

RESEARCH ARTICLE

# A Shared Intellect: A Rawlsian Analysis of Vaccine Patent Protections

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**Abstract:** One fundamental issue at the forefront of the COVID-19 pandemic is the relationship between access to vaccines and intellectual property rights. The purpose of what follows is to advocate for a cosmopolitan interpretation of John Rawls and his *Theory of Justice* and apply it to the debate on vaccine patent protections. Using the Philippines and other developing countries as the context of analysis, this paper has one main claim—that the vaccine patent waiver is right in the interest of justice, and patent protections must be waived to achieve justice in the distribution of vaccines. The approach here analyzes Rawls’ theories on the nature of justice and equitable distribution and addresses their limitations to establish a framework and justify its use in the vaccine patent debate. Using the Cosmopolitan Principles of Justice (CPJ), a modified version of Rawls’ original framework that can be applied to global justice—lifting patent protections is just because patent protections that block access to health are unjust. CPJ then entails a revision of institutions so as to not perpetuate injustice and to be aligned with social justice.

**Keywords:** cosmopolitanism, justice, patent, Rawls, vaccine

## Grounds of Intellectual Property

The fundamental grounds for intellectual property rights are to protect innovation and ensure technological progress. One of the main arguments for protecting patents and intellectual property is the right to protect the fruit of intellectual labor. Although this system has ensured that both the public and the private persons benefit from the intellectual process alongside ensuring healthy competition in line with sound market principles, the usefulness of patent protections comes into question when the incentive for profit and concealing knowledge conflict with the fundamental right to healthcare (Saha & Bhattacharya, 2011). The

problem is much worse when the inequality harms the most vulnerable in society.

## Global Inequality

As of August 2023, poorer states such as Gabon, Papua New Guinea, Burundi, and Madagascar have been lagging behind in their inoculation efforts (Office of the High Commissioner for Human Rights [OHCHR], 2023). Moreover, African countries import 99% of their vaccines, making them reliant on other richer countries, hence exacerbating the problem (Coward et al., 2023). The United Nations Committee

on the Elimination of Racial Discrimination then called on wealthier countries such as Germany, Switzerland, the United Kingdom of Great Britain and Northern Ireland, and the United States of America to waive intellectual property rights on the grounds of clear racial discrimination, specifically towards the Global South (OHCHR, 2023). The vaccine waiver is now more urgent given that the change required to allow developing countries to improve manufacturing capacity has been called for three years prior in the ASEAN (Usher, 2020).

### The Debate in the ASEAN

In October 2020, South Africa and India, alongside other developing countries, called for a waiver of vaccine patent protections in hopes of increasing supply (Usher, 2020). The Philippines has backed this waiver on the same grounds, alongside other leaders in Southeast Asia, in light of numerous challenges in vaccine supply and the economy. A senatorial hearing, *Recommending the Adoption and Immediate Implementation* (2021), clarified the stance of the Philippines vis-a-vis the waiver, summarized as follows:

1. The Philippines maintains the rule of law, including respect for intellectual property rights.
2. The waiver of the COVID-19 vaccine patent is a global solution to a global problem through the increase in supply.
3. The waiver does not suggest a waiver towards all obligations but only those necessary to aid the COVID-19 pandemic efforts.
4. This waiver only suggests a waiver towards certain sections of the patent protection.
5. The suspension is temporary.
6. The Philippines is heavily reliant on imports to secure the vaccine and thus has no manufacturing capacity to develop the vaccine. The waiver may lead to the self-manufacturing of the vaccine.
7. It has been suggested that the waiver may be able to increase technology transfer in light of global partnerships.

The hearing also stated that this rate of vaccination extends the pandemic for two years. The Philippines has already suffered from the longest lockdown in the world (Al Jazeera, 2021). Additionally, over 66,000

deaths have been recorded to date (World Health Organization, 2023). According to Yean (2022), without the rights to the patent and technology, ASEAN nations, namely Myanmar, Indonesia, Thailand, and Vietnam, have attempted to create “home-grown vaccines to speed up the inoculation process” (p. 2). This is mainly due to the reluctance of wealthy countries to donate the lion’s share of their vaccines and to waive the patent protections for vaccines—the latter makes research and development much more difficult. Given this, there are two challenges to this present debate. The first is whether we should waive the patent, and the second is what we owe to one another in the interest of global justice. I seek to answer these questions using my framework of cosmopolitan principles of justice—henceforth labeled CPJ. With this, precedence is useful to understand the issue.

In 2002, there was a debate about whether patents should be lifted to decrease prices for the anti-retroviral treatment for HIV in Africa (Barnard, 2002). This was further exemplified by the legal action taken against the South African government by the Pharmaceutical Manufacturers Association of South Africa and 39 other international pharmaceutical companies (Sidley, 2001). There were multiple arguments in favor of this change to alleviate suffering. Some claimed a utilitarian benefit—that individuals would benefit more on sum if patent protections were to be lifted (Barnard, 2002). Some argued against the lifting based on a Lockean premise of intellectual property (Barnard, 2002). The South African government won the case because the TRIPS agreement and its flexibilities are provided for the sake of the public good (Barnard, 2002). This led to the DOHA declaration, which states in part that:

4. We agree that the TRIPS Agreement does not and should not prevent Members from taking measures to protect public health. Accordingly, while reiterating our commitment to the TRIPS Agreement, we affirm that the Agreement can and should be interpreted and implemented in a manner supportive of WTO Members’ rights to protect public health and, in particular, to promote access to medicines for all.

...

- 5 (c). Each member has the right to determine what constitutes a national emergency or

other circumstances of extreme urgency, it is understood that public health crises, including those relating to HIV/AIDS, tuberculosis, malaria, and other epidemics, can represent a national emergency or other circumstances of extreme urgency. (World Trade Organization [WTO], 2001)

This case will be useful in the application of the established framework (CPJ), given that there is a question of feasibility with moral claims. From this, a general discussion of distributive justice is needed to set a foundation for this debate.

There are numerous formulations for the nature of justice and what we owe to one another. The first question is on the balance of rights, as the debate on what we distribute tends to entail physical goods that are limited in nature. These are goods such as education, necessities, and health. Once we understand what we distribute, there is a meta-ethical question on the pre-conditions of when to distribute (Olsaretti, 2018). I argue that one of the most important questions during this pandemic is the question of health—specifically, the distribution of vaccines. Many argue that these are the same because vaccines are a way to access health (Rueda-Barrera, 2021). This includes the debate on the patent waiver as a means to access health. This is not simply a debate on the effectiveness but a bipartite discussion of the extent of the global obligation to distribute. This is because the solution to this problem is for wealthier countries to donate to less well-off countries and promote policies that decrease inequitable access, such as waiving the patent.

It is important to note that at the time of this writing, the current patent waiver agreed upon on June 17, 2022, does not include the waiver on medical technology and does not provide sufficient tools or information to create the vaccine (WTO, 2022). This means that active and complete technology transfer is not possible under the current waiver (Doctors Without Borders, 2022). Moreover, the reason for waiving the vaccine patent has now moved from a need for the supply of vaccines to a need for countries to have the manufacturing capacity for this pandemic (Mercurio & Upreti, 2022). Whether or not supply is needed now is not the main question of this paper, but rather the question of obligation of developed countries towards developing countries, especially in light of concerns of racial inequality, which are non-economical but are

fundamentally questions of justice. Moreover, there are also legal and ethical concerns about companies increasing the price of vaccines due to having exclusive patent rights, which further block access (Coward et al., 2023). This means that now more than ever, there is a need to ground the obligation of wealthier countries to less developed countries as a form of public good rather than a market commodity. As such, any reference to the waiver in this analysis pertains to a full waiver in line with the interest of the Philippines and other developing countries.

This paper has one main claim—that vaccine patent protections are unjust and must be waived as a necessary condition for justice. Although other factors may need to obtain for this to be a sufficient condition for justice (e.g., proper distribution by governments), a waiver is an important and crucial step toward achieving justice during the pandemic. This is argued by grounding the obligation to waive patents, share technology, and, consequently, distribute vaccines using John Rawls' framework as he seeks to provide a coherent system for states to distribute goods. From this, I shall address the limitations of this framework and seek to solve them through a conception of social justice cosmopolitanism, thereby applying the framework globally in the interest of justice, which allows for the argument that institutions should lift the patent and be revised if necessary.

The first three sections will be devoted to presenting the principles of justice and arguing against the limitations of the framework. The next two sections will be dedicated to establishing the revised moral framework. The proceeding section will be for analyzing the patent waiver and the necessary obligations of institutions. The last section will contain concluding remarks.

## **An Overview of the Political Arguments of John Rawls**

Rawls (1999a) posited that to exist within a functional society, there must be an agreement between what is valuable and what is not. This assumes that people are not swayed by unreasonable sentiments (e.g., greed, will to harm). In his system, people should be able to access primary goods to achieve this moral equality—goods that allow individuals to access two basic experiences of the human condition: (a) the

ability to have a sense of justice and (b) the capacity to decide what is meaningful and valuable in life and existence. Examples of primary goods are basic rights and liberties (food, water, shelter), freedom of movement and choice (occupation), the ability to run for office or to move from social positions assigned from birth, income or wealth, and institutions that promote dignity and self-respect of human beings. The goal of this system is a reflexive equilibrium—a political system wherein the laws that shape our society perfectly cohere with what is just. Given the framework of a stable society, the theory of justice as fairness can be discussed. Rawls (1999a) cited two precepts for equitable distribution:

1. Each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others.
2. These are to be attached to officials and positions under conditions of fair equality of opportunity and secondly under this principle, and crucially, if there is to be social and economic inequality, that must be to the benefit of all.

This presumes some form of reasonable inequality, which ultimately helps the most vulnerable. Rawls (1999a) coined this as the “maximin” principle. What is then considered basic liberty is called a primary good. Rawls (1999a) claimed that these are in the interest of rational beings, and there is an assumption that there is a need for these goods. The last idea that needs to be discussed is the veil of ignorance where we imagine a world as a third party would without prior knowledge of the following: (a) social status (e.g., race, gender, wealth) and (b) the political system of that society, class structure, or economic development. However, people do know the following: (a) that human beings are interested in the acquisition of primary goods by their nature, (b) that there are limited resources, and this must be distributed as such, and (c) general uncontroversial facts of economics and psychology (Rawls, 1999a). From this, we can derive principles from which we can distribute goods fairly. One of which is that people have the right to primary goods. His work is a way to ground the obligation to distribute goods in a fair and equitable way. There are limitations to its use in matters of global justice that need to be enumerated to argue against. Recent literature has used

the Rawlsian framework to discuss the patent debate and vaccine distribution (Collste, 2022). The issue with this approach is that it does not justify its use within pre-existing limitations and merely asserts that there are philosophers arguing against these limitations without arguing for its legitimate use, which is the gap I seek to close alongside the patent debate.

### Limitations on the Global Application of the Framework

Two aspects of this framework require justification: (a) the use of the framework itself concerning health and (b) the limitations of this framework in a global pandemic.

Daniels (1985) argued that a Rawlsian framework is inapplicable to problems of healthcare distribution. The reason for this is that healthcare needs vary among individuals, especially across different demographics (e.g., older individuals tend to have different healthcare needs than younger individuals); hence, this economic and social good cannot be distributed as efficiently or equally, unlike other basic goods such as food or shelter (Daniels, 1985).

Although this critique applies to a majority of healthcare systems, the line is not as clear as to whether this applies to vaccines. This is because the vast majority of individuals need vaccines as a form of inoculation, including those who are immunocompromised, elderly, or pregnant (Center for Disease Control and Prevention, 2024 ). Hence, the critique that Daniels posed regarding a difference in healthcare needs does not apply. Moreover, other philosophers argue that the Rawlsian framework largely pertains to economic and social goods, not goods that pertain to health (Daniels, 1985). From this, I argue that vaccine patent protections have both economic and moral dimensions, as vaccines are both a means for profit and a way to access a fundamental good, which is health. Hence, a Rawlsian framework can be applied as well.

This framework has been used to discuss the justification of health and justice, but there are limitations in its application to a global pandemic—with Rawlsian critics claiming that the scope of the principles of justice can only be applied to states within their government (Brock, 2010). Therefore, the limits of the principles of justice are within the borders of



a country. This seems to be the position that Rawls accepts as well in his Theory of Justice—that his basic structure and principles are specifically a political demand as opposed to an international one, and if it is to be extended, then it only applies to discussions of Just War. In his other work, “The Law of Peoples,” Rawls (1999b) discussed the possibility of a cosmopolitan view. Similar to the basic structure outlined above, he claimed that there must be reasonable pluralism concerning differing views in what he called a possible international utopia. Here, he stated that there are three conditions for a realistic utopia: (a) individuals are reasonable; (b) there must be some notion of a social good or an end that is to be achieved; and (c) there must be a reasonable unity for individuals to focus on one particular goal. He then elucidates the characteristics of “peoples.” These are the obligations and duties of individuals in an international community, which are as follows (Rawls, 1999b):

1. Peoples are free and independent, and this is to be respected by other peoples.
2. Peoples are to observe treaties and undertakings.
3. Peoples are equal and are parties to the agreements that bind them.
4. Peoples are to observe a duty of non-intervention.
5. Peoples have the right to self-defense but no right to instigate war for reasons other than self-defense.
6. Peoples are to honor human rights.
7. Peoples are to observe certain specified restrictions in the conduct of war.
8. Peoples have a duty to assist other peoples living under unfavorable conditions that prevent them from having a just or decent political and social regime.

For those that do not fulfill the conditions of what is considered reasonable, the restrictions do not apply. This leads me to the discussion of cosmopolitanism concerning this international framework.

### Ways to Reject Rawls’ Limitations

A simplified argument extracted from John Rawls’ (1999b) work “The Law of the Peoples” is as follows:

P1: The Rawlsian Principles of Justice only apply to countries that fit the criteria as “reasonable peoples.”

P2: Reasonable peoples are assumed to function under free market and liberal principles—effectively democracies.

C1: The principles of justice cannot apply to all countries, but only to a select few who fit the criteria.

There are several ways to reject this argument to make way for a cosmopolitan interpretation of Rawls. The first is to reject P1. Pogge (1994) adhered to this strategy by claiming that the principles of justice do not apply to a small subset of countries but rather to all peoples. This is because the initial claims of the principles of justice assume that arbitrary relations are not considered in the original position. Factors such as race, gender, and ethnicity must not hold claim to when we distribute. Given this, Pogge (1994) claimed that where one is born is an arbitrary restriction; thus, it should not be considered when using the Rawlsian framework. Another strategy is to reject P2. Macleod (2006) claimed that the list of what is considered reasonable must be expanded to account for countries that have different systems of governance and to limit the list of individuals wherein the Principles of Justice apply do not allow for a cohesive system of human rights. Another way to reject P2 is to reject the criterion of “Peoples” as the avenue of moral concern and instead claim that all individuals and not just “Peoples” should be considered under the principles of justice (Pogge, 2012).

The last and most difficult one is to reject the conclusion and argue that the limitations do not entail the principles of justice are limited. A way to reject this is to argue that the limitations are impermanent, and countries can eventually become democracies (Bernstein, 2006). Therefore, the limitations in the grand scheme of justice are arbitrary. These arguments show that the Rawlsian principles can be applied globally, and to the extent of a moral obligation, I argue that it should apply globally under the principles of justice.

I posit that in the debate regarding vaccine patent protections, Pogge’s framework is appropriate for two reasons: (a) this is in line with the formulation

of Rawls in the principles of justice, which assumes that we must operate under a veil of ignorance; and (b) although the limitations claimed are largely arbitrary, Pogge (2012) distinguished between legal obligations, which is a question on feasibility, and moral obligations, which is a question of duty. This is relevant as other approaches to solve this debate, such as those which argue against the lifting based on infeasibility, discuss legal claims and not moral ones, which are two separate debates (Bacchus, 2021). Although there is value in discussing how this can be implemented to benefit all, the argument is not entirely contingent upon it. Given this, he provided a solution to this dilemma through the lens of social justice cosmopolitanism. With this, some discussion on the features of cosmopolitanism is necessary to ground the extent of the obligation and the form of cosmopolitanism I advocate.

### Cosmopolitanism and its Varieties

The variation that summarizes the cosmopolitan view best for this research is the one posited by Pogge (1992). The first characteristic of cosmopolitanism is individualism, wherein the ultimate units of moral concern are individual human beings rather than collectives such as tribes, families, and state borders. The second characteristic is universalizability—that the concern based on individuality must be equal amongst all human beings regardless of class, gender, beliefs, and other factors outside one's control. The third is that this concern is of a “global force” and is of use to everyone, not just those in their immediate vicinity.

There are two ways to implement this type of cosmopolitan system. The first is known in the literature as “strong cosmopolitanism,” which is a more demanding commitment to eliminate all forms of inequality globally. This includes the lack of prioritization of the treatment of other individuals (Brock, 2010). The second form is “soft cosmopolitanism,” which attempts to allow for the minimum basic needs of individuals derived from moral concern, which allows for some flexibility in global obligation (Brock, 2010). In summation, the difference between the two views is their respective commitments to redistribution—particularly the scale and the strength of the obligation to redistribute. Pogge

(2012) adhered to a form of soft cosmopolitanism as he claimed it is unreasonable to assume that individuals would care for strangers to the same extent as their own family and friends because of basic human connection. Therefore, it is reasonable to reject strong cosmopolitanism as the moral obligation is too difficult to sufficiently adhere to.

In practice, strong cosmopolitanism would fail as well because this would mandate countries such as the U.S. to care for developing countries such as the Philippines to the same degree regardless of whether they can feasibly do so. This would be difficult to do as (a) this violates a form of social contract that the state is beholden to its immediate people, and (b) it is unreasonable for a country to fulfill its obligation without being economically stable first. Although strong cosmopolitanism is ideal, it will likely fail to achieve its goal. Soft cosmopolitanism, on the other hand, is an easier obligation to fulfill and can be fulfilled given the surplus of vaccines—with the fulfillment of the obligation being through donations or, better yet, waiving the patent to achieve the same goal.

Given this, Pogge (2012) provided a way to implement a view of cosmopolitanism without compromising reasonable exceptions. This is known as social justice cosmopolitanism. This form of cosmopolitanism places institutions and countries at the forefront of providing for the basic needs of those who cannot afford them. Given this, it is the institutions that have the strongest obligation to prevent human rights abuses and change their design to promote good. He adds that this is a two-way duty—a positive duty to do good and a negative duty not to harm. Individuals also have an obligation to ensure that they can keep institutions in check through mechanisms (e.g., voting) if applicable. This is a positive duty that inheres with the framework of social justice cosmopolitanism as needed.

I now elucidate three reasons why it is valid to combine the two frameworks – namely, (a) Pogge's cosmopolitanism and (b) John Rawls's *Principles of Justice*. The first reason is that this version of cosmopolitan justice leads to the goals of Rawls as stated in *Theory of Justice* as he wrote:

Justice is the first virtue of social institutions as truth is system of thought. A theory however elegant and economical must be rejected or

revised if it is untrue. Likewise, laws and institutions no matter how efficient or well-arranged must be reformed or abolished if unjust. Each person possesses an inviolability founded on justice that even the welfare of society cannot override. For this reason, justice denies the loss of freedom for some is made right by the good shared by others. It does not allow that the sacrifices imposed by a few are outweighed by the larger sum of advantages enjoyed by many. Therefore, in a just society, the liberties of equal citizenship are taken as settled; the rights secured by justice are not subject to political bargaining or to the calculus of social interest. The only thing that permits us to acquiesce in an erroneous theory is the lack of a better one; analogously, an injustice is tolerable only when it is necessary to avoid an even greater injustice. Being the first virtues of human activities, truth and justice are uncompromising. (Rawls, 1999a, p. 4)

Rawls (1999a) suggested that his theory is based on a system of holding social institutions accountable. This is what social cosmopolitanism supports. The difference is there is an added obligation for citizens to hold these institutions accountable, including transnational and national arrangements (Pogge, 2012). Second, a framework of cosmopolitanism allows for the interest of justice to be applied more broadly and to all countries without unnecessary restrictions. This is extremely important in the context of a patent debate amidst a global pandemic. The loss of health through lack of access cannot be outweighed by upholding systems such as sovereignty (Pogge, 2012). The purpose of justice is to revise and break down those institutions; cosmopolitanism is a way to do this. Finally, the injustice in mandating developed countries to help developing countries, possibly without reciprocation, is the tolerable injustice Rawls pointed out. If this framework is not applied broadly, then there is no room for his system to prevent a greater injustice, thereby depriving access to those who need it more.

With this, CPJ is established. I can now claim that the principles of justice can be applied globally, and it is legitimate to do so. Now, we can proceed with the application.

## **Cosmopolitan Principles of Justice: An Analysis of the Patent Waiver**

My proposed framework (CPJ) accomplishes two things: (a) it allows for the argument to clarify the possessor of the duty (i.e., institutions) and the object of that duty (i.e., individuals), which I will relate to the context of the Philippines; and (b) the principles of justice posit that the waiver is just, and not waiving is unjust. This is because the waiver will likely allow for greater access. With this, I will pinpoint the obligations of institutions and the requisite checks and balances that need to be maintained so that equal or greater inequality through the waiver is avoided.

Given that this argument is seemingly contingent on increasing access, which the current waiver fails to do, and the most prominent counterargument would be that waiving patents will decrease the incentive for innovation, thereby leading to a lack of vaccines and increasing inequity, I point to the case of South Africa to rebut the objections. As stated earlier, the companies lost the battle in the eyes of the court on the basis of public health, which is of primary importance. Thereafter, the companies allowed the state a compulsory license, which allows for states to create a generic version of the drug without the consent of the original patent holder, which led to a drop in the price of these costly drugs, thus saving more lives (Hoen et al., 2011). Although this policy was no panacea, it aided in curbing this epidemic alongside research that had led to a dramatic increase in access to these treatments, amounting to an estimated five million people in developing countries (Hoen et al., 2011).

The case shows that despite possible profit loss, pharmaceutical companies still have the incentive to innovate as they still create medicines to this day despite waivers and flexibilities (Nocera, 2021). This also shows that policies which allow for more equitable access are effective and can be implemented properly. Although a patent waiver is different from a compulsory license, some claim that a pure waiver will be more effective (Gurgula, 2021). This is because a compulsory license is based on a product-to-product basis, and with the bureaucratic nature of intellectual property rights (IPR), this may delay access to vaccines, which would otherwise be mitigated by a broad patent waiver (Gurgula, 2021). This case, along with others in the Asia-Pacific region, will inform my

analysis as I apply CPJ. To proceed, I will discuss the role of international institutions and why the support for waiving is justified, as this is the starting point for social justice cosmopolitanism.

International institutions such as the UN and the WTO must adhere to social justice cosmopolitanism to provide for reasonable access. This is grounded on international human rights law, with the states that hold most of the access to vaccine patents (e.g., the U.K., U.S., Switzerland) being beholden to the principles of those laws. This includes the Universal Declaration of Human Rights (1948), specifically Article 25, which endorses the right of every person to a standard of living that is adequate for health and well-being, including medical care. These countries have also signed and ratified the International Covenant on Economic and Social and Cultural Rights of 1986. Article 12 of this covenant pushes forward the right of everyone to enjoy the highest attainable standard of physical and mental health, including those necessary for the prevention, treatment, and control of epidemic, endemic, occupational, and other diseases (Reidel, 2011). Although these treaties are not legally binding, in all cases, these documents, at a minimum, show a commitment to the protection of human rights on an individual basis, which is cosmopolitan.

To apply the principles of justice, given that they explicitly agree to the same values, there is a moral justification for them to waive the patent. This is in line with the first principle of justice, which states that every person has a right to the most extensive and basic liberties. Health is one of those liberties as this is a primary good. An extension to this list could be freedom of movement, freedom of choice, and occupation, because vaccination is required in entering some areas and being eligible for some jobs (Lema, 2021). This analysis still applies to countries that are not democracies, such as China, as signatories of both charters. During the COVID-19 pandemic, they seem to adhere to the obligation to aid in the crisis as well, despite not being a liberal country, in the case of donating Sinovac vaccines to the Philippines in 2021 (Rocamora, 2021). It is important to note that the Philippines had to be reliant on these obligations as it had no way to manufacture its own vaccines (Department of Health, 2021). This shows that there was a duty fulfilled to provide for those without resources. There is an agreement on reasonable access

and that countries that are not democracies can still be constrained under some form of justice.

On the second principle of justice—on being attached to offices of fair equality of opportunity—I argue that the vaccine patent does not allow for this. Two pieces of analysis are relevant here: (a) on vaccine patents in general and (b) on the patent system at the level of states. Vaccine patents, in general, do not allow other countries to access these goods as the companies that hold these patents are now able to decide what can and cannot be done with their goods and pursue legal action against the state that goes against their demands in spite of legitimate cause.

In 2006, Pfizer sued the Philippines for importing the drug Norvasac from India (Gerhardsen, 2006). The government registered this with the Food and Drug Administration without the consent of Pfizer while the patent was still valid, thereby supposedly violating this patent. In defense, the Philippine government claimed that this was permissible on the grounds of TRIPS flexibilities (Gerhardsen, 2006). This was eventually resolved, but this informs the possible actions that could be taken if the patent is not waived for vaccines despite TRIPS flexibility (Yu, 2006). If the vaccine patent is not waived, this may provide an impetus for corporations to do the same in the present day. Corporations and richer states may not allow for fair equality of opportunity as legal action can be taken against disadvantaged countries, thereby restricting access (Cerilles & Fernan, 2021). Moving on to the patent system on the level of states, it is unclear whether the innovation is worth the restriction of technology transfer. Philippine patent laws, including signatories for the TRIPS agreement and other basic IPRs to protect creative and technological innovation, have been argued to block access, especially in the pharmaceutical industry (Cullet, 2007). This is especially true in developing countries as this blocks access to medicine in some cases due to high prices (Oke, 2013). In practice, patents are needed to ensure innovation, but the line is unclear when research is weak, such as in the Philippines, where patents tend to stifle innovation, given that research and technology transfer is limited (Cabilo, 2009). Worse still, some argue that patents stifle innovation through the process of changing minor details to renew the patent, a prominent issue in patent law known as “evergreening” (Per, 2007). In cases such as these, there needs to be a clear balance between promoting innovation,



competition, and access (Cruz, 2008). Thus, on local and international levels, patents, in most cases, do not allow for fair equality of opportunity and need to be improved and held into account.

The next question is if IPRs allow for a reasonable inequality—specifically vaccine patent protections. There are three types of inequality put forward by vaccine patent protections. The first is the inequality that is inherent in developed vs. developing countries due to historical advantage (Pogge, 1994). The question then becomes whether the patent worsens the inequality for no due advantage. I answer this in the affirmative for three reasons:

1. This increases the power of those who hold patents (i.e., developed countries) because of superior research and historical advantage (Oddi, 1987).
2. The borrowing privilege of richer countries ensures that there is an advantage given to those already favored, thereby further increasing inequality (Pogge, 2001).
3. There is a structural injustice that inheres within these global institutions and initiatives: World Bank through concessionary lending, which favors richer countries, COVAX with its lack of funding and failure to secure vaccines for poorer countries relative to richer countries, and TRIPS, which favors economically wealthy states (Jecker, 2022).

We must then revise the system to remove inequality.

The second type of inequality exists between the corporation and the consumer. This favors the consumer more as the greater beneficiary, given that the goods will be cheaper while the corporation loses profits. I argue that this is a fair inequality because it benefits all for two reasons: (a) a large amount of the funding for corporations was public funds, with biotech companies such as Pfizer already profiting heavily from the vaccine production, amounting to billions of dollars (Nature, 2021); and (2) lower-income countries are lagging behind with a 30% vaccination rate whereas wealthier countries have a substantially greater vaccination rate at 70% (Ferranna, 2023). This is because patent protections can last for 20 years (Murphy, 2012). This is harmful because herd immunity at 70% cannot be reasonably achieved with large inequalities such as these (Althabhwani &

Al-Ghetaa, 2022). The amount lost by this pandemic (totaling \$100,000,000) to create the vaccine should offset the loss of these companies (Thambisetty et al., 2021).

The last form of inequality is that of states in relation to individuals. This exists when governments can decide what to distribute and to whom. In this case, the object of distribution is vaccines. Lifting the patent will still allow for this inequality as governments have the resources to create the vaccine and will enact policies on how to distribute it. Broadly construed, this is a reasonable form of inequality as it allows for fair equality of opportunity, assuming that a reasonable baseline allows access (Brock, 2010). This also benefits all, as governments can enact emergency powers during a health crisis to improve facilities and distribution. Take, for example, the COVID-19 Vaccination Program Act of 2021, which allows for the efficient distribution of vaccines through local government units and the implementation of vaccine cards to limit the spread of the virus (COVID-19 Vaccination Program Act, 2021). This system would not be possible without a centralized government that assumes that some people are more powerful than others but have more responsibilities (Rawls, 1999a). In all three instances, vaccine patent protection must be lifted because it either allows for reasonable access to vaccines or allows for reasonable inequality that benefits all. Given this, vaccine patents fail on both principles of justice and, therefore, should be considered unjust.

To extend this analysis further, cosmopolitanism suggests that institutions are the ones perpetuating this inequality, including global and domestic IPRs, the unequal privilege to richer countries in the WTO, and the TRIPS waiver not being applied equally. In line with this framework, I will then proceed to discuss possible solutions to the problem through general change. There are two ways this is possible: (a) by revising the patent system domestically so as to not perpetuate inequality and (b) by clarifying the relationship between patents and unprecedented global issues while providing solutions. This is important because beyond arguing why this mechanism is just or unjust, cosmopolitan justice entails that we at least propose a change in systems as well (Pogge, 2012).

Note that this essay is primarily concerned with arguing in relation to the vaccine patent waiver. I argue that there is value in changing the national IPR system. The purpose of the patent waiver, as discussed

during the Senatorial hearing and as stated by nations, is to manufacture our own vaccines. If this is achieved without a revision of the domestic patent system, the injustice perpetrated on the international level may remain, which would defeat the purpose of waiving in the first place as it leads to an equal or greater injustice.

Domestically, the best way to protect the rights of all to the vaccine once produced is to uphold laws that are pro-access or revise when necessary. Laws such as the “Universally Accessible Cheaper and Quality Medicines Act” must be maintained as they ensure that “frivolous changes” to medicines are not grounds for a renewal of patents and allow for government use in cases of public health crises (Universally Accessible Cheaper and Quality Medicines Act, 2008). This is done without infringing on competition in the long term, which is important in keeping prices down (Cruz, 2008). Although it is unlikely that these arguments will still hold, it is still important to ensure that “home-grown vaccines” are freely available. In this case, it is important that courts ensure that laws such as these are implemented properly as an institution and that individuals hold these lawmakers accountable through checks and balances.

Internationally, there must now be a clear distinction between patents applying to domestic matters and those that concern international matters. This can be done by understanding the reason for the patent mechanism. The COVID-19 crisis has exposed loopholes in the patent system when it concerns emergency situations (Thambisetty et al., 2021). This concerns the protection of innovation and the power imbalance between developed and developing countries.

It is evident that innovation was not an end in itself but rather a means to secure the needs of society and the optimal distribution of goods and services (Althabhwai & Al-Gheeta, 2022). Moreover, patent protections do inhibit supplies to some degree. Murez (2021) showed that the economic losses will outweigh the benefits of innovation, specifically that global COVID-19 vaccination could have saved over \$21,000 dollars per patient, which is as high as 150-300 times the cost of vaccination. With this, the emergence of the pandemic caused a drop in the GDP of G20 countries by less than 2.5% for every quarter of this pandemic (Althabhwai & Al-Gheeta, 2022). This includes the countries that have the strongest claims to innovation. This data shows that ending the pandemic outweighs

the economic loss for these corporations regardless of whether it inhibits innovation. Furthermore, a recent systematic review states:

The main finding of this review is that the stronger pharmaceutical monopolies created by TRIPS-plus intellectual property rules are generally associated with increased drug prices, delayed availability, and increased costs to consumers and governments. There is evidence that TRIPS flexibilities can facilitate access to medicines although their use is limited to date. (Tenni et al., 2022, p. 1)

Additionally, Abbott (1998) claimed that the foundation of international patent protections is to preserve international trade and not innovation. This shows that the innovation argument does not hold in cases such as a pandemic. The patent waiver debate has also shown the ineffectiveness of distribution for low-income countries as most patents are foreign-owned, which means that instead of innovation, the Philippines will be more concerned with acquiring patents (Sariola, 2021). In this instance, the revision is clear: a patent waiver must be implemented by the WTO, with states acting as institutions to decrease inequality.

Another point of revision is institutions such as the World Bank and COVAX, as they perpetuate the injustice stated above. There are two ways to remedy this. For the World Bank, the solution is to revise the standards for lending to support self-determination and prevent predatory lending. For COVAX, there needs to be a greater attempt to fund and allocate vaccines equally rather than allowing rich countries to purchase them at will (Jecker, 2022).

This duty does not end with the waiver, but this necessitates the correct implementation of these policies. There are numerous problems with the current waiver. This includes limitations in sharing manufacturing processes and formulas, thereby minimizing production (Robbins, 2022). A revision will likely require another consensus alongside the initial policy. The same mechanisms will apply domestically to hold international actions accountable, as states are primarily beholden to individual interests (Rawls, 1999a). The duty is, therefore, to ensure that domestic interest and international interests align with social justice.

## Conclusion

What the COVID-19 pandemic has shown is that cooperation is paramount to survival. Whether the current waiver needs to be revised to include technology and other medicines for proper implementation is still being debated. The mechanics of this will require the expertise of economists, scientists, and policymakers, but practicality is not the only dimension of this debate. There is a principled aspect that demands an answer. In this essay, I have proven one main claim: vaccine patent protections are unjust and should be waived using a revised framework of John Rawls (CPJ). This was done by systematically arguing that (a) the framework of John Rawls should be applied globally and (b) that a revision pertaining to social justice cosmopolitanism is appropriate for this framework. From this, it was legitimate to argue that the patent waiver is just. Given that CPJ requires a revision of institutions if the mechanism is unjust, I proposed some revisions in line with what I have proven, which may guide policy.

## References

- Abbott, F. (1998). The enduring enigma of TRIPS: A challenge for the world economic system. *Journal of International Economic Law*, 1(4), 497–521. <https://doi.org/10.1093/jiel/1.4.497>
- Al Jazeera. (2021, October 19). *Manila Lockdown: One of the longest COVID lockdowns in the world*. <https://www.aljazeera.com/program/witness/2021/10/19/manila-lockdown-one-of-the-longest-covid-lockdowns-in-the-world>
- Althabhwai, N. M., & Al-Ghetaa, A. A. K. (2022). The COVID-19 vaccine patent: A right without rationale. *Medical Humanities*, Mar; 49(1):128-133.
- Bacchus, J. (2021). *An unnecessary proposal: A WTO waiver of intellectual property rights for COVID-19 vaccines*. Cato.org. <https://www.cato.org/free-trade-bulletin/unnecessary-proposal-wto-waiver-intellectual-property-rights-covid-19-vaccines>
- Barnard, D. (2002). In the High Court of South Africa, Case No. 4138/98: The global politics of access to low-cost AIDS drugs in poor countries. *Kennedy Institute of Ethics Journal* 12(2), 159–174. <https://doi.org/10.1353/ken.2002.0008>
- Bernstein, A. R. (2006). A human right to democracy? Legitimacy and intervention. In Rex Martin & David A. Reidy (Eds.), *Rawls's Law of Peoples: A Realistic Utopia?* (pp. 278–298). Blackwell. <https://doi.org/10.1002/9780470776612.ch16>
- Brock, G. (2010). *Global justice: A cosmopolitan account*. Oxford University Press.
- Cabilo, Z. M. D. (2009). Philippine intellectual property rights under the World Trade Organization, 1995-2005: Implementing the flexibilities under a TRIPs-Plus commitment. *Kasarinlan: Philippine Journal of Third World Studies*, 24(1-2), 61–95.
- COVID-19 vaccination. (2024, March 8). Center for Disease Control and Prevention. <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/recommendations/immuno.html>
- COVID-19 vaccination program act of 2021. (2023, July 27). <https://www.officialgazette.gov.ph>
- <https://www.officialgazette.gov.ph/downloads/2021/02feb/20210226-RA-11525-RRD.pdf>
- Cerilles, M. C., Jr., & Fernan, H. G. (2021). Analysing the interplay between the right to health and pharmaceutical patent rights in the introduction of a COVID-19 vaccine into the Philippines. *International Journal of Human Rights in Healthcare*, 14(3), 240–254. <https://doi.org/10.1108/ijhrh-09-2020-0075>
- Collste, G. (2022). Where you live should not determine whether you live: Global justice and the distribution of COVID-19 vaccines. *Ethics & Global Politics*, 15(2), 43–54. <https://doi.org/10.1080/16544951.2022.2075137>
- Cowart, T., Rashi, T., & Bock, G. L. (2023). Should pharma companies waive their COVID-19 vaccine patents? A legal and ethical appraisal. *Laws*, 12(3), Article No. 47.
- Cruz, C. E. (2008). The patent system and the quest for affordable medicines. *DLSU Business & Economics Review*, 18(1), 63–72. <https://doi.org/10.3860/ber.v18i1.698>
- Cullet, Philippe. (2007). Human Rights and Intellectual Property Protection in the TRIPS Era. *Human Rights Quarterly*. 29. 403-430. 10.1353/hrq.2007.0014.
- Daniels, N. (1985). *Just health care*. Cambridge University Press.
- Department of Health. (2021). *Why does the Philippine government need to buy different brands of vaccines?* <https://doh.gov.ph/node/28132#:~:text=Currently%2C%20the%20Philippines%20does%20not,and%20manufacture%20its%20own%20vaccines>
- Doctors Without Borders. (2022). *Lack of a real IP waiver on COVID-19 tools is a disappointing failure for people*. <https://www.msf.org/lack-real-ip-waiver-covid-19-tools-disappointing-failure-people>
- Ferranna, M. (2023, October). Causes and costs of global COVID-19 vaccine inequity. In *Seminars in Immunopathology* (pp. 1-12). Springer Berlin Heidelberg.
- Gerhardsen, T. (2006). *Pfizer fights IP flexibilities in the Philippines*. People's Health Movement. <https://archive.phmovement.org/en/node/186.html>



- Gurgula, O. (2021). Compulsory licensing V the IP waiver: What is the best way to end the COVID-19 pandemic? (the South Centre Policy Brief No. 104). *SSRN Electronic Journal*. <https://doi.org/10.2139/ssrn.3944192>
- Hoen, E. 't, Berger, J., Calmy, A., & Moon, S. (2011). Driving a decade of change: HIV/AIDS, patents and access to medicines for all. *Journal of the International AIDS Society*, 14(1), 15. <https://doi.org/10.1186/1758-2652-14-15>
- Jecker, N. S. (2022). Global sharing of COVID-19 vaccines: A duty of justice, not charity. *Developing World Bioethics*.2023; 23: 5–14. <https://doi.org/10.1111/dewb.12342>
- Macleod, A. (2006). Rawls's narrow doctrine of human rights. In *Rawls's Law of Peoples: A realistic utopia?* Blackwell Pub.
- Mercurio, B., & Upreti, P. N. (2022). From necessity to flexibility: A reflection on the negotiations for a TRIPS waiver for Covid-19 vaccines and treatments. *World Trade Review*, 21(5), 633–649.
- Murez, C. (2021). *Average Covid hospitalization is 150 times more expensive than vaccination*. USNews. <https://www.usnews.com/news/health-news/articles/2021-09-10/average-covid-hospitalization-is-150-times-more-expensive-than-vaccination>
- Murphy, D. J. (2012). Are intellectual property rights compatible with Rawlsian principles of justice? *Ethics and Information Technology*, 14(2), 109–121. <https://doi.org/10.1007/s10676-012-9288-8>
- Nature. (2021). *It's time to consider a patent reprieve for COVID vaccines*. <https://www.nature.com/articles/d41586-021-00863-w>
- Nocera, J. (2021, May 11). *There's a precedent for overriding patents on vital medications*. Bloomberg. <https://www.bloomberg.com/news/articles/2021-05-11/aids-drugs-in-south-africa-shows-precedent-for-overriding-patents-on-medications>
- Oddi, A. S. (1987). The international patent system and third world development: Reality or myth? *Duke Law Journal*, 1987(5), 831–878. <https://doi.org/10.2307/1372691>
- Office of the High Commissioner for Human Rights. (2023, August). *Global North States' persistent refusal to waive COVID-19 vaccine intellectual property rights violated non-discrimination guarantee, UN Committee warns*. <https://www.ohchr.org/en/press-releases/2023/08/global-north-states-persistent-refusal-waive-covid-19-vaccine-intellectual>
- Oke, E. K. (2013). Using the right to health to enforce the corporate responsibilities of pharmaceutical companies with regard to access to medicines. *Journal of Health Diplomacy*, 1(1), 1–15.
- Olsaretti, S. (2018). The idea of distributive justice. In Serena Olsaretti (Ed.), *The Oxford handbook of distributive justice* (pp. 1–11). Oxford University Press.
- Per, J. (2007). *IP views: The clever art of evergreening*. IP Law. <http://iplaw.ph/ip-views/The-Clever-Art-Evergreening.html>
- Pogge, T. (1992). Cosmopolitanism and sovereignty. *Ethics*, 103(1), 48–75. <https://doi.org/10.1086/293470>
- Pogge, T. (1994). An egalitarian law of peoples. *Philosophy Public Affairs*, 23(3), 195–224. <https://doi.org/10.1111/j.1088-4963.1994.tb00011.x>
- Pogge, T. (2001). Priorities of global justice. *Metaphilosophy*, 32(1/2), 6–24. <https://doi.org/10.1111/1467-9973.00172>
- Pogge, T. (2012). Cosmopolitanism: A path to peace and justice. *Journal of East-West Thought*, 4(2), 9–32.
- Rawls, J. (1999a). *A theory of justice. Revised Edition*. Belknap.
- Rawls, J. (1999b). *The law of peoples*. Harvard University Press.
- Recommending the adoption of the recommendations and their immediate implementation*. (2021). <https://legacy.senate.gov/ph/lisdata/3385432278.pdf>
- Reidel, E. (2011). International covenant on economic, social and cultural rights (1966). In *Max Planck encyclopedia of public international law*. Rudiger Wolfrum - Oxford University Press. <https://doi.org/10.1093/law:epil/9780199231690/e836>
- Lema, K. (2021, November 12). *Philippines to require vaccination for employees working on-site*. Reuters. <https://www.reuters.com/world/asia-pacific/philippines-require-vaccination-employees-working-on-site-2021-11-12/>
- Robbins, R. (2022, June 17). W.T.O. countries agree to a limited relaxing of patent protections on coronavirus vaccines. *The New York Times*. <https://www.nytimes.com/2022/06/17/business/wto-covid-vaccine-patent.html>
- Rocamora, J. (2021). *Ph to get 2m more China-donated Sinovac doses*. Philippine News Agency. <https://www.pna.gov.ph/articles/1158764>
- Rueda-Barrera, E. A. (2021). The waiver of COVID-19 vaccine patents: A fairness-based approach. *Journal of Global Ethics*, 17(3), 367–374. <https://doi.org/10.1080/17449626.2021.1998191>
- Saha, C. N., & Bhattacharya, S. (2011). Intellectual property rights: An overview and implications in pharmaceutical industry. *Journal of Advanced Pharmaceutical Technology & Research*, 2(2), 88–93.
- Sariola, S. (2021). Intellectual property rights need to be subverted to ensure global vaccine access. *BMJ Global Health*, 6(4). <https://doi.org/10.1136/bmjgh-2021-005656>
- Sidley, P. (2001). Drug companies withdraw law suit against South Africa. *BMJ*, 322(7293), 1011–1011. <https://doi.org/10.1136/bmj.322.7293.1011>
- Tenni, B., Moir, H. V., Townsend, B., Kilic, B., Farrell, A. M., Keegel, T., & Gleeson, D. (2022). What is the impact



- of intellectual property rules on access to medicines? A systematic review. *Globalization and Health*, 18(1), 1–40.
- Thambisetty, S., McMahon, A., McDonagh, L., Kang, H. Y., & Dutfield, G. (2021). The TRIPS intellectual property waiver proposal: Creating the right incentives in patent law and politics to end the COVID-19 pandemic (LSE Legal Studies Working Paper No. 06/2021). *SSRN Electronic Journal*. <https://doi.org/10.2139/ssrn.3851737>
- Universal declaration of human rights*. (1948). United Nations. <https://www.un.org/en/about-us/universal-declaration-of-human-rights>
- Universally Accessible Cheaper and Quality Medicines Act of 2008, Republic Act No. 9502 (2008). [https://lawphil.net/statutes/repacts/ra2008/pdf/ra\\_9502\\_2008.pdf](https://lawphil.net/statutes/repacts/ra2008/pdf/ra_9502_2008.pdf)
- Usher, A. D. (2020). South Africa and India push for COVID-19 patents ban. *The Lancet*, 396(10265), 1790–1791. [https://doi.org/10.1016/S0140-6736\(20\)32581-2](https://doi.org/10.1016/S0140-6736(20)32581-2)
- World Health Organization. (2023). *Philippines situation*. <https://covid19.who.int/region/wpro/country/ph>
- World Trade Organization. (2001). *Declaration on the TRIPS agreement and public health*. [https://www.wto.org/english/thewto\\_e/minist\\_e/min01\\_e/mindecl\\_trips\\_e.htm](https://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_trips_e.htm)
- World Trade Organization. (2022). *Draft ministerial decision on the TRIPS agreement*. <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q%3A%2FWT%2FMIN22%2FW15R1.pdf&Open=True>
- Yean, T. S. (2022). *The race to produce COVID-19 vaccines in Southeast Asia*. ISEAS-Yusof Ishak Institute. [https://www.iseas.edu.sg/wp-content/uploads/2022/03/ISEAS\\_Perspective\\_2022\\_29.pdf](https://www.iseas.edu.sg/wp-content/uploads/2022/03/ISEAS_Perspective_2022_29.pdf)
- Yu, J. (2006). *Pfizer vs. the Philippines*. The Free Library. <https://www.thefreelibrary.com/Pfizer+vs.+The+Philippines.-a0157194438>