

Anushka Mittal

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Data governance is being explored from all possible angles, ranging from domestic laws to private standards, to international treaties. This article will explore constitutional contributions that have the potential to be the foundation for future adjudication and law making. It focuses on the legal histories of constitutions and landmark decisions related to public biometric use in India and South Africa as case studies to identify decolonial specificities. This is relevant because the global governance of data has the potential to spiral into international law making with states as the unit, without acknowledging the power differentials that exist within a state. It is time that the plurality of interests within nations are accommodated in the development of technology, as the architecture of the future. To this end, the article identifies global constitutionalism as the means through which any discussion of a global data law should be approached, taking into account the decolonial consensus in post-colonial states and its contemporary use in technological debates.

anushkaoui@protonmail.com

### 1. Introduction

Data, understood in their broadest sense as encoded information, have different connotations for different people in different contexts. While they can be empowering for some, they can also be extractive, meaningless or entail merely an impersonal exchange for others. Due to the extent to which multitudinous claims over a single datum can affect policy-making efforts, the exercise of categorization of data is increasingly and uniformly being undertaken across the globe to devise a common vocabulary and concomitant boundaries. This activity involves a new form of power sharing between the various claimants of data, such as technology companies, individuals, communities of people, state governments, civil society, international organizations etc. The power sharing is manifest in the various kinds of digital development models being identified and attributed to states and regions.<sup>1</sup> These localised data governance regimes are marked by internal or domestic power brokerage between differently situated groups. This is because the key actors conceptualize the meaning of data, the relevant stakeholder community, and the reasoning for their governance efforts, differently.<sup>2</sup> For example, in the dis-

pute about the Safe Harbour agreement in the European Union, the decision of the European Court of Justice intended to protect rights granted to individuals in opposition to commercial interests and benefits. Such examples of legal disputes – as well as the law-making process – clarify the many sites of contestations in a jurisdiction that can complicate the characterisation of a particular legal regime.

Against this backdrop, the aim of the article is to explore the contributions of constitutions to the digital discourse using case studies. Specifically, it involves a discussion of the rights' distributions across constitutions which resolve the micro dynamics of power differentials between the state and the citizens, or the majority and the minority groups. This exercise will result in comparative insights that can be used to formulate a global law as it seeks to negotiate a balance between a larger diversity of interests. This can be particularly instructive for the digital economy, as it should not only have piecemeal solutions grounded in antitrust law but aim to develop constitutional formulations.<sup>3</sup> The broad aim is underpinned by the focus on specific case studies.

The constitutional nuance is important, for to be effective, any efforts at global governance need to take into account various kinds of inequalities. Neglecting inequalities implies running a higher risk of replicating the unequal position of people and states in their govern-

1 Amba Kak & Samm Sacks, 'Shifting Narratives and Emergent Trends in Data-Governance Policy', (AI Now Institute, 2021, <https://ainowinstitute.org/Shifting%20Narratives-5-FINAL.pdf>), accessed 15 October 2021.

2 Anke Sophia Obendiek, 'What Are We Actually Talking About? Conceptualizing Data as a Governable Object in Overlapping Jurisdictions', *International Studies Quarterly*, Volume 66, Issue 1, March 2022, sqabo80, <https://doi.org/10.1093/isq/sqabo80>.

3 Tim Wu, *The Master Switch: The Rise and Fall of Information Empires*, (1<sup>st</sup> ed., Alfred A. Knopf, 2010).

PhD Candidate, University of Amsterdam

ance.<sup>4</sup> Thus, the aim is to emphasize the significant contributions that domestic constitutions can make to global norms and the intent of states, in an attempt to bridge various forms and types of inequalities.

The article draws from various sources of literature, such as decolonization studies and legal histories of constitution making, to understand how interests are accommodated. India and South Africa are chosen as the comparators due to their similar axes of coloniality and large public digitization efforts. The constitutions mapped here are also chosen because they promised the transformation of the respective societies and were expected to endure for a long time to come. Arguably, they did so, as will be seen further below. However, it is also acknowledged that Global South scholarship has largely focused on India and South Africa<sup>5</sup> as this article also does. It is hoped that with these case studies as examples, many more constitutions will be explored in the future.

The article aims to explore the ability of constitutionalism to decolonise the technological field for the future. A first step to this end would be to establish why constitutionalism has emerged or is being characterized as a potential consensus against colonisation, within specific localized contexts (Part II). This will be followed by determining how constitutions have responded to data governance debates, especially in terms of adjudication of issues or interpretation of specific rights. Examining the constitutions will also hopefully answer how domestic power imbalances, inequalities and rights' differentials have been addressed, which can be useful to instruct the larger global development (Part III). This is followed by a discussion on how major technology case laws, specifically involving mass biometrics programs, contribute to global data law (Part IV), followed by insights for a global law from a decolonial perspective on technology, discussed within the constitutional realm and beyond (Part V).

The objective of this article is to trace the social interaction of the chosen constitutions with technology, specifically the traditional fundamental rights, which have been implicated to protect people against emerging technologies. Since the technologies inevitably involve characterization of data, their understanding is implicated as well.

## 2. Understanding Constitutionalism

Constitutionalism can be broadly understood as the belief in a constitutional instrument to order power; to control, limit and restrain the power of the state; and also establish institutions to coordinate.<sup>6</sup> While this is the central ordering function of a constitution, it also performs a phenomenological function, in terms of how it affects the general perception of citizens and constructs power in their everyday world. This realm of its function is relevant because constitutions order not just institutions and government structures, but also *infrastructural interaction* amongst citizens. Infrastructure may be

understood as a 'relational entity that brings into being or shapes or excludes social relations, technical relations, and socio-technical relations.'<sup>7</sup> This implies that there is a semblance or locus of power in the everyday that some constitutions recognize and order accordingly. While power interactions among the citizens arise not solely under the influence of the state, the fundamental principles of constitutionalism would have one believe so.<sup>8</sup> Some constitutions incorporate the concept of horizontal application of rights to organize horizontal power differentials.

A constitution has the potential to organize a citizen's interaction with infrastructure, most commonly seen in the protection of access and use of public spaces. This is done through the protection of the right to protest, for example. Horizontal fundamental rights have also been carved out in other ways, such as the rights to equality (Article 14); specific access rights to public places (Article 15(2)) in India; right to establish educational institutions without discrimination on the grounds of race (Article 29(3)) in South Africa; rights to employment and wages (through the rights to equality and profession); and rights to access the justice infrastructure (provision of direct access to courts). This is especially noteworthy at a time when the state has receded, across the globe, with globalization and privatization shifting sets of activities and capacities away from the s.<sup>9</sup>

There are also various types of constitutionalism that inform the construction of a single constitution, be it liberal constitutionalism, structural constitutionalism<sup>10</sup> global constitutionalism or positive constitutionalism.<sup>11</sup> The social impact and experience of a constitution has been outlined by De in *A People's Constitution* (for India), where constitutionalism became the governing frame in postcolonial India through a social history of constitutional and administrative processes.<sup>12</sup> It highlights, in a salient way, the entrenchment of constitutionalism in the everyday life of the governed populace.

### 2.1 Colonialism and Constitutionalism

Decolonial theory uncovers how the political economy of resource extraction still works as a colonial dispositive located at the intersection of old and new constitutional and legal frameworks. It explains the persistence of colonial patterns of power in current societies and state formations, revealing how embedded coloniality/colonialism is in the modern paradigms of universalism and rationality.<sup>13</sup> This section will examine the intricate connection between constitutionalism and imperialism, and will show how constitutionalism emerged, how it is perceived and how it is embedded within societies. A constitution here is considered as a post-colonial proxy insofar as it signifies the state's transition from a colonial set-up to independence, replete with vestiges of the past as well as aspirations for a transformative future.<sup>14</sup> The constitution essentially straddles two worlds, the present

4 United Nations, 'Global governance and global rules for development in the post-2015 era', (2014).

5 Vidya Kumar, 'Towards a Constitutionalism of the Wretched — Global Constitutionalism, International Law and the Global South', *IACL-AIDC Blog*, 10 August 2017, <https://blog-iacl-aidc.org/new-blog-2/2018/5/26/symposium-towards-a-constitutionalism-of-the-wretched-global-constitutionalism-international-law-and-the-global-south-drr7p> accessed 21 January 2022

6 Jeremy Waldron, 'Constitutionalism: A Skeptical View' (2012) NYU School of Law, Public Law Research Paper No. 10-87 <https://ssrn.com/abstract=1722771> accessed 15 September 2021.

7 Benedict Kingsbury and Nahuel Maisley, 'Infrastructures and Laws: Publics and Publicness' [2021] *Annual Review of Law and Social Science* 35.

8 N. W. Barber, *The Principles of Constitutionalism* (OUP 2018).

9 Judith Resnik, 'Globalization(s), privatization(s), constitutionalization, and statization: Icons and experiences of sovereignty in the 21st century' (2013) 11(1) *International Journal of Constitutional Law*, <https://doi.org/10.1093/icon/moso51> accessed 15 December 2021.

10 Mark Tushnet, 'Editorial', (2016) 14(1) *International Journal of Constitutional Law* 1 <https://doi.org/10.1093/icon/mowo21>.

11 N. W. Barber, *The Principles of Constitutionalism* (OUP 2018) chapter 1.

12 Rohit De, *A People's Constitution* (Princeton University Press 2018).

13 Roger Merino, 'Extractive Constitutions: Constitutional Change and Development Paths in Latin America', *Law and Development Review*, [2022] 15(1), 169-200.

14 Monzón, José María. "The Constitution as a Post-Colonial Discourse:

and the liminal past. The post-colonial state thus often reproduces the ways in which populations were perceived and administered by the colonial state, and this occurs along the following axes:

- Keeping populations as targets of intervention<sup>15</sup>
- Accounting and accountability as techniques of such interventions<sup>16</sup>

Through the analysis it will become visible that in the case of the use of biometrics, these conditions often occur even after constitutional adjudication. The decolonial consensus of constitutions may implicitly avoid some pitfalls, but not all. These learnings must inform a global law for any meaningful engagement.

The timeline outlined here encompasses the analysis of the post-colonisation processes preceding the latest versions of the current constitutions of the comparator states. This is because even within post-colonial studies, the occurrence of post coloniality itself is a matter of extensive debate, with the fear being that *every* conquest may be understood as colonization, which renders the analytical device otiose.<sup>17</sup> Furthermore, the point of relating the discussion around constitutionalism to post-coloniality is the fact that not all constitutions of the Global South entail a strong break from the past; at different points of time in the political histories of these states, the modern constitution has been seen as a colonial vestige.<sup>18</sup> Yet, there have been equally potent domestic actors seeking revolutionary change through a constitution. These actors are not only the elites who become the transferees of power from the colonizer. There are elites and then a few others. All of them negotiated and worked together to construct the state and legitimize the newly established sovereignty.<sup>19</sup> The extent and the kind of participation in the use and development of the constitution cannot be easily generalized. To limit the scope of this article, the constitutional journeys of India and South Africa have been focussed upon.

Legal historians have traced the Constitution of India from many angles and viewpoints. Almost two-thirds of the Constitution's articles transferred provisions of the Government of India Act, 1935, which was initiated, debated, scrutinized and assented without any real Indian involvement, along with inclusion of emergency powers as outlined by the colonial regime.<sup>20</sup> At the same time, its fundamental uniqueness in terms of granting people direct access to the highest courts and the institution of a Supreme Court was a remarkable step

An Insight Into the Constitution of Bolivia," *Seattle Journal for Social Justice*: Vol. 12, No. 3, 2014. <https://digitalcommons.law.seattleu.edu/cgi/viewcontent.cgi?article=1712&context=sjsj>.

15 U.Kalpagam, *Rule by Numbers*, (Lexington Books, 2014) 9.

16 *ibid.*

17 Peter Childs and Patrick Williams, *An Introduction to Post-Colonial Theory*. (Prentice Hall 1997).

18 Jeroen Van Bekhoven, 'Reforming the Constitution; Reforming the Postcolonial State? Indigenous Peoples and Constitutional Reforms in Taiwan' [2019] 14(2) *Asian Journal of Comparative Law* 245; D.M Davis, 'Is the South African Constitution an Obstacle to a Democratic Post-Colonial State?' [2018] 34(3) *South African Journal on Human Rights* 359; Linda Camp Keith and Ayo Ogundele, 'Legal Systems and Constitutionalism in Sub-Saharan Africa: An Empirical Examination of Colonial Influences on Human Rights' [2007] 29(4) *Human Rights Quarterly* 1065.

19 Tarunabh Khaitan, 'Directive Principles and the Expressive Accommodation of Ideological Dissenters' [2018] 16(2) *International Journal of Constitutional Law* 389.

20 Harshan Kumarasingham, *Constitution-Making in Asia : Decolonisation and State-Building in the Aftermath of the British Empire* (Routledge 2016).

to structure their everyday life.<sup>21</sup> Kumarasingham dubbed the phenomenon occurring in several states of South Asia as the 'Eastminster' system, where the 'elite-led constitutions that flowed through the Himalayan kingdom bore the debris of British and Indian influence, in an era dominated by an unrepresentative and miniscule band of men which lacked gender, class and culture representation.'<sup>22</sup> The characterization of the development of constitutions as an Eastminster system also explains how the constitution contains continuities and borrowings from the imperial understanding of societal structure, rather than being nationalism's clean break from colonialism.

Even with these shortcomings and structural continuities, it is worth noting that regardless of how imperialized the development may still be, post-colonial constitutions of the erstwhile British empire have nonetheless undergone a journey since their inception. One key constitutional difference is the incorporation of a specific chapter on fundamental rights, or a bill of rights, in India.<sup>23</sup> Furthermore, the constitution-making process of creating a constitution in India included receiving input from the public: there were many requests from people and organizations for the representation of their group, religion, caste, tribe, or profession in the assembly's advisory committee, as well as minorities demanding to be recognized in the Constitution, even though these claims were not solicited by the Constituent Assembly.<sup>24</sup> As Sharni has documented, the preparation of the electoral roll and the institution of universal adult franchise in India, even before the Constitution was drafted and promulgated, was India's stark act of decolonisation. She highlights how electoral institutions that existed before independence were largely a means of 'co-opting ruling elites and strengthening the colonial state.'<sup>25</sup>

On the other side of the world, colonialism in South Africa was shaped by violence, settlement, exploitation and the usurpation of resources. As the white occupiers settled, the occupied territories or colonies were given dominion status by the British and racism and apartheid were institutionalized. This state of affairs continued until 1993, when the African National Congress gained enough power to negotiate with the Afrikaner National Party to change the status quo and democratize South Africa.<sup>26</sup> This form of colonization is distinctly dissimilar to the Indian trajectory, especially in terms of settlement and the assimilation of the colonial power and the time period of conquests. In light of its own circumstances, South African constitutional history went through various phases and a series of compromises up until 1996, culminating in the modern constitution that we see and experience today. The discourses around creating a socially just society in the post-colonial context are shaped by narratives of decolonization and decoloniality, both of which – in the South African context – make claims for the recognition of the African episteme and epistemology.<sup>27</sup>

21 Rohit De, *A People's Constitution* (Princeton University Press 2018).

22 Harshan Kumarasingham, *Constitution-Making in Asia : Decolonisation and State-Building in the Aftermath of the British Empire* (Routledge 2016).

23 *Ibid.*

24 Shani O, 'The People and the Making of India's Constitution', [2022] *The Historical Journal* 1.

25 Shani, O, *How India Became Democratic: Citizenship and the Making of the Universal Franchise* (Cambridge: Cambridge University Press 2017) doi:10.1017/9781107705722.001.

26 Ali Gunes, 'The Illusion of Freedom in South Africa: Post-colonialism, Exploitation and Identity Crisis in Alan Paton's *Cry, The Beloved Country*', [2009] 2(1) *Epiphany* [1840-3719] 20.

27 I.M. Ntshoe, 'Ontologising social justice in decolonised and postapartheid settings' (2020) 34(3) *South African Journal of Higher Education* 26 <https://dx.doi.org/10.20853/34-3>.

South Africa stands for a post-conflict transitional democracy that adopted the path of new constitutionalism ‘characterized by a greater degree of deliberation and choice among a wide array of constitutional models.’<sup>28</sup> The drafting of the final constitution involved not just the technical expertise, manifested through the negotiation between political elites and the Constitutional Assembly, but also individual contributions of new and old enfranchised citizens.<sup>29</sup> The public participation scheme was intended to provide both basic education on democracy and constitutionalism and to elicit the public’s opinion on what the constitution should say. To do this, it used the press, radio and television, the Web, and its own publicity campaign.<sup>30</sup> It’s a characteristic example of a break from elite-driven and elite-led processes of formulating a constitution as the record of the multi-party negotiations and the public debate reveals a process of deliberation and persuasion in negotiations over the 1993 Constitution.<sup>31</sup>

The gamut of rights in the final constitution, affirmed by the Constitutional court as well as the drafters, included the addition of socio-economic rights, a concept of substantive equality, alterations to the property clause, an express provision that the bill of rights be applied horizontally, and the eradication of the levels of scrutiny in the limitation clause.<sup>32</sup>

It was negotiated in a historical setting, distinct from other post-colonial constitutions, trying to undo its delay into modernity. The interest groups were sufficiently organized, due to no less part played by an international political culture,<sup>33</sup> which is evidenced by the subsequent gains made in the negotiation of the required rights. This lapse of time and strength of organization is clearly indicative of the extent of rights coverage, tending towards specificity. For example, the South African Constitution incorporates a justiciable positive right to both reproductive decision making and reproductive health care in its Constitution.<sup>34</sup> Contrast this to India’s focus on constitutional rights for women’s autonomy and expressly gendered clauses in the fundamental rights of equality before law (Article 14), the prohibition of any form of discrimination (Article 15) and equality of opportunity (Article 16(1)). The non-justiciable directive principles of state policy further include the right to an adequate means of livelihood for men and women equally (Article 39(a)), equal pay for equal work for both men and women (Article 39 (d)), protection of the health and strength of workers – men, women and children – from abuse and entry into vocations unsuited to their age and strength (Article 39 (e)), just and human conditions of work, and maternity relief (Article 42).

Against this backdrop, the perceptible sense of constitutionalism in South Africa is pervasive, especially in the formulation of the constitution and the use of the rights. This is evidenced in cases such as

*Port Elizabeth Municipality v. Various Occupiers*<sup>35</sup> where the municipality prayed to evict the ‘illegal occupants’ off a municipal land. The occupiers demanded alternate housing to be provided in lieu of their existing place. The municipality sought to get a ruling that ‘when it seeks eviction of unlawful occupiers it is not constitutionally bound to provide alternative accommodation or land.’ The Constitutional Court described it ‘as turning on establishing an appropriate constitutional relationship between section 25 [of the South African Constitution], dealing with property rights, and section 26, concerned with housing rights.’ The Court concluded that it has a very wide mandate and must give due consideration to all circumstances that might be relevant. The Court passed an engagement order, suggesting mediation to the parties. Many other landmark cases<sup>36</sup> further highlight the deep space that the constitution has created in the minds of the people.

The institution of a charter of rights (Bill of Rights), constitutional supremacy, and the content of rights were all negotiated outcomes that transcended the political spectrum. This even led to decisions regarding the extent of the reach of such rights, in terms of their horizontality or vertical application alone.<sup>37</sup> It included socioeconomic rights that constituted positive liberties or claims against the state. As a corollary, the rights could be applied vertically, diagonally (protecting individuals against a variety of semi-private actors, sufficiently linked to the state to be counted as a part of it) and horizontally.<sup>38</sup> These include the rights to healthcare, food, water, social security, a decent environment and basic education.<sup>39</sup> The caveat or test of reasonableness provides that the attainment of economic rights is premised on the standard of progressive realization by the state, according to the means and policies decided by it.<sup>40</sup>

It is important to emphasize that the historical trajectories of decolonization can be seen in the creation of the modern state itself in erstwhile colonies. It is evident that these constitutions also contain colonial legacies that lead to contestations and discussions in the modern state.<sup>41</sup> The early versions of the constitutions are decolonial to a certain extent and the boundaries are open enough to allow shifts in the future. So far, the relevance of constitutionalism and its legal history has been established. The evolution of rights discourse, as impacted by the public use of technology, offers more insight into decolonial and post-colonial understanding, which will be dealt with next.

### 3. Data Debates in the Constitutions

‘Tech solutionism’ is a common term used by policy makers in developing countries and a refrain used by the civil society in the same

28 Nila Mohanan ‘Negotiating Political Power at ‘Critical Junctures’: Women and Constitution Drafting in South Africa and India’ (2021) *Journal of Asian and African Studies* doi: 10.1177/00219096211025806.

29 Heinz Klug, ‘Participating in the Design: Constitution-Making in South Africa’, [1996] 3 *Rev. Const. Studies* 18, <https://ssrn.com/abstract=3523401>.

30 Christina Murray, ‘A Constitutional Beginning: Making South Africa’s Final Constitution’, (2001) 23 *UALR L. REV.* 809.

31 Heinz Klug, ‘Participating in the Design: Constitution-Making in South Africa’, [1996] 3 *Rev. Const. Studies* 18, <https://ssrn.com/abstract=3523401>.

32 D. M. Davis, ‘Constitutional borrowing: The influence of legal culture and local history in the reconstitution of comparative influence: The South African experience’ (2003) 1(2) *International Journal of Constitutional Law* 181.

33 Heinz Klug, ‘Participating in the Design: Constitution-Making in South Africa’, [1996] 3 *Rev. Const. Studies* 18, <https://ssrn.com/abstract=3523401>.

34 Article 12(2), 27(1)(a).

35 *Port Elizabeth Municipality v. Various Occupiers* Case CCT 53/03.

36 ‘Landmark Cases’ <https://ourconstitution.constitutionhill.org.za/south-african-constitution/exploring-some-landmark-cases/>.

37 Penelope Andrews and Ellmann Stephen, *The Post-Apartheid Constitutions: Perspectives on South Africa’s Basic Law*. (Witwatersrand University Press, Ohio University Press 2001).

38 Stephen Ellmann, ‘A Constitutional Confluence: American ‘State Action’ Law and the Application of South Africa’s Socioeconomic Rights Guarantees to Private Actors’, [2001] 45(1-2) *New York Law School Law Review* 21.

39 Article 24 (Right to Environment), Article 27 (Right to Health Care, Food, Water and Social Security), Article 29 (Right to Education), Article 8 (Application of rights).

40 Mark S. Kende, ‘The South African Constitutional Court’s Construction of Socio-Economic Rights: A Response to Critics’, [2004] 19 *CONN. J. INT’L L.* 617.

41 Merino, Roger, ‘Extractive Constitutions: Constitutional Change and Development Paths in Latin America’, [2022] *Law and Development Review* 15(1), 169-200, <https://doi.org/10.1515/ldr-2021-0127>.



spaces.<sup>42</sup> The idea revolves around the provision of technologically mediated solutions to problems of resource allocation and governance, quintessential functions performed by the state. Datafication and technological mediation are used as policy means to achieve the ends such as social security, food entitlements etc. There are various digital projects and infrastructures being put in place in India and South Africa, in hopes of providing a foundation to institute such solutions. There are many risks and concerns associated with such solutions, which are more often than not ensconced within constitutional debates and case laws. While tech solutionism also incorporates a developmental paradigm and narrative,<sup>43</sup> the right to development is the least commonly present, and second least commonly justiciable, economic and social right.<sup>44</sup> Thus, the more common economic and social rights such as rights to education and social security are used to enable technology as the medium used to achieve these ends. The following sub-sections will discuss two case laws of the different comparative jurisdictions, with their transformative constitutions and large, vulnerable populations. Interestingly, they both made a similar technological choice to respond to the duty of a welfare state, namely, to use biometrics to identify recipients and deliver benefits. Both the cases also focus upon the means employed to deliver the same, without sketching the expanse of the right. While the case law in India focused on the use of the biometric system and technological architecture, the South African case focused on the boundaries of the public-private partnership, a lethal state of affairs which finally catapulted into the state institutions, such as the government and the judiciary, being dependent on the system till the executive could step in and guarantee welfare delivery.

### 3.1 Contestation of rights in India

In India, the discussion surrounding Aadhaar constitutes the foundational layer of the entire public digital infrastructure in the form of unique identification through biometrics. As such, Aadhaar provides a clear case study of the implication of constitutional rights in a technological project. While the project is managed by the Unique Identification Authority of India (UIDAI), a state agency, its creation and sustenance involves many private players such as L-1 Identity Solutions, which handles the source code for the storage of biometric data.<sup>45</sup> The Supreme Court, the highest court of appeal in India, upheld the law and its mandatory use to avail state benefits, subsidies and services. It couched the right to development and socio-economic rights within the right to live with human dignity, protected by Article 21 of the Constitution.<sup>46</sup> The rights matrix is intersectional, to the extent that it attempts to combine the right to live autonomously with the right to be able to live autonomously i.e. the right to an existential minimum.<sup>47</sup> It highlighted that '[it is also referred to as] the social minimum or the basic right to the provision of adequate living conditions also has its roots in the right to equality.'

42 Ian Tucker, 'Evgeny Morozov: "We are abandoning all the checks and balances"' *The Guardian* (9 March 2013) <https://www.theguardian.com/technology/2013/mar/09/evgeny-morozov-technology-solutionism-interview>.

43 Nachtwey O and Seidl T, 'The Solutionist Ethic and the Spirit of Digital Capitalism' (14 March 2020) [osf.io/preprints/socarxiv/sgjzq](https://osf.io/preprints/socarxiv/sgjzq).

44 Ran Hirschl, 'Economic and Social Rights in National Constitutions', (2015) 62 *American Journal of Comparative Law* 1043.

45 Justice K.S. Puttaswamy and Anr. vs. Union of India (UOI) and Ors., (2019) 1 SCC 1, para 434.

46 Justice K.S. Puttaswamy and Anr. vs. Union of India (UOI) and Ors., (2019) 1 SCC 1, Para 109, 116, page 194.

47 Justice K.S. Puttaswamy and Anr. vs. Union of India (UOI) and Ors., (2019) 1 SCC 1, Page 200.

In its own words, the Court acknowledged 'that there cannot be undue intrusion into the autonomy on the pretext of the conferment of economic benefits. Precisely, this very exercise of balancing is undertaken by the Court in resolving the complex issues raised in the petitions.'<sup>48</sup>

Positive rights or welfare obligations of the State occur in Part IV of the Constitution of India, which deals with Directive Principles of State Policy. These are non-justiciable and guide the policy-making efforts of the legislature and executive. The Supreme Court highlighted how 'over time; the values enshrined in the Directive Principles have been read into the guarantees of freedoms in Part III. By a process of constitutional interpretation, the values contained in them have been adopted as standards of reasonableness to expand the meaning and ambit of the fundamental rights guaranteed by Part III of the Constitution. In doing so, judicial interpretation has attempted to imbue a substantive constitutional content to the international obligations assumed by India.'<sup>49</sup>

It also highlighted the scope and contours of rights as not just ends but also means to an end. Thus, the receipt of benefit is not the sole assurance of a right but also the method through which it is achieved. In the case of Aadhaar, a balance was attempted to be struck between the right to welfare and the right to privacy. While it is an important balance to strike, it depends on the court's acceptance of the Aadhaar setup as the necessary apparatus to ensure welfare. This is also the bounds of judicial review, whereby the court is not in a position to suggest any other policy.

The Court finally upheld the law but severely curtailed the use of Aadhaar by private entities, especially its use by mobile phone operators and banks for opening accounts.<sup>50</sup> It also explained the perils of a database-led governance that conflates identity and identification,<sup>51</sup> that significantly impacts the relationship of individuals and citizens with the state as identity becomes what the data can capture, regardless of the autonomy and complexity of the individual.

However, as a value and principle that balances conflicting rights that occur on the axis of human dignity, the case of Aadhaar is an important contribution to think about digital developments and tech solutionism as well as the limits of current constitutional doctrines to act as the necessary checks.

### 3.2 Tech solutionism in South Africa

The socio-economic conditions are guaranteed in South Africa through a new technologically mediated setup. Similar to India, this was introduced to curb fraudulent payments to beneficiaries. The system was conceived by inviting private parties to undertake payment disbursement and deploy their own means and methods of a biometric system.

48 Justice K.S. Puttaswamy and Anr. vs. Union of India (UOI) and Ors., (2019) 1 SCC 1 Page 203.

49 Justice K.S. Puttaswamy and Anr. vs. Union of India (UOI) and Ors., (2019) 1 SCC 1 Pg 793, para 162 & 163.

50 'Initial analysis of Indian Supreme Court decision on Aadhaar' (*Privacy International*, 26 September 2018) <https://privacyinternational.org/long-read/2299/initial-analysis-indian-supreme-court-decision-aadhaar> accessed on 2 February 2022.

51 Justice K.S. Puttaswamy and Anr. vs. Union of India (UOI) and Ors., (2019) 1 SCC 1, Pg 817, para 182, 183.

South African Social Security Agency (SASSA) awarded a tender to Cash Paymaster Services (Pty.) Ltd. for the countrywide payment of social grants to beneficiaries.<sup>52</sup> The tendering process was challenged in view of the irregularities, which made the choice administratively irregular and even unconstitutional. What is key to understand here is the fact that in this setup, the data were collected, processed and stored by a private entity. It was also pitched as a profitable endeavour. This state of affairs was sought to be undone by the Court in 2015 with an option given to the SASSA to restart the tendering process or take up the job of distributing payments, once the term of Cash Paymaster Services (Pty.) Ltd. comes to an end. Interestingly, the executive did not take any action on any front and the contract was extended for this company, where it took care of the personal data and ensured that persons are not targeted for goods and services. In 2017, the contract was further extended again only for the function to be finally performed by the Post Office in 2018.<sup>53</sup>

This case provides an interesting vantage point to observe the play of constitutional discourse. The fact that it did not involve a courtroom exchange, nor legal arguments on privacy, nor the use of biometrics was surprising considering that the right to privacy is an explicit part of the Bill of Rights of the Constitution of South Africa.<sup>54</sup> At the same time, it provides important insight into how the relationship between public functions and private governance must be viewed, namely against a constitutional backdrop. It offers the chance to respond to a domestic power imbalance 'where a private company licenses an indispensable service to the state and the public over several contract cycles while profiting off it – and yet the state maintains a politically tolerant posture in permitting this act.'<sup>55</sup> This is a form of data-based power imbalance that moves beyond mere state surveillance of a vulnerable population. The contract also does not arise out of a vacuum: the private company was involved creating its position, replete with the latest technology, the public space for the use of such technology and government contracts and policies in its favour. In addition to the common elements of proprietary products, platforms and data-processing, the company had specialised in providing payment services in the regions of the country least served by the state and public infrastructure. It bought a subsidiary of the national bank, got the network, contacts, which it matched with its innovation to create a neoliberal state personality.<sup>56</sup>

It is a textbook case of the extent of technological power, potential, dependence and the state of the state, because 'by the time that the legal crisis over the SASSA contract erupted, thousands of merchants, wholesalers, salesmen and contractors were—like the state itself as well as the grant recipients—locked into a payment platform that was separate from, and opposed to, the network used by the largest

banks.'<sup>57</sup> The privatized setup allowed the company to make automatic deductions from the benefits accrued to the recipients and engage in predatory lending, given the personal details and financial initiatives that could be put in place.<sup>58</sup>

#### 4. Decolonizing Technology using the Constitutions

Colonialism, understood as the subjugation and domination of one people over another,<sup>59</sup> was what structured the policies that impacted people in their everyday lives. Technology in general,<sup>60</sup> and biometric data collection in particular, has a colonial past, especially in India and South Africa.<sup>61</sup> It has been underpinned by the need to centralize the state apparatus and the population and confer a homogeneity for administrative purposes.<sup>62</sup> Coloniality is what survives colonialism, in the way that colonial structures prevail even after formal independence.<sup>63</sup> An example is the modern biometric system, which is the infrastructure of choice for former colonial states to introduce in their respective independent territories,<sup>64</sup> rendering a post-colonial framework for their actions and experiences of people.

The emerging theories of digital colonialism, data colonialism and data capitalism recognise this nature of historic continuity and the role of data as the material resources that have been exploited for economic expansion<sup>65</sup> and the control of populations. The fact that this is usually carried out by private foreign corporations enhances the power differential, even between modern nation states.<sup>66</sup> At the same time, in order to understand it better, the characterization of data is an ongoing task. There is a vast body of literature trying to understand their sui generis nature, while also attempting to mould them in a particular analytical category – such as

52 *Allpay Consolidated Investment Holdings (Pty) Ltd And Ors. V. Chief Executive Officer Of The South African Social Security Agency And Ors.* Case CCT 48/13 [2013] ZACC 42 <http://www.saflii.org/za/cases/ZACC/2013/42.pdf>.

53 *Black Sash Trust v Minister of Social Development and Others (Freedom Under Law NPC Intervening)* (CCT48/17) [2017] ZACC 8.

54 Article 14 (Right to Privacy).

55 Keith Breckenridge, 'The global ambitions of the biometric anti-bank: Net1, lockin and the technologies of African financialisation', (2019) 33(1) *International Review of Applied Economics* 93 DOI: 10.1080/02692171.2019.1523836.

56 Keith Breckenridge, 'The global ambitions of the biometric anti-bank: Net1, lockin and the technologies of African financialisation', (2019) 33(1) *International Review of Applied Economics* 93 DOI: 10.1080/02692171.2019.1523836.

57 Keith Breckenridge, 'The global ambitions of the biometric anti-bank: Net1, lockin and the technologies of African financialisation', (2019) 33(1) *International Review of Applied Economics* 93 DOI: 10.1080/02692171.2019.1523836.

58 'Private Players in Welfare Delivery: A Case Study from South Africa' (*Socialprotection.org* 1 September 2020) <https://socialprotection.org/discover/blog/private-players-welfare-delivery-case-study-south-africa>.

59 <https://plato.stanford.edu/entries/colonialism/>.

60 Padamshree Gehl Sampath, 'Technology and inequality: can we decolonise the digital world?' (2020) 28(1) *Renewal: a Journal of Social Democracy* 53.

61 Keith Breckenridge, *Biometric State: The Global Politics of Identification and Surveillance in South Africa, 1850 to the Present* (Cambridge: Cambridge University Press 2014) DOI:10.1017/CBO9781139939546; Shani, O, *How India Became Democratic: Citizenship and the Making of the Universal Franchise* (Cambridge: Cambridge University Press 2017) DOI:10.1017/9781107705722.001; Tarangini Sriraman, *Pursuit of Proof: A History of Identification Documents in India* (Oxford University Press, 2018) accessed 22 February 2022 <https://oxford.universitypressscholarship.com/view/10.1093/oso/9780199463510.001.0001/oso-9780199463510-chapter-5>.

62 Kevin P. Donovan, 'The Biometric Imaginary: Bureaucratic Technopolitics in Post-Apartheid Welfare', (2015) 41(4) *Journal of Southern African Studies* 815 DOI: 10.1080/03057070.2015.1049485.

63 Noah De Lissovoy & Raúl Olmo Fregoso Bailón (2019), 'Coloniality' Keywords in *Radical Philosophy and Education*, (Brill 2019).

64 Keith Breckenridge *Biometric State: The Global Politics of Identification and Surveillance in South Africa, 1850 to the Present* (Cambridge: Cambridge University Press 2014) DOI:10.1017/CBO9781139939546.008; fn1.

65 Mohamed, S., Png, MT. & Isaac, W. 'Decolonial AI: Decolonial Theory as Sociotechnical Foresight in Artificial Intelligence' (2020) *Philos. Technol.* 33, 659 <https://ezproxy-prd.bodleian.ox.ac.uk:2102/10.1007/s13347-020-00405-8>.

66 Kwet, M. (2019). Digital colonialism: US empire and the new imperialism in the Global South. *Race & Class*, 60(4), 3–26. <https://doi.org/10.1177/0306396818823172>.

labour,<sup>67</sup> capital,<sup>68</sup> resource of social relations,<sup>69</sup> human embodiment etc.<sup>70</sup>

Key patterns begin to emerge through analysis of the observations sketched above. Firstly, the chosen findings are in the domain of biometrics-based welfare delivery, which is fundamentally changing the nature and potential of the state as we understand it. Secondly, the use of sensitive, personal data upon which the technology is constructed have made the courts aware of the idea of data in a constitutional form. In both the cases, constitutional precepts were used to caricature the collected data as implicating the right to privacy and by its extension, the right to life. This is also because their attributes such as metadata leave traces that can be used to create profiles of all citizens. Lastly, the courts delved into matters of involvement of the private sector while discussing obligations of the state in guaranteeing constitutional rights. In both the cases, the delivery of state welfare through a private nexus is intricately connected to the digital economy.<sup>71</sup> As the growth of the digital economy has constitutional repercussions, especially using public surveillance tools, this is a key contribution of the constitutional adjudication.

The Indian digital economy is increasingly based on Aadhaar and the Indian population that it covers. The portion of the Indian population that it does not cover then falls through the cracks, being excluded from welfare and market services. The digital economy 'innovations' are built atop Aadhaar.<sup>72</sup> The Court's judgement dealt a blow to Aadhaar insofar as how it was wantonly being used by private parties by virtue of Section 57 of the Aadhaar Act which reads as: '*Nothing contained in this Act shall prevent the use of Aadhaar number for establishing the identity of an individual for any purpose, whether by the State or any body corporate or person, pursuant to any law, for the time being in force, or any contract to this effect.*'

The said provision was struck down by the Court. A crisis was felt amongst start-ups and entrepreneurs, which led to several workarounds being introduced to use Aadhaar, e.g. the offline Aadhaar setup, QR codes, Aadhaar Enabled Payment Systems etc. Furthermore, the Aadhaar Authentication for Good Governance (Social Welfare, Innovation, Knowledge) Rules, 2020 have been passed, which allow it to be used, *for the following purposes, namely:*—

(a) usage of digital platforms to ensure good governance; (b) prevention of dissipation of social welfare benefits; and (c) enablement of innovation and the spread of knowledge

67 Jones, C.I. & Tonetti, C., 'Nonrivalry and the Economics of Data' (2020) 110(9) *America Economic Review* 2819.

68 Nick Couldry and Ulises A. Mejias, 'Data Colonialism: Rethinking Big Data's Relation to the Contemporary Subject' 2019 20(4) *Television & New Media* 336.

69 Nick Couldry and Ulises A. Mejias, 'Data Colonialism: Rethinking Big Data's Relation to the Contemporary Subject' 2019 20(4) *Television & New Media* 336; Shoshana Zuboff *The Age of Surveillance Capitalism: The Fight for a Human Future at the New Frontier of Power* (Profile Books 2019).

70 Ricaurte P. 'Data Epistemologies, The Coloniality of Power, and Resistance' (2019) 20(4) *Television & New Media* 350 doi:10.1177/1527476419831640.

71 Sudeep Jain & Daniela Gabor 'The Rise of Digital Financialisation: The Case of India, New Political Economy', (2020) 25 (5) 813 DOI: 10.1080/13563467.2019.1708879.

72 Dattani K, "'Govrentrepreneurism" for good governance: The case of Aadhaar and the India Stack', [2019] *Area*, 52:411–419. <https://doi.org/10.1111/area.12579>; Jacqueline Hicks, 'Digital ID capitalism: how emerging economies are re-inventing digital capitalism', [2020] *Contemporary Politics*, 26:3, 330-350, DOI: 10.1080/13569775.2020.1751377.

as the *Central Government may allow Aadhaar authentication by requesting entities in the interest of good governance, preventing the leakage of public funds, promoting the ease of living of the residents and allowing them better access to services.*<sup>73</sup>

In India, biometric data were understood as sensitive, inherent to a person, and private. Any use of this data had to be balanced against their probabilistic nature and principles of data protection, such as data minimisation, consent, and legitimate purpose. This characterization is shaping how the digital economy is being built up in India, both through public and circumscribed private efforts, with blended online and offline means. Yet an urgent proliferation can be perceived in view of the lack of an updated data protection law. Biometric data were embedded in constitutional lingua but not interpreted as a constitutional article. The judgement steered away from deciding questions of data ownership and data flows. As the first step in a long and arduous journey of understanding data at many levels, this is still a promising start.

In South Africa as well, the biometric apparatus is replacing paper-based registrations to determine creditworthiness and invigorate microlending.<sup>74</sup> Moreover, Net1, the holding company of Cash Paymasters Services (Pty.) Ltd. has used citizen data for marketing purposes and for facilitating private credit, air-time and electricity payments. Biometric systems and payment systems are being linked in order to financially incentivize the registration and tracking of citizens (either through cash transfer programmes or access to private credit) while banks and formal retailers want to verify identities across payment platforms and compile credit histories and market profiles.<sup>75</sup> Personal data were sought to be protected and safeguarded by SASSA and 'not to be used for any purpose other than the payment of the grants or any other purpose sanctioned by the act.' Further, the 'court precluded the contracting party from inviting beneficiaries to 'opt in' to the sharing of confidential information for the marketing of goods and services,'<sup>76</sup> a very important direction in which to steer the course of the digital economy. The courts' characterization of the biometric programmes against the constitutional background will eventually have subtle and indirect impacts on shaping the digital economy and how the extraction of data is understood in global circles.

Both India and South Africa belie a compromise between competing rights and interests. In both cases there is also an attempt to balance power differentials through transparency and accountability. There has been an ongoing civil society action, which indicates how embedded technology and its use in governance are in the power differentials. It is precisely this outcome which should be resolved using an instrument, be it a law, a global charter or a constitution. Even against the backdrop of a negotiated constitution, however, the powers controlling the technology are not being accounted for. In South Africa, the terms of creation and arrangement of the technology have been explained in clearer terms because the boundaries between private and public caretakers have been blurred. Furthermore, the

73 Rule 3, Aadhaar Authentication for Good Governance (Social Welfare, Innovation, Knowledge) Rules, 2020.

74 Séverine Awenengo Dalberto, Richard Banégas (eds.), *Identification and Citizenship in Africa Biometrics, the Documentary State and Bureaucratic Writings of the Self* (Routledge, 2021).

75 Laura Mann, 'Left to Other Peoples' Devices? A Political Economy Perspective on the Big Data Revolution in Development' (2018) 49(3) *Development and Change* 36 <https://doi.org/10.1111/dech.12347>.

76 *Black Sash Trust v Minister of Social Development and Others (Freedom Under Law NPC Intervening)* (CCT48/17) [2017] ZACC 8.

involvement of private parties in the use of govtech is imminent, which makes such constitutional lessons an important input for the development of a global law.

## 5. Global governance and constitutionalism

Global governance literature provides a political economic analysis of the formation of a global law. It is in stark contrast to the creation of a constitution, especially in its ability to understand and interject in the state-corporate nexus, no matter how feebly done in the case of constitutions. The construction of the constitutional setup provides such a structural, normative and real possibility that is usually absent from global governance norms. This article seeks to lay down an imperative for a global data law to account for data justice in all its multiplicity across differing decolonial and constitutional contexts.<sup>77</sup>

The main argument in favour of a global instrument is the convenience of the promise of internet itself. If data justice or regulation is fragmented, it will impact the openness of the internet. A global law would resemble new constitutionalism, one of the numerous international instruments promoting standards that are constitutional in substance and function, if not in form.<sup>78</sup> It would presumably be a top-down decontextualized resolution of conflicts, assuming all individuals of the world as global citizens on the same plane, premises which may be far from reality. The epistemic gap between the North and South for understanding technology and its potential has been dubbed as techno imperialism,<sup>79</sup> which does not necessarily (but might) influence global policy making. Tully has characterized the constitutive function of international law as one that enables 'legalized hegemony over nominally sovereign yet substantively subalternized former colonies.'<sup>80</sup> A global data law, as a form of global governance would involve a key role by private actors.<sup>81</sup> The discussion about a global data law may boil down to public or private governance of this domain. It would establish common principles and norms that would dictate the actions by states, domestically and internationally.<sup>82</sup> The global call for regulation is marked by a disdain for national regulation, which characterises the latter as a form of nationalism that will fragment globalizing attempts. It supposes that 'the demand for digital sovereignty, which seeks a balance between protection and collaboration, risks undermining multilateralism, leading to "digital nationalism."<sup>83</sup> There are many layers to unpack here because tech solutionism has penetrated into political and social domains,<sup>84</sup> spheres whose boundaries are exclusively set up by constitutionalism. If that is so, then the conversation cannot miss the constitutional nuance and deference

which might result in uniquely contextual solutions, especially in a world order that is at best *proto-constitutional*.<sup>85</sup> Based on the ideas of global constitutionalism, a global data law must attempt to equalise the various internally complex positions of nation states<sup>86</sup> with due regard to their respective contextual domestic technological needs. As has been aspired, 'the scattered legal texts and the case law together might form a body of international constitutional law with a particular normative status.'<sup>87</sup>

## 6. Conclusion

The aim of this article is to understand if a global law cannot only acknowledge the existence of, but also account for the interests and voices of the subaltern,<sup>88</sup> a task the constitution was meant to do and seemingly achieved. Yet, there are several possible perceptions of the relationship between constitutions and colonialism. Modern states are not completely decolonised by constitutionalism. As negotiated processes, even in countries saddled with vast wealth and rights' inequalities indicate, the post-colonial constitutional space for state action to bridge welfare gaps has been limited. Sciulli has summarised the dichotomy underlying 'the liberal-democratic constitutions of modernity: conceived as 'internal restraints' working merely on the political power of the state, they are blind to the power dynamics between intermediate social groups.'<sup>89</sup>

Yet, what is it about a constitution that makes it an important site to be scrutinised for rights and claims? It is in its endurance in the lived reality of the people. As Shani observed, 'the Constitution did not resolve the contending views and tensions around purely economic issues, but it was nonetheless able to produce a legal and political space to contain the conflictual nature of Indian society.'<sup>90</sup> The constitutional nuance is important, as any efforts at global governance need to take into account various kinds of inequalities in order to be effective. If not, they risk replicating the unequal position of people and states.<sup>91</sup>

There is still some gap to unearth the potential of constitutionalism in places where the data debates are raging fiercely and tech solutionism has been instituted, rather deeply. There is still a long way to go in the theorisation of this domain so that such principles can be discussed at the global level; this can happen once constitutional developments and data justice debates across countries are mapped, and common principles are distilled. Beyond the scope of this article, it will be interesting to note and map the global multistakeholder positions taken so far on issues of data governance, particularly to examine them in

77 Taylor, L. (2019). *Global data justice*. *Communications of the ACM*, 62(6), 22–24. DOI:10.1145/3325279.

78 Michel Rosenfeld, Hélène Ruiz Fabri, 'Preface: Rethinking constitutionalism in an era of globalization and privatization', (2008) 6(3-4) *International Journal of Constitutional Law* 371, <https://doi.org/10.1093/icon/mono26>.

79 Padamshree Gehl Sampath, 'Technology and inequality: can we decolonise the digital world?' (2020) 28(1) *Renewal: a Journal of Social Democracy* 53.

80 James Tully, 'Modern Constitutional Democracy and Imperialism' (2008) 46(3) *Osgoode Hall Law Journal* 461 <http://digitalcommons.osgoode.yorku.ca/ohlj/vol46/iss3/1>.

81 Maurizia De Bellis, 'Public law and private regulators in the global legal space', (2011) 9(2) *International Journal of Constitutional Law* 425 <https://doi.org/10.1093/icon/moro42>.

82 Steve Hughes and Rorden Wilkinson *Global Governance Critical Perspectives* (Routledge 2002).

83 Morse, J.C., Keohane, R.O. 'Contested multilateralism' (2014) *Rev Int Organ* 9, 385 <https://doi.org/10.1007/s11558-014-9188-2>.

84 Padamshree Gehl Sampath, 'Technology and inequality: can we decolonise the digital world?' (2020) 28(1) *Renewal: a Journal of Social Democracy* 53.

85 Anne Peters, 'Global Constitutionalism', *The Encyclopedia of Political Thought*, (1<sup>st</sup> ed., 2015) [https://www.mpil.de/files/pdfs/Peters\\_Global\\_Constitutionalism\\_\\_Encyclopedia\\_of\\_Political\\_Thought\\_20151.pdf](https://www.mpil.de/files/pdfs/Peters_Global_Constitutionalism__Encyclopedia_of_Political_Thought_20151.pdf).

86 Peters, Anne. "The Merits of Global Constitutionalism," *Indiana Journal of Global Legal Studies*: Vol. 16, No. 2, 2009. <https://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=1396&context=ijgls>.

87 Anne Peters, 'Global Constitutionalism', *The Encyclopedia of Political Thought*, (1<sup>st</sup> ed., 2015) [https://www.mpil.de/files/pdfs/Peters\\_Global\\_Constitutionalism\\_\\_Encyclopedia\\_of\\_Political\\_Thought\\_20151.pdf](https://www.mpil.de/files/pdfs/Peters_Global_Constitutionalism__Encyclopedia_of_Political_Thought_20151.pdf).

88 Bailey Betik 'Subaltern Studies' (*Post-Colonial Studies @ Emory* 2020) [https://scholarblogs.emory.edu/postcolonialstudies/2020/02/17/subaltern-studies/?utm\\_source=rss&utm\\_medium=rss&utm\\_campaign=subaltern-studies](https://scholarblogs.emory.edu/postcolonialstudies/2020/02/17/subaltern-studies/?utm_source=rss&utm_medium=rss&utm_campaign=subaltern-studies) accessed 27 January 2022.

89 Golia, Angelo Jr and Teubner, Gunther, 'Societal Constitutionalism: Background, Theory, Debates', [2021] *ICL Journal*, 15( 4), 357-411. <https://doi.org/10.1515/icl-2021-0023>.

90 Shani O, 'The People and the Making of India's Constitution' [2022] *The Historical Journal* 1.

91 United Nations, 'Global governance and global rules for development in the post-2015 era', (2014).



light of the domestic constitutional stances, to determine the points of distinctions, usefulness and potential gaps. Global governance is a complex system understood in many ways, through a focus on multiple attributes, one of which is its position as a *site in which struggles over wealth, power, and knowledge are taking place*.<sup>92</sup> It is in this sense that constitutionalism and its trajectory of continuous development can be useful in the formulation of a relevant stance towards as well as the content of a global data law.

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92 Craig N Murphy, 'Global Governance: Poorly Done and Poorly Understood' (2000) 76 (4) *International Affairs* (Royal Institute of International Affairs 1944-) 789 <http://www.jstor.org/stable/2626460>.

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