enshrined in the official African Union Trusted Health framework, and its digital archetypes” (African Union Communique: 8 May 2021).

Against this background, colleagues at the Law Faculty of the University of Johannesburg contributed to research on the topic *The Impact of COVID-19 on the Future of Law and Related Disciplines*. The title seems to suggest that the COVID-19 pandemic will have a lasting effect on future developments in the legal field. Although it might be argued that the theme is extensive and lacks focus, the aim with the choice thereof was to allow colleagues the opportunity to consider critically, the impact of the pandemic on their respective fields. It might also be argued that post-pandemic, all may very well return to the *status quo ante*. The true and long-lasting effect, if any, of the COVID-19 pandemic on legal development, however, remains to be seen and only the future will tell. What is clear, however, is that society as a whole had to adapt to the changing circumstances brought about by the pandemic: survival in the new normal required agile systems and procedures.

The respective authors presented the fruits of their in-depth research on various topics in several thought provoking papers. Not all the contributions were, however, publishable, but the research

The Impact of Covid-19 on the Future of Law

presented for publication, after a double blind peer-review process, covered a wide spectrum of legal disciplines, including international law (contract, trade and investment law), constitutional law, data protection law, environmental law, law of persons and the family, law of delict, civil procedure, labour law and legal research methodology.

The first three contributions focus on international law. In their contribution “COVID-19 regulations as overriding mandatory provisions in private international law—A comparison of regional, supranational and international instruments with the proposed African Principles on the Law Applicable to International Commercial Contracts”, Jan Neels and Eesa Fredericks provide a comparative study of the position of overriding mandatory rules in regional, supranational and international conflicts instruments, with reference to the specific Rome I Regulation on the Law Applicable to Contractual Obligations (2008) and the proposed African Principles on the Law Applicable to International Commercial Contracts (2020). They refer to COVID-19 regulations as an example of overriding mandatory provisions in the context of the disruption of international commerce and consider the proper law of the contract, the *lex fori* and the law of the country of performance as the governing law, as well as the application of the legal systems of other countries. Their research indicates that, although strongly influenced by the corresponding provision in the Rome I Regulation, more clarity is provided by article 11 of the African Principles. In the final analysis, the authors submit that the law applicable to the contract should govern the effect of an overriding mandatory rule on contractual liability, unless the provision itself stipulates the consequences.

Charl Hugo explains in “The impact of the COVID-19 pandemic on international trade, with specific reference to the role of trade documentation”, the importance of the documents used in international trade and how they feature in payment transactions. He considers the function of different rules of the International Chamber of Commerce (ICC) and in particular the Uniform Customs and Practice for Documentary Credits (UCP) and the Uniform Rules for Collections (URC) and analyses the development of companion rules by the ICC to facilitate trade digitisation—especially the electronic supplement to the UCP (the eUCP), the Uniform Rules for Bank Payment Obligations (URBPO) and the Uniform Rules for Digital Trade Transactions. In conclusion, he strongly argues that in view of the disasters of the eruption of Eyjafjallajökull in Iceland in 2010 and the COVID-19 pandemic in 2020, all role players should come together

Introduction

urgently to enable worldwide trade digitisation under the auspices of the International Chamber of Commerce.

In “COVID-19 Related Claims: The Final Nail in the Coffin for International Investment Law?”, Louis Koen indicates that international investment law has increasingly been criticised over its use by investors to challenge public interest regulations. He points out that there has also been growing concern during the COVID-19 pandemic that investment arbitration will be used to challenge measures implemented by states to curb the spread of the virus. His contribution reflects on the most problematic aspects of contemporary international investment law and critically analyses the effectiveness of various model reform treaties in rebalancing the rights of investors and host states and he makes suggestions on what investment law should look like in a post-COVID-19 society.

Turning to privacy protection in “Legal uncertainty under the Protection of Personal Information Act during the pandemic— Exploring European case law as an interpretive guideline”, Jonas Baumann and Nazreen Ismail indicate that COVID-19 lockdowns compelled society to digitalise and thereby substantially increased the processing of personal information. Key provisions of the Protection of Personal Information Act 4 of 2013 (POPIA) were enacted from 1 July 2020, which enabled full enforcement from 1 July 2021. As this is the first comprehensive South African data protection provisions, legal uncertainty was created due to the highly abstract formulation of the act. Baumann and Ismail aim to increase legal certainty with their contribution by exploring European data protection case law when interpreting the POPIA, taking into account recent decisions of the South African Constitutional Court. They analyse the European case law in the context of three fundamental concepts of data protection law, namely, personal information, joint responsibility and consent.

In “No time to waste. Reflections on waste management in South Africa during COVID-19: Lessons to be learned?”, Jenny Hall states that the COVID-19 pandemic is the most immediate reminder of the consequences of not taking a serious approach to addressing environmental issues. She indicates that early statistics show the aggravated effects of the virus experienced by people living in polluted cities and the link between poverty and higher death rates and draws a parallel between the destruction of habitats as the underlying environmental issue at the heart of the outbreak. Her research considers a range of environmental policy responses by the South African government since the pandemic began and assesses the extent

The Impact of Covid-19 on the Future of Law

to which they lay a foundation for the changes that are required and the extent to which they provide a basis for realising environmental justice which disrupts the disproportionate environmental burden that the poor currently experience.

Amanda Boniface focussed her research on “The impact of COVID-19 on domestic violence in South Africa”. She indicates that the pandemic and the resulting lockdowns have had a negative impact on the incidence of domestic violence in the country and concludes that the pandemic has exacerbated pre-existing problems in society that cause domestic violence and that legislation alone is not sufficient to solve the problem of domestic violence in South Africa.

Whitney Rosenberg takes a closer look at infant abandonment in her contribution. Although no official statistics are available in this regard, she assumes that the number of children abandoned would have increased as a result of increased poverty brought about by the pandemic and resultant lockdowns. After consideration of the position in other jurisdictions as well as the possible constitutional implications, she proposes an amendment to the Children’s Act 38 of 2005 to provide for baby savers as a solution.

In “The psychological effects of COVID-19 and lockdown on parental alienation: Emotional harm as a remedy for an alienated parent?”, Franaaz Khan considers the position of parents involved in a tug-of-war over children, especially with courts being temporarily closed, travel restrictions and lockdown regulations as it became harder to enforce custody agreements. She indicates that parental alienation is a recurring problem that affects many families who are experiencing high conflict, separation and divorce and defines parental alienation as a process whereby one parent undermines the child’s previously intact relationship with the other parent. Her research indicates that although parental alienation has been described in the psychiatric literature for at least 60 years, it has never been considered for inclusion in the Diagnostic and Statistical Manual of Mental Disorders (DSM) and various proposals and opinions have been made for its inclusion. Her paper focusses on the civil remedies that are available for an affected parent and she proposes that the additional delictual remedy for emotional distress and harm be utilised by an alienated parent against the alienator if their case warrants it.

Yvette Joubert considers the vexing challenge of access to court in an increasingly online environment. She discusses the compatibility of technology-based reform in the context of the normative constitutional values in South Africa and, more particularly, the right of access to

Introduction

justice against the background of developments in other jurisdictions and concludes that South Africa's socio-economic, service delivery and governance problems should be a warning against the hasty adoption of advanced online litigation systems found in other jurisdictions. She recommends a more pragmatic solution of incremental, rather than revolutionary reform.

Labour law is the focus of Kgomotso Mufamadi and Katleho Letsiri in "Mandatory vaccination against COVID-19—Implications for the South African workplace." They investigate the question in the employment context as to whether employers can compel employees to vaccinate. Compulsory vaccination against the disease would constitute compulsory medical treatment, which is an area that is, at present, not regulated in South African labour legislation. In their research, the authors consider the National Health Act 21 of 2003, the employer's duty to provide and maintain a safe working environment in terms of the Occupational Health and Safety Act 85 of 1993 as well as the provisions of the Consolidated Direction on Occupational Health and Safety Measures in Certain Workplaces issued by the Department of Employment and Labour which contains guidelines for the implementation of mandatory vaccination policies in the workplace. They make recommendations as to whether mandatory vaccinations are justifiable in labour law, considering human rights implications and the limitation of rights in terms of section 36 of the Constitution.

In "Shifting of the academic landscape during COVID-19 and beyond", Michele van Eck indicates that COVID-19 fundamentally shifted the *status quo* of many academic activities resulting in, for example, a sudden move to online teaching and learning and different online approaches to processing data in academic research. In addition thereto, further changes were brought about by the Protection of Personal Information Act 4 of 2013 (POPIA) that came into full effect on 1 June 2020. The current development of a code of conduct by the Academy of Science of South Africa (ASSAf) in terms of section 60 of POPIA and intended to regulate and promote a uniform approach to the processing of personal information in all academic research activities within South Africa, further contributes to the changing environment. She emphasises the different methodological approaches employed in the three broad and general categories of legal research (being that of practical legal research, legal research in relation to humanities and legal research as a social science) and indicates that within these categories of legal research there are instances that empirical data is required for research efforts. It is especially in those instances that COVID-19, POPIA and the anticipated code of conduct may play an



The Impact of Covid-19 on the Future of Law

important role in legal research activities. The paper argues that legal research is not immune to the changes to the academic landscape during the COVID-19 era, with specific reference to legislative interventions that have disrupted the *status quo* and a framework for the collection of data in academic research activities required by COVID-19, POPIA and possibly the new code of conduct is presented for legal research-related activities.



1 Covid-19 regulations as overriding mandatory provisions in private international law

A comparison of regional, supranational and international instruments with the proposed African Principles on the Law Applicable to International Commercial Contracts

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“Alles skud, en dit voel ook meteens
die aarde dryf los, ’n sinkende vlot,
en die mishoring roep deur die reëns
en die winde om genade tot God”
(Opperman *Joernaal van Jorik* (1974) 57).

Abstract

This contribution provides a comparative study of the position of overriding mandatory rules in regional, supranational and

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international conflicts instruments, in particular the Rome I Regulation on the Law Applicable to Contractual Obligations (2008) and the proposed African Principles on the Law Applicable to International Commercial Contracts (2020). COVID-19 regulations are referred to as an unequivocal example of overriding mandatory provisions in the context of the disruption of international commerce. The application of the proper law of the contract, the *lex fori* and the law of the country of performance, as well as the application of the legal systems of other countries are considered. Although strongly influenced by the corresponding provision in the Rome I Regulation, it is suggested that article 11 of the African Principles provides more clarity. The African Principles constitute the sole instrument which explicitly mentions that the overriding mandatory rules of the proper law of the contract are applicable in principle. The African Principles clarify that, for the purposes of the application of the law of the country of performance, any substantial performance under the contract is relevant (that is, both the characteristic and the monetary performance). The African Principles expressly include the country of commencement, continuation and completion of the performance in determining the content of the notion of the law of the country of performance. In respect of the application of the overriding mandatory rules of legal systems other than the *lex fori*, the proper law and the law of the country of performance, the African Principles reflect a *via media* between the opposing positions in the Rome I Regulation and its predecessor, the Rome Convention on the Law Applicable to Contractual Obligations (1980): in exceptional circumstances, the overriding mandatory rules of another legal system may be applied, provided that such law has a manifestly close connection to the particular situation. As the doctrine of overriding mandatory rules can be better explained from a unilateralist rather than a Savignian conflicts paradigm, it is argued that American-style comparative interest or impairment analysis could provide valuable ideas in respect of the exercise of the discretion of a court in cases of the cumulation of overriding mandatory rules. Finally, the submission is made that the law applicable to the contract should govern the effect of an overriding mandatory rule on contractual liability, unless the provision itself stipulates the consequences.

1 Introduction

COVID-19 regulations are an unequivocal example of so-called overriding mandatory rules when they feature in the context of private

international law.¹ They may disrupt international commerce by, for instance, limiting the export and/or import of certain goods. The term “COVID regulations” will be used consistent with South African custom, irrespective of how similar legislative measures may be called in other legal systems. In this country, COVID regulations are issued in terms of the Disaster Management Act.² Once a national state of disaster is declared, the relevant minister³ may make regulations concerning *inter alia* the movement of goods to, from and within the disaster-stricken or threatened area.⁴ For instance, in terms of the regulations of 29 April 2020,⁵ the minister in principle closed the borders of the Republic,⁶ except for, in respect of the international movement of goods, “essential goods for import”⁷ and certain “permitted goods for export”.⁸

The promulgation of COVID regulations and similar measures by many legislators in the world invites a comparison of the position of overriding mandatory rules in various conflicts instruments. This contribution compares the position of overriding mandatory rules in the proposed African Principles on the Law Applicable to International Commercial Contracts⁹ with various regional, supranational and international instruments of private international law of contract.

1 See par 3. On overriding mandatory rules in private international law, in general, see Kuipers *EU Law and Private International Law. The Interrelationship in Contractual Obligations* (2012) 35–175 and Nygh *Autonomy in International Contracts* (1999) ch 9. For a theoretical discussion from a Kantian and Savignian perspective, see Peari *The Foundation of Choice of Law. Choice and Equality* (2018) 205–219; also see Mills *Party Autonomy in Private International Law* (2018) 476–486. For a comparative overview, see Girsberger, Kadner Graziano and Neels “Global perspectives on the Hague Principles” in Girsberger, Kadner Graziano and Neels (gen eds) *Choice of Law in International Commercial Contracts. Global Perspectives on the Hague Principles* (2021) 3 101–116.

2 57 of 2002, namely, in terms of s 27(2) and 59 of the act.

3 See s 3.

4 s 27(2)(f).

5 Regulations R 480 issued in terms of s 27(2) of the Disaster Management Act 57 of 2002, *Regulation Gazette* 11098, vol 658, no 43258 (29 April 2020).

6 reg 21.

7 title of annexure B (twelve categories are listed). See reg 22(1)(a).

8 title of annexure C. See reg 22(1)(e). The regulations were amended numerous times: see *inter alia* the amendments in terms of R 565 of 27 June 2021 (reg 27(1) deals with the transportation of cargo).

9 hereafter “the African Principles”. See Neels “The African Principles on the Law Applicable to International Commercial Contracts—a first drafting experiment” 2020 *Uniform Law Review/Revue de droit uniforme*

The Impact of Covid-19 on the Future of Law

The following example may be used to illustrate the various approaches to the applicability of overriding mandatory rules:

ABC is a company incorporated, domiciled and resident in Ethiopia; its central administration and principal place of business are in Ethiopia. DEF is a company incorporated, domiciled and resident in Mauritius; its central administration and principal place of business are in Mauritius. ABC (seller) and DEF (buyer) concluded a contract of purchase and sale in respect of 100 000 bags of roasted coffee beans of *arabica* quality and grown in the Ethiopian highlands by an established cooperation of small farmers. The contract was negotiated and concluded in Mauritius. In terms of the FOB¹⁰ contract, drafted in English, the goods had to be delivered on a ship in the harbour of Massawa (Eritrea), to be transported by the Mediterranean Shipping Company to Durban harbour in South Africa. Payment, by electronic funds transfer from DEF's account in Delhi, India, had to take place in American dollar into ABC's account at GHI Bank located in the Dubai International Financial Centre (Dubai, United Arab Emirates).

The example will be employed in paragraphs 4.2–4.5 to illustrate the difference in outcome, if any, between the application of article 11 of the African Principles and article 9 of the Rome I Regulation on the Law Applicable to Contractual Obligations of 2008¹¹ in respect of overriding mandatory rules in the form of COVID regulations or similar legislative

426. Also see Neels and Fredericks “An introduction to the African Principles of Commercial Private International Law” 2018 *Stell LR* 347 and Neels and Fredericks “The African Principles of Commercial Private International Law and the Hague Principles” in Girsberger, Kadner Graziano and Neels (gen eds) (n 1) 239.

10 Free On Board. See International Chamber of Commerce *Incoterms 2020. ICC Rules for the Use of Domestic and International Trade Terms* (2019) 103–111.

11 hereafter “the Rome I Regulation”. For introductions to overriding mandatory rules in the private international law of the European Union, see Kadner Graziano, Garcimartín Alférez and Van Calster “European Union perspectives on the Hague Principles” in Girsberger, Kadner Graziano and Neels (gen eds) (n 1) 749 767–774 and Wilderspin “Overriding mandatory provisions” in Basedow, Rühl, Ferrari and De Miguel Asensio (eds) *Encyclopedia of Private International Law II* (2017) 1330.

instruments. Article 9 of the Rome I Regulation¹² was the most important model in the drafting of article 11 of the African Principles.

2 Regional, supranational and international instruments

Instruments (including guides and proposed instruments) taken into account for the purposes of this contribution are (in chronological order): the *Convention sur la loi applicable aux ventes à caractère international corporels* of 1955;¹³ the Rome Convention on the Law Applicable to Contractual Obligations of 1980;¹⁴ the Hague Convention on the Law Applicable to Contracts for the International Sale of Goods of 1986;¹⁵ the Basel Resolution on the Autonomy of the Parties in International Contracts Between Private Persons or Entities of the *Institut de droit international* of 1991;¹⁶ the Inter-American Convention on the Law Applicable to International Contracts of 1994;¹⁷ the Rome I Regulation; the Hague Principles on Choice of Law in International Commercial Contracts of 2015;¹⁸ title 4 of the *Projet de texte uniforme portant droit general des obligations dans l'espace OHADA* of 2015;¹⁹ the (proposed) Asian Principles of Private International Law of 2018;²⁰ the Guide on the Law Applicable to International Commercial Contracts in the Americas of 2019, compiled by the Organization of American

12 Cf a 3(3), 3(4), 6(2) and 8(1) on provisions which “cannot be derogated from by agreement”. Also see a 11(5)(b). On mandatory versus overriding mandatory provisions, see Kuipers (n 1) 63–65.

13 hereafter “the 1955 Hague Sales Convention”.

14 hereafter “the Rome Convention”.

15 hereafter “the 1986 Hague Sales Convention”.

16 hereafter “the Basel Resolution”. See www.idi-iil.org (17-11-2021) (rapporteur Jayme).

17 hereafter “the Mexico City Convention”. The convention is also known as the Mexico Convention; it is the product of the Fifth Inter-American Specialized Conference on Private International Law (CIDIP-V).

18 hereafter “the Hague Principles”.

19 hereafter “the OHADA Preliminary Draft Uniform Act”. OHADA is the abbreviation for the *Organisation pour l'harmonisation en Afrique du droit des affaires* or the Organization for the Harmonization of African Business Law. See www.ohada.org (17-11-2021).

20 hereafter “the Asian Principles”. See Chen and Goldstein “The Asian Principles of Private International Law: objectives, contents, structure and selected topics on choice of law” 2017 *Journal of Private International Law* 411 and Takasugi and Elbalti “The Asian Principles of Private International Law and the Hague Principles” in Girsberger, Kadner Graziano and Neels (gen eds) (n 1) 399.

States;²¹ and the proposed African Principles, the first draft of which appeared in 2021.²²

The instruments drafted under the auspices of the Hague Conference on Private International Law are of an international nature. The 1955 and 1986 Hague Sales Conventions are public-law international conventions on private international law of contract, specifically international contracts of sale. The 1986 convention never entered into force,²³ but the 1955 convention is in effect in one African country (Niger), five European Union countries (Denmark, Finland, France, Italy and Sweden) and two other European countries (Norway and Switzerland).²⁴ When there is a conflict between the 1955 Hague Sales Convention and the Rome I Regulation, the international convention prevails.²⁵ The Hague Principles came into effect on 19 March 2015 by consensus among all the member states of the Hague Conference.²⁶ The instrument is not binding on them but may be used as a model for national, regional, supranational or international instruments;²⁷ it may also be employed to interpret, supplement and develop rules of private international law²⁸ by courts and arbitral tribunals.²⁹ The *Institut de droit international*, established in 1873, is an independent institute which contributes to the development of public and private international law, *inter alia* through non-binding instruments called “resolutions”. The institute issued the Basel Resolution on party autonomy in private international law of contract in 1991.³⁰

21 hereafter “the OAS Guide”. See Organization of American States *Guide on the Law Applicable to International Commercial Contracts in the Americas* (2019). Also see Moreno Rodríguez “The OAS Guide and the Hague Principles” in Girsberger, Kadner Graziano and Neels (gen eds) (n 1) 931.

22 Volume 25 of the *Uniform Law Review/Revue de droit uniforme* (see n 9) appeared in 2021.

23 See the relevant status table at www.hcch.net (17-11-2021).

24 See the relevant status table at www.hcch.net (17-11-2021).

25 Rome I Regulation, a 25(1).

26 See Hague Conference on Private International Law *Principles on Choice of Law in International Commercial Contracts* (2015) (official commentary on the Hague Principles) “Foreword” and “Development of the Principles on Choice of Law in International Commercial Contracts” (no page numbers).

27 preamble par 2.

28 preamble par 3.

29 preamble par 4. Cf the preamble to the UNIDROIT Principles on International Commercial Contracts (2016).

30 See (n 16).

The Rome I Regulation is a supranational instrument of private international law of contract; it is applicable in all European Union countries except Denmark.³¹ Although it no longer applies in the United Kingdom, most of the text remains applicable there today by interim legislation.³² The OHADA Preliminary Draft Uniform Act, when it enters into force, will also be a supranational instrument, as uniform acts adopted unanimously by the countries present and voting at a meeting of the OHADA Council of Ministers are directly applicable in all member states.³³

The Rome Convention is a regional international convention that was open for signature by countries that were member states of the European Economic Community.³⁴ The convention has been superseded by the Rome I Regulation for contracts concluded as from 17 December 2009.³⁵ The text of the Rome Convention has been used as the basis for national legislation in, for example, Japan, South Korea and Turkey; it also influenced the private international law of contract in China, Taiwan, Tunisia and Vietnam.³⁶ The Mexico City Convention is a regional treaty in force only between Mexico and Venezuela.³⁷ However, the convention has influenced private international law in other Latin American countries, either directly (for instance, in the Dominican Republic and Paraguay)³⁸ or indirectly (Brazil would be a good example).³⁹ Furthermore, it remains, due to its experimentation with a teleological substantive-law approach to private international law, “a point of reference in contemporary conflicts discourse”.⁴⁰ Academic models of a regional nature include the Asian Principles

31 On the special position of Denmark, see Kadner Graziano, Garcimartín Alférez and Van Calster (n 11) 748 with n 3.

32 See n 108.

33 Neels “The role of the Hague Principles on Choice of Law in International Commercial Contracts in the revision of the Preliminary Draft Uniform Act on the Law of Obligations in the OHADA region” 2018 *THRHR* 464 466–467.

34 a 28(1).

35 a 28 of the Rome I Regulation.

36 See the references in Girsberger, Kadner Graziano and Neels (n 1) 121–122.

37 Girsberger, Kadner Graziano and Neels (n 1) 125.

38 See the references in Girsberger, Kadner Graziano and Neels (n 1) 125.

39 See Girsberger, Kadner Graziano and Neels (n 1) 125; Gama, Tiburcio and Albuquerque “Brazilian perspectives on the Hague Principles” in Girsberger, Kadner Graziano and Neels (gen eds) (n 1) 984 998.

40 Neels “Choice of law in the revision of the Mexico City Convention—inspirations from the Hague Principles and beyond” 2018 *THRHR* 661 662. See *eg* the numerous references to the Mexico City Convention

(intended for Asian jurisdictions)⁴¹ and the OAS Guide (intended for countries in North, Central and South America),⁴² as well as the African Principles, discussed immediately below.

The formulation of the African Principles on the Law Applicable to International Commercial Contracts is a project of the Research Centre for Private International Law in Emerging Countries at the University of Johannesburg. The African Principles are envisaged to become a regional model law, or even a binding regional convention, for the member states of the African Union.⁴³ They could also be considered by regional economic integration organisations, for instance EAC,⁴⁴ ECOWAS,⁴⁵ OHADA⁴⁶ and SADC,⁴⁷ or by national legislators on the African continent.⁴⁸

3 Definition and nature of overriding mandatory rules

Although the Mexico City Convention contains provisions on (overriding) mandatory rules,⁴⁹ it does not provide a definition thereof. Article 9(1) of the Rome I Regulation defines “overriding mandatory rules” as follows:

“Overriding mandatory provisions are provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation.”

The definition is adopted in article 568(2) of the OHADA Preliminary Draft Uniform Act. Article 11(1) of the proposed African Principles

in the AOS Guide (n 21) and in the official commentary on the Hague Principles (n 26).

41 Takasugi and Elbalti (n 20) 399.

42 See www.oas.org (17-11-2021) for a list of member states.

43 See www.au.int (17-11-2021).

44 East African Community. See www.eac.int (17-11-2021).

45 Economic Community of West African States. See www.ecowas.int (17-11-2021).

46 See (n 19).

47 Southern African Development Community. See www.sadc.int (17-11-2021).

48 See the sources in (n 9).

49 See a 11.

copies the Rome I definition with some minor linguistic and contextual changes:

“Overriding mandatory provisions are rules of law which are regarded as crucial by a country for safeguarding its public interests (including its political, social or economic organisation) to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this instrument.”

In the context of the application of the *lex fori*'s rules and principles in this regard, article 11(1) of the Hague Principles refers to “overriding mandatory rules” as provisions “which apply irrespective of the law chosen by the parties”, as this instrument deals only with choice of law in international commercial contracts and not with all cases where an applicable law has to be determined.⁵⁰ It may be noted that the Basel Resolution, although it is also limited to situations of choice of law, nevertheless refers to the provisions of the *lex fori* “which must be applied to the situation irrespective of the law applicable to the contract”.⁵¹ The Rome Convention (which makes provision for situations where there is a choice of law and where there is no such choice) also refers to (overriding) mandatory rules as “those rules [that] must be applied whatever the law applicable to the contract”.⁵²

COVID regulations would definitely qualify as rules of law that are crucial to safeguard a country's public interests to such an extent that they must apply irrespective of the legal system *prima facie* applicable to the contract.⁵³ The question could be asked whether the definitions above should not include a specific reference to health issues, as a pandemic (as has become clear) can have a devastating effect on society as a whole. One example in this regard would be article

50 Cf a 11

51 a 9(1).

52 a 7(1).

53 Piovesani argues that the qualification by the national legislator of certain legislation as consisting of “overriding mandatory rules” is not conclusive for the purposes of a 9(1) of the Rome I Regulation. See Piovesani “Italian *ex lege* qualified overriding mandatory provisions as a response to the ‘COVID-19 epidemiological emergency’” 2021 *Praxis des internationalen Privat- und Verfahrensrecht* 401. Also see Ungerer “Explicit legislative characterisation of overriding mandatory provisions—EU directives seeking for but struggling to achieve legal certainty” 2022 *Journal of Private International Law* 399.

10 of the 2012 Interpretation by the Supreme People's Court⁵⁴ of the 2010 Private International Law Act of China,⁵⁵ which specifically lists provisions on public health as an example of (overriding) mandatory rules of the forum under article 4 of the act.⁵⁶

The notion of overriding mandatory rules may be regarded as the positive embodiment of the role of public policy in private international law. Rules of certain legal systems, as will be indicated, are applicable on the basis of public policy irrespective of whether or not these legal systems in principle apply to the particular situation. The negative role of public policy in private international law is given effect to by the exclusion of foreign law when the content thereof, or the result of the application *in casu*, clearly infringes on public policy.⁵⁷ Article 12 of the proposed African Principles provides for the negative role of public policy as follows: "The application of a provision of the law applicable in terms of this instrument may be refused only if such application would be manifestly incompatible with fundamental notions of the public policy of the forum." The provision is similar to that in article 16 of the Rome Convention, article 18 of the 1986 Sales Convention, article 18 of the Mexico City Convention, article 21 of the Rome I Regulation, article 11(3) of the Hague Principles,⁵⁸ article 569 of the OHADA Preliminary Draft Uniform Act and article 2(5) of the Asian Principles.⁵⁹ It may be noted here that the 1955 Hague Sales Convention does not contain a provision on (overriding) mandatory

54 See He "Interpretation I of the Supreme People's Court on Certain Issues Concerning the Application of the 'Law of the People's Republic of China on Application of Law to Foreign-related Civil Relations'" 2014 *The Chinese Journal of Comparative Law* 175.

55 Law of the People's Republic of China on the Laws Applicable to Foreign-related Civil Relations of 2010 (for another translation of the title of the legislation, see n 54).

56 See Tsang "From coronation to coronavirus: COVID-19 *force majeure* and private international law" 2020 *Fordham International Law Journal* 187 211–212. Cf the Dutch proposal during the negotiations leading to the Rome I Regulation—McParland *The Rome I Regulation on the Law Applicable to Contractual Obligations* (2015) 690.

57 See Girsberger, Kadner Graziano and Neels (n 1) 112; Kuipers (n 1) 65–67; Neels and Fredericks "The various roles of public policy in private international law: exclusion, inclusion and reform on the basis of constitutional values" in Hugo and Möllers (eds) *Legality and Limitation of Powers. Values, Principles and Regulations in Civil Law, Criminal Law, and Public Law* (2019) 311 and Nygh (n 1) 206–208.

58 Cf a 11(4)–(5).

59 Cf a 26 of the Rome II Regulation on the Law Applicable to Non-contractual Obligations (2007) (hereafter "the Rome II Regulation").

rules but determines that the law determined by the convention “may be excluded on a ground of public policy”.⁶⁰

4 Potentially applicable legal systems

4.1 Introduction

In this section, the legal systems that may play a role in respect of overriding mandatory rules are considered, namely the law applicable to the contract, the law of the forum, the law of the country of performance and, more generally, the law of any other country.⁶¹

4.2 The law applicable to the contract

None of the instruments under discussion, except the African Principles, expressly state the generally accepted principle⁶² that the overriding mandatory rules of the proper law of the contract, and indeed all the rules and principles of this legal system, would, in

60 1955 Hague Sales Convention, a 6.

61 See, in general, Tsang (n 56) 211–215; cf Khanderia and Peari “Party autonomy in the choice of law under Indian and Australian private international law: some reciprocal lessons” 2020 *Commonwealth Law Bulletin* 711 733–737. See Peari (n 1) 218 on the overriding mandatory rules of a state that would have applied in the absence of law. Cf a 11(4) of the Hague Principles; HCCH (n 26) 79; Dickinson “Oiling the machine: overriding mandatory provisions and public policy in the Hague Principles on Choice of Law in International Commercial Contracts” 2017 *Uniform Law Review/Revue de droit uniforme* 406 and Girsberger, Kadner Graziano and Neels (n 1) 114–115. On the difference between the application or the consideration of a legal system, see Dickinson “United Kingdom perspectives on the Hague Principles: beyond the European Union” in Girsberger, Kadner Graziano and Neels (gen eds) (n 1) 892 909–911 and *Republik Griechenland v Grigorios Nikiforidis* C-135/15 (18 Oct 2016) EU:C:2016:774; cf Calliess *Rome Regulations. Commentary* (2015) 259–261. In the text below, reference will only be made to “application” but “consideration” must be deemed to be included. Cf Hague Principles, a 11(2), (4) and (5).

62 See, eg, Briggs *Private International Law in English Courts* (2014) 590–592; Lord Collins of Mapesbury (gen ed) *Dicey, Morris and Collins on the Conflict of Laws II* (2012) 1835; Forsyth *Private International Law. The Modern Roman-Dutch Law including the Jurisdiction of the High Courts* (2012) 344–345; Girsberger, Kadner Graziano and Neels (n 1) 113; Lando and Nielson “The Rome I Regulation”, working paper, Bergen meeting of GEDIP (2008), www.gedip-egpil.eu/en/documents (17-11-2021) par 14; McParland (n 56) 705 n 140; Mills (n 1) 477–478 and Nygh (n 1) 213–215 and 217.

principle,⁶³ be applicable.⁶⁴ The Basel Resolution of the *Institute de droit international* comes closest to formulating the relevant starting point by providing in article 9(1) that “[t]he chosen law shall apply without prejudice to mandatory provisions⁶⁵ of the law of the forum” and, in article 9(3), that the (overriding) mandatory provisions of a third legal system (other than the chosen law and the *lex fori*) “can only prevent the chosen law from being applied” in strictly defined circumstances, as discussed in paragraphs 4.4 and 4.5. However, article 11(2) of the proposed African Principles formulates the default position explicitly as follows: “The overriding mandatory rules of the law governing the contract by virtue of this instrument are in principle applicable.” In a working paper drafted by Lando and Nielson for the purposes of the Bergen meeting of the *Groupe Européen de droit international privé*⁶⁶ in 2008, it is stated that such a provision would not be necessary:

“However, it seems obvious that such a provision is superfluous, as a reference to a national law under the ordinary choice of law rules refers [to] all the rules of the *lex causae*, including the internationally mandatory provisions, which, by definition, are important parts of the *lex causae*. This follows logically from the nature of the ordinary choice of law rules, and the fact that neither Rome I, Article 9 nor [Rome I, Article] 12 excludes the application of the internationally mandatory provisions of the *lex causae*.”⁶⁷

Nevertheless, it is suggested that article 11(2) of the proposed African Principles provides for greater clarity in this regard, which is particularly useful in an instrument intended to be applied in emerging legal systems. A second choice for drafting purposes would be to adopt the style of formulation used in the Basel Resolution.

The law applicable to the contract (civil-law parlance) or the proper law of the contract (common-law terminology) is, in most legal systems, in the first place determined by a choice of law by the

63 except in instances of infringement of public policy on an international level: see par 3 *in fine*.

64 African Principles, a 11(2).

65 The mandatory rules that are intended are those “which must be applied to the situation irrespective of the law applicable to the contract” (a 9(1)).

66 GEDIP or the European Group for Private International Law (EGPIL).

67 Lando and Nielson (n 62) par 14.

parties.⁶⁸ Party autonomy is recognised in both the Rome I Regulation⁶⁹ and the African Principles.⁷⁰ If the parties in the example in paragraph 1 chose English law to govern their contract, the overriding mandatory rules of English law would apply (unless in conflict with the forum's public policy), including the COVID regulations applicable in the United Kingdom (or England and Wales). However, the scope of these regulations is probably limited to the import into, and export from, the United Kingdom, and would, therefore, not be relevant in the given example.

The rules of private international law that determine the applicable law in the absence of a choice of law differ among jurisdictions. In the context of a contract of sale, the most popular options seem to be the application of the law of the habitual residence of the seller or the law of the country of delivery (the characteristic performance).⁷¹ If the Rome I Regulation or the African Principles would be applicable to the example provided in paragraph 1, in the absence of a choice of law, the proper law of the contract would typically be the law of Ethiopia as the law of the country of the habitual residence of the seller.⁷² In terms of article 11(2) of the African Principles, the overriding mandatory rules of the law of Ethiopia would then in principle be applied, unless in conflict with the forum's public policy. The Rome I Regulation does not contain an express provision in this regard but it is generally accepted that the overriding mandatory rules of the law applicable to the contract must be applied as part of that law.⁷³ The overriding mandatory rules referred to could include COVID regulations related to the importation and exportation of goods. *In casu* the Ethiopian COVID regulations pertaining to the export from Ethiopia would *prima facie* be applicable.

4.3 The law of the forum

The Rome I Regulation determines that none of its provisions “shall restrict the application of the overriding mandatory provisions of the law of the forum”.⁷⁴ Comparable provisions are found in the

68 Girsberger, Kadner Graziano and Neels (n 1) 33–42 and 52–68.

69 Rome I Regulation, a 3.

70 African Principles, a 3–4.

71 Girsberger, Kadner Graziano and Neels (n 1) 126.

72 African Principles, a 6(1)(a); Rome I Regulation, a 4(1)(a).

73 See (n 62).

74 a 9(2).

Rome Convention,⁷⁵ the Basel Declaration⁷⁶ and the OAS Guide.⁷⁷ The African Principles state that “[e]ffect may be given to the overriding mandatory rules of ... (a) the law of the forum”.⁷⁸

Article 11(1) of the Hague Principles subscribes to the same idea, combining it with a definition of overriding mandatory rules: “These Principles shall not prevent a court from applying overriding mandatory provisions of the law of the forum which apply irrespective of the law chosen by the parties.” A similar formulation is employed in the 1986 Hague Sales Convention, although provision is also made for an objective proper law of contract: “The Convention does not prevent the application of those provisions of the law of the forum that must be applied irrespective of the law that otherwise governs the contract.”⁷⁹

Nevertheless, once classified as an overriding mandatory rule of the forum according to the relevant definition (for instance, of article 9(1) of the Rome I Regulation or article 11(1) of the African Principles), such a rule will necessarily be applied. This is emphasised in the Mexico City Convention (“the provisions of the law of the forum shall necessarily be applied”),⁸⁰ the OHADA Preliminary Draft Uniform Act (“[t]he provisions of this Title may not affect”)⁸¹ and the Asian Principles (“are to be applied”).⁸²

Returning to the example above,⁸³ an Ethiopian, Eritrean or South African court would apply the overriding mandatory rules of Ethiopian, Eritrean or South African law, respectively. These would include the local COVID regulations pertaining to the import and/or export of goods. In an Ethiopian court, the COVID regulations of Ethiopia would be applicable in respect of exportation. In an Eritrean court, the COVID regulations of Eritrea would be applicable in respect of importation into, and exportation from, Eritrea. In a South African court, the South African COVID regulations would be applicable in respect of importation. A Mauritian court could in principle also apply

75 a 7(2).

76 a 9(1).

77 (n 21) 184.

78 a 11(3)(a). The reference to par 3 and 4 in a 11(5) of the African Principles should perhaps be limited to a 3(b) and 4.

79 a 17.

80 a 11.

81 a 568(1).

82 a 2.8. Also see a 9 of the Basel Resolution. *Cf* a 11(1) of the Hague Principles and a 17 of the 1986 Hague Sales Convention.

83 par 1.

its own COVID regulations, but they would probably not make provision for the current situation, which would then fall outside their scope.⁸⁴

4.4 The law of the country of performance

The 1986 Hague Sales Convention,⁸⁵ the Asian Principles⁸⁶ and the OHADA Preliminary Draft Uniform Act⁸⁷ do not make provision for the application of the overriding mandatory rules of the country of performance. The overriding mandatory rules of the country of performance could fall into the category of the “overriding mandatory provisions of another law” or “the mandatory provisions of the law of another State with which the contract has close ties”, as referred to in article 11(2) of the Hague Principles and article 11 of the Mexico City Convention, respectively. However, neither the Hague Principles nor the Mexico City Convention provide any guidance in this regard, as the issue is assigned to the private international law of the forum. Article 11(2) of the Hague Principles reads: “The law of the forum determines when a court may or must apply or take into account overriding mandatory provisions of another law.” Article 11 of the Mexico City Convention merely adds a minimum requirement in this regard: “It shall be up to the forum to decide when it applies the mandatory provisions of the law of another State with which the contract has close ties.”⁸⁸

Likewise, the Rome Convention does not refer to the overriding mandatory rules of the law of the country of performance; nevertheless, those may be included under the notion in article 7(1) of “the mandatory rules of the law of another country with which the situation has a close connection”, which will be discussed below.⁸⁹ However, it may be beneficial to distinguish between the overriding mandatory rules of the law of the country of performance and the notion of the overriding mandatory rules of another legal system closely connected to the contract, as the country of performance is invariably such a legal system of close connection. Moreover, the overriding mandatory rules of another country, so it is suggested in paragraph 4.5, should be applied only under exceptional circumstances.

84 But see the example in par 4.5.

85 a 17.

86 a 2.8.

87 a 568. Cf Rome II Regulation, a 16.

88 Cf OAS Guide (n 21) 184.

89 See par 4.5.

The Impact of Covid-19 on the Future of Law

Article 9(3) of the Rome I Regulation provides as follows:

“Effect may be given to the overriding mandatory provisions of the law of the country where the obligations arising out of the contract have to be or have been performed, in so far as those overriding mandatory provisions render the performance of the contract unlawful. In considering whether to give effect to those provisions, regard shall be had to their nature and purpose and to the consequences of their application or non-application.”

Article 11(3)(b) of the proposed African Principles provides: “Effect may be given to the overriding mandatory rules of—... (b) the law of the country of the agreed place of any substantial performance under the contract (including the country of commencement, continuation or completion of such performance).” This provision must be read with article 11(5), which provides: “In considering whether to give effect to any of the overriding mandatory rules mentioned in paragraph (3) ..., regard must be had to their nature and purpose and to the consequences of their application or non-application.”

The Rome I Regulation and the African Principles agree that a court should have the discretion to apply or not to apply the overriding mandatory rules of the law of the country of performance, having regard to their nature and purpose and to the consequences of their application or non-application.⁹⁰ However, the Rome I Regulation is not clear on various aspects of the notion of “the law of the country of performance”. Firstly, article 9(3) refers to the law of the country where the performance had to take place in terms of the contract and the law of the country where the performance indeed took place,⁹¹ but some leading authors are of the opinion that only the law of the agreed place of performance was intended and should be considered for application.⁹² Secondly, it is unclear whether “the law of the country of performance” refers only to the country of the contractual performance (in respect of delivery under a FOB⁹³ contract,⁹⁴ this would be the country where the goods must be delivered on the ship—

90 See, *eg*, Calliess (n 61) 260; McParland (n 56) 711 and Rogerson *Collier’s Conflict of Laws* (2014) 325.

91 Also see Calliess (n 61) 257 and McParland (n 56) 706–707.

92 Collins (n 62) 1836.

93 See (n 10).

94 as in the example in par 1.

Eritrea in the example),⁹⁵ or whether it also includes the countries where the various steps involved in the broader delivery process must take place (that is, Ethiopia, Eritrea and South Africa). Thirdly, it is not clear whether “the law of the country of performance” refers to the characteristic performance only (delivery, in a contract of sale) or also to the monetary obligation (payment). Surprisingly, the second and third matters are not even mentioned by many of the leading commentaries on the instrument. However, the authors Plender and Wilderspin deal with the issues and reach conclusions that are broadly in line with the text of article 11(3)(b) of the African Principles.⁹⁶

The African Principles, in this sub-article, specifically provide for the application of “the law of the country of the agreed place of any substantial performance under the contract (including the country of commencement, continuation or completion of such performance)”. The law of the country of the characteristic performance (delivery under a contract of sale) and the law of the country of payment are, therefore, included, both constituting substantial performances. Furthermore, the law of substantial performance comprises the countries of its commencement, continuation and completion.

Under both instruments, the overriding mandatory rules of the law of Eritrea may, therefore, be considered for application in respect of delivery. Under the African Principles, the overriding mandatory provisions of the law of Ethiopia, Eritrea and South Africa may be considered for application in respect of delivery. It is not clear whether application of the law of Ethiopia or South Africa is allowed under the Rome I Regulation. In respect of payment, the laws of India and the Dubai International Financial Centre may be applied under the African Principles; it is not clear whether these systems could play any role under the Rome I Regulation. The African Principles, therefore, provide more clarity on all counts.

4.5 The law of other countries

The 1986 Hague Sales Convention,⁹⁷ the Asian Principles⁹⁸ and the OHADA Preliminary Draft Uniform Act⁹⁹ do not make provision for

95 See n 94 and ICC (n 10) 103 and 106—clauses A1 and A2 (cf clause B2) of the FOB contract.

96 Wilderspin Plender and Wilderspin *The European Private International Law of Obligations* (2015) 363–371.

97 a 17.

98 a 2.8.

99 a 568. Cf Rome II Regulation, a 16.

the application of the overriding mandatory rules of any other law than the country of the forum (and, unexpressed, the proper law of the contract).¹⁰⁰ As has been remarked in paragraph 4.4, the Hague Principles¹⁰¹ and the Mexico City Convention¹⁰² provide no guidance on the application of the overriding mandatory rules of any other country, as this issue is entrusted to the private international law of the forum. The Mexico City Convention merely provides the minimum requirement of a close connection with the relevant law.¹⁰³ The Rome I Regulation provides only for the application of the law of the country of performance in addition to the *lex fori* (and the proper law).¹⁰⁴

However, the Rome Convention provides in article 7(1) for the application of the (overriding) “mandatory rules of the law of another country with which the situation has a close connection, if and in so far as, under the law of the latter country, those rules must be applied whatever the law applicable to the contract”. There is no separate provision for the application of the law of the country of performance; the latter is one of “the law[s] of another country” for the purposes of article 7(1). The court has a discretion to apply or not to apply the law of another country, as the subsection provides that “effect may be given” to such (overriding) mandatory rules.¹⁰⁵ In exercising this discretion, “regard shall be had to ... [the] nature and purpose” of these rules “and to the consequences of their application or non-application”.¹⁰⁶

The United Kingdom strongly objected to incorporating article 7(1) of the Rome Convention into the Rome I Regulation on the basis of legal certainty. The current formulation of article 9(3) of Rome I was a compromise in order to convince the United Kingdom to opt in to membership of the Regulation.¹⁰⁷ Of course, the United Kingdom is no longer a member country of the European Union.¹⁰⁸ Nevertheless, the

100 See par 4.2 and 4.3.

101 a 11(2); cf a 11(5).

102 a 11. Cf OAS Guide (n 21) 184.

103 See a 11: “the law of another State with which the contract has close ties”.

104 a 9(2)–(3).

105 a 7(1).

106 a 7(1).

107 See on the relevant legislative history, McParland (n 56) 684–692 and 697–705.

108 The text of the Rome I Regulation, subject to some minor amendments, continues to apply in the United Kingdom: see The Law Applicable to Contractual Obligations and Non-contractual Obligations (Amendment etc) (EU Exit) Regulations SI 2019/834, issued under s 8 of the European Union (Withdrawal) Act, 2018. See, in general, on the influence of Brexit

application of the overriding mandatory rules of the law of another country (besides the *lex fori*, the proper law of the contract and the *lex loci solutionis*) remains a strongly contested issue in private international law of contract.¹⁰⁹ Accepting such a possibility testifies to “an extensive understanding of the principle of comity”,¹¹⁰ for which there indeed already seems to be some support in African private international law.¹¹¹ Article 11(4)–(5) of the African Principles reflect an attempt to formulate the middle ground, making provision for the application of the overriding mandatory rules of other countries but under strict preconditions only, which are provided in italics in the quotation below:

“(4) *In exceptional circumstances*, the overriding mandatory rules of another country may be applied, provided that such law has a *manifestly* close connection to the particular situation.

(5) In considering whether to give effect to any of the overriding mandatory rules mentioned in paragraph (3) or (4),¹¹² regard must be had to their nature and purpose and to the consequences of their application or non-application.”

It is not easy to provide an example in the context of COVID regulations of when the application of the law of another country would be indicated, but article 11(4), read with section 11(5), leaves the door open for such a possibility in the circumstances of a particular case, if the court is clearly so convinced. One could think of the potential

on private international law: Beaumont “Some reflections on the way ahead for UK private international law after Brexit” 2021 *Journal of Private International Law* 1; Bouwers “Brexit and the implications for tacit choice of law in the United Kingdom” 2018 *Obiter* 728 and Mortensen “Brexit and private international law in the Commonwealth” 2021 *Journal of Private International Law* 18.

109 For South Africa, see the opposing views in literature as referred to in Neels “South African perspectives on the Hague Principles” in Girsberger, Kadner Graziano and Neels (gen eds) (n 1) 350 369 n 172.

110 Calliess (n 61) 260.

111 See Dias and Nordmeier “Angolan and Mozambican perspectives on the Hague Principles” in Girsberger, Kadner Graziano and Neels (gen eds) (n 1) 265 272; Elbalti “Tunisian perspectives on the Hague Principles” in Girsberger, Kadner Graziano and Neels (gen eds) (n 1) 374 391–392; Neels (n 109) 369 n 172; Zaher “Moroccan perspectives on the Hague Principles” in Girsberger, Kadner Graziano and Neels (gen eds) (n 1) 336 346.

112 See (n 78).

application of a COVID regulation from Mauritius, where Mauritian law is the law of the habitual residence of the purchaser but not the *lex loci solutionis* nor the *lex fori* or the proper law—which may well be the scenario sketched in paragraph 1. If the Mauritian COVID regulation were to prohibit any transactions (including delivery or payment) by Mauritian companies which involve the exportation or importation of certain goods (for instance, alcoholic beverages), and the regulation is not limited to the importation *into* or exportation *from Mauritius*, but applies extraterritorially, the regulation could be applied under article 11(4) of the African Principles, if deemed appropriate in the particular circumstances by a court outside Mauritius. It may perhaps be argued that there is a manifestly close link between Mauritian law and the contract of sale, as the purchaser is habitually resident in Mauritius. The court must be convinced that the circumstances are exceptional in order to justify the application of Mauritian law, for instance, the reality of the COVID pandemic and the role that the ban on alcohol may play in easing the pressure on the health systems in various countries. In this regard, one may take note of a particular phrase in the Basel Resolution—article 9(2) requires a close link between the contract and the overriding mandatory rules in dispute and also that “they further such aims as are generally accepted by the international community”.¹¹³ As will be discussed in paragraph 6, the proper law of the contract (English or Ethiopian law) will probably determine what the role of the Mauritian COVID regulation is in the determination of the Mauritian company’s liability for not making payment (unless the contractual consequences are spelled out in the regulation).

5 Cumulation of overriding mandatory rules

The concept of “the cumulation of overriding mandatory rules” refers to the possibility that the overriding mandatory rules of more than one legal system may simultaneously be applicable,¹¹⁴ for instance those

113 Cf the use by Lando and Nielson (n 62) of the notion of “internationally mandatory provisions” (par 14).

114 Cf Calliess (n 61) 258, with references to German literature. On cumulation and gap in the context of the classification of non-unilateral conflicts rules, see Bennett “Cumulation and gap: are they systemic defects in the conflict of laws?” 1988 *SALJ* 444; Forsyth (n 62) 76–90; Neels “Falconbridge in Africa. *Via media* classification (characterisation) and liberative (extinctive) prescription (limitation of actions) in private international law—a Canadian doctrine on safari in Southern Africa (*hic sunt leones!*); or: *semper aliquid novi Africam adferre*” 2008 *Journal of Private International Law* 167 and Neels “Characterization and limitation

of the proper law (English or Ethiopian law *in casu*) and those of the *lex fori* or *lex loci solutionis* (including Eritrean law and the law of the Dubai International Financial Centre).¹¹⁵ The provisions of the law of the forum may trump the rules of the proper law or any other law in this regard. However, the court should have a discretion to apply the *lex fori* together with the proper law and the *lex loci solutionis* or a law of close connection (if potentially applicable) in as far as they are not irreconcilable. All instruments, in as far as they make provision for the application of the law of the country of performance and/or the law of another country, are clear that the (additional) application of the overriding mandatory rules of these systems is discretionary.¹¹⁶ In this regard, the court must take into account the nature and scope of the overriding mandatory rule and the consequences of its application or non-application.¹¹⁷ While a court should always have the option to apply or not to apply the overriding mandatory rules of the potentially applicable legal systems referred to (that is, with the exception of the *lex fori*), it is incumbent that such discretion exists in the event of cumulation, which may entail a true conflict of overriding mandatory rules (the one relevant system may outlaw the importation of all alcoholic beverages while the other one makes an exception for wine). In a field as complicated as the potential application of an additional three¹¹⁸ or more¹¹⁹ legal systems, together with the law generally applicable to the contract,¹²⁰ often in a cumulative scenario (more than one legal system claims applicability), legislators on all levels (national, regional, supranational and international) would indeed be well-advised to leave much to the discretion of the court. The experiences of the courts grappling with the topic may well, in due course, lead to a further refinement of the parameters of the exercise

or liberative prescription in private international law—Canadian doctrine in the Eswatini courts (the phenomenon of dual cumulation)” 2021 *Journal of Private International Law* 361.

115 See the example in par 1.

116 Hague Principles, a 11(2) (*cf* a 11(5)); Basel Resolution, a 9(2); Rome Convention, a 7(1); Rome I Regulation, a 9(3); African Principles, a 11(3) (b) and art 11(4).

117 Basel Resolution, a 9(2); Rome Convention, a 7(1); Rome I Regulation, a 9(3); African Principles, a 11(5).

118 a 11(3)–(4): the *lex fori* and two *leges loci solutionis* (for instance, the law of the country of delivery and the law of the country of payment).

119 a 11(4).

120 See par 4.2.

of discretion in this regard.¹²¹ As the doctrine of overriding mandatory rules can be better explained from a unilateralist rather than a Savignian conflicts paradigm, American-style comparative interest or impairment analysis could provide valuable ideas in this regard.¹²² Dalhuisen provides the following useful guidance:

“[D]omestic public policy bearing on international transactions may also be evaluated for reasonableness or rationality and weighed or balanced against the public policies of other governments that may also have a legitimate interest in the international transaction [C]onduct under and effect of the international transaction on the territory of a concerned state obviously gives its government a legitimate regulatory interest but the outcome will still depend on how much conduct and effect there is on its territory and on the nature of the measures it has taken and on its measured response under standards of governmental behaviour that must be considered increasingly international as well.”¹²³

6 Effect of overriding mandatory rules on contractual liability

This contribution primarily examines which set(s) of overriding mandatory rules may be applied by a court; it does not exhaustively investigate which legal system should govern the effect of such

121 On legal development in this fashion, see Neels “Regsekerheid en die korrigerende werking van redelikheid en billikheid” 1998 *TSAR* 702, 1999 *TSAR* 256 and 477.

122 Cf Kuipers (n 1) 67–68; Nygh (n 1) 208–210 and Peari (n 1) 212–215. See, in general, Neels “An experiment in the systematization of South African conflicts rules” in Omlor (ed) *Weltbürgerliches Recht. Festschrift für Michael Martinek zum 70. Geburtstag* (2020) 529.

123 Dalhuisen *Dalhuisen on Transnational Comparative, Commercial, Financial and Trade Law I Introduction—The New Lex Mercatoria and its Sources* (2013) 327 (cf 274–279). Also see Dalhuisen *Dalhuisen on Transnational Comparative, Commercial, Financial and Trade Law II Contract and Movable Property Law* (2013) 222: “The appropriateness of applying [overriding mandatory rules] in international situations ... may depend also on proportionality and legitimacy seen from an international perspective” (contrast the discussion of overriding mandatory rules in the Rome I Regulation at 222–223); cf Lando and Nielson (n 62) par 14: “internationally mandatory provisions” and Van Rooyen *Die Kontrak in die Suid-Afrikaanse Internasionale Privaatreg* (1972) 219: “Die kernvraag is dus of die derdelandsreël redelikerwys aanspraak maak op gelding.”

overriding mandatory rules on contractual liability. The issue is not dealt with in any of the listed instruments. Two approaches may readily be envisaged, namely that the legal system of the relevant overriding mandatory rule also determines the effect on contractual liability, or that such effect is determined by the proper law of the contract (for instance, via the doctrines of initial or supervening illegality or impossibility of performance, *force majeure*, frustration or hardship).¹²⁴ A third solution that should in our opinion be considered entails that the effect on contractual liability is determined by the proper law (perhaps English law if chosen by the parties) unless the overriding mandatory rule itself (perhaps from Eritrea)¹²⁵ stipulates the effect it should have on contractual liability. The overriding mandatory COVID regulation could for instance prohibit the importation or exportation of certain goods during a certain time period and also determine that no damages may be claimed from a contractual party on the basis of the *prima facie* breach of contract due to its provisions. Such an overriding mandatory rule then (co-)determines, or at least influences, the contractual liability of the parties. Some support for the third solution may be found in article 3.3.1 of the UNIDROIT Principles of International Commercial Contracts of 2016, which is primarily a substantive rather than a conflicts instrument:

124 Cf Calliess (n 61) 259–261 and Collins (n 62) 1837–1840. See on the effect of the pandemic on domestic law of contract in the international sphere: Bahri, Zhou and Boklan *Rethinking, Repackaging, and Rescuing World Trade Law in the Post-pandemic Era* (2021); Eidenmüller, Enriques, Helleringer and Van Zwieten *COVID-19 and Business Law* (2020); Khanderia “Transnational contracts and their performance during the COVID-19 crisis: reflections from India” 2020 *BRICS Law Journal* 52; Khanderia and Peari (n 61) 730–737; So, Sooksripaisarnkit and Garimella “COVID-19 in the context of the CISG: re-considering the concept of hardship and *force majeure*” 2021 *Balkan Yearbook of European and International Law 2020* (2021) 105 and Tsang (n 56) 188–207. On the influence of the pandemic on private international law of delict, see Khanderia “Identifying the applicable law in cross-border disputes on injuries caused by the COVID-19 in India: a critical analysis” 2021 *Commonwealth Law Bulletin* DOI 10.1080/03050718.2021.1894957. Also see O’Callaghan “Return travel and COVID-19 as a grave risk of harm in Hague Child Abduction Convention cases” 2022 *Journal of Private International Law* 587. See, in general, on the effect of the COVID-19 pandemic on private and commercial law, Krans and Nylund (eds) *Civil Courts Coping with COVID-19* (2021). Also see the Online Resolution of the Institute of International Law/*Institut de droit international* on Epidemics, Pandemics and International Law (2021), www.idi-iil.org (17-11-2021).

125 See the example in par 1.

“(1) Where a contract infringes a mandatory rule, whether of national, international or supranational origin,¹²⁶ ... the effects of that infringement upon the contract are the effects, if any, expressly prescribed by that mandatory rule.

(2) Where the mandatory rule does not expressly prescribe the effects of an infringement upon a contract, the parties have the right to exercise such remedies under the contract as in the circumstances are reasonable.”¹²⁷

7 Concluding remarks

This contribution provides a comparative study of the position of overriding mandatory rules in regional, supranational and international conflicts instruments, in particular the Rome I Regulation and the proposed African Principles. Examples pertaining to COVID regulations are used to illustrate the differences and similarities. Although strongly influenced by the corresponding provision in the Rome I Regulation, article 11 of the African Principles, so it is suggested, provides more clarity. The African Principles constitute the sole instrument which explicitly mentions that the overriding mandatory rules of the proper law of the contract are applicable in principle. The African Principles clarify that, for the purposes of the application of the law of the country of performance, any substantial performance under the contract is relevant (that is, both the characteristic and the monetary performance). The African Principles expressly include the country of commencement, continuation and completion of the performance in determining the content of the notion of the law of the country of performance. In respect of the application of the overriding mandatory rules of legal systems other than the *lex fori*, the proper law and the law

126 Article 3.3.1 here refers to a 1.4: “Nothing in these Principles shall restrict the application of mandatory rules, whether of national, international or supranational origin, which are applicable in accordance with the relevant rules of private international law.”


127 Article 3.3.1(3) list the following factors to be taken into account in this regard: the purpose of the rule which has been infringed; the category of persons for whose protection the rule exists; any sanction that may be imposed under the rule infringed; the seriousness of the infringement; whether one or both parties knew or ought to have known of the infringement; whether the performance of the contract necessitates the infringement; and the parties’ reasonable expectations. Article 3.3.1(1) constitutes the conflicts rule and a 3.3.2(2) contains substantive provisions.

1 Covid-19 regulations as overriding mandatory provisions

of the country of performance, the African Principles reflect a *via media* between the opposing positions in the Rome Convention and the Rome I Regulation: in exceptional circumstances, the overriding mandatory rules of another legal system may be applied, provided that such law has a manifestly close connection to the particular situation. Some provisional guidelines are provided on the exercise of the discretion of a court in cases of the cumulation of overriding mandatory rules, and a tentative proposal is made in respect of the legal system(s) applicable to the effect of the various overriding mandatory rules on contractual liability.



2 The impact of the Covid-19 pandemic on international trade, with specific reference to the role of trade documentation

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Abstract

In this contribution, the author explains the importance of the documents used in international trade and how they feature in payment transactions in this context. The role of different rules of the International Chamber of Commerce (ICC)—especially the Uniform Customs and Practice for Documentary Credits (UCP) and the Uniform Rules for Collections (URC)—are explained, as well as the development of companion rules by the ICC to facilitate trade digitisation—especially the electronic supplement to the UCP (the eUCP), the Uniform Rules for Bank Payment Obligations (URBPO) and the Uniform Rules for Digital Trade Transactions—are analysed. The point is made that the trade digitisation envisaged by these rules has not really taken place to a significant extent. The author then points towards two disasters that have occurred during the past two decades, namely the eruption of Eyjafjallajökull in Iceland in 2010 and the COVID-19 pandemic in 2020, as potential catalysts to speed up trade digitisation. The conclusion is that the volcanic eruption (which halted air traffic in Europe for a week causing massive delivery problems for couriers of documents with major knock-on effects for international trade) may have been a timely wake-up call, but the world soon fell

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asleep again. He concludes that the COVID-19 pandemic should not lead to the same lack of action, and that all role players should come together urgently to enable worldwide trade digitisation. He argues that this initiative should be driven by the International Chamber of Commerce.

1 Introduction: Documentary sales

Documents play an important role in international sales. Transacting over national boundaries, and often over oceans, implies remote parties—the buyer and seller—are not negotiating across a counter and payment and delivery are not immediately reciprocal. This means that the risks involved are significantly higher than in a normal domestic sale.¹ It is against this background that the documents become very important, as well as the method of payment chosen.

There are many different documents that may be important in an international sale, but four constitute the kernel. The first is the commercial invoice.² Its role is to reflect, accurately, both the goods sold and the price to be paid. In fact, a pro forma invoice often constitutes the offer leading to the eventual conclusion of the contract.³ The second is the transport document, for example, a marine bill of lading or combined transport document (multimodal-transport document).⁴ These transport documents can fulfil various purposes: they are proof of receipt of the goods; they reflect the contract of carriage; and they

1 Hugo “Payment in and financing of international sale transactions” in Sharrock (ed) *The Law of Banking and Payment in South Africa* (2016) 394–395.

2 Adodo *Letters of Credit: The Law and Practice of Compliance* (2014) 184–187; Murray, Holloway and Timson-Hunt *Schmitthoff The Law and Practice of International Trade* (2012) 88, 208–209 par 11–014; ICC Services *ICC Guide to Export/Import Global Business Standards and Strategies* (2018) par 2.3.7 fig 2.11, par 11.6.3; Van Niekerk and Schulze *The South African Law of International Trade: Selected Topics* (2011) 276.

3 ICC Services (n 2) par 2.2.2 fig 2.5.

4 For a comprehensive overview of transport documents see Murray, Holloway and Timson-Hunt (n 2) 307–338. On the development and potential future of bills of lading as part of the dynamic *lex mercatoria* see Naidoo “From the book of lading to blockchain bills of lading: Dynamic merchant tradition and private ordering” in Hutchison and Myburgh (eds) *Research Handbook on International Commercial Contracts* (2020) 223–243. See ICC Services (n 2) par 2.2.3 fig 2.8, par 11.6.2, par 15.7. See further Adodo (n 2) 187–211; Van Niekerk and Schulze (n 2) 146–164; Gutteridge and Megrah *The Law of Bankers’ Commercial Credits* (1984) 126.

2 The impact of the Covid-19 pandemic on international trade

are documents of title.⁵ Especially important is that, typically, the buyer will not be able to acquire the goods shipped from where-ever they have been delivered or warehoused, without tendering the transport document.⁶ The third is the insurance document (in the event that the seller was responsible to insure the goods),⁷ which serves to prove that the risks that needed to be insured were so insured. Finally, there can be any of several certificates, such as a certificate of quality (certifying that the goods are of the quality contracted for);⁸ a certificate of origin (establishing that the goods originate from a particular country or region);⁹ and a certificate of inspection (certifying that the goods have been inspected in some or other specific manner to ensure that they are fit for purpose).¹⁰

The documents are intended to come into possession of the buyer who needs them to satisfy itself¹¹ that the goods are in order and to obtain delivery of the goods; they also enable the buyer (who, in an international sale contract, is often not the end user or consumer of the goods) to start trading with them by selling (transferring) the documents to another buyer (although the goods may at that time still be on board of a container ship in mid-ocean).¹² This will, of course,

5 Du Toit “Aspects of the bill of lading as a document of title in the eras of the third and fourth industrial revolution” in Vrancken and Hugo (ed) *African Perspectives on Selected Marine, Maritime and International Trade Law Topics* (2020) 135 passim; Gutteridge and Megrah (n 4) 126; Van Niekerk and Schulze (n 2) 148–156.

6 ICC Services (n 2) par 15.7.1; Van Niekerk and Schulze (n 2) 151–156.

7 Murray, Holloway and Timson-Hunt (n 2) 209 par 11–015; Van Niekerk and Schulze (n 2) 277. For an example see ICC Services (n 2) par 2.3.4 fig 2.9.

8 Murray, Holloway and Timson-Hunt (n 2) 89 par 4–013.

9 Murray, Holloway and Timson-Hunt (n 2) 88 par 4–012; Van Niekerk and Schulze (n 2) 278; ICC Services (n 2) par 2.3.7 fig 2.12 (for an example).

10 Murray, Holloway and Timson-Hunt (n 2) 89–90 par 4–013; Van Niekerk and Schulze (n 2) 278; ICC Services (n 2) par 2.3.7 fig 2.13 (for an example).

11 In the type of transaction one typically encounters in this context, buyers and sellers are more likely to be companies than individuals—hence I prefer “it” and “itself” to “he, him or himself” and “she, her and herself”.

12 This has been the position since early times as is evident from the recognition of the delivery of a bill of lading being one of the symbolic forms of delivery. See Du Toit (n 5) 158–9 who questions the accuracy of this description and refers with approval to Carey Miller “Transfer of ownership” in Zimmermann and Visser (eds) *Southern Cross—Civil Law and Common Law in South Africa* (1996) 727–741 who regards it as “not so much symbolic delivery as the only appropriate means of dealing with the goods in transit”. To be transferable bills of lading need to be “negotiable” bills of lading.

only be possible if the documents themselves are in order. It stands to reason that a claused bill of lading (mentioning, for example, some strange seepage from a container)¹³ or a quality certificate raising concerns about the quality of the goods, or an insurance document showing that the goods have not been insured against some or other critical peril, could make it practically impossible for the buyer to trade with the goods by transferring the documents (even through the goods themselves may actually be in perfect condition).

In an open-account payment, the seller simply sends (typically by courier) the documents to the buyer and trusts that the buyer will pay on the agreed date. Banks play no role apart from processing payment.¹⁴ The seller is accordingly exposed to the risk of losing the goods and also not being paid. Hence, this form of payment implies strong trust mostly derived from a long-standing trade relationship between the buyer and the seller.¹⁵

The risk faced by the seller in an open-account payment is addressed in two other important payment methods, in which the documents play a central role, namely, documentary collections and documentary credits (letters of credit). In the case of a documentary collection, the documents move from the seller to its bank (the remitting bank), and from the remitting bank to the collecting bank (in the buyer's country) in accordance with a series of mandates. The collecting bank informs the buyer that it can come and collect the documents from it (and thereby gain access to the goods) but only against payment (in a documents-against-payment (DP) collection)¹⁶ or against acceptance of a trade bill drawn by the seller on the buyer (in a documents-against-acceptance (DA) collection).¹⁷ The seller, therefore, has the security that the buyer will not be able to acquire the documents (and, therefore, also the goods) without paying or accepting the trade bill. In the case of a collection, the physical documents are delivered from the seller to the remitting bank and from the remitting

13 Adodo (n 2) 199–202.

14 On open account payment see Hugo (n 1) 396–399; ICC Services (n 2) par 11.1, 11.4.1. On the role of the bank in open account payment see SWIFT Presentation “Bank Payment Obligation A new payment method” (July 2016) 6 file:///C:/Users/chugo/Downloads/swift_corporates_presentations_bankpaymentobligation.pdf (24-09-2021).

15 Hugo (n 1) 396.

16 Murray, Holloway and Timson-Hunt (n 2) 185 par 10–002; ICC Services (n 2) par 11.4.4; Hugo (n 1) 399–400.

17 Murray, Holloway and Timson-Hunt (n 2) 185 par 10–002; Hugo (n 1) 400–403; ICC Services (n 2) par 11.4.4.

2 The impact of the Covid-19 pandemic on international trade

bank to the collecting bank. The inter-bank delivery will mostly be done by international couriers using commercial airlines.

In the case of a letter of credit, the buyer requests its bank to issue a letter of credit in favour of the seller. The bank, if it accepts this mandate, issues the letter of credit—which, in essence, is a payment undertaking by the bank to pay the seller. It is, however, conditional upon the seller delivering the documents (commercial invoice, insurance document, transport document, certificates and so on) to the bank.¹⁸ Typically, however, the issuing bank will nominate a bank in the seller's country that will examine the documents, and if they are in conformity with the requirements of the letter of credit, will take delivery of them and pay the seller as mandatary of the issuing bank.¹⁹ One of the foundations of the law of letters of credit is the so-called doctrine of strict compliance in terms of which the seller is required to deliver documents that are in strict conformity with the letter of credit;²⁰ “[t]here is no room for documents which are almost the same, or which will do just as well” said Viscount Sumner, speaking for the House of Lords, almost a century ago, in the locus classicus, *Equitable Trust Co of New York v Dawson Partners*.²¹ The seller has the security of a payment promise by a bank conditioned only upon the ability of the seller to deliver the required documents. The bank's promise, moreover, is independent of the underlying contract of sale—hence the bank cannot resist payment, or be interdicted from paying, on the basis of a dispute between the buyer and seller as to the performance by the seller of its obligations under the contract of sale.²²

The documents will accordingly be delivered by the seller to the nominated bank, and by the nominated bank to the issuing bank. The inter-bank delivery, again, is mostly done by international couriers using commercial airlines.²³

18 Hugo (n 1) 403–404; ICC Services (n 2) par 11.4.5; Van Niekerk and Schulze (n 2) 257–260.

19 Hugo (n 1) 405.

20 *OK Bazaars (1929) Ltd v Standard Bank of South Africa Ltd* 2002 3 SA 688 (SCA) 697–698; Hugo (n 1) 414–422; ICC Publishing (n 2) par 12.5.2; Van Niekerk and Schulze (n 2) 285–286.

21 [1926] 27 Ll L Reports 49 (HL) 52.

22 *Philips v Standard Bank of South Africa Ltd* 1985 3 SA 301 (W) 304; *Loomcraft Fabrics CC v Nedbank Ltd* 1996 1 SA 812 (A); Hugo (n 1) 422–430; ICC Services (n 2) par 12.5.1.

23 Nesarul Hoque “COVID-19 pandemic and the delay in delivery of documents” May 2020 *Documentary Credit World* 23 states in this regard that “[t]he speed and widespread reliance on courier companies has

2 International rules governing documentary collections and letters of credit

The Banking Commission of the International Chamber of Commerce has drafted rules pertaining to collections (the Uniform Rules for Collections (URC 522)) and to letters of credit (the Uniform Customs and Practice for Documentary Credits (UCP 600)). These rules are almost invariably contractually incorporated by the parties involved in the collection or the letter of credit. To ensure that the transaction proceeds at a reasonable pace, these rules, especially the UCP,²⁴ impose various time limits that must be met. Article 14(b) provides that “[a] nominated bank acting on its nomination ... and the issuing bank shall each have a maximum of five banking days following the day of presentation to determine if a presentation is complying”. Moreover, article 14(c) provides that “[a] presentation including one or more original transport documents ... must be made by or on behalf of the beneficiary not later than 21 calendar days after the date of shipment ... but in any event not later than the expiry date of the [letter of] credit”.

In the event of the documents being non-conforming and the nominated bank or the issuing bank deciding to refuse to honour the letter of credit, article 16(c) requires the bank concerned to give a single notice to that effect to the presenter of the documents (in other words, if it is the nominated bank, to the seller, and if it is the issuing bank, to the nominated bank). Article 16(d) reads as follows: “The notice required in sub-article 16(c) must be given by telecommunication or, if that is not possible, by other expeditious means, no later than the close of the fifth banking day following the day of presentation.”

This is followed in article 16(f) by the rather scary preclusion rule in terms of which an issuing bank that has not complied with the aforementioned provisions “shall be precluded from claiming that the documents do not constitute a complying presentation”.

Other relevant provisions of the URC 522 and the UCP 600 relate to *force majeure*. In this respect, article 36 of the UCP 600 reads as follows:

“A bank assumes no liability or responsibility for the consequences arising out of the interruption of its business by

brought so much confidence to the delivery process that banks have largely taken the courier system’s efficiency for granted”.

²⁴ Article 5(b) of the URC 522 requires that the collection instruction should state the exact period of time within which the documents must be taken up or for any other action of the buyer.

2 *The impact of the Covid-19 pandemic on international trade*

Acts of God, riots, civil commotions, insurrections, wars, acts of terrorism, or by any strikes or lockouts or any other causes beyond its control.

A bank will not, upon resumption of its business, honour or negotiate under a credit that expired during such interruption of its business.”

Article 15 of the URC 522 is almost identical to the first paragraph of the UCP provision quoted above.

Attention should finally be drawn to the following disclaimer in article 35 of the UCP 600:

“A bank assumes no liability or responsibility for the consequences arising out of delay ... in the transmission of any message or delivery of letters or documents, when such messages, letters or documents are transmitted or sent according to the requirements stated in the credit, or when the bank may have taken the initiative in the choice of the delivery service in the absence of such instructions in the credit.”

Article 14(a) of the URC 522 contains a similar disclaimer.

3 Electronic trade documents (or data)

The quest to establish electronic trade documents has been present for several decades, but, to date, without a convincing breakthrough. The most troublesome has been the transport document. A journal article published in 2016 has the frustrated title “Electronic bills of lading: A never-ending story”.²⁵ The different attempts, from the emergence of the Cargo Key Receipt in 1971 to the latest attempts linked to block-chain technology, have recently been traced competently by Du Toit²⁶ with reference to, inter alia, the South African Electronic Communications and Transactions Act²⁷ and the Sea Transport Documents Act,²⁸ as well as the UNCITRAL Model Law on Electronic Transferable Records (Model Law).²⁹ These developments fall beyond

25 Bury 2016 *Tulane Maritime Law Journal* 197.

26 See (n 5) 135–161. See also Naidoo (n 4) *passim*.

27 25 of 2002 (reviewed briefly in this context by Du Toit (n 5) 153–154).

28 65 of 2000 (reviewed briefly in this context by Du Toit (n 5) 154–155).

29 adopted by the United Nations Commission on International Trade Law (UNCITRAL) on 13 July 2017.

the scope of this contribution. I abide by quoting his final conclusion, which reflects a carefully positive view:

“It is submitted that, in the case of blockchain bills of lading, a sensible interpretation of current legislation, together with the flexibility of the common law, would be able to provide the necessary legal framework for such bills of lading. It is nevertheless suggested that the Model Law will bring further legal certainty and harmonisation with other jurisdictions, for the benefit of global maritime trade.”

In the payment area, there have been similar moves aimed at facilitating electronic documents. The UCP 600 came into operation in 2007. The previous two revisions were the UCP 400 (which came into operation in 1984) and the UCP 500 (which came into operation in 1994). At the 12th ICC Banking Conference held in Paris in 1989, a panel of experts took the view that it was time to revise the UCP 400 “taking into account the need to establish rules for an ‘EDI credit’”.³⁰ Independent rules for EDI credits were ruled out as premature by the ICC Banking Commission in 1990. Instead, it was decided to investigate whether the UCP could not be adapted to both paper and EDI as a first step. With this in mind, a special EDI working party was set up.³¹ However, in the revision process of the UCP 400, it was eventually decided in 1991, that there would be no reference to EDI in the new revision (the UCP 500).³²

Very little happened further in this regard until May 2000 when a task force on the future of the ICC Banking Commission identified as an important goal for the Commission “a greater focus on electronic trade”.³³ Further discussion identified a need to develop a bridge between the UCP 500 and the processing of the electronic equivalent of paper-based documents. The view taken was that the market was looking towards the ICC to provide guidance for the evolution from paper to electronic credits.³⁴

30 Katz “ICC in Action: More on Incoterms 1990: Major EDI, Guarantee Discussions” December 1989 *Letter of Credit Update* 7 8.

31 Katz “ICC in Action: Progress on UCP Revision, Guarantee Rules, New Incoterms Guide” December 1990 *Letter of Credit Update* 9 10.

32 Katz “ICC in Action: UCP Revision; Guarantee Rules; EDI Details; Credit Case Study Excerpts” September 1991 *Letter of Credit Update* 11.

33 ICC Publishing SA *UCP 500 + eUCP ICC (2002) Introduction* 53.

34 Ibid. See also “eUCP text takes final form” dcpro-DCWN_12October20011063.XML.

2 The impact of the Covid-19 pandemic on international trade

The Banking Commission, accordingly, appointed a working group in 2000 co-chaired by Dan Taylor (of the US) and Rene Mueller (of Switzerland). Its efforts were approved by the Banking Commission at its meeting in November 2001 on a weighted vote of 63–3. Thirty-four national delegations voted for and two against it. South Africa was not represented. In fact, Africa was not represented. The only countries that opposed it were Austria and Ireland. Amongst the delegations that voted in favour of it were the US, the UK, Belgium, Canada, Denmark, Finland, France, Germany, Greece, Italy, the Netherlands, Norway, Portugal, Singapore, Spain, Sweden, and Switzerland. The matter was brought to fruition in little more than a year. In January 2002, the Supplement to UCP 500 for Electronic Presentation (eUCP) was published and became operative on 1 April 2002.³⁵ It was not a new revision of the UCP. The ICC, in its introduction to the eUCP explains its status as follows:

“The eUCP is not a revision of the UCP. The UCP will continue to provide the industry with rules for paper letters of credit for many years. The eUCP is a supplement to the UCP that, when used in conjunction with the UCP, will provide the necessary rules for the presentation of the electronic equivalents of paper documents under letters of credit.”³⁶

Maria Livanos Cattai, the then Secretary General of the ICC, described the eUCP as “an update rather than a full revision” of the UCP, and as “a bridge between the current UCP and the processing of the electronic equivalent of paper-based credits”. It was, therefore, to be used “in tandem with, not as a replacement for UCP 500”.³⁷ The eUCP has been revised twice since 2002. As was to be expected, it was revised in 2007, to align it with the UCP 600, under the title *Supplement to the UCP600*

35 The information in this paragraph is contained in periodic reports published in the electronic database of the ICC related to documentary credits *dcprofocus*. Most were also published in the quarterly newspaper *DC Insight* (an electronic version of which is also available on *dcprofocus*). See, inter alia, “eUCP Final version approved” Vol 8 No 1 Jan–March 2002 *DC Insight*; “Electronic supplement to the UCP advances; URGETS rules in suspension” 28 November 2000 *dcpro-DCWN_EUCP_ANS_URGETS.XML*; “eUCP text takes final form” *dcpro-DCWN_12October20011063.XML*.

36 ICC Publishing (n 33) Introduction 53.

37 ICC Publishing (n 33) Foreword 3. See also Introduction 53.

for *Electronic Presentation (eUCP)*.³⁸ It was again revised in 2019 under the shortened title *eUCP Version 2.0* which became operative on 1 July 2019.³⁹ On the same date, the ICC also released the *eURC Version 1.0* (for documentary collections).⁴⁰

The ICC Banking Commission, by word of David Meynell, states that the purpose of the eUCP and eURC is to address “e-compatibility” of the ICC Rules and to ensure that “they are ‘e-compliant’ i.e. enabling banks to accept data vs. documents” which was identified as a requirement “in order to accommodate evolving practices and technologies”.⁴¹ As supplements or updates to the UCP and URC, the legal nature of the eUCP and eURC is the same as that of their mother documents: they constitute rules, which, for them to apply, must be contractually incorporated.⁴² Incorporation of the eUCP or the eURC automatically incorporates the UCP 600 or the URC 522,⁴³ but the converse is not true. A discussion of the particular rules themselves falls well outside the scope of this article.⁴⁴ Regarding their purpose and benefits, however, Meynell, writing for *Trade Finance Global*, states as follows:

“Existing ICC rules, such as UCP 600 and URC 522, whilst being invaluable in a paper world, provide limited protection when applied to electronic transactions. As such, it is inevitable that traditional trade instruments will, over time, inexorably move towards a mixed ecosystem of paper and digital, and, ultimately, to electronic documents alone. In this respect, the eRules provide numerous benefits, some of which are listed below:

38 For a helpful background see the “Editor’s overview” in Byrne (ed) *LC Rules & Laws: Critical Texts for Independent Undertakings* (2018) 23.

39 See “Introduction eUCP Version 2.0” at <https://cdn.iccwbo.org/content/uploads/sites/3/2019/06/icc-uniform-customs-practice-credits-v2-0.pdf> (22-09-2021).

40 <https://iccwbo.org/content/uploads/sites/3/2019/06/icc-uniform-rules-for-collections-v1-0.pdf> (23-09-2021).

41 See his introduction to the eUCP 2. Meynell is the Senior Technical Advisor to the ICC Banking Commission. See also the introduction to the eURC 4.

42 See a e1(b) and (c) of the eUCP and art e2(b) and (c) of the eURC. For a comprehensive discussion see further Hugo “The legal nature of the Uniform Customs and Practice for Documentary Credits: *lex mercatoria*, custom or contracts [sic]” 1994 *SA Merc LJ* 143–168.

43 See a e2a of the eUCP and art e3(a) of the eURC.

44 Despite a strong copyright policy on its instruments the ICC has provided open access to both the eUCP and the eURC together with an article-by-article commentary. See <https://2go.iccwbo.org/users-guide-to-the-eucp.html>.

2 The impact of the Covid-19 pandemic on international trade

- Ensuring relevance in an evolving digital trade world
- Explicitly and unambiguously supporting the usage of electronic documents
- Extending risk mitigation to a digital environment
- Providing conformity when faced with divergent local or regional practices
- A shared understanding of terminologies
- Uniformity and consistency in customs and practice”.⁴⁵

An internet search on statistics relating to the use of these eRules was fruitless. Statistics on non-use are difficult to come by. Anecdotal evidence from the banking community, however, is to the effect that they are seldom used.⁴⁶

The move away from paper to data in payment methods designed for international trade has also been evident during the past decade in other developments apart from the eRules discussed above. The first is the so-called “bank payment obligation” (BPO), an initiative developed in collaboration between the ICC Banking Commission and the Society for Worldwide Interbank Financial Telecommunication (SWIFT). A BPO is essentially an irrevocable undertaking given by one bank to another that payment will be made following a data matching report generated by SWIFT’s Trade Service Utility relating to the international sale. Essentially, data matching takes over the role of document checking in the letter of credit and documentary collection environment. Byrne remarks that the purpose of this initiative was “to reintroduce banks into the supply chain process from which they have been increasingly excluded by open account transactions”.⁴⁷ He further points out that the bank payment obligation “is intended to benefit the seller” by providing an “indirect assurance of payment as a result of an electronic matching of data [as opposed to conforming documents] related to the

45 “Breakdown of the new ICC eRules: eUCP & eURC” in *Trade Finance Global Articles* (28 June 2021) at <https://www.tradefinanceglobal.com/posts/breakdown-of-new-icc-erules-eucp-eurc/> (23-09-2021).

46 Legwaila “Trade digitization: Developments and legal aspects” in Hugo and Du Toit (eds) *Annual Banking Law Update 2017* (2017) 133 138–139 relates that the first issuance of a paperless letter of credit subject to the eUCP was in 2010 between an Australian mining company and a Chinese buyer. The documents in the electroning presentation included the commercial invoice, packing list, certificate of weight, certificate of analysis, the bill of lading and the insurance certificate.

47 See (n 38) 95.

The Impact of Covid-19 on the Future of Law

sale”.⁴⁸ In 2013, the ICC Banking Commission adopted and published the Uniform Rules for Bank Payment Obligations (URBPO 750E)⁴⁹ and published a guide⁵⁰ to these rules. The BPO, however, has not made significant progress to date. Legwaila mentions that the “costs of supporting the software and architecture” is a contributory factor.⁵¹ It may also be that the BPO has been overtaken by the latest initiatives that are focussing on the potential of blockchain in an international-trade context. In this respect, Legwaila refers to “blockchain” as “the end game”:

“What blockchain technologies promise is the instant movement of data (not just the movement of electronic documents ...) from one [party] to the other reducing decision and product processing time and thereby shortening the trade transaction life-cycle. Data visibility, complex analytics and a shift from transaction-based value to information-based value will follow, and the ability to extract, manipulate and benchmark data that would originally have been found only in hardcopy documents will be an important cornerstone of the way business is conducted, risk is mitigated, and commercial transactions will be financed on a cost-effective, global and near-real time basis.”⁵²

A sudden move of a documentary-based trade finance system that has developed over centuries to a significantly different system based on blockchain, however, is highly unlikely. As pointed out by Haynes and Yeo, there are many practical, legal, and cost implications that need to be considered and addressed.⁵³ The enormous potential of blockchain in this context is, however, patently clear.

Finally, the ICC Banking Commission has recently published the Uniform Rules for Digital Trade Transactions (URDTT) Version 1.0.⁵⁴

48 Ibid.

49 See Byrne (n 38) 95.

50 Hennah *ICC Guide to the Uniform Rules for Bank Payment Obligations* (2013). The ICC also issued a discussion paper Bank Payment Obligation (BPO) Doc 010613 (2018) accessible at https://library.iccwbo.org/pdf/BPO_Frequently_asked_questions_corporates_May2018_Final.pdf.

51 See (n 46) 144.

52 Ibid.

53 See “Legal issues arising from the utilisation of blockchain-based products in the 4th industrial revolution” in Hugo and Du Toit (eds) *Annual Banking Law Update 2020* (2020) 47 et seq.

54 In 2021. See [https://2go.iccwbo.org/downloadable/download/pdf/product_id/951/\(24-02-2022\)](https://2go.iccwbo.org/downloadable/download/pdf/product_id/951/(24-02-2022)).

2 *The impact of the Covid-19 pandemic on international trade*

The working group responsible for it expressed its key focus as “helping the trade finance industry realise the many benefits of digitalisation—including transparency, time and cost savings, reduced errors, and reduced compliance and operational risk”.⁵⁵ This, in itself, indicates that we are as yet nowhere near the full realisation of doing away with paper documents in favour of electronic documents or data. In their introduction to the URDTT, the drafting group states:

“The URDTT should be regarded as an over-arching set of rules under which other rulebooks may co-exist and the trade transaction may be documented. This recognises the prior existence of industry terms and conditions, proprietary rulebooks pertaining to individual service providers, as well as the existence of rulebooks developed in conjunction with distributed ledger projects. However, the URDTT may in some cases eventually remove the need for duplicate/repetitive clauses in user agreements and/or proprietary rulebooks.”

Hence, it would be fair to conclude that both in relation to transport and payment methods, much has been done over the past two or more decades to facilitate the “inexorable move to electronic documents” referred to confidently by Meynell.⁵⁶ Legwaila writes of “the trade ecosystem [being] spoilt for choice when it comes to transformation of the trade environment”.⁵⁷ Nevertheless, somehow, it just has not happened as extensively as might have been expected for a drive of already some 5 decades old.

Perhaps a seismic event of significant magnitude is necessary to generate the necessary will amongst all roll players in international trade to bring true impetus to this quest.

55 [https://iccwbo.org/media-wall/news-speeches/icc-banking-commission-launches-working-group-digitalisation-trade-finance/\(25-09-2021\)](https://iccwbo.org/media-wall/news-speeches/icc-banking-commission-launches-working-group-digitalisation-trade-finance/(25-09-2021)).

It is trite in the modern world that the delivery and processing of digitised documents is less costly than the delivery and processing of paper. It does, however, require some infrastructure which may not be uniformly available—especially in some first-world countries. Against this background the focus of the working group of “helping the trade finance community realise” specifically the potential cost-saving benefits of digitisation is crucially important.

56 see the quote above referenced in footnote 45.

57 See (n 46) 138.

4 Eyjafjallajökull

A seismic event of some significant magnitude, however, did in fact occur (unfortunately without the desired results). Volcanic activity that commenced at the end of 2009 on Eyjafjallajökull in Iceland, gradually increased in intensity leading to a small eruption on 20 March 2010.⁵⁸ The eruption entered a second phase on 14 April 2010. During this phase, an estimated 250 million cubic metres tephra⁵⁹ was ejected and the ash plume rose to the height of 9km. By 21 May 2010, the production of lava and ash had come to an end. On 6 June, a small new crater opened up on the west side of the main crater with the emission of small quantities of ash.⁶⁰ On 27 October 2010, Ármann Höskuldsson, a scientist at the University of Iceland Institute of Earth Sciences, stated that the eruption was officially over, although the area was still geothermally active and might erupt again.⁶¹

Although there was no loss of life resulting from the eruption,⁶² the ash cloud spread to Northern Europe which led to the closure of most of the European IFR airspace⁶³ from 15 to 20 April 2010. Consequently “a very high proportion of flights within, to and from Europe were cancelled creating the highest level of air travel disruption since the Second World War”.⁶⁴

On 21 April 2020, the Banking Commission of the ICC, in a news release, stated that the volcanic eruption had led to delays in the presentation of documents by beneficiaries and banks in international trade “due to the inability of courier companies to deliver packages in accordance with their published schedules” having a serious impact

58 It had last erupted in 1821. See <https://www.britannica.com/place/Eyjafjallajökull-volcano> (26-09-2021).

59 fragmental material produced by a volcanic eruption regardless of composition, fragment size, or emplacement mechanism. See <https://en.wikipedia.org/wiki/Tephra> (26-09-2021).

60 Ibid.

61 http://icelandreview.com/icelandreview/daily_news/?cat_id=16539&ew_o_a_id=369471 (26-09-2021).

62 https://en.wikipedia.org/wiki/2010_eruptions_of_Eyjafjallajökull (26-09-2021).

63 There are two sets of regulations governing all aspects of civil aviation referred to by the acronyms VFR (for visual flight rules) and IFR (for instrument flight rules). See https://en.wikipedia.org/wiki/Instrument_flight_rules (26-09-2021).

64 https://en.wikipedia.org/wiki/2010_eruptions_of_Eyjafjallajökull (26-09-2021).

2 The impact of the Covid-19 pandemic on international trade

on transactions subject to the UCP 600 and the URC 522.⁶⁵ The news release, from Paris on 21 April 2010, inter alia, provided the following two opinions (and advice):

- The eruption did not qualify as a *force majeure* event as defined in the UCP 600 and the URC 522 because the banks remained open for business; it was the delivery of the documents to them that was being delayed.
- It is the responsibility of the beneficiary to ensure that the documents are presented to the nominated bank in time. If it is impossible to do so [for example due to volcanic eruptions preventing transport] beneficiaries should consider the appropriateness of seeking an amendment that will allow presentation to be made to another more accessible bank.

It is especially the rather unhelpful, yet clearly correct, opinion provided in the second bullet point that needs to be emphasised: in short, the risk of not being able to present documents to a nominated bank in time, is a risk that the beneficiary must bear, and the fact that volcanic activity has made this impossible is irrelevant. The advice of seeking an amendment when it becomes clear that the beneficiary is not going to be able to deliver in time, is sound—but, of course, requires the consent of the issuing bank⁶⁶ who will be guided by the mandate of the applicant (buyer) who may conceivably, in some cases, be disinclined to give the necessary consent.

The stark reality cannot be escaped that the electronic transmission of documents or data would not have been affected by this seismic event. It was perhaps a wake-up call, but one that seems to have gone unheeded. The final question to be considered against this background is whether a deadly virus might accomplish what a volcanic eruption could not do.

5 COVID-19

On 31 December 2019, the World Health Organisation (WHO) was informed of cases of pneumonia in Wuhan, China, with no known cause. A week later the Chinese authorities identified the cause as a novel coronavirus, temporally named 2019-nCoV. On 30 January 2020, the WHO declared a “Public Health Emergency of International Concern”.

⁶⁵ <https://iccwbo.org/media-wall/news-speeches/volcanic-eruption-delaying-delivery-of-documents-under-icc-rules/> (26-09-2021).

⁶⁶ a 10(a) of the UCP.

The Impact of Covid-19 on the Future of Law

On 11 February, the virus received its official name “COVID-19”. The number of infections increased rapidly worldwide, and on 11 March 2020, the disease was declared a pandemic by the WHO. By September 2021, there had been more than 200 million confirmed cases and over 4.6 million persons had lost their lives due to the disease. Its sustained spread is ascribed to new variants that continued emerging.⁶⁷ In September 2021, it was reported that it had become the deadliest disease in American history surpassing the number of deaths in the 1918 (Spanish) flu.⁶⁸

The first case in South Africa was reported on 5 March 2020. The 38-year-old male was infected on a vacation in Italy.⁶⁹ A mere ten days later the president declared a national state of disaster and, on 23 March, announced a national lockdown which began on 27 March 2020. A gradual and phased easing of the lockdown followed from 1 May. From 21 September, the restrictions were lowered to the lowest level (alert level 1). In December, the country experienced a second wave which led to renewed higher restrictions from 29 December 2020. These were again relaxed from 1 March 2021. During May and June 2021, the Delta variant led to a third wave of infections in South Africa causing the imposition of progressively higher restrictions (alert level 2 on 31 May, alert level 3 on 15 June and adjusted level 4 on 28 June). Restrictions were again progressively lowered from 25 July onward.⁷⁰

By 27 September 2021, the official South African death toll ascribed to COVID-19 was just under 90 000. This, however, does not reflect reality. There had been 260 241 excess deaths from natural causes⁷¹ as

67 All of the above facts in this paragraph were taken from <https://www.news-medical.net/health/History-of-COVID-19.aspx> (28-09-2021).

68 <https://www.smithsonianmag.com/smart-news/the-Covid-19-pandemic-is-considered-the-deadliest-in-american-history-as-death-toll-surpasses-1918-estimates-180978748/> (28-09-2021).

69 <https://www.nicd.ac.za/first-case-of-Covid-19-coronavirus-reported-in-sa/> (28-09-2021).

70 Unless otherwise referenced, the facts in this paragraph were all taken from https://en.wikipedia.org/wiki/COVID-19_pandemic_in_South_Africa (28-09-2021).

71 In relation to excess deaths, Wikipedia states: “Mortality displacement is a phenomenon where a period of excess deaths (i.e., more deaths than expected) is followed by a period of mortality deficit (i.e., fewer deaths than expected). It is also known as “harvesting”. ... It is usually attributable to environmental phenomena such as heat waves, cold spells, epidemics *and pandemics*, especially influenza pandemics, famine or war.” (The italics are mine.) See https://en.wikipedia.org/wiki/Mortality_displacement (28-09-2021).

2 The impact of the Covid-19 pandemic on international trade

from 3 May 2020 with 85%–95% being ascribed to COVID-19 and the others to the overwhelming of the health services.⁷²

South Africa's response to COVID-19 (lockdowns and varying restrictions as infections spiked and receded) was the typical response throughout the world. The lockdowns and restrictions imposed by governments were primarily aimed at preventing rampant spread of the virus. There were many negative consequences, one of which was the devastating effect on international trade arising, inter alia, from the inability to deliver and/or to process paper documents expeditiously.⁷³

6 Response from the trading community

The ICC's response was quick. On 9 April 2020, it issued its comprehensive *Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic*.⁷⁴ The following main general points are made in the paper.

72 https://en.wikipedia.org/wiki/COVID-19_pandemic_in_South_Africa (28-09-2021).

73 Since February 2020, the dominant topic aired in *Documentary Credit World* has been the impact of COVID-19 on international trade. See, amongst many others, Feature "Use of digital signatures due to coronavirus" March 2020 *Documentary Credit World* 17; Baker "For letters of credit, corona crisis magnifies operational problems and considerations" March 2020 *Documentary Credit World* 26; Update "COVID-19 crisis pushing pace of trade digitization" April 2020 *Documentary Credit World* 8; Meynell "Addressing the implications of COVID-19 on transactions subject to ICC Rules" April 2020 *Documentary Credit World* 17; Nizardeen "Will COVID-19 expedite the digitisation of paper-based trade finance document presentation" May 2020 *Documentary Credit World* 20; Nesarul Hoque (n 23); Update "Trade finance and force majeure" June 2020 *Documentary Credit World* 8; Update "A new era for electronic documents" June 2020 *Documentary Credit World* 11; Padinhere "What COVID-19 is showing us about the future of trade" June 2020 *Documentary Credit World* 38; Information Digest "Survey examines impact of COVID-19 on African trade finance" April 2021 *Documentary Credit World* 46; and Sproston "Potential impact on lc parties due to delays in transit" May 2021 *Documentary Credit World* 30.

74 Accessible at <https://iccwbo.org/publication/icc-guidance-note-on-possible-measures-aimed-at-mitigating-the-effects-of-the-Covid-19-pandemic/> (29-09-2021). See also the shorter description by Meynell (n 72) 17–19. For an analysis of the guidance note see Andrlé "Perspectives on the ICC Guidance Paper on COVID-19's impact on trade finance transactions subject to ICC rules regarding force majeure" January 2021 *Documentary Credit World* 29–35.

The Impact of Covid-19 on the Future of Law

- The authors state that, as in the Icelandic crisis, most banks had generally remained open for business, at least to a degree and in such cases there was no *force majeure* event. In some instances, however, they had to close. Against this background, the ICC took the stance that the determination of whether this was a *force majeure* event was not one for the ICC to make but required a decision from a court or arbitration tribunal with jurisdiction.⁷⁵
- It acknowledges that in the extraordinary circumstances, parties may agree to modify some of the rules. Against this background, it urges parties only to do so on competent professional advice.⁷⁶
- The executive summary concludes with the following placatory remarks:

“It remains the core purpose of the ICC rules—and of industry practice—to facilitate and enable good-faith trade, and it is clear that the continuing flow of trade is critical during the COVID-19 pandemic. Accordingly, all parties are encouraged to continue to interact on this basis and to leverage rules as well as sound commercial practice to find solutions to the current situation.”⁷⁷

This resonates with a joint statement by the ICC and the WHO that “as an immediate priority, businesses should be developing or updating, readying or implementing business continuity plans”.⁷⁸

The remainder of this substantial document deals with specific questions put to the Banking Commission on “many associated issues such as delivery and examination of documents, liaison with applicants and beneficiaries, different places for presentation, document examination period, definition of a banking or business day ... [and] events covered by ‘interruption of business’ under *force majeure* provisions”.⁷⁹

A discussion of the specific answers of the ICC Banking Commission to these specific questions in the guidance paper falls outside the scope of this contribution. It is noteworthy, as a further general observation, however, that the guidelines do outline potential alternative solutions to paper that involve the use of “digitalised

75 See par 1(i)–(iii).

76 par 1(v).

77 par 1(vi).

78 par 2(i) with reference to [https://iccwbo.org/media-wall/news-speeches/icc-who-Covid19/\(29-09-2021\)](https://iccwbo.org/media-wall/news-speeches/icc-who-Covid19/(29-09-2021)).

79 par 1(v).

2 The impact of the Covid-19 pandemic on international trade

documents” and/or “electronic documents” which include scanned, faxed or emailed images.⁸⁰ More to the point is a comment by Meynell writing in his capacity as Senior Technical Advisor of the ICC Banking Commission in a feature article published in *Documentary Credit World* in which he unpacked the guidance paper:

“There is no doubt that the problems that are being faced would have been eased if paper documentation was no longer such a necessary requirement for so many aspects of global trade financing. As such the ICC is taking the opportunity to stress the importance of digitalisation and will continue to promote the broader use of ICC eRules i.e., eUCP Version 2.0, eURC Version 1.0, and URBPO as well as UNCITRAL Model Laws on Electronic Commerce, Electronic Transferable Records, and Electronic Signatures.”

A survey conducted by *Documentary Credit World* during the week of 13–20 March 2020, makes for interesting reading. The following questions, inter alia, were put to banks:

- “Due to situations and circumstances with the coronavirus, is your bank willing to accept letters of credit, issuance and amendments, with digital signatures instead of original signatures on paper documents?”
- “Are you presently (or do you anticipate) working from home and issuing documents with digital signatures and forwarding to the beneficiary and/or beneficiary bank as PDFs or other digital documents?”
- “What modifications to your usual LC business procedures are you taking or have been implemented?”
- “If you agree to receive electronic documents and notices from the beneficiary, would you amend the LC to state as such?”, and if so “would your answer change if your client (applicant) refuses to amend the LC?”

⁸⁰ par 5(i) and (ii). The difference between digital records and electronic documents is explained as follows in par 5(vi): “A digital record is one that exists in digitised form only, whereas an electronic record may also encompass a copy of an original document that is stored in electronic form e.g. a scanned copy.”

The Impact of Covid-19 on the Future of Law

- “As beneficiary, would you accept the use of stamps, digital machine or PDF signatures on LCs by work-at-home LC personnel authorized to authenticate LCs the bank wants to issue?”⁸¹

It is not clear in what country or countries the targeted banks were, and clearly it was a hurried survey. It is suggested, however, that one fact emerges clearly from it: there is no uniform practice regarding these issues. In a very real sense, therefore, it makes for depressing reading.

I conclude this paragraph with reference to another survey closer to home. The International Academy of Comparative Law (IACL) is conducting research on legal harmonisation through soft law with specific focus on the UCP 600. The IACL put certain questions to the different national rapporteurs. The South African rapporteurs reached out to the South African National Committee of the ICC Banking Commission. Two of the questions are relevant for the purposes of this contribution:

- “To what extent is digitalization present in the banking and finance industry in South Africa?⁸² How has digitization affected the practice surrounding letters of credit and similar instruments in your jurisdiction? Is the eUCP⁸³ currently applied or being considered?”
- “In South Africa, has the COVID-19 pandemic had any impact on the application of the UCP 600 (for e.g. on Article 35).”

An especially detailed response was received from one of the large banks in South Africa. It reports that: (i) electronic documentation via fax and email is used in some instances but then “backed by the necessary indemnities”; (ii) “there are pockets of true digitization where the data contained in documents such as bills of lading are shared through their lifecycle ... and ownership of the information is passed from one party to the next through the use of distributed ledgers although this is not widely adopted as common practice and requires

81 March 2020, 17–25. Some 62 banks responded. Two interpretations of the survey or responses to it were subsequently published in *Documentary Credit World*. See Verschoren “Quizzical questions lead to varied responses” March 2020 *Documentary Credit World* 30–32; Smith “Interesting responses underscore need for industry to come together” March 2020 *Documentary Credit World* 33.

82 See more information on digitisation and ICC initiatives: <<https://iccwbo.org/global-issues-trends/banking-finance/icc-digitalisation-of-trade-finance/>> and <<https://iccwbo.org/publication/icc-digital-roadmap/>>

83 See <https://cdn.iccwbo.org/content/uploads/sites/3/2019/06/icc-uniform-customs-practice-credits-v2-0.pdf>.

legal clarity and adoption by regulators”; (iii) the endorsement of title documents in digital format remains a challenge; (iv) the eUCP has shown “very limited use” but “is, however, being considered for more formal adoption and general use”; (v) in relation to blockchain “more fintechs [are] coming to the fore” each with its own offering, rules and contracts “but these are being developed in multiple ‘digital islands’ with a small number of ring-fenced participants and critical mass or economics of scale does not make this commercially viable at this stage”; (vi) in relation to the COVID-19 challenge alternative arrangements were negotiated “through open communication between banks and ad-hoc agreements and indemnities”; and, finally, (vii) “[w]ith the return to normal operations of courier services, banks and clients have largely reverted back to standard procedures and handling of original paper-based documents”.⁸⁴

This response shows an appreciation of much of what is happening in relating to electronic documents and digital records in the context of international trade, but the final two remarks referred to seriously question whether significant developments in this regard are likely in the short term.

7 Conclusion

There are many role players in international trade, and to succeed in establishing a firm footing for the use of electronic documents or data matching instead of the centuries-old paper documents,⁸⁵ there needs to be *serious collaboration*. This appears to be absent. To borrow the words of Don Smith in his response to the *Documentary Credit World* survey referred to above, the COVID-19 pandemic underscores the need for industry to come together.

Although the main players are in the private sector, governments need to ensure that the necessary legislation that gives legal efficacy to electronic documents and digital records is in place. The joint statement of the ICC and WHO referred to above “calls on national

84 feedback provided by the bank concerned through the National Committee of the ICC Banking Commission to the South Africa rapporteurs of the IACL.

85 which form an integral part of what Bewes quaintly referred to as “the romance of the law merchant” in his celebrated tome *The Romance of the Law Merchant: Being an Introduction to the Study of International and Commercial Law with Some Account of the Commerce and Fairs of the Middle Ages* (1923). (I have my doubts whether anyone will someday write a book on the romance of e-commerce.)

governments to adopt a whole-of-government and whole-of-society approach in responding to the COVID-19 pandemic”.⁸⁶ Although this statement was primarily aimed at the medical fight against the virus, it is equally apt for the economic fight towards recovery.

To achieve a harmonised approach *someone needs to drive it*. It is suggested that the ICC is the proper body. The ICC was born from the ashes of World War One which had had a devastating effect on international business and trade. A group of industrialists, financiers and traders, who became known as “the merchants of peace” led by Clementel (a former French minister of commerce) founded it in 1919.⁸⁷ The philosophy underlying its birth is well reflected in the introductory phrase of the preamble to its constitution which reads as follows: “the fundamental objective of the International Chamber of Commerce ... is to further the development of an open world economy with the firm conviction that international commercial exchanges are conducive to both greater global prosperity and peace among nations”.⁸⁸

Our war, a century later, is a very different one, but has left many economies and businesses shattered. The prosperity and peace (and economic recovery) that can flow from international commercial exchanges are currently being held back by paper-based trade. To be true to its constitution, *the ICC should be significantly more proactive and visible in relation to trade facilitation* in the COVID-19 (and, hopefully, post COVID-19) era. Most of the private-sector role players in international trade are represented in the ICC. Moreover, in December 2016, the ICC was granted observer status at the United Nations, which has given it significant influence in relation to policies of national governments as well. As the ICC itself put it when sharing this news with the world: “ICC’s Observer Status provides world business with a direct voice into the UN agenda for the first time: providing an opportunity to shape global policies that work with the private sector to drive sustainable development and extend prosperity for all.”⁸⁹

86 [https://iccwbo.org/media-wall/news-speeches/icc-who-Covid19/\(29-09-2021\)](https://iccwbo.org/media-wall/news-speeches/icc-who-Covid19/(29-09-2021)).

87 Irujo “Trade finance and the Banking Commission of the ICC” in Hugo (ed) *Annual Banking Law Update 2016: Recent Developments of Special Interest to Banks* (2016) 71 78; Hugo “Letters of credit and demand guarantees: A tale of two sets of rules of the International Chamber of Commerce” 2017 *TSAR* 11–2.

88 <https://iccwbo.org/constitution/#Preamble> (29-09-2021).

89 <https://iccwbo.org/global-issues-trends/global-governance/business-and-the-united-nations/> (29-09-2021).

2 The impact of the Covid-19 pandemic on international trade

The international-trade community needs more than an explanation of ICC Rules in extraordinary circumstances, or a call to negotiate with counterparties in good faith to seek solutions to terrible problems.⁹⁰ The ICC needs to draw the private sector together in the quest of facilitating trade in difficult times and needs to lobby extensively to generate sufficient pressure on regulators whose antiquated laws cannot accommodate the electronic and digital era. Against this background, it is encouraging that the ICC has established the ICC Digitalisation of Trade Finance Commercialisation sub-stream to the URDTT initiative “with cross-industry representation from all key trade regions” with the intention of “examining both the ICC eRules and the URDTT” and “evaluating opportunities and ideas to drive use of the rules”.⁹¹ To the best of my knowledge, however, as in February 2022, South Africa is not (formally) involved in this project.

I conclude with a final point to ponder (latching onto Legwaila’s remark quoted above of “the trade ecosystem [being] spoilt for choice”⁹²): there are too many products offered by too many role players, requiring too many different rule sets, too many different contracts and too many technological solutions, all of which need to be understood and regulated, and require too much investment of time and money.⁹³ For a uniform approach and for a breakthrough in this decade-old quest, a *clearer focus* is necessary.

Much of which is said above in this conclusion is strongly supported by a news item published in the September 2021 issue of *Documentary Credit World* dealing with a similar call issued by SWIFT.⁹⁴ I quote it in full as a form of peroration:

90 which was to a large degree what was done in the two ICC guidance notes considered above.

91 “The rationale behind the Uniform Rules for Digital Trade Transactions (URDTT) Version 1.0” September 2021 *Documentary Credit World* 9.

92 See the text at n 56 above.

93 See the paragraph (in the text) preceding footnote 83 above. See also on the collaboration of Fintech companies and regulators Soon “Improving the digital financial services ecosystem through the collaboration of regulators and FinTech companies” in Lui and Ryder (eds) *Fintech, Artificial Intelligence and the Law* (2021) 46–63.

94 “SWIFT issues call for collaboration to digitise trade” 6. SWIFT is a very influential body in international banking context, and its call therefore undoubtedly has clout. As to how it is governed, its website provides as follows: “SWIFT is a cooperative company under Belgian law and is owned and controlled by its shareholders (financial institutions) representing approximately 3,500 firms from across the world. The shareholders elect a Board of 25 independent Directors, representing banks across the world, which governs the Company and oversees the management of the

The Impact of Covid-19 on the Future of Law

“Observing that the trade industry has long discussed trade digitisation and its many facets, SWIFT makes clear that immediate action is necessary to transform talk into results. In releasing its August 2021 paper, ‘Digitising trade: The time is now’, SWIFT identifies what it believes is needed to successfully facilitate the digitization of global trade.

Technology alone cannot adequately confront the monumental task of integrating numerous stakeholders, rules, and regulations into a functioning digital trade system globally. Rather, SWIFT’s paper contends that three key enablers are vital for truly facilitating effective trade digitisation: Legal Harmonization; Richer Data and Standards; and Interoperability.

After setting this stage, the 15-page paper assesses the impact of the Covid pandemic on trade processes and SWIFT offers its take on the widely-held view of the pandemic as a catalyst of digitisation. SWIFT then briefly examines challenges to digitisation which include legal considerations tied to transferable records, the indispensability of standards, and fragmentation.

In drawing attention to the key enablers of trade finance digitisation, SWIFT emphasizes the need for adoption of UNCITRAL’s Model Law on Electronic Transferable Records (MLETR), added reliance on ISO 20022 data, and advancement of ICC’s Digital Standards Initiative (DSI).

SWIFT also strongly advocates for utilising what’s already available. In commenting on the documentary credit industry and its need to adapt to a digital world, SWIFT bluntly asks: ‘Whilst the

Company. The Executive Committee is a group of full-time employees headed by the Chief Executive Officer. SWIFT is overseen by the G-10 central banks (Belgium, Canada, France, Germany, Italy, Japan, The Netherlands, United Kingdom, United States, Switzerland, and Sweden), as well as the European Central Bank, with its lead overseer being the National Bank of Belgium. In 2012, this framework was reviewed and the SWIFT Oversight Forum was established, in which the G-10 central banks are joined by other central banks from major economies: Reserve Bank of Australia, People’s Bank of China, Hong Kong Monetary Authority, Reserve Bank of India, Bank of Korea, Bank of Russia, Saudi Arabian Monetary Agency, Monetary Authority of Singapore, South African Reserve Bank and the Central Bank of the Republic of Turkey. The SWIFT Oversight Forum provides a setting for the G-10 central banks to share information on SWIFT oversight activities with a wider group of central banks.” See <https://www.swift.com/about-us/legal/compliance-0/swift-and-sanctions#how-is-swift-governed?> (26-05-2022).

2 The impact of the Covid-19 pandemic on international trade

industry is awash with trade digitisation initiatives, are the existing tools available to us, like eUCP, being leveraged to their full potential?’

The paper underscores SWIFT’s stance that the digitisation of trade can no longer be an ‘if’ but must now be a ‘now and how’.”



3 Covid-19 related claims

The final nail in the coffin for international investment law?

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Abstract

International investment law has increasingly been criticised over the use thereof by investors to challenge regulations in the public interest. Amid the COVID-19 pandemic, there has also been growing concern that investment arbitration will be used to challenge measures implemented by states to curb the spread of the virus. These concerns have seen growing calls for the dismantling of investor-state dispute settlement or the acceleration of reform efforts. This contribution reflects on the most problematic aspects of contemporary international investment law before critically analysing the effectiveness of various model reform treaties in rebalancing the rights of investors and host states. This chapter ultimately seeks to make suggestions on what investment law should look like in a post-COVID-19 society.

1 Introduction

International investment law is facing an unprecedented legitimacy crisis. Internationally, there has been growing concern over its ability to undermine regulations by the state implemented in the public interest.¹ Investment arbitration has already been used to challenge a range of government measures implemented in the public interest. These include black economic empowerment (BEE) legislation implemented by South Africa,² climate change mitigation measures implemented by

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1 Akinkugbe “Africanization and the Reform of International Investment Law” 2021 *Case Western Reserve Journal of International Law* 7 8.

2 *Piero Foresti v Republic of South Africa*, ICSID Case no. ARB (AF)/07/1.

the Netherlands and Canada,³ the polluter-pays principle in Ecuador and Nigeria⁴ as well as the minimum wage implemented by Egypt.⁵ Investors' high success rate in disputes decided on the merits,⁶ and substantial inconsistency in the interpretation of the legal principles underlying international investment law by tribunals have only added fuel to the fire.⁷ These concerns have resulted in a series of reforms led by the United Nations Conference on Trade and Development (UNCTAD) and a significant multinational reform effort through the United Nations Commission on International Trade Law (UNCITRAL) Working Group III.

However, civil society has increasingly shifted from calling for reform to calling for a complete dismantling of investment arbitration.⁸ These calls have been growing louder as investors threaten states with investment disputes over COVID-19 related restrictions.⁹ There is also growing concern that even if a COVID-19 vaccine intellectual property (IP) waiver is obtained under the Trade-Related Aspects of Intellectual Property Rights (TRIPS) agreement, pharmaceutical companies could still claim in investment law. These concerns arise because investment tribunals have already asserted jurisdiction over patents, as seen

3 *Westmoreland Mining Holdings LLC v Government of Canada*, ICSID Case no. UNCT/20/3, Notice of Arbitration and Statement of Claim, 12 August 2019 par 30; *RWE AG and RWE Eemshaven Holding II BV v Kingdom of the Netherlands*, ICSID Case no. ARB/21/4); *Uniper SE, Uniper Benelux Holding B.V. and Uniper Benelux N.V. v Kingdom of the Netherlands*, ICSID Case no. ARB/21/22.

4 *Chevron Corporation (U.S.A.) and Texaco Petroleum Corporation (U.S.A.) v Republic of Ecuador I*, PCA Case no. 2007-02/AA277; *Shell Petroleum N.V. and The Shell Petroleum Development Company of Nigeria Limited v Federal Republic of Nigeria*, ICSID Case no. ARB/21/7.

5 *Veolia Propreté v Arab Republic of Egypt*, ICSID Case no. ARB/12/15.

6 UNCTAD Review of ISDS Decisions in 2019: Selected IIA Reform Issues (2021) 3 at https://unctad.org/system/files/official-document/diaepcbinf2021d1_en.pdf (accessed 25 January 2022).

7 Forere "New developments in international investment law: A need for a multilateral investment treaty?" 2018 *PELJ* 118.

8 A group of civil society organisations had, for example, launched a petition for the termination of the Energy Charter Treaty. This petition garnered 1 million signatures within two weeks.

9 The case of *ADP International S.A. and Vinci Airports S.A.S. v Republic of Chile*, ICSID Case no. ARB/21/40 is the first investment law claim arising from COVID-19 related measures to be registered. Several other notices of arbitration have also been served on states and could see further proceedings being brought.

from the case of *Eli Lilly and Company v The Government of Canada*.¹⁰ A TRIPS waiver may not automatically exclude states' liability under international investment law.

Serious concerns over investment disputes concerning COVID-19 restrictions also led the African Union (AU) to adopt the AU Declaration on the Risks of Investor-State Arbitration Relating to COVID-19 Measures. The declaration aims to raise awareness among African governments on the risk of investment disputes and encourages states to explore all available options under international law to mitigate the risks of such claims.¹¹ Importantly, it reflects the need to ensure that public budgets are directed towards responding to the pandemic and not towards expensive investor disputes.¹² This heightened awareness may accelerate efforts at reforming international investment law or see an ever greater number of countries withdrawing from investment law treaties.

This contribution aims to analyse some of the core reforms needed in international investment law to ensure that it does not undermine human rights, labour standards and urgently needed climate action in a post-COVID-19 society. It does so by analysing the key challenges presented by international investment law and the interplay between these challenges and COVID-19. It then critically analyses the current reform efforts and comments on the slow pace of reform and weak language used in many so-called reformed treaties.

2 The problematic existing international investment law framework

The inconsistent interpretation of the standards relating to indirect expropriations has been a key contributor to the concern of states over investment law claims arising from measures implemented to curb the spread of COVID-19. An indirect expropriation may occur where a regulatory intervention by a state results in a decreased value in an

¹⁰ *Eli Lilly and Company v Government of Canada*, ICSID Case no. UNCT/14/2, Final Award, 16 March 2017; Lentner "Litigating patents in investment arbitration: *Eli Lilly v Canada*" 2017 *Journal of Intellectual Property Law & Practice* 815 816.

¹¹ par 12(i) of the AU Declaration on the Risks of Investor-State Arbitration Relating to COVID-19 Measures.

¹² par 9 of the AU Declaration on the Risks of Investor-State Arbitration Relating to COVID-19 Measures.

investment.¹³ The extent to which COVID-19 related measures would amount to an indirect expropriation will at least partially turn on which of the two competing doctrines—the sole effects doctrine or the police powers doctrine—the tribunal applies. The sole effects doctrine is a school of thought in investment tribunals that assesses indirect expropriation solely with reference to the effect that a measure has on the investor.¹⁴ In terms of this doctrine, the state’s reason for implementing the measure is entirely irrelevant.¹⁵ The police powers doctrine, in contrast, holds that *bona fide* general regulations, which fall within the state’s police powers, can exclude a state’s liability to compensate a foreign investor.¹⁶

If the sole effects doctrine was applied to a claim for indirect expropriation, the question would accordingly be whether the measures have resulted in a permanent or near total deprivation of the investor’s investment. Notably, some tribunals have held that a permanent deprivation does not require the laws or regulations to be in place for an extended period of time, but rather that it is their effect on the investor that should be permanent.¹⁷ This means that even legislation with a short lifespan can amount to an indirect expropriation if its adverse consequences endure for the investor after its repeal,¹⁸ such as instances where the business became insolvent when the regulations restricted its activities. Therefore, the temporary nature of COVID-19 restrictions does not mean that these measures cannot amount to indirect expropriation. This approach makes it particularly difficult for states to know beforehand which regulations will amount to a compensable indirect expropriation as it ultimately

13 Shirlow “Deference and indirect expropriation analysis in international investment law: observations on current approaches and frameworks for future analysis” 2014 29(3) *ICSID Review: Foreign Investment Law Journal* 595 595.

14 Malakotipour “The chilling effect of indirect expropriation clauses on host states’ public policies: A call for a legislative response” 2020 *International Community Law Review* 235 239.

15 Mostafa “The sole effects doctrine, police powers and indirect expropriation under international law” 2008 *Australian International Law Journal* 267 268.

16 Ranjan “Police powers, indirect expropriation in international investment law and article 31(3)(c) of the VCLT: a critique of Philip Morris v. Uruguay” 2018 9(1) *Asian Journal of International Law* 1 17.

17 *Inmaris Perestroika Sailing Maritime Services GmbH v Ukraine*, Excerpts of Award, March 1 2012 par 300.

18 the *Inmaris* case (n 17) par 300.

depends on the impact of the regulations on any one of many investors operating within its territory.

If the police powers doctrine was to be applied to a claim for indirect expropriation, public health measures may not require the state to compensate the investor provided that due process was followed in adopting the regulations. However, the police powers doctrine has also been applied inconsistently. In *Methanex Corporation v United States of America*,¹⁹ for example, the tribunal adopted one of the broadest formulations of the police powers doctrine to date. It held that—

“... as a matter of general international law, a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and, which affects, inter alios, a foreign investor or investment is not deemed expropriatory and compensable unless specific commitments had been given by the regulating government to the then putative foreign investor contemplating investment that the government would refrain from such regulation.”²⁰

The *Methanex* approach is, therefore, directly opposite to the sole effects doctrine. Compensation is not due where investors suffer harm as a result of non-discriminatory regulations that are enacted in the public interest and which have followed due process.²¹ The state only needs to pay compensation where it has given a specific undertaking to refrain from passing such regulations.²² Nevertheless, the *Methanex* approach has rarely been followed by other tribunals.²³ Several tribunals have indicated that allowing an absolute exception to the rules in respect of indirect expropriation for regulations that are adopted in the public interest would “create a gaping hole in international protection against expropriation”.²⁴ These tribunals generally hold that where

19 *Methanex Corporation v United States of America*, UNCITRAL, Final Award, 3 August 2005.

20 the *Methanex* case (n 19) Part D (IV).

21 *Ranjan* (n 16) 17.

22 *Ranjan* (n 16) 17.

23 *Ranjan and Anand* “Determination of indirect expropriation and doctrine of police power in international investment law: a critical appraisal” in Choukroune (ed) *Judging the State in International Trade and Investment Law* (2016) 142–145.

24 *Pope and Talbot v Canada*, Ad hoc Tribunal (UNCITRAL), Interim Award, 26 June 2000 par 99; *Azurix Corporation v The Argentine Republic*, ICSID Case no ARB/01/12, Award, 23 June 2006 par 310; *Compania de Aguas del*

general regulations are unreasonable, arbitrary, discriminatory, disproportionate or otherwise unfair, they would still amount to an indirect expropriation if they result in a neutralisation of the foreign investor's property rights.²⁵

The substantial uncertainty over which measures amount to a compensable indirect expropriation is but one of the problem areas of investment law. Tribunals have also interpreted other standards of treatment, such as the fair and equitable treatment (FET) standard, inconsistently. Zhu argues that some of this inconsistency has come about due to varying approaches being taken in the formulation of FET clauses in bilateral investment treaties (BITs).²⁶ FET clauses that are not explicitly linked to the international minimum standard of treatment,²⁷ have been interpreted as far-reaching self-standing obligations. By contrast, FET clauses that are restricted to the international minimum standard of treatment usually do not include protection of an investor's legitimate expectations.²⁸

Where FET clauses are not linked to the minimum standard of treatment and are interpreted as a self-standing obligation

Aconquija SA and Vivendi Universal v Argentine Republic, ICSID Case no ARB/97/3, Award, 20 August 2007 par 7.5.21.

25 *El Paso Energy International Company v Argentine Republic*, ICSID Case no. ARB/03/15, Award, 31 October 2011 par 241.

26 Zhu "Fair and equitable treatment of foreign investors in an era of sustainable development" 2018 58(2) *Natural Resources Journal* 319 321.

27 The most authoritative statement on the content of the international minimum standard was set out in the *Neer Claim (United States v Mexico)* (1926) 4 R.I.A.A. 60, wherein the tribunal held that a state's treatment of foreign nationals will only be internationally wrongful if its conduct amounts "to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency". The breach of the international minimum standard of treatment is accordingly subject to a high threshold where only particularly egregious acts by the state could result in a breach. There has been some debate as to whether the standard has evolved since the *Neer Claim* but this debate ultimately falls outside of the scope of this contribution. Suffice it to say that most commentators agree that what is considered "egregious" or "outrageous" would have evolved since the *Neer Claim*.

28 However, as some authors correctly note, certain tribunals who suggest that the minimum standard of treatment has evolved substantially since the *Neer Claim* do include legitimate expectations as part of the minimum standard of treatment. See in this respect Mach "Legitimate expectations as part of the FET standard: An overview of a doctrine shaped by arbitral awards in investor-state claims" 2018 *ELTE Law Journal* 105 112.

which includes the protection of investors' legitimate expectations, tribunals have relied heavily on the purpose of BITs in guiding their interpretation of the FET standard. Zhu notes that some tribunal's focus on a BIT's objective of investment protection has resulted in "a one-sided interpretation of the FET and over-protection of foreign investors".²⁹ She argues that the approach formulated in the *Tecmed* case, sets a very low threshold for a breach of the FET standard. This is because as in the *Tecmed* case and in a line of cases that follow its approach, any frustration of investors' legitimate expectations will amount to a breach of the FET standard.³⁰

The overly broad interpretation of standards of treatment and the substantial limitations this poses for the right of states to regulate has seen the UNCTAD increasingly encouraging states to reform their existing BITs. The UNCTAD has recommended that states pay special attention to eight key provisions when reforming their treaties. These provisions are: (i) the definition of an investment; (ii) the definition of an investor; (iii) national treatment (NT); (iv) most-favoured-nation (MFN) treatment; (v) FET; (vi) full protection and security (FPS); (vii) indirect expropriation; and (viii) public policy exceptions.³¹ The UN Working Group on the issue of human rights and transnational corporations has also recommended that states should "[t]erminate or reform urgently all existing international investment agreements in line with the recommendations made by UNCTAD and in the present report".³² Certain reformed treaties have already been adopted in line with the UNCTAD recommendations and are considered in the following section.

3 Reforms to second-generation investment treaties

States from the global south, and African states in particular, have been leaders in the reform of investment treaties.³³ These reformed treaties, which aim to preserve the states right to regulate and promote

29 Zhu (n 26) 324.

30 *Técnicas Medioambientales Tecmed, S.A. v United Mexican States*, ICSID Case no. ARB (AF)/00/2, Award, 29 May 2003; Zhu (n 26) 328–330.

31 UNCTAD International Investment Agreement Reform Accelerator (2020) 4 at https://unctad.org/system/files/official-document/diaepcbinf2020d8_en.pdf (25-01-2022).

32 United Nations High Commissioner for Human Rights 'Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises' available online <https://www.ohchr.org/EN/Issues/Business/Pages/IAs.aspx> (25-01-2022).

33 Akingkugbe (n 1) 9.

sustainable development, are second-generation treaties.³⁴ These treaties usually contain provisions on the state's right to regulate environmental and labour matters.³⁵ They also use more restrictive definitions of an investor and include provisions that excludes measures taken pursuant to the TRIPS agreement. These agreements also require investors to exhaust local remedies, restrict the most-favoured nation (MFN) clause to measures taken, and define indirect expropriation more narrowly or exclude it from the treaty altogether. However, there exists substantial variation in reform efforts within different treaties.

The Morocco–Nigeria BIT is often presented as an excellent model for reforming investment treaties.³⁶ The treaty certainly contains several important reforms, including the recognition that investments must contribute to sustainable development.³⁷ The definition of an “investment” has also been clarified to exclude portfolio investments and sovereign debt.³⁸ However, the term “investor” remains relatively broad by including all entities incorporated in a member state.³⁹ This definition does not accordingly address concerns over treaty shopping adequately. The definition of an investor also covers entities that are not incorporated in the treaty counterparty, but which is directly or indirectly controlled by a natural person from the treaty counterparty.⁴⁰ The BIT clarifies that an entity would be controlled directly by an investor if “he owns more than 50% of the share capital of the entity and ‘controlled indirectly’ by an investor means that the [i]nvestor has the power to appoint the majority of directors of the corporation or legally supervise its activities.”⁴¹ The denial of a benefits clause serves to address some of these concerns by permitting the state to deny treaty benefits to an investor who has no substantial business interests in the territory of the treaty counterparty.⁴²

The treaty is also unique in how it has clarified the scope of the MFN clause. When addressing the reform of investment treaties, MFN

34 Akingkugbe (n 1) 9.

35 Akingkugbe (n 1) 9.

36 Nwankwo “Balancing international investment law and climate change in Africa: assessing vertical and horizontal norms” 2020 *Manchester Journal of International Economic Law* 48 61.

37 a 1(3) of the Morocco–Nigeria BIT.

38 Ibid.

39 a 1(2) of the Morocco–Nigeria BIT.

40 Ibid.

41 Footnote 1 of the Morocco–Nigeria BIT.

42 a 22(2) of the Morocco–Nigeria BIT.

clauses are often neglected by states.⁴³ Ashgarian has warned that neglecting the MFN clause when negotiating reforms could undermine the very essence of the reform efforts by allowing investors to rely on more favourable treatment contained in another treaty which does not include these carve-outs.⁴⁴ The Morocco-Nigeria BIT restricts MFN treatment to investors in “like circumstances”.⁴⁵ The inclusion of the limitation providing that MFN treatment only applies to investors in like circumstances is not in itself unique or unusual. A similar clause was interpreted by the tribunal in the case of *İçkale İnşaat Limited Şirketi v Turkmenistan*,⁴⁶ as requiring a fact-based comparison between the claimant investor and another similarly situated investor to determine if the latter had been accorded more favourable treatment.⁴⁷

However, the tribunal in *Guris Construction and Engineering Inc. and others v Arab Republic of Syria*,⁴⁸ rejected this approach and holds that such provisions require no more than the proper application of the *eiusdem generis* principle.⁴⁹ In terms of the latter approach, one only needs to determine if the area to which the MFN principle applies is broad enough to include the specific type of treatment on which the claimant seeks to rely.⁵⁰ The Morocco-Nigeria BIT clarifies that:

“...references to ‘like circumstances’ in paragraph 2 requires an overall examination on a case-by-case basis of all the circumstances of an investment including, but not limited to:

- a) its effects on third person and the local community;
- b) its effects on the local, regional or national environment, including the cumulative effects of all investments within a jurisdiction on the environment;
- c) the sector in which the investor is in;
- d) the aim of the measure concerned;
- f) the regulatory process generally applied in relation to the measure concerned; the examination referred to in this

43 Ashgarian “The relationship between international investment arbitration and environmental protection: charting the inherent shortcomings” 2020 27(2) *Eastern and Central European Journal on Environmental Law* 5 39.

44 Ashgarian (n 43) 39.

45 a 6(2) of the Morocco-Nigeria BIT.

46 ICSID Case no ARB/10/24, Award, 8 March 2016.

47 the *İçkale* case (n 46) par 329.

48 ICC Case no. 21845/ZF/AYZ, Final Award, 31 August 2020.

49 the *Guris* case (n 48) par 255.

50 the *Guris* case (n 48) par 255.

The Impact of Covid-19 on the Future of Law

paragraph shall not be limited to or be biased toward anyone factor.”⁵¹

However, the clarification of like circumstances technically applies to national treatment and not MFN treatment. The provision on MFN is contained in Article 6(4) of the agreement which does not similarly clarify the meaning of “like circumstances”.

Furthermore, the MFN provisions in the war clause does not seem to be reformed at all. Zrilic notes that the term “war clause” is a misnomer as these clauses generally cover an entire range of events beyond a war.⁵² These clauses frequently make provision for events such as insurrections, revolutions, riots and civil disturbances, i.e. events that fall well below the threshold of war.⁵³ Therefore, the term “war clause” should not be interpreted as confining the scope of this clause to the occurrence of war. It is generally accepted that there are two different types of war clauses, a conventional non-discrimination clause and an extended war clause. Conventional war clauses are the most commonly occurring war clauses in BITs. They merely provide for equality in treatment where compensation is paid for any losses arising during an armed conflict.⁵⁴ Extended war clauses appear less frequently in BITs and provide investors with a right to receive compensation for losses resulting from an armed conflict if certain conditions are met.⁵⁵

The Morocco-Nigeria BIT contains both a classical non-discrimination war clause as well as an extended war clause.⁵⁶ The non-discrimination war clause provides that:

“Investors of one Party whose investments in the territory of the other Party suffer losses due to war, armed conflict, revolution, state of national emergency, insurrection, civil disturbances or other similar events, shall be accorded by the latter Party treatment, as regards restitution, indemnification,

51 a 6(3) of the Morocco-Nigeria BIT.

52 Zrilic *The Protection of Foreign Investment in Times of Armed Conflict* (2019) 106.

53 Zrilic (n 52) 106.

54 Ryk-Lakham “The genealogy of extended war clauses: requisition and destruction of property in armed conflicts” in Ackermann & Wuschka *Investments in Conflict Zones The Role of International Investment Law in Armed Conflicts, Disputed Territories, and ‘Frozen’ Conflicts* (2021) 54.

55 Ryk-Lakham (n 54) 54.

56 a 9 of the Morocco-Nigeria BIT.

3 Covid-19 related claims

compensation or other settlement, no less favourable treatment than that which the latter Party accords to its own investors or to investors of a third State.”⁵⁷

This clause uses the broad term of “treatment” and does not subject it to “measures taken”. In terms of existing investment law jurisprudence, clauses using the broader term of treatment without subjecting it to measures taken, would include all treatment legally owed to the investors of any third state.⁵⁸ This would include compensation to which nationals from a third country are legally entitled to under a strict liability war clause.⁵⁹ The Italy–Nigeria BIT contains such an unqualified extended war clause,⁶⁰ and could be imported into the Morocco–Nigeria BIT by Moroccan investors who suffer losses as a result of a listed event. Nigeria’s failure to pay attention to the wording of the war clause could mean that the carefully negotiated balance sought in the treaty can be disrupted by importing strict liability from another treaty.

The formulation of the environmental provisions in the treaty are also weak. The BIT provides that it must not be interpreted “to prevent a [p]arty from adopting maintaining, or enforcing, in a non-discriminatory manner, any measure otherwise consistent with this [a]greement that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental and social concerns.”⁶¹

The state’s right to adopt environmental regulations is subject to a significant provision that it must be “otherwise consistent” with the investment treaty. A virtually identical provision was interpreted by the tribunal in *Aven v Republic of Costa Rica*,⁶² who held that such provisions affords the state a margin of appreciation and gives “preference to the standards of environmental protection that were stated to be of interest to the Treaty Parties at the time it was signed”.⁶³ However, it does not constitute an exception to the investment protection provisions in the treaty and still limits the way “a [p]arty may implement and enforce its own environmental laws”.⁶⁴ The tribunal also emphasises that such

57 a 9(1) of the Morocco–Nigeria BIT.

58 the *Guris* case (n 48) par 255.

59 the *Guris* case (n 48) par 255.

60 a 4 of the Italy–Nigeria BIT.

61 a 13(4) of the Morocco–Nigeria BIT.

62 ICSID Case no. UNCT/15/3, Final Award, 18 September 2018.

63 the *Aven* case (n 62) par 412.

64 the *Aven* case (n 62) par 413.

provisions “do not -in and of themselves” create any obligations for investors.⁶⁵

Investors’ obligations are particularly important from the perspective of potential state counterclaims. It has been argued that counterclaims can serve as an important tool for host states in counterbalancing “the procedural privilege of investors in investment arbitration”.⁶⁶ Commentators advancing such arguments have urged international tribunals to permit counterclaims to ensure the accountability of multinational corporations at an international level.⁶⁷ Bose has argued that the cases of *Aven v Costa Rica* and *Urbaser v Argentina*⁶⁸ make it apparent that a failure to impose specific obligations on an investor within the investment agreement itself does not mean that an investor does not have obligations under international law.⁶⁹ Where investors breach these obligations, a state may validly bring a counterclaim against the investor for any harm suffered.⁷⁰

However, the tribunal in *Aven* displayed a clear preference for the obligations to arise from the treaty itself.⁷¹ The tribunal in *Sunlodges Ltd (BVI) v United Republic of Tanzania*,⁷² additionally holds that “just as an investor may only bring claims arising under the [t]reaty, the respondent State may only bring counterclaims arising under the [t]reaty.”⁷³ The lack of clear environmental obligations imposed on the investor in the Morocco-Nigeria BIT could accordingly pose a significant barrier to a successful counterclaim against an investor for any environmental harm caused by the investor. From this perspective, the provision in the agreement imposing specific labour obligations on the investor should be welcomed.⁷⁴

65 the *Aven* case (n 62) par 413.

66 Shao “Environmental and Human Rights Counterclaims in International Investment Arbitration: at the Crossroads of Domestic and International Law” 2021(24) *Journal of International Economic Law* 157 158.

67 Shao (n 66) 159.

68 *Urbaser S.A. and Consorcio de Aguas Bilbao Biskaia, Bilbao Biskaia Ur Partzuergoa v Argentine Republic*, ICSID Case no. ARB/07/26, Award, 8 December 2016.

69 Bose “David R Aven v Costa Rica: The Confluence of Corporations, Public International Law and International Investment Law” 2020(35) *ICSID Review* 20 28.

70 Bose (n 69) 28.

71 the *Aven* case (n 62) par 743.

72 PCA Case no. 2018-09, Award, 20 December 2019.

73 the *Sunlodges* case (n 72) par 521.

74 a 18(3) of the Morocco-Nigeria BIT.

However, the labour obligations imposed on the investor in the treaty itself is limited to the “core labour standards as required by the ILO Declaration on Fundamental Principles and Rights of Work, 1998.”⁷⁵ The core labour standards recognises the rights to: “freedom of association and the effective recognition of the right to collective bargaining; the elimination of all forms of forced or compulsory labour; the effective abolition of child labour; and the elimination of discrimination in respect of employment and occupation”.⁷⁶ These rights, although necessary, represent only a fraction of the obligations contained in the corpus of international labour standards. Additionally, a state can only succeed on a counterclaim if it can quantify its claim. This may present challenges in as far as the core labour standards are concerned, how does one after all quantify a claim against an investor over its use of child labour? The other labour provisions in the agreement also only imposes obligations on the state and merely recognises that the state has an obligation to enforce its labour laws and should not lower labour standards in order to attract investments.⁷⁷

4 The Pan African Investment Code as a model for future reforms

The AU adopted the Pan African Investment Code (PAIC) in 2016. It is not a binding treaty but serves to guide member states in their investment policy and may also guide negotiations for the investment protocol in terms of the African Continental Free Trade Agreement (AfCFTA).⁷⁸ The code has been praised for its innovative provisions to balance investors’ rights and the host state’s right to regulate in the public interest.⁷⁹ The code adopts an approach that is similar to the Morocco-Nigeria BIT in defining an investment. Like the Morocco-Nigeria BIT, it specifically excludes sovereign debt and portfolio investments from its scope of protection.⁸⁰ It also requires an enterprise to have substantial business activities in the treaty counterparty’s territory to qualify as a national of that state.⁸¹ This provision more effectively prevents incidences of

75 See n 74.

76 Koen & Rammila “The EU-Korea Panel Report: a watershed moment for the trade-labor nexus or mere symbolic victory?” *2021 Journal of International Trade, Logistics and Law* 53 54.

77 a 15 of the Morocco-Nigeria BIT.

78 Nkwankwo (n 36) 54.

79 Nkwankwo (n 36) 54.

80 a 4(4) of the PAIC.

81 a 4(1) of the PAIC.

treaty shopping, where shell companies are incorporated in a specific jurisdiction with the sole intention of obtaining treaty protection.⁸²

The code's definition of "like circumstances" is virtually identical to that contained in the Morocco-Nigeria BIT.⁸³ However, unlike the Morocco-Nigeria BIT this definition of "like circumstances" applies to the MFN clause and is not restricted to the national treatment clause. This should avoid any confusion as to the meaning of "like circumstances" and makes it clear that the inclusion of the term does not merely entail the application of the *eiusdem generis* principle as suggested in the *Guris* case.⁸⁴ The MFN clause also makes it clear that the term "treatment" does not generally include substantive provisions contained in other treaties.⁸⁵ This provision is particularly important in light of the concerns raised by Ashgarian,⁸⁶ and reduces the risk of the MFN clause being used to subvert the carefully negotiated balance of rights contained in the reformed treaty.

The concern raised in this contribution concerning the war clause in the Morocco-Nigeria BIT is also addressed adequately by the code.⁸⁷ The war clause only offers MFN treatment in relation to measures taken by the state to compensate the investor for losses arising from a listed event. Where a clause is subject to "measures taken", the investor would only be entitled to compensation where the state provides another investor with compensation.⁸⁸ The mere existence of a legal right to demand compensation by any other investor does not amount to a measure taken even though it constitutes treatment.⁸⁹

The expropriation clause also represents a codification of the police powers doctrine. The code provides that "(a) non-discriminatory measure of a Member State that is designed and applied to protect or enhance legitimate public welfare objectives, such as public health, safety and the environment, does not constitute an indirect expropriation under this [c]ode."⁹⁰ The police powers doctrine as codified here accords with the broad understanding of the police powers doctrine formulated in the *Methanex* case.⁹¹ This clause

82 Baumgartner Treaty Shopping in International Investment Law (2017) 10.

83 a 7(3) of the PAIC.

84 the *Guris* case (n 48) par 255.

85 a 7(4) of the PAIC.

86 See paragraph 3 above in respect of the concerns raised by Ashgarian.

87 a 13 of the PAIC.

88 the *Guris* case (n 48) par 244.

89 the *Guris* case (n 48) par 244.

90 a 11(3) of the PAIC.

91 *Methanex* case (n 19) Part D (IV).

then further clarifies that the revocation or restriction of intellectual property rights would not constitute an expropriation provided that the measures are consistent with the TRIPS agreement and any other relevant conventions on intellectual property rights.⁹² This provision represents an important recognition of the clear balance required between intellectual property rights and public health. While this need for balance has long been recognised within the field of international intellectual property law in the aftermath of the Doha declaration,⁹³ it has, thus, far been absent from the field of investment law. The UNCTAD has noted that in the midst of the COVID-19 pandemic, there has been a marked increase in the number of new treaties containing references to the need to balance investors' rights and public health.⁹⁴ In 2020, almost 90% of newly concluded investment treaties contained such references to public health.⁹⁵

From the perspective of counterclaims, the PAIC also contains several innovations. Firstly, while the state's right to bring a counterclaim in investment law is generally implied, the PAIC explicitly sets out this right.⁹⁶ In accordance with this clause, a tribunal must consider the effect of an investors failure to comply "with its obligations under this [c]ode or other relevant rules and principles of domestic and international law" on the merits of the claim or on any damages awarded.⁹⁷ While this first section is included under the "Counterclaims by Member States" section, it more accurately represents a codification of the doctrine of contributory fault in international investment law.⁹⁸ This is because the clause is principally concerned with "mitigating or off-setting effects" and not really an avenue for the state to obtain compensation. The section that follows represents a more traditional understanding of a counterclaim and provides that "(a) Member State may initiate a counterclaim against the investor before any competent body dealing with a dispute under

92 a 11(4) of the PAIC.

93 Bradford-Kerry & Lee "TRIPS, the Doha declaration and paragraph 6 decision: what are the remaining steps for protecting access to medicines?" 2007 *Globalization and Health* 12.

94 UNCTAD Recent Developments In The IIA Regime: Accelerating IIA Reform (2021) 8.

95 UNCTAD Recent Developments (n 94) 8.

96 a 43 of the PAIC.

97 a. 43(1) of the PAIC.

98 See *Yukos Universal Limited (Isle of Man) v Russia* PCA Case no. 2005-04/AA227 Final Award (18 July 2014) par 1637 in respect of a discussion of contributory fault in international investment law.

this [c]ode for damages or other relief resulting from an alleged breach of the [c]ode.”⁹⁹

In contrast to paragraph 1, this section does not, per se, include breaches of domestic law and instead restricts the right to bring a counterclaim to damages arising from a breach of the code. In this way, the code codifies the interpretation by tribunals such as that in the *Sunlodges* case.¹⁰⁰ The effect thereof is that an investor’s breach of domestic law may be relevant to determining an investor’s contributory fault but would only be relevant to a counterclaim if the breach of domestic law also amounts to a breach of the code. Therefore, the extent to which the code imposes substantive obligations on the investor is no less important than in the context of an implied right to bring a counterclaim.

To this end, the code imposes several substantive obligations on the investor. The code provides that “(i)nvestors shall comply with international conventions and existing labor (sic) policies and, in particular, not use child labor (sic) and shall support efforts for the elimination of all sort of child labor (sic), including forced or compulsory labor (sic) within Member States.”¹⁰¹ This provision departs from the Morocco–Nigeria BIT in that it imposes substantive labour obligations on the investor beyond the core labour standards. However, the broad usage of “international conventions” can also create some ambiguity as it is not clear if this refers to those conventions to which the host state is a party or the entire range of ILO Conventions. If the latter, the treaty may create an unusual situation where the investor is not bound by the labour standards in question as a matter of domestic law but is nevertheless bound thereby at the international level. Applying the *iusdem generis* principle may also lead to a more restrictive reading of the clause considering the generality of the clause followed by a specific emphasis on child labour and forced labour.¹⁰²

The code also imposes a general obligation on investors to protect the environment and take appropriate remedial measures where their activities harm the environment.¹⁰³ This obligation to implement remedial measures could well be the basis for a counterclaim when

99 a 43(2) of the PAIC.

100 the *Sunlodges* case (n 72) par 521.

101 a 34(3) of the PAIC.

102 It is by now axiomatic that the *iusdem generis* is applicable in investment law as seen from cases such as *Gas Natural SDG, S.A. v Argentine Republic*, ICSID Case no. ARB/03/10, decision of the Tribunal on Preliminary Questions on Jurisdiction, 17 June 2005 par 46.

103 a 37(3) of the PAIC.

the investor has damaged the environment. The wording of the clause is also capable of being interpreted in line with the polluter pays principle i.e. the obligation to take remedial measures arises whenever the investor's activities cause harm to the environment irrespective of whether the investor was negligent. The code also requires investors to perform an environmental impact assessment before starting with its activities.¹⁰⁴ Where investors fail to conduct an environmental impact assessment, their investment will not enjoy protection in terms of the code.¹⁰⁵

The code also contains several clauses relating to transparency and eliminating bribery and corruption. The code bars investors from influencing the appointment of specific public officials and prohibits the funding of political parties by investors.¹⁰⁶ The code also restricts an investor's ability to give government officials and their relatives gifts or any "undue pecuniary" advantage.¹⁰⁷ The restriction on the funding of political parties is somewhat unique to the code while the remainder of the provisions represent a partial codification of certain restrictions on bribery that have been developed in international investment law as a matter of transnational public policy.¹⁰⁸ Regrettably, the code leaves some of the most controversial issues surrounding corruption in investment arbitration unanswered. In particular, there is no accepted approach in investment arbitration concerning the burden of proof surrounding allegations of corruption while the code adds nothing to clarify the position.¹⁰⁹

104 a 37(4) of the PAIC.

105 *Cortec Mining Kenya Limited, Cortec (Pty) Limited and Stirling Capital Limited v Republic of Kenya*, ICSID Case no. ARB/15/29, Award, 22 October 2018 par 154–155.

106 a 20(2) of the PAIC.

107 a 21(1) of the PAIC.

108 See *World Duty Free Company Limited v Republic of Kenya*, ICSID Case no. ARB/00/07, Award, 4 October 2006 par 141–144 in respect of the development of a prohibition of bribery and influence peddling as a matter of transnational public policy.

109 For example, in *Metal-Tech Ltd. v Republic of Uzbekistan*, ICSID Case no. ARB/10/3, Award, 4 October 2013 the tribunal held that is sufficient for the state to establish a prima facie case of corruption whereafter the burden shifts to the investor to rebut the presumption of illicit activities. In contrast, the tribunal in *Lao Holdings N.V. v Lao People's Democratic Republic I*, ICSID Case no. ARB(AF)/12/6, Award, 6 August 2019 par 109–110 held that "An assessment must therefore be made of which elements of the alleged act of corruption have been established by clear and convincing evidence, and which elements are left to reasonable inference, and on the whole whether the alleged act of corruption is established

5 Conclusion

From this chapter, it has become apparent that the pandemic has already accelerated reform in some areas of international investment law. As noted in this contribution, approximately 90% of newly concluded investment agreements now explicitly reference the need to balance investors' rights and public health. However, so far, there has also not been a mass exodus from the system of investor-state dispute settlement, making predictions of its demise premature. Nevertheless, the increased carve-outs for protection of public health, labour standards and the environment is likely to continue in treaties concluded post-pandemic.

This chapter has also reflected on two innovative African models to be used to reform international investment law. The Morocco-Nigeria BIT has certain flaws that are more appropriately addressed in the PAIC. States relying on the Morocco-Nigeria BIT as a model for their own reformed treaties should pay particular attention to these weaker provisions to avoid repeating the same mistakes. Defining "like circumstances" in relation to national treatment but not in relation to MFN treatment is particularly problematic. This could well perpetuate the practice whereby tribunals find a breach of non-discrimination provisions even in the absence of a comparator.

Nevertheless, states guided by the PAIC also need to pay particular attention to some of the more ambiguous provisions. This is particularly true concerning those provisions where the code imposes obligations on investors to comply with "international conventions". States also need to determine the extent to which breaches of domestic law should be justiciable as part of any counterclaims. This may be particularly valuable in relation to environmental counterclaims, albeit that the general duty to protect the environment contained in the code partially addresses these concerns.

to a standard higher than the balance of probabilities but less than the criminal standard of beyond reasonable doubt."



4 Legal uncertainty under the Protection of Personal Information Act during the pandemic

Exploring European case law as an interpretive guideline

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Abstract

In early 2020, the COVID-19 virus rapidly spread around world and forced people to significantly adjust their lives. Lockdowns compelled society to digitalise, thereby substantially increasing the processing of personal information. On 17 June 2020, when South Africa faced the pandemic's "first wave", key provisions of the Protection of Personal Information Act 4 of 2013 (POPIA) were enacted from 1 July 2020, further enabling full enforcement from 1 July 2021. This first South African omnibus data protection act unleashes legal uncertainty due to the highly abstract formulation of its provisions. Considering the recent increase of processing of personal information, the "young" POPIA is under pressure to evolve quickly to mitigate liability risks for responsible parties and at the same time provide a reliable and predictable framework ensuring the protection of protection of personal information.

As a possible approach to increase legal certainty, this chapter will explore the adoption of European data protection case law when

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interpreting the POPIA taking into account recent decisions of the South African Constitutional Court. Since the 1995 EU Data Protection Directive was used as an integral source when drafting the POPIA, this approach appears to be promising and could potentially contribute to a rapid increase of legal certainty in the *terra incognita* of South African data protection law. The adoption of European case law will be examined in the context of three fundamental concepts of data protection law namely, personal information, joint responsibility and consent.

1 Introduction

On 17 June 2020, when South Africa stood at the beginning of the pandemic's "first wave", President Cyril Ramaphosa paved the way for a new "era"¹ of South African data protection law by proclaiming the applicability of key provisions of the Protection of Personal Information Act² (POPIA) from 1 July 2020,³ hereby enacting a compliance deadline until 1 July 2021.⁴ This act, which was gazetted in 2013,⁵ is the first omnibus data protection act in the Republic. Considering the timing of its commencement, the POPIA could be described as a "child of the pandemic". The POPIA aims to give effect to the constitutional right to privacy⁶ and allows the information regulator to impose fines and issue other orders against responsible parties⁷ that do not comply with its legal framework.⁸

The pandemic forced society to digitalise, thereby significantly increasing the processing of personal information. The national lockdowns resulted in the closing of schools, universities and offices which forced many sectors to work remotely and rely heavily on video conferencing services and cloud providers.⁹ The number of users

1 Cf Baumann and Ismail "The concept of "personal information" in the Protection of Personal Information Act 4 of 2013—a comparative analysis from a European perspective" 2021 TSAR 718 719.

2 Act 4 of 2013.

3 Proclamation No R 21 of 2020, GG 43461 (22-6-2020) 3.

4 s 114(1) of the POPIA.

5 GG 37067 (26-01-2013).

6 s 2 of the POPIA.

7 The responsible party is the primary addressee of the Act, cf below 3.2.

8 See s 95(1) and s 109 of the POPIA.

9 On those developments eg Vester "Your business, the cloud, and lockdown" 30 April 2020 (<https://businesstech.co.za/news/industry-news/393872/your-business-the-cloud-and-lockdown/> (8-1-2022)) and the ILO *Teleworking during the COVID-19 pandemic and beyond* (2020)

of social media platforms increased significantly.¹⁰ Furthermore, technology has been utilised to fight the pandemic directly as COVID-19 tracing apps were launched to trace infection chains and warn people who possibly came in contact with infected persons, thereby raising privacy concerns in legal systems around the globe.¹¹ This sudden increase in the processing of personal information paired with other long term developments, such as the societal transformation within the Fourth Industrial Revolution, puts the POPIA under pressure to become operable and interpretable. In particular, the private sector requires a predictable and enhanced data protection framework to invest in and implement new technologies and business models. From this perspective, the *status quo* under the POPIA is rather sobering as the highly abstract formulations of the Act result in a significant degree of legal uncertainty. Numerous businesses and companies are financially drained by the impacts of the pandemic as well as the unrest which occurred during July 2021 in the provinces of Gauteng and KwaZulu-Natal.¹² As a result, they cannot afford legal uncertainty¹³ which adds to the cost of data protection compliance¹⁴ and the possible

2 f (https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---travail/documents/instructionalmaterial/wcms_751232.pdf (08-01-2022)).

- 10 The social network Facebook, for example, reported for the fourth quarter of 2020 an increase of 11 % of daily active users (year over year) compared to December 2019 (see the Facebook Reports Fourth Quarter and Full Year 2020 Results (27 Jan 2021) (<https://investor.fb.com/investor-news/press-release-details/2021/Facebook-Reports-Fourth-Quarter-and-Full-Year-2020-Results/default.aspx> (08-01-2022))).
- 11 On the data protection aspects of such applications see Bradford, Aboy and Lidell “COVID-19 contact tracing apps: a stress test for privacy, the GDPR, and data protection regimes” 2020 *Journal of Law and the Biosciences* 1 ff; Lim “Assessing the implications of digital contact tracing for COVID-19 for human rights and the rule of law in South Africa” (2020) *AHRLJ* 540; Trotogett “A comparative analysis of data privacy impacted by Covid-19 contact tracing in the European Union, the United States and Israel: Sacrificing civil liberties for a public health emergency” 2020 *ILSA Journal of International & Comparative Law* 56 ff.
- 12 According to Reuters, the South African Treasury estimated the economic damage from the riots in Gauteng and KwaZulu-Natal in July 2021 to decrease the 2021 GDP by 0.7–0.9 percentage points (<https://www.reuters.com/article/safrica-economy-idUSL8N2PV3RU> (08-01-2022)).
- 13 Regarding the cost of legal uncertainty in general Wagner “Economic Analysis of Cross-Border Legal Uncertainty; The Example of the European Union” in Smits *The Need for a European Contract Law* (2005) 31 ff.
- 14 According to a survey by Datagrail, 34 per cent out of 301 involved companies employing more than 1000 employees spent more than US\$ 1 million on the preparation of complying with the GDPR (Datagrail

cost of non-compliance.¹⁵ Due to the recent enactment of the POPIA, case law on the interpretation of the provisions of the Act has rarely been reported¹⁶ and the Information Regulator has not yet published policies and guidance notes addressing the interpretation of certain key concepts of the new South African data protection framework.¹⁷ This creates an urgent need for the POPIA to evolve and become interpretable and operable.

The idea of adopting existing case law of the Court of Justice of the European Union (CJEU), in instances where the court already clarified the (autonomous)¹⁸ interpretation of numerous provisions and concepts of the 1995 Data Protection Directive (DPD)¹⁹ and its successor, the General Data Protection Regulation (GDPR),²⁰ could be a fruitful source to “add meat” onto the bony skeleton of the provisions of the POPIA. Therefore, it is not surprising, that this idea has already been introduced into the academic discussion on the POPIA.²¹ This

The Age of Privacy: The Cost of Continuous Compliance (2020) 5 (<https://datagrail.io/downloads/GDPR-CCPA-cost-report.pdf> (08-01-2022)).

- 15 In the case of non-compliance with the POPIA, s 109(2)(c) provides for fines up to R 10 million. The GDPR provides for fines of up to € 20 million or 4 per cent of the total worldwide annual turnover of the preceding financial year of a company (see a 83(5) and (6) of the GDPR). In addition, both regimes provide for administrative measures by the data protection authorities and private enforcement instruments such as claims for damages by data subjects.
- 16 See eg *Divine Inspiration Trading 205 (Pty) Ltd v Gordon and Others* (22455/2019) 2021 (4) SA 206 (WCC) para 30 ff. (discussion of s 11 POPIA) and *Vumacam (Pty) Ltd v Johannesburg Roads Agency and Others* (14867/20) [2020] ZAGPJHC 186 para 17 (where the court did not elaborate detail on the compliance of CCTV road surveillance with the POPIA).
- 17 Those documents are accessible via <https://justice.gov.za/inforeg/docs.html> (08-01-2022).
- 18 EU Law is to be interpreted autonomously and independently from member state law. See in general Martens *Methodenlehre des Unionsrechts* (2013) 335 ff; in context of EU data protection law CJEU, the *Planet49* case C-673/17 (2019) par 47.
- 19 Directive 95/46/EC of the European Parliament and of the Council (24-10-1995) on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ L 281, 23.11.1995, 31 ff.
- 20 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC, OJ L 119, 4.5.2016, 1 ff.
- 21 See Naude and Papadopoulos “Data Protection in South Africa: The Protection of Personal Information Act 4 of 2013 in Light of Recent International Developments (2)” 2016 *THRHR* 213 228 introducing

idea deserves further exploration as it could increase the level of legal certainty in the South African data protection framework—not only during the pandemic. From a methodical perspective, South African courts are familiar with considering foreign case law to shape and clarify the South African legal framework. The question whether the case law of the CJEU can be adopted to interpret the provisions of the POPIA requires discussion,²² as this omnibus data protection act introduced fundamental changes regarding the protection of privacy within the Republic.²³ Following this discussion, the adoption of landmark decisions of the CJEU as interpretive guidelines will be discussed in the context of three regulatory key concepts of the POPIA. The clarification of these concepts may provide a potential solution to mitigate legal uncertainty in the South African data protection framework which has been fuelled by the pandemic.²⁴

2 The adoption of EU case law under the Protection of Personal Information Act

From a methodical perspective, the possibility to adopt CJEU case law in the field of data protection law when interpreting the POPIA requires further discussion. The role of the European data protection law in the interpretation of the POPIA is of particular relevance and will be discussed subsequently. Thereafter, recent judgments of the South African Constitutional Court will be discussed where minority judgments introduced several criteria for the potential reception of CJEU case law.

the idea of the adoption of the CJEU's decision in *Google Spain SL and Google Inc. v AEPD*, where the court introduced the so-called “right to be forgotten” under the DPD (CJEU, the *Google Spain* case C-131/12 par 89 ff.), in context of s 10 and s 24 the POPIA. See also Baumann and Ismail (n 1) 732 ff on the adoption of the *Breyer* judgment to interpret the term “personal information” under the POPIA. The latter will also be discussed below in par 3.1.

22 See below par 2.

23 Before the provisions of Act 4 of 2013 became applicable, the protection of privacy in South Africa was governed by established common law principles and claims (in detail Roos “Data Privacy Law” in Van der Merwe, Roos, Pistorius, Eiselen and Nel *Information and Communications Technology Law* (2016) 418 ff).

24 See below par 3.

2.1 The role of EU data protection law in the genesis of the Protection of Personal Information Act

The genesis of the Data Protection Bill and its final product, the POPIA, was a lengthy process.²⁵ During the course of this procedure, extensive reference was made to the 1980 OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data,²⁶ the 1981 Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data of the Council of Europe²⁷ and the DPD.²⁸ The influence of the DPD on certain provisions of the POPIA is undeniable.²⁹ Several key provisions of the POPIA mimic the wording and systematisation of provisions contained in the DPD, evidencing the model-character of the European framework. For example, this applies to numerous definitions,³⁰ the material³¹ and territorial scope rules,³² the general principles of processing³³ as well as the grounds for processing.³⁴

25 For the genesis of the POPIA, see Roos “Data Protection Law in South Africa” in Makulilo (ed) *African Data Privacy Laws* (2016) 201 ff; on the Data Protection Bill 2009: Makulilo *Protection of Personal Data in sub-saharan Africa* (2012 Thesis GER) 400 ff.

26 These principles have been revised in 2013 by the OECD Privacy Framework 2013; an overview on the guidelines is provided by Naude and Papadopoulus “Data Protection in South Africa: The Protection of Personal Information Act 4 of 2013 in Light of Recent International Developments (2)” 2016 *THRHR* 213 219 ff.

27 Council of Europe, Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data No. 108/1981 from 28 January 1981; the convention has been revised in 2018: Council of Europe, Convention 108+ Convention for the protection of individuals with regard to the processing of personal data 2018.

28 See for example the references on those frameworks in the reform debate on the South African privacy and data protection law (SALRC, *Issue Paper 24 (Project 124)* (2003) sub 1.2.13 ff; SALRC, *Discussion Paper 109 (Project 124)* (October 2005) sub 1.2.13 ff.; SALRC, *Project 124 Privacy and Data Protection Report* (2009), sub 1.2.13 ff).

29 See for example the statement of Burns and Burger-Smidt, *A Commentary on the Protection of Personal Information Act* (2018) 8: “...it becomes clear that the South African legislature relied heavily on the principles and objectives of the 1995 Directive in drafting the POPI Act”.

30 e.g. the concepts discussed below par 3.

31 See s 3(1)(a) of the POPIA and a 3 of the DPD.

32 See the territorial scope rule in s 3(1)(b) of the POPIA and a 4(1)(a) and (c) of the DPD. For a more detailed discussion of the territorial scope rules of the POPIA, the GDPR and the DPD see Baumann and Ismail “The (Extra-) territorial Scope Rules of the New European Data Protection Law from a Private International Law Perspective—A Model for South Africa?” 2021 (1) *CILSA* 8–17 and 30–34.

33 See s 8 ff of the POPIA and a 6 of the DPD.

34 See s 11 of the POPIA and a 7 of the DPD.

2.2 The adoption of European case law by the South African Constitutional Court

On several occasions in recent years, the South African Constitutional Court considered CJEU case law as an interpretive guideline. In *Horn v LA Health Medical Scheme*³⁵ as well as in *Rural Maintenance (Pty) Limited and Another v Maluti-A-Phofung Local Municipality*,³⁶ Zondo J, in his minority judgments, referred to CJEU case law when interpreting section 197 of the Labour Relations Act.³⁷ In both judgments,³⁸ Zondo J emphasised that section 197 was inspired by EU legislation.³⁹ This reasoning suggests that CJEU case law can be taken into account when interpreting provisions of the POPIA, whose drafting was based on the European data protection law.

In *Competition Commission of South Africa v Media 24 (Pty) Limited*,⁴⁰ on the other hand, Theron J rejected the adoption of CJEU case law in the context of section 8(c) of the Competition Act.⁴¹ This judgment is of particular interest as Theron J argued for a limitation when taking foreign law into account while interpreting South African laws. The judge emphasised that foreign law can be considered for the interpretation of section 8(c) of the Competition Act but “should not displace the express meaning of the [South African] legislation”.⁴² Transferring this reasoning into the context of the POPIA, the adoption of CJEU case law would be out of question if such reference would displace the express meaning and systematisation of particular provisions or concepts as introduced by the Act.

35 (2015) ZACC 13 par 50, 75 ff.

36 (2017) 38 ILJ 295 (CC) 333 ff par 141 ff.

37 66 of 1995.

38 the *Horn* case (n 35) par 67; the *Rural Maintenance* case (n 36) 333 par 141.

39 In both minority judgments, Zondo J refers to the Council Directive 77/187/EEC (of 14 February 1977 on the approximation of the laws of the member states relating to the safeguarding of employees’ rights in the event of transfers of undertakings, businesses or parts of businesses, OJ L 61, 5.3.1977, 26 ff) as well as the “1981 TUPE-Regulations”, which transposed the directive into domestic UK law.

40 *Competition Commission of South Africa v Media 24 (Pty) Limited* 2019 5 SA 598 (CC) 631 ff par 98 ff, 655 par 185.

41 Act 89 of 1998.

42 the *Competition Commission* case (n 40) 655 par 185 (additions by the authors).

3 Specification of selected concepts of the Protection of Personal Information Act

The subsequent discussion will examine the CJEU case law in respect of three fundamental concepts of EU data protection law, which are also contained in the regulatory framework of the POPIA. This refers to the concepts of personal information, joint responsibility and consent.

3.1 The concept of “personal information”

Personal information is the key concept to determine whether the POPIA applies. It is, therefore, imperative to clarify the concept of “personal information” to determine the scope and application of the Act. Evaluating whether “personal information” is processed can be complex. For example, regarding the pandemic-related increased use of cloud services, an assessment needs to be conducted in respect of any information uploaded to the “cloud” to determine whether this information is classified as personal information. The same applies to pandemic-related measures such as COVID-19 tracing apps and the capturing of other information, like the personal details of restaurant patrons or individuals’ vaccination statuses. Even though the pandemic has led to new forms of data processing, it should be noted that the gravity of the concept of “personal information” goes far beyond such pandemic related matters. This concept is the starting point of every data protection assessment and its practical relevance cannot be overemphasised.

After a brief overview of the concept of personal information under the POPIA, the paper will ascertain whether the adoption of the CJEU’s reasoning in the case of *Breyer v Bundesrepublik Deutschland* could mitigate legal uncertainty in the new South African data protection framework.⁴³

3.1.1 *The definition of personal information*

Section 1 of the POPIA generally defines personal information as “information relating to an identifiable, living, natural person, and where it is applicable, an identifiable, existing juristic person”. Along with this definition, the act provides a non-exhaustive list⁴⁴ of examples for personal information. The POPIA essentially adopted the

43 See Baumann and Ismail (n 1) 732 ff for a detailed discussion of the adoption of this judgment under the POPIA.

44 See Abdulrauf “Data protection in the internet: South Africa” in Moura Vincente and de Vasconcelos Casimiro (eds) *Data Protection in the Internet* (2020) 349 352; Burns and Burger-Smidt (n 29) 22 and Roos (n 25) 204.

concept of “personal data”⁴⁵ as provided for in international⁴⁶ and EU data protection laws.⁴⁷

The most problematic requirement for information to be classified as “personal information” or “personal data” lies in determining whether it relates to an “identifiable person”. Despite the history of more than 25 years of EU data protection, the criteria under which a person is “identifiable” remains a subject of controversial academic discussions. Thus far, it is still discussed to which extent third-party knowledge must be taken into consideration. Unlike the UK Data Protection Act 1998,⁴⁸ for example, neither the EU data protection law nor the POPIA explicitly address which entities knowledge is relevant to determine the identifiability of a person. In light of this, it appears to be fruitful to analyse the *ratio decidendi* of *Breyer v Bundesrepublik Deutschland*, which explicitly addressed this aspect.

3.1.2 The *Breyer v Bundesrepublik Deutschland* case

The CJEU interpreted the term “identifiable person” in the context of article 2(a) of the DPD in the 2016 judgment of *Breyer v Bundesrepublik Deutschland*.

The case dealt with the storing of information on all access operations in log files related to public websites of German Federal Institutions. The log files included, *inter alia*, the dynamic IP-Address of computers seeking access to prevent attacks on those websites and to enable the identification of attackers for criminal prosecution.

The *Bundesgerichtshof* requested a preliminary ruling to determine, *inter alia*, whether dynamic IP-Addresses are classified as personal data in terms of article 2(a) DPD for the website the provider

45 It should be noted that the South African and European concepts are not completely identical. *e.g.* regarding the protection of information relating to juristic persons. The POPIA follows a more extensive approach (*cf* Baumann and Ismail (n 1) 730 f and Roos “The European Union’s General Data Protection Regulation (regulation) and its Implications for South African Data Privacy Law: An Evaluation of Selected ‘Content Principles’” 2020 (3) *CILSA* 1 9 f).

46 See s 1(b) of the OECD Guidelines 1980 and s 2(a) of the Convention of the Council of Europe 1981.

47 See a 4(1) of the GDPR and the preceding definition of a 2(a) of the DPD.

48 See the definition of “personal data” under s 1 of the UK Data Protection Act 1998 which provides that “‘personal data’ means data which relate to a living individual who can be identified—(b) *from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller [...]*” (emphasis by the authors).

if a third party, such as an internet service provider, has the additional knowledge required to identify the data subject.⁴⁹

As a starting point in addressing this question, the CJEU referred to recital (26) of the DPD.⁵⁰ This recital provided that when determining if a person is “identifiable”, all means likely to be used, either by the controller or by any other person, to identify the said person should be taken into account. On this basis, the CJEU came to the conclusion that “it is not required that all the information enabling the identification of the data subject must be in the hands of one person”.⁵¹ Thereafter, the court held that “it must be determined whether the possibility to combine a dynamic IP address with the additional data held by the internet service provider constitutes a means likely reasonably to be used to identify the data subject”.⁵² The court then elaborated that those requirements are not met in cases where identification is legally prohibited or practically impossible.⁵³ According to the ruling, such a practical impossibility can be assumed when a disproportionate effort in terms of time, cost and man-power is required and the risk of identification appears to be insignificant in reality.⁵⁴ In respect of dynamic IP-Addresses, the court then reached the conclusion that the existence of legal means to obtain the information from the third party, such as an internet service provider, constitutes means that may reasonably be used to identify the data subject.⁵⁵

3.1.3 *The adoption of Breyer v Bundesrepublik Deutschland under the Protection of Personal Information Act and alternative approaches*

From a South African perspective, the question remains whether an adoption of the *Breyer* decision is desirable and methodologically possible. German scholars, in particular, already discussed several distinctive approaches to ascertain the extent of third-party knowledge which should be taken into account when determining whether a person is “identifiable” under the *Bundesdatenschutzgesetz*, which transposed the DPD into domestic law.⁵⁶ Out of the broad

49 OJ C 89, 16.3.2015, 4 f.

50 CJEU, *Breyer* case C-582/14 (2016) par 42.

51 CJEU, *Breyer* (n 50) par 43.

52 CJEU, *Breyer* (n 49) par 45.

53 CJEU, *Breyer* (n 49) par 46.

54 CJEU, *Breyer* (n 49) par 46.

55 CJEU, *Breyer* (n 49) par 47 f.

56 On the numerous approaches in this context, see Bergt “Die Bestimmbarkeit als Grundproblem des Datenschutzrechts—Überblick über den Theorienstreit und Lösungsvorschlag” 2015 *Zeitschrift für*

spectrum of approaches developed within the German discussion, two approaches to interpret the criteria of “identifiable” were widely supported and could be possible alternatives to interpret the concept of personal information under the POPIA. For this reason, the so-called “objective” or “absolute” approach, as well as the so-called “subjective” or “relative” approach will subsequently be examined as potential alternatives to the adoption of the CJEU’s approach in the *Breyer* judgment.

3.1.3.1 The “objective” or “absolute” approach

The most extensive approach is the so-called “objective” or “absolute” approach. It classifies information as personal data when anybody is able to identify the person.⁵⁷ According to this approach, the entire world’s knowledge would have to be taken into account.⁵⁸ The adoption of this approach under the POPIA would subject almost every processing of information to the Act, thereby contravening the purpose of this legislation to only regulate the processing of “personal” information.⁵⁹ In addition, the definition of the term “unique identifier” in section 1 of the POPIA⁶⁰ suggests that the perspective of the responsible party is of primary relevance. For those reasons, the objective approach should not be supported under the POPIA.

Datenschutz (ZD) 365 ff and Haase *Datenschutzrechtliche Fragen des Personenbezugs* (2015) 259 ff.

57 Pahlen-Brandt “Datenschutz braucht scharfe Instrumente Beitrag zur Diskussion um ‘personenbezogene Daten’” 2008 *Datenschutz und Datensicherheit (DuD)* 34 38. For an absolute approach under the GDPR Buchner “Grundsätze und Rechtmäßigkeit der Datenverarbeitung unter der DS-GVO” 2016 *DuD* 155 156 and Weichert “DSGVO Art 4” in Däubler, Wedde, Weichert and Sommer *EU-DS-GVO und BDSG Kompaktcommentar* (2020) par 19 who acknowledges restrictions by recital (26) of the regulation.

58 See the remarks of the *Landgericht Berlin* 2013 *ZD* 618 619 where the objective approach was rejected in the result.

59 See s 2(b) of the POPIA. On this aspect see also Baumann and Ismail (n 1) 736 f.

60 The section reads as follows: “‘unique identifier’ means any identifier that is assigned to a data subject and is used by a responsible party for the purposes of the operations of that responsible party and that uniquely identifies that data subject in relation to that responsible party” (emphasis added).

3.1.3.2 The “subjective” or “relative” approach

The so-called “subjective” or “relative” approach is more restrictive and requires the controller to be able to identify the person concerned with reasonable effort.⁶¹ The provisions of the POPIA also do not expressly support nor reject the subjective approaches, raising the question of whether it might be beneficial to follow this interpretation. The adoption of the subjective approach as supported in the UK Data Protection Act 1998 may be considered for the interpretation of the POPIA. In this regard, it needs to be noted that section 1 of the UK Data Protection Act 1998 was amended by section 3(2) of the UK Data Protection Act 2018⁶² which does not support the subjective approach any longer. This approach would, therefore, result in the adoption of an already revised legal position.⁶³

3.1.3.3 The adoption of the CJEU’s approach in the Breyer case

The third option would, therefore, be the adoption of the approach as supported in the *Breyer* case. From the reasoning of the court in this judgment, scholars concluded that the CJEU does not follow the objective approach,⁶⁴ but supports a moderate subjective approach which includes elements of the objective approach.⁶⁵ This approach takes into account the means and additional knowledge that the controller will reasonably use for identification.⁶⁶ Under the GDPR,

61 *e.g.* Landgericht Frankenthal 2008 *Multimedia und Recht (MMR)* 687 689; Eckhardt “IP-Adresse als personenbezogenes Datum – neues Öl ins Feuer” 2011 *Computer und Recht (CR)* 339 342; Roßnagel and Scholz “Datenschutz durch Anonymität und Pseudonymität” 2000 *MMR* 721 723. Also see s 1 of the UK Data Protection Act 1998 (n 47). In context of the GDPR Hofmann and Johannes “DS-GVO: Anleitung zur autonomen Auslegung des Personenbezug” 2017 *ZD* 221 226 and Selzer in Jandt and Steidle (eds) *Datenschutz im Internet* (2018) 128.

62 This section reads as follows: “‘Personal data’ means any information relating to an identified or identifiable living individual ...”.

63 Baumann and Ismail (n 1) 737.

64 Moos “Anmerkung zu EuGH, Urteil vom 19.10.2016–C-582/14–Breyer” 2016 *MMR* 845.

65 Karg “Art 4 Nr 1 DSGVO” in Simitis, Hornung and Spiecker gen Döhmann (eds) *Datenschutzrecht* (2019) par 60; Mantz and Spittka “Anmerkung zu EuGH (2. Kammer), Urteil vom 19.10.2016–C-582/14 (Breyer/ Deutschland)” 2016 *Neue Juristische Wochenschrift (NJW)* 3582 3583; Moos (n 64) 845.

66 Article 29 of the Data Protection Working Party *Opinion 4/2007 on the concept of personal data WP 136* (20.6.2007) 15; Brink and Eckhardt “Wann ist ein Datum ein personenbezogenes Datum?” 2015 *ZD* 205 210 f.

the majority supports this moderate approach⁶⁷ with reference to recital (26) of the Regulation⁶⁸ and the leading CJEU case of *Breyer*.⁶⁹

Several arguments can be invoked in support of the adoption of this approach under the POPIA.⁷⁰ The *Breyer* judgment is the leading case in the interpretation of an “identifiable person” in all EU member states. Thus, an adoption of the CJEU’s reasoning would support the aim of the POPIA to regulate the processing of personal information in harmony with international standards.⁷¹ The similarity of the wording of the definition of personal information under the POPIA and the definitions in European data protection law strongly indicate that the CJEU’s interpretation would not displace the express meaning of “personal information” under the POPIA. The genesis and systematic interpretation of the Act support this position. Firstly, the historical connection between the POPIA and the DPD⁷² provide a basis to adopt the EU case law. Secondly, the provisions of the POPIA can be interpreted in favour of the moderate subjective approach. While the definition of “unique identifier” indicates a perspective centred to the responsible party, the definitions of “re-identify” and “de-identify”⁷³ refer to “reasonably foreseeable” methods to identify the data subject or to link data by such a method that identifies the data subject. This

67 e.g. Gola “Art 4 DS-GVO” in Gola (ed) *Datenschutz-Grundverordnung VO (EG) 2016/679 Kommentar* (2018) par 18; Schantz in Schantz and Wolff *Das Neue Datenschutzrecht* (2017) par 279; Schreiber “Artikel 4 DSGVO” in Plath *DS-GVO/BDSG* (2018) par 8; Karg (n 65) par 61 ff; Rucker “B. Scope of application of the regulation” in Rucker and Kugler (eds) *New European General Data Protection Regulation* (2018) par 91 (referring to recital (26) of the regulation).

68 Recital (26) s 3 and 4 of the GDPR read as follows: “To determine whether a natural person is identifiable, account should be taken of all the means reasonably likely to be used, such as singling out, either by the controller or by another person to identify the natural person directly or indirectly. To ascertain whether means are reasonably likely to be used to identify the natural person, account should be taken of all objective factors, such as the costs of and the amount of time required for identification, taking into consideration the available technology at the time of the processing and technological developments”.

69 See above 3.1.2.

70 See also the arguments provided by Baumann and Ismail (n 1) 737 ff.

71 See s 2 of the POPIA.

72 The definition of “personal data” in terms of the DPD formed the starting point of the discussion in the proceedings of the SALRC (*Issue Paper 24 (Project 124)* (2003) sub. 2.48). During those proceedings, the commission then opted to utilise the term “personal information” (SALRC, *Project 124 Privacy and Data Protection Report* (2009), sub 3.1.6).

73 See s 1 of the POPIA.

“reasonability test” applies in the context of section 6(1)(b) of the POPIA which determines whether the application of the Act is excluded. In light of this, the sole reference to the perspective of the responsible party appears to be too restrictive and would render the “reasonability test” meaningless in cases where the responsible party can access the relevant information or apply means to identify the data subject with reasonable efforts.

3.1.3.4 Interim conclusion

In the light of the aforementioned, the adoption of the CJEU’s reasoning in the *Breyer* judgment appears desirable as it provides guidance on how to determine whether a person is “identifiable” in terms of section 1 of the POPIA. Furthermore, reference to this case law would also be in accordance with the methodical requirements as deduced from the Constitutional Court’s recent decisions where case law of the CJEU was considered when interpreting South African legislation.⁷⁴

3.2 The concept of joint responsibility

Under the POPIA, the concept of joint responsibility is closely connected to the principle of accountability as set out in section 8 of the Act which provides that the “responsible party” must comply with the provisions of the Act. Section 1 of the POPIA defines the responsible party as “a public or private body or any other person which, alone or in conjunction with others, determines the purpose of and means for processing personal information”. From a South African perspective, this definition may be regarded as just another “black box” of the new act, as its highly abstract formulation seems difficult to apply in practice. This concerns cases of joint responsibility whereby an entity determines the purpose and means of processing “in conjunction” with other entities. Therefore, a potential joint responsibility needs to be considered as soon as two entities collaborate and administer a particular processing of personal information. For example, this applies to the highly relevant commercial use of social media, which advanced as an important business tool for many small and midsize businesses (SMB) during the pandemic.⁷⁵

⁷⁴ In detail above 2.2.

⁷⁵ According to a Genesis Analytics study (commissioned by Facebook), 65% of the surveyed SMB’s increased their use of social media during the pandemic (Genesis, *How social media is powering small businesses in Africa* (2021) 8 (<https://www.genesis-analytics.com/reports-and-other->

In the European data protection framework, the concept of (joint) controllership has been established in 1995 by article 2(d) of the DPD.⁷⁶ Under the GDPR, this definition was retained⁷⁷ and flanked by the newly introduced article 26, specifically regulating the consequences of joint controllership. The basis of controllership is the authority to determine the purposes and means of processing, therefore, the fact that data are actually processed is not decisive.⁷⁸ The identification of facts that constitute joint controllership, on the other hand, has proven to be complex. In three decisions, the CJEU interpreted and specified the concept of joint controllership.⁷⁹ After introducing these landmark judgments, a possible reception of this case law under the POPIA will be examined, taking into account whether it meets the requirements as set out by the Constitutional Court.

3.2.1 *The CJEU on joint controllership—three landmark decisions*

In the three landmark decisions on joint controllership under the DPD, the CJEU started a process to clarify this nebulous legal concept. Those decisions will subsequently be discussed and criteria to allocate joint controllership will be deduced from the CJEU's reasoning.

3.2.1.1 *ULD Schleswig-Holstein v Wirtschaftsakademie Schleswig-Holstein*

In *ULD Schleswig-Holstein v. Wirtschaftsakademie Schleswig-Holstein*, the CJEU dealt with the question of whether the operator of a Facebook fanpage is jointly responsible with the social network, Facebook, for data processing.

The court stated that the mere use of a social network does not establish joint responsibility for the data processing carried out by the network.⁸⁰ The CJEU also pointed out that the operator of a fanpage enables the possibility for the social network to place cookies on devices of persons who visit this fanpage, regardless

documents/how-social-media-is-powering-small-business-in-africa-report (08-01-2022)).

76 The provision reads as follows: “‘controller’ shall mean the natural or legal person, public authority, agency or any other body which alone or jointly with others determines the purposes and means of the processing of personal data...”.

77 See a 4(7) of the GDPR.

78 CJEU, the *FashionID* case C-40/17 (2019) par 82.

79 CJEU, the *Wirtschaftsakademie* case C-210/16 (2018); CJEU, the *Jehovan* case C-25/17 (2018); CJEU, *FashionID* (n 78).

80 CJEU, *Wirtschaftsakademie* (n 79) par 35.

of whether they are users of the social network or not.⁸¹ The court held that the responsibility of the fanpage operator, regarding the processing of personal data of persons who are not users of the social network, should be regarded as “even greater” since accessing the fanpage automatically triggers such processing.⁸² The possibility of controlling or promoting the data processing by the fanpage operator was considered as relevant participation in the determination of the purposes and means of processing.⁸³ In this case, the fanpage operator could define parameters on its target audience in order for the social network provider to generate user statistics.⁸⁴ Moreover, the court held that joint controllership does not require each entity involved to have access to the personal data concerned.⁸⁵

3.2.1.2 The *Jehovan todistajat*-case

In the *Jehovan todistajat* case, the CJEU discussed joint controllership between the religious community of Jehovah’s Witnesses and its members who engage in the processing of personal data when preaching door-to-door.⁸⁶

In this decision, the court emphasised that an influence on the data processing out of self-interest and the accompanying joint decision on the purposes and means of the processing would establish joint controllership.⁸⁷ The court reiterated that joint responsibility does not require all parties involved in data processing operations to have access to the personal data concerned.⁸⁸ Conclusively, the CJEU affirmed joint controllership of the religious community because it organises, encourages and co-ordinates the processing of personal data by its members.⁸⁹

3.2.1.3 *Fashion ID GmbH & Co. KG v Verbraucherzentrale NRW eV*

In the *FashionID* case, the CJEU ruled on the joint controllership between a website operator who embedded a social plugin (the

81 CJEU, *Wirtschaftsakademie* (n 79) par 35.

82 CJEU, *Wirtschaftsakademie* (n 79) par 41.

83 CJEU, *Wirtschaftsakademie* (n 79) par 36, 39.

84 CJEU, *Wirtschaftsakademie* (n 79) par 36.

85 CJEU, *Wirtschaftsakademie* (n 79) par 38.

86 CJEU, *Jehovan* (n 79) par 63 ff.

87 CJEU, *Jehovan* (n 79) par 68.

88 CJEU, *Jehovan* (n 79) par 69.

89 CJEU, *Jehovan* (n 79) par 72 f.

Facebook “Like” button) into his website and the provider of this plugin (in this case, the social network *Facebook*).⁹⁰

In this judgment, the court emphasised that an influence on the processing and the accompanying joint decision on the purposes and means can establish joint controllership.⁹¹ The court restated that joint responsibility does not require that all parties have access to the personal data in question.⁹² Thereafter, the CJEU held that the integration of the “Like” button into the *FashionID* website enabled *Facebook* to obtain personal data of the website visitors, whether they were members of the social network or not.⁹³ The ruling qualifies this as a joint decision on the means and purposes of the processing.⁹⁴ With regard to the means of processing, the court emphasised that *FashionID* included the “Like” button with the knowledge that it served as a tool for collecting and transmitting data from website visitors, which “exerts a decisive influence” over *Facebook*’s data processing.⁹⁵ Further, the ruling identified that both *FashionID* and *Facebook* would acquire economic interests regarding the data processing carried out.⁹⁶ The court also pointed out that *FashionID*’s responsibility appears to be “even greater” regarding the processing of personal data of website users that are not users of the social network *Facebook*, since accessing the website automatically triggers data processing by *Facebook*.⁹⁷

3.2.1.4 Criteria for the allocation of joint controllership

The discussion of these landmark decisions on the concept of joint controllership illustrates that the CJEU’s reasoning strongly focussed on the underlying facts of the cases. Nevertheless, the Court introduced some general principles. Firstly, it was clarified in all judgments that joint controllership does not require that all parties have access to the personal data in question.⁹⁸ This denotes that factual access or control over the data is not the decisive criteria for controllership. Secondly, the court repeatedly stated that a joint responsibility does not necessarily imply equal responsibility for the various entities

90 CJEU, *FashionID* (n 78) par 64 ff.

91 CJEU, *FashionID* (n 78) par 68.

92 CJEU, *FashionID* (n 78) par 69.

93 CJEU, *FashionID* (n 78) par 75.

94 CJEU, *FashionID* (n 78) par 76.

95 CJEU, *FashionID* (n 78) par 77 f.

96 CJEU, *FashionID* (n 78) par 80.

97 CJEU, *FashionID* (n 78) par 83.

98 CJEU, *Wirtschaftsakademie* (n 79) par 38; CJEU, *Jehovan* (n 79) par 69; CJEU, *FashionID* (n 78) par 69.

involved in the processing of personal data.⁹⁹ This introduces the possibility of a flexible allocation regarding the legal consequences of joint controllership among the respective entities.

Furthermore, abstract criteria for the allocation of joint controllership can be deduced from the abovementioned landmark decisions. From the *Wirtschaftsakademie* judgment, it can be deduced that the influence of an entity to steer the particular purposes of data processing is sufficient to assume joint controllership.¹⁰⁰ From the *Jehovan todistajat* judgment, it can be inferred that encouraging and facilitating, through organisation and coordination, of other entities' processing activities can be regarded as a basis for joint controllership.¹⁰¹ In the *FashionID* judgment, the CJEU clarified that an economic interest of the involved entities is a relevant factor in the allocation of joint controllership.¹⁰² On the basis of these criteria, it is possible to derive guidelines for the allocation of joint controllership in other cases where several entities are involved in the processing of personal information.

3.2.2 Adopting the flexible concept of joint controllership under the POPIA

A reception of the CJEU's landmark judgments could be beneficial under the South African data protection framework as it would mitigate legal uncertainty in determining the (jointly) responsible parties. This would also apply in pandemic-related processing of personal information, such as the operation of the COVID-19 tracing app or the recent spike in the use of social media networks. It could also provide a flexible instrument to *pro futuro* identify responsible parties regarding emerging technologies within the transformation of the Fourth Industrial Revolution, where personal information is processed involving several entities (for example in blockchain-networks).¹⁰³

In adopting the CJEU case law, South African courts and supervisory authorities could promote joint responsibility to an instrument that, due to its flexibility and the low requirements for

99 CJEU, *Wirtschaftsakademie* (n 79) par 43; CJEU, *Jehovan* (n 79) par 66; CJEU, *FashionID* (n 78) par 70.

100 See above 3.2.1.1.

101 See above 3.2.1.2.

102 See above 3.2.1.3.

103 Cf Baumann and Hamm "Datenschutzrechtliche Verantwortlichkeit in privaten Blockchains" in Taeger (ed) *Im Fokus der Rechtsentwicklung—Die Digitalisierung der Welt* (2021) 221 226 ff, on the allocation of joint controllership in private Blockchain networks.

the assumption of joint responsibility, bears the potential to increase the protection of personal information through a broader distribution of accountability. From a methodical perspective, the genesis of the POPIA¹⁰⁴ as well as the similarity of the definition of “responsible party” as provided by the act strongly indicate that reference to the discussed CJEU case law would not displace the meaning of the concept of joint responsibility under the POPIA. Scholars have already emphasised that the POPIA’s definition is almost identical to the definition in the European framework.¹⁰⁵

3.3 The concept of consent

Any processing of personal information regulated by the POPIA must be lawful, which requires a ground for processing as stipulated in section 11(1) of the Act. Those general grounds for lawful processing are very similar to the grounds of processing¹⁰⁶ within the European data protection law.¹⁰⁷ It is, therefore, not a coincidence that the POPIA also recognises consent as a ground for processing.¹⁰⁸

Consent is an ambivalent basis for the processing of personal information. On the one hand, it can justify the processing of personal information based on an informed and free decision of the data subject, even when other grounds for processing are inapplicable. On the other hand, the requirements for valid consent are relatively strict and the data subject may withdraw consent at any given time.

The POPIA defines consent as “any voluntary, specific and informed expression of will in terms of which permission is given for the processing of personal information”.¹⁰⁹ The similarity of this definition to the definition of article 2(h) of the DPD is apparent.¹¹⁰ Under the GDPR, an even more detailed definition of consent was introduced¹¹¹ along with special provisions specifying the requirements

104 See above 2.1.

105 Roos (n 45) 11.

106 See a 7 of the DPD and a 6(1) of the GDPR.

107 Cf Baumann and Ismail (n 1) 721 and Roos (n 45) 17 (“grounds are similar”).

108 See s 11(1)(a) of the POPIA.

109 See s 1 of the POPIA.

110 The definition of a 2(h) read as follows: “‘the data subject’s consent’ shall mean any freely given specific and informed indication of his wishes by which the data subject signifies his agreement to personal data relating to him being processed”.

111 See a 4(11) of the GDPR, defining consent as “any freely given, specific, informed and unambiguous indication of the data subject’s wishes by

of consent.¹¹² The POPIA also provides further provisions related to the concept of consent in section 11(2), addressing the burden of proof which is placed on the responsible party and the right to withdraw consent at any time, clarifying that the withdrawal only eliminates the legal basis to process personal information *ex-nunc*.

The standing of “consent” within the grounds of processing¹¹³ and the interpretation of the requirements for valid consent in data protection law are directly correlated to the extent to which a data protection regime attaches legitimising effects to the decision of the data subject, thereby potentially endorsing informational self-determination.¹¹⁴ In two recent decisions, that will subsequently be discussed, the CJEU strengthened the autonomy of the data subject when consenting to data processing via so-called opt-out settings by introducing the requirement of active consent. Opt-out settings

which he or she, by a statement or by a clear affirmative action, signifies agreement to the processing of personal data relating to him or her”.

¹¹² See a 7 and 8 of the GDPR.

¹¹³ Under the GDPR, some scholars opine that consent should take precedence over other grounds of processing (see *e.g.* Frenzel “DS-GVO Art. 6” in Paal and Pauly (eds) *DS-GVO BDSG* (2018) par 10). Other scholars argue for a subsequent application of consent *de lege ferenda* (Radlanski *Das Konzept der Einwilligung in der datenschutzrechtlichen Realität* (2016) 206 ff; Voigt *Die datenschutzrechtliche Einwilligung* (2020) 475 ff). *De lege lata*, the majority of scholars support the opinion that the grounds of processing of a 6(1) of the GDPR are independent and of an equal rank (*e.g.* Funke *Dogmatik und Voraussetzungen der datenschutzrechtlichen Einwilligung im Zivilrecht* (2017) 112; Kelleher and Murray *EU Data Protection Law* (2018) par 7.02; Kotschy “Art 6” in Kuner, Bygrave and Docksey (eds) *The EU General Data Protection Regulation A Commentary* (2020) sub C 1.1; Krusche “Kumulation von Rechtsgrundlagen zur Datenverarbeitung“ 2020 *ZD* 232 233).

¹¹⁴ The German *Bundesverfassungsgericht* deduced a fundamental right of informational self-determination from a 1(1) and 2(1) of the *Grundgesetz* (*Bundesgesetzblatt I* (1949) 1 ff) in its 1983 landmark decision, the so-called *Volkszählungsurteil*. This right includes the right of the individual “to decide for himself when and within what limits personal matters are to be disclosed” (BVerfGE 65, 1, 42 (translated by the authors)). A number of scholars support a similar interpretation of the fundamental right to protection of personal data as provided by a 8 of the Charter of Fundamental Rights of the European Union (OJ C 326, 26.10.2012, 391 ff), see de Terwangne *The Right to be Forgotten and the Informational Autonomy in the Digital Environment* (2013) 5; Lynskey “Deconstructing Data Protection: The Added-Value of a Right to Data Protection in the EU Legal Order” 63 *ICLQ* (2014) 569, 591 f; such an interpretation is rejected by Kranenborg in Peers, Hervey, Kenner and Ward (eds) *The EU Charter of Fundamental Rights: A Commentary* (2014) Part I par 08.25 f.

typically place the burden of action to refuse consent on the data subject.¹¹⁵ In opt-in settings, the data subject is typically required to consciously exercise control and decide whether to consent.¹¹⁶ Practically, the design of the consent procedure is of significant relevance, as consumers tend to choose the option that has been marked as a default, leading to a higher likelihood for consent in an opt-out default setting.¹¹⁷

During the pandemic, people became more aware of the legal implications of consent. Many activities that forms part of the pandemic's everyday life requires individuals' consent, for example, COVID-19-testing, vaccinations or the disclosure of a person's vaccination status. In addition, consent of the data subject is also requested when using the Covid Alert SA app¹¹⁸ and numerous web-services. In light of the pandemic driven spike in the number of users of such web-services, the concept of consent is of high practical relevance for the legitimate processing of personal information. The idea of adopting the concept of active consent should be explored due to the imminent potential to strengthen data subjects' autonomy.

3.3.1 The inception of “active” consent by the CJEU

The concept of active consent was firstly introduced in the CJEU's 2019 *Planet49* judgment, where the court interpreted the definitions of consent under the DPD and the GDPR. In the 2020 *Orange România* case, the court confirmed the concept of active consent and discussed aspects related to the burden of proof.

3.3.1.1 *Verbraucherzentrale Bundesverband eV v Planet49 GmbH*

The decision of the CJEU in *Planet49* is based on a request for a preliminary ruling by the *Bundesgerichtshof*.¹¹⁹ The *Bundesgerichtshof* was confronted with the question of whether consent to the use of cookies in the context of a “free” online competition by means of a

115 For greater detail on different opt-out designs see Krohm “Abschied vom Schriftformgebot der Einwilligung—Lösungsvorschläge und künftige Anforderungen” 2016 ZD 368, 372 f.

116 Van Oijen and Vrabc “Does the GDPR Enhance Consumers' Control over Personal Data? An Analysis from a Behavioural Perspective” 42 *Journal of Consumer Policy* (2019) 91 99.

117 In greater detail cf Van Oijen and Vrabc (n 116) 98 f.

118 The users of this app are required to consent to the processing of personal information as indicated in the privacy policy (cf <https://sacoronavirus.co.za/covidalert/privacy-policy/> (08-01-2022)).

119 OJ C 112, 26.3.2018, 9 f.

preselected checkbox (so-called opt-out setting) is valid. The question referred to the Court was whether valid consent was given in terms of article 5(3) and article 2(f) of the ePrivacy-Directive¹²⁰ in conjunction with article 2(h) of the DPD and article 6(1) of the GDPR.

Regarding the concept of consent in terms of article 2(h) of the DPD, the CJEU ruled that “the requirement of an ‘indication’ of the data subject’s wishes clearly points to active, rather than passive, behaviour”.¹²¹ According to the Court, consent given by way of a preselected tick in a checkbox does not imply active behaviour by the user of a website.¹²² The Court also stated that this interpretation is supported by the requirement that the data subject’s consent must be given “unambiguously”, as provided for in article 7(a) of the DPD.¹²³ In addition, the court referred to the revision of article 5(3) of the ePrivacy directive in 2009, when the wording of this provision was substantially amended from the requirement that the user had the “right to refuse” the storage of cookies which was amended to “given his or her consent”. The CJEU deduced from this legislative development that users’ consent may no longer be presumed and must be the result of active behaviour.¹²⁴

Thereafter, the Court noted that the wording of article 4(11) of the GDPR “appears even more stringent” than that of its predecessor article 2(h) of the DPD.¹²⁵ With reference to recital (32) of the regulation,¹²⁶ the CJEU concluded that the concept of active consent is explicitly recognised under the GDPR.¹²⁷ In this context, the CJEU

120 Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector, OJ L 201, 31.7.2002, 37 ff.

121 CJEU, *Planet49* (n 18) par 52.

122 CJEU, *Planet49* (n 18) par 52.

123 CJEU, *Planet49* (n 18) par 54.

124 CJEU, *Planet49* (n 18) par 56.

125 CJEU, *Planet49* (n 18) par 61.

126 The recital reads as follows: “Consent should be given by a clear affirmative act establishing a freely given, specific, informed and unambiguous indication of the data subject’s agreement to the processing of personal data relating to him or her, such as by a written statement, including by electronic means, or an oral statement. This could include ticking a box when visiting an internet website, choosing technical settings for information society services or another statement or conduct which clearly indicates in this context the data subject’s acceptance of the proposed processing of his or her personal data. Silence, pre-ticked boxes or inactivity should not therefore constitute consent...”

127 CJEU, *Planet49* (n 18) par 62.

specifies that the recital “expressly precludes ‘silence, pre-ticked boxes or inactivity’ from constituting consent”.¹²⁸

3.3.1.2 *Orange România SA v ANSPDCP*

In *Orange România*, the CJEU dealt with the question of proof regarding valid consent upon a preliminary ruling request by the *Tribunalul București*.¹²⁹ *Orange România*, a telecommunication service provider, allegedly collected and stored copies of customers’ identity documents without their consent. *Orange România* requested customers to consent to the retention of copies of their identity documents when concluding mobile phone contracts. The relevant checkbox, including the consent clause, was ticked by *Orange România*’s sales staff before the actual contract was handed over to the customer for signature.¹³⁰ In the event of refusal of this consent, the company’s practice required the customer to sign an additional form expressing the refusal of consent.¹³¹ As a result, the Romanian data protection authority, ANSPDCP, imposed a fine and ordered *Orange România* to destroy the copies of customers’ identity documents. The order was subsequently challenged in court.

In the ruling, the CJEU confirmed the normative basis for the requirement of active consent.¹³² Thereafter, the court stated that pursuant to article 7(1) of the GDPR, the controller bears the burden of proof for valid consent and must be able to demonstrate that the data subject has consented to the respective processing.¹³³ The mere fact that the box was ticked, in the light of the evidence that the consent clauses had been ticked by sales staff, was considered to be insufficient to prove a positive indication of consent by the customers.¹³⁴ In addition, the fact that the customers signed the contracts, including the ticked consent clause, was also considered insufficient to prove valid consent as there was no evidence that this clause had actually been read and understood by the customers.¹³⁵

3.3.2 Adopting “active” consent under the POPIA

Taking into account the similar wording of the definitions of consent under the POPIA and the DPD, an adoption by South African courts of

128 CJEU, *Planet49* (n 18) par 62.

129 The request is accessible via <https://bit.ly/3yun7Jm> (08-01-2022).

130 CJEU, the *Orange România* case C-61/19 (2020) par 45.

131 CJEU, *Orange România* (n 130) par 45.

132 CJEU, *Orange România* (n 130) par 35–37.

133 CJEU, *Orange România* (n 130) par 42.

134 CJEU, *Orange România* (n 130) par 46.

135 CJEU, *Orange România* (n 130) par 46.

the concept of active consent with reference to the *Planet49* case would be in line with the methodical requirements as indicated by the judges of the Constitutional Court.¹³⁶ Nevertheless, the introduction of active consent into South African data protection law would create significant implications and requires careful consideration. The question of whether an opt-in or opt-out consent should be supported under the new South African data protection framework was extensively discussed during the legislative process.¹³⁷ The remarks in the 2009 SALRC Report favoured an opt-out consent approach and indicated that consent could be inferred from “(in)action”.¹³⁸

This position, which indicates that valid consent does not require active behaviour, has not been incorporated explicitly in the definition of consent under the POPIA, it was merely articulated in the SALRC report. An adoption of the *Planet49* judgment would, therefore, technically not displace the meaning of the POPIA. The South African courts could use the term “expression” within the definition of consent in section 1 of the POPIA as an anchor to introduce the requirement of active behaviour of the data subject.¹³⁹ Such an interpretation could strengthen the informational self-determination of data subjects significantly. In the 2005 SALRC discussion paper, the commission itself highlighted the role of privacy as one of the core democratic values emphasising that the preservation of privacy fosters, *inter alia*, self-determination.¹⁴⁰ This could provide an additional argument in favour of active consent.

On the other hand, the courts would have to bear in mind that a higher degree of self-determination also increases the data subject’s responsibility. A recognition of active consent would result in an increase of situations where the data subject will have to decide whether it wants to consent to a particular processing of personal

136 In detail above 2.2.

137 SALRC *Discussion Paper 109 (Project 124)* (October 2005) sub 4.2.43 ff.

138 See SALRC *Project 124 Privacy and Data Protection Report* (2009) sub 4.2.63: “Thus, for instance, if a person was informed of an intention on the part of the responsible party to use his (non-sensitive) information for a specific purpose, and was offered the opportunity to object to this use (e.g., by means of a negative tick-box on a form), yet did not use this opportunity (ie by returning the form without the box being ticked), his consent to the use of his information can be inferred from this (in) action”.

139 Cf the similar reasoning of CJEU regarding the term “indication” under a 2(h) DPD in CJEU, *Planet49* (n 18) par 52.

140 See SALRC, *Discussion Paper 109 (Project 124)* (October 2005) sub 2.1.1 with footnote 2.

information and actively declare its consent (for example, via opt-in). In this regard, scholars emphasised that this could result in a “consent overload”¹⁴¹ or a “consent fatigue”¹⁴² whereby the data subject does not perceive their decision to consent to be a meaningful decision.

Regarding the evidentiary burden of the concept of active consent, the South African courts would not have to adopt the CJEU’s reasoning in the *Orange România* decision as section 11(2)(a) of the POPIA explicitly allocates the burden of proof for the data subject’s consent to the responsible party. Should the South African courts interpret the definition of consent under the POPIA in favour of active consent, the burden of proof for the responsible party in terms of section 11(2)(a) of the POPIA would include the requirement of active behaviour of the data subject as the provision refers to “consent” in terms of section 1 of the POPIA.

4 Conclusion

The preceding paragraphs illustrate the potential to clarify the South African data protection framework under the POPIA through the adoption of the established case law of the CJEU. In times of a pandemic, this could be an opportunity to quickly mitigate legal uncertainty with reference to established case law, eliminating the need for a lengthy process of South African case law development.

The three key concepts discussed in this paper show a high similarity with the corresponding concepts in the European data protection framework, which provides a methodical basis to adopt the CJEU’s case law. A case where the reception of the European case law would “displace the express meaning of [South African] legislation”, as Theron J articulated, could not be identified. An endorsement for the adoption of the discussed landmark judgments by the Information Regulator or courts would provide clarity on how to interpret those key concepts of the POPIA, thereby promoting legal certainty. This applies to the concept of personal information, where an adoption of the *Breyer* judgment could clarify the interpretation and gravity of the Act’s material scope. Regarding the concept of joint responsibility, abstract criteria to allocate controllership can be deduced from the three landmark decisions of the CJEU. This case law could be a

141 Engeler and Marosi “Planet49: Neues vom EuGH zu Cookies, Tracking und ePrivacy” 2019 *CR* 707 713.

142 Schermer, Custers and van der Hof “The crisis of consent: how stronger legal protection may lead to weaker consent in data protection” 2014 *Ethics and Information Technology* 171 176 f.

starting point to shape the concept of joint responsibility under the POPIA. Lastly, the adoption of the *Planet49* judgment could provide a basis for the requirement of active consent under the POPIA. The requirement of active behaviour would strengthen the informational self-determination of data subjects and promote individual autonomy during the pandemic and thereafter.

Whether the South African courts and the Information Regulator will support an interpretation of the POPIA in light of the established EU case law *pro futuro* is unclear at this stage. From a methodical perspective, such an EU-infused interpretation of the investigated concepts appears to be possible. Insofar as the historical connection to the EU data protection law provides a basis for the adoption of CJEU case law in accordance with the Constitutional Court's considerations. Furthermore, this comparative approach bears the potential to mitigate the pressure on the POPIA to evolve by providing a solid basis in the long run and not only a "quick fix". From an economic point of view, the adoption of CJEU case law might also be advantageous. Should South African policymakers decide to advocate for an adequacy decision by the EU commission to enable free flow of data from the EU without requiring further authorisation,¹⁴³ which is a significant economic factor these days,¹⁴⁴ the commission will have to, *inter alia*, take into account the existence and effectiveness of data protection legislation and supervision as well as the case law in the third state.¹⁴⁵ In that case, the adoption of CJEU case law might be advantageous for South African enterprises and institutions.

143 See a 45(1) of the GDPR.

144 See for example the economic evaluation of the European Parliament concerning the data flow to the US European Parliament, *Resolution of 26 May 2016 on transatlantic data flows* (2016/2727(RSP)) (28.2.2018), OJ C 76/82 sub F and G.

145 See a 45(2)(a) and (b) of the GDPR.

5 No time to waste. Reflections on waste management in South Africa during Covid-19

Lessons to be learned?

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Abstract

There is more and more evidence that environmental crises are reaching unsustainable levels which require urgent and drastic action. As one example, the United Nations Environment Programme's report—"Making Peace with Nature"—which was released in mid-February 2021, again, reveals that the impacts of climate change are already more severe than thought and that there is more need than ever for governments to "up their game" and expand the international legal regime to include new and meaningful, binding rules. Similarly, news headlines regularly report on the alarming rates of biodiversity loss and the scourge of plastic waste in the oceans, with predictions being that there will be more plastic than fish in the oceans by 2050. Yet government leaders have been unwilling to take the hard decisions that are necessary to stop the current trajectories of these crises.

The COVID-19 pandemic is the most immediate reminder of the consequences of taking a leisurely approach to addressing environmental issues. Early statistics showed the aggravated effects of the virus experienced by people living in polluted cities and linkages between poverty and higher death rates. This is in addition to the fact that an underlying environmental issue lies at the heart of the outbreak—namely the destruction of habitats.

Responses to the COVID-19 pandemic during 2020 and 2021 resulted in what was unthinkable two years ago as economies shut

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down across the globe. Ironically, these responses have created an opportunity to reset our thinking, not to return to business-as-usual and to tackle inequality. This resonates with international calls such as “system change, not climate change” and the UN’s Intergovernmental Panel on Climate Change’s report that if dire impacts on people across the planet are to be avoided, the time for treating environmental issues as negotiable has long passed and that the window for implementing responses is urgently narrow.

Although mainstreaming the environment into economic and social decision-making has been a requirement of international law for nearly 30 years, the facts show that we are a long way off this being a reality. In practice, environmental issues are kept in the margins of political priorities. If the discourse doesn’t change then neither will the outcome. The COVID-19 situation has demonstrated that people can and have changed their behaviour and it is these types of changes that must be implemented in response to environmental issues. Systemic change, however, must be based on policy and sound implementation practices. This chapter provides a snapshot insight into waste management activities in the period after the pandemic emerged. It explores both direct and indirect links and considers how responses to the pandemic with associated implications for waste management could have ironically triggered public health impacts. It also shows how these responses significantly impacted on a sector comprising the poorest of the poor—waste pickers—and how responses were misaligned with environmental waste management policy. It is noted that litigation related to waste management service delivery was a stark reminder of the state of environmental injustice and that it is the type of rapid intervention that occurred in response to the pandemic which is required to disrupt the disproportionate environmental burden that the poor currently experience.

1 Introduction

The COVID-19 pandemic that emerged in December 2019, triggered widespread responses which were unthinkable even a few months before. Countries across the globe implemented urgent and far-reaching measures including lockdowns, border closures and the curbing of activities in many economic sectors. These have had enormous impacts on almost every aspect of how we live, whether it be the shutting of businesses and job losses or the way in which we interact and communicate.

There is an interconnectedness and some common denominators between the pandemic and the environmental crises that we are facing¹ which raise questions as to whether the unprecedented responses to the pandemic can yield insights for much needed responses to environmental crises. With regards to the interconnectedness, both Covid and the environmental crises have come about because of people's disregard for the interdependence between humans, animals and the natural world. In the case of COVID-19, the risk was anticipated. Most emerging infectious diseases—as much as three out of four—emerge as a result of the impact that humans have on the environment where activities such as deforesting, illegal trafficking of wildlife, overharvesting and habitat encroachment increase the risk of the spread of zoonotic diseases.² In 2018, a group of experts attached to the World Health Organisation coined the term “Disease X” and predicted that the next pandemic would emerge as a result of interactions between human economic activities and wildlife.³ Daszak, one of the members of that group of experts, has pointed out that while COVID-19 is Disease X, more pandemics will follow unless they are not treated as a disaster-response issue and proactive prevention measures are implemented.⁴

In the case of the environment on the other hand, the risks are also clear. There is more evidence than ever before that current environmental crises are reaching unsustainable levels which require urgent and drastic action. Of the nine planetary boundaries that have been identified as being necessary to maintain the delicate balance of Earth's functioning ability, we are outside the safe zone of four—including climate change and biodiversity loss.⁵ This has led to

1 Armstrong, Capon and McFarlane “Coronavirus is a wake-up call: Our war with the environment is leading to pandemics” *The Conversation* <https://theconversation.com/coronavirus-is-a-wake-up-call-our-war-with-the-environment-is-leading-to-pandemics-135023> (08-10-2020).

2 United Nations Environment Programme *Making Peace with Nature: A scientific blueprint to tackle the climate, biodiversity and pollution emergencies* 2021 110 and “Zoonotic diseases” *Centers for Disease Control and Prevention* <https://www.cdc.gov/onehealth/basics/zoonotic-diseases.html> (09-11-2021).

3 “We knew Disease X was coming. It's here now” *New York Times* <https://www.nytimes.com/2020/02/27/opinion/coronavirus-pandemics.html> (09-11-2021).

4 Ibid.

5 The concept of planetary boundaries was proposed in 2009 by research led by the Director of the Stockholm Resilience Centre, Stockholm University involving 28 internationally recognised scientists. See Rockström,

widespread, albeit not official, acceptance that human activities have caused the Earth to leave its natural geographical epoch and to move into the era of the Anthropocene.⁶ Recent reports by scientists and the United Nations do nothing to allay these Mayday alerts. The UN Environment Programme's *Making Peace with Nature* report which was released in mid-February 2021, for example, shows that the impacts of climate change are already more severe than thought and species extinction is occurring faster than at any time in history.⁷ A report published later in 2021 by Working Group I of the Intergovernmental Panel on Climate Change led the UN Secretary-General, António Guterres, to say that the Working Group's report was "a code red for humanity. The alarm bells are deafening, and the evidence is irrefutable".⁸

It is, therefore, somewhat ironic that, although proactive measures aimed at preventing COVID-19 from arising may have been lacking, the scale of the urgent responses to the pandemic is what is required in the environmental context and which world leaders have been unwilling to take, even though the failure to do so threatens to have even more enduring and calamitous impacts than the pandemic. Leaders have simply been reluctant to set ambitious environmental goals and to take the hard decisions that are necessary to stop the current trajectories of these crises. This notwithstanding, the COVID-19 responses illustrate that behavioural changes are possible in an extremely short period of time. They have provided an opportunity to reset our thinking and not to return to a business-as-usual approach to environmental management and policy. Indeed COVID-19 has illustrated that it is possible to respond to calls such as "system

Steffen, Noone *et al* "A safe operating space for humanity" 2009 *Nature* 461 472–475.

6 The term was coined by Crutzen and Stoermer in Crutzen and Stoermer "The 'Anthropocene'" 2000 in Robin, Sörlin and Warde *The Future of Nature: Documents of Global Change* 2013 479–490. See also Will, Grinevald, Crutzen and McNeill "The Anthropocene: Conceptual and Historical Perspectives" 2011 *Philosophical Transactions: Mathematical, Physical and Engineering Sciences* 842–67 and Kotzé "Rethinking global environmental law and governance in the anthropocene" 2014 *Journal of Energy & Natural Resources Law* 121–156.

7 See n 2.

8 Masson-Delmotte *et al* *Climate Change 2021: The Physical Science Basis. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change 2021*; UN News 9 "IPCC report: 'Code red' for human driven global heating, warns UN chief" <https://news.un.org/en/story/2021/08/1097362> (09-11-2021).

change, not climate change” which are made by the global climate justice movement and to properly engage with the disproportionate burden that the poor experience in dealing with these crises which has been made particularly visible since the outbreak of the pandemic.⁹

These changes need to take place in respect to one of the global environmental crises that is being faced, namely the management of waste which humans generate. It is an issue that, like many other environmental problems, has local, regional and international impacts. Recently there has been much publicity about the scourge of plastic waste in the oceans that is increasing at an alarming rate and which is already destroying marine life and posing a threat to human health.¹⁰ The curse of plastic waste, however, begins at the local level where it is not properly managed. Poor management of plastic and other waste streams at the local level can have significant environmental impacts such as water and air pollution. It can also constitute a public health hazard, like COVID-19. For example a study by Tomita *et al* found that people living within five kilometres of a landfill site in South Africa “had a 41% higher risk of asthma, an 18% higher risk of developing tuberculosis, a 25% higher chance of having diabetes, and an 8% greater chance of having depression” than people who lived further away.¹¹ They also found that the risks associated with tuberculosis, diabetes and depression were significantly higher amongst people who are poor.¹² This is significant as, historically, it is most often the poor who live closest to landfill sites¹³ and more people are living closer to landfill sites than ever before.¹⁴

This chapter provides a snapshot insight to waste management activities in South Africa in the period after the outbreak of the pandemic from the perspective of the generation of waste; the nexus between COVID-19 responses and the recycling of waste and the court’s adjudication of waste management practices by municipalities. In

9 See, for example, Finch and Hernández Finch “Poverty and Covid-19: Rates of incidence and deaths in the United States during the first 10 weeks of the pandemic” 2020 *Frontiers in Sociology* 47.

10 United Nations Environment Programme *From pollution to solution. A global assessment of marine litter and plastic pollution* 2021.

11 Tomita, Cuadros, Burns, Tanser and Slotow “Exposure to waste sites and their impact on health: a panel and geospatial analysis of nationally representative data from South Africa, 2008–2015” 2020 *Lancet Planet Health* e223 e230.

12 Tomita *et al* (n 11) e225.

13 Ruiters “Environmental racism and justice in South Africa’s transition” 2001 *Politikon South African Journal of Political Studies* 95.

14 Tomita *et al* (n 11) e231.

some cases, there are direct casual links between these activities and COVID-19 and in others not. Nevertheless, when the waste management activities with their associated health and environmental impacts are juxtaposed against responses to the pandemic, the inevitable question that arises is whether there are lessons to be learned from government's various COVID-19 response measures.

2 COVID-19's direct impacts on waste management

Some aspects of environmental management undoubtedly benefitted from Covid-related restrictions.¹⁵ During the so-called "hard lockdown" (level 5) in April 2020,¹⁶ for example, a study which solicited input from the public in six provinces found that whereas only 20.61 per cent of respondents reported air pollution as being 'low', 'very low' or 'extremely low' before the Covid restrictions were imposed, during the most restrictive Covid restrictions this percentage rose to 71.92 per cent.¹⁷ These public perceptions have been borne out by scientific studies. In one which surveyed air emission levels in 20 major cities, Johannesburg had the most significant decrease in dust (PM₅ and PM₁₀) emissions during the lockdown period of all the cities.

15 See Bashir and Shahzad "A brief review of socio-economic and environmental impact of Covid-19" 2020 *Air Quality, Atmosphere & Health* 1403; Bates, Primack and Duarte "Global COVID-19 lockdown highlights humans as both threats and custodians of the environment" 2021 *Biological Conservation* 109175 and Lal, Kumar, Kumar, Kumari, Saikia, Dayanandan, Adhikari and Khan "The dark cloud with a silver lining: Assessing the impact of the SARS COVID-19 pandemic on the global environment" 2020 *Science of The Total Environment* 139297.

16 A five level system of restrictive measures was adopted as a response to managing the pandemic with level 5 being the most restrictive and level 1 the least. These were imposed as follows: level 5 from 26 March to 30 April 2020; level 4 from 1 to 31 May 2020; level 3 from 1 June to 17 August 2020; level 2 from 18 August – 20 September 2020; level 1 from 21 September to 28 December 2020; adjusted alert level 3 from 29 December 2020 to 28 February 2021; adjusted alert level 1 from 1 March to 30 May 2021; adjusted alert level 2 from 31 May to 15 June 2021; adjusted alert level 4 from 16 June 2021; adjusted alert level 3 from 16 June to 27 June 2021; adjusted alert level 4 from 28 June to 25 July 2021; adjusted alert level 3 from 26 July to 12 September 2021; and adjusted alert level 2 from 13 September 2021 <https://www.gov.za/Covid-19/about/about-alert-system> (11-11-2021).

17 Barbieri *et al* "Survey data regarding perceived air quality in Australia, Brazil, China, Ghana, India, Iran, Italy, Norway, South Africa, United States before and during Covid-19 restrictions" 2020 *Data in Brief* 106169.

Dust levels decreased by a phenomenal 31.3 per cent compared to the same period in 2019.¹⁸

In addition to better air quality, as different countries implemented lockdown measures, regular footage emerged in the media showing animals entering areas inhabited by humans where they are not normally seen.¹⁹ During South Africa's own hard lockdown footage was posted of lions, hyaenas and African wild dogs roaming through the Skukuza golf course in Mpumalanga.²⁰ Rangers in Cape Town reported sightings of wild animals in the Table Mountain National Park approaching the roads, including shy species such as the caracal and klipspringer²¹ and there was footage of endangered African penguins walking through the streets of Simon's Town in the Western Cape.²²

These benefits of the COVID-19 restrictions revealed insights as to what can happen when there is an "anthropause".²³ However, positive impacts were not anticipated in all environmental sectors, including the waste sector.²⁴ Early in the pandemic, flags were raised about the increase in waste that would eventuate as a result of efforts

18 Barbieri (n 17). The study notes that much of this was attributable to the cessation of economic activities and the restriction on movement. However, the report also notes that 4.9 times more rain fell in Johannesburg during the lockdown than in the same period in 2019 and that this too likely contributed to the decrease of PM_{2.5}.

19 Rutz, Loretto, Bates, Davidson, Duarte, Jetz, Johnson, Kato, Kays, Mueller, Primack, Ropert-Coudert, Tucker, Wikelski and Cagnacci "COVID-19 lockdown allows researchers to quantify the effects of human activity on wildlife" 2020 *Nat Ecol Evol* 1156–1159 1156.

20 "First Lions and Now Penguins in the Streets" *Travel SA People* <https://travel.sapeople.com/2020/04/18/watch-first-lions-and-now-penguins-in-the-streets/> (09-11-2021).

21 See n 20. In some instances the sense of animals 'reclaiming' their space was welcomed by many people and videos of these events went viral. They were not all necessarily accurate. See in this regard, "Fake animal news abounds on social media as coronavirus upends life" *National Geographic* <https://www.nationalgeographic.com/animals/article/coronavirus-pandemic-fake-animal-viral-social-media-posts> (09-11-2021).

22 See n 20.

23 The term was coined by Rutz *et al* (n 19).

24 One positive in South Africa was that strict lockdown measures resulted in a decrease in litter, although this increased again as lockdown measures eased which shows a clear link between human activity levels and littering and arguably that the positive benefit was short-lived as underlying behavioural patterns had not changed. Ryan, Maclean and Weideman "The impact of the COVID-19 lockdown on urban street litter in South Africa" 2020 *Environmental Processes* 1303–1312.

to contain the transmission of the virus.²⁵ This was certainly correct in the case of medical waste. There was a considerable rise in the use of face masks, gloves and aprons in many countries—all of which had to be regarded as potentially contaminated and, therefore, as hazardous waste requiring strict treatment protocols.²⁶ The impact of pandemic responses to this type of waste generation is illustrated in Wuhan where the pandemic originated. By March 2020, Wuhan experienced an increase in medical waste from 40 to 50 tons per day to 247 tons.²⁷ Similar increases are also reported for other cities such as Manila, Kuala Lumpur, Hanoi and Bangkok.²⁸

South Africa was not exempt from the increase in waste generation stemming from the use of personal protective equipment. In 2020, it was reported to have an 80 per cent acceptance rate for the wearing of masks which is estimated to translate to a daily usage of 63 578 916 masks.²⁹ Apart from adding to the amount of waste needing to be landfilled, the waste from these masks constituted a new source of litter and has found its way into the natural environment.³⁰

Lockdown measures also resulted in an increase in domestic waste in many countries such as the United Kingdom. Although this does appear to be location specific and dependent on the type of measures that a country imposed,³¹ it is likely that this occurred at least in some areas in South Africa because of the additional use of consumables such as sanitisers and the extra packaging associated with on-line purchases.

25 Sharma, Vanapalli, Cheela, Ranjan, Jaglan, Dubey, Goel and Bhattacharya “Challenges, opportunities, and innovations for effective solid waste management during and post COVID-19 pandemic” 2020 *Resources, Conservation and Recycling* 105052.

26 Olatayo, Mativenga, and Marnewick “COVID-19 PPE plastic material flows and waste management: Quantification and implications for South Africa” 2021 *Science of The Total Environment* 148190. See also Nzediegwu and Chang “Improper solid waste management increases potential for COVID-19 spread in developing countries” 2020 *Resources, Conservation and Recycling* 104947 104948 regarding concerns that this waste posed an additional risk for developing countries with poor waste management infrastructure.

27 You, Sonne and Ok “COVID-19’s unsustainable waste management” 2020 *Science* 1438.

28 Ibid.

29 Nzediegwu and Chang (n 26).

30 Olatayo *et al* (n 26).

31 Olatayo *et al* (n 26) and Fan, Jiang, Hemzal and Klemeš “An update of COVID-19 influence on waste management” 2021 *Science of The Total Environment* 142014.

Coupled with these altered waste generation patterns, COVID-19 also disrupted waste management in some instances because of labour shortages as workers contracted the virus.³² This was true in the case of Johannesburg where the city provided an update on “the unfortunate state of service delivery by the entities as a direct result of the COVID-19 pandemic” on 8 July 2020 which indicated that 97 workers were infected and that, as a result, four waste depots had been closed in a month and waste collection in some areas had been intermittent.³³ This may have had knock-on effects as the storage of waste for sub-optimal periods attracts vectors with associated disease risks.³⁴

The pandemic, therefore, placed pressure on existing waste management systems which also caused some to question whether developing countries with inadequate waste management systems posed an increased risk to transmission of the virus.³⁵ This concern is relevant in the case of South Africa. Many municipalities were already facing significant challenges in discharging the waste management service delivery function before the outbreak of the pandemic.³⁶ These ranged from the collection function where approximately a quarter (3.67 million tonnes) of domestic waste is not collected and managed through the formal waste collection system,³⁷ to the treatment and disposal of domestic waste where it is formally collected but not disposed of to well managed landfill sites.

Regarding the latter, the 2018 State of Waste Report indicates that the vast majority of the 75 municipal landfills which were assessed were less than 50 per cent compliant with regulatory requirements, with an alarming third of them being between 0 and 25 per cent compliant.³⁸ In addition, many of the larger municipalities are facing challenges in securing enough airspace capacity. For example, the report notes that Newcastle Municipality has already run out of airspace and that

32 Sharma *et al* (n 25) 105052.

33 “Covid-19 impact on services” *Pikitup* <http://www.pikitup.co.za/Covid-19-impact-on-services/> (09-11-2021).

34 Tomita *et al* (n 11) note that vectors such as rats contribute to respiratory diseases such as asthma and hantavirus pulmonary syndrome e224.

35 Nzediegwu and Chang (n 26) 104948.

36 Polasi, Matinise and Oelofse *South African municipal waste management systems: Challenges and solutions* (2020).

37 Rodseth, Notten and Von Blottnitz “A revised approach for estimating informally disposed domestic waste in rural versus urban South Africa and implications for waste management” *2020 South African Journal of Science* 5635.

38 Department of Environmental Affairs 2018 57–58.

the City of Cape Town, Mogalakwena, Steve Tshwete and the City of Johannesburg have less than ten years of airspace left.³⁹

This official research regarding the discharge of the waste management function matches public perceptions of government performance as Statistics South Africa notes high levels of dissatisfaction with the waste management service delivery.⁴⁰ Other studies also echo the reality of poor service delivery in many municipalities. For example, the 2020/21 Gauteng City-Region Observatory Quality of Life Survey notes an average decline in weekly waste collection service in Gauteng by five per cent in the last approximately five years and that there are also marked differences between municipalities. The provincial average may, therefore, disguise some particularly poor performers such as Emfuleni where access to weekly collection in the 2015/16 reporting period was reported to be 80 per cent; 57 per cent in 2017/18 and only 26 per cent in 2020/21.⁴¹

The impact of the pandemic on waste generation is not unique in an emergency situation and highlights the need for there to be adequate capacity to manage existing and abnormal waste loads. Given the challenges which government experiences during ordinary times, there is something of a paradox that the health measures which were imposed to address the spreading of COVID-19 could have itself contributed to an increased risk of another public health issue where that waste was not collected and disposed of properly.

3 COVID-19 regulations and waste management policy

Apart from concerns about increased waste generation, perhaps the most immediately visible link between COVID-19 and waste management was in respect of a poor and marginalised informal sector, namely, waster pickers. In the first flurry of COVID-19 regulations that were passed in terms of the Disaster Management Act, 2002, a list of essential services was included which were allowed to operate

39 State of Waste Strategy (n 38) 48.

40 Statistics South Africa *The state of basic service delivery in South Africa: In-depth analysis of the Community Survey 2016 data* Report No. 03-01-22 2016 (2016) 59 59.

41 De Kadt, Hamann, Mkhize and Parker *Quality of Life Survey 6 (2020/21): Overview Report 2021* Gauteng City-Region Observatory 88-89 https://cdn.gcro.ac.za/media/documents/2021.09.09_QoL_6_2020-21_overview_report_v7.pdf (09-11-2021).

during the hard lock down/ level 5 period.⁴² Waste and refuse removal services were included in the list.⁴³ But it soon became apparent that the authorities interpreted this narrowly as applying to waste collection for disposal by municipalities and that the category did not extend to the 60 000 to 90 000 waste pickers and their recycling activities.

The approach was a disjuncture from prevailing environmental management approaches. Since democracy, South Africa has sought to progressively update its legislative and policy approach to waste management. A key part of this has been recognising and redressing the relationship between the poor and waste as well as the ineffectiveness of regulation focussing on managing the problem i.e. the disposal of waste rather than the underlying cause, namely, the waste being produced in the first place. These two priorities are linked. Whilst the poor produce the least waste, they frequently bear the effects of waste disposal disproportionately as landfill sites have historically been located closer to poor communities.⁴⁴ Many also make their living from waste through picking on collection days or at landfill sites.

As part of the approach to address this, the environmental law reform process which government embarked on in 1995 adopted the internationally accepted waste minimisation hierarchy in both policy and legislation. In terms of the waste minimisation hierarchy, the approach to waste management is reprioritised. Disposal becomes the least preferred option and the avoidance of waste generation the goal. Where waste is generated, recycling, reuse, recovery and treatment of waste are preferred over disposal.⁴⁵

The waste minimisation hierarchy was first reflected as a principle of environmental management in the National Environmental Management Act 108 of 1998 (NEMA).⁴⁶ It was subsequently front and centre of the policy approach to waste management in the White Paper on Integrated Pollution and Waste Management for South Africa: A Policy on Pollution Prevention, Waste Minimisation, Impact Management and Remediation which was adopted in 2000 as a basis

42 Act 57 of 2002 and Regulations issued in terms of section 27(2) of the Disaster Management Act, 2002 (Disaster Management Regulations) GNR 318 GG 43107 18 March 2020.

43 Disaster Management Regulations (n 42) Annexure B(B.15).

44 Ruiters (n 13).

45 Environmental Assessment Institute *Rethinking the Waste Hierarchy* (2005) <https://www.osti.gov/etdeweb/servlets/purl/20623175> (11-11-2021) 1.

46 s 2(4)(a)(ii).

for developing new legislation.⁴⁷ Apart from the title of the policy itself signalling the shift in emphasis away from disposal, the contents of the policy re-emphasise the waste minimisation hierarchy throughout. The policy laid the bedrock for subsequent law reform and the resulting architecture of the National Environmental Management: Waste Act 59 of 2008 is structured around giving effect to it.⁴⁸ Indeed, the objectives of the act set out in section 2 include the following:

- “2(a) to protect health, well-being and the environment by providing reasonable measures for—
- (i) minimising the consumption of natural resources;
 - (ii) avoiding and minimising the generation of waste;
 - (iii) reducing, re-using, recycling and recovering waste;
 - (iv) treating and safely disposing of waste as a last resort”

Despite the shift in policy, practical realisation has been slow at the municipal level and waste pickers have contributed more to the recycling effort than most municipalities.⁴⁹

It was in this context that Lawyers for Human Rights, acting on behalf of several groups of waste pickers, launched an urgent application soon after the level 5 lockdown started requesting a declaratory order that waste pickers falls within the category of essential services.⁵⁰ The court papers which were filed reveal the true hardships that waste pickers are exposed to in their daily lives including their dependency on the environment and their inability to be resilient to change. The papers point out, for example, that many waste pickers do not have access to water and rely on people making water available when they do collections. They also frequently have to cook on open fires, and apart from their income being truncated, the inability to move around to find wood for the fires was a further obstacle. Food donations which they had received also stopped.⁵¹

47 GN 227GG 20978 17 March 2000.

48 Personal knowledge, legal drafter of the Act.

49 The State of Waste (n 38) 2 report indicates that only 10 per cent of waste is recycled.

50 “Tshwane waste pickers ‘face starvation’ as court dismisses their plea for lockdown exemption” *Daily Maverick* <https://www.dailymaverick.co.za/article/2020-04-09-tshwane-waste-pickers-face-starvation-as-court-dismisses-their-plea-for-lockdown-exemption/> (09-11-2021). The court order is not publicly available.

51 *Ibid.*

The minister of co-operative governance and traditional affairs, Nkosazana Dlamini-Zuma, opposed the application. The papers filed by her were at odds with government policy. In part they appeared to simply not appreciate the position that poor and marginalised groups find themselves in and the limitations that they have in making choices. They state both that the lockdown measures “constitute sacrifices that millions of South Africans are prepared to make in order to save our nation”⁵² and that the “applicants’ contention that they should be regarded as an essential service ... is opportunistic”.⁵³ In addition, they do not reflect an appreciation for the waste minimisation hierarchy and the role that it plays in the waste management cycle as the minister stated that: “The work that the applicants are engaged in does not entail waste and refuse removal, at least not in the conventional sense” and that it is an economic activity as “[i]t entails the collection and sale of abandoned material”.⁵⁴

The minister’s approach overlooked the role that waste pickers play in the waste management service delivery function. It is estimated that 80 to 90 per cent of paper and packaging is recovered and collected by the pickers and that they have saved municipalities between R309.2 and R748.8 million in landfill air space per annum as a result of their diverting waste away from landfills.⁵⁵

The court dismissed the application. The hardships that ensued were well documented in the media.⁵⁶ Apart from the impacts on the waste pickers the situation also disrupted waste management. As a CSIR report notes, stopping waste picker activities during the most restrictive periods of lockdown “resulted in stockpiles of recyclable waste at processing facilities while in lockdown with the knock-on

52 Ibid.

53 “Lockdown: Court decision a heavy blow to waste-pickers’ hopes” *GroundUp* <https://www.groundup.org.za/article/Covid-19-court-decision-heavy-blow-waste-pickers-hopes/> (09-11-2021).

54 Ibid.

55 Godfrey, Strydom and Phukubye “Integrating the Informal Sector into the South African Waste and Recycling Economy in the Context of Extended Producer Responsibility” February 2016 CSIR <https://www.csir.co.za/documents/policy-briefinformal-sectorcsir-finalpdf> (09-11-2021).

56 See for example, “Waste pickers reclaim their power” *Mail and Guardian* <https://mg.co.za/article/2020-04-08-waste-pickers-reclaim-their-power/> (09-11-2021) and “Lockdown pushed waste pickers to near-starvation, says report” *Business Day* <https://www.businesslive.co.za/bd/national/2021-04-20-lockdown-pushed-waste-pickers-to-near-starvation-says-report/> (09-11-2021).

effect of backlogs when services may resume, and a resulting lower price paid for recyclables”.⁵⁷

From a regulatory perspective, other developments which ensued in the next year offered both hope and further woes for waste pickers. In this regard, to alleviate the hardships under the level 5 lockdown, the minister of environmental affairs passed directions in terms of the Disaster Management Act on 14 May 2020 in terms of which pickers were allowed to resume their activities if they obtained permits from the municipality under level 4 COVID-19 restrictions.⁵⁸ Whilst undoubtedly demonstrating a sensitivity to the plight of pickers, it provided a challenge which waste pickers had not been exposed to before as they had not had to follow such administrative processes.⁵⁹ This decision too was challenged in court, but was struck off the roll for lack of urgency.⁶⁰

A further policy shift occurred in August 2020 when a waste picker integration guideline was adopted by government.⁶¹ Much of its approach was incorporated into the National Waste Management Strategy 2020 that became effective in January 2021 and which recognises the role of waste pickers and the need to strengthen that role in many places.⁶² For example, it notes that “[i]n the absence of formal systems for separation at source of recyclables, an informal sector comprised of waste pickers has emerged that contributes significantly to the collection of recyclables”.⁶³

On the negative side, certain municipalities demonstrated a misalignment with national government trends. The City of Johannesburg proposed imposing a recycling levy on residents and to award contracts to private companies to collect separated waste, side-

57 Polasi *et al* (n 36) 11.

58 Disaster Management Act (57/2002): Directions regarding measures to address, prevent and combat the spread of COVID-19 in relation to recycling of waste GN 539 GG 43325 14 May 2020.

59 “Lockdown: Waste pickers fight work permit regulation” *IOL* <https://www.iol.co.za/pretoria-news/news/lockdown-waste-pickers-fight-work-permit-regulation-48508907> (09-11-2021).

60 “Waste pickers’ matter struck off Gauteng High Court, Pretoria roll” *IOL* <https://www.iol.co.za/pretoria-news/waste-pickers-matter-struck-off-gauteng-high-court-pretoria-roll-48662052> (09-11-2021).

61 Department of Environment, Forestry and Fisheries and Department of Science and Innovation “Waste picker integration guideline for South Africa: Building the recycling economy and improving livelihoods through integration of the informal sector” 2020.

62 GN 56 GG 44116 28 January 2021.

63 National Waste Management Strategy (n 62) 28.

lining waste pickers in the process.⁶⁴ After numerous objections, the proposal was withdrawn.⁶⁵

The consequence of the COVID-19 responses in this instance was that government did not speak with one voice and suspended its own policy and legislative approach to waste management during certain periods of the lockdown. Given the urgency of the various environmental crises, it would be far more preferable in times of emergency for disaster management responses to be reconciled with environmental ones rather than environmental issues being afforded a Cinderella status in terms of which they can be marginalised whenever it is expedient to do so.

4 Service delivery and the courts during COVID-19

The need for waste pickers in realising the waste minimisation hierarchy was highlighted by litigation against municipal basic service delivery failure which also came to the fore during the COVID-19 lockdown. The first which gained attention during this period related to the South African Human Rights Commission's (SAHRC) investigation into the Msunduzi Municipality's New England landfill site in Pietermaritzburg in 2020.⁶⁶ The SAHRC initiated the investigation after receiving what the court describes as a "desperate cry for help from the citizens of Pietermaritzburg to make the municipality accountable for its continued failure to maintain the landfill site in a manner that would not be injurious to their health and well-being".⁶⁷ As a result of its findings during this investigation, the SAHRC gave the municipality notice in October 2020 that it would be initiating legal proceedings.⁶⁸

In the proceedings, the SAHRC sought a declaratory order and a structural interdict in terms of which the court would exercise a form of supervisory jurisdiction.⁶⁹ The municipality opposed the

64 "Johannesburg is threatening to sideline informal waste pickers. Why it's a bad idea" *University of the Witwatersrand* <https://www.wits.ac.za/news/latest-news/opinion/2021/2021-05/johannesburg-is-threatening-to-sideline-informal-waste-pickers-why-its-a-bad-idea.html> (09-11-2021).

65 "CoJ, Pikitup withdraw R50 recycling levy proposal" *Engineering News* <https://www.engineeringnews.co.za/article/coj-pikitup-withdraw-r50-recycling-levy-proposal-2021-05-13> (09-11-2021).

66 *South African Human Rights Commission v Msunduzi Local Municipality and Others* (8407/2020P) [2021] ZAKZPHC 35 (17 June 2021).

67 the *Msunduzi* case (n 66) par 14.

68 the *Msunduzi* case (n 66) par 18.

69 the *Msunduzi* case (n 66) par 10.

granting of declaratory relief, but ultimately did not challenge the application for a structural interdict.⁷⁰ The judgment in *South African Human Rights Commission v Msunduzi Local Municipality and Others* provides a summary of the compliance measures which the provincial and national environmental departments have taken over the last few years, including issuing various compliance notices in respect of significant contraventions—which were themselves not complied with—in an effort to address the situation. These reflect an inability of the other spheres of government to hold the municipality to account effectively, despite clear attempts to do so.

The judgment also notes the fires that break out on a too frequent basis at the landfill site. Clearly these are serious fires, as fires during October and December 2019 were discussed by the provincial cabinet and one fire during July 2020 lasted five days—with smoke from the fire enveloping major portions of the city and resulting in the N3 highway being closed due to a lack of visibility.⁷¹

The court made a number of important findings that are relevant to the jurisprudential development of environmental law but which are beyond the scope of this article to discuss— other than to mention one which may provide welcome news to members of civil society who wish to hold polluters to account. This was the court’s finding in relation to the municipality’s argument that the SAHRC had not placed scientific or medical evidence before the court which proved unacceptable levels of pollution were caused by the landfill.⁷² The court rejected this argument, accepting the applicant’s argument that there is judicial authority to the contrary and the academic work of Devenish which points out that the concept of environment has now acquired a more sociological element and that in the instance of section 24(b) of the environmental right—which imposes an obligation on government to take measures to secure the environmental right—that does not require harm to wellbeing to be proved.⁷³

In what ultimately ended up being a strong rebuke of the municipality, the judgment notes that “[t]he citizens of Pietermaritzburg, including the highly disadvantaged community of the Sobantu township, are justifiably aggrieved”.⁷⁴ The court was

70 the *Msunduzi* case (n 66) par 13.

71 the *Msunduzi* case (n 66) par 49 and 51.

72 the *Msunduzi* case (n 66) par 97.

73 the *Msunduzi* case (n 66) par 97. Devenish *The South African Constitution* (2005) par 111 at 123.

74 the *Msunduzi* case (n 66) par 91.

persuaded that there was “an abject failure” to comply with the environmental right and associated legislation and that:

“When numerous fires break out at the landfill site, when thick smoke and dust engulf the City, when schools have to be closed, when sections of the N3 freeway have to be shut down and when citizens start complaining about their health and well-being due to the pollution, then there has to be something seriously wrong with the municipality’s operation of this landfill site. It is no answer for the municipality to merely say that it is ‘trying’ in circumstances when the overall evidence suggests the opposite”.⁷⁵

The court concluded its findings with an observation that the municipality’s conduct “shows scant regard for the health and well-being of its citizens and the environment”⁷⁶ and by noting that:

“This municipality like so many others in the country has simply lost touch with its citizens. The officials who are in charge of the municipality seem to forget that they are there only to serve the interests of everyone who live and work within the municipality’s jurisdiction. ... From a ‘City of Choice’ the municipality and its largely incompetent, inefficient and inept officials have literally turned this city into one of filth, grime and degradation. This has to stop. Any expected changes can only be achieved not by political will which is sadly lacking but by the efforts of civil society and organisations such as the Commission herein”.⁷⁷

The court accordingly granted a declaratory order that the municipality was in breach of the latest compliance notice issued to it, its waste management licence and the environmental right as well as various other Acts. It also granted a structural interdict that required the municipality to develop an action plan and submit monthly reports to the court—all of which can be commented on by the public—and an order that the municipality discharge its duty of care and remediation in terms of section 28 of NEMA and report to the court on the steps that it has taken to do so.

⁷⁵ the *Msunduzi* case (n 66) par 88.

⁷⁶ the *Msunduzi* case (n 66) par 107.

⁷⁷ the *Msunduzi* case (n 66) par 108.

The Impact of Covid-19 on the Future of Law

The second judgment, which was handed down in September 2021, relates to Makana Municipality in the Eastern Cape Province. A judgment had already been handed down in January 2020 in the matter of *Unemployed Peoples Movement v Premier, Province of the Eastern Cape* ordering that the council of the municipality be dissolved and that a temporary administrator be appointed because it had breached its obligations in terms of section 152 and 153 of the constitution.⁷⁸ As part of its decision in that judgment, the court was required to consider the contention that the municipality had infringed the environmental right in section 24 of the constitution. There are several references to the poor state of waste management, including the court noting a 2015 court order requiring the municipality to comply with its waste permit conditions as well as granting extensive structural relief⁷⁹ and that “[p]oor waste collection leaves Grahamstown East in a permanent state of unhygienic filth. Illegal dumping sites are not managed, controlled or cleaned, and large swathes of land are breeding grounds for disease”.⁸⁰

The consideration of waste service delivery in the *Unemployed Peoples Movement* case also contributed to the court finding that the municipality was in breach of sections 152 and 153 of the Constitution *inter alia* because it had failed “to ensure the provision of services to its community in a sustainable manner” and had failed “to promote a safe and healthy environment for its community”.⁸¹ An application by several of the respondents to appeal that decision was dismissed in May.⁸²

Efforts to hold the municipality to account were not over, however. In October 2020, proceedings were again launched against the municipality and other respondents by the Ezihagweni Street Committee and Mary Waters High School.⁸³ This application focussed solely on the infringement of the residents’ environmental right through the lens of the consequences of the failed waste management service delivery, including the mushrooming of illegal dump sites as a result of erratic collection services.

78 (553/2019) [2020] ZAECGHC 1 (14 January 2020).

79 the *Unemployed Peoples Movement* case (n 78) par 40.

80 the *Unemployed Peoples Movement* case (n 78) par 46.

81 the *Unemployed Peoples Movement* case (n 78) par115.

82 *Unemployed Peoples Movement v Premier for the Province of the Eastern Cape* (553/2019) [2020] ZAECGHC 47 (21 May 2020).

83 “Makhanda residents take Makana Municipality to court over uncollected refuse” *Legal Resource Centre* <https://lrc.org.za/october-2nd-2020-media-release-makhanda-residents-take-makana-municipality-to-court-over-uncollected-refuse/> (09-11-2021).

5 Reflections on waste management in South Africa

The reality of the conditions which residents in poor areas were forced to contend with is explained by Ms Moholo, one of the street committee members who lives in an area which is referred to as “Ezihagweni” meaning “place of pigs” or “pig sty”, as follows:

“There is another, even larger illegal dumpsite 200 metres along the road from my house in the opposite direction and close to DD Siwisa Primary School. ... The dumpsite has been there for more than five years. The site has never been cleared in the past five years. The rubbish smells terrible and often makes learning conditions at the school intolerable. The school is forced to keep classroom windows closed, even when the weather is hot. Also, young learners often play at the illegal dumping site after school as it is in an open and unsupervised space.

...

Sometimes, to clear the informal dumpsites, residents burn the rubbish, which produces smoke and fumes. Animals such as dogs, donkeys and goats rip open rubbish bags at the unofficial dumping sites. The smell is always unpleasant, and at times it is unbearable. It is particularly bad during warm weather. I don't open my door anymore when it is hot because the smell comes into my house and is overpowering”⁸⁴.

In the face of this daily reality where Ms Moholo raises important health and well-being issues, it must have been a welcome ruling that the court made in September 2021. The court granted an order against the municipality which included a structural interdict. It declared the waste management by-laws to be unconstitutional to the extent that they fail to protect and fulfil the residents' right to an environment that is not harmful to their health and ordered the municipality to amend them within eight months. It also ordered the municipality to clean up a list of illegal dumpsites within 14 days; identify and clean up additional dumpsites within 120 days; provide refuse bags to residents every week within 14 days of the order and provide receptacles around the town within 60 days. It further ordered a range of other steps aimed at improving the quality of waste service delivery within specified time

84 “The filth and the fury: Desperate Makhanda residents obtain court order forcing municipality to clean up the town” *Daily Maverick* <https://www.dailymaverick.co.za/article/2021-09-15-the-filth-and-the-fury-desperate-makhanda-residents-obtain-court-order-forcing-municipality-to-clean-up-the-town/> (09-11-2021).

periods and with an order that the municipality report to the court on its progress.⁸⁵

Shortly after the Makana Municipality order, another Eastern Cape municipality was the subject of a court ruling in October 2021. In this instance, and again after repeated enforcement attempts by the provincial regulatory sphere of government, the Walter Sisulu municipality entered into a plea and sentence agreement in respect of its failure to manage its Aliwal North landfill site. In what is likely the first criminal conviction of a municipality in respect of a waste matter, the municipality was fined R1 million, suspended for five years, and ordered to implement a compliance notice issued to it by the provincial department which required it to close and rehabilitate the landfill site.⁸⁶ Like the examples discussed above, this site too was causing health issues. A community member who lobbied for action to be taken noted that the smoke from the site threatens the health of the Dukathole Township and that “the overfilled dumping sites become breeding grounds for rodents, snakes and insects, which can spread diseases and cause harm to residents”.⁸⁷

These judgments send a strong signal to municipalities regarding their waste management responsibilities and what will, or will not be, tolerated by the courts. While this approach to emphatically holding up the environmental right is to be welcomed, it may also be questioned what the court’s response will be if the municipalities do not comply with the judgments, as they have done in the wake of the administrative enforcement mechanisms which other spheres of government have used in respect of the management of the landfill. They also call into question the potential of cooperative governance as a mechanism for contributing to the holistic actions that are required to address environmental crises, many of which require local intervention and management.

85 The order is available at https://www.groundup.org.za/media/uploads/documents/makhanda_order.pdf (09-11-2021).

86 “Eastern Cape municipality given suspended fine of R1m and forced to relocate mismanaged landfill site” *Daily Maverick* <https://www.dailymaverick.co.za/article/2021-10-13-eastern-cape-municipality-given-suspended-fine-of-r1m-and-forced-to-relocate-mismanaged-landfill-site/> (11-11-2021).

87 Ibid.

5 Conclusion

The pandemic shows that it is possible for government to impose drastic changes in a short period of time even if they result in far-reaching societal consequences. It is precisely this type of rapid change that is needed to address the environmental crises. In the case of waste management, like COVID-19, poor waste management practices have public health and environmental implications and also disproportionately affect the poor. These implications have attracted far less popular attention and less severe regulatory response. As an example, the significantly increased risk of asthma, diabetes and depression—particularly amongst the poor—which is associated with living near a landfill site can, as Tomita *et al* note, “have deadly consequences when left untreated, yet are often neglected when compared with other public health problems in South Africa, such as the HIV and tuberculosis epidemic”.⁸⁸

The snapshot provided above suggests that while the courts may be ready for a new discourse in which they are firmer and more interventionist in their judgments and more sympathetic to the plight of the poor, a sound environmental discourse has not uniformly taken root amongst politicians. In fact, the lockdown period may in general rather have reflected a magnification of the pre-existing failures to uphold the environmental right and policy and of systemic societal injustice rather than being seized on as an opportunity for rapid change.

In the wake of COVID-19, this making of environmental injustice more visible ought to be used as a catalyst to pant rather than breathe life into the constitutional aspirations and environmental right with a renewed sense of urgency. There clearly needs to be a narrowing of the gap between COVID-19 type responses and environmental ones if the waste management crisis is to be arrested and environmental injustice addressed.

One light on the horizon is that the minister of environmental affairs presided over the African Ministerial Conference on the Environment (AMCEN) for a two year period, much of which coincided with the lockdown.⁸⁹ ACMEN produced an African Green Stimulus Programme during this time which is an “initiative developed to

88 Tomita *et al* (n 11) e225.

89 Opening remarks by Ms Barbara Creecy, minister of forestry, fisheries and the environment of the Republic of South Africa on the occasion of part one of the 18th Ordinary Session of the African Ministerial Conference on the Environment (AMCEN) virtual meeting <https://www.gov.za/>

support the Continent's recovery response in a sustainable manner to the devastating socio-economic and environmental impacts of the COVID-19 Pandemic".⁹⁰ Waste is mentioned throughout the document and features as a priority area.⁹¹ The programme is drafted in reasonably high-level wording, but perhaps it will add impetus to building the required waste management political will and capacity. It is hoped so because, if the discourse doesn't change, neither will the outcome and the unsustainable status quo will remain.


speeches/minister-barbara-creecy-18th-ordinary-session-african-ministerial-conference-environment (11-11-2021).

90 *African green stimulus programme* (draft) January 2021 <https://wedocs.unep.org/bitstream/handle/20.500.11822/34409/AGSP.pdf?sequence=3> (11-11-2021).

91 See, for example, (n 90) sections 5.1 and 5.11.



6 The impact of Covid-19 on domestic violence in South Africa

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Abstract

COVID-19 and the resulting lockdown has had a negative impact on domestic violence in South Africa. It is known that pandemics increase violence against women. Some of the impacts that domestic violence has on family law is that a surge of domestic violence can lead to an increase in divorces; an increase in application for care and protection orders for children as well as removals of children from the home environment when it is in their best interests. This chapter explores this impact by examining the definitions of domestic violence and gender-based violence and the statistics available regarding domestic violence in South Africa. After that the provisions of the Domestic Violence Amendment Bill and other measures taken by the South African government to assist victims of domestic violence are discussed. The chapter also briefly examines the role that patriarchy plays in driving domestic violence in South Africa. From this study, it emerges that violence against women in South Africa is linked to various factors including patriarchy, economic dependency and expected roles of women. Here it is seen that women need to be empowered and we need to actively change society's beliefs surrounding the role of women. Additionally, there is an intersection between violence against women and violence against children. The conclusion is reached that the COVID-19 pandemic and the resulting lockdown has exacerbated pre-existing problems in South African society that cause domestic violence and that legislation alone is not sufficient to solve the problem of domestic violence in South Africa. We also cannot rely on statistics alone and need to look at the lived experiences of women in South Africa. Even in situations where gender-based violence or domestic violence is not yet present, there are systemic inequalities

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found in South Africa, often caused by patriarchy and these need to be redressed.

1 Introduction

The COVID-19 lockdown has had disproportionate effects on women¹, children and the elderly in South Africa. Women had to bear a larger workload during lockdown as they are predominantly responsible for the running of the household, child-care and supervising the education of their children in addition to performing their duties as employees (where they had kept their employment during lockdown).² It became clear during the COVID-19 lockdown in South Africa that “[w]omen are more vulnerable to COVID-19-related economic effects because of existing gender inequalities”.³ Added to this is the impact of increased domestic violence, predominantly affecting women, in South Africa. During lockdown, social media reported many instances of domestic violence perpetrated against women and the resulting crimes, such as murder, that occurred. Pandemics increase violence against women.⁴

1 Azcona, Bhatt, Encarnacion *et al* “From insights to action: Gender equality in the wake of COVID-19” 2020 *United Nations Entity for Gender Equality and the Empowerment of Women* at www.unwomen.org/en/digital-library/publications/2020/09/gender-equality-in-the-wake-of-covid-19 (20-09-2021). They make it clear that the effects of crises, including COVID-19 are never gender-neutral.

2 Income disparity makes it difficult for women to leave abusive relationships: Lockdown affected women more than men as women generally earn less than men, women more often work informally, women do not have as much access as men to social protection and are usually burdened with unpaid domestic work and caring for children and family. See UN Women “COVID-19 and its economic toll on women: The story behind the numbers” September 16 2020 at www.unwomen.org/en/news/stories/2020/9/feature-covid-19-economic-impacts-on-women (20-09-2021). See also Casale and Shepherd “The gendered effects of the COVID-19 crisis and ongoing lockdown in South Africa: Evidence from NIDS-CRAM waves 1–5” 8 July 2021 *National Income Dynamics Study (NIDS)—Coronavirus Rapid Mobile Survey (CRAM)* at cramsurvey.org/wp-content/uploads/2021/07/3 (13-05-2021). Disparate economic effects affected women more than men, including less income support for women.

3 Madgavkar, Krishnan, White, Mahajan and Azcue “COVID-19 and gender equality: countering the regressive effects” McKinsey Global Institute at www.mckinsey.com/feature-insight/future-of-work/Covid-19 (20-09-2021).

4 Mittal and Singh “Gender-based violence during COVID-19 pandemic: A mini-review” 08 September 2020 *Front. Glob. Women’s Health* at <https://doi.org/10.3389/fgwh/2020/00004> (20-09-2021).

6 *The impact of Covid-19 on domestic violence*

Prior to lockdown, research had shown that South Africa had the highest amount of gender-based violence in the world.⁵ On 26 August 2020, Carte Blanche reported⁶ that protection orders do not seem to deter perpetrators of domestic violence and that the warrants for arrest that are issued with the domestic violence protection order are often not executed. It was also found that violence escalates after the serving of protection orders as the perpetrators feel that victims are now undermining their power and they then exert their power by being more violent. The report further indicated that the police services were allocated R50 million for the purpose of gender-based violence and that all police are now trained regarding gender-based violence and domestic violence. Solutions to domestic violence that were indicated in this media report were that the different stakeholders must hold each other accountable and that a centralised database may, in the future, overcome some of the problems victims experience when trying to obtain orders against perpetrators, especially where the perpetrators have connections in the courts and/or the police service.

Some of the impacts that domestic violence has on family law is that a surge of domestic violence can lead to an increase in divorces, an increase in application for care and protection orders for children as well as removals of children from the home environment when it is in their best interests. During lockdown, the closing of schools also affected the welfare and safety of some children.⁷ COVID-19 and the resulting lockdowns had an impact on divorce and marriages worldwide, applications for marriage licenses declined in countries that require them, couples postponed marriages, spouses that were unhappy staying married were forced to stay together, and there were various barriers to obtaining a divorce such as earning less or no income due to lockdown and court delays or closed courts.⁸ Prior to the COVID-19 lockdown, one in five marriages in South Africa ended in divorce. Although full statistics are not yet available, experts state

5 Onyejekwe “The interrelationship between gender-based violence and HIV/AIDS in South Africa” 2004 *Journal of International Women’s Studies* 34.

6 Report on “A Protection Order or a Useless Document?” at www.m-net.dstv.com/show/carte-blanche/news/undeterred-watch (20-09-2021).

7 UNESCO “Adverse consequences of school closures” at en.unesco.org/Covid-19/educationresponse/consequences (21-09-2021) indicates that the closure of schools leads to “increased exposure to violence and exploitation” of children.

8 Seifman “COVID-19 impacts on marriage and divorce” 17 September 2021 at www.impakter.com/Covid-19-impacts-on-marriage-and-divorce/ (22-09-2021).

that there has been an increase in divorce and applications for divorce since lockdown.⁹ Daniel¹⁰ indicates that there are large backlogs at the courts and that in Limpopo province alone, there were 11 788 divorces outstanding at the end of 2020. This is almost half of the number of divorces countrywide in 2018. An increase in divorce applications leads to an increase in applications at the family advocate's office for recommendations regarding guardianship, care and contact. Unstable home environments may also lead to an increase in the abandonment of children due to economic abuse (resulting in no or limited access to money or essentials), psychological abuse (the expectant mother does not feel safe or supported) and physical abuse (the expectant mother does not see that the child will be welcomed or cared for and does not want the child to live such a life) and the expectant mother feels that there is "nowhere to run". This chapter will concentrate on the effect that the COVID-19 lockdown had on domestic violence in South Africa.

2 Definition of gender-based violence and domestic violence

Gender-based violence is defined as "violence directed against women on the basis of gender"¹¹ and in particular "any act of gender-based violence that results in, or is likely to result in physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty"¹², whether occurring in public or in private life".¹³ Examples of gender-based violence include sexual harassment, female genital mutilation, forced marriage and violence.¹⁴ Global conventions and agreements that deal with gender-based violence are the Convention on the Elimination of All Forms of Discrimination Against Women, the Security Council Resolution

9 Parent 24 "Will a trust protect my assets during a divorce" 9 July 2021 at <https://www.news24.com/parent/family/relationships/will-a-trust-protect-my-assets-during-a-divorce-20210708> (22-09-2021).

10 Daniel "Divorce is surging in SA—and for many couples this holiday may be the last straw" *Business Insider* 23 December 2020 at www.businessinsider.co.za/sas-divorce-rate-up-30-in-2020-heres-why-its-expected-to-get-even-worse-after-the-holidays-2020-12 (22-09-2021).

11 Available at <https://archive.unescwa.org/our-work/gender-based-violence> (23-08-2021).

12 Full text of the convention available at <https://www.ohchr.org/documents/professionalinterest/cedaw.pdf> (30-09-2021).

13 a 1, Declaration on the Elimination of Violence Against Women 1993.

14 Available at <https://archive.unescwa.org/our-work/gender-based-violence> (23-08-2021).

1325¹⁵ and the Beijing Platform for Action. South Africa signed the Convention on the Elimination of All Forms of Discrimination Against Women in January 1993 and ratified the convention on 15 December 1995. South Africa also ratified the Beijing Platform for Action and has issued reports on its compliance.¹⁶

Domestic violence is defined¹⁷ as any form of abuse. This includes not only physical abuse but also emotional, sexual, economic and psychological abuse. Domestic violence also includes stalking, damage to property, entering a person's property without consent and any abusive or controlling behaviour that causes (or may cause) harm to the person's health, well-being or safety. Gender-based violence, thus, falls within the ambit of "domestic violence" as far as it occurs to parties in a relationship or a previous perceived relationship or living in the same household. The Commission for Gender Equality (CGE) is an independent institution established in terms of section 187 of the Constitution of the Republic of South Africa. The CGE's mandate is to promote respect for gender equality and the protection, development and attainment of gender equality in South Africa. Part of its mandate is to monitor the implementation of the international and regional conventions, covenants and charters signed, or acceded to, and or ratified by South Africa, that impact directly or indirectly on gender equality. These instruments include the Beijing Declaration and Platform for Action¹⁸ (BPA), the Convention on the Elimination of Violence Against Women (CEDAW), the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, and the Solemn Declaration on Gender Equality in Africa. The commission has the mandate to monitor compliance with these international instruments and to prepare and submit reports to parliament.¹⁹ Already in 2010, it was reported by the Commission for Gender Equality that there was inadequate enforcement of domestic violence legislation

15 South Africa reaffirmed its commitment to this resolution on 31 October 2020: Media Statement

31 October 2020 South Africa's Vote on Women Peace and Security Resolution at the United Nations Security Council at <http://www.dirco.gov.za/docs/2020/unsc1031.htm> (20-09-2021).

16 South Africa's report on the progress made on the implementation of the Beijing platform for action 2014-2019 at https://static.pmg.org.za/190828National_Beijing_25_Report.pdf (20-09-2021).

17 In the Domestic Violence Act 116 of 1998.

18 1995.

19 Commission for Gender Equality "South Africa's compliance with the Beijing Declaration and Platform for Action" March 2010 8.

by the police and the courts.²⁰ Support services must work together in order to combat gender-based violence.²¹ In 2019, the Department of Women raised concerns in their report:

“There is, however, concern that the institutionalisation of the transformation agenda for women may have slowed down. Central to this concern are the continuing challenges and multiplicity of oppressions faced by South African women informed by their differently constructed subjective positions in relation to the political, economic, and social power structures. Although the agenda for gender equality and women’s empowerment in South Africa is advanced in comparison with many other countries, efforts to achieve gender equality and women’s empowerment through legislative and policy interventions have yet to substantially transform society and the economy.”²²

Infrastructure and support systems are needed to support the legislation that aims to prevent violence against women.²³ A report compiled by the Western Cape police ombudsman shows that gender-based violence victims are still not being properly assisted in 2021.²⁴ The report stated that 80% of victims were not interviewed in private; 60% of the victims of gender-based violence were not provided with a chance to give information during the trial or investigation; 60% of the victims were not told about support services for victims of gender-based violence that are available in the community and none were told to apply for financial compensation in instances where they suffered damage or financial harm. Family Violence, Child Protection and Sexual Offences (FCS) units were formed by the police services but this

20 Commission for Gender Equality (n 19) 21. For a discussion of challenges facing the police with regard to domestic violence, see Retief and Green “Some challenges in policing domestic violence” 2015 *Social Work (Stellenbosch Online)* 135-147 at <http://dx.doi.org/51-1-432> (20-09-2021).

21 Padayachee “A synchronized response to intimate partner violence” *News and Views for Magistrates* 2006 no. 7 at www.journals.co.za/doi/abs/10.10520/EJC69306 (17-09-2021).

22 Department of Women “South Africa’s report on the progress made on the implementation of the Beijing Platform for Action 2014-2019 Final Draft” 2019 21.

23 Mogale, Burns and Richter “Violence against women in South Africa: Policy, position and recommendations” 2012 *Violence against Women* 580-594.

24 Shange “Police Ombud Reveals Poor Treatment of GBV Victims in Western Cape” 18 August 2021 *Times Live* available at <https://www.timeslive.co.za/news/south-africa> (29-09-2021).

is not sufficient and clearly more needs to be done to combat gender-based violence, including domestic violence, in South Africa.²⁵ Men and boys can also be taught how to prevent gender-based violence.²⁶ Research has shown that violence against women is learned behaviour but that there is not a single factor that explains why there is such a high rate of gender-based violence in South Africa.²⁷ The statistics surrounding gender-based violence are shocking. One in three women worldwide experience physical or sexual violence in their lifetime²⁸ and 137 women are killed every day by their family members.²⁹ The global cost of gender-based violence was 1.5 trillion USD, 2% of GDP.³⁰ In South Africa, one woman is murdered every three hours; this is five times the global average.³¹

Not only women but also children were affected by the COVID-19 lockdown. There was, at first, a decrease in non-accidental injuries to children but then the cases climbed again.³² The cases decreased during hard lockdown when there was an alcohol sale ban but it was difficult for women and children to access services during lockdown.³³ Violence against children is widespread in South Africa with one in three children reporting some form of maltreatment, yet the child protection

25 Shange (n 24). See also Sibanda-Moyo, Khonje and Brobbey “Violence against women in South Africa: A country in crisis in 2017” CSVR (Centre for the study of violence and reconciliation) 2017. For a discussion of gender-based and sexual violence and HIV in South Africa see Artz, Klazinga and Müller “Sexual and gender-based violence and HIV in South Africa: an HIV facility-based study” 2020 *South African Medical Journal* 377–381.

26 Colpitts “Engaging men and boys to prevent gender-based violence in South Africa: Possibilities; tensions and debates” 2019 *Canadian Journal of Development Studies* 423.

27 Sibanda-Moyo, Khonje and Brobbey (n 25) 69.

28 World Health Organization “Devastatingly pervasive: 1 in 3 women globally experience violence” at <https://www.who.int/news/item/09-03-2021-devastatingly-pervasive-1-in-3-women-globally-experience-violence> (20-09-2021).

29 United Nations Office on Drugs and Crime “Global Study on Homicide: Gender-related killing of women and girls” 2018 10 at https://www.unodc.org/documents/data-and-analysis/GSH2018/GSH18_Gender-related_killing_of_women_and_girls.pdf (20-09-2021).

30 Dortnall “African Universities Gender Equality Forum Presentation” 12 August 2021.

31 Available at www.itsnotok.africa (23-08-2021).

32 The Children’s Institute University of Cape Town Press Release “Children and COVID-19: It’s time to put children first—from response to recovery” 3 August 2021.

33 Ibid.

system is dysfunctional and very few children receive protection and therapeutic services.³⁴ Reform of child protection is affected by a lack of evidence about the specific services needed and how they best operate.³⁵ There is an intersection between violence against children and violence against women, although the fields of research into violence against women and violence against children have developed as two separate fields.³⁶ It was reported in 2021³⁷ that 35% of women worldwide have been subjected to physical or sexual violence from an intimate partner and one in two children³⁸ experienced violence in the last year. Exposure to violence as a child increases the possibility of males later being the perpetrators of violence themselves.³⁹

According to Amnesty International, the “COVID-19 pandemic has prompted an escalation in gender-based violence against women and girls in South Africa”.⁴⁰ “Harmful gender stereotypes embedded in social and cultural norms ... have fuelled the rise in violence against women and girls in Madagascar; Mozambique; South Africa; Zambia and Zimbabwe”.⁴¹ One activist stated, “girls are taught that husbands only beat their wives when they love them”.⁴² Not only has the COVID-19 pandemic caused a rise in gender-based violence, “[i]t has also magnified existing structural problems such as poverty; inequality; crime; high unemployment and systematic criminal justice failures” and “[l]ockdown measures meant that women could not escape abusive

34 Available at <http://www.ci.uct.ac.za/ci/projects/theme/violence-against-children> (23-08-2021).

35 Ibid.

36 Available at <http://www.ci.uct.ac.za/ci/intersections> (23-08-2021). See further Padayachee “Children: the secondary victims of domestic violence” 1994 *Acta Criminologica* 50; Office on Women’s Health “Effects of Domestic Violence on Children” 2019 at <https://www.womenshealth.gov/relationships-and-safety/domestic-violence/effects-domestic-violence-children> (20-09-2021).

37 Ibid.

38 Age 2 to 17.

39 Available at <http://www.ci.uct.ac.za/ci/intersections> (23-08-2021). See also Mathews and Lehlogonolo “Connecting the Dots Deepening our Understanding of Violence Against Women and Children” at http://www.ci.uct.ac.za/sites/default/files/image_tool/images/367/intersections/repository/Intersections_Research%20Brief_16_03.pdf (25-08-2021).

40 Amnesty International “Southern Africa: Homes Became Dangerous Place for Women and Girls During COVID-19 Lockdown” 9 February 2021 at <https://www.amnesty.org/en/latest/press-release/2021/02/southern-africa-homes-become-dangerous-place-for-women-and-girls-during-covid19-lockdown/> (20-09-2021).

41 Ibid.

42 Ibid.

partners or leave their homes to seek protection”.⁴³ What aggravated the domestic violence escalation during the COVID-19 lockdown was that the provision of support services for domestic violence during lockdown were not included in the measures to combat the spread of COVID-19. Already in the first week of lockdown, 2 300 calls were made to the South African police services asking for assistance with gender-based violence and by the middle of June 2020 “21 women and children had been killed by intimate partners in the country”.⁴⁴

The South African government website⁴⁵ now provides details of services available to victims of domestic violence. These include an emergency telephone line, a please call me service, skype consults and a sms for help service. An explanation of how to obtain a protection order is also on the website. However, forms still need to be completed; these are accessible on the website, and the application currently has to be made at the magistrate’s court. The amendments have tried to address this shortcoming. The Domestic Violence Amendment Bill⁴⁶ has been approved by parliament⁴⁷ and has been signed by the President. The changes included in the Domestic Violence Amendment Bill are some changes to definitions.⁴⁸ The definition of “domestic relationship” has been amended to include “persons in a close relationship” that share or shared the same residence. The “domestic violence” definition now includes “sexual harassment; related person abuse; spiritual abuse; elder abuse; coercive behaviour; controlling behaviour [and to] to expose a child to domestic violence”. Domestic violence additionally includes entering the temporary or permanent residence or workplace of a person without their consent⁴⁹ as well as any other “behaviours of an intimidating, threatening, abusive, degrading, offensive or humiliating nature”.⁵⁰ The definition of domestic violence also now covers “where conduct harms or inspires the reasonable belief that harm may be caused to the complainant”.⁵¹ The definition of “economic abuse” has been amended to include

43 Muchena, Amnesty International’s Director of East and Southern Africa.

44 See n 40.

45 Available at www.gov.za/about-government-domestic-violence (17-08-2021).

46 B20 of 2020. These changes are now found in the Domestic Violence Amendment Act 14 of 2021.

47 On 10 September 2021.

48 “Harassment” is further defined; “sexual harassment” is defined further; “elder abuse” is included and defined.

49 “Where the parties do not share the same workplace or place of study”.

50 clause 1.

51 Ibid.

the deprivation of education expenses and accommodation.⁵² The amendment bill defines “emotional, verbal or psychological abuse” as including “manipulating, threatening, offensive, intimidating conduct” that causes mental or psychological harm to a complainant⁵³ as well as “the wilful damaging or destruction of any property in close vicinity of a complainant” and harming or threatening to harm a household pet or other animal where the welfare of the animal affects the complainant’s well-being and the threat to commit self-harm or suicide.⁵⁴ The amendments also provide that “exposing a child to domestic violence” is included in “domestic violence”, this “means to intentionally cause a child to—(a) see or hear domestic violence; or (b) experience the effects of domestic violence”.⁵⁵ Previously such matters had to be dealt with separately. The definition of “physical abuse” now also comprises “threats of physical violence”.⁵⁶ “Related person abuse” is included now within the realms of domestic violence. Related person abuse includes threatening the complainant with causing physical violence to the related person or damaging or threatening to damage the property of the related person.⁵⁷ A “related person” is defined as “any member of the family or household of a complainant, or a person in a close relationship with the complainant”.⁵⁸ This definition clearly covers a wide variety of relationships and no marriage between the “related person” and the complainant is required. “Spiritual abuse” is defined as including “(a) advocating hatred against the complainant because of his or her religious or spiritual beliefs, that constitutes incitement to cause harm to the complainant; (b) preventing the complainant from exercising his or her constitutional right to freedom of conscience, religion, thought, belief and opinion, including to give external manifestation to his or her religious or spiritual convictions and beliefs; or (c) manipulating the complainant’s religious or spiritual convictions and beliefs to justify or rationalise abusing the complainant”.⁵⁹ A “third party actor” means a person “(a) who is not or has not been in a domestic relationship with a complainant; (b) who conspired with, was procured by, or used by, the respondent to commit an act of domestic violence against the complainant; and (c) who—(i)

52 Ibid.

53 Ibid.

54 Ibid.

55 Ibid.

56 Ibid.

57 Ibid.

58 Ibid.

59 Ibid.

committed or allegedly committed an act of domestic violence against the complainant; or (ii) aided or allegedly aided the respondent in the commission of an act of domestic violence against the complainant”.⁶⁰ This definition is important as domestic violence does not always take place in isolation but can take place within families or extended families where there is a culture of gender-based violence.

An application for a protection order can now be made electronically.⁶¹ The amendment bill also provides that the court can issue a “domestic violence safety monitoring notice”⁶² together with the protection order and this will direct the police to contact the applicant regularly and visit their home and to use reasonable force to gain entry into the home if they are prevented from entering. The amendment bill also stipulates that the magistrate may appoint a social worker or family advocate to investigate the circumstances surrounding the application when a minor child is involved.⁶³ Provision is also made that an existing order must be recorded on the court file and that the complainant must be given a chance to apply for the amendment or variation or setting aside of any existing order and that the court may make an order for a limited period that contradicts any such existing order, if urgent relief is needed against domestic violence.⁶⁴ These amendments take into account the reality of the prevalence of domestic violence in South Africa and the forms that such domestic violence takes. Given the human rights violations caused towards women in South Africa due to failure by the police to enforce protection orders and low levels of convicting and prosecuting domestic violence offences⁶⁵ whether these amendments are sufficient and will be properly applied and enforced in practice remains to be seen.

60 clause 1: “This Act does not prevent a complainant from applying for relief in terms of the Protection from Harassment Act, 2011 (Act No. 17 of 2011), where a third party actor committed an act, if committed by a respondent, would amount to domestic violence against the complainant, and which constitutes harassment in terms of that Act”.

61 clause 4(1)(a)(bb).

62 clause 4A.

63 clause 5(1).

64 clause 5(3).

65 Report by the Committee on the Elimination of Discrimination Against Women “Inquiry concerning South Africa under article 8 of the Optional Protocol to the convention on the Elimination of all Forms of discrimination Against Women” 14 May 2021 1.

3 Patriarchy

The high incidence of domestic violence in South Africa cannot be viewed in isolation as it occurs within South African society at large. Patriarchy and its influence on the South African family and the commission of domestic violence needs to be examined.

*“Patriarchy is a system of society or government in which the father or eldest male is head of the family and descent is reckoned through the male line hence, the system promotes male privilege. The attitudes and expectations organized on this basis rank men above women, providing a social structure that gives men uncontested authority. It is an obsession with control as a core value around which social life is organized. Men maintain their privilege by controlling women and anyone else who might threaten their positions. Women are subordinated and treated as inferior because they are culturally defined as inferior. Men however, do not suffer because femaleness is a devalued and oppressed phenomenon”.*⁶⁶

Johnson⁶⁷ explains that patriarchy is “a kind of society” itself, that is “organized around certain kinds of social relationships and ideas ... our participation [in it] both shapes our lives and gives us the opportunity to be part of changing or perpetuating it”. The elements that define patriarchy are that it is “male-dominated; male-identified and [has] male centered (sic) character, [it is] a set of symbols and ideas that make up a culture”.⁶⁸ Mudau and Obadire⁶⁹ found that patriarchy suppresses women around the world and there are outdated practices in place that state that a women’s role in the family is below that of a man. The study even found that patriarchy was used to control women’s use of contraceptives⁷⁰ and it prevented women from

66 Johnson and Leone, quoted in Mudau and Obadire “The role of patriarchy in family settings and its implications to girls and women in South Africa” 2017 *Journal of Human Ecology* 67–72. See also Kurk and Okazawa-Rey “Patriarchy, the system” 2004 *Women’s Lives Multicultural Perspectives* 25–32. For a discussion of patriarchy and the workplace see the classic, Witz *Professions and Patriarchy* (1992) and for a general discussion of the history of patriarchy, see Miller *Patriarchy* (2017).

67 Johnson “Patriarchy the system: An it, not a He, a them or an us” in Kirk and Okazawa-Rey *Women’s Lives: Multicultural Perspective* (2004) 26.

68 Johnson (n 67) 29.

69 Johnson (n 67) 29.

70 Men believed that it would make them (the men) sick when they had sexual intercourse with them.

obtaining educational advancement.⁷¹ Johnson⁷² opines that in order for patriarchy to be present, men do not need to have “oppressive personalities” or be conspiring together to defend their male privilege. We do not need to prove that women are victims and men are villains in order to demonstrate that patriarchy exists in a society, if the “society is oppressive” then those who live in that society will see that oppression as a normal part of everyday life and will participate in it.⁷³

Dortnall⁷⁴ states that patriarchal privilege drives gender-based violence and that we must address unequal power relations, we need to empower women and transform attitudes, beliefs and norms. Hunnicutt⁷⁵ opines that a study of patriarchy should not only focus on individual attributes but on social conditions that lead to violence against women. In South Africa, the department of women, youth and persons with disabilities has the mission to “accelerate socio-economic transformation and implementation of the empowerment and participation of women, youth and persons with disabilities through oversight, monitoring, evaluation and influencing policy”.⁷⁶ The department monitors gender equality and “the impact of seemingly neutral decisions, plans, laws, policies and practices on them through capacity building and responsive budgeting; and facilitating and monitoring capacity building and skills development for them to participate meaningfully in all areas of the economy and the workplace”.⁷⁷ The fact that the department exists acknowledges the influence of patriarchy in South Africa.

Patriarchy influences the way a society functions, even when considering whether legislation is discriminatory, we cannot disregard patriarchy:

71 See also Coetzee “South African education and the ideology of patriarchy” 2001 *South African Journal of Education* 21.

72 Johnson (n 67) 26.

73 Johnson (n 67) 26.

74 African Universities Gender Equality Forum Presentation 12 August 2021.

75 Hunnicutt “Varieties of patriarchy and violence against women: Resurrecting patriarchy as a theoretical tool” 2009 *Violence against Women* 553–573.

76 Department of Women at <https://nationalgovernment.co.za/units/view/31/departments-of-women-youth-and-persons-with-disabilities-dwypd> (23-08-2021). See also World Health Organization *Violence Prevention: The Evidence. Preventing Violence by Developing Life Skills in Children and Adolescents*, Geneva, 2009.

77 Department of Women (n 76).

The Impact of Covid-19 on the Future of Law

*“The South African labour market is generally more favourable to men than it is to women and men are more likely to be in paid employment than women, regardless of race in general, but with particular significance for African women in the main. Significant numbers of women, mainly black African women, remain in low-productivity jobs, often in informal sector enterprises whose access to technology is poor”.*⁷⁸

Women are also more likely than men to be involved in unpaid work. About 55.2% of those involved in non-market activities were women as measured in the second quarter of 2018. Women’s unequal share of unpaid care and domestic work is an important barrier to their economic empowerment and well-being. This reflects not only the time-intensive nature of some tasks performed around the home, such as caring for other household members, but also the uneven distribution of caring activities between household members, which reflect social norms and practices and intra-household decision-making. In 2010, the Time-Use Survey conducted by Stats SA showed that women between the ages of 20 and 29 years were estimated to have spent 2.3 hours per day in market production activities, and 4.7 hours in household production activities. While men spent more time in market production than women, the opposite is true for household production. Men outnumber women amongst the employed by more than two million. There are around one-quarter more women than men amongst the non-searching unemployed. “Men have better labour market outcomes (employment as opposed to unemployment) and women dominate amongst those with worse labour market outcomes (non-searching unemployment as opposed to narrow unemployment)”.⁷⁹ This unequal labour leads to women being economically dependent on men and less able to leave the household when domestic violence takes place. A study has previously shown that the economic and social empowerment of women reduces violence against women by their intimate partners.⁸⁰ It is important to note that violence against women does not take place in isolation from other factors, instead it is “closely interlinked with relations of power

78 Report of the UN Secretary General, E/CN.6/2017/3, to the 61st Session of the Commission on the Status of Women, 2016 26.

79 Department of Women (n 76) 25.

80 Kim *et al* “Understanding the impact of a microfinance-based intervention on women’s empowerment and the reduction of intimate partner violence in South Africa” 2007 *American Journal of Public Health* 794–802.

and feeds on and induces multiple vulnerabilities, including disability, economic dependence, identity-based inequalities, and the personal circumstances of women's and children's lives".⁸¹

In South Africa, one in three men believe that women should not have equal rights.⁸² Many women give up their careers to perform unpaid care of the children and the household or help with their husband's business or career and, thus, their husband's estate is advantaged. South Africa needs to "overcome the structural barriers that prevent the participation of women as equal players in the economy and society in general".⁸³ Based on the statistics on gender-based violence and the clear influence of patriarchy in South Africa, is there even equal bargaining power between spouses before they enter into marriage? Women may not be as free to negotiate regarding the antenuptial contract as they may be economically dependent on men. Women often have unequal bargaining power compared to men and as a result may enter into antenuptial contracts that are detrimental to them. The World Health Organization⁸⁴ already stated more than a decade ago that "promoting gender equality is a critical part of violence prevention" as gender equality makes the risk of violence against women higher. The World Health Organization recommended that the initiatives that can be used to improve gender equality include school programmes to deal with gender attitudes, and community intervention programmes, including micro-finance schemes for women as well as media interventions to change the perceptions of women's right and gender norms.⁸⁵ The World Health Organization recommends that programmes must include both men and women in order to prevent conflict between men and women.⁸⁶ Wall⁸⁷ opines that

81 Sibanda-Moyo, Khonje and Brobbey (n 25) 70.

82 Statistics South Africa 2018 at www.itsnotok.africa (23-08-2021).

83 Sibanda-Moyo, Khonje and Brobbey (n 25) 70.

84 "Violence prevention the evidence: promoting gender equality to prevent violence against women, series of briefings on violence prevention" 2009 3 at https://www.who.int/violence_injury_prevention/violence/gender.pdf (30-09-2021).

85 World Health Organization 2009 3.

86 Ibid.

87 "Gender inequality and violence against women: What's the connection" June 2014 *ACCSA Research Summary* Australian Centre for the Study of Sexual Assault 1. Biroli "Violence against women and reactions to gender equality in politics" 2018 *Politics and Gender* 681 also states that violence is perpetrated against women "just because they are women" but that their experiences are also formed by "race, class, sexuality, generation and nationality".

The Impact of Covid-19 on the Future of Law

a multi-dimensional perspective is needed in order to understand the link between violence against women and gender equality and states that research on gender inequality also needs to consider factors other than just gender, such as class and race.

The Promotion of Equality and Prevention of Unfair Discrimination proposed amendment bill⁸⁸ would change the definition of “discrimination” to mean:

“any act or omission, including a policy, law, rule, practice, condition or situation which, whether intentionally or not, directly or indirectly—

(a) imposes burdens, obligations or disadvantage on;[or]

(b) withholds benefits, opportunities or advantages from[,];

(c) causes prejudice to; or

(d) otherwise undermines the dignity of, any person [on] related to one or more of the prohibited grounds[;],irrespective of whether or not the discrimination on a particular ground was the sole or dominant reason for the discriminatory act or omission”.

The definition of “equality” would include:

“(a) the full and equal enjoyment of rights and freedoms as contemplated in the Constitution;

(b) equal right and access to resources, opportunities, benefits and advantages;

(c) [and includes] *de jure* and *de facto* equality;

(d) [and also] equality in terms of impact and outcomes; and

(e) substantive equality”.

The bill would also provide, a bit more clearly, that the state has a “general responsibility to promote equality:

88 B 20 of 2021. For a discussion of the proposed bill see De Vos “Proposed amendments to the Promotion of Equality and Prevention of Unfair Discrimination Act the bill have been heavily criticised by various right-wing religious, conservative and ‘classic’ liberal groups. While the bill is not perfect, much of the criticism is based on a misrepresentation (or misunderstanding) of the amendments, and driven by an ideological antipathy towards the eradication of systemic inequality, especially in the ‘private’ sphere” *Daily Maverick* 23-06-2021 at <https://bit.ly/3PdEJko> (26-08-2021).

6 *The impact of Covid-19 on domestic violence*

24. (1) The State and public bodies have a duty and responsibility to eliminate discrimination and to promote and achieve equality.
- (2) All persons have a duty and responsibility to eliminate discrimination and to promote equality.
- (3) The State, public bodies and all persons have a duty and responsibility in particular to—
- (a) eliminate discrimination on the grounds of race, gender and disability;
- and
- (b) promote equality in respect of race, gender and disability.
- (4) The State, public bodies and the organisations and institutions referred to in section 28(1) must take reasonable measures, within available resources, to make provision in their budgets for funds to implement measures aimed at eliminating discrimination and promoting equality referred to in this Chapter”.

Additionally, the bill provides that the state has to amend existing legislation or enact further legislation in order to achieve the abovementioned aims:⁸⁹

- “(6)The measures to be adopted by the State to achieve equality must—
- (a) proactively address systemic and multidimensional patterns of inequality and discrimination found in social structures, rules, attitudes, actions or omissions which prevent the full and equal enjoyment of rights and freedoms as contemplated in the Constitution, including equal access to resources, opportunities, benefits and advantages and social goods; and
- (b) provide for reasonable accommodation of the needs of persons on the basis of any of the prohibited grounds.”⁹⁰

It is hoped that these changes, combined with the changes to domestic violence legislation,⁹¹ will help ameliorate the effects of patriarchy

89 clause 25(3).

90 clause 25(6).

91 Discussed below at par 4.

on women in South Africa and result in fewer incidences of domestic violence in South Africa.

4 Domestic violence legislation in South Africa

The current Domestic Violence Act provides for the application by a victim of domestic violence for a protection order. The applicant can apply for a protection order against the perpetrator of domestic violence at their nearest magistrate's court. Inadequacies in the provisions of the Domestic Violence Act led to the drafting of the Domestic Violence Amendment Bill. This bill was one of three bills that cabinet has approved to combat gender-based violence. The other bills are the Sexual Offences and Related Matters Amendment Bill and the National Register for Sexual Offences Bill. The purpose of the Domestic Violence Amendment Bill is to address shortcomings in the Domestic Violence Act. The amendments also aim to align the Domestic Violence Act with the Protection of Harassment Act 17 of 2011. The Domestic Violence Amendment Bill stipulates that a "relationship" in terms of the bill includes anyone who has been dating, engaged in customary relationships, in intimate or in sexual relationships of any duration and perceived romantic relationships.⁹² Provision is also made for the departments of health, social development, basic education and higher education to provide services to domestic violence survivors and to refer them to medical care and shelter. Section 18B was included in the amendment and provides that the directors-general of the previously mentioned departments may provide directives. These directives must:

"prescribe services to be provided to a complainant who is a child, a person with a disability or an older person, prescribe the manner in which a functionary who must deal with a complainant who is a child, a person with a disability or an older person in order to protect them against further acts of domestic violence, prescribe services to be provided to a complainant who is an adult person, provide for a public and communication initiative to education the public on the provisions of the Act [and] the obligations of the ... South African Police Services ... provide for the designation of accredited shelters ... prescribe the manner in which a risk assessment must be conducted in respect of a complainant to provide or refer the complainant for further services".

92 clause 2 of the bill.

The amendments also provide that if a functionary⁹³ “becomes aware of the fact, or on reasonable grounds believes or suspects” that domestic violence has been committed against a child, a person with a disability or an older person and fails to report it to a social worker or to the police that such person can then be fined or imprisoned⁹⁴. Additionally “a court may also, when considering an application for a protection order, cause an investigation to be carried out as contemplated in section 47 of the Children’s Act, 2005 “and if a child that is affected by the proceedings is in need of care and protection then the court must order that the question of whether the child is in need of care and protection must be referred to designated social worker for an investigation.”⁹⁵ The bill amends the previous section 5(6) and now provides that the interim protection order will be of full force from the time that it exists and its contents have been brought to the respondent’s attention. Prior to the amendment, the interim protection order had to be served on the respondent and had no effect until this had been done. The amended section 18(1) states that

“a prosecutor may not refuse or institute a prosecution or withdraw a charge, ... [where] that contravention or offence involve[s] the infliction of grievous bodily harm or a dangerous wound against the complainant or a related person, or where the complainant or a related person is threatened with a weapon, unless that prosecutor is authorised thereto by the relevant Director of Public Prosecutions”.

The amendments also stipulate that arrest can take place without a warrant.⁹⁶ Orders for domestic violence protection can be applied for online and applications “must be uploaded onto the integrated

93 Medical practitioner, health service provider, social worker, official in the employ of a public health establishment, educator or care-giver.

94 clause 2A. Functionaries must also provide the complainant with a list containing the names of accessible shelters and public health establishments and give the complainant a notice with information and the remedies that the complainant may make use of.

95 clause 5.

96 clause 3: A police official “who receives a report that an offence containing an element of physical violence has allegedly been committed during an incidence of domestic violence; and reasonably suspects that a person who may furnish information regarding the alleged offence is in any private dwelling may ... without warrant enter those premises for the purpose of interrogating that person and obtaining a statement from him or her”.

electronic repository”⁹⁷ and provision is made for electronic (online) service of the protection order; this includes service via Facebook.⁹⁸ If electronic communications were used to perpetrate domestic violence then the “electronic communication service providers” now have to provide assistance to the court with regards to these communications.⁹⁹

5 Conclusion

COVID-19 and the effects of lockdown have revealed and exacerbated pre-existing problems in South African society. Due to the close proximity in which victims and their abusive partners have had to live and the difficulty of obtaining services to help them, the instances of domestic and gender-based violence have increased in South Africa during lockdown. It is clear that gender-based violence, including domestic violence is due to patriarchy¹⁰⁰ and gender inequality in South Africa.¹⁰¹ Dlamini¹⁰² makes it clear that the government needs to give the same amount of attention to gender-based violence as it has to COVID-19. The Domestic Violence Amendment Bill has been long awaited. Hopefully some of its provisions will provide assistance and relief to victims of domestic violence in South Africa. However, a band-aid in the cracks of South African society, alone, is not sufficient to correct these problems in society and to prevent further violence against women. “When oppression is woven into the fabric of everyday life, we don’t need to go out of our way to be overly oppressive. In order for an oppressive system to produce oppressive consequences as the saying goes what evil requires is simply that ordinary people do nothing”.¹⁰³ Legislation alone is not sufficient to fix gender-based violence in South Africa. Caution must also be exercised in the way that the media is used to raise awareness of domestic violence, for example, challenges were caused by the use of the hashtag #MenAreTrash to raise awareness of violence against women, as men are needed to be allies in the prevention of violence against women.¹⁰⁴ Recent statistics

97 clause 4.

98 clause 13(1): if the order cannot be served immediately then it may be served by email, fax, sms or on a “known social media platform”.

99 clause 5B.

100 Dlamini “Gender-based violence, twin pandemic to COVID-19” Nov. 30 2020 *Critical Sociology* 583–590 uses the term “toxic masculinity”.

101 Johnson (n 67) 26.

102 See (n 100) 583.

103 Johnson (n 67) 26.

104 D’Avanzato, Bogen, Kuo and Orchowski “Online dialogue surrounding violence against women in South Africa: a qualitative

indicate that gender-based violence is continuing to rise in South Africa¹⁰⁵ and recent rape statistics are “horrific”.¹⁰⁶ It is hoped that the amendments to legislation will help curb this. The amendment will allow direct referral to social workers and it will allow for investigations to be done on order from the Domestic Violence (Magistrate’s) court.

A South African study has shown that “Domestic Violence in South Africa is a consequence of the complex interplay of patriarchy, culture and negative masculine construct”.¹⁰⁷ It has been shown that systemic inequalities make women vulnerable to gender-based violence. Policies should not just look at “ideological perspectives” but the “lived experiences of women”.¹⁰⁸ The Human Sciences Research Council¹⁰⁹ stipulated that the available figures on gender-based violence in South Africa are outdated so the council is conducting a study into gender-based violence in South Africa, over a 30 month period. The study will look at “emotional, economic, physical and sexual intimate partner violence, non-partner sexual violence; sexual harassment and other forms of GBV which were not often included in similar studies, such as *ukuthwala* (bride abduction)”. It is clear that more studies and actions on ground level are needed with regards to domestic violence in South Africa and that the amended Domestic Violence Bill is a step in the right direction. COVID-19 lockdown just brought the existing issues to the fore and even where gender-based violence or domestic violence is not yet present, there are systemic inequalities in South Africa, often caused by patriarchy. This needs to be redressed.

analysis of #MenAreTrash” 2021 *Journal of Sexual Aggression* at DOI: 10.1080/13552600.2021.1892219 (21-09-2021).

105 MP Zandile Majosi, as quoted by News 24 “Parliament’s adoption of GBV is ‘a leap that is long overdue’” 10 September 2021 at www.news24.com (15-09-2021).

106 Ibid.


107 Mshweshwe “Understanding domestic violence: masculinity, culture, traditions” October 2020 *Heliyon* at <https://www.sciencedirect.com/science/article/pii/S2405844020321770> (30-09-2021).

108 See (n 25) 70.

109 Research on GBV: HSRC and DSI briefing 23 February 2021 at www.hsrc.ac.za/en/news/general/research-on-gbv (21-09-2021).



7 Covid-19 and its impact on infant abandonment in South Africa

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Abstract**

The COVID-19 pandemic has had a devastating impact on millions of people around the world.¹ Not only has its impact been direct through sickness and the loss of life but also indirect through unemployment, the closure of schools and an increase in poverty. Existing problems were exacerbated by the pandemic as countries who already faced humanitarian crises were particularly vulnerable to the effects of the pandemic.² One such existing problem faced in South Africa is the number of infants that are unsafely abandoned annually. In 2010, this number was an alarming 3 500 babies according to Blackie.³ One of the leading causes of child abandonment in South Africa is poverty. Poverty, in turn, is an indirect result of the pandemic, therefore, a rise in the number of infants abandoned may be safely assumed with no official statistics of the number of infants abandoned since the start of lockdown. Further, the lack of a legal and safe method of infant relinquishment as an existing problem and leading cause of infant abandonment was further exacerbated by the pandemic as desperate mothers had no other option but to unsafely abandon their infants. This chapter focusses on the impact of COVID-19 on the existing problem

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1 Chricaden "Impact of COVID-19 on people's livelihoods, their health and our food systems" 2020 <https://www.who.int/news/item/13-10-2020-impact-of-covid-19-on-people's-livelihoods-their-health-and-our-food-systems> (18-01-2022).

2 Ibid.

3 Blackie "Child Abandonment and adoption in the context of African ancestral beliefs in contemporary urban South Africa" 2014 National Adoption Coalition of South Africa: Fact Sheet on Child Abandonment at <https://fliphtml5.com/zzjr/atap/basic> (21-01-2022).

of infant abandonment in South Africa, with the proposed solution being baby savers. The approach to this challenge in other jurisdictions is also considered. The proposed amendment of the Children's Act through the inclusion of specific provisions pertaining to baby savers is also included. Lastly, the rights that are infringed upon through the non-recognition of a safe method of infant relinquishment, such as, the right to life and human dignity is also addressed under a discussion on constitutionality.

1 COVID-19 and its impact on children in SA with a specific look at infant abandonment

Reports indicate that the COVID-19 pandemic, although not directly impacting on children in the form of infections and hospitalisations, had an indirect impact that posed a clear and present danger to children.⁴ The effects of the pandemic on children are reported to be emotional abuse, physical abuse including sexual violence, and neglect and this leads to a perpetual cycle of violence and poverty with childhood victims becoming adult perpetrators or further victims of violence.⁵ One effect of the pandemic that goes unmentioned is the rise in the number of children that are abandoned by their parents or care-givers due to increased economic pressure, the closure of businesses, the lack of income and any form of assistance. The number of unsafe infant abandonment cases were already at an all-time high in South Africa prior to the COVID-19 pandemic with the last official statistics reporting an alarming rate of 3 500 infants abandoned in 2010.⁶ A study published in 2016, indicates that many infant deaths

4 World Vision "COVID-19 Aftershocks, a perfect storm: Millions more children at risk of violence under lockdown and into the 'new normal'" 2020; World Vision "COVID-19 Aftershocks: Secondary impact threatens more children's lives than the disease itself" at <https://www.wvi.org/publications/report/coronavirus-health-crisis/Covid-19-aftershocks-perfect-storm> (21-01-2022).

5 UCT Press Release "Government cuts support to families" 2021 <https://icts.everlytic.net/public/messages/do-print-pdf/hBj8PnB2rfniLLQN/tAySWePoFsCzs64l/NJNLKwdYB1w2LbEM> (18-01-2022).

6 Blackie (n 3). This number was obtained by adding the figures provided by Child Welfare Organisations in South Africa. Blackie (n 3) at 7 states "Child Welfare South Africa estimate the number of children to be abandoned in 2009/2010 at 2750, a marked increase from previous years (this number excluded Johannesburg and Cape Town metropolitan areas). Cape Town Child Welfare reported between 500 to 600 babies and children abandoned between 2009 and 2010, and Johannesburg Child Welfare (one of the largest child protection organisations in the

in South Africa are as a result of abandonment⁷. The researchers found that 454 children under 5 years of age were killed in 2009.⁸ Only eight out of a total of 241 neonates (referring to a child that is 28 days old or younger) were more than six days old when they died.⁹ These findings were underestimates because of the difficulty in distinguishing between infanticide (the killing of an infant within the first year of life) and other causes of death during infancy.¹⁰ Importantly, 84.9% of neonaticides (the killing of an infant in the first 28 days of life) was as a result of abandonment and these abandoned neonates were found to be at full term.¹¹ Due to a lack of resources in underdeveloped countries, data is difficult to obtain and deaths are, therefore, often inadequately identified and reported.¹² However, researchers found that “a child born in South Africa is at the highest risk of being killed during its first six days of life.”¹³ The situation worsened with the outbreak of the COVID-19 pandemic in 2020 when a national lockdown was announced and implemented on 27 March 2020. At the start of the lockdown there were fears that COVID-19 and the resultant lockdown would have a devastating impact particularly on women and children and these fears were realised. Between April and December 2020, 83 infants were unsafely abandoned and only 34 survived. In 2021, between the months of January and September, 60 infants were unsafely abandoned and only 26 were found alive.¹⁴ Albeit much less than the 3500 infants that were abandoned in 2010, it must be borne in mind that these numbers were taken from a few newspaper publications and, therefore, only represent a few of the known and reported cases. Some of the leading causes of child abandonment will now be looked at to determine how these relate or could be exacerbated by the COVID-19 pandemic.

Gauteng province) reported rescuing an average of fifteen babies a month over this period. It is widely believed that many child abandonments go unreported, yet these estimated numbers point to a total of over 3500 babies and children who were abandoned over this twelve month period (Weekend Post 27/08/2010).”

7 Abrahams, Mathews, Martin *et al* “Gender differences in Homicide of Neonates, Infants, and Children under 5 y in South Africa: Results from the cross-sectional 2009 National Child Homicide Study”.

8 Abrahams *et al* (n 7) 2.

9 Ibid.

10 Ibid.

11 Ibid.

12 Ibid.

13 Ibid.

14 Grabham Director of Door of Hope Children’s Mission. Informal collection of news reports.

2 The leading causes of infant abandonment

There are many causes of child abandonment in South Africa, some of which include gender based violence, gender inequality, poverty, HIV/AIDS, rape and restrictive legislation.¹⁵ Restrictive legislation and poverty will now be discussed as they are the most prominent reasons for child abandonment in South Africa. Gender based violence is discussed separately in a preceding chapter.

2.1 Restrictive legislation

South African laws are both restrictive and reactive. Restrictive in that it does not provide for a safe alternative to unsafe abandonment and reactive in that it places the focus on the act of abandonment instead of on prevention. The problem with this approach is that it places the lives of children in imminent danger. Section 305(3)(b) of the Children's Act¹⁶ regulates the abandonment of children in South Africa, by declaring it an offence to abandon a child.

“(3) A parent, guardian, other person who has parental responsibilities and rights in respect of a child, caregiver or person who has no parental responsibilities and rights in respect of a child but who voluntarily cares for the child either indefinitely, temporarily or partially, is guilty of an offence if that parent or caregiver or other person—

- (a) abuses or deliberately neglects the child or
- (b) abandons the child.”

Further, the concealment of birth of an infant is dealt with by section 113 of the General Law Amendment Act¹⁷ and defined as:

“113. Concealment of birth of newly born child—

(1) Any person who, without a lawful burial order, disposes of the body of any newly born child with intent to conceal the fact of its birth, whether the child died before, during or after birth, shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding three years.

¹⁵ Blackie (n 3).

¹⁶ Act 38 of 2005.

¹⁷ Act 46 of 1935.

- (2) A person may be convicted under subsection (1) although it has not been proved that the child in question died before its body was disposed of.
- (3) The institution of a prosecution under this section must be authorised in writing by the Director of Public Prosecutions having jurisdiction.”

South African law saw the introduction of the crime of concealment of birth by way of various statutes from the year 1845.¹⁸ Hoctor and Carnelly state that all these statutes were founded upon similar English legislation.¹⁹ A charge of concealment of birth as contained in section 113 of the General Law Amendment Act, is applied if a mother hides the body of an infant. This does not include the act of exposure of an infant because the elements of this crime involve “concealing” or “disposing” of the child’s body as opposed to abandoning the child’s body in an open field, toilet or alongside the road as we see in news articles.²⁰ It also does not include abandoning a child that is still alive.

18 Hoctor *Snyman’s Criminal Law* (2020) 382.

19 Hoctor and Carnelly “The purpose and ambit of the offence of concealment of birth—*S v Molefe* 2012 (2) SACR 574 (GNP)” 2012 *Obiter* 732; Rosenberg *The Legal Regulation of Infant Abandonment in South Africa* (2020 thesis UJ) at 421 fn 122 “Ordinance 10 of 1845 borrowed from the Offences Against the Person Act of 1861, South Africa’s enactment of the Infant Life Protection Act of 1907 also emulated the English Infant Life Protection Act of 1872. Further, the creation of the crime of exposing of an infant which only happened in later years in South Africa in terms of s 258(d) of the Criminal Procedure Act 51 of 1977 and which is also governed by s 113 of the General Law Amendment Act 46 of 1935.”

20 In *Rex v Dema* 1947 1 SA 599 (E) when the accused’s child died shortly after birth she placed the child in a wooden box in the front of her bed. The court, making use of s 113 of the General Law Amendment Act 46 of 1935 held that the word “disposes” requires some degree of permanence and merely placing a body in a place that is easily locatable and in full view does not amount to disposing. Therefore, the court found the accused not guilty of the crime of concealment of birth. According to Stevens “Assessing the interpretation of the elements of ‘dispose’ and ‘child’ for purposes of establishing the offence of concealment of birth—*S v Molefe* 2012 (2) SACR 574 (GNP)” repository.up.ac.za/handle/2263/41050 (22-05-2022), placing the body of a child in a bag next to a rubbish bin in a street will not amount to concealment of birth because it does not satisfy the element of “dispose” in terms of s 113 of the General Law Amendment Act because it lacks the measure of permanence that is required. Stevens also refers to other examples that will lack the measure of permanence required such as leaving the body of the child at the entrance of a hospital, in a public toilet or next to the road.

The Impact of Covid-19 on the Future of Law

In most cases, however, it is a challenge to ascertain whether a child was alive or dead at the moment of “disposal” and, therefore, the police will open a case of concealment of birth.²¹ Thus, concealment of birth does serve as an alternative offence to murder or attempted murder.²² The difficulty with the prosecution of this crime is that many babies are abandoned out in the open such as on the street,²³ in a field,²⁴ in the bushes²⁵ and in a mall.²⁶ This results in the director of public prosecutions being unable to prosecute this crime successfully because the element of “disposal” and “concealment” is, in most cases, absent.²⁷

Section 239(2) of the Criminal Procedure Act provides:

“239. Evidence on charge of infanticide or concealment of birth.—

(1) At criminal proceedings at which an accused is charged with the killing of a newly born child, such child shall be deemed to have been born alive if the child is proved to have breathed, whether or not the child had an independent circulation, and it shall not be necessary to prove that such child was, at the time of its death, entirely separated from the body of its mother.

(2) At criminal proceedings at which an accused is charged with the concealment of the birth of a child, it shall not be necessary to prove whether the child died before or at or after birth.”

21 Rosenberg (n 19) 431.

22 See s 258 of the Criminal Procedure Act.

23 <http://www.iol.co.za/pretoria-news> (30-07-2021); <http://www.risingsunlenasia.co.za> (17-08-2021).

24 <http://www.roodepoortrecord.co.za> (04-08-2021).

25 <http://algoafm.co.za> (14-08-2021); <http://www.dailyvoice.co.za> (18-08-2021).

26 <http://lowvelder.co.za> (20-08-2021).

27 See *S v Molefe* 2012 2 SACR 574 (GNP) at par 9 where Rabie J held that there was no compliance with the element of “dispose” which is necessary for the offence of concealment of birth. That disposing required some measure of permanence and not placing the child’s body in full view of everyone; In *Rex v Emma Madimetse* 1919 TPD 59-60 Wessels J doubted whether this was a case of concealment of birth because he stated “had she told her mistress that she had given birth to a child, there could be no concealment of birth”, however, the court refused to accept the evidence of the accused on her statement to her mistress and, therefore, decided that to throw a child into a sanitary bucket is *per se* concealment of birth.

In terms of this section, an accused may still be charged with infanticide if it is proved that the child breathed prior to dying and again it is emphasised that a charge of concealment of birth is warranted despite uncertainty as to when the child died. In addition, in terms of section 258 of the Criminal Procedure Act, exposing an infant is declared a competent verdict in lieu of one of murder or attempted murder.²⁸

These laws only function once the crime is committed, once the infant is unsafely abandoned and, therefore, do not provide an adequate solution in preventing the act of abandonment and possibly the death of an infant. This restrictive legislation, according to Blackie, is one of the causes of child abandonment because it does not provide the mother with a further option such as safe relinquishment. The proliferation of infant abandonment will continue if preventative measures are not adopted to curb this practice.²⁹ Only punishing the action does not safeguard the lives of infants. Such laws would be justified if used in conjunction with an option for safe relinquishment, in that instance, if a mother still opts to unsafely abandon her child, her prosecution for these crimes is warranted. The goals of deterring crimes of this nature and of retribution through punishment are not attained because few women are ever successfully prosecuted.³⁰

The effects of existing restrictive legislation that fails to provide a safe alternative to unsafe infant abandonment was exacerbated by the pandemic as women who found themselves in desperate situations with a lack of support and resources during the national lockdown

28 “258. Murder and attempted murder.—If the evidence on a charge of murder or attempted murder does not prove the offence of murder or, as the case may be, attempted murder, but—the offence of culpable homicide; the offence of assault with intent to do grievous bodily harm; the offence of robbery; in a case relating to a child, the offence of exposing an infant, whether under a statute or at common law, or the offence of disposing of the body of a child, in contravention of section 113 of the General Law Amendment Act, 1935 (Act 46 of 1935), with intent to conceal the fact of its birth; the offence of common assault; the offence of public violence; or the offence of pointing a firearm, airgun or airpistol in contravention of any law, the accused may be found guilty of the offence so proved.”

29 Rosenberg (n 19) 492 “As experienced in the Netherlands where a baby box was opened in June 2014 after the *Raad voor Strafrechtstoepassing en Jeugdbescherming* (Council for the administration of criminal justice and the protection of juveniles) advised the government to focus their efforts on preventing the act of abandonment rather than prosecuting the act. Advies vondelingenkamer en babyhuis, 30 June 2014, see www.rsj.nl/english (10-11-2019).”

30 Rosenberg (n 19) 492.

turned to the only option they thought they had, which was to unsafely abandon their infants.

2.2 Poverty

According to Statistics South Africa, more than six out of ten children between the ages of 0–17 years old were multi-dimensionally poor in 2015.³¹ This means that children experience poverty in one or more of the following areas of their lives: health, housing, nutrition, protection, education, information, water and sanitation.³² In 2015, 80% of children were deprived in at least two of these areas. This was the situation prior to the COVID-19 pandemic. After lockdown, in another survey conducted by Statistics South Africa, the percentage of respondents receiving no income increased from 5.2% to 15.4% after the sixth week of the national lockdown.³³ Of the majority of the respondents who indicated that their primary sources of income was in the form of salaries or wages, this number was 76.6% prior to lockdown and declined to 66.7% by the sixth week of lockdown, indicative of the fact that less respondents were now receiving an income at all than prior to the national lockdown.³⁴ This decrease in income resulted from the shutting down of businesses, and due to the reduced demand for goods and services.³⁵ The national lockdown also resulted in an increase in the amount of people claiming from the Unemployment Insurance Fund (UIF), taking loans and for those who had savings and investments, accessing and exhausting these.³⁶ Since the start of lockdown, 7% of respondents reported experiencing hunger. This increased from 4.3% and this indicates greater food insecurity in the country as a result of

31 Statistics South Africa “South Africa’s poor little children” at <http://www.statssa.gov.za/?p=13422> (15-09-2021); Full report Child Poverty in South Africa: A Multiple Overlapping Deprivation Analysis, Report 03-10-22 dated 22 June 2020 at <https://www.unicef.org/esa/media/6551/file/UNICEF-South-Africa-Multidimensional-Child-Poverty-Analysis-2020.pdf> (15-09-2021).

32 Statistics South Africa (n 31).

33 Statistics South Africa “Loss of income resulting from the COVID-19 pandemic may lead to higher levels of food insecurity SA” 2020 at <http://www.statssa.gov.za/?p=13327> (15-09-2021); Full report “Results from Wave 2 survey on the impact of the COVID-19 pandemic on employment and income in South Africa” at http://www.statssa.gov.za/?page_id=1854&PPN=Report-00-80-03&SCH=72638 (15-09-2021).

34 Statistics South Africa (n 31).

35 Ibid.

36 Ibid.

the pandemic.³⁷ Lastly, 18.7% of respondents indicated that they could not pay their debt.³⁸ It was stated that:

“Before the pandemic, 59% of South Africa’s children lived in households with an income below Stats SA’s poverty line of R1 183 per person per month, while 30% of children lived below the food poverty line of R585 per month or R20 a day. This meant that a third of children lived in households with not enough money to meet their daily energy requirements. In 2018, child hunger affected 2.1 million children (11%) nationally, of whom 197 000 lived in the Western Cape.”³⁹

The COVID-19 pandemic and resultant hard lockdown measures implemented to curb its spread merely worsened an already existing and growing problem. In April 2020, 47% of households reported running out of money for food and 15% of households reported child hunger.⁴⁰ The closure of schools, the rise in food prices and the suspension of the National School Nutrition Programme (NSNP), which provides nutrition to more than nine million children during school terms, saw an increase in child hunger.⁴¹ Children who were fed by Early Childhood Development Centres were left without a daily meal as these centres were closed.⁴² In May 2020, the government introduced five mechanisms to mitigate the effects of lockdown, namely social grant top-ups, the COVID-19 Social Relief of Distress (SRD) Grant and the Temporary Employer/Employee Relief Scheme (TERS), COVID-19 Caregiver Allowance as well as emergency food assistance.⁴³ These

37 Ibid.

38 Ibid.

39 Hendricks, Hall, Goieman *et al* Children and COVID-19 Advocacy Brief “Nutrition and food security” 2 at http://www.ci.uct.ac.za/sites/default/files/image_tool/images/367/Projects/Current_Projects/Covid-children/pdfs/Advocacy%20Brief_Nutrition_02_08.pdf (21-01-2022); Sambu “Child Health: Nutrition” in Shung-King, Lake, Sanders, Hendricks (eds) South African Child Gauge 2019, Children’s Institute, University of Cape Town at http://www.ci.uct.ac.za/sites/default/files/image_tool/images/367/Child_Gauge/South_African_Child_Gauge_2019/ChildGauge_2019_final_print%20%28sm%29.pdf (21-01-2022).

40 Hendricks *et al* (n 39) 2.

41 Ibid.

42 Ibid.

43 Hendricks *et al* (n 39) 2; Van der Berg, Patel, Bridgman “Hunger in South Africa during 2020: Results from Wave 3 of NIDS-CRAM” at <https://cramsurvey.org/wp-content/uploads/2021/02/10.-Van-der-Berg-S.->

mechanisms helped alleviate child hunger because between July and August these numbers declined; however, in November 2020, a rapid rise in the number of households experiencing child hunger was again reported due to the discontinuation of the COVID-19 Caregiver Allowance as well as a discontinuation of the social grant top-ups and, thus, food insecurity continued well into 2021, with one in seven households still reporting food insecurity in April 2021.⁴⁴ This food insecurity was also more likely in households that were single female-headed.⁴⁵

Prior to the COVID-19 pandemic, poverty was already seen as one of the leading causes of infant abandonment with women unable to provide for the needs of their infants. With the rise in poverty and food insecurity during the national lockdown, many more women abandoned their infants than prior to this period. From April to December 2020, 83 infants were unsafely abandoned, these numbers only reflect those cases that are known and that are reported in the news. Of this number, 49 infants were reportedly found dead.⁴⁶ The numbers of infants unsafely abandoned continued into 2021 as the national lockdown persisted with 60 infants being unsafely abandoned between the months of January and early September and 34 of these infants being found dead.⁴⁷

Patel-L.-Bridgman-G.-2021-Hunger-in-South-Africa-during-2020-Results-from-Wave-3-of-NIDS-CRAM-1.pdf (21-01-2022).

44 Hendricks *et al* (n 39) 2; Van der Berg, Patel, Bridgman “Food Insecurity in South Africa- Evidence from the NIDS-CRAM Wave 5” at <https://cramsurvey.org/wp-content/uploads/2021/07/13.-Van-der-Berg-S.-Patel-L-and-Bridgman-G.-2021-Food-insecurity-in-South-Africa-%E2%80%93-Evidence-from-NIDS-CRAM-Wave-5.pdf> (21-01-2022).

45 Hendricks *et al* (n 39) 3; Crush, Caesar, Haysom “The State of Household Food Security in Cape Town, South Africa”, *Hungry Cities Report 2018* at <https://hungrycities.net/wp-content/uploads/2018/09/HCP12.pdf> (21-01-2022).

46 Information compiled by Nadene Grabham Director of the Door of Hope Children’s Mission Johannesburg; this was also accurately predicted by the National Adoption Coalition of South Africa (NACSA) Wilson “Opinion: The impact of COVID-19 and the lockdown on child protection and adoption” at <https://www.news24.com/parent/family/parenting/opinion-the-impact-of-Covid-19-and-the-lockdown-on-child-protection-and-adoption-20200409> dated 9 April 2020 (16-09-2021).

47 Information compiled by Nadene Grabham Director of the Door of Hope Children’s Mission Johannesburg.

3 Baby safe havens and baby savers as a possible solution to unsafe infant abandonment in South Africa with a brief look at baby savers in other countries

3.1 What are baby safe havens and baby savers?

Baby safe havens allow mothers to relinquish their children safely to designated providers such as staff on duty at police stations, fire stations as well as hospitals instead of abandoning their children in unsafe locations.⁴⁸ Similarly, a baby saver also functions as an alternative to unsafe infant abandonment by allowing the mother to leave her infant in a box-like structure also referred to as a safe. Once a baby is placed inside, an alarm is triggered to alert someone on the other side that an infant has been placed therein.⁴⁹ Baby savers can be attached to a wall of a child and youth care centre or a place of safety. Alternatively, a baby saver can be erected independently and not at a wall attached to a child and youth care centre or place of safety. In this instance, the baby saver's alarm will notify first responders and emergency medical workers to collect the baby from the saver within a few minutes.⁵⁰ Both of these mechanisms are aimed at saving the lives of infants who would otherwise be discarded in unsafe locations that could lead to their deaths. Furthermore, an advantage of using a designated safe-haven provider or baby saver is the protection of the mother's identity. The mother is not obliged to leave any identifying information. This is, in many instances, the main reason why mothers feel secure in making use of this option.⁵¹ These options serve as a last resort where women are unable to obtain pregnancy counselling or pregnancy counselling is unsuccessful.

48 Boniface and Rosenberg "The Challenges in Relation to Undocumented Abandoned Children in South Africa" 2019 *Journal of South African Law* 49.

49 Boniface and Rosenberg (n 48) 49; *Odievré v France* 42326/98 Strasbourg 13-02-2003 (2004) 38 *European Human Rights Reports* 43 referred to as "tours" or collectively known as Foundling Homes in 1638, later abolished and replaced with the open office system in France. In South Africa, these hatches or safes have been opened by various missions such as the Door of Hope Children's Mission in Berea, Johannesburg which opened the first modern day baby saver.

50 Boniface and Rosenberg "The potential effects of the legalisation of baby safes and anonymous birth on the parental responsibilities and rights of unmarried fathers in South Africa" 2017 *Journal of Contemporary Roman Dutch Law* 254.

51 Boniface and Rosenberg (n 48) 49.

Various baby savers have already been established throughout South Africa, one such saver and the very first modern day saver in South Africa was established by the Door of Hope Children's Mission in Berea, Johannesburg in 1999. Without any legal backing provided to the establishment of baby savers, their existence is not known by desperate women seeking to relinquish their infants. When legalising these savers, certain provisions should be put in place in order to ensure their proper functioning. Many countries around the world have implemented baby savers and baby safe havens such as China, India and Namibia. Each of these countries and their laws will now be briefly discussed.

3.2 Baby savers in China

China installed their first baby saver, referred to as a "baby safety island" in a children's home in Shijiazhuang City, Hebei Province in June 2011.⁵² Thereafter these baby savers were expanded in 32 locations across China between August 2013 and December 2014.⁵³ This has resulted in 1400 abandoned babies being rescued through these baby savers.⁵⁴ Wang states that the goal behind the installation of these baby savers are "[p]utting life and children's best interests first" and this method is chosen as it improves the survival rate of abandoned babies.⁵⁵

China's laws recommend that each "baby safety island" should be installed closest to the nearest children welfare institute to enable babies to be cared for quickly after relinquishment.⁵⁶ They also require various facility standards that need to be observed to ensure the safety of the infant that is relinquished.⁵⁷ These standards include incubators, beds and blankets, alarms, fans, air conditioners and signage that will allow women to locate these baby safety islands with ease.⁵⁸ They also have a procedure to accept babies, an inspection system and a medical

52 Wang "Development and Challenge of Protection Measures for Abandoned Babies in China" in conference proceedings of 14th Asian Congress of Health Promotion in Kumamoto, Japan April 2018, 37-39; Rosenberg "Mechanisms adopted in curbing unsafe infant abandonment: A comparison between Namibia and South Africa" 2021 *African Human Rights Law Journal* 734 940.

53 Wang (n 52) 37; Rosenberg (n 52) 940.

54 This number was recorded in 2018 see Wang (n 52); Rosenberg (n 52) 940.

55 Wang (n 52) 37; Rosenberg (n 52) 940.

56 Wang (n 52) 37.

57 Ibid.

58 Ibid.

treatment procedure.⁵⁹ Importantly, it is noted that the survival rate of abandoned babies was less than 50% prior to the establishment of the baby safety islands and after implementation this increased to 70% and that this mechanism did not cause a proliferation of infant abandonment as the numbers of abandoned babies did not show a significant increase from the average in previous years.⁶⁰ Despite this positive report, Wang suggests that these baby safety islands still face some challenges as most of the children abandoned suffer from disabilities and disease; and middle-sized cities with floating populations⁶¹ have seen a rise in the number of abandoned infants and many members of the public are still conflicted about the use of the baby safety island.⁶²

3.3 Baby savers in India

India introduced a baby saver in the form of “the cradle” in 1978, which consists of a basket left outside of the home with an alarm system attached to it. This was introduced by the Delhi Council for Child Welfare due to an increase in female infanticide, children being abandoned close to hospitals and parks, social stigmas and poverty.⁶³

3.4 Baby safe havens in Namibia

More recently, our neighbouring country, Namibia, has introduced baby safe haven laws through section 227 of the Child Care and Protection Act⁶⁴ that commenced on 30 January 2019 and provides for the procedure for dealing with abandoned children left with approved authorities. Section 227(1) reads as follows:

“parent, guardian or care-giver of a child who abandons the child may not be prosecuted under section 254⁶⁵ for such abandonment

59 Ibid.

60 Ibid.

61 A group of people that reside in a given place for a limited amount of time and cannot be considered as part of the official census, this is especially the case in the South China area, Xiamen, Fujian Province, Nanjing Province and Jiangsu Province. See Wang (n 52) 37–39.

62 Wang (n 52) 37.

63 Bhalla “The Present Situation and Issues Relating to Children being Abandoned in baby boxes/cradle in India” in conference proceedings of 14th Asian Congress of Health Promotion in Kumamoto, Japan dated April 2018 46–50; Rosenberg (n 52) 940.

64 Act 3 of 2015.

65 s 254 “(1) Subject to the provisions of section 227(1), a parent, guardian or other person who has parental responsibilities and rights in respect

The Impact of Covid-19 on the Future of Law

if the child— (a) is left within the physical control of a person at the premises of a hospital, police station, fire station, school, place of safety, children’s home or any other prescribed place; and (b) shows no signs of abuse, neglect or malnutrition.”

Subsection 2 provides that anyone who finds an abandoned child must report such finding to the police or to a designated social worker who will then place the child in a place of safety and start an investigation.⁶⁶ In terms of subsection 5, a social worker who has been notified of an abandoned child must provide an opportunity for someone to reclaim the child by publishing information pertaining to the child in a national newspaper as well as a local one.⁶⁷ In addition to this, the social worker must cause for an announcement on at least one national radio station.⁶⁸ In respect of reclaiming a child, section 227(6) gives the person 60 days from the date on which the child was abandoned.⁶⁹ However, in this instance, the social worker will conduct an investigation because the child will be treated as one in need of protective services in terms of section 131(1)⁷⁰ and in terms of section 139.⁷¹ An abandoned child may

of a child, care-giver or person who has no parental responsibilities and rights in respect of a child but who voluntarily cares for the child either indefinitely or temporarily, commits an offence if that parent or care-giver or other person—(a) abuses or deliberately neglects the child; or (b) abandons the child, and is liable on conviction to a fine not exceeding N\$50 000 or to imprisonment for a period not exceeding ten years or to both such fine and such imprisonment. (2) A person who is legally liable to maintain a child commits an offence if that person, while able to do so, fails to provide the child with adequate food, clothing, lodging and medical assistance and is liable on conviction to a fine not exceeding N\$50 000 or to imprisonment for a period not exceeding 10 years or to both such fine and such imprisonment.”

66 “s 227(4); In terms of s 139, a social worker has 45 days within which to investigate the circumstances surrounding the child and to compile a report that must be submitted to the children’s court” see Rosenberg (n 52) 734.

67 Rosenberg (n 52) 946.

68 Ibid.

69 Ibid.

70 “Child in need of protective services (1) In this Chapter, a child is in need of protective services, if that child—(a) is abandoned or orphaned and has insufficient care or support.”

71 Section 139 of the Child Care and Protection Act 3 of 2015 reads as follows: “(3) For purposes of an investigation made under this section, a designated social worker may—

(a) question any person who may have relevant information in order to establish the facts surrounding the circumstances giving rise to the concern;

not be made available for adoption immediately after abandonment as a period of 60 days must expire before such a child may be placed for adoption.⁷² The 60 days start running after the date of the newspaper publication or the radio broadcast, whichever is the latest, and also providing that no one has claimed responsibility for the child.⁷³

Namibia enacted these laws because of the rise in the number of babies reportedly abandoned on a monthly basis.⁷⁴ In Windhoek, Namibia in 2008, 13 fetuses were found abandoned according to staff at Gammams Water Care Works.⁷⁵ Namibian police suggest the problem is a “significant” one.⁷⁶ Hubbard states that between 2003 and 2007,

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- (b) evaluate the child’s family circumstances;
 - (c) evaluate the child’s environmental circumstances;
 - (d) identify sources who may verify any alleged neglect, maltreatment or abuse of the child;
 - (e) identify the level of risk to the child’s safety or well-being;
 - (f) identify actual and potential protective and supportive factors in the home and broader environment to minimise risk to the child;
 - (g) make an assessment of the child’s developmental, therapeutic and other needs;
 - (h) request entry into any premises in order to obtain relevant information;
 - (i) enter and search any premises without a warrant if there is good reason to believe that the delay involved in obtaining a warrant would prevent the obtaining of relevant information which is critical to the investigation, but search of a building or structure used as residence, may not be carried out without a warrant, unless the owner or occupier of the residence, has consented to the search or the designated social worker on reasonable grounds believes that a warrant will be granted if applied for and that delay in obtaining such warrant would defeat the objects of the search;
 - (j) be accompanied by a member of the police; and
 - (k) recommend any appropriate protective measures or intervention as provided for in this Act.”; Rosenberg (n 52) 946 n 44.

72 s 227(7); Rosenberg (n 52) 946–947.

73 s 227(7); Rosenberg (n 52) 946–947.

74 Rosenberg (n 52) 940.

75 Lewis “Baby dumping on the rise in Namibia” 2013 <https://www.voanews.com/africa/baby-dumping-reported-rise-namibia> (2020-02-06); National Planning Commission with support from UNICEF “Children and adolescents in Namibia 2010 a situation analysis” 2010, https://www.unicef.org/sitan/files/SitAn_Namibia_2010.pdf (2020-02-06) 57; Hubbard “Baby dumping and infanticide” 2008 Gender Research and Advocacy Project of the Legal Assistance Centre Windhoek, Namibia 3 <https://www.lac.org.na/projects/grap/Pdf/monoinfant.pdf> (21-01-2022); Rosenberg (n 52) 749.

76 Hubbard “Baby-dumping and infanticide” 2008 Gender Research and Advocacy Project of the Legal Assistance Centre Windhoek, Namibia 1 6;

23 cases of baby abandonment were reported—this increased from six prior to 2003.⁷⁷ This served as reason for the implementation of baby safe haven legislation.

4 Proposals to implement baby savers in South Africa

The following proposals have been made to parliament for the legalisation of baby savers through the insertion of section 316 in chapter 23 of the Children's Act 38 of 2005:

“CHAPTER 23

MECHANISMS FOR SAFE RELINQUISHMENT OF INFANTS:
BABY SAVERS, DESIGNATED SAFE HAVEN PROVIDERS”

316(1) A Baby Saver or Designated Baby Save Haven Provider may only operate after being certified to comply with the standards prescribed by the Minister in terms of the relevant regulations, by way of a certificate of compliance;

316(2) When making use of Baby Savers or Designated Safe Haven Providers the following provisions must be complied with in order to qualify as Safe Relinquishment of an Infant—

(a) Age of the Child—an infant of one year old or younger may be safely relinquished in a Baby Saver, or to a Designated Safe Haven Provider by any person mentioned in section 316(2)(b);

(b) Relinquishing person is a person who is reasonably deemed to be:

(i) either of the parents; or

(ii) the legal guardian; or

(iii) a person or caregiver acting with the consent of the parents.

(c) Abuse—If an Infant shows any signs of Abuse, in terms of section 1 of the Act, upon being relinquished in a Baby Saver or to a Designated Safe Haven Provider—

(i) The Abuse must be reported to the South African Police Services as prescribed;

(ii) The Relinquishing Person will be prosecuted for Abuse in terms of section 305(3)(a) and (d) of the Act; and

The Namibian delegation, while presenting the report on the Elimination of All Forms of Discrimination Against Women published in 1995 to the United Nations Committee, conceded that “infanticide is a significant problem in Namibia”; Rosenberg (n 52) 749.

⁷⁷ Hubbard (n 76); Rosenberg (n 52) 940.

7 Covid-19 and its impact on infant abandonment

(iii) The Relinquishing Person will not enjoy anonymity and confidentiality as guaranteed in section 316(4).

316(3) Immunity from prosecution—a Relinquishing Person who safely relinquishes an Infant in a Baby Saver or to a Designated Safe Haven Provider and the Infant shows no signs of Abuse, will be immune from prosecution for Abuse in terms of section 305(3)(a) and (d) of the Act.

316(4) Anonymity and confidentiality—a relinquishing person is guaranteed absolute anonymity and confidentiality when making use of a Baby Saver or Designated Safe Haven Provider and provided the Infant shows no signs of Abuse in terms of section 316(2)(c).

316(5) Voluntary Provision of Information—A Relinquishing Person has the right to voluntarily disclose Personal Information of the Infant or itself on relinquishing an Infant in a Baby Saver or to a Designated Safe Haven Provider. Such Personal Information of the Relinquishing Person and/or the Infant will be kept confidential in accordance with the provisions of the Protection of Personal Information Act and such information relating to the Infant may only be used to provide the necessary medical treatment to the Infant;

316(6) Termination of Parental Responsibilities and Rights—the parental responsibilities and rights of Parents will be terminated once the 90 days' time period has expired in terms of section 316(7) and in terms of Reg. 56(2)(b)(ii) of the Children's Act 38 of 2005.

316(7) Reclaiming a child—a Relinquishing Person who has safely relinquished an Infant through a Baby Saver or to a Designated Safe Haven Provider may decide to reclaim the Infant within and no later than 90 days from the date on which an advertisement is placed in the local newspaper to notify other interested parties of the relinquishment of the Infant, failing which the Infant will be legally adoptable.

316(8) Reunification—A Parent with parental responsibilities or the Legal Guardian of the Infant shall be reunified with the Infant that was safely relinquished in terms of section 316(2), on success of the prescribed Reunification process.

316(9) Proof—upon reclaiming a Child or Infant the Parent or Legal Guardian wishing to reclaim the Child or Infant will have to provide proof that he or she is the Parent or Legal Guardian,

The Impact of Covid-19 on the Future of Law

this will be at the discretion of the Child Protection Organisation. Proof may be in the form of but not limited to—

- a. A bracelet that was acquired from the Baby Saver or from the Designated Safe Haven Provider where relevant; or
- b. DNA testing; or
- c. Providing a photo of the Infant; or
- d. Clinic card; or
- e. Any other relevant information that provides sufficient proof that he or she is the Parent or the Legal Guardian.

316(10) The Minister must publish regulations prescribing:

- a) the role, purpose and related matters of the national oversight body appointed by the Department to regulate Baby Savers and Designated Safe Haven Providers to ensure compliance with the Act;
- b) The intake protocols in respect of the use of Baby Savers and Designated Safe Havens;
- c) The minimum safety and design requirements that must be adhered to in relation to Baby Savers and safety standards for Designated Safe Havens;
- d) The investigation and reporting of Abuse of an Infant;
- e) The process to be followed by a Relinquishing Person who seeks to reclaim an Infant following Safe Relinquishment in terms of section 316(2); and
- f) The Reunification process.

316(11) Commencement Provision—Section 316(1) to section 316(9) will come into operation on a date fixed by the Minister by proclamation in the Gazette in respect of Baby Savers and Designated Baby Safe Haven Providers respectively.

316(12) Commencement Provision—The above section 316 in respect of Designated Baby Safe Haven Providers will only come into effect once regulations have been published in respect thereof.”

These proposed provisions cover more of the aspects that were omitted in terms of the Namibian legislation such as age of the child, who the relinquishing person can be, immunity from prosecution, and

anonymity.⁷⁸ An amendment to section 236 of the Children's Act is also proposed, which deals with when consent to adoption is not required by including the following paragraph: "(g) has safely relinquished an [i]nfant in a Baby Saver or to a Designated Safe Haven Provider and has failed to [r]eclaim the [i]nfant or [c]hild as provided in terms of the prescribed [r]eclaim process."

Furthermore, an amendment to section 305(3) of the Children's Act is proposed to include paragraph (c), (d) as well as an amendment to subsection 4. The proposed section provides instances in which a parent or caregiver will be guilty of child abandonment if they have not safely relinquished an infant either through a baby saver or to a designated safe haven provider or alternatively they have relinquished an infant through a baby saver or to a designated safe haven provider but the infant shows signs of abuse.⁷⁹ Subsection 4 also provides that a person will not be guilty of failing to legally maintain a child if the child has been relinquished through a baby saver or to a designated safe haven provider. Therefore, child abandonment will still be a crime in terms of legislation if not done in the prescribed manner and if the child shows signs of abuse. Regulations have also been drafted to provide for the minimum safety standards that each baby saver must observe, the intake protocols of infants through these savers to prevent child trafficking and the compliance certificate that must as a first step be issued to organisations wishing to install savers on their premises as well as recommendations for a national advertising campaign to bring awareness to the existence of these safes and their exact locations. With many countries serving as both good and bad examples, these aspects are not being left to chance or "figuring out" but have purposefully been thought through to protect the best interests of each child left in a baby saver.

78 See Rosenberg (n 52) 741–744 for a detailed explanation on the shortcomings of Namibia's safe haven laws.

79 "(c) abandons an Infant other than through Safe Relinquishment in a Baby Saver or other than to a Designated Safe Haven Provider provided for in section 316(1);

(d) relinquishes an Infant in a Baby Saver or to a Designated Safe Haven Provider but such Infant shows signs of Abuse in terms of section 316(1) (c);

(4) A person who is legally liable to maintain a child is guilty of an offence if that person, while able to do so, fails to provide the child with adequate food, clothing, lodging and medical assistance unless the Relinquishing Person, has relinquished an Infant in a Baby Saver or in terms of the provisions of Baby Safe Haven laws, then he or she will not be guilty of an offence in terms of this subsection."

5 Constitutionality

Section 11 of the Constitution of the Republic of South Africa provides that everyone has the right to life. This is guaranteed to everyone including children. The lack of the provision of a safe alternative to unsafe infant abandonment does not safeguard the child's right to life which forms part of the fundamental rights guaranteed in the Constitution. O' Regan J commented as follows in *S v Makwanyane*:

“The right to life is, in one sense, antecedent to all the other rights in the Constitution. Without life in the sense of existence, it would not be possible to exercise rights or to be the bearer of them. But the right to life was included in the Constitution not simply to enshrine the right to existence. It is not life as mere organic matter that the Constitution cherishes, but the right to human life: the right to live as a human being, to be part of a broader community, to share in the experience of humanity. This concept of human life is at the center (sic) of our constitutional values. The Constitution seeks to establish a society where the individual value of each member of the community is recognised and treasured. The right to life is central to such a society.”⁸⁰

The right to life also has a socio-economic element which means that the state will be obligated to meet certain needs in respect of this right, such as shelter, food and education. Sachs J remarked that the state must create conditions to allow all persons to enjoy the right.⁸¹ Therefore, the state is under a duty to legalise a safe method of infant relinquishment, which is in line with the duty to “create conditions to enable *all persons* to enjoy the right”. Furthermore, the right of an infant to human dignity as guaranteed by section 10 of the Constitution is also infringed when an infant is discarded in a dumpster, alongside the road or in a toilet. According to Chaskalson P, the right to life and human dignity are the most important of all the rights as well as the source of all other rights, these two rights must be valued above all others.⁸² In addition section 28(2) of the Constitution provides “(a) child's best interests are of paramount importance in all matters concerning a child”. Establishing a baby saver law is placing the child's best interests in a position of paramount importance by safe guarding the child's fundamental rights as guaranteed in the constitution.

80 *S v Makwanyane* 1995 3 SA 665 (CC) par 326.

81 the *Makwanyane* case (n 80) par 326 and 327.

82 the *Makwanyane* case (n 80) par 144.


Being a party to the United Nations Convention on the Rights of the Child, article 6 is of relevance to South Africa. The article provides that “state parties recognise that every child has the inherent right to life and that state parties shall to the maximum extent possible ensure the survival and development of the child”. Thus, for the child to survive and develop, a safe method of infant relinquishment is necessary to prevent death that results from unsafe abandonment.

6 Conclusion

The COVID-19 pandemic highlighted many existing humanitarian crises experienced by several countries around the world. Our response to these prior to the pandemic was either non-existent or slow. With an increase in poverty causing more desperation for mothers and restrictive legislation failing to ease the pressure, the need for a safe method of infant relinquishment became even more apparent. The implementation of baby savers and baby safe havens in many countries around the world, all with a common goal of protecting the child’s right to life and best interests, serves as an example to South Africa. As a first step, baby savers should be legalised in South Africa to allow organisations to both open these savers and advertise their existence. Safe haven laws should be implemented in future as staff at hospitals and fire stations as well as police stations will require specialised training on procedures to be followed when receiving an infant and this specialised training will take time to implement. The pandemic has shown us that in the area of infant abandonment, South Africa was ill prepared to prevent unsafe abandonments and, with clear solutions, there exists no justification for such ill preparedness.

8 The psychological effects of Covid-19 and lockdown on parental alienation

Emotional harm as a remedy for an alienated parent?

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Abstract

The COVID-19 lockdown has severed many families, where they found themselves having a limited period to decide who would live where and with whom. In other instances, it cemented the divide which already existed for the non-custodial parent. Parents found themselves in a tug-of-war over the children and with courts being temporarily closed during this time, travel restrictions and lockdown regulations, it became harder to enforce custody agreements. This worked out somewhat perfectly for the parent who tried to alienate their children from the other parent. Parental alienation is a recurring problem that affects many families who are experiencing high conflict, separation and divorce. Parental alienation can be defined as a process whereby one parent undermines the child's previously intact relationship with the other parent. It creates a situation where the alienating parent teaches the child to reject the other parent, to fear the parent and to avoid having contact with that parent. Although not much has been done to officially recognise parental alienation in South African courts, the law advocates for the best interests of the child in terms of the Children's Act 38 of 2005.

Although parental alienation has been described in the psychiatric literature for at least 60 years, it has never been considered for the

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inclusion in the Diagnostic and Statistical Manual of Mental Disorders (DSM). Nonetheless there have been various proposals and opinions that parental alienation be included in the definition. In addition, parental alienation does have emotional consequences to an alienated parent. When an alienator parent's conduct leads a child to reject the other parent, the alienated parent's emotional response usually includes a "sense of powerlessness and frustration", stress, loss, grief, anger, fear and feelings of pain, anxiety, deficiency, humiliation and being unloved. Ultimately, the alienated parent experiences the anguish of the loss of a child, which in turn causes that parent immense mental pain and suffering. This is similar to loss and is combined with the continuing concern for the child.

The long-time existence of parental alienation and its lack of appropriate legislative consequences is a cause for concern. Unless effective deterrents to parental alienation are implemented, it is a fair prediction that alienation will continue. This paper will focus and discuss the civil remedies that are available for an affected parent. The paper will further propose that the additional delictual remedy for emotional distress and harm be utilised by an alienated parent against the alienator if their case warrants it.

1 Introduction

When parents part ways, children are often the victims being caught up in their parents' bitterness. While some parents can agree upon their child's living arrangements, there is a minority where the levels of animosity are such that children end up suffering emotional harm. The single most important factor that prevents a healthy environment between parents is communication. The extreme case results in one parent either deliberately or unwittingly turns the child against the other parent. This phenomenon is known as parental alienation. Unless steps are taken by the alienated parents, with the support of professionals and the courts, parental alienation will continue to damage the lives of children. One of the unfortunate impacts of the COVID-19 pandemic is the increase we have seen in cases where one parent uses lockdown or self-isolation measures as an excuse to stop the other parent from seeing their child. Claims that a family need to self-isolate is difficult to prove and with our courts under increasing pressure, the time it currently takes for matters to reach court can mean damage as issues cannot be addressed as swiftly. In addition, the psychological damage that is experienced by the alienated parent is a cause for concern. The question that follows is whether in addition to

the delictual claim for defamation, there is further remedial assistance that is available to the alienated parent who is the victim of such psychological and emotional abuse? This chapter will examine and discuss the accessory remedy of emotional harm in delict that can also be utilised by the alienated parent if their case warrants it.

The chapter firstly considers the distinction between parental alienation and parental alienation syndrome. In addition, the effects of COVID-19 on parental alienation are highlighted in this paper. Moreover, the paper examines the psychological implications of parental alienation on the alienated parent and the current legislative framework in South Africa pertaining to parental alienation. The paper further discusses the civil remedies available to an alienated parent in South Africa and draws on the similarities and differences with the United States. The paper concludes by advancing that alienated parents should explore the additional delictual claim of emotional harm in South Africa.

2 Definition of parental alienation v parental alienation syndrome

2.1 Parental alienation (PA)

Richard Gardner first coined the term parental alienation in early 1980 in response to a cluster of symptoms.¹ Parental alienation refers to an attempt by one parent to alienate the child or children from the other parent usually within the context of divorce and or separation². This includes denigrating, criticising and attacking the other parent in front of the children and with the children. The parent's aim is to remove the target parent from the child's life and make it seem as if that is the way the child feels.³

2.2 Parental alienation syndrome (PAS)

Parental alienation syndrome is a somewhat controversial term which refers to the psychological condition that exists within the child who has been a victim of parental alienation behaviour. PAS is the effect of one parent's manipulation so that the child changes his or her view

1 Viljoen "Unintentional state enforced parental alienation syndrome during the hard lockdown in South Africa" 2021 *The Family Journal: Counselling and Therapy for couples and Families* 1.

2 Viljoen (n 1) 2.

3 Viljoen (n 1) 2.

of the other parent from being a person of love into a person of hate.⁴ This is a very damaging psychological illness which can and often will create lifelong harm to the child. According to Childress, children can become so indoctrinated and eager to please the powerful parent that they themselves might start hating or abusing the targeted parent.⁵ PAS does not appear in the Diagnostic and Statistical Manual of Mental Disorders (DSM-5) which lists mental health conditions recognised by the American Psychiatric Association.⁶ Neither is it recognised as a mental health condition by the World Health Organization (WHO). Although the WHO officially updated their 11th International Classification of Diseases (ICD-11) on 25 May 2019 to include PAS,⁷ it was removed again on 20 September 2020. The reason according to WHO is because it is a “judicial term and issue and its inclusion for coding purposes in the ICD-11 will not contribute to valid or meaningful health statistics”. However, the DSM-5 has a code for a “child affected by parental relationship distress” which could include PAS.⁸

3 The effects of COVID-19 and parental alienation in South Africa

South Africa, while being delayed in terms of the contraction of the disease when contrasted with the rest of the world, was no exception to this global pandemic. In response to the rising number of confirmed cases in South Africa, a “hard” or full lockdown was announced on 23 March 2020 by President Ramaphosa. Strict rules and regulations were issued by the government for the general public. One of the regulations prohibited the movement of children between divorced parents, separated parents, co-holders of parental rights or responsibilities during lockdown. However, during April 2020, amendments were made to this regulation resulting in their relaxation. The resultant is that the movement of children between parents and/or co-holders of parental rights and responsibilities remained prohibited. There were two exceptions, where an existing court order was in existence

4 Bernet, “Parental alienation, DSM-V, and ICD-11” 2010 *The American Journal of Family Therapy* 76.

5 Bernet (n 4) 77; “Parental alienation has officially been recognized by WHO, but it’s been a violation of od SA children’s rights sine 2005” at https://www.news24.com/parent/Family/Relationships/Finance_Legal/parental-alienation-has-officially-been-recognised-by-who-but-its-been-a-violation-of-sa-childrens-rights-since-2005 (16-11-2021).

6 Bernet (n 4) 103.

7 Viljoen (n 1) 2.

8 Viljoen (n 1) 3.

or if there was a parental right or responsibility agreement or plan which regulated contact arrangements in place.⁹ These regulations placed the onus on those transporting these children to have in their possession the necessary court order or agreement. What can result in complication to this is that these provisions are subject to the condition that there is no person known to have come in contact with an individual who has contracted COVID-19 in either home to which the child is expected to travel to or from.¹⁰ The COVID-19 lockdown has severed many families and cemented the divide which already existed for the non-custodial parent. This worked out somewhat perfectly for the parent who tried to alienate their children from the other parent. Parental alienation is a recurring problem that affects many families who are experiencing high conflict, separation and divorce.¹¹

4 Psychological effects of parental alienation

Parental alienation causes behavioural, emotional, or psychological harm.¹² It can be a form of psychological violence and abuse that occurs in the family context, where the child is used as an instrument or agent by one parent against the other. PA has been viewed as one of the most serious types of “emotional abuse” and a species of psychological violence.¹³ Several techniques are utilised in parental alienation. They include false allegations of child abuse, false statements relating to the targeted parent or devaluation of such parent through criticism of lifestyle or character, distorting history or limiting conversations or visits with the child.¹⁴ The impairment in the parental relationship can lead to significant psychological consequences for an individual. Both the child and the targeted parent who is subject to the loss of a child, which can cause extreme mental anguish, are arguably the victims of psychological violence.¹⁵

9 Viljoen (n 1) 2; “South Africa: Lockdown: What does it mean for divorced and separated parents’ contact rights in respect of their children” at <http://www.mondaq.com/south-africa/divorce/925790/lockdown-what-does-it-mean-for-divorced-and-separated-parents-s39-contact-rights-in-respect-of-their-children> (18-11-2021).

10 Viljoen (n 1) 3.

11 Viljoen (n 1) 3.

12 Van der Bijl “Investigating parental alienation as a form of domestic violence, child abuse and harassment: A legal hypothesis” 2016 *Obiter* 121.

13 Van der Bijl (n 12) 123; *Hendrickson v Hendrickson* 2000 ND 1 603 N.W.2d 896 903.

14 Van der Bijl (n 12) 123.

15 Van der Bijl (n 12) 123.

When an alienator parent's conduct leads to a child to reject the other parent, the alienated parent's emotional response usually includes a "sense of powerlessness and frustration", stress, loss, grief, anger and fear and feelings of pain, anxiety, deficiency, humiliation and being unloved.¹⁶ Additionally these feelings of pain and suffering are sometimes exacerbated by some outsiders, who at least partially blame the alienated parent for the child's rejection by pointing to the alienated parent's flaws.¹⁷ The intense emotions suffered by the alienated parent can cause him or her to lash out at even the child. Ultimately the alienated parent experiences the anguish of the loss of a child, which in turn causes that parent immense mental pain and suffering. This is similar to the loss of a child to death, but in some ways, it can seem worse to the alienated parent because the alienated parent wants to restore their relationship with their children and will try anything to end the impasse. Eventually some alienated parents give up on the parent-child relationship.

5 Current legislative frameworks regarding parental alienation in South Africa

5.1 Legislative frameworks

5.1.1 Constitution of the Republic of South Africa¹⁸

The inclusion in the Bill of Rights of a special section on the rights of the child was an important development for South African children. Children need special protection because they are among the most vulnerable members of society. They are dependent on others, their parents and families, or the state when these fail, for care and protection. Children's rights are a priority, and the best interests of a child are the overriding concern when it comes to any matter affecting them.¹⁹ Section 28 of the Constitution protects the interest of a child, and this includes protection from harm or abuse. The interpretation of this provision will most certainly include abuse from parental alienation.

16 Varnado "Inappropriate parental influence: A new app for tort law and upgraded relief for alienated parents" 2011 *DePaul Law Review* 113.

17 Varnado (n 16) 126.

18 Constitution of the Republic of South Africa, 1996.

19 "Children's rights: Why protect children's rights?" at [http: www.concourt.org.za](http://www.concourt.org.za) (22-11-2021).

5.1.2 The Children's Act²⁰

Section 9 of the Children's Act specifically singles out and ensures that a child's best interest is of paramount importance. Section 7(1) of the act should be read together with section 28(2) of the Constitution. After the Children's Act was enacted, a list of factors was provided in s 7(1) that need to be considered in the determination of the best interests of a child. These factors include the nature of the relationship between the parent and child,²¹ the attitude and capacity of the parents,²² the emotional and physical security of the child,²³ the need to be raised in a stable family or caring environment,²⁴ and the need to be protected from any psychological or physical harm that could be caused by abuse, neglect, exploitation or exposing such child to exploitative harmful or violent behaviour.²⁵ Our courts have reiterated that children need to be protected from abuse, neglect, maltreatment or degradation as seen in the case of *G v G*.²⁶ Courts have also looked at which parent is better able to promote and ensure the child's physical, moral, emotional and psychological welfare as noted in the case of *Soller NO v G and Another*.²⁷ In the constitutional court decision of *S v M*, it was held that where a breakup in a family is certain to occur, the state should minimise the negative effect on children as far as possible and the best effort possible should be made to avoid the destruction of family life.²⁸

5.1.3 The Domestic Violence Act 116 of 1998

In terms of the Domestic Violence Act, domestic violence can take on many different forms. In terms of section 1, the harm that is defined as domestic violence includes forms of abuse such as psychological or emotional, harassment, intimidation and stalking.²⁹ Further in terms of section 1 emotional, verbal, and psychological abuse refers to a pattern of degrading or humiliating conduct. In addition, the act recognises that the respondent can be a person who is, or was, in a domestic relationship with the complainant.³⁰ Section 7 allows for a

20 Children's Act 38 of 2005

21 s 7(1)(a) of the Children's Act; Van der Bijl (n 12) 128.

22 s 7(1)(b) and (c) of the Children's Act; Van der Bijl (n 12) 129.

23 s 7(1)(g) of the Children's Act.

24 s 7(1)(k) of the Children's Act.

25 s 7(1)(l) and (i) of the Children's Act.

26 *G v G* 2003 5 SA 396 (ZH) 400.

27 *Soller NO v G and Another* 2003 5 SA 430 (W) 54-55.

28 *S v M* 2008 3 SA 232 (CC), 2007 2 SACR 539 (CC) 20; Boezaart *Child Law in South Africa* (2009) 281-284 and Van der Bijl (n 12) 129.

29 Van der Bijl (n 12) 129.

30 Van der Bijl (n 12) 130; s 7 of the Domestic Violence Act 116 of 1998.

protection order to be issued to prohibit the commission of any act constituting domestic violence or enlisting the help of another person to commit any such act. Despite the act focussing on violence against women and children, the definition in respect of the complainant is not restricted to such persons and would include male victims of domestic violence as well. The act also views a domestic relationship where parties are divorced and are parents of a child.³¹ Therefore, a former spouse who is the alienated parent will be included in terms of this act. However, a crossroad may present itself with the issuing of a protection order in a situation where a child may be in the sole custody of the parent who is enlisting the child's aid in perpetrating the harm.³² Sometimes a protection order may aggravate visitation rights should such an order be issued.³³ Nonetheless, penalties in the form of a fine or imprisonment occur for contravention relating to protection orders.³⁴

5.1.4 Protection from Harassment Act 17 of 2011

As one is aware, the above act regulated harassment in South Africa. Section 1 of the act defines harassment as directly or indirectly engaging in conduct that the respondent knows or ought to know (a) causes harm or inspires the reasonable belief that harm may be caused to the complainant. Harm is broadly defined and includes "any mental, psychological, physical or economic harm" caused.³⁵ In addition, the act also covers instances where the alienating parent sends harassing emails or harasses verbally.³⁶ Sections 2, 11(a) and 11(b) allows for a protection order and a suspended warrant of arrest to be issued, in addition to a fine and imprisonment being imposed if the alleged perpetrator is found to have contravened any section of the act.³⁷

It is applauded that there are different forms of criminal relief available as discussed above in respect of the Domestic Violence Act and the Protection from Harassment Act to an alienated parent. This relief includes an alienated parent seeking a protection order against the alienator to the alienator being convicted of an offence. Unfortunately, the criminal law remedies cannot provide a system of compensation for an alienated parent who has been wrongfully harmed by the intentional or culpable conduct of the alienator. The

31 s 1 of the Domestic Violence Act.

32 Van der Bijl (n 12) 130.

33 Van der Bijl (n 12) 130.

34 s 7 and 12 of the Domestic Violence Act.

35 s 1(b) of the Protection from Harassment Act.

36 s 4 of the Protection from Harassment Act.

37 s 11(a) and (b) of the Protection from Harassment Act.

law of delict offers this relief, and it is also the voice of society's views on what it considers acceptable behaviour and what it does not. At the heart of the delictual principles lie society's legal convictions, or *boni mores*, which include legal and public policy considerations as well as constitutional rights and norms.³⁸

Parental alienation is becoming increasingly popular and with the sensitive times such as COVID-19, public policy considerations will reasonably expect that a victim be provided with additional forms of civil remedies if their case warrants such relief. The current civil remedy available to an alienated parent is discussed below with focus thereafter turning to emotional harm as an additional remedy that should also be considered by the alienated parent.

5.2 Civil remedy

5.2.1 Defamation

The law of defamation is mainly concerned with protecting the *fama* (the good name or reputation) of both natural and juristic persons. In the case of *O'Keeffe v Argus Printing and Publishing Co Ltd*: "(a) person's reputation is ... that character for moral or social worth to which he is entitled amongst his fellow-men".³⁹

A person's reputation refers to the good name the person enjoys in the estimation of others, that is, what others think of that individual as a person.⁴⁰ The constitution protects reputation via the right to dignity, and courts have indicated that the right to dignity includes the right to reputation.⁴¹ The law of defamation seeks to protect a person's right to an unimpaired reputation or good name against any unjust attack. In doing so, the right to reputation is often pitted against the right to freedom of speech and expression.⁴² A victim would have to prove that the defamation was (i) wrongful and (ii) intentional and (iii) publication of (iv) defamatory material that (v) refers to the plaintiff.⁴³

Although the civil remedy for defamation is available for some victims alienated parents, it can be onerous to prove at times. In addition to proving all the elements of delict, the plaintiff must prove the additional requirement of publication as discussed above.

38 Jabavu *The Law of Delict in South Africa* (2013) 3.

39 *O'Keeffe v Argus Printing and Publishing Co Ltd* 1954 3 SA 244(C) 247-248.

40 Jabavu (n 38) 410.

41 Jabavu (n 38) 411.

42 Jabavu (n 38) 422.

43 Jabavu (n 38) 423.

Publication demonstrates that the defamatory statement has reached someone other than the person to whom it refers.⁴⁴ Reputation involves what others think of someone, a person's right to reputation is factually interfered with only when another person communicates defamatory material referring to that person and makes it known to at least one other person.⁴⁵ The requirement of publication which is a required conduct element in defamation is vital. If nothing has been published, the plaintiff will not succeed in such a claim.⁴⁶ The majority of parental alienation cases take place in a private dwelling set up and often the attack is only between the alienator and the victim. In these circumstances it will be impossible for a victim to successfully institute a defamation claim where no publication has occurred. However, it is not the end of the road for a victim. It is common cause and accepted that delict in South Africa is generic and allows for victims to claim for various forms of damages. In the circumstances, this paper seeks to advance the idea that a delictual claim for emotional harm should be explored by an alienated parent as an additional remedy.

In comparison, in the United States, victims are afforded a civil relief known as intentional infliction of emotional distress (IIED) similar to South Africa's delictual claim for emotional harm and shock. However, in the United States, there is increasing support to include parental alienation claims under IIED as well. Such a remedy can be instituted if a case warrants it. This form of relief offered in the United States is examined below in more detail.

6 Parental alienation in the United States of America and tort law

In the United States, a tort in common law jurisdiction is a civil wrong that causes a claimant to suffer loss or harm resulting in legal liability for the person who commits the act.⁴⁷ Tort law is favoured as an alternative field of law for consideration of the issue of parental alienation. Authors have advocated that courts should recognise a cause of action for the intentional alienation of a child as a form of tort (delictual action), not only for compensation for the victim parent, but also as a form of deterrent against behaviours that

44 Jabavu (n 38) 423.

45 Jabavu (n 38) 423.

46 Jabavu (n 38) 424.

47 García "Intentional infliction of emotional distress torts as the best option for victims when cyberbullying conduct falls through the cracks of the U.S. criminal law system" 2016 *Revista Juridica* 85.

denigrate the other parent, and also to disincentivise the other parent from causing harm.⁴⁸ A tort (delict) is committed where a defendant intentionally interferes with the plaintiff's rights where the plaintiff has a custody order for custody or visitation rights, which action includes situations where there is the wilful disobedience of a court order, violent abduction or wrongful detention.⁴⁹ Scholars such as Hatch have further demonstrated that where there is a "pattern of behaviour" that would ultimately undermine the relationship between the father and the children that interferes with the father's parental rights and constitutes serious emotional abuse, it amounts to tortious interference of custody rights.⁵⁰ Courts in the US have also recognised a "rubric of harms" under tort law, which include emotional harm, anxiety, diminished enjoyment or loss of tranquillity or autonomy.⁵¹ A stand-alone emotional distress claim entails that emotional harm is inflicted intentionally without the need to assert the physical harm that was also inflicted.⁵² For the plaintiff to succeed in an IIED claim, they must establish *prima facie* four elements:

- a. that the defendant intended to inflict emotional distress or knew or should have known that emotional distress was a likely result of their action;
- b. that the conduct was extreme and outrageous;
- c. that the defendant's conduct was the cause of the plaintiff's distress;
- d. that the emotional distress sustained by the plaintiff was severe.

Currently all states and territories in the United States recognise IIED as a civil cause of action in one way or another.

Similarly in South Africa, an alienated parent can in his/her personal capacity institute a claim for emotional harm and shock under the action of *actio iniuriarum* against the alienating parent. The definition of emotional shock and harm can include various meanings as discussed below. To date, in South Africa, no claim for emotional harm and shock based on parental alienation has been instituted. It is submitted that victims should explore this additional remedy offered if their case warrants it. The emotional harm and shock remedy in South Africa is further discussed below.

48 Van der Bijl (n 12) 126.

49 Van der Bijl (n 12) 126.

50 Van der Bijl (n 12) 126.

51 Van der Bijl (n 12) 127.

52 Van der Bijl (n 12) 127.

7 Emotional harm and shock in South Africa

An example of an instance where a person could suffer “emotional shock” would be as a result of a motor vehicle accident.⁵³ The person suffering from the “emotional shock” could either have been directly involved in an accident or a witness to the accident or heard of the consequences of the accident afterwards.⁵⁴ The causing of actual emotional shock is treated in practice as a specific form of delict which may result in patrimonial loss. For non-patrimonial loss suffered due to the infringement of the personality right to physical-mental integrity, so called general damages maybe claimed with the action for pain and suffering or *actio iniuriarum*.⁵⁵ An injury to the brain or nervous system that results from nervous or emotional shock is also a form of physical or bodily injury, because the nervous system is as much a part of the body as bones and muscles.⁵⁶ The landmark decision pertaining to emotional shock was the case of *Bester v Commerical Union*⁵⁷ where the court had to decide the nature of emotional shock because the plaintiffs claim was based on legislation that provided for an award of damages for “bodily injury” caused by, or results from driving a motor vehicle. Since the decision in the *Bester* case, terminology relating to emotional shock has developed and expanded to include: “shock”, “nervous shock”, “psychological lesion”, “psychological trauma”, “psychological disorder” and “psychiatric injury”.⁵⁸ In the recent decision of *Swartbooi v RAF*⁵⁹, emotional shock was described as⁶⁰ “(s)hock suffered by a person without necessarily personally sustaining bodily injury. This kind of shock is caused when a third party observes or is mortified by an unpleasant or disturbing event, for example, the killing of a relative or a person with whom the third party had a close relationship.”

53 Ahmed and Steynberg “Claims for ‘Emotional Shock’ Suffered by Primary and Secondary Victims” 2015 *THRHR* 181.

54 Ahmed and Steynberg (n 53) 181.

55 Ahmed and Steynberg (n 53) 182.

56 Ahmed and Steynberg (n 53) 183.

57 *Bester v Commerical Union* [1972] ZAENGTR (20 Nov 1972) 1.

58 Ahmed and Steynberg (n 53) 183.

59 *Swartbooi v RAF* 2012 3 All SA 670 (WCC); 2013 1 SA 30 (WCC).

60 the *RAF* case 34F-G.

7.1 Requirements in respect of a claim for causing emotional shock in South Africa

If the causing of emotional shock should result in a successful delictual claim, all five elements of delict must generally be present, namely conduct, wrongfulness, fault, causation, and harm or loss.

7.1.1 Conduct

The conduct (in the form of an omission or commission) of the wrongdoer would typically lead to the death or injury of the primary victim, which could also result in the primary victim suffering emotional shock.⁶¹

7.1.2 Wrongfulness

The conduct must cause harm or prejudice in a legally reprehensible or unreasonable manner to be regarded as wrongful. When someone suffers emotional shock, the wrongfulness would typically lie in the infringement of the plaintiff's right to his or her physical-mental integrity.⁶² The infringement could result in either physical or non-physical injuries (mental or psychological).

7.1.3 Fault

Fault in the form of either negligence or intention is usually required to succeed with a claim for the causing of emotional shock.⁶³ In respect of negligence, what must be established is whether the reasonable person in the position of the wrongdoer would have foreseen the reasonable possibility of the conduct causing the emotional shock and would have taken reasonable steps to prevent such harm from occurring, if such wrongdoers failed to take those reasonably preventative steps, his/her conduct is regarded as negligent.⁶⁴ If the psychological harm was caused intentionally, one could also bring an action under the *actio iniuriarum*. Intentional infliction of emotional shock is an *iniuria* actionable under the *actio iniuriarum*. In *Waring and Gillow Ltd v Sheborne*,⁶⁵ the court acknowledged intentional emotional shock and stated: "(i)t would be different, under certain circumstances, in an *actio iniuriarum* based upon a wilful attack upon or violation of the feelings of another. In such a case, it might be possible to award compensation for the outrage of the feelings or the insult to the honour". The principles of the *actio*

61 Ahmed and Steynberg (n 53) 190.

62 Ahmed and Steynberg (n 53) 190.

63 Ahmed and Steynberg (n 53) 191.

64 Ahmed and Steynberg (n 53) 191.

65 *Waring and Gillow Ltd v Sheborne* 1904 (TS) 340- 348.

iniuriarum are broad enough to accommodate cases of intentional infliction of emotional shock as well.

7.1.4 Causation

In *Barnard v Santam Bpk*⁶⁶ it was stated that not only must it be proven that the conduct of the wrongdoer was negligent but also that the negligent conduct of the wrongdoer was the legal cause of the harm suffered. Factual and legal causation must be proved. Factual causation must obviously be present, and the question of legal causation is to determine whether the harm or loss suffered is not too remote to be recognised in law.⁶⁷ The test to be applied is a flexible one in which factors such as reasonable foreseeability, directness, the absence, or presence of a *novus actus interveniens*, legal policy, reasonableness, fairness and justice all play their part.⁶⁸ In determining legal causation in the case of emotional shock, the flexible approach is applied. In terms of this approach, there is no single criterion for legal causation but what must be determined is whether there is a close enough relationship between the wrongdoer's conduct and its consequence for such consequence to be imputed to the wrongdoer in view of policy considerations based on reasonableness, fairness and justice.⁶⁹

8 Recommendation and conclusion

The paper examined the effects of COVID-19 on parental alienation in South Africa and the exacerbated psychological effects that resulted because of the alienators conduct on the alienated parent. With the current pandemic and the uncertainty of future lockdowns being imposed, there will be a further rise in psychological harm suffered by an alienated parent. Moreover, this paper sought to highlight and discuss the legislative framework in South Africa and the protection that is afforded to an alienated parent. The criminal law remedies available provide ventilation for such parents. However, the paper discussed that criminal law remedies cannot offer a victim compensation for the harm that they have suffered as a result of the intentional conduct of the alienator. The paper examined our international counterpart, the United States and the civil remedy under tort law offered to an alienated parent. In respect of the current civil remedy available in South Africa to an alienated parent i.e.: a claim for defamation under

66 *Barnard v Santam Bpk* 1999 1 SA 202 (SCA); 1998 4 All SA 403 (A) D-E.

67 Ahmed and Steynberg (n 53) 194.

68 Ahmed and Steynberg (n 53) 195.

69 Ahmed and Steynberg (n 53) 195.

the *actio iniuriarum*, one noted that in certain instances, the element of publication which is one of the requirements for such a claim, will prove onerous in circumstances when the harm occurs in a private platform between the alienator and the alienated parent. In addition, the paper examined and discussed the current remedy of emotional shock and harm that is available in South Africa and has proposed that an alienated parent should consider exploring this additional remedy under the *actio iniuriarum* as well. Undeniably, the alienated parent would have to successfully prove all delictual elements on a balance of probabilities. However, the fault element in respect of such a claim is broad enough to accommodate cases in which the conduct is either intentional or negligent. This is encouraging and provides the victim a better chance of success as compared to United States where the fault requirement is strictly that of intention in respect of the IIED claim. It is accepted that with a claim for emotional shock and harm where there is only psychological harm suffered, there is no closed list of cases and courts can impose liability for any conduct that either intentionally or negligently causes psychological harm. It is proposed further that our courts should be amenable to listen to cases of this nature where the alienated parent suffers only psychological harm. The alienated parent who suffers from such harm must prove a detectable and recognised psychiatric injury or lesion that is not passing or trivial. This additional recourse will assist a victim in providing him with the necessary psychological assistance that he requires and more so provide him with the comfort that his aggressor would not be let off easily. This will also serve as a deterrent to future alienators of such offences.



9 Online dispute resolution: A Ferrari pulled by donkeys?

Considering access to court in an increasingly online age

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Abstract

The heading of the chapter proposes a disconnect between technology and available resources and, thus, anticipates the conclusion that is reached, namely that South Africa's notorious socio-economic, service delivery and governance problems should be a warning against the hasty adoption of advanced online litigation systems found in other jurisdictions. A more pragmatic solution of incremental reform, rather than revolutionary reform, is suggested. The chapter discusses the compatibility of technology-based reform seen in the context of the normative constitutional values in South Africa, more particularly the right of access to justice. The starting point is to note the response of South African courts to COVID-19 lockdown restrictions. Next, consideration is given to changes in the South African litigation landscape pre-dating the pandemic, which evidence a willingness to step away from the traditional adversarial mind-set and, thus, lays the basis for reform of this country's civil litigation structures. Reforms predating the pandemic include CaseLines, court-annexed alternative dispute resolution (ADR), and the commercial court. With this base line established, consideration is given to what lies ahead, by referring to reforms found in other more progressive jurisdictions, such as the systems of online dispute resolution that are operational in England, Canada and Utah. It is suggested that these jurisdictions have the advantage of better resources (including financial, technology

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and human resources) and further, that they do not face the same crippling socio-economic and governance difficulties as lawmakers do in South Africa. The final paragraphs consider the importance of keeping reform in line with the constitution. A complete break with the entrenched adversarial mind-set can only be effected by a new set of civil procedure rules. However, in the interim and in order to maintain the momentum of reform—which was propelled forward by covid—incremental steps that follow a roadmap set by reforms found in other jurisdictions offer a more pragmatic solution.

1 Introduction

When an experimental rule dealing with case management was introduced in the Cape provincial division of the high court (as it was formerly known, now the Western Cape division) in 1997,¹ one commentator likened the process to a Ferrari being towed by a team of donkeys, as no engine had been fitted.² The rule in question was lengthy and complex, and was never extended to any of the other provinces. In the Western Cape, the case management experiment ground to a halt in 2001.³ The demise of the rule has since been attributed to the non-existing infrastructure, including computer hardware and software among others, as well as the lack of skilled personnel.⁴ Griesel, thus, argues that the failure of the rule lay not with the content of the rule itself, but with the way in which the rule was implemented.⁵ The lesson to be learnt from this failed experiment and its relevance to the topic of leveraging technology as a response to COVID-19 in order to benefit society, is to avoid reform for reform's sake. In the altered litigation landscape brought about by COVID-19, it is tempting to import digital technologies from other jurisdictions, such as the continent, but it goes without saying that the socio-economic and political landscapes in those jurisdictions differ vastly to that found in South Africa, and this weighs against the wholesale adoption of foreign systems.

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- 1 High Court Rule 37 deals with pre-trial conferences. In response to the general discontent with the efficacy of this rule, a pilot Rule 37A was introduced and this was the first time that South African courts experimented with case management, albeit in a rudimentary form; see Friedman "Case management in South Africa" 1997 *Consultus* 40 41 and Harms *Civil Procedure in the Supreme Court* (1998) 250.
 - 2 Griesel "Cape Rule 37A—What went wrong?" 2001 *De Rebus* 8.
 - 3 Rule 37A was repealed by GN373 of 30 April 2001.
 - 4 Erasmus "Case management: The demise of Cape Rule 37A" 2001 *De Rebus* 39. The complexity of the rule may also added to its unpopularity.
 - 5 Erasmus (n 4).

This chapter discusses the compatibility of technology-based reform seen in the context of the normative constitutional values in South Africa, more particularly the right of access to justice. In order to set the scene, the discussion commences by looking at how South African courts responded to COVID-19 lockdown restrictions. The focus then turns to the changes in the litigation mind-set that had already taken place prior to the pandemic, which show an awareness of the need for reform. These reforms include CaseLines, court-annexed alternative dispute resolution (ADR), and the commercial court. In order to assess what lies ahead, a look is then taken at reforms seen in other jurisdictions, such as England's system of online dispute resolution (ODR). The concluding paragraphs consider the need for incremental reform and the importance of keeping reform in line with the Constitution.

2 The courts' response to COVID-19

Firstly, some background to this discussion is necessary as it will clarify the expedited need for reform. Due to the rising COVID-19 cases in the country, a national state of disaster was declared in South Africa on 15 March 2020, which brought about lockdowns of varying tiers and intensities. At the time of writing, the state of disaster is still in effect and an adjusted level lockdown is still in force. As a result of enforced social distancing and regulations against public gatherings, courts had to find alternative ways of continuing with the business of the court. Within days, the chief justice responded by restricting court access to persons with a material interest in a case.⁶ Only such persons could (and at the time of writing are still) permitted to enter a court room,

6 Disaster Management Act: Directives issued by the Chief Justice to prevent and curb the spread of Coronavirus COVID-19, GG 43117, GeN 187, 20 March 2020; media statement delivered by the minister of police and minister of justice and correctional services on the occasion of the implementation of the COVID-19 Disaster Management Regulations, Friday 20 March 2020 at GCIS Pretoria (online) at https://www.justice.gov.za/m_speeches/2020/20200320-Covid-19-JointMinisterialMediaBriefing.pdf (13-09-2021); directions to address, prevent and combat the spread of Coronavirus COVID-19 in all courts, court houses and justice service points in the Republic of South Africa, GG 43709, GoN 73, 3 Feb 2021, 11 Sep 2020, (applicable during level 2 of lockdown); directions issued in terms of regulation 4(2) of the regulations made under the Disaster Management Act, 2002, GG 44133, RG 11232. GoN 73, 3 Feb 2021 (applicable to adjusted level 3 of the lockdown); directions: measures to address, prevent and combat spread of Coronavirus COVID-19 in all courts, court precincts and justice service points, GG

subject to the safety measures and physical distancing requirements, with non-essential visitors only allowed into the court precinct with the permission of the head of court.⁷ Where possible, proceedings are conducted online, as regulations stipulated that audio-visual links may be used in proceedings if the presiding officer deemed it appropriate and if it will prevent unreasonable delay, save costs or be convenient and make it unnecessary for the person to appear in person in the court room.⁸ In an effort for courts to function optimally, a priority roll was introduced, which is still complied with.⁹ In addition, the judges president of the various high court divisions implemented special arrangements to address COVID-19 implications for litigation in their courts, for instance, in Gauteng, the judge president issued a practice directive that only the urgent court could hear matters,¹⁰ and even this court had to operate by means of teleconferencing/videoconferencing or other electronic means.¹¹ Parties could only physically appear where

44868, RG 1131, GoN 632 16 Jul 2021 (applicable to adjusted level 4 of the lockdown).

- 7 Persons with a material interest are “litigants, accused persons, legal practitioners, witnesses, or persons who may be needed to provide support to the litigant, accused persons and witnesses including family members and persons accompanying children, victims of domestic violence or sexual offences and persons with disabilities and members of the media”; see par 2 of the March directions; par 4 of the Feb directions and par 5 of the July directions.
- 8 par 3 of the March directions; par 5 of the Feb directions and par 14 of the July directions (n 6).
- 9 paras 4–6 of the Feb directions mention that the priority roll relates to detainees, including children. paras 15–17 of the July directions (n 8) embroiders on cases that are placed on the priority roll and includes cases where accused persons are charged with sexual offences, gender-based violence and femicide, serious contact crimes or serious violent crimes, corruptions or contravention of COVID-19 regulations, cases that are trial-ready, cases that are to be enrolled for sentence following conviction, partly heard cases, cases that may be considered suitable for alternative dispute resolution and any other cases that the presiding officer deems necessary to be included on the priority roll.
- 10 All matters enrolled for the period 27 March to 17 April 2020 were ipso facto removed from the roll and re-enrolled later in the year.
- 11 Judge President’s Practice Directive—Special Arrangements to Address COVID-19 Implications for all Litigation in the Pretoria and Johannesburg High Courts, 25 March 2020 (online) at https://www.judiciary.org.za/images/Directives/Directives_April_2020/High_Court_of_South_Africa/Gauteng_Division/Judge_Presidents_Directive_Special_Arrangements_to_Address_COVID-19_Implications_for_All_Litigation_in_the_Pretoria_and_Johannesburg_High_Courts.pdf (13-09-2021).

it was impossible to arrange online proceedings and issuing of new process had to take place via e-mail.

3 Pre-pandemic reforms

3.1 CaseLines

The South African civil justice system was not totally without resources at the onset of the pandemic. Fortuitously, a digital/electronic filing system called CaseLines had freshly been piloted in the Gauteng Division. Although operational only in a rudimentary and experimental form, it nevertheless enabled electronic document filing and case presentation and, thus, facilitated the prompt switch to online litigation which happened almost overnight.¹² In terms of the Special Arrangements to Address COVID-19 directive, all papers and communications had to take place via CaseLines and only where this could not be done, or where delivery could not take place via e-mail, could physical documents be delivered. In order to aid the understanding of the reader, a brief discussion of the method of electronically uploading and filing pleadings and other documents in terms of CaseLines is provided in the following paragraphs.

It is the duty of the registrar to create an electronic case on the CaseLines system at the outset of the matter, as soon as summons has been issued. The registrar provides access to the legal representatives involved in the matter by “inviting” them to the case. The legal representatives, in turn, invite counsel to the case, obviously in those matters where counsel is briefed. Within two court days of a case being created, the plaintiff in a trial action or applicant in motion proceedings must upload the case record or other court documents into the electronic file. The responsibility to upload pleadings and other relevant documents lies with the party responsible for each particular pleading or document in line with the rules of court, with the exception of urgent cases. The registrar or secretary of the senior judge will invite the judge to the case when the judge is allocated.

¹² Judge President’s Practice Directive 1 of 2020—Implementation of the CaseLines System in the Gauteng Division of the High Court—Pretoria and Johannesburg, (online) at <https://www.judiciary.org.za/index.php/judiciary/directives/high-court-of-south-africa/gauteng-division-of-the-high-court> (13-09-2021). There are two high courts in the Gauteng Division, namely the Gauteng Division in Pretoria and the Gauteng Local Division in Johannesburg. The full implementation of the CaseLines digital/electronic system in Gauteng took effect on 27 Jan 2020.

CaseLines applies to opposed and unopposed motions, motion interlocutory applications, ordinary civil trials, divorce actions, case management conferences, default judgments in terms of rule 31(5), appeals, rule 43 applications, summary judgment applications and applications for leave to appeal (this is not a full list). The aim is to eventually allow no hardcopy pleadings and other relevant documents on all cases designated for handling through the CaseLines system and created on the system. The exception is where the party is unrepresented.

3.2 Court-annexed mediation

Another area of reform introduced prior to the pandemic, is court-annexed ADR. Although not technology based, ADR's foothold in South African civil court proceedings aids this discussion, as evidence of a change in adversarial mind-set. Amendments to the court rules and practice guidelines introduced by the various courts make it possible for litigants to consider alternative methods of problem solving. It is noteworthy that these changes have been introduced in order to increase access to justice. Court-annexed mediation was implemented in order to give effect to section 34 of the Constitution and also to bring into effect the resolution of the access to justice conference held in July 2011 under the leadership of the chief justice towards achieving delivery of accessible quality justice for all.¹³ In the magistrates' courts, a new chapter 2 was added to the MCR containing the new rules 70 to 87 which deal with the voluntary submission of civil disputes to mediation in selected courts. The rules came into effect on 1 December 2014.¹⁴ The rules only apply to a selected number of courts as designated by the minister by publication in the gazette.¹⁵ Uniform rule 41A introduces mediation as a dispute resolution system in the high courts.¹⁶ The mediation contemplated in the high court differs from

13 MCR r 70. The list of courts that offer court-annexed mediation is set out on the website of the department of justice and correctional services which can be accessed at www.justice.gov.za/mediation/mediation.html (05-08-2019). The Short Process Courts and Mediation in Certain Civil Cases Act 103 of 1991 attempted to introduce mediation in magistrates' courts before but this act was never implemented. See Wiese *Alternative Dispute Resolution in South Africa* (2016) 89.

14 G37448 RG 10151 GoN, 18 March 2014.

15 The list of courts may be found on the website of the department of justice.

16 De Vos and Broodryk "Fundamental procedural rights of civil litigants in Australia and South Africa: Is there cause for concern 2019 *Journal of South African Law* 426 425.

that launched in the magistrates' court as it cannot be employed before litigation is instituted. The main features of the new rule 41A require the parties, when issuing a summons or application or delivering a plea or answering affidavit, to indicate: whether they consider mediation as a possibility; to deliver a joint minute recording their agreement to refer the dispute to mediation; the suspension of time limits to deliver pleadings while mediation is in progress; the procedure when there are multiple parties involved in litigation and some parties participate in ADR while others do not; the admissibility and confidentiality of documents; a joint minute relating to the outcome of mediation proceedings; and the costs of mediation proceedings.¹⁷

In this milieu, it is significant to see that the chief justice's various directives in response to COVID-19 give priority status to matters which are suitable to alternative dispute resolution and which can be finalised in that manner. It seems to be a confirmation that there is a drive to direct matters, which are capable of being settled by means of ADR, away from courts in order to alleviate the current levels of congestion on court rolls. The directive reminds parties to a civil dispute that they may consider alternative dispute resolution mechanisms and if they intend doing so, they must follow the procedures set out in the court rules.¹⁸ Parties using ADR may use the services of a judge who is no longer in active service or a mediator who is appointed in terms of the rules.¹⁹ A suitable person must be designated to assist parties who choose to resolve their dispute by means of ADR. Jurisdictions globally are increasingly employing ADR to alleviate the pressure on court rolls. As will be seen from the discussion below, certain overseas jurisdictions employ online dispute resolution (ODR). In addition, ADR is being employed to resolve disputes more economically.

3.3 The commercial court

Yet another example of reform introduced before the pandemic that shows the willingness of the legislature to deviate from conventional court procedures, is the commercial court. This court has been operational in Gauteng since October 2018 and has introduced

¹⁷ De Vos and Broodryk (n 16).

¹⁸ par 7 of the Feb Directive and paras 24–28 of the Directives (n 6). In the magistrates' court, ch 2 of the rules sets out court-annexed mediation and in the high court rule 41A deals with the referral of matters to alternative dispute resolution.

¹⁹ par 27 of the Chief Justice's directives (n 6).

a simplified form of litigation in respect of commercial matters.²⁰ The commercial court is administered as part of the high court and a “commercial court case” is defined very widely as “ordinarily a substantial case that has as its foundation a broadly commercial transaction or commercial relationship” (examples of such matters set out in schedule 1 to the commercial court practice directives).²¹ The aims of the commercial court are “to promote efficient conduct of litigation in the High Court and to resolve disputes quickly, cheaply, fairly and with legal acuity” and matters in this court are dealt with in line with “broad principles of fairness, efficiency and cost-effectiveness”.²² Thus, although the commercial court steps away from conventional court procedure, it aims to increase access to justice, rather than diluting it.

Procedure in the commercial court has been pared down. For instance, the initiating process for having a matter heard in the commercial court requires only a letter to be sent to the judge

20 The commercial court practice directive was issued by Mlambo JP, the judge president of the Gauteng Division of the high court, on 3 October 2018 and was effective immediately. The commercial court is a specialist court first envisioned by judge CF Eloff, the then judge president of the Transvaal Provincial Division of the supreme court in 1996 (as it was then known—now the Gauteng Division, Pretoria), but which never got off the ground. Judge Eloff was acquainted with the idea from the London commercial court and established a committee to consider a similar court in South Africa. This committee was in favour of the establishment of such a court and, recognising that it would take too long to change the rules of court in parliament, a practice directive was issued in 1996 whereby all litigants in a pending action could apply to the judge president of Transvaal for their case to be designated as a commercial case; see practice note 1 of 1996: commercial court practice direction (commercial court PD) and Eloff “The Johannesburg Commercial Court” October 1993 *Consultus* 115.

21 Commercial court PD schedule 1. The list set out in schedule 1 serves as a guideline only and is not a closed list. The list consists of the following: the export and import of goods; the carriage of goods by land, sea, air or pipeline; the exploitation of oil and gas reserves or other natural resources that do not involve administrative law; insurance and reinsurance; banking and financial services; the operation of markets and exchanges; the purchase and sale of commodities; medical scheme matters; commercial matters arising out of business rescue and insolvency cases; all commercial matters affecting companies arising out of the Companies Act 71 of 2008 and its interpretation; arbitration; delictual cases that take place in a commercial context, for example unlawful competition cases; generally, appropriate contractual matters; and intellectual property cases.

22 Commercial court PD schedule (n 21) 1.1 and 4.1.

president.²³ Parties file statements of case, as opposed to the exchange of pleadings.²⁴ Should the parties not agree to a timetable to bring the matter to trial, the judge will determine the timetable.²⁵ All matters are subject to case management, but the management procedure is very informal with only two case management conferences envisaged. No request for further particulars may be made and no general discovery is required in the commercial court, although the judge in charge of case management may permit the “targeted disclosure of documents”.²⁶ The managing judge determines the time of the case management conferences, the dates for filing expert reports and joint minutes, and the need for a meeting with the experts if issues need to be narrowed.²⁷ If the parties intend relying on expert evidence, the experts must convene a meeting, file their expert reports and produce a joint minute setting out the issues in agreement and disagreement and the reasons for the disagreement.²⁸ The simplified procedure of the commercial court is aimed at bringing commercial matters, which have increasingly been resolved by means of ADR, back to the courts.

4 Looking ahead: Reforms taking place in other jurisdictions

4.1 England

Having considered such reforms as have taken place in South Africa, it is now necessary to look further afield to see what the future holds. The ODR system found in England shows one way forward, as it provides for online dispute resolution for small claims without the involvement of legal practitioners. ODR came about after an investigation by Lord Justice Briggs, as he then was, into the civil courts structures in England. Lord Briggs identified five main weaknesses in the civil court system in his final report of July 2016, namely: lack of adequate access

23 See (n 21) 2.1. Any party may apply for a matter to be allocated as a commercial court case by delivering a letter to the judge president, setting out: (a) a broad and uncontroversial description of the case; and (b) why the case is a commercial case or should be considered such, warranting treatment under the commercial court directives. The judge president will determine whether the case should be allocated as a commercial court case and will inform the parties in writing of the outcome; *Ibid* 2.5 and 2.6.

24 See (n 21) 4.3–4.4.

25 See (n 21) 3.3.

26 See (n 21) 4.5.

27 See (n 21).

28 See (n 21) 5.5.

to courts; inefficiencies due to the “tyranny of paper”; unacceptable delays; under-investment in civil justice, and inadequate enforcement of judgments.²⁹ Significantly, Lord Briggs proposed the establishment of the online court for low value claims to enable litigants to resolve their disputes online, without the need for legal representatives.³⁰ The online court is now part of an extensive reform programme for the civil and criminal justice system in the HM courts and tribunals service.³¹ The main distinguishing feature of the online court is the desire to limit the need for lawyers. The term “online solutions court” may be a misnomer, as the entity envisioned is not a court in the traditional sense, but is an asynchronous online end-to-end procedure where one stage builds on the other in a symbiotic process. There is no virtual trial simultaneously attended by all parties and presided over by an adjudicator. The procedure is based on a three tier system suggested by Susskind, advisor on technology to the chief justices in England, in 2015.³² Susskind’s three tiers are: a) assisting users to classify and categorise their problem and to be aware of their rights and available solutions; b) facilitating the dispute by communicating through the internet with facilitators who would assess statements and papers; and c) judgment of the matter to be done by judges who would receive the papers electronically and communicate their judgment in the same fashion.³³ Lord Briggs added two further tiers, notably: a) alerting users to ADR (both at the outset of the process and in tier two when facilitators can assist parties in choosing the appropriate form of ADR); and b) determining whether there is a dispute valid in law.

29 Commons Library Briefing 15 March 2017 <https://2bqk8cdew6192tsu41lay8t-wpengine.netdna-ssl.com/wp-content/uploads/2017/04/JUSTICE-briefing-Prison-and-Courts-Bill.pdf> (10-07-2018) 41.

30 Briggs “Civil Courts Structure Review—Interim Report (December 2015) at <https://www.judiciary.uk/wp-content/uploads/2016/01/CCSR-interim-report-dec-15-final-31.pdf> and Civil Courts Structure Review—Final Report (July 2016) at <https://www.judiciary.uk/wp-content/uploads/2016/07/civil-courts-structure-review-final-report-jul-16-final-1.pdf> (05-07-2020).

31 Koo “The role of the English courts in alternative dispute resolution” 2018 *Legal Studies* 666–683 666–667.

32 Susskind chaired the Justice Council’s Online Dispute Resolution Advisory Group and brought out a report called the “Online Dispute Resolution for Low Value Claims” published in 2015.

33 Commons Library Briefing 15 March 2017 at <https://2bqk8cdew6192tsu41lay8t-wpengine.netdna-ssl.com/wp-content/uploads/2017/04/JUSTICE-briefing-Prison-and-Courts-Bill.pdf> (10-07-2018) 42.

Sorabji calls the online court a “multi-door court house” and he highlights the most notable features of the online court.³⁴ First, it is designed to operate without lawyers, and second, adjudication is not the primary aim of the procedure. It, thus, aims to create the first English multi-door court, with adjudication available as the last stage of the process. Sorabji instructs that this is not a new idea, and refers to Sander’s proposal of a multi-door courthouse or comprehensive justice centre, which encompasses diverting a number of matters from adjudication if possible, and if not, providing various processes by which the remaining disputes can be resolved.³⁵ Although Sander did not provide exact processes, he envisaged a screening clerk who would identify the appropriate dispute resolution method for each claim, with the added benefit that initial allocation would not preclude claimants from moving between dispute resolution processes as desired. Sorabji points out that the online court “replicates Sander’s under-developed appreciation that there should be an increased focus on preventative law by incorporating dispute resolution methods into the court’s process”.³⁶ Further, the online court’s facilitator replicates Sander’s screening clerk and in addition, the provision of a choice of online dispute resolution mechanisms are replicated. A matter may even go directly to adjudication, bypassing other dispute resolution methods, if it involves a novel legal issue or it is not suitable for online procedures due to complexity. Sorabji concludes that the online court is in effect a multi-door courthouse, albeit that it is a subject-specific, low financial jurisdictional threshold tribunal that will predominantly be conducted online.³⁷ Sorabji spotlights the innovation of this court, which lies in its movement away from the usual model of adjudication. Sorabji notes:

“The [online court] thus represents the first attempt to move English civil justice from a structural perspective—which is to say in terms of court and procedural design—beyond what could be described as the adjudicative paradigm: one that understands the court’s role as being to manage claims to a trial on their

34 Sorabji “The Online Solutions Court—a multi-door court house for the 21st Century” 2017 *Civil Justice Quarterly* 86. Sorabji is a senior teaching fellow at the faculty of laws, University College London.

35 Sorabji (n 34) 91; see also Sander “A dialogue between Professors Frank Sander and Mariana Hernandez Crespo: Exploring the evolution of the multi-door courthouse” 2008 *University of St Thomas Law Journal* 665 670.

36 Sorabji (n 34) 92.

37 See (n 34) 98.

The Impact of Covid-19 on the Future of Law

substantive merits. While it is true to say that since the Woolf Reforms ... there has been an increased emphasis on the idea that the primary aim of process should be to facilitate settlement, and that procedure should be managed to resolution, howsoever that is achieved, rather than trial and adjudication, that has not previously been embedded in the structure of either a civil court or civil process. The [online court] takes that step.”³⁸

4.2 Canada

ODR is getting a foothold in progressive court systems. In Canada, for example, there is the civil resolution tribunal located in British Columbia which was established by the Civil Resolution Tribunal Act (2012). The tribunal initially had jurisdiction over small claims and strata property (condominium) cases, but its jurisdiction has since been expanded to include certain motor vehicle accident and other specified disputes. Salter and Thompson elucidate the nature of ODR by explaining that the process involves an end-to-end design, with each step building on the other in symbiosis.³⁹ They point out that this differs from a procedure that grafts a single dispute resolution step into an adversarial court process. The authors explain as follows:

“Steps like mediation may augment, but do not transform, traditional public justice processes. The add-on approach lacks the benefits of gradually escalating intensity and resources. It also lacks the seamlessness of an end-to-end system. For example, using current public justice processes, the parties would begin by framing their disputes adversarially in their pleadings, setting out explicitly contrasting rights-based positions, bolstered by legal arguments demonstrating why they should triumph over every opponent. If mediation is then offered as an add-on process, the parties would have to pivot from the adversarial approach and engage in an internet-based negotiation aimed at identifying common ground and possible concessions. It is unrealistic to expect parties to detach quickly from the initial adversarial, rights-based position when they are suddenly in an added-on mediation. Yet the current civil justice

³⁸ See (n 34).

³⁹ Salter and Thompson “Public-centered civil justice redesign: a case study of the British Columbia Civil Resolution Tribunal” 2016 *McGill Disp Resol* 113 117.

9 Online dispute resolution: A Ferrari pulled by donkeys?

system drives parties to adopt and document deeply entrenched positions before any collaborative step is taken.”⁴⁰

Salter and Thompson argue that the courtroom should not be seen as the primary forum for dispute resolution and they quote Briggs’ statement that “[t]he common law legal system was designed by legal actors, for legal actors”.⁴¹ In contrast, ODR is designed with the end user in mind, namely the public. It is premised upon proportionality, namely that a matter should consume no more than its fair share of resources. ODR does not impose a static regime at the outset, but allows the matter to grow through the phases. These phases are self-help, direct negotiation, facilitation and finally, adjudication. Each phase is designed to encourage resolution of the dispute, in whole or in part, with minimum costs and effort.⁴² The adjudicative phase that is envisaged is also innovative, as it is a mixture of an inquisitorial and adversarial process, where parties can make arguments and submit evidence, but the end result is a binding decision. Salter and Thompson refer to the civil resolution tribunal as a prime example of a new model of public civil justice that should replace historical systems.

4.3 Utah

Yet another example of a system embracing ODR is seen in Utah’s online dispute resolution programme, a pilot project recently launched in that jurisdiction. Justice Himonas spoke in March 2018 of the benefits of ODR and this project in particular, in an address wherein he ventilated access to justice issues for unrepresented litigants. Himonas highlights the benefits of ODR, which include the removal of jurisdictional barriers, as well as the ability of parties to communicate asynchronously or in real time and further, the fairness that is inherent in the provision of expert systems and a facilitator to all parties.⁴³ The system is limited to claims with a monetary value not exceeding \$11 000. Simplified, the model involves the following process: firstly, education and evaluation (for which self-help resources are made available); next, providing a meaningful settlement opportunity (at this stage the facilitator is key); and lastly, if the parties cannot come to a resolution, the matter can be adjudicated. The aim is to resolve disputes within a six week timeframe.

40 See (n 39) 118.

41 See (n 39); Briggs (n 30).

42 Salter and Thompson (n 39) 127.

43 See (n 39) 881.

4.4 Singapore

Moving away from ODR, it is instructive to look at an example of a jurisdiction that employs a number of systems to ensure an efficient civil justice system—Singapore. Foo, Chua and Ng, writing on the models and measures in the Singaporean civil justice system⁴⁴ confirm that reform in that jurisdiction came about as a result of incremental steps driven by the judiciary, rather than as result of one “Big Bang” event.⁴⁵ The authors identify the following categories: diversionary, facilitative, monitoring and dispositive.⁴⁶ Firstly, diversionary systems refer to ways in which matters can be diverted from legislation, by using ADR and pre-action protocols.⁴⁷ Secondly, facilitative systems denote the supporting infrastructure that enables litigation to proceed smoothly.⁴⁸ Singapore has, for instance, appointed more adjudicators and has further appointed judicial commissioners who are appointed for fixed terms and who perform the functions of a judge. They have also provided their administrative staff with the necessary skills and training to operate as case management officers. Another facilitative system is the use of technology. Thirdly, monitoring consists of systems to ensure that certain key performance indicators, such as lifespan of cases, clearance rates and waiting periods are managed.⁴⁹ The key component here is the use of pre-trial conferences. Fourthly, dispositive measures refer to the concept of automatic discontinuance of an action due to want of prosecution.⁵⁰ Looking to the future, the authors refer to the value that can be added by the field of management science, where efficiency and productivity is key, and they cite as an example, the Supreme Court’s “Customer Service” initiative.⁵¹ Lastly, the authors highlight the need for co-operation amongst different jurisdictions as “[n]o single Judiciary has a monopoly on good case management ideas”.⁵² The message to be gleaned from these authors is that Singapore has been very successful in turning their troubled

44 Foo, Chua and NG “Civil case management in Singapore: Of models, measures and justice” 2014 *ASEAN Law Journal* 1–34 Research Collection School of Law, at https://ink.library.smu.edu.sg/cgi/viewcontent.cgi?article=4210&context=sol_research (04-02-2020).

45 See (n 44) 13 and 18.

46 See (n 44) 13.

47 See (n 44) 13–15.

48 See (n 44) 15–20.

49 See (n 44) 20–23.

50 See (n 44) 24.

51 See (n 44) 25–26.

52 See (n 44) 27.

system around into an efficient one, by placing reliance on a number of systems and in the future, they will look to management science to complement these systems.

5 The future of procedural reform in South Africa

5.1 South Africa's receptivity for reform

The innovative procedures discussed above are redefining the role of courts and are paving the way for alternative means of dispute resolution to play a significant part in increased access to justice for all parties, even those without the financial resources to appoint legal representatives. In terms of these procedures, there is no "pre-trial phase", as the trial has been removed as the ultimate aim of dispute resolution. The trial is simply another door that a litigant may wish to open, should other methods of resolution have failed. Having regard to Griesel's analogy of the Ferrari pulled by the donkeys, it must be considered whether the South African civil justice system is able to support technological advances such as an ODR system. At the outset, it is submitted that the perennial socio-economic difficulties faced by a major part of the population in South Africa again militates against such a notion. Many people do not have access to the internet, or to suitable devices for connectivity. It is suggested that it would be inappropriate at this juncture to divert funds into the establishment of an ODR platform, when the real courtrooms are desperately in need of funding.

5.2 The need for reform to be constitutionally compliant

The fact that South Africa is a constitutional democracy renders it inconceivable for reform to manifest in any guise other than one that is compatible with the Constitution.⁵³ Any legislation that is

53 The Constitution of the Republic of South Africa, 1996 is the *lex fundamentalis* of the country and any law or conduct that is inconsistent with it is invalid, while the obligations imposed by it must be fulfilled; s 2 of the constitution; Currie and De Waal *The Bill of Rights Handbook* (2013) 8–9. The authors confirm that any law or conduct that is in conflict with the Constitution will not have the force of law. In order to give effect to a right in terms of the Bill of Rights our courts must apply or, if necessary, develop the common law; see s 8 of the Constitution. Ch 2 of the Constitution sets out the Bill of Rights which is the cornerstone of democracy in South Africa. The Bill of Rights applies to all law and binds the legislature, the executive the judiciary and all organs of state.

inconsistent with the Constitution is “objectively invalid”.⁵⁴ The interim constitution of South Africa styled itself as a “historic bridge between the past of a deeply divided society characterized by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights”⁵⁵ and, as such, it facilitated the country’s transition from apartheid to democracy.⁵⁶ It is imperative that any reform in South Africa must be linked to the constitution, taking cognisance of the fact that the Constitution continues to operate as a bridge between the present and the future. The Constitution ensures a number of fundamental rights, including the right of access to court, and although this is a fundamental right, no fundamental right is absolute or automatically trumps other fundamental rights. The careful balancing of competing rights in terms of constitutional norms, inevitably results in the limitation of one or more of those rights. It is submitted that there are no jurisdictions that offer an unfettered access to justice and that ultimately considerations of proportionality come into play. One would, for instance, not go to court to adjudicate a dispute of R1000, regardless of the fundamental right to do so. The consideration of proportionality refers to both the weighing up of conflicting rights, and the measure of the amount of resources that is appropriate to allocate to a single claim.

5.3 Providing a roadmap for reform

Theophilopoulos lists the following principles of the Anglo-American adversarial system of civil procedure: all persons must have equal and effective access to an independent and impartial judiciary, with reasonable costs and a reasonable duration of litigation; parties must have an equal opportunity to present their cases to court (known as the *audi et alteram partem* principle); the parties are in control of the decision to institute or defend an action and to determine the scope

54 *Ferreira v Levin; Vryenhoek v Powell* 1996 1 SA 984 (CC); 1996 1 BCLR 1 (CC) par 27.

55 Constitution of the Republic of South Africa Act 200 of 1993.

56 See Phillip “In love with SA’s Constitution” *Mail and Guardian* (24 Feb 2012) at <https://mg.co.za/article/2012-02-24-in-love-with-sas-constitution/> (04-02-2021) where mention is made of the fact that the erstwhile American supreme court justice Ruth Bader Ginsburg called the Constitution one of the finest in the world and a model for other countries to follow; see also Bilchitz “Can fundamental rights bridge the divide between ideal justice and the South African reality?” inaugural lecture at the University of Johannesburg on 15-10-2015 at <https://www.uj.ac.za/faculties/law/Documents/Fundamental%20Rights%20as%20Bridging%20Concepts%2025.pdf> (04-02-2021).

of the dispute, as well as the evidence to be placed before the court; there must be opportunity for direct oral communication between the parties, although some types of evidentiary material may be in writing; the main proceedings must take place in public; the court has to consider the evidentiary material objectively and on rational grounds; the court must give a reasoned and legally motivated judgment and the decision of the court is final and binding, with provision for appeal or review in specific circumstances.⁵⁷

Embedding technological processes in the civil justice system while still adhering to the above principles does not seem out of reach. Courts already rely on court rules in order to operate and these rules prescribe the steps that a litigant must take in order to enforce a claim. Court rules create certainty in procedures and facilitate access to court,⁵⁸ but “rules are made for courts and not that the courts are established for rules”.⁵⁹ On par with this reasoning, technology must not be seen as a means in itself, but as a tool that can be utilised to attain justice. Courts have the inherent power to protect and regulate their own processes and to develop the common law, taking into account the interests of justice.⁶⁰ The guarantee of access to courts does not include the right to choose the method of approaching and placing a dispute before a particular court, as the “determination of the process to be followed when litigants approach courts is left in the hands of the courts”.⁶¹

Premised on the submission that the “blue sky” vision of a fully reformed procedural system for South African civil courts is not yet feasible, best practice dictates that a road map be devised upon which future reforms may be built incrementally. If one likens the procedural system to a vehicle in need of repair, the objective is to keep the vehicle on the road and moving, whilst that repair is being effected. Phased

57 Theophilopoulos *Fundamental Civil Procedure* (2020) 2–4, see also De Vos “Civil procedural law and the Constitution of 1996: An appraisal of procedural guarantees in civil proceedings” 1997 *Journal of South African Law* 444.

58 *Mukkadam v Pioneer Foods* 2013 5 SA 89 (CC) par 31.

59 *Ibid*; see also the earlier matter of *Thint Holdings (Southern Africa) (Pty) Ltd v National Director of Public Prosecutions: Zuma v National Director of Public Prosecutions* 2009 3 BCLR 309 (CC) par 62 where the court with reference to s 172 of the Constitution stated that s 34 exists so that parties whose rights have been violated are not barred by procedural, legal or other obstacles from obtaining relief from the courts; De Vos and Broodryk (n 16) 627–639.

60 s 173 of the constitution; the *Mukkadam* case (n 58) par 33.

61 See (n 58) par 1.

improvements will refine and add to the existing system and will start a snowballing pattern of reforms leading to an ultimate overhaul of procedural law. This recommendation is made upon the premise that there is indeed a demand for change, due to the defects in current court procedures that make litigation too slow, complex and expensive for the majority of South African citizens seeking legal redress. This assumption of dysfunction is validated by court judgments expressing extreme disapprobation and censure about the way litigation is currently being conducted in South African courts. In South Africa, there is a dearth of empirical studies in the field of procedural law, in contrast to global studies carried out in countries such as United Kingdom, Hong Kong and Australia which have devoted significant resources and time to interdisciplinary studies based on quantitative data. These countries have access to digital and electronic systems that are employed to collect data from various sources such as courts, legal representatives, firms, legal professional councils, academic institutions and litigants. They also have access to the skilled manpower, such as experts needed to conduct the necessary data analysis. Compared to these jurisdictions, South Africa is still taking baby steps in the arena of civil procedural reform. The CaseLines system will be hopefully prove to be a useful data repository for purposes of future quantitative analysis of the judicial system.

5.4 Access for all: The courts as a public resource

It is essential to mention that South African courts are a public resource and this resource is limited. In terms of section 34, the state has an obligation to provide working courts for the adjudication of disputes.⁶² The section dictates that “[e]veryone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and

62 Rautenbach and Venter *Rautenbach-Malherbe Constitutional Law* (2018) 450. The authors instruct that s 34 encompasses a right of equality in civil proceedings, a right of information concerning the opposition’s case and the hearing, a right to be heard and to adduce evidence; a right of persons who are not parties to the proceedings not to be affected by adverse orders and a right for reasons for a court’s decision; in support they rely on *De Beer v North Central Local Council and South Central Council* 2001 11 BCLR 1109 (CC) par 10, 11 and 13; *Geuking v President of RSA* 2004 9 BCLR 895 (CC); *Mphaphele v First National Bank of SA Ltd* 1999 3 BCLR 253 (CC); and *Besserglik v Minister of Trade, Industry and Tourism* 1996 6 BCLR 745 (CC).

impartial tribunal or forum”.⁶³ Thus, the right to a fair trial applies to everybody, both plaintiff and defendant, as well as other parties who are not before the court. Processes to ensure that parties before the court do not take up more than their share of court resources, therefore, augment access to justice. Further, when considering the right to a fair trial, one should not look at every individual step of a trial, but should consider the action as a whole. The right of access to court lays the foundation for an orderly society and facilitates the resolution of disputes, obviating the need for self-help.⁶⁴

In *S v Jaipal*⁶⁵ the constitutional court pointed out that for the state to respect, promote and fulfil its duty to ensure free access to courts, resources are required.⁶⁶ In addition to ensuring that the courts are independent, impartial, dignified, accessible, and effective, the state has to ensure that there are buildings with court rooms, offices and libraries, recording facilities and security measures, as well as adequately-trained and salaried judicial officers, prosecutors, interpreters and administrative staff.⁶⁷ The court acknowledged that few countries in the world can boast with unlimited or even sufficient resources, but had to concede that South Africa is particularly constrained in terms of resources, as it is dealing with transformation, the eradication of poverty and inequality.⁶⁸ However, the court cautioned that limited resources will not be an excuse for poor court

63 The constitutional court has in numerous cases affirmed the importance of the right of access to courts in our law, for instance *De Lange v Smuts* 1998 3 SA 785 (CC); *Chief Lesapo v North West Agricultural Bank* 2000 1 SA 409 (CC); *First National Bank of South Africa Ltd v Land Bank and Agricultural Bank of South Africa* 2000 3 SA 626 (CC); *Sheard v Land Bank and Agricultural Bank of South Africa* 2000 3 SA 626 (CC); *Metcash Trading Ltd v Commissioner, South African Revenue Service* 2001 SA 1109 (CC); *Lufuno Mphaphuli v Andrews* 2009 4 SA 529 (CC) par 199–218; *Twee Jonge Gezellen (Pty) Ltd v Land And Agricultural Development Bank of South Africa t/a The Land Bank* 2011 2 SA 1 (CC); *Member of the Executive Council for Health, Gauteng v Lushaba* 2017 1 SA 106 (CC); *University of Stellenbosch Legal Aid Clinic v Minister of Justice and Correctional Services* 2016 6 SA 596 (CC); and *Liesching v S* 2016 6 SA 596.

64 the *Chief Lesapo* case (n 63) par 22. Rautenbach and Venter (n 62) 477, however, note that although the courts often state that the main purpose of s 34 is to secure good order by guarding against self-help, s 34 is an individual right that protects individual conduct and interests, like all the other rights, and it does not exist primarily for the sake of community interests.

65 2005 4 SA 581 (CC).

66 the *Jaipal* case (n 65) par 54–55.

67 See (n 65).

68 See (n 65) par 56.

work and that “reasonable, careful and creative measures, born out of a consciousness of the values and requirements of [the] Constitution” must be applied.⁶⁹ The state has taken legislative steps to promote access to justice, for instance by the creation of the CCMA, the small claims courts, the maintenance courts, rental housing tribunals, the national credit regulator and national consumer tribunal, the national consumer commission, the companies tribunal, and the takeover regulation panel.⁷⁰

In the *Twee Jonge Gezellen* case, the constitutional court noted that “the right embodied in s 34 is a right to a fair public hearing, not a right to a trial.”⁷¹ Further, many procedures that are “the daily stuff of court business” are decided on affidavit, and never go to trial.⁷² These are significant pronouncements in the context of this discussion as it signifies that courts have always had the authority to determine the process by which parties enforce their right of access to court. In pursuance of this line of reasoning, it is submitted that the right to have disputes resolved by “fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum” is not confined to a court in the traditional sense.

6 Conclusion

COVID-19 caused a surge in technology-based procedures in South African courts, as courts were forced to assimilate online procedures at short notice. It is suggested that the momentum of this swell be maintained and that incremental procedural reform should traverse along a path that will culminate in new civil procedure rules. The South African civil justice system must break with the entrenched adversarial mind-set and ultimately only a completely new set of rules will effect such a change. In the interim, the benefits of technology can be exploited to make justice more accessible. Innovative examples from England, Canada, Utah and Singapore were mentioned. It is not suggested that these examples be imported wholesale into South Africa, but that it must remain a priority to maintain and expand upon electronic services. Ultimately, the services provided by the current small claims court may migrate to an online procedure akin to ODR, but this will only be feasible if everyone has access to internet services. Regrettably, it is not possible to postulate when this will be a reality.

69 See (n 65). The court noted that a failure to provide a fair trial is as dangerous as cancelling an election due to a lack of facilities.

70 Currie and De Waal (n 53) 714–715.

71 the *Twee Jonge Gezellen* case (n 63) par 38.

72 Ibid.



10 Mandatory vaccination against Covid-19

Implications for the South African workplace

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Abstract

COVID-19 vaccines have been identified by the World Health Organization as the most effective tool to protect persons against the novel COVID-19 disease, which has had a devastating impact on the global community. The roll-out of COVID-19 vaccines has given rise to various questions and in the employment context, the most pertinent question is whether employers can compel employees to vaccinate. Compulsory vaccination against the disease would constitute compulsory medical treatment, which is an area that is presently not regulated in South African labour legislation. For this reason, the authors will consider the National Health Act 21 of 2003 as more general legislation containing provisions on this area, particularly in the context of informed consent and the circumstances under which the requirement of consent may be limited. The authors will further consider the employer's duty to provide and maintain a safe working environment in terms of the Occupational Health and Safety Act 85 of 1993 in the context of vaccinations and will analyse the provisions of the Consolidated Direction on Occupational Health and Safety Measures in Certain Workplaces issued by the department of employment and labour which contains guidelines for the implementation of mandatory vaccinations policies in the workplace. In considering the above,

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recommendations will be made as to whether mandatory vaccinations are justifiable in labour law, considering relevant issues such as reasonable accommodation, whether employees may be dismissed for a refusing to vaccinate, liability in the case of adverse reactions to the mandatory vaccine, the human rights implications, and the limitation of rights in terms of section 36 of the Constitution.

1 Introduction

The Occupational Health and Safety Act (OHSA)¹ imposes a duty on employers to provide and maintain, as far as reasonably practicable, a safe working environment for employees as well as other persons who have access to the premises.² In the COVID-19 era, this includes adopting measures that will prevent the spread of the disease including social distancing measures, sanitisation, the wearing of cloth masks and more recently, administering COVID-19 vaccinations—a measure that has been identified by the World Health Organization (WHO) as the most effective tool for protecting people against the disease.³ However, the roll-out of the COVID-19 vaccinations has given rise to various questions in the employment context. The authors will specifically consider the question pertaining to whether employers can compel employees to vaccinate against disease. This would constitute compulsory medical treatment, an area which is not specifically regulated by South African labour legislation, which is in contrast with compulsory medical testing which is regulated in terms of section 7 of the Employment Equity Act.⁴ In the absence of labour legislation regulating this area, the authors will consider the National Health Act⁵ which requires in section 7, one's informed consent prior to receiving medical treatment, unless the failure to treat the individual or a group of people will result in a "serious risk to the public health".⁶ Furthermore, the Department of Employment and Labour issued COVID-19 vaccination Guidelines in the Consolidated Direction on Occupational Health and Safety Measures in Certain Workplaces (OHS directions). In terms of the OHS directions, employers must undertake

1 Act 85 of 1993.

2 s 8 of the OHSA.

3 WHO "COVID-19 and mandatory vaccination: ethical considerations and caveats" at <<https://www.who.int/publications/i/item/WHO-2019-nCoV-Policy-brief-Mandatory-vaccination-2021.1>> (30-11-2021).

4 Act 55 of 1998.

5 Act 61 of 2003.

6 See s 7(1)(d) of the National Health Act.

a risk assessment taking into account *inter alia*, whether it intends to make COVID-19 vaccines mandatory and if so, identify employees who must be vaccinated by virtue of their risk of transmission through their work, or risk of severe COVID-19 or death due to their age or comorbidities. However, employers are still required to ensure that the implementation of a mandatory vaccination plan is reasonable and justifiable, and to further balance the constitutional rights of employees in doing so. It specifically refers to the right to bodily integrity in section 12(2) and the right to freedom of religion, belief and opinion in section 13 of the Constitution.⁷ In considering the above, the writers will make recommendations as to whether it is justifiable in labour law to compel employees to vaccinate and whether employees may be disciplined for refusing to vaccinate.

2 Introduction to COVID-19 and COVID-19 vaccination history

Since its emergence in 2019, the novel COVID-19 has had a fundamental global impact.⁸ The outbreak began in Wuhan, China in December 2019 and it was declared a global pandemic by the WHO on 11 March 2020.⁹ The causative virus, SARS-Cov-2, primarily spreads when an infected person is in close contact with others and the most common symptoms include “acute onset of fever, chills, cough, shortness of breath, and loss of taste or smell”.¹⁰ The disease spreads at an alarmingly rapid rate which is evidenced by the significant number of positive COVID-19 cases globally, and the deaths as a result thereof.¹¹ Governments soon learned that if not properly contained, COVID-19 can have a devastating impact on the human population. Therefore, in order to curb transmission of the disease, many jurisdictions declared

7 The Constitution of the Republic of South Africa, 1996.

8 World Health Organization “Evaluation of COVID-19 vaccines effectiveness interim guidance” at <https://www.who.int/publications/i/item/WHO-2019-nCoV-vaccine_effectiveness-measurement-2021.1> (30-10-2021).

9 See World Health Organization “WHO Director-General’s opening remarks at the media briefing COVID-19—11 March 2020” at <<https://www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-Covid-19---11-march-2020>> (30-10-2021).

10 World Health Organization (n 8).

11 As at 14 January 2022, there have been 318 648 834 confirmed cases of COVID-19 including 5 518 343 deaths globally (see WHO Coronavirus (COVID-19) dashboard available online at <<https://covid19.who.int/>> (16-01-2022)).

it a national disaster and imposed national lockdowns and other containment measures. In South Africa, COVID-19 was declared a national disaster in terms of section 27(1) of the Disaster Management Act.¹² The government imposed a national lockdown which entailed the restriction of the movement of persons and goods including confining all persons to their places of residence unless strictly for the purpose of performing essential services, obtaining essential goods or services, collecting a social grant or seeking emergency medical attention.¹³ The WHO further recommended the wearing of cloth masks, the continuous washing of hands and sanitisation as measures that could prevent the spread of the disease,¹⁴ and it later identified vaccines as the most effective tool to protect against COVID-19.¹⁵ It reports that global efforts to develop multiple vaccines in response to the pandemic have been unrivalled in the history of public health as by December 2020, over 200 vaccine candidates were in development.¹⁶ Consequently, governments began to consider making COVID-19 vaccination mandatory as a means to increase vaccination rates and to achieve public health goals.¹⁷ Vaccines generally work by presenting an

12 Act 57 of 2002.

13 Government Gazette 11062 (25 March 2020). The government introduced a five level COVID-19 alert level system to manage the gradual easing of the lockdown which is guided by criteria including the “level of infections and the rate of transmission, the capacity of health facilities, the extent of the implementation of public health interventions and the economic and social impact of continued restrictions”. Alert level 1 indicates a low COVID-19 spread with a high health system readiness; Alert level 2 indicates a moderate COVID-19 spread with a high health system readiness; Alert level 3 indicates a moderate COVID-19 spread with a moderate health system readiness; Alert level 4 indicates a moderate to a high COVID-19 spread with a low to moderate health system readiness; Alert level 5 indicates a high COVID-19 spread with a low health system readiness. The South African national state of disaster began with Alert level 5 and gradually decreased (see <[https://www.gov.za/Covid-19/about/about-alert-system#:~:text=\(a\)%20'Alert%20Level%201,a%20high%20health%20system%20readiness%3B&text=\(d\)%20'Alert%20Level%204,a%20low%20health%20system%20readiness](https://www.gov.za/Covid-19/about/about-alert-system#:~:text=(a)%20'Alert%20Level%201,a%20high%20health%20system%20readiness%3B&text=(d)%20'Alert%20Level%204,a%20low%20health%20system%20readiness)> (22-10-2020)).

14 World Health Organization “Advice for the public: Coronavirus disease (COVID-19)” at <<https://www.who.int/emergencies/diseases/novel-coronavirus-2019/advice-for-public>> (16-01-2022).

15 World Health Organization (n 3).

16 World Health Organization (n 8).

17 World Health Organization (n 3).

antigen to the body's immune system so that when the body encounters infection in the future it has been "trained" to attack the infection.¹⁸

Despite vaccines largely being viewed in a positive light, particularly as an alternative to lockdown provisions, there has also been considerable mistrust and hesitancy associated with the vaccine rollout. Vardas notes that mistrust has been fuelled by the perceived speedy development of the vaccines.¹⁹ Dhai notes that hesitancy results from a myriad of sources including distrust of the state, politicisation of processes around vaccine rollout, reinfection despite vaccination and poor communication with the public.²⁰ Other writers attribute hesitancy to religious and cultural views of the public.²¹ The WHO also attributes hesitancy to unfavourable social influences.²² In relation to Africa especially, Jiva-Doko notes that negative perceptions of vaccines are a result of religious beliefs which associate their use to a lack of trust in God's healing power.²³ Some religious leaders have also reinforced these beliefs by publicly denouncing vaccines in countries like South Africa and Zimbabwe.²⁴ Over and above, this hesitancy or outright refusal may be attributed to health-related risk associated with vaccines.

Despite hesitancy, employers in other jurisdictions have quickly moved towards making vaccines mandatory in the context of certain workplaces. Australia made vaccines mandatory for high-risk care workers and similarly, vaccination is mandatory for home care workers. In France, new laws have given authority to the president to make vaccines mandatory in some workplaces. In the US, in New York, state employees are required to be vaccinated or be tested weekly. This

18 Vardas "Ethics and legalities of vaccines and vaccination" 2021 at <https://www.medicalacademic.co.za/post-summary/?post_referred=27136> (16-01-2022).

19 Vardas (n 18).

20 Dhai "To vaccinate or not to vaccinate: Mandatory COVID-19 vaccination in the workplace" 2021 *South African Journal of Bioethics Law* 42 43.

21 Jiva-Doko "The history of vaccines. An educational resource by the college of physicians of Philadelphia. Cultural perspectives on vaccination" at <www.historyofvaccines.org/content/articles/cultural-perspectives-vaccinations> (16-01-2022).

22 World Health Organization "Behavioural Considerations for Acceptance and Uptake of COVID-19 vaccines". World Health Organization Technical Advisory Group on Behavioural Insights and Science for Health Meeting Report: 15 October 2020.

23 Jiva-Doko (n 21).

24 Dzinamarira *et al* "COVID-19 vaccine roll out in South Africa and Zimbabwe: Urgent need to address community preparedness, fears and hesitancy" 2021 *Vaccines* 9 (250) 1-10.

is similar to regulations in California that provide for weekly testing as an alternative to vaccination.²⁵

International labour standards do not directly address issues surrounding mandatory vaccines and the ILO acknowledges that this will ultimately be regulated by member states themselves. But the ILO does emphasise the need for a broadly consultative approach to matters of occupational health and safety. Overall, in relation to vaccines, it is recommended that if an employer opts for implementation of a mandatory vaccine policy, this must be done in a non-discriminatory manner and in such a way that costs are not attributed to workers.²⁶

3 Compulsory medical treatment in South Africa

Compulsory medical treatment, which encompasses mandatory COVID-19 vaccination, is not specifically regulated in terms of South African labour legislation. This is in contrast with compulsory medical testing which is regulated by section 7 of the Employment Equity Act (EEA). Section 7(1) of the EEA provides that: “[m]edical testing of an employee is prohibited unless—(a) legislation permits or requires the testing; or (b) it is justifiable in light of medical facts, employment conditions, social policy, the fair distribution of employee benefits or the inherent requirements of a job.”

Section 7(2) of the EEA further prohibits the testing of an employee to determine their HIV status unless this is determined to be justifiable by the labour court. In *EWN v Pharmaco Distribution (Pty) Ltd*,²⁷ the labour court considered whether a clause in the employment contract of an employee suffering from bipolar disorder, which requires the employee to undergo medical examination at the discretion of the employer, was lawful and enforceable, and whether the dismissal of the employee for refusing to undergo said medical examination was automatically unfair in terms of section 187(1)(f) of the Labour Relations Act (LRA)²⁸. The court held that the employer could only require the employee to undergo medical testing if the requirements of section 7(1)(b) of the EEA were met and that in the absence of being able to establish that the contractual clause was justifiable under one

25 Dhai (n 20).

26 International Labour Organization “ILO standards and COVID-19 (coronavirus)” at <https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_780445.pdf> (16-01-2022)

27 *EWN v Pharmaco (Pty) Ltd* 2016 37 ILJ 449 (LC).

28 Act 66 of 1995.

of the exceptions listed in the provision, the clause was unlawful and unenforceable.²⁹ In respect of s 7(2) of the act, the labour court in *Irvin & Johnson Ltd v Trawler & Line Fishing Union*³⁰ held that that the core rights that are affected by HIV testing are the right to security and control over the body, the right not to be subjected to medical or scientific experiments without consent, and the right to privacy.

In contrast, medical treatment is provided for in terms of the National Health Act. Section 7(1)(d) of the act states that: “7(1) [s] ubject to section 8, a health service may not be provided to a user without the user’s informed consent, unless—(d) failure to treat the user, or a group of people which includes the user, will result in a serious risk to public health”.

This section becomes particularly important in the context of mandatory COVID-19 vaccination as it speaks to the balancing of the rights of the collective against those of the individual. In light of this section, the failure of an individual to vaccinate against COVID-19 may be deemed a serious risk to public health; therefore, their right of refusal could be limited. This triggers a limitations clause analysis in terms of section 36 of the Constitution,³¹ which will be considered below.

4 The employer’s obligation to provide a safe working environment

4.1 The Occupational Health and Safety Act

In terms of the common law, there is a duty on employers to establish safe working conditions for their employees.³² The duty to provide safe working conditions originates either in the law of delict, or the law of contract, and was reinforced in the OHSA. Section 8(1) of the act requires employers to “provide and maintain, as far as reasonably

29 See (n 27) par 36 and 49.

30 2003 4 BLLR 379 (LC).

31 s 36 states that “(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 the 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 other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.”

32 Van Niekerk and Smit (eds) *Law@work* (2019) 97.

practicable, a working environment that is safe and without risk to the health of the employees”. In terms of s 8(2)(b) of the act, employers are required to take “such steps as may be reasonably practicable to eliminate or mitigate any hazard or potential hazard, to the safety or health of employees, before resorting to personal protective equipment”. The act further extends the standard of safety to persons other than workers who are affected by the activities of the workplace,³³ which could include consumers, clients and members of the general public.

4.2 The Consolidated Direction on Occupational Health and Safety Measures in Certain Workplaces

In view of the novel pandemic, the minister of employment and labour issued the Consolidated Direction on Occupational Health and Safety Measures in Certain Workplaces (OHS directions) to “address, prevent and combat the spread of COVID-19 in certain workplaces”.³⁴ The OHS directions address the various measures to be implemented by employers in an attempt to curb the spread of the disease, including social distancing, symptom screening, sanitisers, disinfectants and the washing of hands, as well as the compulsory wearing of cloth masks. In respect of vaccination, clause 3 of the OHS directions requires employers to undertake a risk assessment to determine whether it intends to make vaccination mandatory and prescribes that the risk assessment should be completed within 21 days from the commencement of the directions. It states further that should the employer intend to make vaccination mandatory, it must in its determination identify those employees who must be vaccinated by virtue of their risk of transmission through their work or their risk for severe COVID-19 disease or death due to their age or comorbidities. Annexure C of the OHS directions contains guidelines for employers who have elected to make vaccination mandatory, stating at the outset that departures from the guidelines may be justifiable in “proper circumstances”, taking into consideration for example, the size and nature of the workplace. The primacy of collective agreements is highlighted as it is stated that the guidelines are not intended to substitute some. Importantly, the guidelines place a premium on public health imperatives, the constitutional rights of employees and the efficient operation of the employer’s business. Thus, in its determination of a

³³ See preamble to the OHSA.

³⁴ See preamble to the Consolidated Direction on Occupational Health and Safety Measures in Certain Workplaces.

mandatory vaccinations plan, an employer would be required to take adequate consideration of all three factors. Employees should further be notified of the obligation to be vaccinated, the right to refuse vaccination specifically on constitutional or medical grounds,³⁵ and the opportunity to consult a health and safety representative, worker representative or trade union official. The guidelines provide further details in respect of those employees who refuse to be vaccinated on the aforementioned grounds, and places an obligation on employers to counsel the employee and allow the employee to seek guidance from a health and safety representative, worker representative or trade union official, to refer the employee for further medical evaluation should there be a medical contraindication for vaccination, and if necessary, take steps to reasonably accommodate the employee in a position that does not require the employee to be vaccinated.³⁶

4.3 Reasonable accommodation

The guidelines refer to the concept of “reasonable accommodation” which predominantly finds application in the context of the employment of persons with disabilities in the workplace. Reasonable accommodation is defined in section 1 of the EEA to mean “any modification or adjustment to a job or to the working environment that will enable a person with a disability to have access to, participate in or advance in employment”. The definition in the guidelines mirrors the EEA definition and here reasonable accommodation is defined as “any modification or adjustment to a job or to the working environment that will allow an employee who fails or refuses to be vaccinated to remain in employment and incorporates the relevant portions of the Code of Good Practice: Employment of Person with Disabilities published in terms

35 Constitutional grounds include the right to bodily integrity in terms of s 12(2) and the right to freedom of religion, belief and opinion in s 13 of the Constitution whereas medical grounds are defined as “an immediate allergic reaction of any severity to a previous dose or a known (diagnosed) allergy to a component of the COVID-19 vaccine”.

36 In terms of the guidelines, “reasonable accommodation” is defined as any modification or adjustment to a job or to the working environment that will allow an employee who fails or refuses to be vaccinated to remain in employment and incorporates the relevant portions of the Code of Good Practice: Employment of People with Disabilities published in terms of the EEA. This might include an adjustment that permits the employee to work offsite or at home or in isolation within the workplace such as an office or a warehouse or working outside of ordinary working hours. In instances of limited contact with others in the workplace, it might include a requirement that the employee wears a N95 mask.

of the Employment Equity Act, 1999 (Act No. 97 of 1999)).³⁷ Evidently, employees who refuse to vaccinate against COVID-19 are, in terms of the guidelines, likened to persons with disabilities in the workplace which triggers the application of relevant provisions of the code. The code states that reasonable accommodation may be temporary or permanent, and may include *inter alia*, re-organising workstations, restructuring jobs so that non-essential functions are re-assigned, and adjusting working conditions, including working time and leave.³⁸ Reasonable accommodation in the context of employees who refuse to vaccinate would include measures that permit the employee to work offsite, at home, or in isolation within the workplace such as an office or a warehouse outside ordinary working hours.³⁹ The extent of reasonable accommodation is, however, limited in the code as it states that the employer need not reasonably accommodate the employee if this would impose an unjustifiable hardship on the business of the employer.⁴⁰ Importantly, the code states that an accommodation that imposes an unjustifiable hardship for one employer may not be so for another.⁴¹ It may, therefore, be challenging for an employer to reasonably accommodate an unvaccinated employee in the manner recommended by the guidelines, whose job requires the provision of personal services that result in substantial contact with others, such as restaurants and hospitals.⁴² In these circumstances, the termination of the employment relationship may be justifiable.⁴³

37 para 5(3) of Annexure C of the Consolidated Direction on Occupational Health and Safety Measures in the Workplace.

38 Item 6.8 and 6.9 of the Code of Good Practice: Employment of Person with Disabilities.

39 para 5(3) of Annexure C of the Consolidated Direction on Occupational Health and Safety Measures in the Workplace.

40 Item 6.11 of the Code of Good Practice: Employment of Person with Disabilities. “Unjustifiable hardship” is defined in item 6.12 of the code as “any action that requires significant or considerable difficulty or expense. This involves considering, amongst other things, the effectiveness of the accommodation and the extent to which it would seriously disrupt the operation of the business”.

41 Item 6.13 of the Code of Good Practice: Employment of Person with Disabilities.

42 Botha “Mandatory vaccinations in the workplace: Lessons from COVID-19” 2021 *Industrial Law Journal* 2065 2073.

43 Botha (n 42).

5 Liability in the case of adverse reactions to mandatory COVID-19 vaccination

At common law, an employee who contracts an illness or is injured during the course and scope of employment is entitled to institute delictual action against the employer.⁴⁴ This position does not guarantee that the employer will be in a financial position to pay the awarded compensation; therefore, in order to remedy such instances, the Compensation for Occupational Injuries and Diseases Act⁴⁵ (COIDA) was introduced.⁴⁶ COIDA specifically regulates compensation for work-related illness, injury and death in South Africa.⁴⁷ It establishes the compensation fund in terms of which employers are obligated to contribute and provides a system of no-fault compensation for employees who contract diseases or injuries that arise in the course of their employment.⁴⁸ In *Jooste v Score Supermarket Trading (Pty) Ltd (Minister of Labour Intervening)*⁴⁹ the court described COIDA as “important social legislation which has a significant impact on the sensitive and intricate relationship amongst employers, employees and society at large. The state has chosen to intervene in that relationship by legislation and to effect a particular balance which it considers appropriate”.⁵⁰

COIDA becomes relevant with reference to COVID-19 in the workplace, particularly in those circumstances where employees contract the disease at work, and for our purposes, where employees possibly experience adverse reactions or side effects to the COVID-19 vaccination administered in terms of a mandatory workplace vaccination policy. What recourse would such employees then have? The South African government has attempted to address this issue in view of the provisions of COIDA. In October 2021, the compensation fund commissioner issued a notice stating that the compensation

44 Van Niekerk and Smit (n 32) 516.

45 Act 130 of 1993.

46 s 35(1) of COIDA provides that “No action shall lie by an employee or any dependant of an employee for the recovery of damages in respect of any occupational injury or disease resulting in the disablement or death of such an employee against such employee’s employer, and no facility for compensation on the part of such employer shall arise save under the provisions of this act in respect of such disablement or death”. See also Van Niekerk and Smit (n 32).

47 Van Niekerk and Smit (n 32).

48 s 15 of COIDA.

49 1999 2 SA 1 (CC).

50 the *Jooste* case (n 49) par 9.

fund will cover employees for injuries, illnesses or death as a result of receiving the COVID-19 vaccine. This is, however, subject to several qualifications including that the employee must be required to vaccinate as an inherent requirement of employment or where vaccination is required based on the risk assessment conducted in terms of the OHS Directions.⁵¹ Other requirements include that the employee must have been vaccinated with SAHPRA-approved COVID-19 vaccines; the chronological sequence between the vaccine inoculation and the development of symptoms and clinical signs must be provided; evidence must be provided of the employer's risk assessment and vaccination plan as set out in paragraph 3(1)(a)(i), (ii) and (b) of the OHS directions; the employee must have presented symptoms and clinical signs that are generally recognised as side effects of the COVID-19 vaccine and; additional tests may be required to assess the presence of abnormalities of any organ affected.⁵²

The notice interestingly mentions the concept of an "inherent job requirement" which seemingly introduces a new basis upon which employers may require employees to be inoculated. This is because the concept does not appear in the OHS directions and guidelines, but it is stated that the operational requirements of the employer must be considered in the determination of a vaccination plan. This is in fact not equivalent to the inherent requirements of an employee's job. The concept of inherent job requirements is primarily used in labour law as a defence against claims of discrimination. Section 6(2)(b) of the EEA provides that "it is not unfair discrimination to distinguish, exclude or prefer any person on the basis of an inherent requirement of a job". However, the act does not define what constitutes an inherent job requirement, thus, leaving it to the courts to determine its meaning. Essentially, an inherent requirement must be an essential and indispensable characteristic that the employee must possess in order to perform the essential functions of the job.⁵³ The indication from previous court decisions on the subject is that this defence will be strictly interpreted.⁵⁴ Therefore, it may be difficult for employers to

51 "Notice on compensation for COVID-19 vaccination side effects published in terms of section 6A(b) of Compensation for Occupational Injuries and Diseases Act 130 of 1993 as amended" *Government Gazette* 45356 (22-10-2021).

52 *Ibid.*

53 Govindjee and Van der Walt *Labour Law in Context* (eds) (2017) 71.

54 In *TDF Network Africa (Pty) Ltd v Faris* 2019 2 BLLR 127 (LAC) par 36-38, the court held that "(c)onsidering the exceptional nature of the defence, the requirement must be strictly construed In general, the requirement

prove that an employee has lost the inherent ability to perform their core duties due to being unvaccinated. It is further evident from the requirements that an employee would not be able to claim from the compensation fund if the employer is unable to furnish proof of the risk assessment and vaccination plan as required by the OHS directions.

6 A new legal framework: The Code of Good Practice, 2022

The Code of Good Practice: Managing Exposure to SARS-COV in the Workplace, 2022 (the code) was published by the minister on 15 March 2022. The code was introduced due to the impending expiry of the declaration of the national state of disaster which meant that the OHS direction issued in terms of the Disaster Management Act would cease to have legal effect.⁵⁵ The code is not binding; however, persons such as employers, judges and arbitrators are required to take the provisions of the code into account when interpreting any employment law. The code must be read with the provisions of the Regulations for Hazardous Biological Agents, 2022 (“HBA Regulations) in which coronavirus is listed as a class 3 hazardous biological agent.⁵⁶ The code largely mirrors the provisions of the OHS direction, with a few significant differences. Employers are still required to undertake a risk assessment. However, a distinction is made between provisions which must be included, and those that are optional.⁵⁷ Measures such as social distancing, PPE and facecloth masks are optional in terms of the code,⁵⁸ which in turn suggests that these may no longer be strictly required by employers. Unlike the OHS direction, the code makes no mention of specific categories of employees who must be vaccinated,

must be rationally connected to the performance of the job. This means that the requirement should have been adopted in a genuine and good faith belief that it was necessary to the fulfilment of a legitimate work-related purpose and must be reasonably necessary to the accomplishment of that purpose”. See also *Woolworths (Pty) Ltd v Whitehead (Women’s Legal Centre Trust Intervening)* 2000 3 SA 529 (LAC); *Hoffman v South African Airways* 2001 1 SA 1 (CC); *Independent Municipal and Allied Workers Union v City of Cape Town* 2005 26 ILJ 1404 (LC); *Dlamini v Green Four Security* 2006 27 *Industrial Law Journal* 2098 (LC).

55 See chapter 1 of the Code of Good Practice: Managing Exposure to SARS-CoOV in the Workplace, 2022.

56 See chapter 1 of the Code of Good Practice: Managing Exposure to SARS-CoOV in the Workplace, 2022.

57 Items 6(1) and 6(2) of the Code of Good Practice: Managing Exposure to SARS-CoOV in the Workplace, 2022.

58 Item 6(2)(a)–(d) of the Code of Good Practice: Managing Exposure to SARS-CoOV in the Workplace, 2022.

such as employees who are at risk of transmission through their work, severe COVID-19 or death due to age or comorbidities. Employers are permitted to require employees to disclose their vaccination status and produce a vaccination certificate,⁵⁹ and provision is also made for those instances where an employee experiences contra-indications to the vaccine.⁶⁰ In respect of the latter, the employer, upon receipt of the employee's medical certificate, may refer the employee to a confirmatory medical evaluation at the employers cost.⁶¹ Employers who accept the employees' contra-indications to the vaccine are then obliged to reasonably accommodate said employees in a position that does not require them to vaccinate.⁶² The code further makes provision for the employee's right of refusal to work if, with reasonable justification, circumstances arise which pose an imminent and serious risk of exposure to COVID-19.⁶³ This is a welcomed inclusion in the code as the right of refusal to work was only previously contained in the Mine Health and Safety Act.⁶⁴

7 Dismissals: Incapacity, misconduct or operational requirements?

As it stands, there are different forms of dismissal which may inevitably come into play should employers create mandatory vaccine policies, depending on the nature and wording of a particular policy. Where an employee cannot perform their role due to refusal to vaccinate, they may be said to be incapacitated, in that they would be unable to perform their work in line with the requirements of their job.⁶⁵ They may also be dismissed for operational requirements as a "no fault" form of dismissal, as their refusal may be misaligned with the employer's operational or similar needs relating to, for example, occupational health and safety.⁶⁶ Third, a refusal to vaccinate may amount to insubordination in that the employee would be refusing to obey a lawful instruction.⁶⁷ And lastly, an employee may believe the

59 See (n 55) item 12(2).

60 See (n 55) Item 12(3).

61 See (n 55) Item 12(5).

62 See (n 55) Item 12(6).

63 See (n 55) Item 15(1).

64 Act 29 of 1996.

65 Item 10 of the Code of Good Practice: Dismissal.

66 Item 2 Notice of Code of Good Practice on Dismissal Based on Operational Requirements.

67 See (n 65) item 7.

instruction to vaccinate renders the working environment intolerable and, thus, is subject to a constructive dismissal.⁶⁸

With all of these possibilities, a few general principles will apply. First in the situations relating to incapacity and operational requirements, the employer would need to do all that it can to reasonably accommodate the employee.⁶⁹ This also aligns to the OHS directions issued by the Department of Labour noted earlier in this discussion. This is when it would be necessary to consider alternatives to dismissal such as the employee working from home, wearing a face covering, testing regularly or working in a different part of the building from other workers. In line with both of these forms of dismissal and in line with ILO guidelines, the ideal set of circumstances ought to be determined through a consultative process with employees and not unilaterally by the employer.⁷⁰

Regarding a dismissal for insubordination as well as constructive dismissal, ultimately it would need to be determined whether the instruction to vaccinate would be lawful in the particular circumstances. This brings us to another critical consideration that can render any dismissal substantively unfair—whether or not the reason for the dismissal amounts to unfair discrimination.⁷¹ If an employee's dismissal carries this underlying element, he or she would have been the victim of an automatically unfair dismissal which carries possible compensation of up to 24 months wages. But what would constitute unfair discrimination comes down to an assessment of firstly, whether the employee has been discriminated against, or put simply, treated differently based on any ground listed in section 9 of the Constitution and then whether or not that discrimination is justifiable in terms of section 36 of the Constitution.

8 Human Rights Implications

Clause 3(4) of the OHS directions, when highlighting that employers must ultimately elect how they deal with mandatory vaccines, must take into account their employees' constitutional rights to bodily integrity and their rights to freedom of religion, belief and opinion.⁷² But most rights in the constitution may be limited in terms of the

68 s 186(1)(e) of the LRA.

69 See (n 65) Item 3.

70 See (n 55).

71 s 187(f) of the LRA.

72 Dhai (n 20).

limitations clause as outlined in section 36.⁷³ Broadly speaking, it is important for an employer, and then presiding officers, to take a rights based approach when considering mandatory vaccines and said approach would necessarily involve a section 36 analysis at some stage of the enquiry.

Karim and Kruger note that there is often tension between individual human rights and the achievement of public health objectives.⁷⁴ It is not uncommon for public health measures in the wake of disease to limit human rights. An early and extreme example is the isolation of ships on those on board for 40 days to prevent the spread of the Black Death during the 1300s, which included preventing access to food and water⁷⁵ as well as the development of leper colonies.⁷⁶

Karim and Kruger, however, argue that a better approach involves balancing disease control with human rights in such a way that one may compliment the other, rather than the two being at odds.⁷⁷ Mann *et al* proposes considering human rights as a dimension of public health.⁷⁸ They propose a three-stage framework in this regard which Karim and Kruger directly associate with proportionality as envisaged in section 36. In particular, the questions the framework raises in relation to whether incursions on rights are justifiable in light of the public health concern.⁷⁹

The core rights implicated in dismissals relating to covid vaccines are the right to bodily integrity and the right the religious freedom. In 2020, the high court had an opportunity to grapple with the balance between public health and the right to religious freedom in the wake of the COVID-19 pandemic in *Mohamed v The President of the Republic of South Africa*.⁸⁰ The matter dealt with a group of Muslim litigants who believed their right to religious freedom, amongst others, was violated by lockdown regulations which restricted their movements. They argued that their religious practices necessitated that they congregate in prayer which was expressly prohibited by lockdown regulations. The

73 s 36 of the Constitution.

74 Karim and Kruger “Which Rights? Whose Rights? Public Health and Human Rights through the Lens of South Africa’s COVID-19 Jurisprudence” 2021 *Constitutional Court Review* 533 536.

75 Sedhev “The Origin of Quarantine” 2002 *Clinical Infectious Diseases* 1071 1072.

76 Karim and Kruger (n 74).

77 Karim and Kruger (n 74).

78 Mann *et al* “Health and Human Rights” 1994 *Health and Human Rights* 6 8.

79 Karim and Kruger (n 74) 544.

80 2020 5 SA 553 (GP).

respondents argued that the restrictions were necessary to curb the infection rate and prevent the healthcare system from being completely overwhelmed as a result. The court, in denying the applicants' petition to be exempted from the regulations held that:

“Every citizen is called upon to make sacrifices to their fundamental rights entrenched in the Constitution. They are called upon to do so in the name of ‘the greater good’, the spirit of ‘ubuntu’ and they are called upon to do so in ways that impact on their livelihoods, their way of life and their economic security and freedom. Every citizen of this country needs to play his/her part in stemming the tide of what can only be regarded as an insidious and relentless pandemic.”

This judgment demonstrates the way in which a court may consider the balancing of rights in the context of COVID-19, but it differs considerably from the context of mandatory vaccination. Particularly because, as section 36 requires, the state and employers must consider whether there are less restrictive means to achieve the intended purpose. In *One South Africa Movement and Another v President of the Republic of South Africa*,⁸¹ the applicants sought an order stopping the re-opening schools which they argued would compromise public health objectives. Karim and Kruger note that the court's approach was one which sought to balance public health objectives against other rights and, in its outcome, held that it would be permissible to adopt less stringent public health objectives to support the realisation of other rights.⁸² The court held as follows:

“Thus, while the initial concern and response to the virus was largely and understandably a public health one, with time the impact of the virus on issues such as the economic survival of nations and their citizens, and the simple ability to live a meaningful and decent life, has come sharply into focus. The ability of governments, in particular those in the developing world, to respond holistically to the needs and well-being of their citizens has come under increased pressure. This has been exacerbated by the inevitable recognition over time that the virus will be with us for some time and that a cure in the form of a vaccine is still somewhere in the future.”⁸³

81 2020 5 SA 576 (GP).

82 Karim and Kruger (n 74) 552.

83 the *One South Africa Movement* case (n 81) par 2.

The court further took the view that it is possible to protect both lives and livelihoods without preferring one over the other in adopting less restrictive public health measure.⁸⁴ This judgment is positioned much closer to our current reality in the wake of COVID-19, wherein in the midst of less restrictive overall lockdown measures, it becomes critically important for the state and for employers to become more creative in the way in which it approaches the balancing of rights. It cannot be reasonable to adopt a blanket approach in a workplace when the state itself has adopted an approach of relatively flexibility in its current approach and has further recommended a flexible and accommodative approach to employers in an effort to balance the interests of workers and public health objectives.

8 Commission for Conciliation, Mediation and Arbitration (CCMA) awards on mandatory vaccination

The CCMA has had an opportunity to consider the merits in relation to mandatory vaccines. It is worth considering the outcomes of these awards as they may provide a roadmap for how matters of this nature should, or perhaps, should not be dealt with in future.

In *Theresa Mulderij v Goldrush Group*,⁸⁵ the applicant was a business related and training officer who was dismissed by the respondent on the grounds of incapacity in that she refused to comply with the respondent's Mandatory Vaccination Policy.⁸⁶ The applicant indicated to the company that she had no intention of ever being vaccinated.⁸⁷ She based her non-compliance on section 12(2) of the constitution which provides that every person has the right to bodily integrity.⁸⁸ She was also of the view that the vaccines does not stop the spread or contraction of COVID-19 but merely serves to minimise the severity of its symptoms and side effects.⁸⁹

The respondent argued that due to the nature of the applicant's duties, there was no other position she could occupy. The applicant also interacted with site-owners as well as other employees.⁹⁰ The commissioner in this matter did not spend a considerable amount of time justifying their finding save to say that "in my own sense

84 the *One South Africa Movement* case (n 81) par 98.

85 CCMA case number GAJB24054-21, award issued 21 January 2022.

86 the *Theresa Mulderij* case (n 85) par 4-5.

87 the *Theresa Mulderij* case (n 85) par 7.

88 the *Theresa Mulderij* case (n 85) par 22.1.

89 the *Theresa Mulderij* case (n 85) par 22.3.

90 the *Theresa Mulderij* case (n 85) par 20.

of fairness, I can only conclude that the applicant is permanently incapacitated on the basis of her decision to not getting vaccinated and [by] implication refusing to participate in the creation of a safe working environment.”⁹¹

It may have been useful to spend more time considering the work of the applicant. Because she was a front facing employee who interacts with external and internal stakeholders, subjecting her to mandatory vaccination may have been justifiable in this instance.

In *Gideon J Kok v Ndaka Security and Services*⁹² the applicant was a safety practitioner working for a private security company which rendered services to, amongst others, Sasol Ltd. In the matter, the applicant alleged that he was subjected to an unfair labour practice as he was instructed to only return to work once vaccinated. The alternative was that he submits to weekly COVID-19 testing. Sasol, as a client of the respondent, required 100% vaccination rate at their premises where the applicant rendered service.⁹³

Initially the applicant submitted test results but he bore the cost of these and eventually was no longer willing to undergo the said weekly testing.⁹⁴ The applicant’s refusal to comply was also based on section 12 of the Constitution. Despite the employer insisting the applicant stay away from work, they continued to pay him his full salary.

The commissioner in this matter performed an analysis which was based broadly on the requirements outlined in section 36 of the Constitution, which may provide future presiding officers with useful guidelines. Commissioner Venter noted that section 12 contains a very important right and that, in this matter, the limitation is also very important. When considering the nature of the limitation, the commissioner stated that there was a very limited chance of adverse effects from being vaccinated. He further noted that there was a clear and demonstrable relation between the limitation and its purpose. Lastly he noted there were less restrictive means such as face masks but that vaccination appeared to be a last resort.⁹⁵

The commissioner also considered the nature of the work performed by the applicant and the context within which he operates. He noted that security companies are on the front line. In addition, the applicant works in an open office shared by 10 colleagues. The applicant,

91 the *Theresa Mulderij* case (n 85) par 27.

92 CCMA Case number FSWK2448-21, award issued 25 January 2022.

93 the *Kok* case (n 92) par 7.

94 the *Kok* case (n 92) par 11.5.

95 the *Kok* case (n 92) par 38.

as part of his job, was required to visit all of the company's sites and interact with personnel. In addition, the applicant himself had once contracted COVID-19 and through contact tracing it was determined that he may have passed the virus to nine of his colleagues.⁹⁶ As a result of the aforesaid, the commissioner determined that the suspension of the applicant was fair.⁹⁷

9 Conclusion

Lastly, and significantly, the court in *Democratic Alliance v Minister of Co-operative Governance and Traditional Affairs*⁹⁸ emphasised the following:

“We must not lose sight of the fact that rights enshrined in the Bill of Rights must be protected and may not be unjustifiably infringed. It is for the legislature to ensure that, when necessary, guidance is provided as to when limitation of rights will be justifiable. It is therefore not ordinarily sufficient for the legislature merely to say that discretionary powers that may be exercised in a manner that could limit rights should be read in a manner consistent with the Constitution in the light of the Constitutional obligations placed on such officials to respect the Constitution. Such an approach would often not promote the spirit, purport and objects of the Bill of Rights. Guidance will often be required to ensure that the Constitution takes root in the daily practice of governance. Where necessary, such guidance must be given. Guidance could be provided either in the legislation itself, or where appropriate by a legislative requirement that delegated legislation be properly enacted by a competent authority.”⁹⁹

For the authors, this approach is of critical significance when considering the implications of COVID-19 on the workplace. Already there is considerable debate and confusion as to whether it will be justifiable to dismiss employees for refusing to vaccinate. Whilst the writers are of the view that it is not, in light of the approach the directions took in making dismissal a measure of absolute last resort, the directions unfortunately falls short in prohibiting dismissal outright in an effort to protect the rights of workers to bodily

96 the *Kok* case (n 92) par 41–42.

97 the *Kok* case (n 92) par 58.

98 Case no. 22311/2020 (ZAGPPHC) (unreported) 168.

99 the *Democratic Alliance* case (n 98) par 75.

integrity and religious freedom. The directions make clear and helpful suggestions, which the writers believe constitute “less restrictive means” as envisaged in section 36 of the Constitution. However, the reality is the directions leaves it to employers to determine what constitutes public health objectives, what health and safety measures are necessary within their context and what “less restrictive means” are—all determinations which one wonders if all employers are adequately equipped to make without clear direction from the state. It appears as though it will be up to the courts to expressly draw lines and prescribe the ways in which workers rights must be balanced against the state and employer’s health and safety objectives.



11 Shifting of the academic landscape during Covid-19 and beyond

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Abstract

The Constitution of the Republic of South Africa, 1996 affords every person a right to freedom of expression, which includes “academic freedom and freedom of scientific research”.¹ These very freedoms form the cornerstone of academic research undertaken by various subject disciplines across South Africa. Yet, COVID-19 fundamentally shifted the *status quo* of many academic activities resulting in, for example, an abrupt move to online teaching and learning and different online approaches to processing data in academic research. Further changes during the COVID-19 era were precipitated by the Protection of Personal Information Act 4 of 2013 (POPIA) that came fully into force on 1 June 2020, a few short months after the first peak of COVID-19 infections in South Africa. This coincides with the development of a code of conduct by Academy of Science of South Africa (ASSAf) in terms of section 60 of POPIA, which is currently underway and intended to regulate and promote a uniform approach to the processing of personal information in all academic research activities within South Africa. In this, there is an incorrect assumption that legal research is immune to these research developments, and although this may hold true for certain methodological approaches of legal research, this is certainly not the case for all legal research activities. There are different methodological approaches employed in the three broad and general categories of legal research (being that of practical legal research, legal research in relation to humanities and legal research as a social science). Within these categories of legal research there are instances (especially in the context of social

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1 s 16(1)(d).

sciences) that empirical data is required for research efforts, and it is in those instances COVID-19, POPIA and the anticipated code of conduct may play an important role in legal research activities. Against this background, this paper argues that legal research is not immune to the changes to the academic landscape during the COVID-19 era with specific reference to legislative interventions that have disrupted the *status quo*. Therein, a framework for the collection of data in academic research activities required by COVID-19, POPIA and possibly the new code of conduct is presented for legal research-related activities.

1 Introduction

In the words of Shakespeare, “[t]rue it is that we have seen better days”.² COVID-19 has dismantled social engagements as we knew and understood them, and thereby disrupted (on a global scale) lives, livelihoods, businesses, institutions and governments in some way, shape or form. Higher institutions of learning have not been immune to the devastation of COVID-19, having seen a disruption of both pillars of traditional academia being that of teaching and learning, as well as academic research. Therein, COVID-19 required a metamorphic change in adopting innovative online teaching and learning models as well as the way academic research and the collection of data transmuted into an almost exclusive online engagement. These changes have been largely precipitated by the need to transcend physical barriers by means of online alternatives in cyberspace, thereby adopting safe social distancing practices required during the COVID-19 era. Yet, stepping into the digital world is wrought with its own dangers, especially considering the value placed on data which is fast becoming a new and valuable world commodity. COVID-19 has, in addition to the actual fallout of the disease, created new and nefarious opportunities to gain access to data and information systems in the form of, amongst other things, ransomware attacks.³ This is particularly relevant when considering that the basis of scientific research is modelled after the collection, storage and analyses of reliable data which, due COVID-19,

2 Shakespeare’s play “As you like it” found in “The complete works of William Shakespeare” (2007) Wordsworth Library Edition *The Shakespeare Head Press, Oxford Edition*, 622, act II, scene VII, being the words uttered by Duke Senior.

3 Minnaar “‘Gone phishing’: The cynical and opportunistic exploitation of the coronavirus pandemic by cybercriminals” 2020 *Acta Criminologica: African Journal of Criminology & Victimology Special Edition: Impact of COVID-19* 33(3) 28 38.

is largely conducted in the online ethos. In addition to the COVID-19 regulations and online research activities, researchers are also now required to contend with new legislative requirements under the Protection of Personal Information Act of 2013 (POPIA) that came fully into force during the COVID-19 era and will require researchers to think differently in the way research data is gathered, handled, stored and destroyed.⁴ It is against this background that this paper intends to consider the changes in the academic landscape specifically related to academic research in context of COVID-19 and POPIA, and how these changes may impact future academic research projects both generally and more specifically within the legal research discipline.

2 General principles of academic research activities

2.1 Introductory comments

On 31 December 2019, Wuhan Municipal Health Commission in China reported the first cases of an unknown pneumonia that would eventually be identified as a new form of corona virus, known as COVID-19.⁵ Over a short period of time with infections rising at an alarming pace, one-by-one, governments took extensive and arguably drastic steps to curb infections, including the implementation of lockdowns and social distancing practices. These practices had, amongst other things, hampered academic research, especially in the way data was to be collected. The social distancing regulations altered many traditional practices of data collection, which forced researchers to shift to online alternatives. The use of online platforms brought about different considerations, such as the safety, storage and destruction of data which recently would be regulated by legislative intervention of POPIA. Legal research, as a category of academic research, in this context is of particular interest as there may be a perception that legal research is immune to online data collection practices as well as POPIA requirements, an assumption this paper argues is flawed.

Siems and Sithigh argue that there are generally three different conceptual approaches to legal research, which can be described as the:⁶

4 Protection of Personal Information Act 4 of 2013.

5 See <https://www.who.int/news/item/27-04-2020-who-timeline---Covid-19> (19-09-2021).

6 Siems and Sithigh “Mapping Legal Research” 2012 *Cambridge Law Journal* 71(3) 651 653.

law being a “practical discipline”;
law as a form of humanities; and
law as a form of social sciences.

Depending on the conceptual and methodological approaches undertaken, the legal research activities may be either more or less susceptible to COVID-19 changes and consequently POPIA requirements. To assess the impact of COVID-19 and POPIA specifically on legal academic research, it is necessary to first consider the principles of academic research generally to establish the possible touchpoints that may overlap with certain types of academic legal research areas.

2.2 Academic research in general

The foundation to academic research is centred in the freedoms afforded to research activities in the South African constitutional democracy. The Constitution affords every person the right to freedom of expression, which includes “academic freedom and freedom of scientific research”.⁷ These freedoms form the cornerstone for the research undertaken by academics, researchers, and scientists across South Africa. However, there is, broadly speaking, a distinction between so-called scientific and non-scientific research,⁸ wherein scientific research is based on objective, tangible, and measurable criteria.⁹ The basis of producing such objective, tangible and measurable criteria lies in the collection of reliable and verifiable data that is obtained in a legitimate and ethical manner. In this regard, much focus has been given to research activities that employ an empirical methodological approach which is often found in medical, health and natural science research activities, but nothing prevents such approaches to be relatable to other research activities, such as social sciences (including that of legal research activities).¹⁰

COVID-19 and POPIA are of relevance to medical and health research that relates to human subject participation in such research activities. Specific rules have been developed to protect human participants and find their early roots in the medical advances made

7 s 16(1)(d).

8 Kometsi “Scientific nature of legal research and its contribu[t]ion to scholarship” 2017 25(1) *Lesotho Law Journal* 59 73.

9 See, for instance, Kometsi (n 8) 73–74.

10 It is worth noting that legal research would, in this context, be considered a social science.

at the expense of victims of medical research atrocities of the Second World War that had no meaningful form of providing informed consent and often leading to dire consequences to the human participant.¹¹ Determined not to repeat history, medical research has sought guiding frameworks for ethical research activities. Take for instance the ethical principles relating to medical research of human participants recorded in the Belmont Report of 1979,¹² the World Medical Association's Declaration of Helsinki of 1964,¹³ the Singapore Statement on Research Integrity,¹⁴ as well as the Montreal Statement.¹⁵ Generally, these ethical principles have been insignificant in traditional legal research activities, but may become more relevant as contemporary legal methodological research approaches change, adapt and develop from traditional legal doctrinal approaches to other forms of research.

Closer to home, South Africa also has a general legislative framework focussed on medical research, which centres around the concept of informed consent in terms of section 12(2)(c) of the constitution,¹⁶ which is further exemplified in sections 7(1) and 7(3) of the National Health Act of 2003.¹⁷ Medical research would almost

11 See, for example, <https://encyclopedia.ushmm.org/content/en/article/nazi-medical-experiments> (25-09-2021) and Bhatt "Evolution of clinical research: A history before and beyond James Lind" 2010 1(1) *Perspect Clinical Research* 6-10 (<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3149409/>) (25-09-2021).

12 Also referred to as "Ethical principles and guidelines for the protection of human subjects of research the National Commission for the Protection of Human Subjects of Biomedical and Behavior[u]ral Research" https://www.hhs.gov/ohrp/sites/default/files/the-belmont-report-508c_FINAL.pdf (05-09-2021).

13 Also referred to as "WMA Declaration of Helsinki—ethical principles for medical research involving human subjects" <https://www.wma.net/policies-post/wma-declaration-of-helsinki-ethical-principles-for-medical-research-involving-human-subjects/> (05-09-2021).

14 <https://wcrif.org/singapore-statement> (05-09-2021).

15 Also referred to as "Montreal Statement on Research Integrity in Cross-Boundary Research Collaborations" <https://wcrif.org/montreal-statement/file> (05-09-2021).

16 s 12(2)(c) of the Constitution provides that "not to be subjected to medical or scientific experiments without their informed consent". See also discussion in Adams, Veldsman, Ramsay and Soodyall "Drafting a code of conduct for research under the Protection of Personal Information Act No. 4 of 2013" (2021) *South African Journal of Science* 1 2.

17 National Health Act 61 of 2003. See also discussion in Adams, Veldsman, Ramsay and Soodyall (n 16) 2.

always include human participants,¹⁸ and where other forms of academic research involves human participants in some way, shape or form, similar principles have generally been adopted in such research activities. The screening and approval processes of ethics committees are central to these forms of research activities and the National Health Act also requires “[e]very institution, health agency and health establishment at which health research is conducted, must establish or have access to a health research ethics committee, which is registered with the National Health Research Ethics Council”.¹⁹ Such ethics committees must then review and grant permission regarding the research that involves human participants in the data collection process.

In addition to the above legal framework, several broad principles related to academic research are also relevant to research activities involving human participants, and can be summarised as follows:

- i. Acceptable conduct.²⁰ The scientific nature of academic research can be described as a form of “human conduct”,²¹ and if this is correct then Beckmann argues that such conduct must conform with socially acceptable values normally set out in the rules, policies and codes of conduct of academic institutions.²² These accepted and established processes, particularly with reference to the process of collecting data during the COVID-19 era, has changed many research approaches so to ensure compliance with social distancing requirements that may hamper the collection of data from human participants.
- ii. Accountability.²³ Beckmann notes that “researchers are to some degree accountable to society for what they do”,²⁴ and this is done

18 s 15(1) of the National Health Act 61 of 2003 notes that “[a] health worker or any health care provider that has access to the health records of a user may disclose such personal information to any other person, health care provider or health establishment as is necessary for any legitimate purpose within the ordinary course and scope of his or her duties where such access or disclosure is in the interests of the user”. Furthermore, s 17 (1) of the National Health Act 61 of 2003 requires controls to be put in place to avoid unauthorised access to health records.

19 s 73.

20 Beckmann “University research ethics clearances: safety nets, or a false sense of legal immunity?” (2017) 31(3) *South African Journal of Higher Education* 6 11.

21 Beckmann (n 20) 11.

22 Ibid.

23 Ibid.

24 Ibid.

- by conducting research in a “responsible manner”.²⁵ This form of accountability is highlighted in the measures that must now be taken under COVID-19 with additional rules to ensure the safety of human participants, and also the responsible manner in which personal information of human participants must be processed in terms of POPIA, which is closely linked to the next principle.
- iii. Liability.²⁶ Insofar as research is unethical (arguably also illegal) which causes damage to human participants, then the researcher or the research institution may, in certain circumstances, be held responsible for the damages that have been incurred.²⁷ This action would conceivably take the form of a delictual claim, but in modern research practices, the liability may also be contractual in nature which would be dependent on the arrangement and documents signed between the researcher and the human participant. Added to this, it may also be said that this sense of liability and accountability is now also underscored by legislative duties wherein possible fines may be issued against a researcher for any failure to adhere to the provision of POPIA.²⁸
 - iv. Informed consent.²⁹ Beckmann notes that the human participant must understand the nature of the research, as well as ensuring that the participation of the research is voluntary.³⁰ The concept of informed consent is consistent with, for example, the National Health Act and the Belmont Report,³¹ which requires all the relevant information to be disclosed to the research participant in a way that is comprehensible so to ensure that the human participant acts and participates voluntarily in the research project.³²
 - v. Risks and benefits of research.³³ Any research related to human subjects may be subject to certain risks; however, the extent of such risk against the potential benefit of the research must be assessed. Ethics committees play an important part in screening

25 Ibid.

26 Ibid.

27 Beckmann (n 200) 12, notes that this type of damages may take the form of a delictual claim. Although it is questionable whether Beckmann’s description of a contractual claim would require the element of “blameworthiness”, as only a breach of the contractual obligation is required to attract contractual liability.

28 Ch 11 of POPIA.

29 Beckmann (n 200) 14.

30 Beckmann (n 200) 15.

31 Belmont Report of 1979 (n 122) 6–7.

32 Belmont Report of 1979 (n 122) 6–8.

33 Beckmann (n 200) 14.

- research activities and assessing the risk-benefit ratio in relation to the research, the community and the human participant.
- vi. Mutual human respect, beneficence and achieving justice.³⁴ Underscoring all the other principles of research, is that research must be respectful to the research participant, the wider community and that it intends to achieve a form of justice rather than injustice. This is to avoid the reoccurrence of questionable past research practices.³⁵

Going hand-in-hand with the above principles, is that of so-called research ethics which is central to any type of academic research. After all, Beckmann notes that, although separate, a relationship exists between the concepts of the law, morality and ethics.³⁶ In other words, the ends do not justify the means in academic and scientific research, but research must be done in the correct way holding true to academic ethical practices. These processes and practices were strained under COVID-19, especially in the manner in which data was collected where individual movement and social interaction were restricted. Discourse related to ethical research considerations have largely been focussed on the medical and health sciences, being research activities related to human participants, but such principles could be extended to other research practices wherein the research involves human participants.³⁷ In instances where empirical data is collected that relates to human participants' personal information then such activities would also now be regulated under POPIA (which is discussed further in paragraph 3 below).

2.3 Legal academic research

Legal academic research has seemingly navigated COVID-19 unscathed, uninterrupted and has been left largely unaffected. In fact, the principles highlighted in the preceding paragraph have, to the most part, not generally featured in legal academic research. For this reason, little discourse exists on the principles of research ethics in relation to legal research activities. The reason for this can be related to the traditional view of the general nature of legal academic research, which has been said to originate from a logical or common-

34 Belmont Report of 1979 (n 122) 4-6; Declaration of Helsinki of 1967 (n 133) par 7.

35 See ft 11.

36 Beckmann (n 200) 8.

37 Beckmann (n 200) 9.

sense approach.³⁸ There have even, in the past, been arguments that legal research is not truly scientific in nature, which may be based on the lack of understanding the important role legal research plays in society. After all, legal research is much more complex than simply an analysis of the law and touches almost all areas of human interaction.

Legal academic research can generally be categorised into three broad groups, and dependent on the group, COVID-19 may have had either a significant or less significant impact on such research. The first is that law is a practical discipline.³⁹ This form of research can be described as “research that is valuable for legal practitioners in drafting contracts, advising clients and mediating conflicts”.⁴⁰ This form of legal research would conceivably include that of court processes, and has been described as a “comparative value-free analysis of legal rules”,⁴¹ and relates to the discipline of application.⁴² Considering the restrictions on movement, social engagement and the closing of courts (save for exceptional circumstances) and even law clinics under the COVID-19 era, law as a practical discipline may result in limited research data gathering.

The second form of legal research is its connection with the humanities.⁴³ This category of research is inherently focussed on the interpretation discipline and has been described as the interaction between the law and “history, philosophy, theology and literature which are generally recognised as having a primary affiliation with the humanities”.⁴⁴ Legal research, in this context, can be described as having a close connection to the humanities wherein the process is explored of understanding and interpreting principles rather than practically applying legal principles.⁴⁵ Legal academic research in this category would not have been significantly impacted by COVID-19 as legal texts remain readily available regardless of COVID-19 restrictions.

The third category of legal research finds its connection in that of social science.⁴⁶ There are different branches of social sciences, including, for example, economics, social welfare, and even political

38 Kometsi (n 88) 74.

39 Siems and Sithigh (n 6) 653.

40 Ibid.

41 Ibid.

42 Siems and Sithigh (n 6) 655.

43 Siems and Sithigh (n 6) 653.

44 Siems and Sithigh (n 6) 654.

45 Siems and Sithigh (n 6) 655.

46 Ibid.

sciences,⁴⁷ and often includes quantitative empirical legal research approaches in so-called “socio-legal” research activities.⁴⁸ This form of legal academic research includes the sourcing and analysing of data and herein, COVID-19 would likely have had the greatest impact in legal research activities. However, there has traditionally been limited empirical research data used in legal academic research.

Notwithstanding these three broad categories of legal research, traditionally legal academic research has generally not addressed many of the concepts and principles of academic research discussed in paragraph 2 (above). One reason for this is most of the legal academic research has employed a doctrinal research methodology. It may then be perfectly natural to assume that legal academic research in the context of data collection under COVID-19 and POPIA is irrelevant and one that need not be addressed by legal researchers. After all, doctrinal research has been said to have “dominated legal scholarship”,⁴⁹ which Hasnas describes as the process of “analy[s]ing, and/or attempting to shape legal doctrine by use of the standard lawyers’ tools of language, theory, logic, and legislative history”.⁵⁰ Doctrinal research could also be described as a literature study, or qualitative research.⁵¹ In this context, legal research can also be described as a process of “fact finding ..., fact ordering, fact systematising and studying and predicting legal trends”.⁵²

This traditional approach has, in the past, brought into question whether legal academic research is truly scientific research in the strict sense of the definition. After all, the traditional approach to legal research rarely (if at all) uses empirical data or personal information in its research methodology. However, legal research cannot escape the social constructs upon which it rests,⁵³ which is certainly the case when considering legal research as forming part of the disciplines of humanities or that of social sciences. In fact, Khodie notes the law is integral to the social fabric and forms the very heart of “human

47 Ibid.

48 Ibid.

49 Hasnas “New directions in legal scholarship: Implications for business ethics research, theory, and practice” 2010 20(3) *Business Ethics Quarterly* 503 504.

50 Hasnas (n 49) 504.

51 Kometsi (n 8) 85.

52 Khodie “Course on research methodology in law” 1982 24(2/3) *Journal of the Indian Law Institute* 605 606.

53 Kometsi (n 8) 69–72, describes other methods such as the logical method, comparative method, historical method, and even a combination of research methods.

activities”,⁵⁴ and does not, according to Jain, “operate in a vacuum”.⁵⁵ It seems natural that developments in the law would influence society and conversely, as society develops, that the role of the law (and consequently legal research) should also evolve. This, in more contemporary legal academic research, has seen the divergence of doctrinal research methodologies wherein legal academic research has branched to research methodologies that have, in some instances, relied on empirical data.

Two reasons are suggested for the shift from the traditional doctrinal research methodologies; firstly, that legal research has become more interdisciplinary in nature,⁵⁶ and secondly, legal research has, presumably, due to the interdisciplinary nature of certain legal research structures, adopted empirical research orientated approaches.⁵⁷ Examples of such a shift in research methodologies may be illustrated in areas such as international law, wherein arguments have been made for the inclusion of behavioural research (in the context of economic analyses and illustrates the connection to social sciences),⁵⁸ which, if used, would require the use of some form of empirical research methodological approach.⁵⁹ Also, the discipline of comparative law may use a variety of research methodologies and is not necessarily limited to a single research approach.⁶⁰ Finally, indigenous law may also illustrate the change from strictly adhering to “rule-based” methodologies to incorporating “behavioural” methodological approaches for more accurate studies of indigenous law (which illustrate the connection with the humanities).⁶¹ Such

54 Khodie (n 52) 606.

55 Jain “Legal research and methodology” (1972) *Journal of the Indian Law Institute* 14 (4) 487.

56 Hasnas (n 52) 504, which provides the example of the interplay between the law, economics, cognitive psychology and evolutionary biology.

57 Hasnas (n 52) 504, examples of such empirical research include “case studies, archival analyses, intensive interviews, laboratory experiments, observational studies, [and] field experiment”.

58 Broude “Behavio[u]ral international law” 2015 163(4) *University of Pennsylvania Law Review* 1099 1103, 1156. In fact, the author argues that both cognitive psychology and behavior economics should be incorporated into the study of international law.

59 Adapted from Broude (n 58) 1157.

60 See, for example, the discussion in Oderkerk “The need for a methodological framework for comparative legal research: Sense and nonsense of “methodological pluralism” in comparative law” 2015 79(3) *The Rabel Journal of Comparative and International Private Law* 589–623.

61 Adapted from Van Niekerk “Indigenous law and narrative: rethinking methodology” 1999 32(2) *The Comparative and International Law Journal*

The Impact of Covid-19 on the Future of Law

research activities would have been limited, or possibly halted, under the COVID-19 restrictions.

In addition to these examples, empirical data is also now challenging the accuracy of certain assumptions whereupon some legal principles (and consequently legal rules) rests. In this regard, Blasi and Jost make the following observation:⁶²

“Both law and legal advocacy necessarily rest on assumptions about human motivation and behavior. Many of those assumptions are wrong. Just as scientific experimentation determined that Aristotle’s physics did not accurately describe the behavior of objects, modern psychology and other social and behavioral sciences have determined that many common understandings of human behavior are, at the very least, incomplete”.

Take for instance, certain assumptions whereupon contractual legal principles are based have been empirically illustrated to be inherently incorrect.⁶³ Examples of this include that contracting parties always act to their own best interest, and a contractual freedom to enter into contracts has been found to be inaccurate or, at the very least, incomplete.⁶⁴ These examples illustrate that law is not a self-contained silo wherein legal research is limited to the circular analyses of the law itself,⁶⁵ but rather that such data requires a reevaluation of theoretical assumptions upon which some legal principles rests.⁶⁶ Therein legal research steps closer into the realms of the disciplines of the humanities and social sciences.

If the traditional approach of legal research is evolving, then data collection and information gathering in legal academic research may have a wider application than traditionally thought. After all, the traditional approach to legal research has placed much focus on the data contained in traditional classification of primary and secondary

of Southern Africa 208 212–213, in this context a behavioral approach to studying indigenous law may classify the researcher as a legal realist.

62 Blasi and Jost “System justification theory and research: Implications for law, legal advocacy, and social justice” *California Law Review* 2006 94(4) 1119.

63 Hasnas (n 49) 505.

64 See Hasnas (n 49) 505.

65 Adapted from Kometsi (n 8) 86–87.

66 Hasnas (n 49) 505.

sources of law.⁶⁷ However, as discussed above, the traditional doctrinal approach to legal research is being challenged in various disciplines of legal academic research,⁶⁸ and thereby a shift is taking place from a self-contained analysis of the law to broader and inclusive methodological approaches that test legal assumptions against empirical facts.⁶⁹ This effectively means that the same rules and principles discussed in paragraph 2.2 (above) may equally apply to certain areas of legal academic research, especially when human participants are involved in the data collection of the research activities. This notwithstanding, the developments in legal research does not appear to have been significantly impacted by COVID-19.

This certainly does not mean that doctrinal research methodologies in legal research is obsolete. To the contrary, doctrinal research methodology holds a valuable place in legal research,⁷⁰ but it is not the only research methodology that may be used in legal research. Insofar as other research methodologies are used, such as empirical research studies, wherein personal information or data is collected, analysed or used from human participants then legal research must take into account research ethics (discussed in paragraph 2 above) as well as the impact of POPIA on such research activities (which will be discussed further below).⁷¹

3 The processing of research data and information

3.1 Existing legislative framework

There are certainly legislative measures in place to combat illegal processing of data,⁷² but for the purposes of this paper, focus is rather placed on the general factors related to academic research. Historically,

67 Typically, primary sources would be legislation, case law and secondary sources would be journal articles and textbooks. Khodie (n 52) 608, notes that secondary sources are such information that is gathered from or originates from primary sources.

68 See, for example, Hasnas (n 49) 503.

69 Adapted from Kometsi (n 8) 86–87.

70 Tadesse “Legal research tools and methods in Ethiopia” 2012 25(2) *Journal of Ethiopian Law* 68 76, describes such methods as including “legal analysis, legal synthesis, methods of interpretation, and methods of legal reasoning”.

71 It should be noted that the type of methodology utilised must be both “reliable” and “replicable”, see Kometsi (n 8) 69.

72 Electronic Communications and Transactions Act 25 of 2002. See also discussion of Minnaar (n 3) 42.

secrets and the failure to disclose information in South Africa has been a source of human rights abuses,⁷³ which have been addressed in the rights afforded by the constitution for every person to have the right to access of information.⁷⁴ The Promotion of Access to Information Act of 2000 (PAIA) gives effect to this right to information,⁷⁵ but the right to information must be carefully weighed against the constitutional right to privacy, which is now governed by POPIA.

Both PAIA and POPIA play a role in academic activities, but there are also other legislative requirements that may also influence data and information academic activities. In the context of academic activities, three general forms of legislative controls in relation to information and data, can be categorised as follows:

- i. Legislative requirements for the storage of information and data. This form of legislative intervention requires certain information to be collected and stored. Although not directly related to academic research, an example of this in academia can be found in relation to teaching and learning activities in the National Qualifications Framework Act that requires the establishment of a national learner's database (effectively an electronic management information system) wherein certain information must be stored.⁷⁶ According to the National Qualifications Framework Amendment Act of 2019, the information that would be stored in the database includes, for example, information related to qualifications of the learners,⁷⁷ learner achievements,⁷⁸ and information regarding or associated with registration, verification and accreditation.⁷⁹
- ii. Legislative requirements for the access to information and data. This form of legislative intervention sets the rules related to when and how collected and stored information may be provided to persons that requests access thereto. An example of this can be found in the Higher Education Act,⁸⁰ which allows access to

73 Preamble of the Promotion of Access to Information Act 2 of 2000 (PAIA).

74 s 32(1)(a).

75 Preamble of PAIA.

76 s 31 of the National Qualifications Framework Act 67 of 2008. See also s 1 of the National Qualifications Framework Amendment Act 12 of 2019.

77 Amendment to s 13(1)(l) of National Qualifications Framework Act 67 of 2008 in terms of the National Qualifications Framework Amendment Act 12 of 2019, which also notes that such qualifications would include full and partial qualifications.

78 See (n 76).

79 See (n 76).

80 Higher Education Act 101 of 1997.

information of the register and the auditor's report,⁸¹ and should be read with the provisions and requirements set out in PAIA. More particularly, PAIA makes specific reference to protecting research specific information and instances where the request for such information may be refused.⁸²

- iii. Legislative requirements for the protection of information and data. This form of legislative intervention sets the rules of how information must be processed, handled and protected. An example of this would be POPIA which relates specifically to the personal information of parties.

It is the third legislative intervention, being the protection of information and data under the auspices of POPIA that is of particular focus in this paper and may be relevant to certain legal academic research activities. POPIA has a direct bearing on the way personal information is managed in an online environment, which is required under the COVID-19 era. It may, however, also be noted that there may be instances wherein various legislative interventions may conflict with one another, in which case, the piece of legislation that affords the greater protection would prevail.⁸³

3.2 Protection of personal information

POPIA came into effect on 1 July 2020, with a 12-month grace period to comply with the certain provisions of the Act,⁸⁴ which ended on 1 July 2021 and on which date POPIA came fully into force and requires compliance with its provisions insofar as academic research activities fall within the scope of the act. Different concepts of POPIA as it may relate to academic research are highlighted below:

- i. "Processing" in the context of academic research includes the collection, storage, use and destruction of personal information of

81 s 56 read with s 57.

82 s 43(1)(b) of PAIA states that requests to access records related to existing research in public bodies that is carried must be refused where such a disclosure would result in "serious disadvantage" to the public body, "a person that is or will be carrying out the research on behalf of the public body", or "the subject matter of the research". A similar restriction would apply to research conducted by a third party for the public body in terms of s 43(1)(a) of PAIA. Also see s 69 of PAIA that requires similar limitations in relation to information requests of information in a private

83 s 3(2)(b) of POPIA.

84 See also Adams, Veldsman, Ramsay and Soodyall (n 16) 1.

the human participant (which is also known as the data subject in the context of POPIA).⁸⁵

- ii. “Personal information” has quite a wide definition under POPIA.⁸⁶ Research that gathers or uses such personal information from human participants in research related activities would then conceivably fall within the scope of the information protected under POPIA.
- iii. “Responsible party” in the context of academic research activities would be the person or party that collects personal information from the human participant.⁸⁷ This would include, for example, the researcher or the research institution.⁸⁸ In fact, according to Universities of South Africa (USAf), all public universities will process personal information and would, therefore, be considered a responsible party.⁸⁹
- iv. “Data subject” in the context of academic research activities relates to the person whose personal information is processed in the context of the research activities.⁹⁰ The data subject would include any student (prospective, applicant or current), alumni, authors, service providers, donors, or funders,⁹¹ and may also include a human participant in research activities.⁹²
- v. “Information Officer” is the person appointed within the research institution to ensure compliance with the provision of POPIA.⁹³
- vi. “Operator” is a third person who the responsible party uses to process the personal information of the data subject.⁹⁴

POPIA requires certain principles to be adhered to when processing the personal information of the data subject. The lawful conditions of processing that must be adhered to are: accountability,⁹⁵ processing

85 See also s 1 of POPIA.

86 See also s 1 of POPIA.

87 See also s 1 of POPIA.

88 Adams, Adeleke, Anderson, Bawa, Branson, Christoffels *et al* “POPIA code of conduct for research” (2021) *South African Journal of Science* 1.

89 The 2020 POPIA Industry Code of Conduct: Public Universities 13.

90 s 1 of POPIA defines a data subject as “means the person to whom personal information relates”.

91 The 2020 POPIA Industry Code of Conduct: Public Universities 6.

92 Adams, Adeleke, Anderson, Bawa, Branson, Christoffels *et al* (n 88) 1.

93 Adams, Adeleke, Anderson, Bawa, Branson, Christoffels *et al* (n 88) 1.

94 Adams, Adeleke, Anderson, Bawa, Branson, Christoffels *et al* (n 88) 1. See also s 1 of POPIA.

95 s 8.

limitation,⁹⁶ purpose specification,⁹⁷ further processing limitations,⁹⁸ information quality,⁹⁹ openness,¹⁰⁰ security safeguards,¹⁰¹ and data subject safeguards.¹⁰² Generally, where personal information is processed in an academic research environment, POPIA would apply and requires adherence to the provisions of POPIA.¹⁰³ The exception to this in the research context is if the information or data has been de-identified without the possibility of being re-identified.¹⁰⁴

Notwithstanding the various conditions of processing required, it is perhaps necessary to highlight that a starting point in the processing of personal information is that research subjects must be informed that their personal information is being processed,¹⁰⁵ and to update such information if necessary.¹⁰⁶ There may be instances where information is required to be processed by law (see for example the discussion in paragraph 3.2 above) and our courts have already established that it is not the intention of POPIA to prevent the processing of information should the law require this.¹⁰⁷ It is, however, not the intention of this paper to discuss the content of POPIA in any level of detail as the development of industry codes may change the way the various sections of POPIA may impact research activities (see the below discussion).

3.3 Development towards a code of conduct

Section 60 of POPIA contemplates industry specific codes of conduct that would regulate the processing of personal information in a particular sector.¹⁰⁸ Any code of conduct must include the lawful conditions of processing information (or its equivalent),¹⁰⁹ and how

96 s 9–12.

97 s 13–14.

98 s 15.

99 s 16.

100 s 17–18.

101 s 19–22.

102 s 23–25.

103 See s 4.

104 s 6(1)(b).

105 s 5(1)(a).

106 s 5(1)(c).

107 See, for example, *Divine Inspiration Trading 205 (Pty) Ltd v Gordon* 2021 (4) SA 206 (WCC) par 34.

108 s 60(3) notes that a code of conduct may apply to specific information, specific body, specific activities or a specified industry or profession. See also Adams, Veldsman, Ramsay and Soodyall (n 16) 1.

109 s 60(2)(a).

such lawful conditions of processing information would be applied within the sector in which the code of conduct would apply.¹¹⁰ Such codes of conduct may be issued by the Information Regulator or may be issued by means of application by a body representing the particular industry or profession.¹¹¹

Already two important developments in the industry codes may influence academic research's compliance with POPIA going forward. The first, which relates broadly to academic activities, is that USAf has adopted, in 2020, a code to guide institutions of higher education on how to process personal information (USAf's Code).¹¹² It appears that the intention for USAf's Code to be registered with the Information Regulator,¹¹³ however, at the time of writing this paper, USAf's Code has not yet been adopted by the Information Regulator. The second, which is specific to academic research, is the Academy of Science of South Africa (ASSAf), acting as a representative for academia in general, took on the mantle to spearhead the development of a code of conduct for academic research in South Africa (Code of Conduct).¹¹⁴ The development of the Code of Conduct will have a far-reaching impact on the way academic research is undertaken. Although, at the time of writing this paper, the Code of Conduct has not yet been adopted by the Information Regulator, articles written about the Code of Conduct as well as the discussion documents issued by ASSAf provides clues to what the Code of Conduct would entail. Piecing this together may provide guidance as to how the Code of Conduct may impact future academic research.

From the outset, it appears that the Code of Conduct would not apply to "market research, political and public opinion polling, audits, quality assurance or programmatic monitoring and evaluation; or other research where the purpose is not directly to contribute to the improvement of knowledge through peer-reviewed publication".¹¹⁵ The scope of the Code of Conduct is intended to include:¹¹⁶

"... all research conducted in South Africa or by a responsible party domiciled in South Africa, and which uses (collects, processes or stores) personal information as defined under POPIA as

110 s 60(2)(b).

111 s 61(1)(a)–(b).

112 POPIA Industry Code of Conduct: Public Universities of 2020.

113 Adams, Veldsman, Ramsay and Soodyall (n 16) 1.

114 Ibid.

115 Adams, Adeleke, Anderson, Bawa, Branson, Christoffels *et al* (n 88) 3.

116 Adams, Veldsman, Ramsay and Soodyall (n 16) 2.

pa[r]t of the research process. The Code [of Conduct] will pertain to all research activities in South Africa that ordinarily undergo prior and independent ethics review, that follow a recognised scientific methodology or system of analysis, and that aim to publish the research in contribution to the respective field of stud[y]”.

Of particular importance is that the Code of Conduct makes specific mention of the types of research it envisages would be regulated:¹¹⁷

“this Code is relevant to research—whether basic or applied—in any discipline including, but not limited to, natural sciences, engineering and technology, medical and health sciences, social sciences, education, management, economics, theology, law, and the humanities and which:

- follows a recognised scientific methodology or system of analysis, and improves or creates new knowledge, or deepens understanding; and
- would ordinarily undergo prior independent ethics review”.

It is of particular interest that legal research has been specifically identified as falling within the scope of the Code of Conduct. Also, the discussions in paragraph 2 (above) have highlighted the instances wherein ethics reviews are required, and generally this would be in instances where academic research relates to or involves human participants in some way, shape or form. This may, dependent on the type of research undertaken, also have a direct bearing on certain forms of legal academic research. However, it is generally thought that these developments would have minimal impact on legal academic research.

ASSAf had public consultation sessions regarding the Code of Conduct,¹¹⁸ and the intention is for the Code of Conduct to regulate all research conducted in South Africa (including that of legal academic research). The purpose of the Code of Conduct can be summarised as to:

- i. provide prior authorisation for research as required under section 57 of POPIA;¹¹⁹

117 Adams, Adeleke, Anderson, Bawa, Branson, Christoffels *et al* (n 88) 2.

118 On 3 and 18 May 2021. For further information see <https://www.assaf.org.za/index.php/news/812-code-of-conduct-for-research-as-per-chapter-7-of-popia> (04-09-2021).

119 Adams, Veldsman, Ramsay and Soodyall (n 16) 1.

The Impact of Covid-19 on the Future of Law

- ii. provide “guidance to researchers on how to rationalise the provisions of POPIA in relation to existing laws and standards regulating research”;¹²⁰
- iii. provide clarity to how certain of POPIA’s principles would apply to academic research;¹²¹
- iv. provide clarity as to how and when exceptions to lawful processing would apply in the context of academic research;¹²²
- v. establish a “comprehensive and uniform approach to the regulation of personal information for research across all government departments, academic institutions, research councils and the private sector”;¹²³ and
- vi. provide guidance to how existing laws would be reconciled with POPIA.¹²⁴

It is unclear, at this stage, exactly what the content of the Code of Conduct holds but from the consultation sessions it appears that the intent of the Code of Conduct is to allow for a uniform approach and interpretation of POPIA within the sphere of academic research. Therefore, the details of the Code of Conduct, at this stage, is limited and the last update was that ASSAf had submitted the draft Code of Conduct to the Information Regulator during July 2021. Although, academia have not generally been privy to the submitted document, ASSAf has advised that they expect a response from the Information Regulator within 13 weeks from such submission.¹²⁵ What is also necessary to keep in mind is that, once the Code of Conduct has been accepted, it would be considered legally binding.¹²⁶ This means any failure to comply with the Code of Conduct, once issued and accepted in terms of section 60 of POPIA, would result in a breach in lawful processing of personal information.¹²⁷ In the meantime, whilst the Code of Conduct is being considered, USAf’s Code currently provides a non-binding general guideline to processing of personal information

120 Ibid.

121 Ibid.

122 Ibid.

123 Ibid.

124 Adams, Veldsman, Ramsay & Soodyall (n 16) 2, which refers to National Health Act 61 of 2003 and PAIA as laws that require reconciliation with POPIA.

125 See <https://www.assaf.org.za/index.php/news/812-code-of-conduct-for-research-as-per-chapter-7-of-popia> (04-09-2021).

126 See Adams, Veldsman, Ramsay and Soodyall (n 16) 1.

127 s 68; ch 10 of POPIA.

in a general academic setting, and which principles may be useful to consider in the context of academic research.

4 Emerging framework research during the COVID-19 era and beyond

The developments during the COVID-19 era have brought about many changes to academic research, but this is not the case for legal academic research which appears to remain largely immune to these developments. Added to this, legislative interventions and the almost organic evolution to legal research has changed the academic landscape for many academic researchers. Undoubtedly, once USAF's Code and the Code of Conduct have been adopted by the Information Regulator, further changes may be required in academic research, but in the meantime, a framework for the use of data and information has emerged that can be broadly categorised, and a general framework related to research ethics and also a framework related to the processing of information and data generally.

Some authors have highlighted certain general principles that may be useful for the protection of data and information in academic research, these include:

- i. The implementation of relevant and appropriate policies and procedures for the access of information.¹²⁸ These policies should be reflective of both research ethics as well as legislative requirements. In this context, academic research should strictly adhere to the policies and procedures within the academic institution in the processing of personal information of research participants.
- ii. There should be clear safeguards for physical access to information.¹²⁹ This is particularly important when physical copies of information are stored. In these instances, the necessary protections must be put in place to protect the physical storage of information which may include, for example, keeping information in locked offices, the access to such offices and so on.
- iii. There should also be safeguards for electronic access to information.¹³⁰ Insofar as information is stored digitally (as would be the case under COVID-19), then electronic access to information must be protected by means of passwords, secure storage and retrieval, firewalls, anti-virus software and the like.

128 Adams, Adeleke, Anderson, Bawa, Branson, Christoffels *et al* (n 88) 8.

129 *Ibid.*

130 *Ibid.*

- iv. Appropriate training should be provided to individuals dealing with information.¹³¹ This type of training would include, for example, administrative support staff, researchers as well as students conducting research to ensure compliance with POPIA and, once adopted by the Information Regulator, also that of USAf's Code as well as the Code of Conduct.
- v. Different levels of security protections should be adopted in relation to the sensitivity of the information.¹³² Certain information may be more sensitive than other types of information, and the measures to protect information must then equally take into consideration the different types of information as well as the sensitivity of such information in the context of academic research. One way to protect personal information is to de-identify the information,¹³³ which can be done by means of "masking" or using pseudonyms.¹³⁴ This is particularly useful in academic research when the identity of the human participant is protected. Should this method be adopted, human participants should be adequately informed of the de-identification process.

Once the Code of Conduct has been adopted, there will certainly be further measures that may be put in place. In the meantime, researchers are expected to still comply with the provisions of POPIA. The above framework may provide a starting point for new academic research practices in the processing of personal information of human participants and perhaps a framework for legal research involving human participants.

5 Conclusion

Academic research has, like so many other industries, had first-hand experience of the disruptive impact of COVID-19 restrictions. Added to the challenges faced in the collection of research data under these conditions, an additional layer of complexity has been added with researchers and postgraduate research students now being required to

131 Ibid.

132 Ibid.

133 s 1 of POPIA defines the concept of de-identification as "personal information of a data subject, means to delete any information that ... (a) identifies the data subject; (b) can be used or manipulated by a reasonably foreseeable method to identify the data subject; or (c) can be linked by a reasonably foreseeable method to other information that identifies the data subject".

134 The 2020 POPIA Industry Code of Conduct: Public Universities 11.

comply with the provisions of POPIA. If this was not enough, the exact manner of compliance with POPIA still remains uncertain as USAf's Code and the Code of Conduct at the time of writing this paper has yet to be adopted by the Information Regulator, which may influence the way academic research is undertaken to ensure compliance with POPIA. These developments are changing the face of academic research and requires researchers to approach the collection, storage, use and destruction of information in a different way.

Legal academic research may, at first, appear to have been unaffected by COVID-19 and POPIA. This, in itself, is concerning as it raises questions as to whether legal academic research (as a research discipline) is aligned with other research methodological approaches. This notwithstanding, it was illustrated that not all legal research activities are immune, as legal academic research is undergoing its own metamorphic change. Legal academic research remains firmly footed in doctrinal research methodologies which would, to an extent, have been immune to the various developments in the processing of data in academic research, but the evolution of legal academic research challenges these assumptions and points towards wider research methodological approaches which requires legal researchers to reassess many legal assumptions and the exclusive use of doctrinal research methodologies. Insofar as empirical data is used in legal academic research, then academic ethics in relation to human participants, POPIA, and the Code of Conduct will become central considerations of the legal researcher. This notwithstanding, it would appear that legal academic research would, to the most part, remain unaffected save for the developments in research shifting from doctrinal research methodologies to other forms of research methodologies.

Whatever view is ultimately taken on this, a definite cross-disciplinary approach in the humanities and social sciences will change the face of academic legal research. Therein, the online environment precipitated by COVID-19 and legislative interventions of POPIA is changing legal academic research and may require legal researchers to adopt new approaches in the processing of data and information in their research activities.

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