

# The public-private: a key legal nexus for South Africa's AI future

- ❖ **Private-public intersections are increasingly relevant in the delivery of services to the public, and AI in South Africa will grow the relevance of these relationships.**
- ❖ **An examination of a South African case study demonstrates how the result of such relationships can lead to risks of infringements of the rights of citizens.**
- ❖ **The case study also demonstrates that, while the law struggles to keep up with developments in the political economy of technologies, it can play a vital role in ensuring the accountability needed for a beneficial introduction of AI technologies into the development space.**

## Introduction

Artificial Intelligence (AI) is here; but what 'here' means is very different according to the country in which it is being implemented or explored. In South Africa, a data controversy relating to the commercial use of the national social grants distribution database provides some foundational insight into future risks in the deployment of AI. I will be considering specifically here the public-private intersections in the deployment of technology-centred projects, and what accountability needs to look like to mitigate against the risk that citizens may be subject to because of them.

## Key Concepts

AI are computer programmes that mimic human intelligence and cognition (human intelligence being understood as reasoning, learning and problem-solving) (Marwala, 2015; PricewaterhouseCoopers, 2018).

Data governance underpins key governance questions for AI but does not fully capture the remit of accountability.

It is useful to consider AI within the context of "data processing plus". While AI leverages data to make decisions, and thus data governance frameworks are an underpinning concern in considering the necessary governance environment for AI, it is also the decisions and outputs of AI that will also need to have layers of accountability.

While of course there are a variety of ways AI intersects with different areas of law, such as liability and private law, or data processing and regulation, this policy brief will consider constitutional law as it relates to obligations arising in a development context.

## Case Study

In South Africa, public-private partnerships have not always resulted in positive outcomes for citizens.

In 2016, a case was heard before the Constitutional Court in South Africa, which sought to try and ensure the distribution of social grants to South African beneficiaries was not interrupted as a result of a major public-private sector dispute that had been in and out the courts since 2010. A private company, Cash Paymaster Services (CPS), had been procured by the South African Social Security Agency (SASSA) to distribute social grants to citizens - the most significantly resourced social programme in the country. Yet this arrangement had been marred by controversy, mismanagement and conflict - not least of all because CPS's other subsidiaries were said to be abusing the personal data of social grants beneficiaries to sell them over-priced products and policies, increasing grant beneficiary indebtedness to Net1's stable of companies (Net1 being the holding company for CPS) (Margele & Ngubane, 2018).<sup>1</sup>

The privatisation of social grants distribution was authorised in terms of the Social Assistance Act 2004, 4(2)(a), but followed a 'modernising vision' of grants distribution in South Africa from as early as 1996, which would focus on interoperable databases and digitalised processes (Vally, 2016). There was always a perception that this digitalisation would require private sector assistance. And the desire for digitalisation was matched by an early desire by SASSA to institute a massive biometric data collection project as part of its functions. It is this biometric data collection that justified their original decision to tender CPS in particular, and once the contract was in place, SASSA began swiftly devolving the actual function of biometric data collection to CPS, viewing it otherwise as "duplication" (Vally, 2016).<sup>2</sup>

Technological functions are often implemented through public-private partnerships in South Africa, in various forms. The latest strategic document from the Commission of the Fourth Industrial Revolution notes for example specifically on AI, that the establishment of an AI Institute should be established as a private-public partnership for supporting AI capacity-building (Commission on the Fourth Industrial Revolution, 2020). These functionary imaginings of development as delivered by the public and private will only grow with digitalisation, and then with Fourth Industrial Revolution technologies - a relationship of real concern in the delivery of public goods (Gillwald, 2020; Ostrom & Ostrom, 1977).

So while, amidst all this controversy, the role of constitutional law may seem secondary, the question of public obligations with private actors is a fundamental one for considering the future of the AI-enabled economy, particularly when - in engaging on questions of their responsibilities to grant beneficiaries - CPS' former CEO Serge Belamant noted clearly: "We're not a government, we are a company. We work for profit" (Pather, 2017).

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<sup>1</sup> News reports in fact 2018 alleged that, of the R14 billion in grant funds that were distributed monthly by CPS, R550 million was returned to Net1 as payment for loans, insurance and other services.

<sup>2</sup> So intrinsically are these technological capacities understood as private sector functions that later when the distribution was moved back to SASSA in partnership with the South African Postal Services, the biometric data collection had to be suspended as employees went on strike against having to perform the function (Koko, 2018).

## Case Law

The SASSA-CPS debacle was mired in litigation, but one of the related Constitutional Court judgements expanded on some important constitutional principles on public-private obligations in a rights context. Who is *responsible* for when the rights of citizens are violated in these arrangements?

South African constitutional and administrative law has responded to the ‘merging’ of public and private activities by using both a broad definition of a ‘public function’, and a broad meaning of an ‘organ of state’ to try and extend what were traditionally understood as public obligations (Finn, 2013). In *AllPay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others* 2014 (4) SA 179 (CC), Justice Froneman considered that the application of socioeconomic rights obligations on the private sector, or juristic persons, was not to wholly supplant the public obligations of the state, but “...[i]t is rather to require private parties not to interfere with or diminish the enjoyment of a right”. In other words, the Courts are trying to ensure people remain protected, rather than making the private sector equivalent to the state.

In the *Allpay* case the Court wanted to ensure that the grants beneficiaries were not negatively impacted by the dispute between SASSA and CPS – and so obliged CPS to carry on fulfilling the terms of the underlying irregular contract on its order. While the specifics of how that worked need not be delved into, essentially the Court held that accountability arose from CPS undertaking constitutional obligations when they entered into a contract to perform a public function.

Yet, the judgement makes a murky foundation for these obligations – sometimes suggesting that CPS is in fact an ‘organ of state’ because it is performing a public function and therefore has the same obligations to respect the rights of citizens as the state does per section 8(2) of the Constitution, but at other points suggesting the obligations arise from the contract, and again at others suggesting it might be the horizontal application of the Bill of Rights (Finn, 2013). These are very refined constitutional law questions, but the key takeaway is this: the Court is willing to extend Bill of Rights obligations on the private sector, and is exploring the proper foundations for doing so.

## Conclusions and Recommendations

The obligations on private sector actors in a human rights context is gaining traction in international human rights law, too (Kolabhai, 2020). Importantly, it has been noted that the private sector will have obligations even when there is no contractual relationship with the state, but rather due to the need to keep citizens protected from violations – and may extend to proactive obligations to avoid violation through “due diligence” assessments of risks and impacts (Kolabhai, 2020).<sup>3</sup> What should remain at the forefront of legal

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<sup>3</sup> While this brief was dealing with public-private intersections, the proactive obligations on businesses in the context of AI importantly links to calls for social (and by extension potentially rights) impact assessments prior, and during, the deployment of AI (Crawford & Calo, 2016).

A key role for the rule of law in the future of AI will be helping to ensure accountability for the violation of rights, with a focus on the citizen.

explorations of these intersections, though, is ensuring a rights-centred approach that focuses significantly at the domestic level on ensuring citizens have access to remedies (Kolabhai, 2020).

If we turn back to the AI context, this will need to ensure remedies for underlying data risks for citizens (such as loss of privacy and lack of access), which will mean implementing data governance frameworks. But, it will also mean exploring accountability for decisions and actions that will result from implementing AI in the context of service delivery – a reality that seems certain given the case study we have already outlined. This will mean a focus on constitutional and administrative law trying to adapt to the complexities of these emerging public-private intersections; but the focus should remain on the rights of citizens to act as a guiding light for legal clarity. The law is always challenged by the pace of technology (Petit, 2017), but that is why it should remain focused on its constitutional objective on ensuring that people are “...equally *protected* by law” (Constitution of the Republic of South Africa, 1996, Preamble). While the law will need to adapt quickly, Froneman’s judgement was keenly based on ensuring *accountability* in the performance of public and development functions. The risk that AI may lead to less accountability, as actors attempt to shirk obligations and responsibilities, helps to outline a central emerging role for the rule of law: ensuring accountability is assured.

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