



11 Shifting of the academic landscape during Covid-19 and beyond

Michele Van Eck* 

Faculty of Law,
University of Johannesburg

Abstract

The Constitution of the Republic of South Africa, 1996 affords every person a right to freedom of expression, which includes “academic freedom and freedom of scientific research”.¹ These very freedoms form the cornerstone of academic research undertaken by various subject disciplines across South Africa. Yet, COVID-19 fundamentally shifted the *status quo* of many academic activities resulting in, for example, an abrupt move to online teaching and learning and different online approaches to processing data in academic research. Further changes during the COVID-19 era were precipitated by the Protection of Personal Information Act 4 of 2013 (POPIA) that came fully into force on 1 June 2020, a few short months after the first peak of COVID-19 infections in South Africa. This coincides with the development of a code of conduct by Academy of Science of South Africa (ASSAf) in terms of section 60 of POPIA, which is currently underway and intended to regulate and promote a uniform approach to the processing of personal information in all academic research activities within South Africa. In this, there is an incorrect assumption that legal research is immune to these research developments, and although this may hold true for certain methodological approaches of legal research, this is certainly not the case for all legal research activities. There are different methodological approaches employed in the three broad and general categories of legal research (being that of practical legal research, legal research in relation to humanities and legal research as a social science). Within these categories of legal research there are instances (especially in the context of social

* BCom (Law) (RAU), LLB, LLM, P.G. Dip Interpretation and Drafting of Contracts, Dip Corporate Law (UJ), LLD (UP), BTh (SATS). Head of Department & Senior Lecturer: Department of Private Law at the University of Johannesburg.

¹ s 16(1)(d).

sciences) that empirical data is required for research efforts, and it is in those instances COVID-19, POPIA and the anticipated code of conduct may play an important role in legal research activities. Against this background, this paper argues that legal research is not immune to the changes to the academic landscape during the COVID-19 era with specific reference to legislative interventions that have disrupted the *status quo*. Therein, a framework for the collection of data in academic research activities required by COVID-19, POPIA and possibly the new code of conduct is presented for legal research-related activities.

1 Introduction

In the words of Shakespeare, “[t]rue it is that we have seen better days”.² COVID-19 has dismantled social engagements as we knew and understood them, and thereby disrupted (on a global scale) lives, livelihoods, businesses, institutions and governments in some way, shape or form. Higher institutions of learning have not been immune to the devastation of COVID-19, having seen a disruption of both pillars of traditional academia being that of teaching and learning, as well as academic research. Therein, COVID-19 required a metamorphic change in adopting innovative online teaching and learning models as well as the way academic research and the collection of data transmuted into an almost exclusive online engagement. These changes have been largely precipitated by the need to transcend physical barriers by means of online alternatives in cyberspace, thereby adopting safe social distancing practices required during the COVID-19 era. Yet, stepping into the digital world is wrought with its own dangers, especially considering the value placed on data which is fast becoming a new and valuable world commodity. COVID-19 has, in addition to the actual fallout of the disease, created new and nefarious opportunities to gain access to data and information systems in the form of, amongst other things, ransomware attacks.³ This is particularly relevant when considering that the basis of scientific research is modelled after the collection, storage and analyses of reliable data which, due COVID-19,

2 Shakespeare’s play “As you like it” found in “The complete works of William Shakespeare” (2007) Wordsworth Library Edition *The Shakespeare Head Press, Oxford Edition*, 622, act II, scene VII, being the words uttered by Duke Senior.

3 Minnaar “‘Gone phishing’: The cynical and opportunistic exploitation of the coronavirus pandemic by cybercriminals” 2020 *Acta Criminologica: African Journal of Criminology & Victimology Special Edition: Impact of COVID-19* 33(3) 28 38.

is largely conducted in the online ethos. In addition to the COVID-19 regulations and online research activities, researchers are also now required to contend with new legislative requirements under the Protection of Personal Information Act of 2013 (POPIA) that came fully into force during the COVID-19 era and will require researchers to think differently in the way research data is gathered, handled, stored and destroyed.⁴ It is against this background that this paper intends to consider the changes in the academic landscape specifically related to academic research in context of COVID-19 and POPIA, and how these changes may impact future academic research projects both generally and more specifically within the legal research discipline.

2 General principles of academic research activities

2.1 Introductory comments

On 31 December 2019, Wuhan Municipal Health Commission in China reported the first cases of an unknown pneumonia that would eventually be identified as a new form of corona virus, known as COVID-19.⁵ Over a short period of time with infections rising at an alarming pace, one-by-one, governments took extensive and arguably drastic steps to curb infections, including the implementation of lockdowns and social distancing practices. These practices had, amongst other things, hampered academic research, especially in the way data was to be collected. The social distancing regulations altered many traditional practices of data collection, which forced researchers to shift to online alternatives. The use of online platforms brought about different considerations, such as the safety, storage and destruction of data which recently would be regulated by legislative intervention of POPIA. Legal research, as a category of academic research, in this context is of particular interest as there may be a perception that legal research is immune to online data collection practices as well as POPIA requirements, an assumption this paper argues is flawed.

Siems and Sithigh argue that there are generally three different conceptual approaches to legal research, which can be described as the:⁶

4 Protection of Personal Information Act 4 of 2013.

5 See <https://www.who.int/news/item/27-04-2020-who-timeline---Covid-19> (19-09-2021).

6 Siems and Sithigh "Mapping Legal Research" 2012 *Cambridge Law Journal* 71(3) 651 653.

law being a “practical discipline”;
law as a form of humanities; and
law as a form of social sciences.

Depending on the conceptual and methodological approaches undertaken, the legal research activities may be either more or less susceptible to COVID-19 changes and consequently POPIA requirements. To assess the impact of COVID-19 and POPIA specifically on legal academic research, it is necessary to first consider the principles of academic research generally to establish the possible touchpoints that may overlap with certain types of academic legal research areas.

2.2 Academic research in general

The foundation to academic research is centred in the freedoms afforded to research activities in the South African constitutional democracy. The Constitution affords every person the right to freedom of expression, which includes “academic freedom and freedom of scientific research”.⁷ These freedoms form the cornerstone for the research undertaken by academics, researchers, and scientists across South Africa. However, there is, broadly speaking, a distinction between so-called scientific and non-scientific research,⁸ wherein scientific research is based on objective, tangible, and measurable criteria.⁹ The basis of producing such objective, tangible and measurable criteria lies in the collection of reliable and verifiable data that is obtained in a legitimate and ethical manner. In this regard, much focus has been given to research activities that employ an empirical methodological approach which is often found in medical, health and natural science research activities, but nothing prevents such approaches to be relatable to other research activities, such as social sciences (including that of legal research activities).¹⁰

COVID-19 and POPIA are of relevance to medical and health research that relates to human subject participation in such research activities. Specific rules have been developed to protect human participants and find their early roots in the medical advances made

7 s 16(1)(d).

8 Kometsi “Scientific nature of legal research and its contribu[t]ion to scholarship” 2017 25(1) *Lesotho Law Journal* 59 73.

9 See, for instance, Kometsi (n 8) 73–74.

10 It is worth noting that legal research would, in this context, be considered a social science.

at the expense of victims of medical research atrocities of the Second World War that had no meaningful form of providing informed consent and often leading to dire consequences to the human participant.¹¹ Determined not to repeat history, medical research has sought guiding frameworks for ethical research activities. Take for instance the ethical principles relating to medical research of human participants recorded in the Belmont Report of 1979,¹² the World Medical Association's Declaration of Helsinki of 1964,¹³ the Singapore Statement on Research Integrity,¹⁴ as well as the Montreal Statement.¹⁵ Generally, these ethical principles have been insignificant in traditional legal research activities, but may become more relevant as contemporary legal methodological research approaches change, adapt and develop from traditional legal doctrinal approaches to other forms of research.

Closer to home, South Africa also has a general legislative framework focussed on medical research, which centres around the concept of informed consent in terms of section 12(2)(c) of the constitution,¹⁶ which is further exemplified in sections 7(1) and 7(3) of the National Health Act of 2003.¹⁷ Medical research would almost

11 See, for example, <https://encyclopedia.ushmm.org/content/en/article/nazi-medical-experiments> (25-09-2021) and Bhatt "Evolution of clinical research: A history before and beyond James Lind" 2010 1(1) *Perspect Clinical Research* 6-10 (<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3149409/>) (25-09-2021).

12 Also referred to as "Ethical principles and guidelines for the protection of human subjects of research the National Commission for the Protection of Human Subjects of Biomedical and Behavior[u]ral Research" https://www.hhs.gov/ohrp/sites/default/files/the-belmont-report-508c_FINAL.pdf (05-09-2021).

13 Also referred to as "WMA Declaration of Helsinki—ethical principles for medical research involving human subjects" <https://www.wma.net/policies-post/wma-declaration-of-helsinki-ethical-principles-for-medical-research-involving-human-subjects/> (05-09-2021).

14 <https://wcrif.org/singapore-statement> (05-09-2021).

15 Also referred to as "Montreal Statement on Research Integrity in Cross-Boundary Research Collaborations" <https://wcrif.org/montreal-statement/file> (05-09-2021).

16 s 12(2)(c) of the Constitution provides that "not to be subjected to medical or scientific experiments without their informed consent". See also discussion in Adams, Veldsman, Ramsay and Soodyall "Drafting a code of conduct for research under the Protection of Personal Information Act No. 4 of 2013" (2021) *South African Journal of Science* 1 2.

17 National Health Act 61 of 2003. See also discussion in Adams, Veldsman, Ramsay and Soodyall (n 16) 2.

always include human participants,¹⁸ and where other forms of academic research involves human participants in some way, shape or form, similar principles have generally been adopted in such research activities. The screening and approval processes of ethics committees are central to these forms of research activities and the National Health Act also requires “[e]very institution, health agency and health establishment at which health research is conducted, must establish or have access to a health research ethics committee, which is registered with the National Health Research Ethics Council”.¹⁹ Such ethics committees must then review and grant permission regarding the research that involves human participants in the data collection process.

In addition to the above legal framework, several broad principles related to academic research are also relevant to research activities involving human participants, and can be summarised as follows:

- i. Acceptable conduct.²⁰ The scientific nature of academic research can be described as a form of “human conduct”,²¹ and if this is correct then Beckmann argues that such conduct must conform with socially acceptable values normally set out in the rules, policies and codes of conduct of academic institutions.²² These accepted and established processes, particularly with reference to the process of collecting data during the COVID-19 era, has changed many research approaches so to ensure compliance with social distancing requirements that may hamper the collection of data from human participants.
- ii. Accountability.²³ Beckmann notes that “researchers are to some degree accountable to society for what they do”,²⁴ and this is done

18 s 15(1) of the National Health Act 61 of 2003 notes that “[a] health worker or any health care provider that has access to the health records of a user may disclose such personal information to any other person, health care provider or health establishment as is necessary for any legitimate purpose within the ordinary course and scope of his or her duties where such access or disclosure is in the interests of the user”. Furthermore, s 17 (1) of the National Health Act 61 of 2003 requires controls to be put in place to avoid unauthorised access to health records.

19 s 73.

20 Beckmann “University research ethics clearances: safety nets, or a false sense of legal immunity?” (2017) 31(3) *South African Journal of Higher Education* 6 11.

21 Beckmann (n 20) 11.

22 Ibid.

23 Ibid.

24 Ibid.

- by conducting research in a “responsible manner”.²⁵ This form of accountability is highlighted in the measures that must now be taken under COVID-19 with additional rules to ensure the safety of human participants, and also the responsible manner in which personal information of human participants must be processed in terms of POPIA, which is closely linked to the next principle.
- iii. Liability.²⁶ Insofar as research is unethical (arguably also illegal) which causes damage to human participants, then the researcher or the research institution may, in certain circumstances, be held responsible for the damages that have been incurred.²⁷ This action would conceivably take the form of a delictual claim, but in modern research practices, the liability may also be contractual in nature which would be dependent on the arrangement and documents signed between the researcher and the human participant. Added to this, it may also be said that this sense of liability and accountability is now also underscored by legislative duties wherein possible fines may be issued against a researcher for any failure to adhere to the provision of POPIA.²⁸
 - iv. Informed consent.²⁹ Beckmann notes that the human participant must understand the nature of the research, as well as ensuring that the participation of the research is voluntary.³⁰ The concept of informed consent is consistent with, for example, the National Health Act and the Belmont Report,³¹ which requires all the relevant information to be disclosed to the research participant in a way that is comprehensible so to ensure that the human participant acts and participates voluntarily in the research project.³²
 - v. Risks and benefits of research.³³ Any research related to human subjects may be subject to certain risks; however, the extent of such risk against the potential benefit of the research must be assessed. Ethics committees play an important part in screening

25 Ibid.

26 Ibid.

27 Beckmann (n 200) 12, notes that this type of damages may take the form of a delictual claim. Although it is questionable whether Beckmann’s description of a contractual claim would require the element of “blameworthiness”, as only a breach of the contractual obligation is required to attract contractual liability.

28 Ch 11 of POPIA.

29 Beckmann (n 200) 14.

30 Beckmann (n 200) 15.

31 Belmont Report of 1979 (n 122) 6–7.

32 Belmont Report of 1979 (n 122) 6–8.

33 Beckmann (n 200) 14.

- research activities and assessing the risk-benefit ratio in relation to the research, the community and the human participant.
- vi. Mutual human respect, beneficence and achieving justice.³⁴ Underscoring all the other principles of research, is that research must be respectful to the research participant, the wider community and that it intends to achieve a form of justice rather than injustice. This is to avoid the reoccurrence of questionable past research practices.³⁵

Going hand-in-hand with the above principles, is that of so-called research ethics which is central to any type of academic research. After all, Beckmann notes that, although separate, a relationship exists between the concepts of the law, morality and ethics.³⁶ In other words, the ends do not justify the means in academic and scientific research, but research must be done in the correct way holding true to academic ethical practices. These processes and practices were strained under COVID-19, especially in the manner in which data was collected where individual movement and social interaction were restricted. Discourse related to ethical research considerations have largely been focussed on the medical and health sciences, being research activities related to human participants, but such principles could be extended to other research practices wherein the research involves human participants.³⁷ In instances where empirical data is collected that relates to human participants' personal information then such activities would also now be regulated under POPIA (which is discussed further in paragraph 3 below).

2.3 Legal academic research

Legal academic research has seemingly navigated COVID-19 unscathed, uninterrupted and has been left largely unaffected. In fact, the principles highlighted in the preceding paragraph have, to the most part, not generally featured in legal academic research. For this reason, little discourse exists on the principles of research ethics in relation to legal research activities. The reason for this can be related to the traditional view of the general nature of legal academic research, which has been said to originate from a logical or common-

34 Belmont Report of 1979 (n 122) 4-6; Declaration of Helsinki of 1967 (n 133) par 7.

35 See ft 11.

36 Beckmann (n 200) 8.

37 Beckmann (n 200) 9.

sense approach.³⁸ There have even, in the past, been arguments that legal research is not truly scientific in nature, which may be based on the lack of understanding the important role legal research plays in society. After all, legal research is much more complex than simply an analysis of the law and touches almost all areas of human interaction.

Legal academic research can generally be categorised into three broad groups, and dependent on the group, COVID-19 may have had either a significant or less significant impact on such research. The first is that law is a practical discipline.³⁹ This form of research can be described as “research that is valuable for legal practitioners in drafting contracts, advising clients and mediating conflicts”.⁴⁰ This form of legal research would conceivably include that of court processes, and has been described as a “comparative value-free analysis of legal rules”,⁴¹ and relates to the discipline of application.⁴² Considering the restrictions on movement, social engagement and the closing of courts (save for exceptional circumstances) and even law clinics under the COVID-19 era, law as a practical discipline may result in limited research data gathering.

The second form of legal research is its connection with the humanities.⁴³ This category of research is inherently focussed on the interpretation discipline and has been described as the interaction between the law and “history, philosophy, theology and literature which are generally recognised as having a primary affiliation with the humanities”.⁴⁴ Legal research, in this context, can be described as having a close connection to the humanities wherein the process is explored of understanding and interpreting principles rather than practically applying legal principles.⁴⁵ Legal academic research in this category would not have been significantly impacted by COVID-19 as legal texts remain readily available regardless of COVID-19 restrictions.

The third category of legal research finds its connection in that of social science.⁴⁶ There are different branches of social sciences, including, for example, economics, social welfare, and even political

38 Kometsi (n 88) 74.

39 Siems and Sithigh (n 6) 653.

40 Ibid.

41 Ibid.

42 Siems and Sithigh (n 6) 655.

43 Siems and Sithigh (n 6) 653.

44 Siems and Sithigh (n 6) 654.

45 Siems and Sithigh (n 6) 655.

46 Ibid.

sciences,⁴⁷ and often includes quantitative empirical legal research approaches in so-called “socio-legal” research activities.⁴⁸ This form of legal academic research includes the sourcing and analysing of data and herein, COVID-19 would likely have had the greatest impact in legal research activities. However, there has traditionally been limited empirical research data used in legal academic research.

Notwithstanding these three broad categories of legal research, traditionally legal academic research has generally not addressed many of the concepts and principles of academic research discussed in paragraph 2 (above). One reason for this is most of the legal academic research has employed a doctrinal research methodology. It may then be perfectly natural to assume that legal academic research in the context of data collection under COVID-19 and POPIA is irrelevant and one that need not be addressed by legal researchers. After all, doctrinal research has been said to have “dominated legal scholarship”,⁴⁹ which Hasnas describes as the process of “analy[s]ing, and/or attempting to shape legal doctrine by use of the standard lawyers’ tools of language, theory, logic, and legislative history”.⁵⁰ Doctrinal research could also be described as a literature study, or qualitative research.⁵¹ In this context, legal research can also be described as a process of “fact finding ..., fact ordering, fact systematising and studying and predicting legal trends”.⁵²

This traditional approach has, in the past, brought into question whether legal academic research is truly scientific research in the strict sense of the definition. After all, the traditional approach to legal research rarely (if at all) uses empirical data or personal information in its research methodology. However, legal research cannot escape the social constructs upon which it rests,⁵³ which is certainly the case when considering legal research as forming part of the disciplines of humanities or that of social sciences. In fact, Khodie notes the law is integral to the social fabric and forms the very heart of “human

47 Ibid.

48 Ibid.

49 Hasnas “New directions in legal scholarship: Implications for business ethics research, theory, and practice” 2010 20(3) *Business Ethics Quarterly* 503 504.

50 Hasnas (n 49) 504.

51 Kometsi (n 8) 85.

52 Khodie “Course on research methodology in law” 1982 24(2/3) *Journal of the Indian Law Institute* 605 606.

53 Kometsi (n 8) 69–72, describes other methods such as the logical method, comparative method, historical method, and even a combination of research methods.

activities”,⁵⁴ and does not, according to Jain, “operate in a vacuum”.⁵⁵ It seems natural that developments in the law would influence society and conversely, as society develops, that the role of the law (and consequently legal research) should also evolve. This, in more contemporary legal academic research, has seen the divergence of doctrinal research methodologies wherein legal academic research has branched to research methodologies that have, in some instances, relied on empirical data.

Two reasons are suggested for the shift from the traditional doctrinal research methodologies; firstly, that legal research has become more interdisciplinary in nature,⁵⁶ and secondly, legal research has, presumably, due to the interdisciplinary nature of certain legal research structures, adopted empirical research orientated approaches.⁵⁷ Examples of such a shift in research methodologies may be illustrated in areas such as international law, wherein arguments have been made for the inclusion of behavioural research (in the context of economic analyses and illustrates the connection to social sciences),⁵⁸ which, if used, would require the use of some form of empirical research methodological approach.⁵⁹ Also, the discipline of comparative law may use a variety of research methodologies and is not necessarily limited to a single research approach.⁶⁰ Finally, indigenous law may also illustrate the change from strictly adhering to “rule-based” methodologies to incorporating “behavioural” methodological approaches for more accurate studies of indigenous law (which illustrate the connection with the humanities).⁶¹ Such

54 Khodie (n 52) 606.

55 Jain “Legal research and methodology” (1972) *Journal of the Indian Law Institute* 14 (4) 487.

56 Hasnas (n 52) 504, which provides the example of the interplay between the law, economics, cognitive psychology and evolutionary biology.

57 Hasnas (n 52) 504, examples of such empirical research include “case studies, archival analyses, intensive interviews, laboratory experiments, observational studies, [and] field experiment”.

58 Broude “Behavio[u]ral international law” 2015 163(4) *University of Pennsylvania Law Review* 1099 1103, 1156. In fact, the author argues that both cognitive psychology and behavior economics should be incorporated into the study of international law.

59 Adapted from Broude (n 58) 1157.

60 See, for example, the discussion in Oderkerk “The need for a methodological framework for comparative legal research: Sense and nonsense of “methodological pluralism” in comparative law” 2015 79(3) *The Rabel Journal of Comparative and International Private Law* 589–623.

61 Adapted from Van Niekerk “Indigenous law and narrative: rethinking methodology” 1999 32(2) *The Comparative and International Law Journal*

The Impact of Covid-19 on the Future of Law

research activities would have been limited, or possibly halted, under the COVID-19 restrictions.

In addition to these examples, empirical data is also now challenging the accuracy of certain assumptions whereupon some legal principles (and consequently legal rules) rests. In this regard, Blasi and Jost make the following observation:⁶²

“Both law and legal advocacy necessarily rest on assumptions about human motivation and behavior. Many of those assumptions are wrong. Just as scientific experimentation determined that Aristotle’s physics did not accurately describe the behavior of objects, modern psychology and other social and behavioral sciences have determined that many common understandings of human behavior are, at the very least, incomplete”.

Take for instance, certain assumptions whereupon contractual legal principles are based have been empirically illustrated to be inherently incorrect.⁶³ Examples of this include that contracting parties always act to their own best interest, and a contractual freedom to enter into contracts has been found to be inaccurate or, at the very least, incomplete.⁶⁴ These examples illustrate that law is not a self-contained silo wherein legal research is limited to the circular analyses of the law itself,⁶⁵ but rather that such data requires a reevaluation of theoretical assumptions upon which some legal principles rests.⁶⁶ Therein legal research steps closer into the realms of the disciplines of the humanities and social sciences.

If the traditional approach of legal research is evolving, then data collection and information gathering in legal academic research may have a wider application than traditionally thought. After all, the traditional approach to legal research has placed much focus on the data contained in traditional classification of primary and secondary

of Southern Africa 208 212–213, in this context a behavioral approach to studying indigenous law may classify the researcher as a legal realist.

62 Blasi and Jost “System justification theory and research: Implications for law, legal advocacy, and social justice” *California Law Review* 2006 94(4) 1119.

63 Hasnas (n 49) 505.

64 See Hasnas (n 49) 505.

65 Adapted from Kometsi (n 8) 86–87.

66 Hasnas (n 49) 505.

sources of law.⁶⁷ However, as discussed above, the traditional doctrinal approach to legal research is being challenged in various disciplines of legal academic research,⁶⁸ and thereby a shift is taking place from a self-contained analysis of the law to broader and inclusive methodological approaches that test legal assumptions against empirical facts.⁶⁹ This effectively means that the same rules and principles discussed in paragraph 2.2 (above) may equally apply to certain areas of legal academic research, especially when human participants are involved in the data collection of the research activities. This notwithstanding, the developments in legal research does not appear to have been significantly impacted by COVID-19.

This certainly does not mean that doctrinal research methodologies in legal research is obsolete. To the contrary, doctrinal research methodology holds a valuable place in legal research,⁷⁰ but it is not the only research methodology that may be used in legal research. Insofar as other research methodologies are used, such as empirical research studies, wherein personal information or data is collected, analysed or used from human participants then legal research must take into account research ethics (discussed in paragraph 2 above) as well as the impact of POPIA on such research activities (which will be discussed further below).⁷¹

3 The processing of research data and information

3.1 Existing legislative framework

There are certainly legislative measures in place to combat illegal processing of data,⁷² but for the purposes of this paper, focus is rather placed on the general factors related to academic research. Historically,

67 Typically, primary sources would be legislation, case law and secondary sources would be journal articles and textbooks. Khodie (n 52) 608, notes that secondary sources are such information that is gathered from or originates from primary sources.

68 See, for example, Hasnas (n 49) 503.

69 Adapted from Kometsi (n 8) 86–87.

70 Tadesse “Legal research tools and methods in Ethiopia” 2012 25(2) *Journal of Ethiopian Law* 68 76, describes such methods as including “legal analysis, legal synthesis, methods of interpretation, and methods of legal reasoning”.

71 It should be noted that the type of methodology utilised must be both “reliable” and “replicable”, see Kometsi (n 8) 69.

72 Electronic Communications and Transactions Act 25 of 2002. See also discussion of Minnaar (n 3) 42.

secrets and the failure to disclose information in South Africa has been a source of human rights abuses,⁷³ which have been addressed in the rights afforded by the constitution for every person to have the right to access of information.⁷⁴ The Promotion of Access to Information Act of 2000 (PAIA) gives effect to this right to information,⁷⁵ but the right to information must be carefully weighed against the constitutional right to privacy, which is now governed by POPIA.

Both PAIA and POPIA play a role in academic activities, but there are also other legislative requirements that may also influence data and information academic activities. In the context of academic activities, three general forms of legislative controls in relation to information and data, can be categorised as follows:

- i. Legislative requirements for the storage of information and data. This form of legislative intervention requires certain information to be collected and stored. Although not directly related to academic research, an example of this in academia can be found in relation to teaching and learning activities in the National Qualifications Framework Act that requires the establishment of a national learner's database (effectively an electronic management information system) wherein certain information must be stored.⁷⁶ According to the National Qualifications Framework Amendment Act of 2019, the information that would be stored in the database includes, for example, information related to qualifications of the learners,⁷⁷ learner achievements,⁷⁸ and information regarding or associated with registration, verification and accreditation.⁷⁹
- ii. Legislative requirements for the access to information and data. This form of legislative intervention sets the rules related to when and how collected and stored information may be provided to persons that requests access thereto. An example of this can be found in the Higher Education Act,⁸⁰ which allows access to

73 Preamble of the Promotion of Access to Information Act 2 of 2000 (PAIA).

74 s 32(1)(a).

75 Preamble of PAIA.

76 s 31 of the National Qualifications Framework Act 67 of 2008. See also s 1 of the National Qualifications Framework Amendment Act 12 of 2019.

77 Amendment to s 13(1)(l) of National Qualifications Framework Act 67 of 2008 in terms of the National Qualifications Framework Amendment Act 12 of 2019, which also notes that such qualifications would include full and partial qualifications.

78 See (n 76).

79 See (n 76).

80 Higher Education Act 101 of 1997.

information of the register and the auditor's report,⁸¹ and should be read with the provisions and requirements set out in PAIA. More particularly, PAIA makes specific reference to protecting research specific information and instances where the request for such information may be refused.⁸²

- iii. Legislative requirements for the protection of information and data. This form of legislative intervention sets the rules of how information must be processed, handled and protected. An example of this would be POPIA which relates specifically to the personal information of parties.

It is the third legislative intervention, being the protection of information and data under the auspices of POPIA that is of particular focus in this paper and may be relevant to certain legal academic research activities. POPIA has a direct bearing on the way personal information is managed in an online environment, which is required under the COVID-19 era. It may, however, also be noted that there may be instances wherein various legislative interventions may conflict with one another, in which case, the piece of legislation that affords the greater protection would prevail.⁸³

3.2 Protection of personal information

POPIA came into effect on 1 July 2020, with a 12-month grace period to comply with the certain provisions of the Act,⁸⁴ which ended on 1 July 2021 and on which date POPIA came fully into force and requires compliance with its provisions insofar as academic research activities fall within the scope of the act. Different concepts of POPIA as it may relate to academic research are highlighted below:

- i. "Processing" in the context of academic research includes the collection, storage, use and destruction of personal information of

81 s 56 read with s 57.

82 s 43(1)(b) of PAIA states that requests to access records related to existing research in public bodies that is carried must be refused where such a disclosure would result in "serious disadvantage" to the public body, "a person that is or will be carrying out the research on behalf of the public body", or "the subject matter of the research". A similar restriction would apply to research conducted by a third party for the public body in terms of s 43(1)(a) of PAIA. Also see s 69 of PAIA that requires similar limitations in relation to information requests of information in a private

83 s 3(2)(b) of POPIA.

84 See also Adams, Veldsman, Ramsay and Soodyall (n 16) 1.

the human participant (which is also known as the data subject in the context of POPIA).⁸⁵

- ii. “Personal information” has quite a wide definition under POPIA.⁸⁶ Research that gathers or uses such personal information from human participants in research related activities would then conceivably fall within the scope of the information protected under POPIA.
- iii. “Responsible party” in the context of academic research activities would be the person or party that collects personal information from the human participant.⁸⁷ This would include, for example, the researcher or the research institution.⁸⁸ In fact, according to Universities of South Africa (USAf), all public universities will process personal information and would, therefore, be considered a responsible party.⁸⁹
- iv. “Data subject” in the context of academic research activities relates to the person whose personal information is processed in the context of the research activities.⁹⁰ The data subject would include any student (prospective, applicant or current), alumni, authors, service providers, donors, or funders,⁹¹ and may also include a human participant in research activities.⁹²
- v. “Information Officer” is the person appointed within the research institution to ensure compliance with the provision of POPIA.⁹³
- vi. “Operator” is a third person who the responsible party uses to process the personal information of the data subject.⁹⁴

POPIA requires certain principles to be adhered to when processing the personal information of the data subject. The lawful conditions of processing that must be adhered to are: accountability,⁹⁵ processing

85 See also s 1 of POPIA.

86 See also s 1 of POPIA.

87 See also s 1 of POPIA.

88 Adams, Adeleke, Anderson, Bawa, Branson, Christoffels *et al* “POPIA code of conduct for research” (2021) *South African Journal of Science* 1.

89 The 2020 POPIA Industry Code of Conduct: Public Universities 13.

90 s 1 of POPIA defines a data subject as “means the person to whom personal information relates”.

91 The 2020 POPIA Industry Code of Conduct: Public Universities 6.

92 Adams, Adeleke, Anderson, Bawa, Branson, Christoffels *et al* (n 88) 1.

93 Adams, Adeleke, Anderson, Bawa, Branson, Christoffels *et al* (n 88) 1.

94 Adams, Adeleke, Anderson, Bawa, Branson, Christoffels *et al* (n 88) 1. See also s 1 of POPIA.

95 s 8.

limitation,⁹⁶ purpose specification,⁹⁷ further processing limitations,⁹⁸ information quality,⁹⁹ openness,¹⁰⁰ security safeguards,¹⁰¹ and data subject safeguards.¹⁰² Generally, where personal information is processed in an academic research environment, POPIA would apply and requires adherence to the provisions of POPIA.¹⁰³ The exception to this in the research context is if the information or data has been de-identified without the possibility of being re-identified.¹⁰⁴

Notwithstanding the various conditions of processing required, it is perhaps necessary to highlight that a starting point in the processing of personal information is that research subjects must be informed that their personal information is being processed,¹⁰⁵ and to update such information if necessary.¹⁰⁶ There may be instances where information is required to be processed by law (see for example the discussion in paragraph 3.2 above) and our courts have already established that it is not the intention of POPIA to prevent the processing of information should the law require this.¹⁰⁷ It is, however, not the intention of this paper to discuss the content of POPIA in any level of detail as the development of industry codes may change the way the various sections of POPIA may impact research activities (see the below discussion).

3.3 Development towards a code of conduct

Section 60 of POPIA contemplates industry specific codes of conduct that would regulate the processing of personal information in a particular sector.¹⁰⁸ Any code of conduct must include the lawful conditions of processing information (or its equivalent),¹⁰⁹ and how

96 s 9–12.

97 s 13–14.

98 s 15.

99 s 16.

100 s 17–18.

101 s 19–22.

102 s 23–25.

103 See s 4.

104 s 6(1)(b).

105 s 5(1)(a).

106 s 5(1)(c).

107 See, for example, *Divine Inspiration Trading 205 (Pty) Ltd v Gordon* 2021 (4) SA 206 (WCC) par 34.

108 s 60(3) notes that a code of conduct may apply to specific information, specific body, specific activities or a specified industry or profession. See also Adams, Veldsman, Ramsay and Soodyall (n 16) 1.

109 s 60(2)(a).

such lawful conditions of processing information would be applied within the sector in which the code of conduct would apply.¹¹⁰ Such codes of conduct may be issued by the Information Regulator or may be issued by means of application by a body representing the particular industry or profession.¹¹¹

Already two important developments in the industry codes may influence academic research's compliance with POPIA going forward. The first, which relates broadly to academic activities, is that USAf has adopted, in 2020, a code to guide institutions of higher education on how to process personal information (USAf's Code).¹¹² It appears that the intention for USAf's Code to be registered with the Information Regulator,¹¹³ however, at the time of writing this paper, USAf's Code has not yet been adopted by the Information Regulator. The second, which is specific to academic research, is the Academy of Science of South Africa (ASSAf), acting as a representative for academia in general, took on the mantle to spearhead the development of a code of conduct for academic research in South Africa (Code of Conduct).¹¹⁴ The development of the Code of Conduct will have a far-reaching impact on the way academic research is undertaken. Although, at the time of writing this paper, the Code of Conduct has not yet been adopted by the Information Regulator, articles written about the Code of Conduct as well as the discussion documents issued by ASSAf provides clues to what the Code of Conduct would entail. Piecing this together may provide guidance as to how the Code of Conduct may impact future academic research.

From the outset, it appears that the Code of Conduct would not apply to "market research, political and public opinion polling, audits, quality assurance or programmatic monitoring and evaluation; or other research where the purpose is not directly to contribute to the improvement of knowledge through peer-reviewed publication".¹¹⁵ The scope of the Code of Conduct is intended to include:¹¹⁶

"... all research conducted in South Africa or by a responsible party domiciled in South Africa, and which uses (collects, processes or stores) personal information as defined under POPIA as

110 s 60(2)(b).

111 s 61(1)(a)–(b).

112 POPIA Industry Code of Conduct: Public Universities of 2020.

113 Adams, Veldsman, Ramsay and Soodyall (n 16) 1.

114 Ibid.

115 Adams, Adeleke, Anderson, Bawa, Branson, Christoffels *et al* (n 88) 3.

116 Adams, Veldsman, Ramsay and Soodyall (n 16) 2.

pa[r]t of the research process. The Code [of Conduct] will pertain to all research activities in South Africa that ordinarily undergo prior and independent ethics review, that follow a recognised scientific methodology or system of analysis, and that aim to publish the research in contribution to the respective field of stud[y]”.

Of particular importance is that the Code of Conduct makes specific mention of the types of research it envisages would be regulated:¹¹⁷

“this Code is relevant to research—whether basic or applied—in any discipline including, but not limited to, natural sciences, engineering and technology, medical and health sciences, social sciences, education, management, economics, theology, law, and the humanities and which:

- follows a recognised scientific methodology or system of analysis, and improves or creates new knowledge, or deepens understanding; and
- would ordinarily undergo prior independent ethics review”.

It is of particular interest that legal research has been specifically identified as falling within the scope of the Code of Conduct. Also, the discussions in paragraph 2 (above) have highlighted the instances wherein ethics reviews are required, and generally this would be in instances where academic research relates to or involves human participants in some way, shape or form. This may, dependent on the type of research undertaken, also have a direct bearing on certain forms of legal academic research. However, it is generally thought that these developments would have minimal impact on legal academic research.

ASSAf had public consultation sessions regarding the Code of Conduct,¹¹⁸ and the intention is for the Code of Conduct to regulate all research conducted in South Africa (including that of legal academic research). The purpose of the Code of Conduct can be summarised as to:

- i. provide prior authorisation for research as required under section 57 of POPIA;¹¹⁹

117 Adams, Adeleke, Anderson, Bawa, Branson, Christoffels *et al* (n 88) 2.

118 On 3 and 18 May 2021. For further information see <https://www.assaf.org.za/index.php/news/812-code-of-conduct-for-research-as-per-chapter-7-of-popia> (04-09-2021).

119 Adams, Veldsman, Ramsay and Soodyall (n 16) 1.

The Impact of Covid-19 on the Future of Law

- ii. provide “guidance to researchers on how to rationalise the provisions of POPIA in relation to existing laws and standards regulating research”;¹²⁰
- iii. provide clarity to how certain of POPIA’s principles would apply to academic research;¹²¹
- iv. provide clarity as to how and when exceptions to lawful processing would apply in the context of academic research;¹²²
- v. establish a “comprehensive and uniform approach to the regulation of personal information for research across all government departments, academic institutions, research councils and the private sector”;¹²³ and
- vi. provide guidance to how existing laws would be reconciled with POPIA.¹²⁴

It is unclear, at this stage, exactly what the content of the Code of Conduct holds but from the consultation sessions it appears that the intent of the Code of Conduct is to allow for a uniform approach and interpretation of POPIA within the sphere of academic research. Therefore, the details of the Code of Conduct, at this stage, is limited and the last update was that ASSAf had submitted the draft Code of Conduct to the Information Regulator during July 2021. Although, academia have not generally been privy to the submitted document, ASSAf has advised that they expect a response from the Information Regulator within 13 weeks from such submission.¹²⁵ What is also necessary to keep in mind is that, once the Code of Conduct has been accepted, it would be considered legally binding.¹²⁶ This means any failure to comply with the Code of Conduct, once issued and accepted in terms of section 60 of POPIA, would result in a breach in lawful processing of personal information.¹²⁷ In the meantime, whilst the Code of Conduct is being considered, USAf’s Code currently provides a non-binding general guideline to processing of personal information

120 Ibid.

121 Ibid.

122 Ibid.

123 Ibid.

124 Adams, Veldsman, Ramsay & Soodyall (n 16) 2, which refers to National Health Act 61 of 2003 and PAIA as laws that require reconciliation with POPIA.

125 See <https://www.assaf.org.za/index.php/news/812-code-of-conduct-for-research-as-per-chapter-7-of-popia> (04-09-2021).

126 See Adams, Veldsman, Ramsay and Soodyall (n 16) 1.

127 s 68; ch 10 of POPIA.

in a general academic setting, and which principles may be useful to consider in the context of academic research.

4 Emerging framework research during the COVID-19 era and beyond

The developments during the COVID-19 era have brought about many changes to academic research, but this is not the case for legal academic research which appears to remain largely immune to these developments. Added to this, legislative interventions and the almost organic evolution to legal research has changed the academic landscape for many academic researchers. Undoubtedly, once USAF's Code and the Code of Conduct have been adopted by the Information Regulator, further changes may be required in academic research, but in the meantime, a framework for the use of data and information has emerged that can be broadly categorised, and a general framework related to research ethics and also a framework related to the processing of information and data generally.

Some authors have highlighted certain general principles that may be useful for the protection of data and information in academic research, these include:

- i. The implementation of relevant and appropriate policies and procedures for the access of information.¹²⁸ These policies should be reflective of both research ethics as well as legislative requirements. In this context, academic research should strictly adhere to the policies and procedures within the academic institution in the processing of personal information of research participants.
- ii. There should be clear safeguards for physical access to information.¹²⁹ This is particularly important when physical copies of information are stored. In these instances, the necessary protections must be put in place to protect the physical storage of information which may include, for example, keeping information in locked offices, the access to such offices and so on.
- iii. There should also be safeguards for electronic access to information.¹³⁰ Insofar as information is stored digitally (as would be the case under COVID-19), then electronic access to information must be protected by means of passwords, secure storage and retrieval, firewalls, anti-virus software and the like.

128 Adams, Adeleke, Anderson, Bawa, Branson, Christoffels *et al* (n 88) 8.

129 *Ibid.*

130 *Ibid.*

- iv. Appropriate training should be provided to individuals dealing with information.¹³¹ This type of training would include, for example, administrative support staff, researchers as well as students conducting research to ensure compliance with POPIA and, once adopted by the Information Regulator, also that of USAf's Code as well as the Code of Conduct.
- v. Different levels of security protections should be adopted in relation to the sensitivity of the information.¹³² Certain information may be more sensitive than other types of information, and the measures to protect information must then equally take into consideration the different types of information as well as the sensitivity of such information in the context of academic research. One way to protect personal information is to de-identify the information,¹³³ which can be done by means of "masking" or using pseudonyms.¹³⁴ This is particularly useful in academic research when the identity of the human participant is protected. Should this method be adopted, human participants should be adequately informed of the de-identification process.

Once the Code of Conduct has been adopted, there will certainly be further measures that may be put in place. In the meantime, researchers are expected to still comply with the provisions of POPIA. The above framework may provide a starting point for new academic research practices in the processing of personal information of human participants and perhaps a framework for legal research involving human participants.

5 Conclusion

Academic research has, like so many other industries, had first-hand experience of the disruptive impact of COVID-19 restrictions. Added to the challenges faced in the collection of research data under these conditions, an additional layer of complexity has been added with researchers and postgraduate research students now being required to

131 Ibid.

132 Ibid.

133 s 1 of POPIA defines the concept of de-identification as "personal information of a data subject, means to delete any information that ... (a) identifies the data subject; (b) can be used or manipulated by a reasonably foreseeable method to identify the data subject; or (c) can be linked by a reasonably foreseeable method to other information that identifies the data subject".

134 The 2020 POPIA Industry Code of Conduct: Public Universities 11.

comply with the provisions of POPIA. If this was not enough, the exact manner of compliance with POPIA still remains uncertain as USAf's Code and the Code of Conduct at the time of writing this paper has yet to be adopted by the Information Regulator, which may influence the way academic research is undertaken to ensure compliance with POPIA. These developments are changing the face of academic research and requires researchers to approach the collection, storage, use and destruction of information in a different way.

Legal academic research may, at first, appear to have been unaffected by COVID-19 and POPIA. This, in itself, is concerning as it raises questions as to whether legal academic research (as a research discipline) is aligned with other research methodological approaches. This notwithstanding, it was illustrated that not all legal research activities are immune, as legal academic research is undergoing its own metamorphic change. Legal academic research remains firmly footed in doctrinal research methodologies which would, to an extent, have been immune to the various developments in the processing of data in academic research, but the evolution of legal academic research challenges these assumptions and points towards wider research methodological approaches which requires legal researchers to reassess many legal assumptions and the exclusive use of doctrinal research methodologies. Insofar as empirical data is used in legal academic research, then academic ethics in relation to human participants, POPIA, and the Code of Conduct will become central considerations of the legal researcher. This notwithstanding, it would appear that legal academic research would, to the most part, remain unaffected save for the developments in research shifting from doctrinal research methodologies to other forms of research methodologies.

Whatever view is ultimately taken on this, a definite cross-disciplinary approach in the humanities and social sciences will change the face of academic legal research. Therein, the online environment precipitated by COVID-19 and legislative interventions of POPIA is changing legal academic research and may require legal researchers to adopt new approaches in the processing of data and information in their research activities.

