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ABSTRACT

This paper interrogates the proposed state ownership of data by South Africa's Draft National Cloud and Data Policy 2021 and argues that the quest for state ownership is evidence of South Africa's policy preference for the state custodianship of critical natural resources. The paper suggests that a preferred reading of the proposed state ownership is the affirmation of a regulatory space to address issues related to the digital economy. This paper further suggests that regulatory oversight is inconsistent with the proposed state ownership because of the multi-dimensional nature of data and the fact that data is constitutional property. Rather than seek state ownership of data, the paper examines how to strike a delicate balance between the rights of citizens over data, such as privacy and the data use by companies who are recognized by South African Law to be entitled to some protection of privacy; intellectual property rights and confidential information. The paper sketches a framework of the balance in data governance in South Africa by reviewing jurisprudence that enables South Africa assert appropriate regulatory oversight through laws policies and institutions that enhance her digital economy.

KEY WORDS **DATA; GOVERNANCE; CONSTITUTIONAL PROPERTY; STATE OWNERSHIP; SOUTH AFRICA**

STATEMENTS AND DECLARATIONS
*The author declares that there are no financial and non-financial interests directly or indirectly related to this paper***.**

I. INTRODUCTION

This paper interrogates the proposed state ownership of data by South Africa's *Draft National Cloud and Data Policy*[1] and argues that the quest for state ownership is likely an affirmation of a regulatory space to address issues related to the digital economy. This paper notes that the proposed state ownership accords with the State's policy preference to endow ownership over natural resources, such as water

[1] See Draft National Policy on Data and Cloud (2021)

minerals, on the South African State as a custodian but argues that the multi-dimensional nature of data- as an intangible; non-rivalrous and co-produced asset - creates considerable challenges because data is likely constitutional property. Rather than seek ownership of data that would result in claims of expropriation of property and compensation, there are enough instruments to enable the South African State to assert regulatory oversight through laws, policies and institutions that would enhance her digital economy. This paper is organized as follows. In the next part, an overview of the DDCP is undertaken. Following on this, part III determines whether 'data' is constitutional property and the consequence of such characterization. In part four, the paper evaluates whether state ownership of data amounts to deprivation or expropriation. Part five of the paper interrogates the question of whether state ownership of data is a fundamental ingredient of data governance.

II. SOUTH AFRICA'S DRAFT NATIONAL DATA AND CLOUD POLICY

An overview of South Africa's digital economy is important to provide a context for the *Draft Data and Cloud Policy.* For example, South Africa is a regional data powerhouse. For example, the landing stations of four high-capacity undersea cables boast 157 000km of terrestrial fibre optic cables connecting about 1.6 million homes and buildings. Access to Broadband is modest. As of Jan 2020 the internet penetration rate in the country was about 62 percent (38.19 million out of a 58.93 million population), the mobile phone connection is 176% of the population, and 37% of the population are active social media users [2] Moreover, 25 of Africa's 79 data centers are in South Africa.[3] In 2017, a survey found that there were 18.3 million e-commerce users with an additional 6.36 million expected online shoppers in 2021.[4]

For our purposes, the DDCP is organized around two policy thrusts. The first concern regards data as infrastructure and property critical to South Africa's development but operates in an inadequate regulatory environment. The second policy thrust is an appropriate intervention to address an inefficient regulatory

[2] See Competition Commission in the Digital Economy Version 2 p. 15.
[3] See for example, an increased investment in establishing data centres in South Africa. See Illidge *My Broadband* 2022.
[4] See Tempest 2020 p.2.

environment that considers data as a natural resource that should be in the public trusteeship/ownership of the South African State. In terms of the second policy thrust, the DDCP declares that**:** " Data generated in South Africa shall be the property of South Africa, regardless of where the technology company is domiciled.[5] Furthermore, " Government shall act as a trustee for all government data generated within the borders of South Africa.."[6]

The motivation for state ownership is to 'restrict and protect some of its citizen's data to participate in the global digital economy' effectively[7] Writ significant in a question of state ownership is a crusade against 'misappropriation of a resource as crucial as data. Sequestration is, therefore, considered a 'long term strategy' to contain and protect the produced data.[8] The impression that South Africa only 'produces' data used by 'Big Data' and other firms represents some of South Africa's realities. As a regional industrial and technological powerhouse, South African individuals and firms are actively engaged in the 'use' and 're-use' of both 'local' and 'foreign' data. Accordingly, the characterisation of 'misappropriation' as a feature of South Africa's digital economy is incorrect. For example, South Africa is home to thriving[9] 'local' e-commerce platforms such as 'Takealot' ; and 'Mall ofAfrica'; as well as streaming and satellite companies such as Showmax and DSTV.

While there is enough evidence that the regulatory framework of South Africa's digital economy is inadequate, it is doubtful whether state ownership of data is the appropriate response. To interrogate this point, we now turn to the idea of state ownership of data as a form of state ownership of natural resources that have long been a preferred policy option for the South African government.

Other key features of the DDCP include the development of digital infrastructure 'to ensure connectivity with the deployment of access and core network infrastructure

[5] Note 1See Draft National Policy on Data and Cloud (2021) p.27
[6] As above
[7] As above.
[8] See for example, what the UNCTAD 2021 P. xvi sets out as challenges of developing countries such as South Africa in a digital world: "As the data-driven digital economy has evolved, a data-related divide has compounded the digital divide. In this new configuration, developing countries may find themselves in subordinate positions, with data and their associated value capture being concentrated in a few global digital corporations and other multinational enterprises that control the data. They risk becoming mere providers of raw data to global digital platforms, while having to pay for the digital intelligence obtained from their data."
[9] See generally Goga et al 2019.

such as submarine cables, 5G, fibre."[10] The DDCP envisages a State Digital Infrastructure Company (SDIC) to build and maintain digital infrastructure. To stimulate digital innovation through access to data and cloud services, the DDCP recommends a 'National Open Data Strategy' that consists of different mechanisms to access public data and the establishment of Data Trusts. Measures to enhance digital sovereignty such as localization and regulated cross-border data transfers are also the focus of the DDCP.[11] Cybersecurity[12]; data governance[13]; competition[14] skills and capacity development[15]; as well as research innovation and human development[16] with different policy interventions are articulated.

III. IS 'DATA' CONSTITUTIONAL PROPERTY IN SOUTH AFRICA?

This section of the paper evaluates whether 'data' is constitutional property as defined by section 25 of the South African Constitution. This evaluation is essential because the state ownership of data could amount to expropriation or deprivation with the consequence that the former would entitle the right holder to compensation. The recognition of an object or interest as constitutional property qualifies that object or interest to the unique scheme of s. 25 that seeks a balance in protecting private property interests within defined public purposes.[17] Thus, section 25(1) of the Constitution provides that "no one should be deprived of property except in terms of a law of general application and no law may permit arbitrary deprivation of property". Furthermore, section 25(2) of the Constitution states that private property may be expropriated for public purpose or in the public interest and subject to compensation. Accordingly, the status of constitutional property invites an inquiry of the nature and extent of the balance between the private interest and public purpose in the legislative framework of the object or interest. Secondly, constitutional property affirms its relational status to other rights in the Bill of Rights and the importance of the limitation of rights through standards of proportionality as set out in section 36 of

[10] As above pp.19.
[11] See section 10.3 and 10.4 DDCP as above.
[12] See section 10.5 as above
[13] See section 10.6 as above
[14] See section 10.7 as above
[15] See section 10.8 as above
[16] See section 10.9 above.
[17] See Van der Walt, 2012 p.

the Constitution as well as the balancing of other rights in the Bill of Rights that conflict with and/or complement constitutional property.

While the types of property protected by section 25 of the Constitution is not defined, land is the most obvious because section 25(4) provides that property is not limited to 'land'. Even though South African courts have been reluctant in recognizing or developing a general definition of property[18] to enable the identification of constitutionally protected property, South African courts are generous in their interpretation of what qualifies as constitutional property. All kinds of objects and interests tangible and intangible have been recognised as 'property' including company shares;[19]; usufructs[20]; the right to use land temporarily to remove gravel, [21]a liquor licences[22]; trade marks[23] and by extension other intellectual property rights such as copyright patents and designs; rights of unlawful occupiers of land not to be evicted[24] and the right to the goodwill of a business.[25] A generous interpretation of what constitutes constitutional property appears settled by the recognition of a liquor licence as constitutional property in *Shoprite Checkers (PTY) Ltd v MEC for Economic Development.*[26] Some of the insights gleaned from *Shoprite Checkers* is that the value of the interest or right is a crucial factor in determining what constitutes constitutional property. A reasonable conclusion from South African constitutional property jurisprudence is that data is constitutional property. However, the multi-dimensional[27] nature of data as facts ideas and the building blocks of different rights and interests that on their own and in various forms may also constitute constitutional property require closer examination.

Personal data qualifies as constitutional property for several reasons. First, the economic value of personal data is an adequate motivation. Second, the protection

[18] See *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa,* 1996 (4) SA 744 (CC) para 51: "No universally recognized formulation of the right to property exists'.
[19] See for example *Cooper v Boyes NO and another* 1994 (4) SA 521 (C).
[20] See *National Credit regulator v Opperman* 2013 2 SA 1 (CC)
[21] See *Du Toit v Minister of Transport* 2006 1 SA 297 (CC)
[22] *Shoprite Checkers (PTY) Ltd v MEC for Economic Development* 2015 6 SA 125(CC).
[23] See *Laugh It Off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International and Another* 2006 (1) SA 1 (CC).
[24] See *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC);
[25] See *Phumelela Gaming and Leisure Ltd v Grundlingh* 2007 6 SA 350(CC)
[26] 2015 6 SA 125(CC). See Badenhorst & Young 2017 p. 26- 46; du Plessis & Palmer 2018 p. 73-89.
[27] See generally Max Planck Institute for Innovation and Competition 2016; Andanda 2019, p. 1052-1081; Yu (2019) 859-929.

afforded South African citizens by the right to privacy (s. 14 of the Constitution)[28] enhances the informational autonomy of citizens. Third, South African data legislation such as the Protection of Personal Information Act (POPIA)[29] which is enacted to give effect to section 14 of the Constitution with elaborate rules for citizen control of the use and re-use of their personal information is another justification.[30] For example, POPIA recognizes rights of data subjects[31] including rights of notification; to establish whether a third party holds information; to object to the processing of personal information; not to have personal information processed for direct marketing; and to institute a civil action to protect personal information. These three examples illustrate the value of the personal data of citizens. Several recent decisions by South African courts have held that citizens own their personal data. In *Black Sash v Minister of Social Development*[32] South Africa's Constitutional Court recognized that South African citizens retain considerable control over their personal information collected by a State Entity. This case concerned the South African Social Security Agency (SASSA) established to give effect to the right to have access to social security.[33] SASSA had concluded a contract with a private entity (CPS) to pay social grants on its behalf, which the Constitutional Court sanctioned on the condition that any new contract between SASSA and CPS should contain adequate safeguards to ensure that personal data obtained in the payment process remains private and used for the payment of social grants. Accordingly, SASSA would retain the personal information of South African citizens for the purpose it was obtained. The only way CPS would obtain the information would be with the consent of data subjects who are social assistance beneficiaries.[34] In *Discovery Ltd v Liberty Group Ltd*[35]a South African Court held that information supplied to a company that is a responsible party remains the property of the person who may give out such

[28] Section 14 of the Constitution provides that " Everyone has the right to privacy, which includes the right not to have(a) their person or home searched; (b) their property searched; (c) their possessions seized; or (e) the privacy of their communications infringed.
[29] Act 4 of 2013
[30] Section 2(a) of POPIA provides that the purpose of the Act is to " give effect to the constitutional rights to privacy, by safeguarding personal information when processed by a third party…'
[31] See section 5 of POPIA.
[32] [2017] ZACC 8
[33] See section 27(1)(c) of the Constitution provides that Section 27(1)(c) of the Constitution provides: "Everyone has the right to have access to (c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance."
[34] There is evidence that Net1 UEPS Technologies Inc (Net1), CPS's mother company, exploited the biometric database to market financial services to the SASSA beneficiaries. See for example, Adams *et al* 2020 p.11.
[35] [2020] ZAGPHCJ 67.

information to a competitor. Many citizens contractually cede different privileges, entitlements and access to other individuals and firms as consideration for goods and services. These contractual relationships underscore the importance of 'personal' data as 'constitutional property'. A recent example of the importance of personal information is the recent hack of financial information held by TransUnion involving over 3 million South Africans.[36] Fourth, 'personal' data seems to include 'public data' generated by the South African government. Examples include biometric information held by social security[37] health[38] security[39] and home affairs[40] services who capture store and process these pieces of information as part of their statutory mandate. It is fair to conclude that in the aftermath of *Black Sash v Minister of Social Development*, the privacy and informational rights of South African citizens are not transferred to South African statutory bodies who can only use it for specified purposes.[41] Therefore, it is to conclude that South African State entities are 'custodians' of statutorily obtained 'personal' data. Without the consent of South African citizens, their personal information is not available to third parties, presumably including other State entities, except within limitations recognized by POPIA.[42] Whether some state entities own the information they collect would depend on their mandate, which involves the transformation of the personal information which it collects from citizens.. For example, *Statistics South Africa* is a government department that derives its mandate from the Statistics Act (Act No. 6 of 1999) to collect and process data on persons and companies for statistical purposes. It fulfills this mandate by conducting nationwide household and business surveys. The data is used to produce official statistics on economic growth, unemployment, living conditions and poverty.

Concerning juristic persons, their data rights and interests are also constitutional property constituted in several ways. First, since the South African Bill of Rights are

[36] See BUISNESSTECH 2022.
[37] An example is personal information held by SASSA which is a state entity established pursuant to section 27(1)(c) of the Constitution.
[38] See for example Cachalia and Klarren 2021
[39] Note the different artificial intelligence that enables surveillance technology discussed in Stone 2020, p. 6-7.
[40] See Department of Home Affairs, 2016.
[41] See section 13 of POPIA.
[42] See section 14 & 15 of POPIA.

horizontally applied[43], corporate data information is entitled to the protection of s.14 of the Constitution.[44] A long line of cases such as *Financial Mail (Pt) Ltd v Sage Holdings Ltd*[45], *Janit v Motor Industry Fund Administrators (Pty) Ltd*[46] *AK Entertainment CC v Minister of Safety and Security*[47] and *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd ; In re Hyundai Motor Distributors (Pty) Ltd v Smit NO.*[48] Second, corporate data are protected as copyright if they qualify for database protection. Database protection is generally available in terms of section 2 of the South African Copyright Act, which protects literary works defined as including " …irrespective of literary quality and in whatever form expressed-tables and compilations, including tables and compilations of data stored or embodied with a computer, but shall not include a computer program."[49] Company databases are therefore eligible for copyright protection.[50] If algorithms are part of a database, they also qualify under South African copyright law. Third**, the** South African Common Law recognises the Law of confidential information or trade secrets that arise from the obligations of confidentiality express or inherent in corporate and juristic relationships. Accordingly, assuming copyright is not available for algorithms, the Law of confidential information can protect algorithmic information, artificial intelligent systems and other re-used data.[51] In *Discovery Ltd v Liberty Group Ltd*[52]a Court agreed that proprietary information consisting of the science, proprietary algorithm, data, and modeling that helped a company operate a reward system is the company's property. The appropriate question is whether confidential information or trade secrets is constitutional property in South Africa[53] and the response is probably yes given how constitutional property has been

[43] See section 8(2) of the Constitution provides that " A provision in the Bill of Rights binds a natural or a juristic person if, and to the extent that it is applicable that it is applicable, taking into account the nature of the right and the nature of duty imposed by the right,"
[44] " Everyone has the right to privacy, which includes the right not to have (a) their person or home searched; (b) their property searched; (c) their possessions seized; or (d) the privacy of their communications infringed."
[45] 1993 (2) SA 451(A)
[46] 1995 (4) SA 293 AD.
[47] 1995 (1) SA 783 (E).
[48] 2001 (1)SA 545 (CC)
[49] See the case of *The Philanthropic Collection (Pty) Ltd v Girls and Boys South Africa*
[50] See the case of *Haupt t/a Softcopy v Brewers Marketing Intelligence (Pty) Ltd and Others* 2006 (4) SA 458 (SCA) that databases are protected as literary works.
[51] See for example *Genesis One Lighting v Jamieson Bradley* [2019]ZAGPJHC 93. See also *Waste Product Utilisation Pty Ltd v Williams* 2003 (2) SA 575. See also
[52] Note 34.
[53] See Aplin 2016 p. 421- 437.

interpreted in South Africa. Fourth, certain statutory safeguards and protection for commercial data suggest that corporate data right or interest is likely to be constitutional property. For example, commercial data is largely exempt from the requests for information under the Protection of Access to Information Act (PAIA).[54] In several cases, South African firms have successfully resisted the 'fishing' of competitors who have sought to use PAIA to gain a competitive advantage if the information includes a trade secret; confidential information; or corporate financial, commercial scientific or technical information other than a trade secret.[55] Fifth, personal data acquired and transformed by data companies through contracts with South African citizens within the framework of POPIA are limitations on the control of personal data that are part of contracts with data companies.

To sum up this part, it is evident that there are different interlocking and multi-dimensional data rights[56] and interests exist that would be impacted where the South African government to legislate the state ownership of data. The next part of the article addresses the implications of state ownership of data that is constitutional property.

IV. WOULD STATE OWNERSHIP OF DATA AMOUNT TO EXPROPRIATION OR DEPRIVATION WITHIN THE FRAMEWORK OF THE CONSTITUTIONAL PROPERTY CLAUSE

This section addresses the two frameworks- expropriation and deprivation- by which the South African State in exercise of eminent domain takes the property of its citizens. At first blush, state ownership of data amounts either to expropriation or deprivation of property within the framework of the constitutional property clause. The fundamental difference between expropriation and deprivation is that the latter is regarded as exercise of state power in the public interest or public purpose. To illustrate the difference between the two, I consider a number of legislations where the South African State has claimed ownership of natural resources that the courts have adjudged as 'deprivation' rather than expropriation. For example, the National

[54] See for example, Katarina Foss-Solbrekk 2021 247
[55] See section 36 of PAIA. See the cases of Sibex Enginnering Services (Pty) Ltd v Van Wyk and Another 1991 (2) SA 482. See also Wideopen Platform (Pty) Ltd v City of Cape Town Case No 7973/2020 (10th February 2022)
[56] See Razzano, G (2021) p. 9.

Water Act 36 of 1998 declares that the South African State is the public trustee of the nation's water resources.[57] Another example is found in the National Environmental Management: Biodiversity Act (NEMBA)[58] which declares the State's trusteeship of biological diversity.[59] The Mineral and Petroleum Resources Development Act (MPRDA)[60]and is another example. The exercise of rights under the Mineral and Petroleum Resources Development Act is used below as an example of the consequences of state ownership of trusteeship of natural resources. The decision of the South African Constitutional Court in *Agri South Africa v Minister of Minerals and Energy*[61] raises issues that illustrate the difference between expropriation and deprivation. *Agri SA* is an appeal by South African mineral rights holders that the commencement of the Mineral and Petroleum Resources Development Act had the immediate effect of expropriating their mineral right conferred on such holders in terms of the Minerals Act.[62] The preamble to the MPDRA indicates that it had been enacted in acknowledgment of state ownership of petroleum and mineral resources. The provisions of the MPRDA which sought to balance these objectives included the vesting of all mineral and petroleum resources in the State[63]; and the power granted to the State to issue different prospecting mining exploration and production rights.[64] At its inception, a key provision of the MPRDA with respect to existing mineral and petroleum rights was a transitional corridor to enable existing holders to continue enjoying such rights.[65] In addition, any person who could prove that the MPRDA had expropriated his right was entitled to compensation by the State. The claimants in *Agri SA* argued successfully at the High Court that the MPRDA had expropriated its property. On losing at the Supreme Court of Appeal, an unsuccessful appeal was launched at the Constitutional Court. The majority of the Constitutional Court held that the MPRDA did not expropriate existing mineral and petroleum rights at its inception essentially because the State did not

[57] This is evident from a combined reading of sections 2 and 3 of the National Water Act. See for example, Van der Schyff 2013 p.369-389.
[58] Act 10 of 2004
[59] See section 3 above.
[60] No 28 of 2002. The MPRDA entered into force on 1 May 2004.
[61] [2013} ZACC 9. Hereafter *Agri SA.*
[62] No 50 of 1991.
[63] Section 3 of the MPRDA.
[64] Section 5(1) ibid.
[65] See Schedule II to the MPRDA. In effect the existing rights were given a lifespan of between two to five years from the commencement of the MPRDA within which the owner could lodge a conversion application which would yield MPRDA rights.

become owners of the property since the transfer of ownership of property is an essential requirement for expropriation. The majority judgment made a distinction between deprivation and expropriation in terms of s. 25 of the 1996 Constitution. According to the Court

> Deprivation within the context of section 25 includes extinguishing a right previously enjoyed, and expropriation is a subset thereof. Whereas deprivation always takes place when property or rights therein are either taken away or significantly interfered with, the same is not necessarily true of expropriation. Deprivation relates to sacrifices that holders of private property rights may have to make without compensation, whereas expropriation entails state acquisition of that property in the public interest and must always be accompanied by compensation.[66]

It is the payment of compensation and state acquisition that differentiates deprivation and expropriation. Accordingly, substantial interference with property which qualifies as indirect expropriation could also qualify as deprivation but ineligible for compensation if it is not arbitrary and affected through a law of general application.[67] According to the Court, the three ingredients of expropriation are "(i) compulsory acquisition of rights in property by the state, (ii) for a public purpose or in the public interest, and (iii) subject to compensation."[68] The fact that the claimant in *Agri SA* had clearly recognized that the property did not vest in the State and still went ahead to contend that expropriation had occurred was ruled as non-existent in South Africa.

Agri SA illustrates a perceived need to preserve a national space to protect the public interest of facilitating equitable access to mineral resources. The denial that the MPDRA amounted to expropriation was thus a means of achieving a balance between the public and private interest in s.25 of the 1996 Constitution. On the other hand, the minority judgment in *Agri SA* illustrates the point that payment of compensation and the recognition of indirect expropriation does not harm the delicate balance struck in section 25 of the 1996 Constitution. The minority judgment recognized that the MPRDA had effected the indirect expropriation of mineral and petroleum rights since the MPDRA had substantially interfered with the rights of the

[66] Par 48 (footnotes omitted)
[67] The limitation analysis is featured in Paragraph 49 of *Agri SA*.
[68] Para 67 ibid.

claimants. In addition, the minority judgment recognized that the balance in the MPRDA in the form of non-monetary compensation also reflects the balance struck in s. 25 of the 1996 Constitution. In this regard, the minority judgment held that "The constitutionally best interpretation of the MPRDA is thus, in my view, that the transitional measures should be interpreted as 'compensation in kind' measures that seek to give effect to the just and equitable compensation for property in terms of the provisions of section 25 of the Constitution."[69]

It is easy to surmise that the vesting of property in the State in claims of state ownership amounts to expropriation. Otherwise, state ownership amounts to deprivation that entitles the government to articulate a regulatory framework to further the public interest. Accordingly, the assertion of state ownership of data in the National Draft Policy may be nothing more than an assertion of regulatory oversight in the unfolding digital economy to enable the South African government to address different issues that concern data. Apart from some 'transformed' public data held by some segments of South African government, it is difficult to imagine how the government would institute a licensing scheme of a multi-dimensional and fluid interest such as 'data' in an environment where individuals and responsible parties own a significant amount of data. If the 'deprivation as licensing' regime highlighted by *AgriSA* is a motivation towards a data licensing regime, that will cause considerable damage to the emerging South African digital economy. 'Deprivation as regulatory oversight' is preferable and appears to be crucial in balancing the private interests and public purposes objective inherent in constitutional property. The next part of the article argues why state ownership of data is not essential for South Africa's digital economy within the preferred 'deprivation as regulatory oversight'.

V. TIPPING THE BALANCE BY STATE OWNERSHIP OF DATA: A FRAMEWORK OF A FAIR BALANCE IN REGULATING OF SOUTH AFRICA'S DIGITAL ECONOMY

A finding that state ownership of data is deprivation would absolve the government from paying compensation but result in a significant tilt towards public purposes that would not address the significant challenges posed by the use and transformation of data in a digital economy. The same difficulties remain even if state ownership is held to be expropriation. Therefore, this part of the paper addresses a broad

[69] Paragraph 90 of *Agri SA*.

framework of a fair balance in managing data as constitutional property and its importance to the digital economy. A fundamental challenge of a data economy is how to articulate that 'fair' balance. [70] A hypothesis that guides what follows hereunder is that a basic functional framework of data governance exists in South Africa albeit in need of considerable reform that does not need a tilt towards public purposes through State ownership of data to function effectively. Evidence of this framework consists of the regulatory oversight of the South African digital economy through legislation such as Electronic Communications and Transactions Act (25 of 2002); Protection of Personal Information (POPIA); Promotion of Access to Information Act No 2 of 2000; the Cybercrimes Act No 19 of 2020; National Archives of South Africa Act (43 of 1996); the Competition Act (89 of 1998) and the Protection of State Information Act (84 of 1982). The DDCP correctly asserts that these legal policy and regulatory regimes are uncoordinated 'to support and drive the development of a digital economy.'[71] There are many examples of this uncoordinated framework. First, as the DCCP recognises, there is an uncoordinated framework for access and sharing of government held data.[72] The recommendation of an 'Open Data'[73] framework is evidence of this point, especially in light of the circumscribed access framework of the PAIA, because as the DCCP also realises " the benefits of data are realised when data is available and accessible to all in an equal and equal manner"[74] and "…will create new industries and digitally transform traditional industries to be part of the digital revolution."[75] Secondly, the recent TransUnion Hack[76] call into question the potential of the recently enacted Cybercrime Act to protect the integrity of the digital economy's infrastructure. Thirdly the effect of the immunisation of digital intermediaries by Section 73 of the Electronic Communications and Transactions Act from liability for 'providing access to, or for operating facilities for information systems, or for information systems or transmitting, routing or storage of data messages' is a matter for further exploration. If these three

[70] See generally Van der Walt, 2012 p.113-131.
[71] Note 1, p. 6
[72] Note 1 , p 21: " A large quantum of data is generated by government and its institutions using public funds….a significant portion of this data remains inaccessible to many citizens, although such data may be non-sensitive in nature and could be used by citizens for scientific, economic and developmental purposes
[73] As above.
[74] As above.
[75] As above.
[76] BUSINESS TECH 2022.

lingering challenges of regulatory oversight are an example, it is difficult to imagine how state ownership would address the complex challenges of regulatory oversight of digital economies. Instead, as has become evident in other countries and regions different forms of platform liability has become a mechanism for data governance.[77]

To further illustrate the challenges of articulating a fair balance in a digital economy, this paper turns to a more detailed examination of the balance wrought in the regulation of personal information by POPIA and its proposed amendments. POPIA enables South African citizens to regulate the processing of their personal information by juristic persons for commercial objectives. Accordingly, the conditions of access to personal information that are the building blocks of corporate information are therefore of strategic importance. Thus while there are conditions of processing personal information coupled with rights of data subjects and specific exclusions of certain data from collection,[78] there are general and specific exceptions that enable access to the personal information. Accordingly, understanding how the rights of data subjects are enforced is crucial. First, data firms can use de-identified data[79]. Thus even though POPIA excludes data that has been de-identified to the extent that it cannot be re-identified again[80] there is as Swales notes " …'no specific guidance on how to achieve data de-identification directly'[81] Accordingly, a framework for de-identification would be of much concern, relevance and interest for data re-use and transformation by companies. Secondly, yet another issue that is likely to arise in the contractual consent to the collection of personal information is jurisprudence that have developed in the transformation of South African contract law that addresses the genuineness of consent of South African citizens in asymmetrical contracts such as the data contracts.[82] Whether the contractual relationship between citizens and data collecting firms is built on real or illusory

[77] See for example, Geiger and Jütte (2021) 517-543. See also Republic of Poland v European Parliament and Council of the European Union (Case C-401/19).
[78] Section of POPIA provides that
[79] Section1 of POPIA defines ''de-identify'', the deletion of 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. ;
[80] See section 6(1)(b) of POPIA. Commentators have noted that this provision is consistent with Recital 26 of the European Union's Directive 95/46/EC [The General Data Protection Regulation (GDPR)]. See for example Swales 2021
[81] As above, p.2.
[82] See, for example, the indirect application of the Bill of Rights to contracts through the development of the principle of public policy. In

autonomy of South African citizens is a matter that a jurisprudence will surely address by exploring the asymmetrical relationship between corporate and individual contractors.[83] Thirdly, it is not clear whether the manner that POPIA regulates cross-border data flows is an adequate standard of digital sovereignty to ensure that personal data is stored and localised in South Africa so that citizens and regulatory authorities exercise enough control to regulate cross border data flows.[84] Fourthly, given the principle of subsidiarity in South African constitutional Law, it remains an open question whether POPIA sets an appropriate standard in the protection of personal information in view of the provisions of section 14 of the Constitution.[85] Fifthly, whether the Information Regulator endowed with institutional oversight over POPIA is adequately resourced to provide frameworks that seek to balance the protection of the information of South African citizens with access to such information as a staple of the digital economy is another matter altogether.[86] Such concern stems from many areas of privacy regulation in need of standard-setting through the use of Codes of Conduct as permitted by section 60(1) of POPIA for the lawful processing of personal information but are still outstanding in many cases.[87] Secondly, the lack of policy on de-identification, was noted, above, which leaves stakeholders without guidance on how to proceed.

Another reason why the blunt instrumentality of state ownership of data is not helpful is because it robs the economy of the utility of the South African Bill of Rights that provides adequate juridical space for the limitation of POPIA and balancing of the competing and complementary rights in data use and re-use. Three examples illustrate this point. First, there may be a need to limit the exercise of rights emanating from POPIA when they conflict with other human rights through the

[83] There is considerable literature that has addressed how human rights have impacted the development of contract law. A representative sample of the cases that have explored how human rights impact contractual autonomy and generated considerable literature include *Brisley v Drotsky* 2002 (4) SA 1 (SCA); *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA); *Barkhuizen v Napier* 2007 (5) SA 323 (CC)**;** *Brendakamp and Others v Standard Bank of South Africa Ltd* 2010 (4) SA 468 (SCA) **and** *Potgeiter NO and Others* 2012 (1) SA 637 (SCA). A representative sample of the literature include the following: Bhanna & Meerkoter 2015; Bhana 2015; Kruger 2011; and Hutchinson 2011.
[84] See Nyamwena and Mondliwa 2020, p. 2-4. Van der Berg (2021)
[85] See Cachalia and Klaaren (2021), pp.19-20.
[86] See for example, Da Veigha et al 2017 p. 399-422; Zenda et al 2020 p. 113–132
[87] Section 60(1) (a) and (b) of POPIA. See also notices of receipt of codes of conduct from juristic persons and their associations. See the notices of submitted codes of conduct at https://infohttregulator.org.za/codes-of-conduct. Other possibilities exist through collaborations with other regulatory agencies one of which is the South African Human Rights Commission. See Adams & Adeleke 2020.

instrumentality of the limitation clause of section 36 of the Constitution.[88] For example, group bias of data use and transformation in profiling and security-related concerns are of concern. Stone notes the 'potential infringements on the right to privacy and freedom of movement, the possible risks of state-sanctioned discrimination, and the criminalisation of communities'[89] in the smart technologies used in public policing and private security operations. The second requires the balancing of competing rights within the data ecosystem. For example, since juristic persons are entitled to the right to privacy and appropriate corporate information is constitutional property, there is much to unpack as to how these rights are balanced with the right to privacy or citizens in light of the provisions of section 8(2) and 8 (4) of the Constitution. Section 8(2) provides that the Bill of Rights bind a juristic person if and to the extent it is applicable taking into account the nature of the right and the nature of any duty imposed by the right. In addition, section 8(4) provides that a juristic person is entitled to rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person. It may well be that data transformation may affect the weight given to juristic persons' rights. It is certainly 'new' territory for South African courts as they weigh different interests and perspectives in balancing data ecosystem rights. The case of *Discovery Ltd v Liberty Group Ltd*[90] is a recent example of the balancing of rights and entitlements in a corporate data ecosystem in which two juristic persons disputed the consequences of access by one of the firms to the database of the other company. Concerning claims of unlawful competition, the Court drew attention to the fact that a reasonableness criterion used to determine the limits of lawful non-actionable completion requires in a constitutional era to be seen through the spirit purport and objects of the Bill of Rights.[91] The Court weighed constitutional property protected by section 25 against the right to freedom to trade protected by section 22. It may well have been entitlements deriving from the right to privacy and the constitutional property of the company in conflict. There are many possibilities in this regard, including a court considering all rights in the Bill of Rights as equal and then carefully weighing the facts of the dispute to conclude. Yet another possibility is to consider

[88] See generally Currie (2010); Bilchitz (2011).
[89] See generally Stone 2020 p. 2.
[90] See note 34.
[91] Above, paras 43-64.

the right to privacy of a citizen as stronger than other rights.[92] Fortunately, there is jurisprudence about balancing of rights from cases such as *National Media v Bogoshi*[93] *South African Broadcasting Corporation v The National Director of Public Prosecutions*[94] and *Khumalo v Holomisa*[95] that provide some guidance that point to a contextual engagement that treats all rights as equal.

VI CONCLUSION

This paper has argued that state ownership of data as a fundamental principle of data governance alters the fair balance between private interests and public purposes that is critical for South Africa's digital economy. Rather the fact that data is constitutional property and is protected by other rights such as the right to privacy requires a legislative and judicial framework for balancing personal and corporate data rights, entitlements and interests that is not present but slowly developing in South Africa.

[92] See Cachalia and Klaaren, 2021 p. 16-17.
[93] 1998 (4) SA 1196 (CC).
[94] 1999 (4) SA 469 (CC)
[95] [2002] ZACC12.

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