



Data
Governance
Network

November 2020

Working Paper 11

Exploring the Constitutional Tenability of Data Sharing Policies

Anushka Mittal

IT for Change

Data Governance Network

The Data Governance Network is developing a multi-disciplinary community of researchers tackling India's next policy frontiers: data-enabled policymaking and the digital economy. At DGN, we work to cultivate and communicate research stemming from diverse viewpoints on market regulation, information privacy and digital rights. Our hope is to generate balanced and networked perspectives on data governance — thereby helping governments make smart policy choices which advance the empowerment and protection of individuals in today's data-rich environment.

About Us

IT for Change aims for a society in which digital technologies contribute to human rights, social justice and equity. Our work in the areas of education, gender, governance, community informatics and internet/digital policies push the boundaries of existing vocabulary and practice, exploring new development and social change frameworks.

Disclaimer and Terms of Use

The views and opinions expressed in this paper are those of the author and do not necessarily represent those of the organization.



This work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License.

Design

Cactus Communications

Suggested Citation:

Mittal, A. (2020). Exploring the Constitutional Tenability of Data Sharing Policies. Data Governance Network Working Paper 11

Abstract

Data sharing mandates are being introduced in various jurisdictions to balance the skewed data power in the digital economy and address the 'data divide'. There is a possibility that these mandates may be challenged by those who view data as private property. In view of this tension, this paper seeks to understand data sharing policies from a constitutional lens. It specifically analyses the data sharing recommendation of India's Draft Non-Personal Data Committee Report, 2020, using the constitutional principles and objectives enshrined in Article 39 (b) read with Article 31C of the Constitution of India. The paper argues that any future data sharing law must amply justify the involved 'common good' to resist any challenge to it. The law should undertake a legitimate reallocation exercise so that data can be made available to all, reclaiming its public good nature. Further, the specific models of Business to Government data sharing being mulled over in various places have been identified. The paper also touches upon provisions of other constitutions, which have a focus on economic objectives, in terms of justifying data sharing laws in the future. The paper concludes by affirming constitutional tenability of such laws to be framed in the future, in India and elsewhere.

Table of Contents

| | |
|--|-----------|
| Introduction | 04 |
| Constitutionalism for allocation of Data | 06 |
| Tracing Article 39 (b) | 06 |
| Constitutional history of Article 39 (b) | 07 |
| Jurisprudential history of Article 39 (b) | 08 |
| Phase 1- Focus on directive principles for resource distribution | 09 |
| Phase 2- Shifts in the jurisprudence after 1972 | 09 |
| Phase 3- Focus on natural resources | 10 |
| Examining the application of Article 31C | 11 |
| Emerging distributive aspects of data governance | 15 |
| Scoping global constitutions | 21 |
| Conclusion | 25 |
| Bibliography | 26 |
| Acknowledgements | 28 |
| About the author | 28 |

Introduction

Less noticed has been the management of data, “the sludge of the information age – stuff that no one has yet thought very much about.”¹

-MIT Sloan Management Review, 1998

A little more than two decades after this observation, data and data governance is a hotly contested issue of the 21st century. Given its novel and central role in digital age social and economic systems, data is being characterised and recharacterised in various ways, some new and some a transformation of an existing concept and entity. Understood theoretically as a systemisation of abstraction of information, knowledge and occurrences, there are many formal definitions of data. For example, the Information Technology Act, 2000 defines it as:

...a representation of information, knowledge, facts, concepts or instructions which are being prepared or have been prepared in a formalised manner, and is intended to be processed, is being processed or has been processed in a computer system or computer network, and may be in any form (including computer printouts magnetic or optical storage media, punched cards, punched tapes) or stored internally in the memory of the computer.

The Personal Data Protection Bill, 2019 defines it as:

...including a representation of information, facts, concepts, opinions or instructions in a manner suitable for communication, interpretation or processing by humans or by automated means.

Data is an abstract concept to be distinguished from its physical embodiment. It can be regarded as “a reinterpretable representation of information in a formalized manner suitable for communication, interpretation, or processing.” In fact, data is the state of information during processing, storage and communication.² Data can also be understood as information encoded in a way that can be processed by machines comprising software and application data alike.³ It is clearly a **representation** of sorts and due to its various new roles in the society and economy, it is being characterised in various ways such as a part of personhood,⁴ a resource,⁵ property or asset⁶ or labour.⁷

This paper attempts to explore data's characterisation as a resource. Data is widely understood to be a key resource and raw material for the digital economy. Management and business schools have previously mulled over how to internally manage data as a 'resource' and discussed its valuation and

¹ Levitin, A.V. & Redman, T. C. (1998). Data as a Resource: Properties, Implications, and Prescriptions (Fall). MIT Sloan Management Review. <https://sloanreview.mit.edu/article/data-as-a-resource-properties-implications-and-prescriptions/>

² Wiebe, A. (2017). Protection of industrial data – a new property right for the digital economy?. *Journal of Intellectual Property Law & Practice*. 12(1). 62–71.

³ Zech, H. (2015). Information as Property. *Journal of Intellectual Property, Information Technology and E-Commerce Law*. 6(3). 192-198.

⁴ Lee, A. (2019). Towards Informatic Personhood: understanding contemporary subjects in a data-driven society. *Information, Communication & Society*. 1-16.

⁵ Coleman, D. (2019). Digital Colonialism: The 21st Century Scramble for Africa through the Extraction and Control of User Data and the Limitations of Data Protection Laws. *Michigan Journal of Race and Law*. 24(2). 417-439; Sadowski, J. (2019). When data is capital: Datafication, accumulation, and extraction. *Big Data & Society*. 6(1). 1-12.

⁶ Ritter, J. & Mayer, A. (2018). Regulating Data as Property: A New Construct for Moving Forward. *Duke Law and Technology Review*. 16(1). 220-227.

⁷ Jones, C.I. & Tonetti, C. (2020). Nonrivalry and the Economics of Data. *American Economic Review*. 110(9). 2819-2858.

importance for private companies.⁸ With the explosion of data and data based industries, categorisation and understanding of data is being fleshed out by political actors as well. There are many ways to look at data as a resource such as by employing a political economy lens⁹ captured in the proposition that “the world economy is transitioning from a phase of container shipping to one of packet switching, where the largest and most important cross-border flows are data not physical goods” or viewing data as a 'factor of production' and a 'new economic resource'.¹⁰ What these ideas bring to fore is the lack of a corresponding discourse around economic rights which results in an uncritical acceptance of 'free' data outflows, and data hoarding as the most remunerative business model for most large digital companies. To revisit the status quo, states are mulling over various strategies and developing policy documents to regulate and tap into this resource. Two examples of emerging policy prescriptions are data sharing and community ownership of data. These two concepts are being implemented in various states and at various levels. Jurisdictions such as European Union¹¹ and India¹² are considering various levels of access to private data for public use. Similarly, data ownership and governance structures are also being put in place to assert collective, community and non-private rights over such data. These developments aim to lay out economic rights, reallocate and redistribute data resource and to help perform public functions better. In other ways, Barcelona and Netherlands have provided public data ownership as a standard clause in their public procurement practices.¹³

Such regulatory arrangements may beget constitutional questions because of the shift in perception of data, from a private resource to a public or common one. Further, such access to data and ownership regime may be opposed on the touchstone of infringement of fundamental right to carry out trade and practice profession as the de facto holders of data may consider the aforementioned policy prescriptions to be an unreasonable intrusion into the business practices.¹⁴

The research aims to explore the constitutional position with respect to these changes and understand them using constitutional principles and doctrines. It must also be noted at the outset that the present research focuses on data in the broadest sense to include non-personal data, data which is perceived as a resource or data which is an essential raw material for the digital economy (hereinafter, data). It specifically excludes personal data or any data implicating questions of privacy, identity and identifiability. This is because it is being increasingly realised that different governance frameworks are needed for personal and non-personal data.¹⁵

⁸ Supra n 1; Goodhue, D., Quillard, J., & Rockart, J. (1988). Managing the Data Resource: A Contingency Perspective. *MIS Quarterly*. 12(3). 373-392.

⁹ Azmeh, S., Foster, C. & Echavarrri, J. (2020). The International Trade Regime and the Quest for Free Digital Trade. *International Studies Review*. 22(3). 671-692. <http://doi.org/10.1093/isr/viz033>

¹⁰ Weber, S. (2017). Data, development, and growth. *Business and Politics*, 19(3), 397-423. doi:10.1017/bap.2017.3

¹¹ European Commission. (2020). Communication from Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A European Strategy for Data. https://ec.europa.eu/info/sites/info/files/communication-european-strategy-data-19feb2020_en.pdf

¹² Personal Data Protection Bill 2019 (Section 91); Ministry of Electronics and Information Technology, India. (2020). Report by the Committee of Experts on Non Personal Data Governance Framework. https://static.mygov.in/rest/s3fs-public/mygov_159453381955063671.pdf

¹³ European Commission. (2020). Towards a European Strategy on business to government data sharing for the public interest, (Final Report prepared by the High Level Expert Group on Business to Government Data Sharing). <https://ec.europa.eu/digital-single-market/en/news/experts-say-privately-held-data-available-european-union-should-be-used-better-and-more>

¹⁴ NS Nappinai. (2020). Unsustainability of Non Personal Data in the Personal Data Protection Bill, 2019. Cyber Saathi. <https://www.cybersaathi.org/cyber-saathi-papers-submission-2/>

¹⁵ Supra n 6.

Most countries have accorded privacy protections to personal data, yet 'industrial' or non-personal data is sought to be regulated via ownership, access, sharing and transfer rules.¹⁶ Thus, this paper discusses the constitutional and regulatory treatment, specifically of non-personal data. Part I will review the constitutional position in India for various kinds of resources with a particular focus on Article 39 (b) and Article 31C of the Constitution of India [hereinafter, Constitution]. Part II will focus on the classification of data as a resource in various jurisdictions that can then be regulated within the constitutional structure as provided in Part I. Further, it will touch upon various regulatory structures for other kinds of public good resources globally. Part III will touch upon comparative constitutionalism regarding economic rights to resources or its redistribution to understand the convergence across various nations for any resource based classification of data, in the future. The paper concludes with affirming the possibility of treating data as a material resource under the Constitution such that it can be distributed by developing sharing mechanisms and providing community rights over it, as are being thought of currently.

Constitutionalism for allocation of Data

While personal data has been constitutionally treated¹⁷ and its allocation tested against the fundamental right to privacy,¹⁸ there have neither been legislative nor constitutional discussions regarding non-personal data. While its regulation and legislation is a separate matter, one way to look at it constitutionally has been presented in this section, based on the policy discussions so far. Specifically, the scheme of Article 39 (b) read with Article 31C has been analysed, in that order. The aim is to characterise the current policies governing data as a way to distribute material resources. If that can be established then such policies can repel and resist the challenge to the fundamental right to practice trade, business and profession using the shield provided under Article 31C. The approach will focus on the 'enforcement' and 'complementary' stages of development of the relationship between Part IV (Directive Principles of State Policy) and Part III (Fundamental Rights) of the Constitution.¹⁹

Tracing Article 39 (b)

The Srikrishna Committee Report on Personal Data Protection reiterated that the Indian state is commanded by the imperatives of Part IV of the Constitution to serve the common good. Specifically, it put forth the directive principles enshrined in Articles 39 (b) and (c) to be recognised.²⁰

Article 39 (b), (c) of the Constitution provides;

The State shall, in particular, direct its policy towards securing—

(b) that the ownership and control of the material resources of the community are so distributed as best to subserve the common good;

(c) that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment;

¹⁶ *Id*

¹⁷ *Justice KS Puttaswamy v. Union of India* (2017) 10 SCC 641.

¹⁸ *Justice KS Puttaswamy v. Union of India and Another* (2019) 1 SCC 1.

¹⁹ Ambrose, A.D. (2013). Directive Principles of State Policy and Distribution of Material Resources with Special Reference to Natural Resources - Recent Trends. *Journal of the Indian Law Institute*. 55(1). 1-20.

http://14.139.60.114:8080/jspui/bitstream/123456789/12211/1/002_Directive%20Principles.pdf

²⁰ Committee of Experts under the Chairmanship of Justice B.N. Srikrishna. 2019. Page 11. Fn 10.

This reference in the Srikrishna Committee Report to the constitutionally enshrined policy objectives to regulate the data economy indicates that it would neither be incongruent to view data as a resource nor to discuss it in terms of the aims, aspirations and reallocative potential of Article 39 (b) of the Constitution. The research aims to characterise and understand the role of the State in data governance as juxtaposed against its role to be fulfilled pursuant to Article 39 (b). To understand its scope, it is important to chart the history of Article 39 (b) to understand what informs its content and mandate.

Constitutional history of Article 39 (b)

During the drafting of the Constitution, there were widespread discussions related to the provision of a charter for an economic democracy in the Constitution, in accordance with the Objectives Resolution which sought to assure political, social and economic justice to the people of India.²¹ It was also clarified, time and again, by the drafters that the content of economic democracy can only be laid down by the Parliament.²² At the same time, the Constituent Assembly was aware of the class divisions that had debilitated the country and stringent measures that were needed to deal with the same, including constitutional ones.

Throughout the framing of the Constitution, even up until its final revision, some members wished to enshrine the basis of economic justice as fundamental rights. To that end, Dr B.R. Ambedkar laid down the object in framing the Constitution as two-fold:²³ “(i) to lay down the form of political democracy, and (ii) to lay down that our ideal is economic democracy and also to prescribe that every Government whatever, it is in power, shall strive to bring about economic democracy.” When challenged if the Constitution furthered the aspirations of a true democracy in India, Dr B.R. Ambedkar emphatically made reference to Article 39 as an example of socialist principles governing the State in its aims to make policies and laws.²⁴

During the drafting of the Constitution, there were various amendments which were suggested regarding its scope and mandate, in the hope of realising the ideal of economic justice, the most emphatic of which was forwarded by Mr KT Shah. He proposed a change to spell out the content of the article by laying down the type of resources to be protected and the method of care. He expressed that the article should provide for community ownership of natural resources such as mines, mineral wealth, forests, rivers and flowing water, seas, which is to be enforced through the State or state corporations.²⁵

²¹ *Constituent Assembly Debates*. (Vol 1, Dec 13, 1946).

https://www.constitutionofindia.net/constitution_assembly_debates/volume/1/1946-12-13#1.5.17

²² *Constituent Assembly Debates* (Vol 7, Nov. 19 1948)

https://www.constitutionofindia.net/constitution_assembly_debates/volume/7/1948-11-19#7.56.167; *Constituent Assembly Debates* (Vol. 7, Nov. 22 1948)

https://www.constitutionofindia.net/constitution_assembly_debates/volume/7/1948-11-22#7.57.114; *Constituent Assembly Debates* (Vol. 5, Aug. 30 1947)

https://www.constitutionofindia.net/constitution_assembly_debates/volume/5/1947-08-30

²³ *Constituent Assembly Debates* (Vol. 7, Nov. 19 1948)

https://www.constitutionofindia.net/constitution_assembly_debates/volume/7/1948-11-19#7.56.168

²⁴ *Constituent Assembly Debates*. (Volume 7, 15 Nov. 1948).

https://www.constitutionofindia.net/constitution_assembly_debates/volume/7/1948-11-15

²⁵ *Constituent Assembly Debates* (Vol. 7, Nov 22 1948)

https://www.constitutionofindia.net/constitution_assembly_debates/volume/7/1948-11-22#7.57.46

To the more narrower term of 'natural resources', a change for which the amendment was sought to be made, Dr B.R. Ambedkar indicated his reservation as the original draft encompassed broader language which included the intent of the suggested amendment.²⁶ Finally, the proposal was not accepted and Article 39 (b) was retained as seen in its current form.

It must be noted that Article 39 (b) forms a part of Part IV of the Constitution, titled the Directive Principles of State Policy. The beacon of interpretation is provided by Article 37²⁷ which clarifies that the foregoing provisions are not justiciable or enforceable by any court. Even when so enshrined, these provisions are known to constitute effective economic rights.²⁸

Jurisprudential history of Article 39 (b)

Article 39 (b) has been deliberated enough to yield a rich jurisprudence as it is seen as the harbinger of distributive justice²⁹ and has been evoked many times to fulfil its role. Its development can be looked at in phases; one before the Constitutional (Twenty Fifth Amendment) Act, 1972 [hereinafter, 25th constitutional amendment] and the one after. The 25th constitutional amendment added Article 31C to the Constitution to shield laws from the challenges of fundamental rights enshrined in Article 14 and Article 19, if the law was framed to further the aims of Article 39 (b) and Article 39 (c).

This part traces how the key elements of Article 39 (b) have been interpreted, the journey and the route of interpretation, divided into various segments. The main elements of Article 39 (b) under consideration that need to be understood are:

- ownership and control
- material resources
- community
- distributed and
- subserve the common good.

This division is in consonance with how the Supreme Court viewed Article 39 (b) when it noted that “Each word in the article has a strategic role and the whole article is a social mission. It embraces the entire material resources of the community. Its task is to distribute such resources. Its goal is so to undertake distribution as best to **subserve** the common good. It reorganizes by such distribution the ownership and control.”³⁰

²⁶ Constituent Assembly Debates (Vol. 7, Nov 22 1948)

https://www.constitutionofindia.net/constitution_assembly_debates/volume/7/1948-11-22#7.57.128

²⁷ *The provisions contained in this Part shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws.*

²⁸ Daintith, T. (2004). The constitutional protection of economic rights. *International Journal of Constitutional*

Law. 2(1). 56-90. <https://doi.org/10.1093/icon/2.1.56>; Constituent Assembly Debates (Vol 11, 21 Nov. 1949)

https://www.constitutionofindia.net/constitution_assembly_debates/volume/11/1949-11-21#11.161.29;

Constituent Assembly Debates (Vol 11, 24 Nov. 1949)

https://www.constitutionofindia.net/constitution_assembly_debates/volume/11/1949-11-24#11.164.52

²⁹ Khaitan, T. (2018). Directive principles and the expressive accommodation of ideological dissenters.

International Journal of Constitutional Law. 16(2). 389-420. <https://doi.org/10.1093/icon/moy025>

³⁰ *State of Karnataka v. Ranganatha Reddy*, AIR 1978 SC 215.

Since the Constitution underwent many changes which impacted Article 39 (b), its position and efficacy, the study is divided into pre and post 1972 phases, along with the modern phase tracing the evolution in the last two decades (post 2000).

Phase 1- Focus on directive principles for resource distribution

During the early years of the nation, till 1972, the institution of various important redistributive policies such as progressive taxation met constitutional challenges. One such challenge was raised to the system of progressive taxation instituted in the Income Tax Act by the Finance Act, 1951. It was contended that such system was discriminatory and violated Article 14 of the Constitution. The High Court of Calcutta negated the contention and held such policy to be in consonance with the objective sought to be achieved by Article 39.³¹

At another instance, the acquisition of bus service business was validated by the Madras High Court as being done under Article 39 (b) and (c) with a broad view taken regarding the scope of Article 39 (b), negating the contention that only resources like land are subject to the constitutional treatment.³²

Phase 2- Shifts in the jurisprudence after 1972

On the back of various nationalisation and acquisition laws, the Supreme Court held that “material resources of the community in the context of reordering the national economy embraces all the national wealth, not merely natural resources, all the private and public sources of meeting material needs, not merely public possessions. Everything of value or use in the material world is material resource and the individual being a member of the community his resources are part of those of the community. To exclude ownership of private resources from the coils of Article 39 (b) is to cipherise its very purpose of redistribution the socialist way.” Subsequently, the Court held that buses, motor vehicles and contract carriages are 'material resources' and their acquisition by the state of Karnataka as part of its policy to regulate road transport is valid to further the aims and objectives of Article 39 (b).

In another instance, a question arose whether 'material resources' must be held to be only those resources which belong to the people or the State since inception or could other resources be characterised as such as well.³⁴ The Court held that “there is no warrant for interpreting the expression in so narrow a fashion as suggested and confine it to public-owned material resources, and exclude private-owned material resources. The expression involves no dichotomy. When Article 39 (b) refers to material resources of the community it does not refer only to resources owned by the community as a whole but it refers also to resources owned by individual members of the community. Resources of the community do not mean public resources only but include private resources as well.”³⁵

³¹ *Seth Sukhlall Chandanmull v. A.C. Jain, Income Tax Officer and anr.*, (1959) 37 ITR 101.

³² *V. Parthasarathi v. State Of Tamil Nadu And Ors.*, AIR 1974 Mad 76.

³³ *Supra* n 30.

³⁴ *Sanjeev Coke Manufacturing Company v. Bharat Coking Coal Limited*, 1983 SCR (1)1000, page 19.

³⁵ *Id*

Simply put 'material resources of the community' is not confined to natural resources; it is not confined to resources owned by the public; it means and includes all resources, natural and non natural, public and private-owned. The expression 'material resources of the community' means all things which are **capable of producing wealth for the community.**³⁶

Similarly, it did not confine distribution to any one way or method. It held that “‘distribute’ [is not] to be used in Article 39 (b) in the limited sense, that is, in the sense only of retail distribution to individuals. It is used in a wider sense so as to take in all manner and method of distribution such as distribution between regions, distribution between industries, **distribution between classes and distribution between public, private and joint sectors.** The distribution envisaged by Art. 39(b) necessarily takes within its stride the transformation of wealth from private-ownership into public ownership and is not confined to that which is already public-owned.”³⁷

Following the conclusion, the Court validated the acquisition of coke oven plants and coal mines. Further, electric energy generated by electricity companies was also held to amount to material resources under Article 39 (b).³⁸

Phase 3- Focus on natural resources

After the trends highlighted above, the course of jurisprudence took a meandering turn with a strong focus on various questions related only to natural resources. These natural resources are considered to be national/ public property assets.³⁹ The allocation of scarce, renewable and non-renewable resources is governed by the public trust doctrine,⁴⁰ with the ownership and control vested in the State. For a scarce, non-renewable resource like coal⁴¹ as well as for a scarce, renewable resource like spectrum,⁴² the Supreme Court enunciated principles for distribution 'to subserve the common good'. The conclusion was that the State acts as a trustee on behalf of people for such resources and for any kind of distribution, it must be guided by principles of equality and larger public good.⁴³ Based on this principle, the Court validated practices of auction to unlock the value for the common good and invalidated arbitrary practices based on opacity, preferential treatment and partiality.

It held that “As natural resources are public goods, the doctrine of equality, which emerges from the concepts of justice and fairness, must guide the State in determining the actual mechanism for distribution of natural resources. In this regard, the doctrine of equality has two aspects: first, it regulates the rights and obligations of the State vis-a-vis its people and demands that the people

³⁶ *Id*

³⁷ *Id*

³⁸ *Tinsukhia Electric Supply Co. Ltd v. State Of Assam And Ors.*, 1989 SCR (2) 544.

³⁹ *Re: Special Reference No.1 of 2012*, (2012) 10 SCC 1.

⁴⁰ Recognised by India by the Supreme Court in *M.C. Mehta v. Kamal Nath* (1997) 1 SCC 388; *Jamshed Hormusji Wadia v. Board of Trustee, Port of Mumbai* (2002) 3 SCC 214; *Intellectuals Forum, Tirupathi v. State of A.P.* (2006) 3 SCC 549; *Fomento Resorts and Hotels Limited v. Minguel Martins* (2009) 3 SCC 571.

⁴¹ *Manohar Lal Sharma v. Principal Secretary and Ors.*, (2014) 9 SCC 516.

⁴² To understand how spectrum is considered to be scarce and renewable at the same time, please see: Herter, C.A. (1985). The Electromagnetic Spectrum: A Critical Natural Resource. *Natural Resources Journal*. 25(3). 651-663. <https://digitalrepository.unm.edu/cgi/viewcontent.cgi?article=2312&context=nrj>

⁴³ *Centre for Public Interest Litigation and Ors. v. Union of India and Ors*, AIR 2012 SC 1002. Para 72.

be granted equitable access to natural resources and/or its products and that they are adequately compensated for the transfer of the resource to the private domain; and second, it regulates the rights and obligations of the State vis-a-vis private parties seeking to acquire/use the resource and demands that the procedure adopted for distribution is just, non-arbitrary and transparent and that it does not discriminate between similarly placed private parties.”⁴⁴

Accordingly, it was held that these resources may be distributed by auctions, as one of the means to ensure fair and transparent distribution to unlock the value for common good.⁴⁵

The Supreme Court read the goals of Article 39 (b) to inform the allocation of the natural resources such that it is not rendered arbitrary, as a violation of Article 14. It held that Article 39 (b) is a restriction on distribution built into the Constitution, meeting the object of 'subserving the common good'. It further held that, “the overarching and underlying principle governing distribution is furtherance of common good. But for the achievement of that objective, the Constitution uses the generic word distribution. Distribution has broad contours and cannot be limited to meaning only one method i.e. auction. It envisages all such methods available for distribution/allocation of natural resources which ultimately subserve the common good.”⁴⁶

Further, natural gas and petroleum products are statutorily governed and held to be scarce and non-renewable natural resources, to be exploited keeping in mind the public trust doctrine and the constitutional restrictions that apply to the governmental and private players alike, who exploit the resources.⁴⁷ The public trust doctrine hinges on the idea that certain common properties such as rivers, seashore, forests and the air are held by the Government in trusteeship for the free and unimpeded use of the general public. Under the Roman law, where this doctrine was developed, the resources were owned by no one or by everyone in common. Under the English common law, however, the Sovereign could own these resources but the ownership was limited in nature, the Crown could not grant these properties to private owners if the effect was to interfere with the public interests in navigation or fishing. Resources that were suitable for these uses were deemed to be held by the Crown for the benefit of the public.⁴⁸ These resources are also held to be sovereign resources and assets globally which informs their constitutional position as well.⁴⁹

In conclusion, there is a significant shift in the kinds of resources which are lately subjected to Article 39 (b). However, at all times, it is important to note that the Supreme Court has taken a stance for a broader interpretation, and this position is also supported by the drafting history of Article 39 (b), highlighted above. This is a crucial point to note to subject community data to the test of Article 39 (b).

⁴⁴ *Id*

⁴⁵ *Supra* n 39.

⁴⁶ *Id*

⁴⁷ *Reliance Natural Resources Ltd. v. Reliance Industries Ltd.* (2010) 7 SCC 1.

⁴⁸ Sheikh, D. (2012). The Spectre of Spectrum: Public Interest Questions around Spectrum Management in India. *Indian Journal of Law and Technology*. 8. 11-24. <http://ijlt.in/wp-content/uploads/2015/08/Danish-Sheikh-final.pdf>

⁴⁹ Hossain, Z. & Kumar, A.P. (2010). The New Jurisprudence of Scarce Natural Resources: An analysis of the Supreme Court's judgment in *Reliance Industries Limited v. Reliance Natural Resources Limited* (2010) 7 SCC 1. *Indian Journal of Constitutional Law*. 6. 105-114. <http://www.commonlii.org/in/journals/INJConLaw/2010/6.pdf>

Examining the application of Article 31C

The property regime carved out in the Constitution, especially the fundamental right to property in Article 31 which was later omitted, has a rich history of its own.⁵⁰ It may not be necessary to trace it here at length, given the specific context of the focus of this paper on the resource of data and the aim to analyse the limited policy prescriptions for data governance against constitutional imperatives. The research aims to understand how any future data regulation can be constitutionally positioned depending upon Article 39 (b), (c) as well as Article 31C which focuses on saving laws giving effect to certain directive principles.

The applicable Article 31C provides;

Notwithstanding anything contained in article 13, no law giving effect to the policy of the State towards securing the principles specified in clause (b) or clause (c) of article 39 shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by article 14 or article 19;

Provided that where such law is made by the Legislature of a State, the provisions of this article shall not apply thereto unless such law, having been reserved for the consideration of the President, has received his assent.

The Constitution (Twenty Fifth) Amendment Bill, 1971 was taken up for consideration by the Law Commission of India, suo motu, in its 46th Report.⁵¹ Article 31C was heralded as historic and the 'first major and significant step towards implementing two of the Directive Principles'.⁵² The Law Commission also recognised that Article 31C effectively meant that enforcement of Article 39 (b) and (c) would amount to regulation of fundamental right under Article 19 (1) (g), within the limits of Article 19 (6).⁵³

Article 31C was then added to the Constitution by the Constitution (Twenty Fifth Amendment) Act in 1972. Subsequently its constitutional validity was challenged and upheld in the case of *Keshvananda Bharti v. State of Kerala*⁵⁴ in 1973. It was sought to be modified by the Constitution (Forty-fourth Amendment) Act, 1978 to enlarge its scope of application and the grounds on which certain laws could be shielded. The shield was sought to be granted to all laws passed to further the aims of any Directive Principle of State Policy enshrined in Part IV. This amendment to Article 31C was struck down by the Supreme Court in the case of *Minerva Mills v. Union of India*⁵⁵ and the provision relegated to its original version.

In the case of *State of Karnataka and anr. v. Shri Ranganatha Reddy and anr.*,⁵⁶ Justice Krishna Iyer explained the contours of 'distribution' which would qualify a legislation for immunity under Article 31C. It was sought to be answered, whether "'distribution' amounted to a scheme to divide and deal out

⁵⁰ For a concise and insightful background, Wahi, N. (2015). *The Fundamental Right to Property in the Indian Constitution*. <https://ssrn.com/abstract=2661212>

⁵¹ Law Commission of India. (1971). *Forty Sixth Report on the Constitution (Twenty Fifth Amendment) Bill, 1971* <http://lawcommissionofindia.nic.in/1-50/Report46.pdf>

⁵² *Id.* Page 5. Para 14.

⁵³ *Id.* Pages 9, 10. Para 24, 27.

⁵⁴ *Keshvananda Bharti v. State of Kerala* (1973) 4 SCC 225.

⁵⁵ *Minerva Mills Ltd. v. Union of India* 1980 2 SCC 591.

⁵⁶ *Supra* n 30.

to a plurality of persons, to disperse, diffuse or scatter ownership and control of material resources of the community compulsorily taken by the State? Or does it embrace 'distribution with a wider connotation of 'removal' from the private sector and allocation in the public sector, dividing and arranging, separating and allocating, acquiring from individuals and making over to collective institutions or State organs, acting for and in the interest of the, community, according, to the State Plan or policy decision on the scheme of distribution and allocation of resources among the different sectors of economic activity so as best to subserve the public good?"

It was held that a broad, expansive and spacious understanding must be provided to the concept. Thus, 'distribution' could involve "classification and allocation of certain industries or services or utilities or articles between the private and the public sectors of the national economy to distribute those resources. It is a matter of public policy left to legislative wisdom whether a particular scheme of take-over should be undertaken."

A key requirement for any piece of regulation to seek immunity under Article 31C requires "a real and substantial connection between the law and the Directive Principles [Article 39 (b), (c)]. To determine whether a law satisfies this test, the court would have to examine the pith and substance, the true nature and character of the law as also its design and the subject matter dealt with by it together with its object and scope. The dominant object of the law must be to give effect to the Directive Principle, to be accorded protection under the amended Article 31C."⁵⁷ This connection requires a reasonable nexus between the aims and objects of the legislation and Article 39 (b), (c).⁵⁸

On similar lines, the court in the case of *State of Tamil Nadu v. L. Abu Kavur Bai and ors.*⁵⁹ validated the Tamil Nadu Stage Carriages and Contract Carriages (Acquisition) Act, 1973 which sought to nationalise certain carriages and the service of providing transportation. It also held that "it is manifest that Article 31C gives a complete protective umbrella to any law passed with the object of achieving the aims and goals of Art. 39 (b) & (c) so as to make it immune from challenge on the ground that the said law violates Arts. 14, 19 [or 31]."⁶⁰ It also focussed on the various ways in which 'distribution' could occur, as envisaged under Article 39(b) whereby "the words 'apportionment', 'allotment', 'allocation', 'classification', clearly fall within the broad sweep of the word 'distribution'. So construed, the word 'distribution' as used in Article 39(b) will include various facets, aspects, methods and terminology of a broad-based concept of distribution."

Any data governance framework involving distributional issues may be opposed on multiple grounds,⁶¹ the broadest of which could be the fundamental right to carry out trade and practice any profession as per Article 19 (1) (g). However, this right is not absolute and is subject to the reasonable restrictions under Article 19 (6). Even though, Article 31C permits any law passed to give effect to principles laid down in Articles 39 (b), (c) not to be deemed void on the ground that it is inconsistent with, or takes away

⁵⁷ *Minerva Mills Ltd. v. Union of India* 1980 2 SCC 591 as affirmed in the case of *Sanjeev Coke Manufacturing Company v. Bharat Coking Coal Limited*, 1983 SCR (1)1000.

⁵⁸ *Supra* n 38.

⁵⁹ *State of Tamil Nadu v. L. Abu Kavur Bai*, AIR 1984 SC 326.

⁶⁰ Removed by the *Constitution (Forty Fourth Amendment) Act, 1978*.

⁶¹ Agrawal, A. (2020, January 20). Considering intellectual property rights over non-personal data. *Medianama*. <https://www.medianama.com/2020/01/223-intellectual-property-rights-non-personal-data/>; Agrawal, A. (2020, March 12). Define a compliance period, scrap non-personal data: NASSCOM, DSCI on Personal Data Protection Bill. *Medianama*. <https://www.medianama.com/2020/03/223-nasscom-dsci-submission-personal-data-protection-bill-2019/>

or abridges any of the rights conferred by Article 14 or Article 19, there have been instances where a violation of the fundamental freedom to carry out trade was contended to be in excess of Article 19 (6) which was also analysed by the court.

Article 19 (6) provides that;

Nothing in sub-clause (g) [fundamental right to carry out trade and practice any profession] of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the general public, reasonable restrictions on the exercise of the right conferred by the said sub-clause, and, in particular, nothing in the said sub-clause shall affect the operation of any existing law in so far as it relates to, or prevent the State from making any law relating to,—(I) the professional or technical qualifications necessary for practising any profession or carrying on any occupation, trade or business, or (ii) the carrying on by the State, or by a corporation owned or controlled by the State, of any trade, business, industry or service, whether to the exclusion, complete or partial, of citizens or otherwise.

It will be seen whether and how the content of reasonable restrictions under Article 19 (6) is understood against the context of Article 39 (b) along with Article 31C.

The right to establish educational institutions is considered to be a fundamental right under Article 19 (1)(g). When a law was passed to regulate the capitation fee charged by private educational institutions, it was challenged as to whether it amounts to a reasonable restriction under Article 19 (6). At that stage, Article 39 (b) was invoked as well to inform the object of the law and contextualise the aims and intent of the restriction on capitation fee as well as Article 31C was invoked to shield the legislation from the challenge under Article 19. In a dichotomous judgement, the High Court of Karnataka held that though the statute does not fall within the purview of Article 39 (b), it could still consider its provision to be regulating 'material resources of the community' and private educational institutions as 'material resources'⁶² for analytical purposes. However, it did not consider regulation of capitation fees of private educational institutions as a matter of 'distribution' as the regulation did not amount to vesting of State ownership or transfer of private ownership to public ownership.⁶³

On the other hand, in the case of *Minerva Mills v. Union of India*,⁶⁴ the constitutional validity of the Sick Textile Undertakings (Nationalisation) Act, 1974 was examined. The petitioners contended that certain provisions violated the fundamental right to carry out trade and practice profession and the legislation was not a reasonable restriction within Article 19 (6). The Supreme Court negated the contention and held that textile industries constitute material resources of the community. The reorganization and restructuring of any ailing industry subserves the interests of the general public and these aims give effect to Article 39 (b) which also places the legislation successfully within the purview of Article 31C.

In conclusion, the jurisprudence of Article 39 (b), coupled with its nexus with Article 31C, indicates a clear potential of its application to the distributional questions arising in data governance, as outlined in Part II. It has also been elucidated above how the constitutional term, 'material resources', has been interpreted across several historical phases, to indicate its flexible and broad scope. If the distributive elements of the current explorations in data governance, as described below in some detail, can be shown to conform to these constitutional provisions and ideals, it would provide them a sound constitutional grounding.

⁶² *Bapuji Educational Association v. State*, AIR 1986 Kar 119, Para 14.

⁶³ *Id*

⁶⁴ *Minerva Mills Ltd. And Ors. v. Union of India and Ors.*, (1986) 4 SCC 222.

Emerging distributive aspects of data governance

Would a better specification of legal ownership rights or introducing access provisions to improve efficiency reduce data market failures?⁶⁵

This Part will explore the policy prescriptions for allocation and distribution of data which are being envisaged. It will look at the global tide of regulations, policies, discussions and debates for such data. In India as well as the European Union, some form of data ownership structures and data sharing regulations are being deliberated upon. These two policy instruments are considered the key elements of enabling and regulating the digital economy. It is recognised that from an economic policy perspective, the maximisation of social welfare from data requires maintaining a balance between data rights' protection and access rights.⁶⁶

In India, a Committee has been established by the Ministry of Electronics and Information Technology to consider various aspects of non-personal data.⁶⁷ Accordingly, it has categorised data into various types based on the origins, subject, source or use of data. This has resulted in various classifications of data such as data which is naturally non-personal and another which is rendered non-personal by processing. This fits in the definition of non-personal data as provided in the Personal Data Protection Bill, 2019 as 'data other than personal data'.⁶⁸ For example, weather data occurs naturally as non-personal data while an anonymised dataset of telecom usage in an area is a type of processed non-personal data.

Based on the criteria above, the Report by the Committee of Experts on Non-Personal Data Governance Framework [hereinafter, NPD Report] further classified data as public, community and private. It suggested that public non-personal data should be designated as a national resource as this data arises due to public work and is generated by the government.⁶⁹ Further a specific classification of non-personal data is devised, 'community data' which refers to anonymised data and "data about inanimate and animate things or phenomena – whether natural, social or artefactual, whose source or subject pertains to a community of natural persons."⁷⁰ This characterisation is not hard to understand if viewed from the lens of how natural resources are normatively understood to belong to the people,⁷¹ or the community in general, which is a subset or type of 'material resources', as constitutionally treated. Since the source or subject of such data vests in the multitude of a group, one way to view it is as an extension or derivative of such natural resources. For example, soil, forests, air quality data is the data or digital

⁶⁵ Brown, N.D., Martens, B. & Langer, M. (2017). The economics of ownership, access and trade in digital data. *Digital Economy Working Paper 2017-01*. JRC Technical Reports. European Commission.

⁶⁶ *Id*

⁶⁷ Constitution of a Committee of Experts to deliberate on Data Governance Framework. (2019). https://meity.gov.in/writereaddata/files/constitution_of_committee_of_experts_to_deliberate_on_data_governance_framework.pdf

⁶⁸ Explanation to Personal Data Protection Bill 2019 (Section 91(2)). It must be noted that this definition only extends to the sub-section and not the entire text of the draft law.

⁶⁹ Ministry of Electronics and Information Technology, India. (2020). *Report by the Committee of Experts on Non Personal Data Governance Framework*. https://static.mygov.in/rest/s3fs-ublic/mygov_159453381955063671.pdf, Pages 14, 24, 48.

⁷⁰ *Id*. Page 15.

⁷¹ Brower, T. (2016). Constitutions as Counter-Curses: Revenue Allocation and the Resource Curse. *Journal of Law and Policy*. 24(2). 291-343.

manifestation of soil, forests and air which are natural resources, governed by the public trust doctrine. Such data is held to be naturally occurring community data. Further, the idea of community data⁷² had also arisen in the Srikrishna Committee Report⁷³ as “a body of data that has been sourced from multiple individuals, over which a juristic entity may exercise rights. It also considered such data akin to a common natural resource, where ownership is difficult to ascertain due to its diffused nature across several individual entities.” The Srikrishna Committee Report proposed the need for a suitable law to protect privacy of such collective personal data.

Further, the NPD Report lays down a complete framework to enable data sharing starting from the identification of Data Businesses to the regime to access data which has been “opened up”.⁷⁴ Data Businesses are required to submit the metadata about all data they collect for open access. After looking up such directories, data requests can be made which, if found legitimate, would entail controlled access to data to the interested entities. The data sharing may occur peer to peer or may be facilitated by the regulator. Data sharing may be undertaken for sovereign purposes, core public interest purposes or for economic purposes, including competition and promotion of digital start-ups industry. Finally, the NPD Report concludes with the need for a future framework legislation to lay down principles for recognising legitimate trustees for community data and the data sharing principles.⁷⁵ Currently, any plausible data sharing regime for governmental purposes is enshrined only in Section 91, Personal Data Protection Bill, 2019.

In Europe, a High Level Expert Group was constituted to formulate a ‘European Strategy on Business to Government Data Sharing for Public Interest’⁷⁶ which recently released its Final Report and recommendations.⁷⁷ The Final Report was supported by the Joint Research Centre's, Technical Report on the Economics of Business to Government data sharing.⁷⁸ It highlighted how data availability is currently characterised by a market failure due to high prices charged by the private entities to share data as well as the apparent reluctance to share it due to a lack of incentives. The Final Report considered its findings and also considered data as a 'non-rivalrous, non-excludable',⁷⁹ 'infrastructure resource'⁸⁰ and a 'critical public infrastructure for the future'.⁸¹ It also noted that Business to Government data sharing, [hereinafter, data sharing] however, remains limited, isolated and in the form of short term collaborations.⁸² After laying down the myriad use cases for the government to unlock public value of

⁷² Data that arises socially or relationally may be considered a social resource; Singh, P.J. & Vipra, J. (2019). Economic Rights Over Data: A Framework for Community Data Ownership. *Development*. 62(1). 53-57.

⁷³ Committee of Experts under the Chairmanship of Justice B.N. Srikrishna. 2019. Page 45.

⁷⁴ While this emphasis would imply that the data was erstwhile closed up, it is used as a tool to intrigue and rethink this assumption.

⁷⁵ Supra n 69. Page 20, 43.

⁷⁶ Meetings of the Expert Group on Business-to-Government Data Sharing. <https://ec.europa.eu/digital-single-market/en/news/meetings-expert-group-business-government-data-sharing>

⁷⁷ European Commission. (2020). *Towards a European Strategy on business to government data sharing for the public interest*, (Final Report prepared by the High Level Expert Group on Business to Government Data Sharing). <https://ec.europa.eu/digital-single-market/en/news/experts-say-privately-held-data-available-european-union-should-be-used-better-and-more>

⁷⁸ Brown, N.D. & Martens, B. (2020). The economics of Business to Government Data Sharing. *Digital Economy Working Paper 2020-04*. JRC Technical Reports. European Commission. <https://ec.europa.eu/jrc/sites/jrcsh/files/jrc119947.pdf>

⁷⁹ Supra n 77. Page 17.

⁸⁰ *Id.* Page 18.

⁸¹ *Id.* Page 75.

⁸² *Id.* Pages 7, 9.

data, ring-fenced by private collectors, it suggested creation of an EU wide data governance structure for data sharing, complete with data stewards and impact assessments to calculate the utility to be derived from datasets required by the governments.⁸³

The Final Report recommended only data sharing, without putting obligations on private entities to collect new data for public use. Similarly, it clarified that data sharing will not involve seizure of datasets and the private entities can continue to monetise the data simultaneously. However, such data could be of all types; raw, processed or inferred. It also suggested a tiered approach to data sharing, ranging from voluntary, compensated to mandated data sharing and has suggested data sharing principles which must form the backbone of any data sharing arrangement. These principles include proportionality, data use limitation, compensation and transparency to address concerns of incentive alignment to share data.

Further, the European Commission envisages a legal framework in the form of the Data Act by 2021 to foster data sharing. To that extent, even the EU wide common interoperable data spaces will also be developed to overcome all types of legal and technical barriers to data sharing.

While the aforementioned policies are full-fledged efforts, there have been some basic beginnings elsewhere as well. The OECD has documented data sharing strategies across 37 countries which noted that significantly fewer countries target private sector data. Most notably, France has introduced the concept of 'data of general interest' which is sought by the State from private entities in the Digital Republic Act, 2016. Similarly, Finland collects and releases datasets of forest data, collected from forests owned by private individuals, as open data. It gathers data either by purchasing it from the private sector (e.g. airborne-laser-scanned data) or by receiving it as statutory responsibilities, i.e. data-sharing activities enforced by legislation.

With respect to community ownership of data, due to the original conception and nature of data, there is widespread discussion to create a data commons as it currently suffers from the tragedy of

⁸³ *Id.* Page 28, 42.

⁸⁴ *Id.* Page 43.

⁸⁵ *Id.* Page 44.

⁸⁶ *Communication from Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions*, European Commission, 'A European Strategy for Data', https://ec.europa.eu/info/sites/info/files/communication-european-strategy-data-19feb2020_en.pdf

⁸⁷ OECD. (2019). *Enhancing Access to and Sharing of Data: Reconciling Risks and Benefits for Data Re-use across Societies*. OECD Publishing, Paris. https://read.oecd-ilibrary.org/science-and-technology/enhancing-access-to-and-sharing-of-data_276aaca8-en#page10; Policy initiatives enhancing data access and sharing. (2019). In *Enhancing Access to and Sharing of Data: Reconciling Risks and Benefits for Data Re-use across Societies*. <https://www.oecd-ilibrary.org/sites/baf19328-en/index.html?itemId=/content/component/baf19328-en&mimeType=text/html>

⁸⁸ Government of France (2016), *Loi pour une République numérique*, <http://www.senat.fr/leg/pjl15-744.html>; <https://www.republique-numerique.fr/pages/digital-republic-bill-rationale>; Wallace, N. (2018). *Countries Can Learn from France's Plan for Public Interest Data and AI*. Centre for Data and Innovation. <https://www.datainnovation.org/2018/08/countries-can-learn-from-frances-plan-for-public-interest-data-and-ai/>

⁸⁹ Finland's model in utilising forest data. (2019). PTT Helsinki. <https://www.metsakeskus.fi/sites/default/files/ptt-report-261-finlands-model-in-utilising-forest-data.pdf>

⁹⁰ *Supra* n 77.

anti-commons.⁹¹ This is because the resource of data is currently underused and monopolised to exclude certain key stakeholders and data users. Such a discussion has also arisen for various other kinds of resources such as spectrum⁹² and digital goods and services.⁹³ As a case study, the Convention on Biological Diversity read with the Nagoya Protocol to the Convention provides for state sovereignty over genetic resources,⁹⁴ which may include data and derivatives of the genetic resources. However, it also provides for the community as a stakeholder, specifically for the requisite consent processes and benefit sharing negotiations,⁹⁵ for any commercial use or exploitation. Similarly, recognition of indigenous rights, community ownership and involvement in governance of data resources is being asserted by the Maori Data Sovereignty Charter for data that is sourced from the community or of which it is the subject.⁹⁶

On the other hand, there is widespread documentation of the awareness and struggle associated with seeking community ownership of key resources by communities in resource rich countries. One nation which appears time and again to explore this issue is Nigeria.⁹⁷ Marred with deep conflicts and poverty, centred around the lack of control over the way resources are expended, Nigerians have also quoted a term for these problems; 'resource control'.⁹⁸ For context, Nigeria's per capita GDP was \$1,113 in 1970 and \$1,084 in 2000; between these two dates, the percentage of citizens living on less than \$1 per day increased from 36 percent to 69 percent!⁹⁹ There have been agitations focussing on modification of laws to instil the ideas of community ownership and enhance accountability through ultimate control in the hands of the people for key resources. For example, the Petroleum Act and the Minerals and Mining Act vest petroleum and minerals respectively in the federal government. In the course of petroleum industry reform, attempts were made to alter the wording of the clause in the Petroleum Act, so as to make the language more inclusive. The proposed clause was stated as follows:

*Property and sovereign ownership of petroleum within Nigeria, its territorial waters, the continental shelf, the Exclusive Economic Zone and the extended continental shelf shall vest in the sovereign state of Nigeria **for and on behalf of the people of Nigeria.***

⁹¹ Supra n 79; Shkabatur, J. (2019). The Global Commons of Data. *Stanford Technology Law Review*. 22(2). 354-411. https://law.stanford.edu/wp-content/uploads/2019/09/Shkabatur_Global-Commons_20190830-1.pdf <http://datagovernance.org/report/data-and-data-intelligence-commons>

⁹² Supra n 48.

⁹³ Rosnay, M.D. & Crosnier, H.L. (2012). *An Introduction to the Digital Commons: From Common-Pool Resources to Community Governance*. Building Institutions for Sustainable Scientific, Cultural and genetic Resources Commons. <https://halshs.archives-ouvertes.fr/halshs-00736920/document>.

⁹⁴ Rhodes, C. (2016). Potential International Approaches to Ownership/Control of Human Genetic Resources. *Health Care Analysis*. 24. 260–277. <https://doi.org/10.1007/s10728-015-0300-4>

⁹⁵ *Id*

⁹⁶ Te Mana Raraunga - Māori Data Sovereignty Network Charter. <https://static1.squarespace.com/static/58e9b10f9de4bb8d1fb5ebbc/t/5913020d15cf7dde1df34482/1494417935052/Te+Mana+Raraunga+Charter+%28Final+%26+Approved%29.pdf>; Hudson, M., Anderson, T., Dewes, T. K., Temara, P., Whaanga, H., & Roa, T. (2017). "He Matapihi ki te Mana Raraunga". *Conceptualising Big Data through a Māori lens*. In H. Whaanga, T. T. A. G. Keegan, & M. Apperley (Eds.), *He Whare Hangarau Māori - Language, culture & technology* (pp. 64–73). Hamilton, New Zealand: Te Pua Wānanga ki te Ao / Faculty of Māori and Indigenous Studies, the University of Waikato.

⁹⁷ Supra n 71; Omorogbe, Y. (2016). Resource Control and Benefit Sharing in Nigeria. In *Sharing the Costs and Benefits of Energy and Resource Activity: Legal Change and Impact on Communities*. Oxford University Press. Retrieved 10 Sep. 2020, from <https://oxford.universitypressscholarship.com/view/10.1093/acprof:oso/9780198767954.001.0001/acprof-9780198767954-chapter-15>.

⁹⁸ *Id*

⁹⁹ Supra n 71.

However, it was rejected and no change was carried out.

Another example of how community rights are being mulled over is the debate around the use and protection of agricultural data. It revolves around various axes; ranging from the kinds and types of data collected to whether the practices of data collection implicate privacy concerns or something beyond.¹⁰⁰ In that case also, it is realised that farmer communities have lesser rights over data generated than the intermediaries which engage in processing such data¹⁰¹ and they need to be made a key stakeholder in all agricultural data uses. For example, the Grower Information Services Co-operative in the USA has created a data cooperative where the growers pool their data and can keep it private and secure from the involvement of third parties, all undertaken against the background of a community organisation.¹⁰²

It has also been noted that there is the force of international commitments and understanding towards the characterisation of any resource as nationally relevant. For example, the Supreme Court recognised spectrum as a resource and its nature as that of a scarce, renewable resource due to global recognition of the same¹⁰³ while there are arguments to the contrary i.e. spectrum is a public good, non-excludable and non-rivalrous.¹⁰⁴ The literature on international development is replete with various examples of international instruments which impacted national and local developments for rights to resources.¹⁰⁵ Natural resources, for example, as an embodiment of state sovereignty are supported by various treaties and binding commitments such as United Nations Charter of Economic Rights and Duties States, 1974, United Nations General Assembly Resolution 1803 (XVII); Permanent Sovereignty over Natural Resources, 1962, United Nations General Assembly Resolution 3016 (XXVII); Permanent Sovereignty over Natural Resources of Developing Countries, 1972.¹⁰⁶ These institutional structures for ownership of natural resources are then enforced through community participation as well. There are energy policies in the UK which seek a communitarian lens to the questions of energy development and use. Similarly, the Mineral and Petroleum Resources Development Act 2002 of South Africa gives a

¹⁰⁰ Wiseman, L. Sanderson, J. Zhang, A. & Jakku, E. (2019). Farmers and their data: An examination of farmers' reluctance to share their data through the lens of the laws impacting smart farming. *NJAS - Wageningen Journal of Life Sciences*. 90. 1-10. <https://www.sciencedirect.com/science/article/pii/S1573521418302616>

¹⁰¹ Beer, J. *Ownership of Open Data: Governance Options for Agriculture and Nutrition*. GODAN.

https://www.godan.info/sites/default/files/documents/Godan_Ownership_of_Open_Data_Publication_lowres.pdf

¹⁰² (2018, October 22). Cooperatives Returning Value to Their Members Since the Start. GISC. <https://www.gisc.coop/cooperatives-returning-value-to-their-members-since-the-start/>; A Grower's Data Coop – Leveling the Growing Field. <https://www.gisc.coop/about/>.

¹⁰³ Supra n 39.

¹⁰⁴ Hadzic, S. Aguera, P. & Gillwald, A. (2020). *Innovative spectrum approaches for internet openness in South Africa*. Online Symposium On The Value Of Internet Openness At The Time Of Covid-19.

https://www.medianama.com/2020/05/223-spectrum-approaches-south-africa/?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+medianama+%28Medianama%3A+Digital+Media+In+India%29

¹⁰⁵ Mbote, P.K. (2004). The Impact of International Treaties on Land and Resource Rights. In Munyaradzi Saruchera, (Ed.), *Securing Land and Resource Rights: Pan-African Perspectives*. (48-64). Programme for Land and Agrarian Studies Cape Town, South Africa (2004), <http://www.ielrc.org/content/a0407.pdf>; Bilder, R.B. (1980). International Law and Natural Resources Policies, *Natural Resources Journal*. 20(3). 451-486. <https://digitalrepository.unm.edu/nrj/vol20/iss3/3>;

¹⁰⁶ *Permanent sovereignty over natural resources of developing countries*. GA Res 3016/ XXVII UN Doc A/RES/3016(XXVII) (adopted 18 December, 1972). <https://digitallibrary.un.org/record/191568?ln=en> 9780198767954.001.0001/acprof-9780198767954-chapter-15.

preferential right to community for mineral prospecting and mining.¹⁰⁷ International recognition for natural resources has formed the basis for the Supreme Court's recognition and Indian jurisprudence as well.¹⁰⁸ International articulation, more often than not, finds a place to discuss any designation or enforcement of uncommonly understood rights, including right to drinking water.¹⁰⁹ Currently, in the absence of recognition by the international community of the resource of data or data as a resource, the jurisprudence being developed in India is likely to form a strong basis for further work in the area of regulation for data. Another type of property regime involves designation of community ownership at an international and global level¹¹⁰ for the international community to foster such as done by the UN Convention on the High Seas¹¹¹ for the high seas and seabed beyond areas of national jurisdiction; the Outer Space Treaty for outer space¹¹² and the Antarctic Treaty for the Antarctica.¹¹³

It must be noted that the data related policy proposals in India so far do not contemplate any acquisition or nationalisation of data. However, for the sake of enabling widespread data sharing and availability, it seeks to explore new ownership structures, with or without State intermediation but with community rights and claims. It seeks to put in place data and benefit sharing arrangements, thus governing the distribution of such resources. So far, ownership and control of 'material resources' under the ambit of Article 39 (b) has been seen to vest in the State, either as a trustee or through public corporations. Since data is considered to be a community resource, diversely owned, it necessitates a trustee or stewardship framework for its governance. As understood in Part I, the State is empowered, under certain conditions, to acquire businesses and their resources to serve public interests. However, creating a framework for data markets, business and community stakeholder standards is actually distinct from acquisition. This is because the proposed framework envisages a community ownership, distinct from State ownership. Moreover, State ownership is one way to give effect to the community in the sense that the State is assumed to be the agent of the overall national community (or state community), to ultimately provide welfare of all resources to the people on whose behalf it acts.¹¹⁴ Similarly, 'distribution' incorporates within its scope; redistribution, change of ownership, auction etc.¹¹⁵ With such ownership in place, the State usually determines the distribution of a scarce resource. While the jurisprudence is not confined to scarce resources¹¹⁶ or even the method of distribution¹¹⁷ or the meaning of 'common good,' we posit that once the ownership or control structures are in place, the distribution of data for governmental purposes is within the scope of an expansive vision of 'distribution'. Moreover, while data exhibits traits of a public good because of its use at zero or

¹⁰⁷ Barton, B., & Goldsmith, M. (2016). Community and Sharing. In *Sharing the Costs and Benefits of Energy and Resource Activity: Legal Change and Impact on Communities*. Oxford University Press. Retrieved 10 Sep. 2020, from <https://oxford.universitypressscholarship.com/view/10.1093/acprof:oso/9780198767954.001.0001/acprof-9780198767954-chapter-2>. Page 60.

¹⁰⁸ Supra n 43. Paras 64-66.

¹⁰⁹ Kothari, J. (2006). *The Right to Water: A Constitutional Perspective*. 'Water, Law and the Commons' International Environmental Law Research Centre. http://www.ielrc.org/activities/workshop_0612/content/d0607.pdf

¹¹⁰ Supra n 95.

¹¹¹ *Convention on the High Seas*, opened for signature on 29 April, 1958, UNTS 450, (entered into force on 30 September 1962), https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXI-2&chapter=21

¹¹² *Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies*. GA Res 2222/XXI. UN Doc A/6431

<https://www.unoosa.org/oosa/en/ourwork/spacelaw/treaties/outerspacetreaty.html>

¹¹³ Britannica, *Antarctic Treaty*, (online at 13 May 2020), <https://www.britannica.com/event/Antarctic-Treaty>

¹¹⁴ Supra n 108. Page 55.

¹¹⁵ Supra Part 1.

¹¹⁶ Supra n 33.

¹¹⁷ Supra n 39.

negligible marginal cost,¹¹⁸ Big Data, because of the way it is collected and held by dominant business entities with strong network effects and exclusive collection capacities, can be excluded.¹¹⁹ The current practices of the market distort the public good nature of data which can be rectified by regulation. Since the content of 'material resources' spans a wide variety of resources such as buses, taxes, coal mines or electricity all premised on their **ability** to generate wealth and value for the community at large,¹²⁰ it is suggested that data, understood as non-personal, natural, industrial or machine generated data can also be subject to a law based on the objectives of Article 39 (b). This law can incorporate conditions of community ownership as well as widespread data sharing for larger societal and economic objectives.

Another important aspect of this discussion on fair distribution of resources among the people in a society and connecting to the issue of data governance is the manner in which courts have treated new technological developments, often connecting them to the realm of rights and entitlements. This can most notably be seen in the debates that arise to justify public interest exceptions¹²¹ or to mould intellectual property laws and policies to suit the needs of a developing nation.¹²² In this regard it may also be noted how internet and its access has been declared a fundamental right such as in the case of *Faheema Shirin RK v. State of Kerala and ors.* (read into Article 21)¹²³ and its use as a medium of speech, expression and trade has been read into the exercise of fundamental rights under Article 19 in *Anuradha Bhasin v. Union of India and ors.*¹²⁴ As data and data derived intelligence becomes central resources and components of social and economic organization, it would be interesting to observe how similar developments in jurisprudence take place with regard to fair distribution of data and data based intelligence throughout the society.

Scoping global constitutions

*Recent social movements in the world's city squares, from the Arab Spring through the Indignados to Occupy Wall Street, have ruptured these traditional [Right-Left] debates, questioning whether state-oriented, representative politics can meet people's basic needs and suggesting instead new modes of social reproduction based on direct democracy and the creation of commons.*¹²⁵

This Part will deal with comparative constitutionalism with nation states with pronounced economic rights jurisprudence and a focus on resource allocation. There are many national constitutions in the world which aim to 'redistribute resources to serve the common good.' The research would attempt to explore the patterns of this constitutional entitlement (understood broadly, as this clause may be

¹¹⁸ Supra n 94.

¹¹⁹ Supra n 7.

¹²⁰ Supra Part I.

¹²¹ *Entertainment Network (India) Limited v. Super Cassette Industries Limited*, (2008) 13 SCC 30; *Super Cassettes Industries Limited v. Music Broadcast Private Limited* AIR 2012 SC 2144, *South Indian Music Companies Association v. Union of India*, (2016) 3 Mad LJ 647.

¹²² Noronha, F. (2006). India At The Forefront Of Knowledge Commons Debate. Intellectual Property Watch. <https://www.ip-watch.org/2006/09/03/india-at-the-forefront-of-the-knowledge-commons-debate/>

¹²³ *Faheema Shirin RK v. State of Kerala and Ors.* AIR 2020 Ker 35.

¹²⁴ *Anuradha Bhasin v. Union of India and Ors.* (2020) 3 SCC 637.

¹²⁵ Thomas Murray, T. (2015). Socio-Economic Rights Versus Social Revolution? Constitution Making in Germany, Mexico and Ireland, 1917–1923. *Social & Legal Studies*. 24(4). 1–22.

couched as a directive, obligation etc.) in various nations to enable any redistribution of resource, including a contemporary resource of a new kind, such as data. This is also significant because socio-economic rights entrenched in various constitutions is a manifestation of social movements which sought to ensure equitable resource distribution.¹²⁶ As people increasingly recognise the importance of data, multiple stakeholder claims are bound to arise about economic rights to or ownership and exclusivity of data. In this respect, insights about how such resources were seen and treated in the past will be useful to such discussions and decisions about contesting claims. It is for this reason that this paper endeavours to hark back to these histories of jurisprudence around resource distribution, allocation and sharing.

However, it must be noted that the research may be constrained by the lack of accessibility regarding the legal resources of certain nations. 10 other constitutions were found that oblige the state to redistribute material resources for the common good, in one form or the other. These are the Constitutions of Sri Lanka, Nigeria, Nepal, Mozambique, Ireland, El Salvador, Ecuador, Bolivia, Cape Verde and Cuba. Beyond this, there are several constitutions which discuss redistribution of material resources as part of the Preamble.¹²⁷ However, the strength and justiciability of the right differs. This can be further contrasted to 84 other constitutions which were examined which lay down clear ownership rights and governance structure, only for natural resources. A few chosen examples of resource related clauses and their application have been outlined below, spanning Africa, Latin America and Europe.

The case of the Irish Constitution can be particularly instructive as the scheme of Part IV of the Constitution of India was inspired by it. The current Constitution in Ireland was adopted in 1937 as a successor to the 1922 Free State Constitution. Article 45 of the Constitution enshrines the Directive Principles of State Policy and provides for its non-justiciability.¹²⁸ Article 45.2 specifically provides for certain entitlements as follows:

ii. That the ownership and control of the material resources of the community may be so distributed amongst private individuals and the various classes as best to subserve the common good.

iii. That, especially, the operation of free competition shall not be allowed so to develop as to result in the concentration of the ownership or control of essential commodities in a few individuals to the common detriment.

Interestingly, the intervention by the courts is very distinct from the position taken in India. The judicial approach has been to drastically limit its application and enforcement because it is a non-justiciable provision.¹²⁹ For example, in the case of *John O'Reilly and Others v. Limerick Corporation, Minister for the Environment, Minister for Health, Minister for Education, Ireland and the Attorney General*,¹³⁰ the plaintiffs belonged to a traveller/nomadic community which sought halting sites/ surfaces to habituate while travelling and damages from the State for all the inconvenience caused till date. In reading the

¹²⁶ *Id*

¹²⁷ The Constitute Project,

https://www.constituteproject.org/search?lang=en&q=resources&status=in_force&status=is_draft

¹²⁸ Carolan, E. (2017). Developments in Irish Constitutional Law: The Year 2016 in Review. Iconnect.

<http://www.iconnectblog.com/2017/12/developments-in-irish-constitutional-law-the-year-2016-in-review/>

¹²⁹ Trispiotis, I. (2010). Socio-Economic Rights: Legally Enforceable Or Just Aspirational?. *Opticon* 1826. 8. 1-10.

https://www.ucl.ac.uk/opticon1826/archive/issue8/articles/Article_Laws_-_Ilias__Social_equality__Publish_.pdf

¹³⁰ *John O'Reilly and Others v Limerick Corporation, Minister for the Environment, Minister for Health, Minister for Education, Ireland and the Attorney General* [1989] I.L.R.M. 18. https://www.escribnet.org/sites/default/files/caselaw/oreilly-limerick_1.pdf

relevant statute, the court concluded that the housing authority was required to draw up a plan for habitation of the plaintiffs but not obliged to provide those dwelling sites.

With respect to the claim for damages for non-provision of adequate resources to the plaintiff, the court rejected the plaintiffs' claim, beyond its jurisdiction. It held that "What could be involved in the exercise of the suggested jurisdiction would be the imposition by the court of its view that there had been an unfair distribution of national resources. As the present case demonstrates, it may also be required to decide whether a correct allocation of physical resources available for public purposes has been made. In exercising this function the court would not be administering justice as it does when determining an issue relating to commutative justice but it would be engaged in an entirely different exercise, namely, an adjudication on the fairness or otherwise of the manner in which other organs of State had administered public resources."

It concluded that while its Constitution embraces the concept of distributive justice, the enforcement of such justice cannot be brought before the court in light of the strict separation of powers envisaged. Thus, all such claims must be raised before the legislature or the executive. As noted above, the jurisprudence observed in India involved a defence of state policies on the touchstone of policies furthering a just redistribution. In contrast to that position, this case is one where the plaintiff is attempting to assert rights of a non-justiciable nature and seek relief. The evolution, nature and course that resource redistribution has taken in India is vastly different from Ireland. The Constitution of Ireland further contains a constitutional goal of maintaining bounds on free competition such that 'concentration of the ownership or control of essential commodities in a few individuals to the common detriment' is not allowed. These constitutional directives call for the state to favour private initiative and ensure 'reasonable' efficiency in production, but 'where necessary' the state is also to 'supplement' private enterprise. The state is to protect the public against 'unjust exploitation', and to aim towards distribution of ownership and control to serve 'the common good'.¹³¹ Its statutory framework is also developed keeping in mind the requirement of the Treaty of the European Union and the constitutional goal of 'common good'.¹³²

The Constitution of **Nigeria** in Article 16 (2)(b) provides for a non-justiciable directive principle as follows: *The State shall direct its policy towards ensuring:*

.....

that the material resources of the nation are harnessed and distributed as best as possible to serve the common good;

.....

While there is considerable discussion regarding the justiciability and the extent of application of the directive objectives, the courts are increasingly taking a more open and positive stance regarding the utility and application of these objectives and entitlements.¹³³ In *Okogie v. Attorney General of Lagos*

¹³¹ Wise, M. (2000). OECD Country Studies: Ireland -The Role of Competition Policy in Regulatory Reform. <http://www.oecd.org/ireland/2497344.pdf>

¹³² *Declan Cronin v. The Competition Authority, The Minister for Enterprise and Employment, Ireland and The Attorney General, Respondents; Texaco (Ireland) Ltd.* [1998] 1 IR 265.

¹³³ Nwauche, E. (2016). Indirect Constitutional Protection of Economic, Social and Cultural Rights in Nigeria. In D. Chirwa & L. Chenwi (Eds.), *The Protection of Economic, Social and Cultural Rights in Africa: International, Regional and National Perspectives* (501-526). Cambridge: Cambridge University Press.; <https://ecommons.cornell.edu/bitstream/handle/1813/34197/aoo26.pdf?sequence=1&isAllowed=y>

State,¹³⁴ the court was required to adjudicate whether the right to education included the right of parents to choose schools for their children and the right of any person or institution to establish and maintain educational institutions. This claim was based on the freedom of expression, economic objectives and educational objectives provided in the Constitution.¹³⁵

The Constitution of **Mozambique** provides the basis of its economic policy in Article 96 as, *The State economic policy shall be directed towards laying the fundamental bases for development, improving the living conditions of the people, strengthening the sovereignty of the State, and consolidating national unity, through the participation of citizens and the efficient use of human and material resources.*

As a commentator has noted, socio-economic rights may be derived from Article 96 which provides that individual rights and freedoms are guaranteed by the state. However, the shortcoming as noted for other nations is equally true for Mozambique, that it does not have any record of higher court cases dealing with enforcement of socio-economic rights.¹³⁶ This is also because it is a civil law country and since the legal precedents neither lay down the law, nor bind the future courts, any litigation is not considered strategic enough from that point of view.

The Constitution of **Ethiopia** provides for economic objectives in Article 89 (1) as:

Government shall have the duty to formulate policies which ensure that all Ethiopians can benefit from the country's legacy of intellectual and material resources.

As had been noted before, there is no official publication of the judgments of courts in the country.¹³⁷ Even the unofficial source publish judgements in the national language.¹³⁸ However, commentators thinking on similar lines do invoke Article 89 to ground the conservation framework for different kinds of resources such as water.¹³⁹

The constitutional history of **Bolivia** is marred by multiple struggles and a constant renegotiation of the rights' framework. The current Constitution had been adopted by a referendum with a 90.24% participation. Bolivia's Constitution is also the seventeenth constitutional text in its republican history.¹⁴⁰ Article 316 of the Constitution of Plurinational State of Bolivia, 2009 occurring in Part IV titled 'Economic Structure and Organization of the State' provides that *it is the function of the State in the economy to promote policies of equitable distribution of wealth and of the economic resources of the country, for the purpose*

¹³⁴ *Okogie v. Attorney General of Lagos State* (1981) 1 NCLR 218.

¹³⁵ *Supra* n 134.

¹³⁶ Matchaya, G., Kaaba, O. & Nhemachena, C. (2018). Justiciability of the Right to Water in the SADC Region: A Critical Appraisal. *Laws*. 7(2). 18. <https://doi.org/10.3390/laws7020018>

¹³⁷ Yeshanew, S. (2016). Ethiopia's Hybrid Constitutional Protection of Economic, Social and Cultural Rights. In D. Chirwa & L. Chenwi (Eds.), *The Protection of Economic, Social and Cultural Rights in Africa: International, Regional and National Perspectives* (pp. 423-446). Cambridge: Cambridge University Press. doi:10.1017/CBO9781316780251.017

¹³⁸ As seen here: List of Cases. <https://chilot.me/wp-content/uploads/2014/11/cassation-volume-16-table-of-contents.pdf>

¹³⁹ Abteu, W. & Dessu S.B. (2018). *The Grand Ethiopian Renaissance Dam on the Blue Nile*. Springer. Page 35. https://books.google.co.in/books?id=1pdmDwAAQBAJ&pg=PA34&lpg=PA34&dq=ethiopian+constitution+economic+objectives+article+89+cases&source=bl&ots=JRTGJ2sLFW&sig=ACfU3U1ETLN2BOIU2EBkaj5Y-6pdqbb51g&hl=en&sa=X&ved=2ahUKEwiTl__D9sbpAhUhZTgGHQ03BCEQ6AEwDHoECACQAQ#v=onepage&q=ethiopian%20constitution%20economic%20objectives%20article%2089%20cases&f=false

¹⁴⁰ Nagel, MI. (2009). *The Bolivian Legal System and Legal Research*. Global Lex. <https://www.nyulawglobal.org/globalex/Bolivia.html>

*of preventing inequality, social and economic exclusion, and to eradicate poverty in its multiple dimensions. It also lays down its function to administer economic resources for research, technical assistance and transfer of technology to promote productive activities and industrialization.*¹⁴¹

It must be noted that many economic transformations in Bolivia are attributed to political transformations, evidenced by its constitutional mandate for economic organisation, including public ownership of natural resources and some strategic sectors of the economy.¹⁴² The Constitution recognises the State as owner of the resources generated by the extractive sector (mainly hydrocarbons and mining).¹⁴³

Cuba has undergone several revisions of the constitutional text as well, as seen today. In fact, its fight for independence was also supported by constitutional texts promulgated by the people resisting and fighting Spanish colonialism. All this adds to the rich constitutional history which can inform the present research as well as the global jurisprudence related to socio-economic rights, enshrined in various constitutions. This is also because the colonial struggle was fought along an axis of need of greater socio-economic dignity for the people and real and substantial control to the people for governance.¹⁴⁴ Title II lays down the Economic Foundations in the Constitution. Article 19 of the Constitution of Cuba, 2019 provides that *the State directs, regulates, and monitors economic activity, reconciling national, territorial, collective, and individual interests for the benefit of society. Socialist planning constitutes the central component of the system of governance for economic and social development. Its essential function is to design and conduct strategic development, planning for relevant balances between resources and needs.*¹⁴⁵

Article 3 of the Constitution of Ecuador, 2008 lays down the duties of the State, involving *planning national development, eliminating poverty, and promoting sustainable development and the equitable redistribution of resources and wealth to enable access to the good way of living.*¹⁴⁶

Further, Article 313 provides; *The State reserves the right to administer, regulate, monitor and manage strategic sectors, following the principles of environmental sustainability, precaution, prevention and efficiency.*

Strategic sectors, which come under the decision making and exclusive control of the State, are those that, due to their importance and size, exert a decisive economic, social, political or environmental impact and must be aimed at ensuring the full exercise of rights and the general welfare of society.

The following are considered strategic sectors: energy in all its forms, telecommunications, non renewable natural resources, oil and gas transport and refining, biodiversity and genetic heritage, the radio spectrum, water and others as established by law.

¹⁴¹ The Constitution of Bolivia, 2009. Retrieved from https://www.constituteproject.org/constitution/Bolivia_2009.pdf

¹⁴² Arauz, A., Weisbrot, M., Bunker, A. & Johnston, J. (2019). *Bolivia's Economic Transformation: Macroeconomic Policies, Institutional Changes, and Results*. Centre for Economic and Policy Research. <https://cepr.net/images/stories/reports/bolivia-macro-2019-10.pdf>

¹⁴³ Campodonico, H. (2016). *Recovering Sovereignty Over Natural Resources: The Cases of Bolivia and Ecuador*. South Centre. https://www.southcentre.int/wp-content/uploads/2016/10/RP71_Recovering-Sovereignty-Over-Natural-Resources-The-Cases-of-Bolivia-and-Ecuador_EN.pdf

¹⁴⁴ Wachs, J. (1996). Reviving the 1940 Cuban Constitution: Arguments for Social and Economic Rights in a Post-Castro Government. *American University International Law Review*. 10(1). 525-569. doi:10.1017/CBO9781316780251.017

¹⁴⁵ *Constitution of Cuba, 2019*. https://www.constituteproject.org/constitution/Cuba_2019.pdf?lang=en

¹⁴⁶ *Constitution of Ecuador, 2015*. https://www.constituteproject.org/constitution/Ecuador_2015?lang=en

As the construction of the article suggests, there is ample scope to expand the list of sectors indicated by the Constitution.¹⁴⁷ In almost all cases, there is an extensive development and discussion regarding the State and private negotiations for natural resources, largely due to the political and economic position, statute and importance of these resources.¹⁴⁸ However, any discussion regarding other kinds of resources is largely absent from literature. A broad outline of the resource regulating constitutional entitlements have been provided which indicates the scope that is available for its use. Even for nations which have not advanced the directive principles judicially as far as India has, their constitutions enable policymaking using these principles. The constitutional validity of such policy or law would depend on its content which can resort to these principles for better allocation and reap the objectives enshrined in the respective constitutions.¹⁴⁹

Conclusion

As data governance frameworks to regulate various kinds of data are put in place, especially data sharing, there will be inevitable push back from various quarters. In such a scenario, it is necessary to explore the strength of the corresponding data governance frameworks, not only from the lens of the policy objectives but also in terms of their constitutionally tenability so that a fundamental and broad consensus can be evidenced. Such explorations and discussions can provide a source for future case laws and the dialectical foundation for ways to understand data. It can also test the contemporaneity of the Constitution which has successfully withstood various challenges across time. As the question of economic rights for data is investigated, it is important to explore whether it can be sourced to the economic rights framework in constitutions which had the political foresight and appropriate inclination to include necessary rights to accommodate such a framework. Alternatively, in various places such resource allocation and distribution is laid down as a directive principle for states to observe.

Data governance frameworks involving economic rights, like community ownership as well as data sharing are being explored in various places. Contentions and debates surrounding the questions about rights, liabilities and the abilities of relevant stakeholders have been deliberated before in the context of various other kinds of resources, with different kinds of structures put in place for different resources. A constitutionally sound treatment which lays down a solid basis for fair distribution of resources has also been suggested to ward off resource curses in nations afflicted by it i.e. the paradox displayed by the continued poverty of resource rich countries due to mismanagement.¹⁵⁰ Against this background and as per the discussion here, we are of the view that Article 39 (b) of Indian constitution can be applied to the resource of data, considering it as a 'material resource'. The various possible governance structures that are being suggested in the NPD Report, such as community ownership, data sharing requirements,

¹⁴⁷ Espinosa Velasco, S. X. (2019). Ecuador and international investment law and policy: between constitutional sovereignty and state responsibility. Boekenplan Maastricht. <https://doi.org/10.26481/dis.20190329se>

¹⁴⁸ Bebbington, A., Abdulai, A., Bebbington, D., Hinfelaar, M., Sanborn, C., Achberger, J., Huber, C., Hurtado, V., Ramírez, T., & Odell, S. (2018). Political Settlements, Natural Resource Extraction, and Inclusion in Bolivia. In *Governing Extractive Industries: Politics, Histories, Ideas*. Oxford University Press. Retrieved 13 May, 2020, from <https://www.oxfordscholarship.com/view/10.1093/oso/9780198820932.001.0001/oso-9780198820932-chapter-3>.

¹⁴⁹ See the various ways in which the constitutional provisions can be interpreted in Nigeria, *Supra* n 132.

¹⁵⁰ *Supra* n 71.

stewardship processes, etc., are of such a nature which effectively vest 'ownership and control' with the community coupled with data sharing as one method of 'distribution' of the 'material resource' within the constructions of Article 39 (b). Further, with a clear tangible need and public interest backgrounded against the policy instruments, these seem to satisfy all key elements of Article 39 (b). Thus, if a law is framed with these key principles at its heart and a clear nexus with the common and public interest that it seeks to serve, such a law can be effectively shielded from possible legal or constitutional challenges. Further, this constitutional treatment is perhaps one way to deal with the data debates. Combined with the political spectre and history of Article 31C as well as the final shape that the NPD Report takes, resolving issues of conflict of interest, regulatory certainty, delineation of community boundaries and the mechanism to effectuate the relationship between a trustee and a community, it would be interesting to note the further responses to this research to resolve the data debates with the objective of data sharing centrally placed.

There is also a greater need to explore further nuances of Part IV of the Constitution comprising Directive Principles of State Policy¹⁵¹ as well as the negotiations and potential of socio-economic rights, in diverse contexts including data governance.¹⁵² With the constitutional argument posited above, it is felt that the proposed policy measures in India regarding community data and data sharing have a due constitutional sanction and legitimacy. Further, even modern constitutions framed in the 21st century such as Nigeria, Mozambique and some in Latin America noted in Part III above, also see the wisdom in incorporating resource distribution clauses in the form of economic rights or directive principles. For a deeper exploration of the strength of these clauses, it is felt that their inclusion juxtaposed against the digital economy provides an ability for future researchers to cull out applicable principles for policies related to digital resources, including data, especially in the nations of the Global South. This constitutional similarity among these countries also provides a political axis for them to form alliances at the global level, especially for global trade negotiations that increasingly focus on digital issues.

Bibliography

1. Prasad, RUS. (2008). The Impact of Policy and Regulatory Decisions on Telecom Growth in India. Stanford Centre for International Development. <https://kingcenter.stanford.edu/sites/default/files/publications/361wp.pdf>
2. Sagay, I. (2008). Nigeria: Federalism, the constitution and resource control. http://www.nigerdeltapeoplesworldcongress.org/articles/nigeria_federalism_.pdf
3. Neri, A. (2020). We should treat data as a natural resource. Here's why. World Economic Forum. <https://www.weforum.org/agenda/2020/03/we-should-treat-data-as-a-natural-resource-heres-why/>

¹⁵¹ Supra n 29.

¹⁵² Supra n 126.

-
4. Ranganathan, S. (2016). Global Commons. *European Journal of International Law*. 27(3). 693–717. <https://academic.oup.com/ejil/article/27/3/693/2197248>
 5. Adair, A. (2015). Economic Reforms in Cuba and the United States: Sure I CAN Invest...But Should I?. *Law School International Immersion Program Papers*, No. 1. https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1003&context=international_immersion_program_papers
 6. Kittichaisaree, K. & Kuner C. (2015). The Growing Importance of Data Protection in Public International Law. *EJIL Talk*. <https://www.ejiltalk.org/the-growing-importance-of-data-protection-in-public-international-law/>
 7. McHugh, C. (2003). Socio-Economic Rights in Ireland: Lessons to be Learned from South Africa and India. *Hibernian Law Journal*. 4. 109-144.
 8. Nolan, A. (2008). Ireland: The Separation of Powers vs Socio-economic Rights. in Langford (Ed.), *Social Rights Jurisprudence: Emerging Trends in Comparative and International Law* (295-319). Cambridge: Cambridge University Press.
 9. Nwauche, E. (2016). Indirect Constitutional Protection of Economic, Social and Cultural Rights in Nigeria. In D. Chirwa & L. Chenwi (Eds.), *The Protection of Economic, Social and Cultural Rights in Africa: International, Regional and National Perspectives* (501-526). Cambridge: Cambridge University Press.
 10. ESCR Net. <https://www.escr-net.org/>
 11. Mandlate, A., Nhampossa, J., & Chirwa, D. (2016). Direct Constitutional Protection of Economic, Social and Cultural Rights in Lusophone Legal Systems: Angola and Mozambique. In D. Chirwa & L. Chenwi (Eds.), *The Protection of Economic, Social and Cultural Rights in Africa: International, Regional and National Perspectives* (372-395). Cambridge: Cambridge University Press. doi:10.1017/CBO9781316780251.015
 12. Frischmann, Brett M. (2005). An Economic Theory of Infrastructure and Commons Management. *Minnesota Law Review*. 89. 917-1030. <https://ssrn.com/abstract=588424>
 13. Ethiopian Legal Brief. <https://chilot.me/federal-laws/>
 14. Lal, P. (2012). Self-Reliance and the State: the Multiple Meanings of Development in Early Post-Colonial Tanzania. *Africa*. 82. 212-234.

Acknowledgements

The author will like to recognize the role of the entire IT for Change team in this work. At IT for Change, knowledge production is a collective enterprise. But for it, this work would have been impossible. The author would like to thank Mr. Parminder Jeet Singh for his constructive comments, feedback and suggestions and Mr. Vinay Narayan for editorial inputs. The author expresses gratitude to the members of the Data Governance Network and all participants of the 5th Quarterly Round Table for very valuable comments and questions on the draft of the paper.

About the Author

Anushka is a Research Assistant at IT for Change. Her research focuses on data governance, digital economy, competition law and constitutional law. Anushka is a lawyer and has previously worked at a law firm, Cyril Amarchand Mangaldas.

 datagovernance.org  dgn@idfcinstitute.org

 [@datagovnetwork](https://twitter.com/datagovnetwork)  [/datagovnetwork](https://facebook.com/datagovnetwork)  [/datagovnetwork](https://youtube.com/datagovnetwork)