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A HUMAN RIGHTS ANALYSIS OF SOUTH AFRICA'S CONTROL OF MARKETING OF ALCOHOLIC BEVERAGES BILL

UMA ANÁLISE DOS DIREITOS HUMANOS DO PROJETO DE LEI DE CONTROLE DE MARKETING DE BEBIDAS ALCOÓLICAS DA ÁFRICA DO SUL

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Abstract

In 2013, the South African government drafted the Control of Marketing of Alcoholic Beverages Bill to address alcohol-related harms. This draft Bill aims to protect children's health by restricting alcohol advertising but was opposed with arguments that advertising restrictions will violate human rights. Using the International Covenant on Civil and Political Rights and Siracusa Principles this paper assesses the claim that restricting alcohol advertising poses an unjustifiable limitation on human rights, including the right to freedom of expression. An analysis shows that the limitation may be justifiable to protect children's right to health and their right to be free from all forms of violence. Restricting alcohol advertising is a government obligation to protect children's rights from private sector violations.

Keywords

Human rights. Business. International law. Alcohol control. Siracusa Principles.

Resumo

Em 2013, o governo sul-africano elaborou o Projeto de Lei de Controle de Comercialização de Bebidas Alcoólicas para lidar com os danos relacionados ao álcool. Este projeto de lei tem como objetivo proteger a saúde das crianças restringindo a publicidade do álcool, mas foi criticado com argumentos de que as restrições de publicidade violarão os direitos humanos. Utilizando o Pacto Internacional sobre Direitos Cívicos e Políticos e os Princípios de Siracusa, este documento avalia a alegação de que restringir a publicidade de bebidas alcoólicas é uma limitação injustificável aos direitos humanos, incluindo o direito à liberdade de expressão. Uma análise mostra que a limitação pode ser justificável para proteger o direito das crianças à saúde e seu direito de estarem livres de todas as formas de violência. A restrição da publicidade do álcool é uma obrigação governamental de proteger os direitos das crianças contra violações do setor privado.

Palavras-chave

Direitos humanos. Empresas. Direito internacional. Controle do álcool. Princípios Siracusa.

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1. INTRODUCTION

A substantial proportion of the global disease burden is attributable to high rates of alcohol consumption and abuse (Griswold et al., 2018). Children are particularly vulnerable to alcohol-related harm both as a result of their own consumption and as a consequence of adult consumption. Children are also susceptible to alcohol-related harm as a result of peer influenced drinking (Handren et al., 2016, Hung et al., 2017). Early initiation of drinking is associated with increased risk for alcohol-related harms in later life (Grant and Dawson, 1997, Grant, 1998, Kraus et al., 2000, Dawson et al., 2008, Shepherd et al., 2006), unintentional injuries (Hingson et al., 2009, Hingson et al., 2000), violence (Shepherd et al., 2006) and risky behaviours (Sartor et al., 2007). Evidence also links adult drinking to children being physically hurt, verbally abused, exposed to domestic violence and left unsupervised (Laslett et al., 2017). Maternal drinking can lead to foetal alcohol spectrum disorder (FASD) (Popova et al., 2017). Parental alcohol abuse can lead to child abuse and maltreatment, which can in turn lead to childhood psychopathology (World Health Organisation and John Moores University, 2006) and problem drinking later in life (Shin et al., 2009).

Alcohol is shown to have a strong relationship to non-communicable disease (NCDs) (Parry et al., 2011) and has a causal relationship to more than 200 ICD disease codes (Rehm et al., 2009). Literature suggests that the commercial determinants of health – defined by (Kickbusch et al., 2016) as “strategies and approaches used by the private sector to promote products and choices that are detrimental to health” (p. e895) – are a key barrier to attaining equitable global health, including for NCDs (Ottersen et al., 2014). Globalisation, trade liberalisation and the deregulation of industry have enabled transnational corporations to become the vector of NCDs worldwide (Moodie et al., 2013, Freudenberg, 2014). Hence, such NCDs are aptly termed ‘industrial epidemics’ (Jahiel and Babor, 2007).

Alcohol-related harm presents a significant public health problem in South Africa, a country that has one of the highest prevalence of risky drinking in the world (World Health Organisation, 2018). In 2000, alcohol-related harm led to 7.1% of all deaths and 7% of total disability-adjusted life years (Schneider et al., 2007). Amongst those who consume alcohol in South Africa, individuals over the age of 15 years consumed an average of 29.9 litres of pure alcohol per drinker per year in 2010, compared to 11.4 litres in Mozambique, 19.3 litres in Brazil, 15.6 litres in the United Kingdom and 13.4 litres in Australia (World Health Organisation, 2018). Moreover, South Africa has the highest rates of FASD globally (May et al., 2013).

To address alcohol-related harms, the South African government drafted the Control of Marketing of Alcoholic Beverages Bill (draft Bill) in 2012 (Dlamini, 2013). The draft Bill prohibits (a) the advertising and marketing of alcoholic beverages except at point of sale; (b) any sponsorship associated with alcoholic beverages; and (c) any promotion of alcoholic beverages through, for example, gifts, cost reductions and competitions. The Minister of Social Development specifically noted that the draft Bill was developed cognisant of the exposure of children to alcohol advertising and was based on evidence-based recommendations (Dlamini, 2013), which include banning alcohol advertising as a strategy to decrease alcohol-related harms (Anderson et al., 2009a, World Health Organisation, 2010a, World Health Organisation, 2010b).

Although the draft Bill was approved for publication for public comment in September 2013, it has never been made public (Bertscher et al., 2018). The draft Bill has undergone various regulatory impact assessments – assessments carried out by or on behalf of government to determine the economic and social impacts of the restriction – the results of which are not in the public domain (Bertscher et al., 2018). Research suggests that the alcohol and allied industries launched a concerted lobbying and advocacy campaign to prevent the development of the draft Bill from moving forward (Bertscher et al., 2018).

There is a growing body of evidence to suggest that the alcohol industry (AI) has used political strategies to influence the formulation of health policies so as to ensure that their products remain unregulated (Paukštė et al., 2014, Babor, 2009, Miller and Harkins, 2010, Alavaikko and Österberg, 2000, Mosher, 2009, Anderson and Baumberg, 2005, Hawkins et al., 2012, McCambridge et al., 2013, Baggott, 2006, Anderson, 2004, Babor et al., 2015, Casswell, 2013, Gilmore and Fooks, 2012, London et al., 2012, Parry et al., 2014, Jahiel and Babor, 2007, Savell et al., 2016, Casswell and Thamarangsi, 2009, Gilmore et al., 2011, Bakke and Endal, 2010, Martino et al., 2017, Vendrame, 2017, Bertscher et al., 2018). Similar political strategies are seen across industries (Freudenberg, 2014).

As corporate influence is such a common phenomenon in health policy development, it has prompted researchers to develop methods for a Health Impact Assessment of Corporations whose activities may have both positive and negative impacts on health (Baum et al., 2016). Often industry's negative impacts are mediated through policy capture or undermining of regulatory processes (Savell et al., 2016, Martino et al., 2017), including in South Africa (Bertscher et al., 2018). A key industry strategy has been to emphasise the idea that there is only a minority of drinkers who abuse alcohol, and there is a majority of responsible drinkers. This argument enables industry to shift the responsibility for alcohol-related harms onto the drinker and away from corporations producing the potentially health-harming product to avoid regulation (Savell et al., 2016, Martino et al., 2017). In a world where the 'vector' of diseases are corporations who profit from the unconstrained marketing of the unhealthy commodities (Moodie et al., 2013), there is a need for strong regulation informed by the obligation to protect health, including children's health. Therefore, a rights-based approach provides an important counter argument to industry's approach of shifting responsibility.

Opponents of the draft Bill have argued that restricting alcoholic beverage advertising will be ineffective in curbing alcohol-related harms and could violate rights to freedom of expression, trade, dignity and information for consumers (Louw, 2014, Louw, 2015). International experience suggests that opposition to public health regulations are challenged by actors with vested interests who claim that such regulation may unduly limit human rights. For example, in their paper, Steele et al. (2016) point out that the tobacco industry drew on human rights to argue against Canada's 1988 Tobacco Products Control Act in the *RJR-MacDonald Inc v Attorney General of Canada* claiming that the Act violated freedom of expression.

A human rights based approach to health recognises that states have obligations to take steps to control illness and injury and that actions to promote the general welfare of a society may limit derogable rights (United Nations General Assembly, 1966b), which may include obligations to regulate the private sector (United Nations Committee on Economic Social and Cultural Rights, 2000). Limitations of rights, however, need to be justifiable. The South African Constitution similarly permits rights limitations under limited circumstances. Under section 36 of the South African Constitution,

rights may be limited only in terms of law and only “to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom” (Constitution of the Republic of South Africa, 1996p. 1261).

In the context of international human rights law, we provide an analysis of whether restrictions proposed in the draft Bill are a justifiable limitation of human rights, which may benefit other countries facing possible corporate opposition to public health legislation. We focus on the right to freedom of expression as the tobacco industry has notably used this argument in the past when governments introduce laws to restrict tobacco advertising, and it is beyond the scope of this paper to conduct an analysis of multiple rights. However, the following analysis could be used to assess other potential rights violations.

1.1 ICCPR AND SIRACUSA PRINCIPLES

In 1998, South Africa ratified the International Covenant on Civil and Political Rights (ICCPR), which provides a wide range of civil and political rights. Certain rights provided under the ICCPR can be limited to protect national security, public safety, public order, public health or the rights of others (United Nations General Assembly, 1966a). However, there was a concern that governments could abuse the provisions in the ICCPR that permit them to limit and derogate certain human rights, most notably for national security or public emergency. As a response in 1984 the American Association for the International Commission of Jurists (AAICJ) developed 14 interpretative principles on the limitation and derogation provisions in the ICCPR, which they called of the ‘Siracusa Principles’ – after the city in Italy in which these principles were drafted (AAICJ, 1985). The Siracusa Principles were adopted by the UN Economic and Social Council in 1985 (Gruskin and Loff, 2002, United Nations Economic and Social Council, 1985).

In the absence of legally binding principles governing the limitation of rights in the context of the ICCPR, the Siracusa Principles provide the most authoritative guidance at present on the conditions under which the limitation of rights may be permitted. International law scholars have referred to the Siracusa Principles when considering the relationship between health and human rights. For example, under certain circumstances quarantining or isolating a patient with an infectious disease, such as Ebola, typhoid or COVID-19, could be a justifiable limitation to their right to freedom of movement, and such limitation may be permitted according to international human rights law (Spadaro, 2020, World Health Organisation, 2002).

In summarising the Siracusa Principles, Gruskin and Loff (2002) developed five criteria that must be considered when determining whether a rights limitation is justifiable. A World Health Organisation (WHO) publication on health and human rights, which Gruskin contributed to also outlines these criteria:

- The restriction is provided for and carried out in accordance with the law;
- The restriction is in the interest of a legitimate objective of general interest;
- The restriction is strictly necessary in a democratic society to achieve the objective;
- There are no less intrusive and restrictive means available to reach the same objective; and
- The restriction is not drafted or imposed arbitrarily, i.e. in an unreasonable or otherwise discriminatory manner according to human rights law (World Health Organisation, 2002, p. 20).

Using the ICCPR and Siracusa Principles we assess the claim that restricting alcohol advertising until point of sale are an unjustifiable limitation on the right to freedom of expression.

1.2 STRUCTURE AND METHOD OF ANALYSIS

We structure this paper in the following way. In Section 1, we discuss the meaning and scope of the right to freedom of expression as protected under the ICCPR in order to gain clarity on this right. In Section 2, we outline the specific conditions under which the ICCPR permits a limitation of this right and the justifiability of the limitation. In Section 3, drawing on the guidance of the Siracusa Principles, we assess whether the draft Bill will be effective and whether there are less restrictive means to protecting the rights of others and public health. As it is beyond the scope of this paper to undertake an in-depth discussion on all 14 interpretative principles, we concentrate on the most relevant principle for this case, namely that the limitation should be the least restrictive means to achieve the same purpose of the limitation (Siracusa Principle No. 11).

General comments (GCs) (which provide expert interpretations for United Nations (UN) conventions by the UN Committee responsible for the respective treaty), and general rules of treaty interpretation (established under the Vienna Convention on the Law of Treaties) (United Nations, 1969) are used in our analysis to clarify the meaning and scope of the human right in question. Given that opposition to public health is a feature of corporate behaviour in numerous other sectors, where empirical evidence is not available, analogous evidence is drawn from other sectors. A conclusion is reached as to the justifiability of the measures in the draft Bill, with some contextual discussion as to its relevance for the general issue of implementing regulatory public health measures in other countries.

2. ANALYSIS

2.1 THE RIGHT TO FREEDOM OF EXPRESSION

Opponents to the draft Bill have argued that restricting alcohol (and tobacco) advertising violates freedom of expression (ICCPR article 19). According to article 19(2) of the ICCPR:

Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice (p. 178).

Article 19(2) thus provides protection for both disseminating and receiving information and ideas "of all kinds" and in different formats (that is, print or any other media). To decide whether alcohol advertising is protected by article 19(2) of the ICCPR, there is a question as to whether corporate entities qualify as rights holders and whether commercial advertising qualifies as a form of expression.

If according to article 19(2) of the ICCPR "everybody" has the right to freedom of expression, can the AI as a legal person can claim that their right to freedom of expression has been violated? The Office of the United Nations High Commissioner for Human Rights (OHCHR) which oversees the ICCPR does not accept complaints from private and public legal entities who claim that their rights have been violated (van Kempen, 2010). According to van Kempen, "legal persons do not qualify as

beneficiaries of the rights" (p. 2) protected under the ICCPR. The author argues that the drafters of the ICCPR deliberately chose to exclude legal persons and maintain only natural persons as rights holders, which is reflected in the Preamble of the ICCPR ("these rights derive from the inherent dignity of the human person") and has been reiterated in the ICCPR GC No. 31(9) (United Nations Human Rights Committee, 2004). Corporations would thus be unable to claim a violation of the right to freedom of expression under the ICCPR. Moreover, international law scholars and public health advocates have argued that freedom of expression does not apply, and therefore cannot be used, to protect commercial advertising as the right is intended to protect an individual's right to free social and political speech – and cannot be applied in the same way to a corporation's profit making goals (Shiner, 2003, Cabrera and Gostin, 2011).

The South African Constitution protects commercial speech under the right to freedom of expression (Constitution of the Republic of South Africa, 1996) and the South African Supreme Court of Appeal has held that advertising restrictions for tobacco products constitute a limitation of the TI's right to freedom of expression, albeit a limitation justifiable under the Constitution's limitation clause (BATSA v Minister of Health (463/2011) [2012] ZASCA 107, 2012, para 13).

Although international law scholars have argued that freedom of expression does not apply to protect commercial advertising (Shiner, 2003, Cabrera and Gostin, 2011), the wording of article 19(2) of the ICCPR suggests a wide scope of protection not only for "information" but also for "ideas of all kind". While it may be questionable whether advertising conveys information or facts, one could argue that it imparts ideas. Furthermore, ICCPR GC No. 34(11) (United Nations Human Rights Committee, 2011), which interprets the right to freedom of expression, suggests that commercial speech is not excluded from the scope of protection; the GC stipulates that the right "may also include commercial advertising" (p. 3). Yet, notes from the deliberations on the drafting of GC No. 34 suggest that the Human Rights Committee did not envision the same protection for commercial advertising as for non-commercial types of expression and therefore drafted a separate sentence on commercial advertising, using the term "may include" rather than "include" (International Service for Human Rights, 2011).

ICCPR GC No. 34 does not substantiate the scope or circumstances under which commercial advertising is protected by the ICCPR. However, given that alcohol advertising may be protected under the right to freedom of expression, the draft Bill could be argued to limit the right because it restricts alcohol advertising until point of sale.

The draft Bill could furthermore limit *consumers' right* to receive information about the product they are consuming. In a South African court case that examined the banning of all tobacco advertising (including at point of sale), the court held that "[a]dvertising allows the manufacturer, importer and other trader to impart information concerning its product" (BATSA v Minister of Health (463/2011) [2012] ZASCA 107, 2012, para 13, p. 8) and that the banning of advertising limited consumers' right to receive information. However, as mentioned above, it appears dubious whether alcohol advertising does, in fact, convey information about the product or merely focuses on persuading the consumer to buy the product. Again, even if the advertising does not convey information, under the ICCPR, consumers have the right to receive "ideas of all kinds", which could include ideas in the form of advertising. Given that the draft Bill restricts advertising except at point of sale and prohibits other forms of product promotion and marketing, it can be argued that the draft

Bill limits consumers' right to freedom of expression, that is, specifically the right to receive information as protected under the ICCPR.

2. 2 SPECIFIC GROUNDS FOR RESTRICTING FREEDOM OF EXPRESSION ACCORDING TO THE ICCPR

This section outlines the specific conditions under which the ICCPR permits a limitation of the right to freedom of expression and the justifiability of the limitation. The ICCPR article 19(3) sets out the limitations of this right as follows:

The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

- (a) For respect of the rights or reputations of others;
- (b) For the protection of national security or of public order (ordre public), or of public health or morals. (p. 178)

In the following sections we discuss the specific criteria for restricting freedom of expression according to the ICCPR, namely the restriction: 1) is provided for by law, 2) respects the rights of others, and 3) is in the interests of public health. We argue that the restriction is justifiable for each of these criteria.

2.2.1 PROVIDED FOR BY LAW

The restriction of alcohol advertising until point of sale outlets has not yet been enacted but is part of a national draft Bill. The restriction will only come into effect after the draft Bill has been published for public comment and debated in Parliament, following the appropriate South African legislative process. Once approved by Parliament and enacted by the President, the draft Bill will become a law of general application (that is, applicable to anyone). The limitation therefore meets the criterion contained in the Siracusa Principles that all limitations on a right recognised by the ICCPR shall be provided for by law.

2.2.2 RESPECTS THE RIGHTS OF OTHERS

Limitations of article 19(3) of the ICCPR are permissible if they are necessary to protect the rights and freedoms of others. According to the Siracusa Principles (para 35), the term "rights and freedoms of others" (p. 9) extends beyond the rights and freedoms recognised in the ICCPR. Therefore, we interpret this principle such that when considering the rights of others, any international treaty ratified by the relevant country would have to be considered.

While the draft Bill relates to both adults and children, this paper focuses on children's rights. The draft Bill may be needed to protect children's rights protected under the International Covenant on Economic, Social and Cultural Rights (ICESCR) (United Nations General Assembly, 1966b) and the United Nations Convention on the Rights of the Child (UNCRC) (United Nations General Assembly, 1989), both of which have been ratified by South Africa.

Article 12 of the ICESCR provides the right to the highest attainable standard of physical and mental health. The full realisation of the right includes the provision for the healthy development of the child. As governments have the obligation to respect, protect, and fulfil the rights protected in

international treaties, governments are obligated to protect right from violations by third parties, such as non-state actors (Inter-Parliamentary Union and United Nations Office of the High Commissioner for Human Rights, 2016).

The UN Committee on Economic, Social and Cultural Rights issued GC No. 14, provides guidance on the interpretation of the right to the highest attainable standard of health. GC 14 stipulates that the failure to regulate the activities of corporations to prevent them from violating individuals' health may amount to a violation of the right to health. For instance, "the failure to discourage production, marketing and consumption of tobacco, narcotics and other harmful substances" (United Nations Committee on Economic Social and Cultural Rights, 2000, section 51), which for children would include alcohol, amounts to a violation of the right to health. Upstream interventions to prevent alcohol-related harms, such as restricting alcohol advertising, are thus consistent with realising article 12 of the ICESCR.

The draft Bill may also serve to protect several children's rights under the UNCRC. All rights protected under the UNCRC need to be interpreted in the light of its four guiding principles: non-discrimination (article 2); best interest of the child (article 3); the right to life, survival and development (article 6); and child participation (article 12). Protecting children from exposure to alcohol advertising is pertinent to protect their right to survival and development and their right to the highest attainable standard of health (article 24) because – as will be argued below – alcohol advertising encourages alcohol consumption, which has negative effects on children's health and development.

As government's duty to protect human rights includes the duty to protect children from rights violations by third parties, this right includes obligations for both government and the private sector. UNCRC GC No. 16 addresses state obligations regarding the impact of the business sector on child rights, and indicates that states are obligated to protect children from the marketing of harmful substances (United Nations Committee on the Rights of the Child, 2013b). UNCRC GC No. 16 highlights the risks associated with marketing of harmful products to children and proposes preventive measures such as regulation to creating an enabling environment conducive to realising child rights (Chapman, 2016).

UNCRC GC No. 16 also stipulates that where transnational corporations headquartered in a foreign country operate within a countries' borders, states are obliged to regulate these entities' operations so that they do not negatively impact the rights of children, or violate rights in foreign jurisdictions (Chapman, 2016, United Nations Committee on the Rights of the Child, 2013b). In addition, UNCRC GC No. 15, which interprets UNCRC article 24, suggests that the right to health as applied to children creates responsibilities for the private sector, stating that businesses should "refrain from the advertisement, marketing and sale to children of tobacco, alcohol and other toxic substances" (United Nations Committee on the Rights of the Child, 2013a, p. 18). UNCRC article 24 thus includes protection from alcohol advertising.

The private sector's responsibility to ensure the rights of others are not infringed is included under the UN's Guiding Principles on Business and Human Rights (United Nations Office of the High Commissioner for Human Rights, 2011) and reflected in the UN Global Compact, a UN initiative to promote social responsibility on the part of subscribing corporations, which includes a specific commitment to respecting human rights (United Nations Global Compact, n.d.-b).

Furthermore, UNCRC article 17 protects children's right to information which includes protection *from* harmful information. UNCRC article 17(e) encourages governments to develop "guidelines for the protection of the child from information and material injurious to his or her well-being" (United Nations General Assembly, 1989, p. 7). Even if alcohol advertising were to be considered information – which is, as noted above, contested – it would also be information that is harmful for children's well-being, since it attempts to market a product harmful to children's health.

We argue below that children exposed to alcohol advertising are encouraged to start drinking. Therefore, article 17(e) provides cogent grounds for restricting advertising directed at children, which governments should address proactively. It is also in the best interest of the child (UNCRC article 3) to protect children from harmful information.

Lastly, UNCRC article 19 protects children's right to be free from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse and requires governments to take all appropriate legislative, administrative, social and educational measures to protect children from all forms of violence. Restriction of alcohol advertising until point of sale is meant to reduce the consumption of alcohol by children and by adults. As discussed below, alcohol consumption is a risk factor for violence affecting children and the draft Bill aims to protect children from direct and indirect exposure to violence.

2.2.3 IN THE INTEREST OF PUBLIC HEALTH

Article 19(2) of the ICCPR may be limited if the limitation is necessary to protect public health. According to the Siracusa Principles, public health can justify a limitation of human rights:

...to allow a state to take measures dealing with a serious threat to the health of the population or individual members of the population. These measures must be specifically aimed at preventing disease or injury... (AAICJ, 1985, p. 8).

In exploring public health implications of alcohol advertising, the following sections discuss the impact of alcohol consumption on children and the links between alcohol advertising and alcohol consumption.

1) The impact of alcohol consumption on children

Alcohol consumption by children is a major public health concern in many countries, particularly in South Africa, where 12% of children consume their first alcoholic beverage before the age of 13 years, well below the legal age for drinking of 18 years (Morojele and Ramsoomar, 2016). Nationally, a high proportion of 10 to 19 year-olds report consuming alcohol (36.6% of males and 28.2% of females) and binge drinking (30.3% of male and 20.1% of female adolescents) during the past month (Morojele and Ramsoomar, 2016).

The consumption of alcohol bears significant health risks for children. Heavy drinking increases children's risk of mental health, social and behavioural problems (Natvigaas et al., 1998, Brown et al., 2000, Bonomo et al., 2001, Ellickson et al., 2003, Best et al., 2006, Gutierrez and Sher, 2015, Morojele and Ramsoomar, 2016). Additional health risks to children stem from risky behaviours associated with alcohol consumption (for example, unprotected sex, which may lead to sexually transmitted infections and unplanned pregnancy) (Morojele and Ramsoomar, 2016)

Alcohol consumption by adults can also have detrimental effects on children. FASD – a result of maternal consumption of alcohol during pregnancy – can lead to a range of behavioural and intellectual impairments, of which foetal alcohol syndrome (FAS) is the most severe form (Popova et al., 2017). Studies in the wine growing regions of the Western Cape Province show an extremely high prevalence of FASD ranging between 6.8% to 28% (Viljoen et al., 2005, May et al., 2000, May et al., 2007, May et al., 2013, May et al., 2016, May et al., 2017, Roozen et al., 2016). Some of these prevalence rates are the highest reported in any community globally (May et al., 2013, Roozen et al., 2016)

Adult alcohol consumption is a risk factor for other harmful behaviours, such as violence against children (Mathews and Benvenuti, 2014). For instance, children whose parents abuse substances are between 2.2 and 3.4 times more likely to report sexual abuse (Artz et al., 2016). Aggressive behaviour by adults can affect children both directly (experiencing violence) and indirectly (witnessing domestic or community violence) and either can have negative long-term effects on children (Widom, 2014). Katwan et al. (2011) found that reported maternal drinking prior to and after pregnancy was associated with behavioural disorders in children.

II) The links between alcohol advertising and alcohol consumption

Alcohol advertising plays a role in creating and increasing the demand for alcohol. It encourages both children (Austin et al., 2006, Ellickson et al., 2005, Jernigan et al., 2017) and adults to consume alcohol (Casswell, 2004, Snyder et al., 2006, Anderson et al., 2009b, Chen et al., 2005), which can be detrimental to children's health and wellbeing, as discussed above. In terms of adult consumption, for example, a cross-sectional community survey in the Western Cape province of South Africa, which is known for high rates of FAS (Bowers et al., 2014, Olivier et al., 2013), found that women who reported high exposure to alcohol advertisement were 2.3 times more likely to report hazardous drinking according to the AUDIT questionnaire (95% CI 1.0-5.0), 4.5 times more likely to report problem drinking according to the CAGE questionnaire (95% CI 1.3-15.6), 1.7 times more likely to report experiencing partner violence (95% CI 1.0-2.8), and 3.4 times more likely to report heavy drinking taking place in their community (95% CI 2.1-5.5) (Amanuel et al., 2018).

Literature suggests that alcohol advertising targets children directly and encourages them to consume alcohol (Casswell, 2004, Snyder et al., 2006, Anderson et al., 2009b, Chen et al., 2005, Austin et al., 2006, Ellickson et al., 2005, Smith and Foxcroft, 2009, Booth et al., 2008). For example, research in South Africa found that 21% of all television advertising between 3pm and 9pm, a time when children would most likely be watching TV, was for alcohol (Mchiza et al., 2013). In these adverts, South African celebrities were used to promote alcoholic beverages in the context of positive messages, such as "fun, sophistication, flexibility, peer status and championship" (p. 6), which contravened the AI's own code of conduct.

Research in several European countries suggests that alcohol advertisements deliberately target young people (de Bruijn et al., 2012, Hastings, 2013, Hastings et al., 2010). A study found that European adolescents were more likely to initiate binge drinking one year after being able to name a favourite alcohol advertisement (Morgenstern et al., 2014) and another study on German adolescents showed positive association between exposure to alcohol advertising and youth drinking (Morgenstern et al., 2011). Elsewhere underage drinking of specific brands is positively associated

with brand-specific advertising in the US (Naimi et al., 2016) and alcohol marketing exposure to youth and increased youth alcohol consumption and drunkenness in the Philippines (Swahn et al., 2013)

A systematic review of prospective cohort studies found young people's exposure to alcohol advertising was associated with subsequent alcohol consumption (Smith and Foxcroft, 2009) and another systematic review on the effects of alcohol pricing and promotion found that alcohol advertising may increase earlier onset of drinking (Booth et al., 2008). In addition, two further systematic reviews of longitudinal studies suggest that exposure to alcohol advertising and media increases the chance that adolescents will start to drink earlier and, if they already drink, will drink in larger quantities (Anderson et al., 2009b, Jernigan et al., 2017).

Research also shows that the AI intentionally targets demographics where consumption is low, much like the tactics of the tobacco industry, which has targeted children as "replacement smokers" (Toebes et al., 2017). Therefore, a restriction of alcohol advertising will prevent increased demand for alcohol amongst young people and the consequences of early commencement of drinking.

2.3 GENERAL SIRACUSA PRINCIPLE: AVAILABILITY OF LESS RESTRICTIVE MEANS TO ACHIEVE THE SAME PURPOSE OF THE LIMITATION

In addition to the specific requirements of article 19(3) of the ICCPR, the limitation should comply with the general interpretative Siracusa Principles. One of the key questions in relation to the draft Bill is whether there are less restrictive means to achieve the same goals of protecting the rights of others and protecting public health. If less restrictive but equally effective means are available to achieve the purpose, the draft Bill would be an unjustifiable limitation of article 19(2) of the ICCPR. It therefore needs to be assessed whether the draft Bill (1) is likely to achieve the purpose of protecting children from alcohol marketing and alcohol-related harm, and (2) whether less restrictive, but equally effective alternatives are available.

2.3.1 EFFECTIVENESS OF DRAFT BILL

If the draft Bill aims to limit alcohol advertising to protect children from alcohol-related harms, would preventing exposure to advertising decrease the hazardous drinking and earlier initiated drinking? A 2014 Cochrane review found there was insufficient evidence to answer the question at that time (Siegfried et al., 2014). This conclusion, however, does not indicate that restricting alcohol advertising is ineffective – rather that there is currently insufficient evidence to show that stopping exposure will be effective. A later systematic review, by Scott et al. (2017) while acknowledging some mixed findings and heterogeneity in study design, content and outcomes, reported "sufficient confidence of an overall effect of promotional marketing (usually advertising) upon some early life drinking behaviours" (p. 91) and recommended strengthening advertising regulations and confining advertising targets to adult populations. A 2020 in-depth literature review concludes that there is indeed a causal relationship between alcohol marketing and drinking patterns among young people (Sargent and Babor, 2020).

An analogous situation appeared to have existed in relation to tobacco advertising restrictions in 1999. Even though evidence from systematic reviews was inconclusive at the time,

national and international policies adopted advertising restrictions based on observational data (Lovato et al., 2011). Subsequently, success in reducing smoking rates, both in general, and amongst young persons in South Africa has been documented (Hofman and Lee, 2013). In addition, a growing body of observational research mentioned above supports the argument that restricting alcohol advertising would decrease the rates of alcohol consumption and the associated burden of disease.

According to the WHO, restricting alcohol advertising is considered one of the most cost-effective upstream methods of reducing alcohol-related harm (World Health Organisation, 2017). Babor notes, however, that restricting alcohol advertising alone is not a panacea (Babor, 2010). A variety of additional parallel public health interventions are essential to curb alcohol-related harm, such as increasing alcohol pricing, taxation and limiting sales licences (Alcohol and Public Policy Group, 2010). This integrated approach is already underway in South Africa as the Inter-Ministerial Committee on Substance Abuse adopted a comprehensive policy to reduce alcohol abuse, with alcohol advertising restrictions being only one of the many interventions to tackle alcohol abuse (National Department of Social Development, 2011).

2.3.2 AVAILABILITY OF LESS RESTRICTIVE MEANS

Are there less restrictive, but equally effective means for preventing alcohol-related harms? The draft Bill neither denies individuals the freedom to purchase and consume alcohol, nor does it bar the AI from manufacturing and selling alcoholic beverages. The draft Bill does, however, restrict advertising and marketing of alcoholic beverages until the point of sale only. Therefore, this limitation does not erode the essence of the right of freedom of expression (Siracusa Principle No. 2), since alcohol advertising is not completely prohibited, and consumers can still access information or ideas about the product at point of sale. Below we outline and assess potentially less restrictive alternatives. In each case below we argue that there is no less restrictive, but equally effective means to preventing alcohol-related harms.

1) Education directed at those who abuse alcohol

The AI suggests that most people who drink, do so responsibly, and that only a minority of people who drink are problem drinkers. They therefore call for government to develop targeted interventions that educate those who abuse alcohol to drink responsibly (McCambridge et al., 2013, Parliamentary Monitoring Group, 2013). The AI justifies targeted interventions, such as education, at a small group of people who, what they argue, are the source of the problems with alcohol misuse. However, targeted education, including school-based programmes have limited effectiveness (Strom et al., 2014, Agostinelli and Grube, 2002, Babor and Caetano, 2005, Jones et al., 2007). Even if one can reach problem drinkers, there are practical barriers that render this initiative resource intensive, such as how to recruit problem drinkers into such programs. Furthermore, educational programmes would not prevent harmful drinking, since by definition, such individuals would already be abusing alcohol. Therefore, downstream educational interventions ignore the upstream population level interventions that would be more effective in reducing alcohol-related harms. Moreover, targeted intervention places the burden on the state, shifting the responsibility away from the AI who contribute to problem drinking through alcohol advertising.

Although 42% of South Africans abstain from drinking, those who do, report rates of binge drinking that are amongst the highest in the world (World Health Organisation, 2018). This is particularly a problem for young people (World Health Organisation, 2014). For example, according to a Youth Risk Behaviour Survey, 30% of male adolescents between 10 and 19 years old reported heavy drinking in the past month (Morojele and Ramsoomar, 2016). The notion of a 'minority' of problem drinkers is therefore not supported by available evidence. Alcohol education targeting adolescent 'problem drinkers' alone does not constitute a sufficient primary prevention. Education is an intervention of weak effectiveness and would not prevent drinking since, such targeted children would already be abusing alcohol.

II) Application of the restrictions on advertising to only those who abuse alcohol

Notwithstanding the fact that adult alcohol misuse can negatively affect children, restricting alcohol advertising only to adult problem drinkers does not appear to be feasible. The nature of advertising is such that it aims to reach consumers on the basis of their demographic attributes and preferences but can never be absolutely selective for only those consumers who abuse alcohol. Noel et al. (2016c) have drawn attention to the difficulties of enforcing partial restrictions on marketing for specific populations. This confirms the practical barriers of a restriction being made specific to those who abuse alcohol.

III) Restricting advertising to avoiding children being exposed to advertising

The practical difficulty of protecting children from being exposed to alcohol marketing would substantially undermine partial advertising restrictions. Studies on tobacco show that efforts to restrict advertising to certain types of media were ineffective (Saffer and Chaloupka, 2000). Controlling advertising on certain types of media such as billboards, podcasts, TV and radio are likely to be ineffective because one cannot fully control when children are exposed to the media. For example, cable TV (as opposed to broadcast TV) and the use of cable TV recording devices make it difficult to control when children watch TV and what they view. Moreover, restrictions applied to certain types of media may lead the AI to shift advertising to other media where no restriction is enforced (Nelson, 2003).

Empirical research on partial alcohol advertising suggest they may not be effective (Saffer and Chaloupka, 2000). US studies of partial advertising restrictions on TV using an underage viewership threshold of 30% and in magazines showed no reduction in youth exposure and consumption (Nelson, 2003). Another US study investigating the mortality rate of alcohol interventions on youth, showed that partial advertising restrictions would reduce alcohol-related life-years lost by 4%, whilst a complete ban would reduce alcohol-related life-years by 16.4%. (Hollingworth et al., 2006)

Even if it were practically possible to ensure that only children were not exposed to advertising, this would not sufficiently protect them from alcohol-related harm because adult drinking would continue as a result of advertising aimed at adults. Therefore, alternative measures can only be considered effective if they limit the exposure of both adults and children to alcohol advertising.

IV) Public education

Instead of limiting alcohol advertisement, an alternative upstream intervention could be to run awareness campaigns that educate the public about the negative effects of alcohol consumption and how to drink responsibly. While this would be a less restrictive intervention, literature confirms that education type programmes are ineffective in reducing alcohol abuse (Anderson et al., 2009a).

Indeed, industry has been criticised for promoting interventions of unproven or weak effectiveness, particularly interventions that translate a public health problem at societal level into an individual level behaviour change problem – for which interventions are generally of poor effectiveness (Casswell and Thamarangsi, 2009). It is furthermore questionable whether it would be productive to use limited public funding to run counter advertising campaigns responding to the AI's massive marketing campaigns supported by large budgets (Jernigan and Babor, 2015).

V) Self-regulating advertising

Another argument for a less restrictive measure would be to allow the marketing of alcoholic beverages to remain self-regulated, but with strict law enforcement (Parliamentary Monitoring Group, 2012, Parliamentary Monitoring Group, 2013). In many countries, if not all, the AI 'self-regulates' its advertising through its own code of conduct including in South Africa (Noel et al., 2016a). However, despite the existence of such a code, a substantial proportion of South African alcohol advertising is screened between 3pm and 9pm when children are watching TV (Mchiza et al., 2013). It is also well-noted that alcohol companies around the world continuously violate their own self-regulation guidelines, including in Africa (Noel and Babor, 2016, Jones and Donovan, 2002, Vendrame et al., 2010, Casswell and Anna, 2005, Noel et al., 2016b). Self-regulation is, therefore, ineffective in protecting children from exposure to alcohol marketing, generates an inherent conflict of interest, and has been described as a flawed strategy (Noel and Babor, 2016).

VI) Addressing underlying drivers of alcohol abuse

The industry argues that the government should address alcohol abuse through focusing on the underlying drivers of alcohol abuse, such as unemployment and alleviating poverty (Parliamentary Monitoring Group, 2012, Parliamentary Monitoring Group, 2013). This argument is not in itself an alternative to advertising restrictions. Rather, as part of a comprehensive approach to reducing alcohol-related harms, alcohol advertising restrictions should be part of integrated strategies for alcohol harm-reduction, which would include addressing unemployment and alleviating poverty.

2.3.3 OTHER GENERAL INTERPRETATIVE PRINCIPLES

Although the other 14 general interpretative Siracusa Principles relating to the justification of limitations are important, we concentrate on what we consider to be the most relevant principle for this case, namely that the limitation must be the least restrictive means to achieve the purpose of the limitation. Taking the above into consideration, we note that the draft Bill is also consistent with other general Siracusa Principles. For instance, once enacted, opponents of the draft Bill will be able to challenge the law in a court (Siracusa Principle No. 8). The draft Bill also complies with Siracusa

Principle No. 10, which requires the limitation to respond to a pressing public need (reducing alcohol consumption in a country with significantly high levels of alcohol-related health and social harms) and to pursue a legitimate aim (protecting children's rights and children's health). Balancing the draft Bill's effect on the right to freedom of expression with children's rights and public health suggests that the limitation is proportionate to its aim. The draft Bill will be applied in a non-arbitrary and non-discriminatory manner (Siracusa Principle No. 7 and 9). This means that the advertising restriction must be applied to all advertising of alcoholic beverages and be binding for all companies. Compliance will require effective monitoring and enforcement of the advertising restriction by law enforcement agencies.

3. DISCUSSION

Applying the Siracusa Principles and ICCPR article 19(3), this paper assesses the credibility of claims that restrictions on alcohol advertising are an unjustifiable limitation of human rights, and indicates that restricting of alcohol advertising until point of sale is a justified limitation of the right to freedom of expression. This analysis takes into consideration the key question as to the status of corporate entities as rights holders. Under the ICCPR, corporations would thus be unable to claim a violation of the right to freedom of expression as the ICCPR excludes legal persons and maintains only natural persons as rights holders.

Although the South African Constitution protects commercial speech under the right to freedom of expression, advertising restrictions for tobacco products constitute a limitation of the industry's right to freedom of expression. This indicates that in South Africa the AI might be able to claim a violation of the right to freedom of expression. To counter this argument, the right to expression violation may be claimed to be justified given the child health implication of allowing alcohol advertising.

This paper draws upon the UNCRC as the main international treaty to identify the specific child rights that support restricting alcohol advertising until point of sale. Our analysis has shown that the ICCPR permits limitations of the right to freedom of expression. The restriction of alcohol advertising would only come into effect after the draft Bill has been published for public comment and debated in Parliament following South Africa's legislative process. Limitations of article 19(2) of the ICCPR are permissible if they are necessary to protect the rights and freedoms of others, which we argue does indeed protect the rights of the child.

Restricting alcohol advertising is in the interest of public health as alcohol consumption, which alcohol advertising encourages, bears significant health risks for children. ICCPR article 19(2) requires compliance with general interpretative Siracusa Principles such that there are less restrictive means with which achieve the same goals of protecting the rights of the child. The draft bill may be effective if it is to be implemented amongst a range of public health interventions to curb alcohol-related harm, such as increasing alcohol pricing, taxation and limiting sales licences of which the Inter-Ministerial Committee on Substance Abuse has stated they will implement (National Department of Social Development, 2011).

Although the other 14 general interpretative Siracusa Principles are important, we concentrate on what we consider to be the most relevant principle for this case, namely that the limitation must be the least restrictive means to achieve the purpose of the limitation. As it is beyond

the scope of the paper to examine all the 14 Siracusa Principles against the child rights implications, we recommend that a full analysis of restricting alcohol advertising be conducted taking into consideration the rights of the child.

Considering the analysis above the authors suggest that there is sufficient argument to support both national laws and an international treaty to protect and promote child's right from third parties, such as the AI. Some recommend that child rights advocates develop a governance framework convention to regulate alcohol advertising and such an international treaty could be modelled on the existing Framework Convention on Tobacco Control (FCTC), a legally binding international treaty to regulate tobacco (Au Yeung and Lam, 2019)

A large body of literature suggests that industry contributes to NCDs globally and deploys various political strategies to influence or undermine the development of health policy to control unhealthy commodities (Paukštė et al., 2014, Babor, 2009, Miller and Harkins, 2010, Alavaikko and Österberg, 2000, Mosher, 2009, Anderson and Baumberg, 2005, Hawkins et al., 2012, McCambridge et al., 2013, Baggott, 2006, Anderson, 2004, Babor et al., 2015, Casswell, 2013, Gilmore and Fooks, 2012, London et al., 2012, Parry et al., 2014, Jahiel and Babor, 2007, Savell et al., 2016, Casswell and Thamarangsi, 2009, Gilmore et al., 2011, Bakke and Endal, 2010, Martino et al., 2017, Vendrame, 2017, Bertscher et al., 2018, Moodie et al., 2013). A key industry strategy has been to emphasise the notion that only a minority of drinkers abuse alcohol and a majority of drinkers drink responsibly. Such notions enables industry to shift the responsibility for alcohol-related harms onto the drinker and away from corporations producing health-harming products to avoid regulation (Martino et al., 2017).

There is also a growing body of human rights guidance specifically addressing human rights obligations of non-state actors, such as private corporations where their operations impact on children (Ruggie, 2011, Inter-Parliamentary Union and United Nations Office of the High Commissioner for Human Rights, 2016). Approximately 10 000 companies have signed on to the abovementioned UN Global Compact, including a number of the world's largest alcohol producers, such as Anheuser-Busch, Diageo and Heineken (United Nations Global Compact, n.d.-a). Most notably the OHCHR set up an intergovernmental working group to develop a legally binding instrument based on human rights to ensure that the private sector is obligated to uphold international human rights law (United Nations Human Rights Committee, 2019).

Toebes et al. (2017) have argued that protecting children from tobacco-related harms is a child rights issue where children's best interests justify governments provisions to protect children from the marketing and advertising of tobacco products. Child rights arguments are strengthened not only by the UNCRC but by strong child-oriented language in the FCTC. No such international treaty exists for alcoholic beverages, which has been argued could give support to the global initiative to restrict alcohol advertising globally (Chapman, 2016).

Although human rights-based reasoning can support efforts to protect children's rights from third parties, relying on such reasoning is not a panacea for alcohol control measures. Despite increased implementation of tobacco control policies worldwide since the ratification of the FCTC, limited implementation has been observed in low- and middle-income countries, which may be due to few political and practical consequences if countries do not adequately comply with and monitor tobacco control measures (Bialous, 2019, Tous and Compaore, 2016). Moreover, the FCTC has not prevented the tobacco industry from interfering in domestic tobacco control policies (Bialous, 2019,

Chung-Hall et al., 2019, Martin and de Leeuw, 2013, Hiilamo and Glantz, 2015, Egbe et al., 2019) Nevertheless, implementation of the FCTC has 'resulted in measurable impacts on tobacco consumption, prevalence and other outcomes' (Chung-Hall et al., 2019, p. s119), which indicates that there is utility in the human right approach that has given rise to the FCTC as an innovative global governance initiative.

International trade agreements directly conflict with alcohol control policies to limit accessibility, reduce availability, increase prices and restrict marketing (Grieshaber-Otto et al., 2000). In practice, trade agreements tend to undermine human rights concerns, which is why the FCTC provides an instrumental counter-weight to international trade agreements that reduce trade barriers and increase trade in tobacco products (Zeigler, 2006). It has been argued that a similar framework convention may be needed for alcohol control since research suggests that, until more balanced international trade agreements are developed, domestic alcohol control policies will remain weak (Grieshaber-Otto et al., 2000). Even in the absence of such international agreements, application of human rights arguments can strengthen civil society driven advocacy and mobilisation to hold governments and non-state actors to account (London et al., 2012).

Given the results of our analysis above, we propose recommendations for future research into right based analyses for restricting alcohol advertising. Firstly, there is a possibility that there are other child rights benefits to restricting alcohol advertising and thus such analyses should be conducted and further explored to ensure that child rights are balanced with the rights of corporate entities. Secondly, we recommend that a similar methodology could be used to analyse the human rights implications of restricting alcohol advertising more generally – as opposed to child rights only. Lastly, this paper shows that this methodology was successfully applied to the draft Bill and could be applied to similar policies and legislation aimed to promote and protect the public health from other risky behaviours that lead to NCDs, such as unhealthy foods and sugary beverages.

4. CONCLUSION

This paper shows that the draft Bill is a justified limitation of the right to freedom of expression. Restricting alcohol advertising addresses a cogent health problem of sizeable significance in South Africa. It is likely to be effective and cannot be replaced by less restrictive alternatives. Given that the nature and extent of the limitation is marginal – consumers would still be able to receive alcohol advertising at point of sale – the draft Bill could be implemented without disproportionate restrictions of rights while making a major contribution to children's rights, particularly their right to health. Global health advocacy would be well served by drawing on rights arguments to strengthen public health policies aimed at addressing industrial epidemics and commercial determinants of health. Human rights-based reasoning is a powerful legal tool to protect the healthy development of children.

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