

Patent Injustice and Right to Health

¹Jawad, A. M. & ²Ibhawoh, Bonny

^{1,2}Faculty of Health Science – Global Health, McMaster University
Corresponding Email: jawadam2022@gmail.com

How to cite this article: Jawad, A. M., & Ibhawoh, B. (2024). Patent Injustice and Right to Health. *Journal of Medicine, Nursing and Public Health*, 4(1), 17-36.

Abstract

This paper argues that existing intellectual property rights, specifically patents, perpetuate healthcare inequity by hindering access to essential medicines in developing nations. It identifies patent injustice, predominantly due to the Trade-Related Aspects of Intellectual Property Rights Agreement, as a key issue contributing to the healthcare disparity. Through the lens of justice theory, it critically analyses patent law justifications, illuminating their inadequacies and divergence from principles of fairness and equal liberty. The paper proposes a pattern of alteration in the rationale of patent rights, urging a transition from profit-driven motivations to principles derived from theories of justice, as advanced by Rawls, Sen, and Ubuntu philosophies. It focuses on the ethical imperative of integrating these principles into industry structures and patent systems. This novel approach prioritizes the health and well-being of all. The paper asserts that patents should be reformed to simplify equitable pharmaceutical access, highlighting the need for a systemic overhaul that de-emphasizes global health equity.

Keywords: *Right to Health; Patent; Injustice; Pharmaceuticals; Trade-Related Aspects of Intellectual Property Rights Agreement, Agreement; African Nations*

1.0 Introduction

Several African nations are apprehensive about adopting intellectual property (IP) because of its potential to hinder their access to vital medicines.¹ Despite the creation of the World Trade Organization (WTO) and the implementation of Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement two and a half decades ago, Africa continues to face significant challenges in ensuring the availability of essential pharmaceuticals.² The TRIPS Agreement forced the developing countries to establish the minimum IP protection principles, indicating that patent protection within the TRIPS Agreement has hindered access to affordable medicines in developing countries, which results in high prices and inadequate availability.³ These concerns highlight the reform of the IP agreement that focuses on equitable access to remedies

¹ W Jayashree. "Patents: an Indian perspective." *The Making of the TRIPS Agreement*. WTO library, 2015. 295-320.

² The agreement, TRIPS. "Agreement on Trade-Related Aspects of Intellectual Property Rights 15 Apr. 1994." *Marrakesh, reprinted in International Legal Materials* 33 (1994): 1125-1272.

³ M Marion, et al. "The role of intellectual property rights on access to medicines in the WHO African region: 25 years after the TRIPS agreement." *BMC Public Health* 21.1 (2021): 1-19.

in developing countries.⁴ Implementing the TRIPS Agreement highlights the urgency of promoting a more inclusive approach to global healthcare.⁵

The Agreement represents a significant challenge faced by African nations in their quest to access crucial medicines, often attributed to a phenomenon known as "patent injustice." This paper argues that the current intellectual property rights landscape, particularly the patent protection provisions within the TRIPS Agreement, unfairly hampers African nations' access to essential medicines, leading to "patent injustice." This exacerbated existing inequalities, injustices, and increased poverty in low-income countries stemming from the TRIPS Agreement and its provisions related to patent protection. The paper explores the principles of justice theory in the context of the pharmaceutical industry. It delves into the justification of patent law, ideas of justice concerned with patent rights, and the concept of patent injustice. These topics provide a deeper understanding of the complex issues surrounding IP rights and their impact on access to essential medicines in African nations. Examine principles like fairness and liberty to prioritize the welfare of marginal communities. It analyses the biases in the patent law; it suggests reforming it with justice principles and ensuring equitable pharmaceutical access for all populations.

2.0 Literature Review

2.1. Justification of Patent Law

Throughout history, the evolution of patent law has been shaped by policy and developments. In the seventeenth century, the Statue of Monopiles in England responded to the Crown's misuse of monopiles for non-novel subject matter.⁶ This regulation manifests a significant shift by placing the enforcement of patents under the authority of ordinary law courts, promoting fair innovation and competition.⁷ Afterwards, the American colonies followed England's lead by permitting patents, albeit in a limited fashion due to their large societies.⁷ Despite their limited scope, these early colonial patents laid the foundation for state-specific patent practices. However, as national markets emerged and technological advancements, conflicts arose from the disparate patent customs among states, calling for a unified patent system.⁷

The need for a constant patent system became increasingly evident as the U.S. transitioned into a newly formed nation.⁷ The discord in state patent practices presents significant challenges, prompting the need for a federal patent system to ensure coherence and consistency in fostering innovation.⁷ In the era of international trade negotiations, non-tariff trade-related issues, including IP rights, gained significant attention.⁷ In the aftermath of the Uruguay Round of the General Agreement on Tariffs and Trade (GATT) and the founding of the WTO in 1995, it was the U.S. that acted as a critical promoter for integrating intellectual property rights into the discussions.⁷ The safeguard of IP was seen as a controversial issue involving actual violations of patents. The U.S. considered the WTO the ideal institution to address these concerns due to its capability to enforce international oversight and trade-related authorizations to ensure respect for IP rights.⁷ However, the TRIPS Agreement compels member countries in the WTO to provide the minimum level of protection for patents, including pharmaceutical products and processes. However, it has flashed concerns over the potential injustices, particularly concerning access to healthcare in developing nations. Thus, the evolution and justification for

⁴ M Bryan. "Resolving the public health crisis in the developing world: problems and barriers of access to essential medicines." *Nw. Univ. J. Int'l Hum. Rts.* 5 (2006): 1.

⁵ C Carlos M., Juan I. Correa, and Bram De Jonge. "The status of patenting plants in the Global South." *The Journal of World Intellectual Property* 23.1-2 (2020): 121-146.

⁶ D Peter. "Justifying intellectual property: back to the beginning." *A Philosophy of Intellectual Property* (1996): 13-39. Chapter 2.

⁷ R Donald G. *Intellectual property rights and global capitalism*. ME Sharpe, 2004. Chapter 1, 6.

patent law have been influenced by a desire to balance public interest and the protection of inventors' rights, the need for consistency in the face of expanding markets and technology, and the role of international trade negotiations in setting IP standards. Thus, it is essential to continue analysing these laws to ensure they align with principles of justice and do not inadvertently preserve inequalities, especially in critical sectors' access to pharmaceuticals and health care.

2.2 Justice Theory and Patent Rights

John Rawls' theory of justice as fairness is relevant in assessing the justice aspects of pharmaceutical patents.⁸ It offers a contemporary framework for defining justice, specifically regarding fairness and ethical implications surrounding exclusive rights and access to life-saving medications. Implementing this theory in the pharmaceutical industry provides an equitable distribution of access to medicine and healthcare resources while protecting the right to health for all individuals. Critical assessments of Rawls' theory emphasise that it encourages a deeper exploration of its principles.⁸ It engages in analysis and adapts the approach to address the challenges, including the monopoly of pharmaceutical patent systems. This comprehensive assessment promotes a more multifaceted understanding of the theory's application.

The approach of Rawls' theory of justice is fairness to address how we could build a just society that ensures equality and freedom for all of its public. In such a society, the boundaries of fair cooperation are determined by the mutual agreement among citizens. Entry into this cooperative society assumes an initial stage of shared understanding, often referred to as 'the original position,' which is a foundation for introducing the theory of justice as fairness. This mutual understanding establishes the framework for discussing and applying the principles of justice in the context of societal cooperation. In addressing the issue of equitable distribution of what John Rawls describes as "primary goods" – such as rights, powers, opportunities, income, wealth, and the foundations of self-respect among members of society, he puts forth a critical question: which principles of justice should preside over this distribution? To this end, Rawls suggests two fundamental principles: The first principle asserts that each individual should be accorded an equal claim to the most expansive range of freedom that does not infringe upon the liberties of others.⁹ This principle embodies a vision of maximal, yet respectful, liberty where everyone has the right to enjoy a full spectrum of freedom without compromising the freedom of others. The second principle underscores the arrangement of socio-economic discrepancies such that they predominantly aid the most disadvantaged members of society.⁹ Furthermore, it insists that such discrepancies should foster roles and positions accessible to all under circumstances of "fair equality of opportunities."⁹ For those with a minor opportunity. In essence, this principle seeks to ensure that any existing socio-economic disparities work to the advantage of the least privileged and that all opportunities are made available under equitable conditions.

Justice theory stresses the interdependence between society and individuals and its evolution and transformation over time. It focuses on the fundamentals of justice in concrete realities rather than abstract notions. Commitment to fairness and freedom does not ensure justice; it requires a new path and a responsive approach to address human realities. Critical and constructive analyses help develop a well-founded understanding of justice within the current

⁸ R John. A theory of justice: Revised edition. Harvard university press, 2020. P.xii, Chapter VIII, p.242.

⁹ R John. A theory of justice: Revised edition. Harvard university press, 2020. P.xii, Chapter VIII.

context of pharmaceutical patents. I have formulated the problem into a question that delves into the nature of justice. What are the potential grounds for justice?

In this discussion of a theory of justice, the author delves into the principles guiding the approach to justice, focusing on the relationship between individuals within society. The first section explores the connection between law and justice, explaining the limitations of law in establishing justice. The second section concerns justice, truth, and goodness. It addresses the prioritization of right and good on the grounds of fairness. The aim is to promote a comprehensive understanding of the principles underpinning justice from these discourses. This result entails a thorough analysis of 'patent injustice,' which includes balancing areas of both contention and concurrence across diverse perspectives. Through this process, the exploring of the intricate layers of injustice related to IPR rights, mainly patents, will be understood. The draws of analysis from various sources and scholars' arguments concerning the role of justice in ensuring freedom and fairness.

2.2.1. The connexion between justice and law

The concept of justice finds its principle within the collective framework of a group, and Ubuntu's philosophy supports this view. It has profoundly influenced the problem-solving approaches adopted by African communities, particularly in addressing issues that impact individuals and the collective.¹⁰ This philosophy has shaped their understanding of justice and guided their endeavours in resolving conflicts and fostering social harmony. In the context of the interplay between the self and the collective, the African philosophy of Ubuntu offers invaluable insights. Ubuntu highlights the interconnectedness of individuals and their moral responsibilities to the community. This viewpoint resonates with the critique put forth by scholars like Sandel, highlighting the illusory nature of individual autonomy unbiassed from social connections.¹⁰ Ubuntu sounds like a harmonious balance between individual independence and the community's well-being, showing that individuals are not isolated entities but rather intricately tangled with others.

Within the Ubuntu framework, justice entails considering the common good alongside individual autonomy.¹¹ It acknowledges that the pursuit of justice necessitates an appreciation for the connection and shared responsibilities within the community. By adopting Ubuntu's perspective, African communities attempt to create a just and harmonious society that acknowledges the standing of both individual agency and the well-being of the collective. Within the Ubuntu framework, justice involves considering the common good alongside personal autonomy. This resonates with the argument that justice can only be realized by aligning the self with the collective objectives of society. Moreover, the stress on social institutions and mechanisms for stabilizing equality in Rawls's theory of justice also reflects the recognition of the connection of individuals within society.¹² It aligns with the Ubuntu principle of communal relationships and the importance of organizing justice based on principles of duty and right.¹¹ The original position behind the "veil of ignorance" in Rawls's theory parallels the Ubuntu emphasis on eliminating societal biases to unveil a clearer sense of justice.¹²

Rawls stated, "A conception of justice is a necessary part of any such political assessment."¹² Underlining the importance of a shared understanding of justice in the structure of a politically functional society. Society may lack the requisite backbone for its political operation without

¹⁰ M Derek, and Jon Pike, eds. *Debates in contemporary political philosophy*. Routledge, 2002. Part 3.

¹¹ M Derek, and Jon Pike, eds. *Debates in contemporary political philosophy*. Routledge, 2002. Part 3.

¹² R John. *A theory of justice: Revised edition*. Harvard university press, 2020. P.xii, Chapter VIII.

such a common comprehension.¹³ Developing nations ought to assert their political will to safeguard and utilize the policy flexibility the TRIPS Agreement provides.¹³ This means firmly resisting any pressures to adopt intellectual property standards that do not match their current economic and technological progress. This can be viewed as a practical manifestation of justice and equity within international law and relations.

In this context, justice is not confined to safeguarding individual interests within civil society and exclusively favours the shielding of civil society over individuals. Instead, it necessitates a delicate balance between these two dimensions, indicating that justice is fundamental in managing the equilibrium within a political society. The clarity in this matter is often established through the lens of law, as evident in the legal frameworks of various countries worldwide. Laws play a role in determining what is considered just.¹⁴ However, this raises an important question: To what extent does the law align with justice? Is everything legal necessarily just? Does compliance with the law always equate to justice?

In the realm of philosophical inquiry into justice, Locke affirms that individuals enter into a social contract where they willingly subject themselves to the authority of a governing body and its laws.¹³ In this social contract, the laws established by the government function as the basis for justice in society. Locke emphasizes respecting and abiding by the laws to uphold justice. He argues that the law provides a framework for individuals to exercise their rights and freedoms while ensuring that their actions do not infringe upon the rights and freedoms of others.¹³ opposing the law disrupts the balance of justice and undermines the social contract that guarantees the rights and well-being of all individuals. Adhering to the law is seen as an expression of justice, while conflicting with it is considered a departure from justice.

For instance, pursuing monopolistic profits and unjust pricing practices in the pharmaceutical industry can violate this principle. New liberalism's endorsement of free competition has paved the way for glaring injustices within the pharmaceutical industry.¹⁵ Monopolistic companies, including pharmaceutical giants, prioritize imaginary profits over the well-being of citizens. This has led to what is described as "medical apartheid," demanding immediate action to preserve human health and rectify the imbalance.¹⁵ In Canada, the exorbitant pricing of innovative treatments for rare diseases is evident, with costs ranging from \$100,000 to over \$2 million annually.¹⁶ This inequity in access to crucial healthcare interventions has garnered recognition from the Canadian government, as demonstrated by their allocation of funding in Budget 2019.¹⁶ They have committed up to \$1 billion over two years, with an ongoing commitment of up to \$500 million annually. However, this budget allocation highlights the disproportionate influence that pharmaceutical companies hold over national governments, compelling them to purchase medicines at exorbitant prices.¹⁷ Organizations such as Global Justice in the UK have consistently emphasized this issue, shedding light on the industry's perpetuation of inflated costs. The global impact of monopolistic practices is far-reaching. Between 2018 and 2020, the prices of various treatments more than doubled, depleting resources and restricting access to vital care.¹⁷ Tim Bierley from Global Justice stated, "The NHS must not be held to ransom by Big Pharma over drug pricing. The universities and public

¹³ M Yasin. "Greek thought in arab ethics: Miskawayh's theory of justice." (2000).

¹⁴ R John. A theory of justice: Revised edition. Harvard university press, 2020. P.xii, Chapter VIII.

¹⁵ W Lori. "Medical Apartheid: The Dark History of Medical Experimentation on Black Americans From Colonial Times to the Present (2006)." *Journal of Research Administration* 39.2 (2008): 99-103.

¹⁶ Government of Canada improves access to affordable and effective drugs for rare diseases. [Access from online, June 13, 2023].

<https://www.canada.ca/en/health-canada/news/2023/03/government-of-canada-improves-access-to-affordable-and-effective-drugs-for-rare-diseases.html>.

¹⁷ T Ryan R., et al. "Multicomponent strategy with decentralized molecular testing for tuberculosis in Uganda: a cost and cost-effectiveness analysis." *The Lancet Global Health* 11.2 (2023): e278-e286.

researchers already fund much of the research that pharmaceutical companies rely on, so the taxpayer is already paying twice for the many important medicines we need. It is time to stand up to the pharmaceutical industry's outsized power and an insatiable profit motive and find a more democratic and equitable way to produce medicines for all."¹⁸ Consequently, these monopolistic pricing mechanisms impede individuals' fundamental right to health, which is the foundation for the meaningful enjoyment of other rights. These circumstances underscore the contradiction between pharmaceutical companies exercising their rights and freedoms while infringing upon the rights and freedoms of others. The industry's influence on pricing and access to essential pharmaceuticals hampers the realization of equitable healthcare. It hinders individuals from exercising their fundamental rights to health and well-being, which is the bedrock for the meaningful enjoyment of other rights.

Rawls sees justice as everyone having an equal right to the most comprehensive and exhaustive form of freedom, without prejudice to the freedom of others.¹⁹ The fundamental principle of equality extends to the realm of law and the treatment of individuals.¹⁹ Under this principle, all individuals should be treated equally, with equal rights and responsibilities. This includes equal access to material resources provided by the state, such as employment opportunities, necessities, security, safety, and the preservation of human dignity.¹⁹ It can be argued that the law's definition of justice derives its authority from its monopoly on the use of force, which it employs or threatens to employ in response to violations of justice. However, delving into the formation of laws and the representatives who shape them would divert us from the core of this discussion. Thus, the focus remains on examining the claim's validity regarding the correlation or potential divergence between justice and law.

The legal perspective perceives justice as a system governed by rules that regulate the presence or absence of class distinctions in the distribution of wealth, status, power, and loyalty.²⁰ Every citizen is expected to comply with the laws that are relevant to them, and any violation of these laws is regarded as a clear indication of intervening to address disparities, either through the use of force or through punitive measures.²⁰ The legal definition of justice often portrays it as rigid and static despite historical investigations proving otherwise. Plato's concept of justice can be found in his views on the ideal city-state.²¹ In Plato's perfect society, a strict hierarchical structure is established, with philosophers-kings ruling at the top and the remaining citizens assigned specific roles based on their capability.²¹

This destined arrangement suggests a predetermined notion of justice based on fixed social positions and limited mobility. It may overlook the diversity of talents, aspirations, and potential for growth among individuals, potentially stifling social progress and hindering the attainment of true justice. David Crocker highlights the significance of agency and valuable capabilities as the foundation for human rights, social justice, and individual and collective duties.²² He argues that in exploring development ethics, it becomes essential to assess how a globalized world either facilitates or impedes the fulfilment of moral obligations in respecting rights by individuals and institutions. David Crocker asserts that the ultimate objective of sustainable and equitable development, national or global, is to ensure that every individual

¹⁸ Health campaigners warn of the cost to the NHS of recent pharmaceutical proposals to reform key drug pricing mechanism. [Retrieve from online in Jun 13, 2023]. <https://www.globaljustice.org.uk/news/health-campaigners-warn-of-the-cost-to-the-nhs-of-recent-pharmaceutical-proposals-to-reform-key-drug-pricing-mechanism/>.

¹⁹ R John. A theory of justice: Revised edition. Harvard university press, 2020. P.xii, Chapter VIII.

²⁰ R John. A theory of justice: Revised edition. Harvard university press, 2020. P.xii, Chapter VIII.

²¹ Wallach, John R. "Plato." *Handbook of the History of the Philosophy of Law and Social Philosophy: Volume 1: From Plato to Rousseau*. Cham: Springer International Publishing, 2023. 283-294.

²² A Sen. The idea of justice. London: Penguin Books, 2009. Part iv, p. 381, chapter 4, 17.

²² A Sen. The idea of justice. London: Penguin Books, 2009. Part iv, p. 381, chapter 4, 17.

worldwide attains sufficient agency and morally essential capabilities.²² This goal extends to all individuals, regardless of nationality, ethnicity, religion, age, gender, or sexual orientation.²² I argue that Crocker emphasizes the importance of agency and morally basic capabilities for all individuals, regardless of their background. This highlights the universal nature of development goals and the need to address global inequalities and injustices to ensure everyone can lead dignified lives.

Sen focuses on the significance of the contributions and efforts made by each body but also considers the capabilities and well-being of individuals involved in relations. He contends that justice addresses disparities and inequalities that hinder individuals from fully participating in and gaining from economic exchanges.²³ Sen's approach expands the understanding of justice in economic transactions by emphasizing the importance of fostering equitable and enhancing capabilities and outcomes.²³ Mill emphasizes the principle of distributive justice, which considers the fair distribution of resources and opportunities in economic transactions.²⁴ He argues that justice obliges taking into account the contributions made by each party and the broader societal impact of their actions. Mill Defender's structures and strategies maximize joy for the most significant portion of the population, focusing on diminishing disparities and fostering the prosperity of every person involved in economic transactions.²⁴ His methodology aligns with Aristotle's stress on completing a fair balance and upholding fairness and equity in economic transactions.²⁵

Attributing justice exclusively to the law can grant legitimacy to those responsible for implementing the regulations. This can create a situation where ordinary citizens gain additional freedom and power beyond their professional duties through their role as enforcers of justice. Sometimes, individuals may exploit their positions to legitimize unjustifiable actions, leaving little room for objection. This scenario can apply to enforcing the TRIPS Agreement by the WTO, which significantly impacts developing countries.²⁶ While the TRIPS Agreement is apparently about creating a fair international framework for protecting intellectual property rights, its enforcement can often unreasonably benefit large pharmaceutical companies, primarily based in developed nations. These companies typically hold patents on many essential medicines, and the TRIPS Agreement enforcement can allow them to uphold high prices by reducing competition from generic drugs, mainly in developing countries.

Additionally, any opposition in the name of justice may be seen as contradictory and objectionable.⁸ This scenario becomes apparent when authorities suppress legitimate demands, such as those advocating for job opportunities or exercising free speech. The legitimacy of implementing laws can be seen in the criminal justice system. Law enforcement agencies and judicial institutions play a crucial role in maintaining justice by capturing and prosecuting individuals who have violated the law. The arrest, trial, and punishment process are based on the principle of ensuring the maintenance and accountability of social order. However, there can be instances where the legitimacy of law enforcement actions is questioned. Concerns may arise regarding the use of excessive force by police officers during arrests, leading to claims of police brutality. In such cases, applying laws may be seen as infringing individual rights and declining justice. When power is abused, such as in cases of excessive force by police, the relationship between law enforcement and justice can become strained. A notable instance that

²³ A Sen. *The idea of justice*. London: Penguin Books, 2009. Part iv, p. 381, chapter 4, 17.

²⁴ M David. *Principles of social justice*. harvard university Press, 2001. P.61.

²⁵ W Ann. "Justice as economics in Aristotle's Nicomachean ethics." *Canadian Political Science Review* 4.1 (2010): 1-11.

²⁶ R Donald G. *Intellectual property rights and global capitalism*. ME Sharpe, 2004. Chapter 1, 6.

exemplifies this took place in the United States, the tragic case of George Floyd on May 25, 2020, when Derek Chauvin, a police officer from Minneapolis, maintained a knee on Floyd's neck for over nine minutes amidst an apprehension. Floyd's untimely demise incited a wave of anger and demonstrations throughout the U.S. and worldwide, rekindling the momentum of the Black Lives Matter movement and amplifying demands for restructuring the police force and eradicating racial injustice.

Moreover, War often invokes the language of law to justify its actions, whether these justifications are based on facts or mere assertions.²⁷ For example, a war that invokes the concept of a just war and the notion of legality is the NATO intervention in Kosovo in 1999.²⁸ NATO member states, led by the United States, justified their military intervention to respond to the ethnic cleansing and human rights abuses perpetrated by the Serbian forces against ethnic Albanians in Kosovo. In this case, the involvement was framed as a just war to stop the ongoing atrocities and protect the civilian population. The concept of legality was invoked through arguments of humanitarian intervention and the responsibility to protect principle.²⁹ Advocates of the intervention argued that the actions taken by NATO were in line with international law, particularly the principles of human rights and the prohibition of genocide.³⁰ However, the interference was not universally accepted as lawful. Some condemned it as a violation of the United Nations Charter, which forbade using force without authorization from the Security Council, and argued that it set a precedent for illegal military interventions based on humanitarian grounds. This example determines how the concept of a just war involves a complex interplay between legal arguments, moral justifications, and differing interpretations of international law. It cabinets the challenges and debates surrounding the attribution of legality to armed conflicts framed as pursuing justice or protecting human rights.³⁰

Justice becomes justice when rooted in the defence of human rights, considering them universal and inviolable. Human rights law is the foundation from which the legitimacy of a just war is derived.²⁹ When a war is justified to protect and uphold human rights, it is seen as just.³⁰ However, the example of George Bush Jr.'s speech on Iraq highlights a potential separation between justice and law. In this case, Bush positioned himself as the arbiter of justice, determining what actions should be taken by nations and even the Iraqi people. This analysis shows that justice can be manipulated by the powerful and may not always align with the law. While compliance with the law often establishes order, it does not always assure justice. Thus, justice can exist both within and outside the framework of the law, and its understanding depends on maintaining human rights and ensuring fairness and equity for all. I argue that human rights have always been closely tied to social reasoning and the responsibilities of wielding power. The consideration of obligations related to human rights emphasizes the need for those in positions of specialist and influence to take effective and responsible action to protect and promote human rights. It recognizes that power ensures individuals' well-being and dignity and upholds the principles of justice and equality.

This indeed offers a stark example of how justice can be contentious in the realm of pharmaceutical patents.³¹ The international patent system under TRIPS provides the legal framework to ensure that pharmaceutical companies protect exclusive rights to produce and

²⁷ V W Johan. "Rawls, Habermas and Liberal Democratic Law." *Neth. J. Legal. Phil.* 52 (2023): 16.

²⁸ K Sidita. "Just Another Civil War? The Influence of Conflict Perceptions on Western Conflict Management in Kosovo and Beyond." *World Affairs* 186.2 (2023): 284-322.

²⁹ K Sidita. "Just Another Civil War? The Influence of Conflict Perceptions on Western Conflict Management in Kosovo and Beyond." *World Affairs* 186.2 (2023): 284-322.

³⁰ A Sen. *The idea of justice*. London: Penguin Books, 2009. Part iv, p. 381, chapter 4, 17.

³¹ R Prabhaskar, and G. O. U. R. Praharsh. "The TRIPS waiver decision at the World Trade Organization: Too little too late!." *Asian Journal of International Law* 13.1 (2023): 10-21.

sell the medicines they develop. While this assists the purpose of rewarding innovation, it also sets up a scenario where the drive for profits can outweigh the necessity to preserve human health, acknowledged universally as a fundamental human right. When patent protections result in exorbitant medication prices, the accessibility of these essential drugs and vaccines becomes increasingly difficult for individuals in low- to middle-income nations. This is a clear violation of distributive justice, which advocates for equal access to healthcare and critical treatments for everyone, regardless of socioeconomic status. A prominent illustration of this conflict is the ongoing global debate around the patent protection of COVID-19 vaccines.³¹ South Africa and India led the call to temporarily suspend these vaccines' patent rights to facilitate more comprehensive production and distribution, especially targeting underprivileged nations. Despite their efforts, the proposal was turned down by the TRIPS council and several powerful countries from the global North. This event underlines an apparent disjunction between legal frameworks and justice in the context of pharmaceutical patents.³² It further amplifies the call for an urgent adjustment of global intellectual property laws to prioritize human health over corporate profit. This case exemplifies how justice can exist both within and beyond the horizon of law, and its realization is fundamentally tied to upholding human rights and guaranteeing fairness and equality for all.

2.2.2 The connection between justice and benevolent

Justice is no longer seen as a stand-alone concept but intertwined with ideas of what is right and good.⁹ The understanding of justice has evolved to recognize that it cannot be divorced from moral considerations and the pursuit of the common good.³² While justice includes principles of fairness, equality, and the protection of rights, it also involves determining what is morally right and striving for the greatest good of society.³² This recognition emphasizes that justice goes beyond mere adherence to laws and regulations; it encompasses ethical judgments and considerations of what is morally justifiable in a given context.³² In the theory of justice as fairness, positive outcomes arise from the simultaneous operation of various conditions. It is crucial to avoid the misconception that this conception of justice is self-interested by considering the entirety of the original position.³¹ Compared to combining benevolence and justice, the assumptions underlying justice as fairness offer significant advantages. The latter approach is hindered by its complexity, as formulating a precise theory becomes impractical due to the overwhelming complications arising from vast information. Additionally, clarifying the relative strength of benevolent desires poses challenges.

One challenge in balancing benevolence with justice is prioritising these often-conflicting principles.³³ Like accessing pharmaceuticals in impoverished countries, a purely benevolent action may seem morally commendable. However, this could undermine justice by inadvertently creating dependencies or disrupting local health sectors. On the other hand, a strict adherence to justice might demand equal access to healthcare and medications for all, irrespective of their ability to pay. This could potentially hamper the profitability and, thus, pharmaceutical companies' research and innovation capability, which would be against the principles of a free market economy.

Additionally, benevolence can be subjective, varying greatly among individuals and societies, whereas justice often demands a more universal application.³⁴ Judging and quantifying benevolence or compassion is difficult, whereas justice can be more objectively measured

³² R John. *A theory of justice: Revised edition*. Harvard university press, 2020. P.xii, Chapter VIII.

³³ R John. *A theory of justice: Revised edition*. Harvard university press, 2020. P.xii, Chapter VIII.

³⁴ M Fritz. *An economic review of the patent system*. No. 15. U.S. Government Printing Office, 1958.

using legal and ethical standards. For instance, one might feel compassionate towards sick people who cannot afford necessary medicines. At the same time, another might believe in the idea of self-command, considering that individuals should bear responsibility for their health expenses. Balancing these different viewpoints can be a complex task.

Sen's perspective on justice aligns with Rawls's emphasis on moral powers and human capabilities.³⁵ Both scholars argue against the narrow focus on self-interest and rational choice theory, asserting that individuals possess a sense of justice and the capacity to consider ideas of fairness and ethical reasoning.³⁵ Sen's capability approach complements Rawls's theory of justice as fairness by highlighting the significance of expanding people's capabilities and freedoms. He contends that justice should encompass more than merely distributing material resources and include individuals' opportunities and abilities to lead fulfilling lives. When connecting these concepts to the world of patents and pharmaceuticals, Sen's theories offer valuable insights. Just as Sen argues for justice to go beyond the distribution of resources, the issue of patents in the pharmaceutical industry cannot be limited to who holds the patent rights. True justice involves assessing the accessibility, affordability, and impact of these patented drugs on human lives, reflecting the capabilities approach.³⁵ Sen's capability approach emphasizes freedom and opportunities for individuals to lead fulfilling lives. Applying this approach to the pharmaceutical industry, justice would entail a fair distribution of patent rights among pharmaceutical companies and ensuring that these patented drugs are accessible and affordable to all, considering their impact on people's capabilities and well-being.

For example, the Treatment Action Campaign (TAC) is a South African organization that advocates for access to healthcare services, particularly concerning HIV/AIDS treatment.³⁶ The TAC played a vital role in challenging government policies and pharmaceutical companies to ensure affordable and accessible treatment for people with HIV/AIDS.³⁷ Despite no resource constraints, the government's policies on nevirapine were based on unsupported claims of its effectiveness. In the TAC case, the government's policies hindered access to a proven and affordable treatment like nevirapine.³⁷ Despite the availability of the drug at no cost from pharmaceutical suppliers and within the state's resources, the government's unsupported claims about its effectiveness unjustly limited access. This raises concern about justice as fair distribution of resources should ensure access to effective treatments. The court's recognition of this and its intervention in policy-making demonstrate a commitment to upholding justice and protecting socio-economic rights. This implies that the current patent system should not prevent low- and middle-income countries from accessing essential medicines. Moreover, the distribution of resources, in this case, pharmaceuticals, shouldn't solely be based on the market demands in wealthier nations but should consider the health needs of the global population, including those diseases prevalent in poorer countries. To make this system more just, drug development should also focus on life-threatening illnesses that significantly impact humans, regardless of the commercial incentives. Further investigation will be done in the field of study in the context of South Africa from the selected participants.

In this context, justice as fairness could encompass measures such as implementing differential pricing, compulsory licensing, or encouraging the development of generic drugs to ensure that essential medications are affordable and accessible to all, regardless of their geographical location or economic standing. This brings us back to Sen's idea of enhancing capabilities - in

³⁵ A Sen. *The idea of justice*. London: Penguin Books, 2009. Part iv, p. 381, chapter 4, 17.

³⁶ M P. Sean. "Patents, Human Rights, and Access to Medicines." *Human rights law review* 22.4 (2022).

this case, all individuals, irrespective of their socioeconomic status, can lead healthy lives. This intersection of Sen's and Rawls' ideas provides a robust framework for analysing justice in pharmaceutical patents, promoting stability between the rights of patent holders and the global population's needs. A just society should give individuals freedom and equal opportunities to pursue their goals while considering ethical principles and moral reasoning in evaluating social arrangements. Undeniably, there might be an argument suggesting that the distribution of wealth or resources should be proportional to individuals' moral merit insofar as this is achievable.³⁷

Also, benevolence could lead to overprotective actions, which might seem beneficial on the surface but may fail to respect the autonomy and dignity of individuals or nations.³⁷ This could eventually lead to injustice. Paternalistic actions driven by benevolence often overlook the importance of individual or national independence.³⁷ Such actions assume a position of superiority, disregarding the decision-making capabilities of those being acted upon. The principle of autonomy, a key element of justice, is violated by usurping the right to make choices and imposing decisions upon others.³⁸ The foundation of justice rests upon recognizing and preserving the freedom and agency of individuals and nations to make decisions that align with their values and circumstances.³⁸ Furthermore, paternalistic actions can inadvertently neglect the inherent dignity of individuals or nations.³⁷ Justice demands that all parties be treated with equal respect, acknowledging their intrinsic worth. However, acts of paternalism may unintentionally undermine this principle, as they can patronize or infantilize those involved. This failure to recognize the capacity for self-determination and self-respect denies individuals or nations their due dignity.³⁸ Another aspect of paternalism that engenders injustice is the imposition of values.³⁸ Individuals or nations may impose their subjective beliefs and preferences upon others when acting out of benevolence. This imposition disregards different individuals or nations' diverse perspectives and cultural contexts. Justice requires acknowledging and respecting the plurality of values and allowing individuals or nations the freedom to shape their paths following their unique circumstances. Hence, while benevolence and justice are essential principles in moral and societal frameworks, combining them flawlessly is a complex and challenging 'justice as fairness' approach proposed by John Rawls, with its "veil of ignorance,"³⁹ provides a more objective and universally applicable framework that can help navigate these intricacies.

2.2.3 Veil of Ignorance

The combination of mutual impartiality and the "veil of ignorance"³⁸ provides simplicity and clarity while ensuring the effects of assumptions that, at first glance, seem morally more appealing.³⁸ To ensure justice is served without bias and conflicting interests, Rawls introduces a central concept into his model - the "veil of ignorance". This notion asserts that individuals tasked with deciding the principles of justice governing their society remain unaware of their societal position, be it their wealth status, race, gender, intelligence level, and so forth.³⁸ This idea resonates strongly with the Kantian theory, often cited by Rawls, in which legislators are expected to be ideal agents, keen on cooperating based on the priority of justice over self-interest or the moral law over personal advantage.³⁸ This notion of primacy stipulates that human reasoning (or sense of justice) should supersede their rationality during the collective

³⁷ R John. A theory of justice: Revised edition. Harvard university press, 2020. P.xii, Chapter VIII.

³⁸ A Sen. The idea of justice. London: Penguin Books, 2009. Part iv, p. 381, chapter 4, 17.

³⁹ R John. A theory of justice: Revised edition. Harvard university press, 2020. P.xii, Chapter VIII.

principal selection process. Most importantly, it posits that individuals are ends in themselves rather than a mere means to an end. This standpoint signifies a significant departure from utilitarianism.³⁸

Assuming one was situated within the Rawlsian original position to determine the principles of justice required for the pharmaceutical industry, primary concerns would revolve around accessibility, affordability, and the advancement of global health. From this perspective, an individual behind the veil of ignorance would be rational and guided by self-interest yet unaware of their specific circumstances. Indeed, they would be ignorant of their residence in a developed or an emerging country's society, their financial status, or any potential disease afflictions. Furthermore, they would not ascertain if the current patent system benefited them, enabling access to cost-effective drugs. Faced with the mission of selecting the principles of justice to govern societal interactions concerning pharmaceuticals, an individual behind the “veil of ignorance” would pay special attention to those in the most disadvantageous positions. The reason is that their societal status is unknown; they could potentially find themselves at the bottom rung of the societal ladder.

In the pharmaceutical sector, the most vulnerable individuals could be those living in less developed countries battling severe illnesses without the financial means to access essential medications. The current patent structure can inadvertently guide pharmaceutical firms to favour the development. Suppose a person's affliction is not prominent in more developed nations. In that case, it is doubtful that pharmaceutical companies will commit to researching and developing a treatment for it. The reasoning is simple: Under the current patent system, such a drug may not yield enough profit, rendering its development an unfavourable business strategy. Even if an existing drug could potentially treat the illness, accessibility is unlikely in developing regions, and the cost of such medication is frequently prohibitive due to the significant pricing strategies employed by pharmaceutical companies.

Under the hypothetical construct of the “veil of ignorance,” a person who might find themselves in the least advantageous societal position would resort to the 'maximin' decision-making principle. This principle directs individuals to optimize the worst possible outcomes when decision-making under uncertainty, thereby enhancing the conditions of those who are worsted off. Using this principal safeguard, if the individual behind the “veil of ignorance” is amongst the most disadvantaged in society, they would attempt to maximize the favourable circumstances within this position.

According to Rawls, if individuals were shrouded in a veil of ignorance, they would gravitate towards his dual principles of justice: the equal liberty principle and the difference principle.⁴⁰ The similar liberty principle calls for an equitable dispersion of fundamental freedoms, implying that all members of a society should be entitled to identical liberties. When applied to the global pharmaceutical industry, it is crucial to consider the entire human race as the society for which principles of justice should be established, as the industry's influence extends to global health. Consequently, the goal should be to formulate principles that guarantee universal affordability and accessibility of medicines. The difference principle posits that socio-economic inequalities should be structured to advantage the least privileged in society to the greatest extent.

Typically, justice is associated with equal distribution of goods and services unless an unequal distribution might significantly benefit those most disadvantaged.³⁹ In the context of the

⁴⁰ R John. A theory of justice: Revised edition. Harvard university press, 2020. P.xii, Chapter VIII.

pharmaceutical industry, it would be more beneficial to concentrate R&D on life-threatening diseases that pose a significant threat to human health. This would call for reversing the existing R&D biases and urge companies to create therapies for critical illnesses that primarily affect people in underdeveloped areas. When these principles are embraced under the veil of ignorance, unfair practices in the pharmaceutical industry can be eradicated. The foundational features and regulations the pharmaceutical industry must adhere to be seen as just can be ascertained through Rawlsian justice. Regrettably, the prevailing patent system is unjust, lacking the principles and features that Rawlsian justice necessitates. However, it is possible to devise a plan that satisfies these critical features and directions.

The purpose of considering the priority of right over benevolence, or the importance of benevolence over right, is not to establish a hierarchy between them but to explore the foundations of justice.⁴¹ The question is whether justice can be comprehended independently of a specific notion of benevolence or to provide a rational justification that affirms the autonomy of rights in determining what is just. This investigation examines whether justice can be grounded in its principles, irrespective of conceptions of benevolence. It explores the possibility of establishing justice within a framework emphasising rights' intrinsic value and significance.

2.3 Discussion

To ensure justice in the pharmaceutical realm, it becomes imperative to devise a system that simultaneously acknowledges the inherent value and importance of patent rights and underscores the ethical duty of ensuring access to essential medications. This may necessitate overhauling the existing patent system or instituting global health policies that guarantee affordability and accessibility while not hindering innovation and progress within the industry. In this hypothetical scenario, pharmaceutical firms would possess rationality and self-interest but lack knowledge of their circumstances. They would be unaware of their societal position, economic status, health condition, or the intricacies of the patent system that could impact their access to affordable medications. When faced with the mission of selecting principles of justice to govern the pharmaceutical industry for the entire society, the individual in this position of limited knowledge would prioritize the well-being of the community's most vulnerable members. This priority arises from the inherent uncertainty surrounding their situation, recognizing that they could find themselves in the least advantageous position. As a result, their decision-making process would be driven by a deep concern for the welfare of the least advantaged individuals and a steadfast commitment to ensuring equal and fair access to pharmaceuticals for all, regardless of their socioeconomic circumstances.

When considering the pharmaceutical landscape, the most disadvantaged position in society would involve an individual grappling with a life-threatening illness, residing in a poor country, lacking the financial means to afford essential medications, and encountering limited accessibility to crucial drugs. In this scenario, the current patent system introduces biases for pharmaceutical companies, leading them to prioritize R&D efforts primarily for diseases that have greater relevance and market potential in the developed world. Consequently, conditions affecting individuals in underserved regions are often overlooked as they are deemed less profitable within the existing patent framework. Even if a medication exists for a specific disease, it is unlikely to be within reach for those in developing nations due to excessive pricing

⁴¹ R John. A theory of justice: Revised edition. Harvard university press, 2020. P.xii, Chapter VIII.

and the substantial mark-ups imposed by pharmaceutical companies. Within the pharmaceutical landscape, the most disadvantaged position would involve an individual facing a life-threatening illness in a poor country, lacking the financial means to afford essential medications, and encountering limited accessibility to crucial drugs. The current patent system introduces biases that lead pharmaceutical companies to prioritize research and development (R&D) efforts primarily for diseases with greater relevance and market potential in the developed world. Consequently, conditions affecting individuals in underserved regions are often overlooked as they are deemed less profitable within the existing patent framework. Even if a medication exists for a specific disease, it is unlikely to be accessible to those in developing nations due to excessive pricing and substantial mark-ups imposed by pharmaceutical companies. According to the difference principle, social and economic disparities should be structured to maximize advantages for the most disadvantaged individuals in society. While the general notion of justice entails equal distribution of goods and services, there are cases where unequal distribution can be justified if it ultimately benefits those in vulnerable positions.

In the context of the pharmaceutical industry, a more beneficial approach would involve redirecting R&D efforts toward diseases that pose significant threats to human life. This requires addressing biases in R&D and encouraging pharmaceutical companies to focus on creating drugs for individuals in developing regions afflicted with life-threatening illnesses. By shifting the current focus and allocating resources towards these neglected areas, the aim is to improve healthcare outcomes and provide vital treatments to those in dire need. This approach aligns with the principles of justice by prioritizing the well-being of the least advantaged in society and promoting fairness in distributing healthcare resources.

Rawls posits that individuals unaware of their specific circumstances would select two principles of justice. When contemplating the global pharmaceutical industry, the principles of justice being deliberated would encompass the entirety of humanity. This is because the issue pertains to global health, affecting people worldwide. The principles must be devised to ensure the accessibility and affordability of drugs for every human being. The objective is to establish principles prioritising universal access to essential medications, regardless of an individual's social or economic standing and geographical location. This underscores the crucial role of justice in safeguarding healthcare equality within the pharmaceutical domain. The principles chosen should reflect a commitment to uphold the fundamental right to health for all individuals, mitigating disparities and fostering fairness in providing pharmaceutical resources.

Through the Rawlsian lens of justice, it becomes clear that a truly fair pharmaceutical industry is achievable when its governing principles are set behind a veil of ignorance, thereby eliminating the potential for bias and inequality.⁴² However, the current patent system falls short of embodying this vision of justice as defined by Rawls, lacking the requisite principles and qualities that facilitate fairness and equity. Despite these shortcomings, it is possible to envision and create a system that encapsulates the fundamental tenets outlined by Rawls. This necessitates significantly transforming the pharmaceutical industry's structure and mechanisms, particularly the current patent system. By re-evaluating and reforming patent laws, we can install principles that ensure equal access, affordability, and a focus on the welfare of the most disadvantaged. This overhaul aims to transform the pharmaceutical industry into a just system that upholds the principles of equality and fairness, in line with Rawlsian justice. Such a reformation would provide a robust countermeasure against the prevailing 'patent

⁴² R John. A theory of justice: Revised edition. Harvard university press, 2020. P.xii, Chapter VIII.

injustice', setting the stage for a more detailed discussion on the nature of this injustice and its implications in the following section.

The current patent system fails to meet the principles of Rawlsian justice and is criticized by scholars in areas such as universal access, innovation, and spending efficiency. According to these viewpoints, the patent system inadequately addresses the issue of universal access to medications. Pharmaceutical companies lack incentives to provide affordable products to impoverished individuals in remote regions. Consequently, people in developing countries often cannot afford pharmaceutical products due to their high market prices. As a result, these companies do not prioritize making drugs accessible in such areas, as it would not be financially profitable for them.⁴³ Typically, drugs are primarily available in developed countries with greater pharmaceutical consumption, and individuals can afford the medications despite significant markups. Pharmaceutical companies require substantial profits to fund further R&D and generate returns for their shareholders.⁴² The current system prioritizes financial gains over the goal of ensuring widespread access to medications. These concerns are echoed by scholars who highlight the need for a more equitable approach that addresses the disparities in access, fosters innovation, and promotes efficient allocation of resources. They argue for alternative models prioritising affordability, accessibility, and the overall well-being of individuals, particularly those in disadvantaged regions.

To enhance universal access to drugs, it is necessary to establish an approach that supports the sustainability of pharmaceutical companies while addressing the needs of the developing world. A potential solution involves re-imagining the existing patent system to incentivize innovation and the production of accessible pharmaceutical products for developing regions. In the pharmaceutical industry, innovation comes with significant costs, leading to biases in research and development decisions. Pharmaceutical companies prioritize drugs catering to the developed world's demands to maximize profits. Unfortunately, the current patent system lacks incentives to prioritize global health improvement. This results in a situation where individuals in developed countries who can afford the market prices of pharmaceuticals have better access than those in developing nations. The burden of life-threatening diseases and serious illnesses is disproportionately borne by the developing world, accounting for approximately 90% of the global disease burden.⁴⁴ In line with Rawls' principles of fairness and justice, a more equitable approach requires redistributing R&D investments to uplift the most disadvantaged individuals. This entails directing a proportional number of resources based on the global burden of disease, with a focus on developing world needs. By reallocating R&D funding, pharmaceutical companies can better serve those in the worst-off positions globally. Such an approach seeks to promote fairness and equality by addressing the health challenges the developing world faces. It aims to bridge the gap in pharmaceutical resource distribution and reduce disparities between developed and developing regions. If a fair agreement is reached in the original position regarding pharmaceutical patents, it does not automatically mean that any distribution conflicting with the accepted principles is unjust. Rawls proposes that we lack an independent standard to discern the correct conclusion regarding pure procedural justice. Instead, the fairness of the procedure itself determines the fairness of the outcome, regardless of the specific distribution. Applying this to pharmaceutical patents means the fair approach to determining patent rights should be the focus. The particular allocation of rights and medication access would depend on the principles agreed upon in the original position. Whether it involves broad access or limited availability, the outcome is considered fair if the appropriate procedure

⁴³ R Donald G. *Intellectual property rights and global capitalism*. ME Sharpe, 2004. Chapter 1, 6.

⁴⁴ M P. Sean. "Patents, Human Rights, and Access to Medicines." *Human rights law review* 22.4 (2022).

has been followed correctly. Rawls' ideas imply that his hypothetical deliberations cannot rely on pre-existing independent criteria of just distribution. Instead, they must create their standards within the framework of the fair procedure. This suggests that there may be no universally applicable pre-existing criteria for social justice. Individuals must choose and establish the basis for patent systems and pharmaceutical access that align with their notion of justice while ensuring that fair procedure is respected.

An additional area of concern in the current patent system that raises issues of injustice is the overall spending efficiency. Instead of allocating significant sales revenue and funding towards R&D, the current system often diverts resources towards lobbying, gaming, patenting, litigation, marketing, and counterfeiting activities. This allocation of resources can be viewed as wasteful and does not guarantee increased innovation or the development of new drugs.⁴⁵ Specifically, the focus should be on developing medicines that cater to the needs of developing regions, which bear a more significant disease burden. By aligning spending with the areas of the greatest need, a more just system can be established, ensuring that resources are utilized to benefit the most vulnerable populations.

The fundamental disparities between the existing patent system and an alternative system formulated from a position of limited knowledge are principles around three key aspects. Firstly, the objective is to ensure global access and affordability of medications. Secondly, the elimination of biases in innovation that disproportionately favour the most disadvantaged individuals. Finally, spending efficiency can be optimised by reducing wasteful practices and increasing investment in R&D. From the perspective of Rawlsian justice, these issues are the primary grounds for unjustly considering the current patent system. A more just and equitable pharmaceutical industry can be realised by addressing these concerns and establishing a new framework rooted in fairness and equality principles.

Attributing the establishment of justice to the importance of rights suggests the necessity of recognizing the foundational aspects of human nature from which society emerges. This notion can be traced back to the social contract theorists, including Rawls. Nevertheless, Rawls concedes that the integrity of this assumption doesn't carry practical consequences. On this matter, my perspective aligns with Rawls. However, where Rawls and I differ is how this assumption shapes our understanding of justice. It creates a tension between the theoretical concept of justice and its practical application.

Stating the importance of rights does not deny the significance of the good; instead, it acknowledges its importance. It suggests that the good emerges from laws resulting from rights and duties agreements. However, it is crucial to avoid understanding the establishment of justice solely regarding the good. Positioning goodness as primary over truth can lead to a totalitarian regime rather than promoting democracy. If we accept that political freedom is a value in itself, as thinkers like Berlin and Constant argue, guaranteeing equal political freedom manifests goodness. Isaiah Berlin and Benjamin Constant are renowned thinkers who have contributed to the discourse on political freedom. While they emphasise the value of political freedom, they approach the concept from slightly different perspectives.

Isaiah Berlin's perspective on political freedom is often associated with his essay "Two Concepts of Liberty." He distinguishes between negative liberty and positive liberty.⁴⁶ According to Berlin, negative liberty is the absence of external constraints or interference, allowing individuals to act without hindrance. Positive liberty, conversely, pertains to the

⁴⁵ M Fritz. *An economic review of the patent system*. No. 15. U.S. Government Printing Office, 1958.

⁴⁶ B Isaiah. "Two concepts of liberty." *The liberty reader*. Routledge, 2017. 33-57.

ability to work following one's own rational will and self-determined goals. Berlin warns against the potential dangers of positive liberty, as it can lead to paternalistic or authoritarian measures in pursuing collective goals. He argues that preserving negative liberty and protecting individuals from coercion or interference is crucial in safeguarding political freedom as an inherent value. In his essay "The Liberty of the Ancients Compared with that of the Moderns," Benjamin Constant explores the distinction between ancient and modern notions of liberty.⁴⁷ He highlights the difference between "liberty of the ancients," which involves active participation in public affairs and decision-making, and "liberty of the moderns," which emphasizes individual rights and freedom from interference. Constant argues that modern societies should prioritize individual rights and liberties while maintaining a limited role for the state in citizens' private lives. He advocates preserving personal autonomy and protecting civil liberties as essential components of political freedom. I will say that both Berlin and Constant emphasize the significance of political independence as a value. Berlin underscores the importance of negative liberty and avoiding coercion or interference, while Constant stresses the value of individual rights and the limitation of state intervention. Their approaches contribute to understanding political freedom as a manifestation of goodness, emphasising preserving personal autonomy and safeguarding against excessive governmental control.

Alternatively, utilitarians argue that goodness lies in the equal enjoyment of benefits by members of society.⁴⁸ In my view, goodness encompasses both perspectives and more.⁴⁷ It encompasses society's economic, political, and moral aspects, harmonized concerning each individual.⁴⁷ It is a relative concept recognising individuals' diverse societal needs and capacities. In this context, justice involves regulating and controlling this dynamic movement driven by citizens and overseen by the state. It entails ensuring that each party is allowed to manage their economic and political circumstances in line with their capacity and legitimacy. For example, justice may involve the state extracting taxes from the wealthy and providing facilities or grants to support the poor. Ultimately, justice aims to balance the interests and capacities of all members of society. Justice is inherently concerned with the reality of human existence, encompassing its contradictions, differences, and agreements. Its purpose is to prevent the occurrence of injustice in society by rationalizing institutions and ensuring a just relationship between the individual and society. Amartya Sen emphasizes the concept of capability in evaluating justice, which refers to an individual's ability to do things based on their skills and entitlement to benefit from them.⁴⁹ This notion of capability is akin to Rawls's focus on differences and social inequalities, recognizing their existence while striving to overcome them by understanding their essence.

From this perspective, justice arises from recognising existing inequality and pursuing greater equality through practical improvements. True equality entails providing equal opportunities in a free and fair manner, while freedom allows individuals to act according to their capabilities. However, it is essential to acknowledge that not everyone possesses the same capacity to seize opportunities, particularly individuals who are disabled or sick. Thus, establishing justice solely based on equal opportunity according to individual abilities may fail to address the complexities of justice. Justice is not exclusively a rational concept; it also acknowledges emotions and passions, recognizing that individuals are multifaceted beings with strengths and weaknesses. This holistic understanding of justice opens up the possibility of a just life for all, considering the full range of human existence.

⁴⁷ C Benjamin. "The Liberty of the Ancients Compared with that of the Moderns." *Political writings* 325 (1988).

⁴⁸ R John. *A theory of justice*: Revised edition. Harvard university press, 2020. P.xii, Chapter VIII.

⁴⁹ A Sen. *The idea of justice*. London: Penguin Books, 2009. Part iv, p. 381, chapter 4, 17

Addressing the issue of patent injustice becomes imperative, and a balanced approach is advocated to safeguard intellectual property rights while ensuring equitable access to medicines. Recognizing the significance of comprehensive reforms within the international intellectual property framework, the focus is on prioritizing the well-being of citizens and upholding their fundamental right to health. By acknowledging the intricate interplay between intellectual property and human rights, a delicate equilibrium that protects commercial interests while promoting the equitable availability of medicines can be established. Leveraging the inherent flexibility enshrined in the TRIPS agreement, as emphasized in the Doha Declaration, is pivotal in facilitating unhindered access to economically viable generic medicines.⁵⁰ The utilization of this flexibility might become instrumental in addressing patent injustice and promoting equitable access to essential drugs; further exploration will be illustrated in the next theme.

3.0 Conclusion

The pursuit of justice seeks to reconcile the relationship between the individual and society, acknowledging that individuals play a role in shaping culture and understanding that community is more than the sum of its parts. Justice is not an innate quality bestowed upon a chosen few but rather a skill everyone can learn. It is a dynamic relationship between all parties, encompassing the collective and the individual. Justice is the guiding force that governs interactions between the group and individuals, impartially adjudicating and ensuring fairness for each individual while upholding the common good.

Justice continuously adapts and evolves in the expression of challenges, seeking to create new relationships and reconfigure its components. It is not a static concept but a dynamic process that responds to the ever-changing reality of citizens. Today, justice deals with the dilemma of balancing freedom and equality. To address this, I propose that the only feasible form of justice is the equality of opportunity within a framework of independence and integrity among citizens.⁸ Justice assessment should be linked to competency rather than absolute equality in all aspects. Efficiency becomes paramount as it ensures that justice empowers competent individuals, providing them with development opportunities. At the same time, justice should not marginalize less privileged people but rather protect their rights and dignity. This can be achieved by establishing institutions that safeguard workforce rights, provide social security settlements, and create equal opportunities for all citizens, irrespective of their wealth or social status.

4.0 Recommendations

A multifaceted approach is required to bridge the gap between the ideal of justice and the realities of the pharmaceutical industry. It begins with a theoretical reassessment of intellectual property rights, drawing on moral philosophy to establish principles safeguarding collective well-being, especially of the most vulnerable. This theoretical groundwork paves the way for practical shifts in the pharmaceutical industry, where companies are incentivized to prioritize research and development for diseases that disproportionately affect developing regions. Such a shift would necessitate public funding and international partnerships to foster innovation where it is most needed. Policy-wise, the adoption of flexible patent laws is crucial. These laws must accommodate the dual needs of stimulating pharmaceutical innovation and ensuring the availability of affordable medications. This can be achieved through mechanisms like

⁵⁰ R Donald G. *Intellectual property rights and global capitalism*. ME Sharpe, 2004. Chapter 1, 6.

compulsory licensing, which permits the manufacturing of generic drugs without the patent holder's consent in specific circumstances, and by promoting patent pools that facilitate the sharing of intellectual property to enhance drug development. Moreover, there is a pressing need to establish global health policies that enforce equitable pricing strategies. A tiered pricing system can be instrumental in making essential drugs affordable in low-income countries without stifling market dynamics in wealthier nations. Strengthening healthcare systems in developing countries is also vital, ensuring that once medications become accessible and affordable, they can be effectively distributed and administered.

Ethical licensing is another practical measure that can have a substantial impact. It involves pharmaceutical companies allowing the generic production of their patented drugs in low-income regions, either through voluntary agreements or mandated by international accords. Such practices would require stringent monitoring to ensure compliance and effectiveness. Transparency plays a significant role in aligning pharmaceutical practices with ethical norms. Public reporting on R&D investments and pricing structures can hold companies accountable and ensure their operations contribute to global health priorities. Lastly, advocacy for comprehensive reforms within the international intellectual property framework should be intensified. The objective is to recalibrate the system to focus on the commercial aspects and the implications for human rights, particularly the right to health. By leveraging the inherent flexibility within the TRIPS agreement, as highlighted in the Doha Declaration, the goal of equitable access to medicines can become more attainable. In conclusion, the amalgamation of theory, practice, and policy in pharmaceutical justice requires a concerted effort that spans ethical theory, incentivization of health-focused innovation, policy flexibility, and systemic transparency. Through such integrative reforms, the principle of justice can be realized in the global landscape of health and pharmaceuticals.

Bibliography

1. Jayashree, W. "Patents: An Indian Perspective." In *The Making of the TRIPS Agreement*, 295-320. WTO Library, 2015.
2. "Agreement on Trade-Related Aspects of Intellectual Property Rights, April 15, 1994." In *International Legal Materials* 33: 1125-1272.
3. Marion, M., et al. "The Role of Intellectual Property Rights on Access to Medicines in the WHO African Region: 25 Years After the TRIPS Agreement." *BMC Public Health* 21, no. 1 (2021): 1-19.
4. Bryan, M. "Resolving the Public Health Crisis in the Developing World: Problems and Barriers of Access to Essential Medicines." *Northwestern University Journal of International Human Rights* 5 (2006): 1.
5. Carlos, C. M., Juan I. Correa, and Bram De Jonge. "The Status of Patenting Plants in the Global South." *The Journal of World Intellectual Property* 23, nos. 1-2 (2020): 121-146.
6. Peter, D. "Justifying Intellectual Property: Back to the Beginning." In *A Philosophy of Intellectual Property*, 13-39. Chapter 2. 1996.
7. Donald, R. G. *Intellectual Property Rights and Global Capitalism*. M.E. Sharpe, 2004. Chapter 1, 6.
8. John, R. *A Theory of Justice: Revised Edition*. Harvard University Press, 2020. P. xii, Chapter VIII, 242.
9. Derek, M., and Jon Pike, eds. *Debates in Contemporary Political Philosophy*. Part 3. Routledge, 2002.
10. Yasin, M. "Greek Thought in Arab Ethics: Miskawayh's Theory of Justice." 2000.

11. Lori, W. "Medical Apartheid: The Dark History of Medical Experimentation on Black Americans From Colonial Times to the Present." *Journal of Research Administration* 39, no. 2 (2008): 99-103.
12. Government of Canada. "Improves Access to Affordable and Effective Drugs for Rare Diseases." Last modified June 13, 2023. <https://www.canada.ca/en/health-canada/news/2023/03/government-of-canada-improves-access-to-affordable-and-effective-drugs-for-rare-diseases.html>.
13. Ryan, T. R., et al. "Multicomponent Strategy with Decentralized Molecular Testing for Tuberculosis in Uganda: A Cost and Cost-Effectiveness Analysis." *The Lancet Global Health* 11, no. 2 (2023): e278-e286.
14. Health Campaigners. "Warn of the Cost to the NHS of Recent Pharmaceutical Proposals to Reform Key Drug Pricing Mechanism." Last modified June 13, 2023. <https://www.globaljustice.org.uk/news/health-campaigners-warn-of-the-cost-to-the-nhs-of-recent-pharmaceutical-proposals-to-reform-key-drug-pricing-mechanism/>.
15. Wallach, John R. "Plato." In *Handbook of the History of the Philosophy of Law and Social Philosophy: Volume 1: From Plato to Rousseau*, 283-294. Springer International Publishing, 2023.
16. Sen, A. *The Idea of Justice*. Penguin Books, 2009. Part IV, 381, Chapter 4, 17.
17. David, M. *Principles of Social Justice*. Harvard University Press, 2001. 61.
18. Ann, W. "Justice as Economics in Aristotle's Nicomachean Ethics." *Canadian Political Science Review* 4, no. 1 (2010): 1-11.
19. Donald, G. *Intellectual Property Rights and Global Capitalism*. M.E. Sharpe, 2004. Chapter 1, 6.
20. Johan, V. W. "Rawls, Habermas, and Liberal Democratic Law." *Netherlands Journal of Legal Philosophy* 52 (2023): 16.
21. Sidita, K. "Just Another Civil War? The Influence of Conflict Perceptions on Western Conflict Management in Kosovo and Beyond." *World Affairs* 186, no. 2 (2023): 284-322.
22. Fritz, M. *An Economic Review of the Patent System*. U.S. Government Printing Office, 1958. No.
23. Sean, M. P. "Patents, Human Rights, and Access to Medicines." *Human Rights Law Review* 22.