

## Comparative analysis of conceptions of human rights, democracy and the rule of law in selected third countries

Work Package No. 3 – Deliverable No. 3

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## Executive Summary

This report presents a **comparative analysis of the different understandings and perspectives on human rights, democracy and rule of law** in third countries with which EU has established strategic partnerships: **China, India, Peru and South Africa**. This explorative report focuses on theoretical conceptions of human rights, democracy and rule of law, with limited attention to their operationalization. The eventual aim of Work Package 3, of which this report forms a part, is to provide the EU with conceptualizations of human rights, democracy and the rule of law that take into consideration the diverse conceptions found in third countries and in other international organisations.

This comparative study poses a challenge to the reader who is unfamiliar with non-western perspectives on human rights, democracy and rule of law. While South African conceptions appear largely familiar to a European audience, China, India, and Peru present notions and perspectives that are more divergent – compared to those found in the EU. In this sense, this report is meant to challenge some of the reader's assumptions.

The report starts with a detailed description of the methodology used (Chapter II). It clarifies the terminology used, and the methods of data collection and analysis. It also discusses the practical and methodological challenges of this comparative study.

Chapter III provides a description of the historical, social, and political context of each of the countries under review, in order to more fully understand the development of the domestic conceptions of human rights, democracy and rule of law.

Chapter IV is dedicated to the comparative analysis of the domestic conceptions. This chapter is divided into three parts. Human rights conceptualisations are examined in Section A. This section shows that in the countries under review, the notion of 'human dignity', present in the European conception, is combined with other traditional notions that encourage group understandings of human rights and moderate individualism. This is the case with the notions of 'harmony and the spirit of common brotherhood' in India, the principle of *Ubuntu* in South Africa and the principle of *unity* in China.

With the exception of China, where the 'universal and relative' character of human rights is emphasized, the universality of human rights was endorsed in all countries. The same holds for the indivisibility of human rights, although prevalence of one set of rights was perceived in practice. The main distinction, amongst the countries and with the EU, was the notion of 'minority', inherently connected to each country's own historical construction. Collective rights, and moreover, the country's approach towards diversity, is deeply connected to these notions.

The review also shows that the approach towards equality taken by the countries under review is very similar to the one adopted at the EU, recognizing the equality of individuals and prohibiting discrimination based on enumerated grounds. The main difference is found in relation to the recognition of sexual orientation as a ground for discrimination.

The next chapter discusses conceptions on democracy in Section B. It finds that South Africa, Peru and India all hold similar conceptions of democracy as the EU. At the same time, these countries have distinctive elements in their concept of democracy, for instance by recognizing both constitutional authority and traditional authority (South Africa), fostering the political representation and participation of socially disadvantaged groups (India). The Chinese conception of democracy diverges widely from the EU conception of democracy since it does not include free and competitive elections as a core element, nor does the principle of ‘multi-party cooperation’ challenge the undisputed leadership of the Communist Party of China. Also, contrary to the liberal and free-market foundation of the EU, we found an explicit commitment to socialism in the Constitution of China and India, and explicit references to a ‘social state’ and ‘social justice’ as core constitutional values in Peru and South Africa, respectively.

As regards the rule of law, dealt with in Section C, this report finds that the EU shares core minimal/ ‘thin’ elements with all four countries under review. Chinese, Indian, South African and Peruvian views on legality and equality before the law do not appear much different from the EU’s views. On the other elements of the rule of law, conceptual divergences occur, particularly with regards to China, which promotes the notion of a ‘socialist rule of law with Chinese characteristics.’ It appears that in modern day China the rule of law is viewed more as an instrument (to rein in corruption, for example, and to attain the desired social system) than as an end in itself.

The report concludes that some elements of the domestic conceptions of human rights, democracy and rule of law in China, India, Peru and South Africa are widely different from the EU’s conceptions, although there is also much shared ground. Without doubt, EU external policies should be sensitive to possible conceptual differences and indicate awareness of these differences in their conceptualisations of human rights, democracy and rule of law. It also recognises that an enduring challenge is to distinguish compliance/implementation from abstract conceptions.

The report also shows that human rights occupy a privileged position in international relations and in EU foreign policy in particular, and that this emphasis on human rights is also reflected at national level. The degree of standard setting on human rights – by means of binding international treaties and authoritative soft law instruments – is not matched for democracy and rule of law.

## List of abbreviations

|                        |  |
|------------------------|--|
| ANC                    | African National Congress  |
| BEE                    | Black Economic Empowerment   |
| Bureau of Human Rights | Seventh Bureau of the State Council Information Office of the PRC  |
| CAPD                   | China Association for Promoting Democracy  |
| CASE                   | Community Agency for Social Enquiry  |
| CAT                    | Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment   |
| CDL                    | China Democratic League  |
| CEDAW                  | Convention on the Elimination of all Forms of Discrimination Against Women   |
| CERD                   | Committee on the Elimination of Racial Discrimination  |
| CGE                    | Commission for Gender Equality   |
| CNDCA                  | China National Democratic Construction Association   |
| CONGO                  | Committee on Non-Governmental Organizations  |
| CPC                    | Communist Party of China   |
| CPED                   | International Convention for the Protection of All Persons from Enforced Disappearance   |
| CPRC                   | Constitution of the People's Republic of China   |
| CPWDP                  | China Peasants and Workers Democratic Party  |
| CRC                    | Convention on the Rights of the Child  |
| CRL Rights Commission  | Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities                        |
| CRPD                   | Convention on the Rights of Persons with Disabilities  |
| CZGD                   | China Zhi Gong Dang  |
| DA                     | Democratic Alliance  |
| EIC                    | East India Company   |
| EPA                    | Environment Protection Act   |
| EU                     | European Union   |
| FHR                    | Foundation for Human Rights  |
| FRAME                  | Fostering Human Rights Among European Policies   |
| ICCPR                  | International Covenant on Civil and Political Rights   |
| ICCPR-OP1              | Optional Protocol to the International Covenant on Civil and Political Rights  |
| ICCPR-OP2              | Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty |
| ICERD                  | International Convention on the Elimination of All Forms of Racial Discrimination  |
| ICESCR                 | International Covenant on Economic, Social and Cultural Rights   |
| ICRMW                  | International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families                      |
| IEC                    | Independent Electoral Commission   |
| INC                    | Indian National Congress   |

|           |  |
|-----------|--|
| JNE       | National Jury of Elections   |
| LGBTI     | Lesbian, Gay, Bisexual, Transgender and Intersex   |
| MPNF      | Multi-Party Negotiation Process  |
| MPs       | Members of Parliament  |
| NGO       | Non-governmental Organisation  |
| NPC       | National People's Congress   |
| OAS       | Organisation of American States  |
| OBCs      | Other Backward Classes   |
| ONPE      | National Office of Electing Process  |
| OP        | Optional Protocol  |
| OP-CAT    | Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment                |
| OP-CEDAW  | Optional Protocol to the Convention on the Elimination of Discrimination against Women   |
| OP-CRC-AC | Optional protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict                  |
| OP-CRC-SC | Optional protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography |
| OP-CRPD   | Optional Protocol to the Convention on the Rights of Persons with Disabilities   |
| PAIA      | Promotion of Access to Information Act   |
| PIL       | Public Interest Litigation   |
| PRC       | People's Republic of China   |
| PUCL      | People's Union for Civil Liberties   |
| PUDR      | People's Union for Democratic Rights   |
| RCCK      | Revolutionary Committee of the Chinese Kuomintang  |
| RENIEC    | National Registry of Identification and Civil Status   |
| SAHRC     | South African Human Rights Commission  |
| SCs       | Scheduled Castes   |
| SIM       | Netherlands Institute of Human Rights  |
| SINAMOS   | National System of Support of Social Mobilisation  |
| STs       | Scheduled Tribes   |
| TEU       | Treaty on European Union   |
| TSL       | Jiu San Society and the Taiwan Democratic Self-Government League   |
| UN        | United Nations   |
| UNDP      | United Nations Development Programme   |
| UNRISD    | United Nations Research Institute for Social Development   |
| WTO       | World Trade Organization   |

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## I. Introduction

### A. Aim and scope of this study

The general purpose of work package 3, of which this deliverable forms part, is to explore the different meanings given to the concepts of human rights, democracy and the rule of law'. Deliverable 3.1 provided a state-of-the-art literature review of those concepts, revealing how these remain contested and are continually subject to questioning and revision. Moreover, an in-depth comparative analysis of the meanings attributed to these concepts within the EU, third countries, and regional and international organisations is generally lacking.

Deliverable 3.2 provided an analysis of the content and interpretation of human rights, democracy and rule of law given by the European Union ('the EU'). EU external action appears to be largely dominated by the European understanding of these concepts. The lack of awareness about the different meanings attributed to human rights, democracy and rule of law in different places can lead to difficulties when advocating the 'universality and indivisibility of human rights' (Article 21(1) TEU) in its relations with third countries.<sup>1</sup> This, in turn, can lead to questioning the legitimacy of the EU external action and hinder the EU's engagement with its actors and partners. Only after external understandings of these concepts have been studied does it become possible to assess how human rights, democracy and the rule of law need to be theoretically and conceptually defined for EU internal and external policies, how they will be best represented and defended abroad, how questions of priority areas can be addressed and how EU policies are best organised.

This report presents a comparative analysis of the different understandings and perspectives on human rights, democracy and rule of law in third countries with which EU has established bilateral cooperation, fostering human rights. Bearing in mind current EU's strategic partnerships, this study focuses on China, India, Peru and South Africa. The final purpose of this exercise is to identify shared and differing conceptions when compared to EU-held convictions so that EU policy-making may be adapted accordingly. In doing so, this report will contribute towards more effective external policies on human rights.<sup>2</sup> The scope of this review is limited to the exploration of the domestic understandings of human rights, democracy and rule of law, without engaging in a discussion on actual compliance with such formal declarations. Having said that, the analysis of case law provides some insight into the shortcomings in the implementation of those definitions.

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<sup>1</sup> See Rosa Balfour, 'Principles of Democracy and Human Rights: A Review of the European Union's Strategies towards its Neighbours' in Sonia Lucarelli and Ian Manners (eds), *Values and Principles in European Union Foreign Policy* (Routledge 2006) 114-129.

<sup>2</sup> The extent to which the differences in conceptions lead to contestation of EU policies will be addressed in the final stage of this project, by Deliverable 3.5 on human rights dialogues.

The aim of the report is not to provide a criticism of domestic conceptions, rather, it explores and compares them from a more descriptive point of view. This report is, thus, not normative, but explorative in nature. Chapter II provides detailed description of the methodology used, and discusses some of the practical and methodological challenges we encountered. Chapter III describes the social and political context of each of the countries under review, including a comparison of treaty ratification. Chapter IV is dedicated to the comparative analysis of the domestic conceptions. This section is divided into three parts. Human rights conceptions are examined in Section A, while conceptions on democracy are discussed in Section B. The comparative analysis of conceptions on the rule of law is dealt with in Section C. Each subsection concludes with a comparison between the domestic and EU conceptions. Finally, Chapter V discusses the main results of the comparative analysis.

## II. Methodology

### 1. Outline of key terms

#### a) *Concepts, conceptions and conceptualisations*

In line with the meaning of the terms ‘concepts’ and ‘conceptions’ provided in Deliverable 3.2,<sup>3</sup> this report understands **concepts** as abstractions that designate concrete objects, like ‘table,’ or more ethereal ones, like ‘justice.’<sup>4</sup> Concepts are categories of thought used by people to group entities together. They do not have clear boundaries and they are dynamic, meaning that their content changes over time.

When there are different ways of explicating or interpreting a concept, there are different **conceptions** of the concept. For instance, exploring the concept of justice, Rawls explains that there are various conceptions of justice in different societies, all corresponding to one and the same concept.<sup>5</sup> Millikan suggest that ‘conceptions’ can be understood as various specific means to the same end, each of which is fallible, and can have many components. Conceptions, thus, may be wrong, or partial.

This is tied to the notion of contested concepts: contested concepts are those concepts of which competing conceptions exist. Human rights, democracy, and rule of law are prime examples of such contested concepts since different conceptions about them are found in different places and times.

**Conceptualisation** is the process whereby concepts are given theoretical meaning. The process typically involves defining the concepts abstractly in theoretical terms. **Operationalisation** moves the focus of attention from the abstract level to the empirical level. It refers to the operations or procedures needed to measure the concept(s).<sup>6</sup>

This report explores domestic **conceptions** of **contested concepts**, namely human rights, democracy and rule of law. In doing so, the focus remains on the abstract level, paying limited attention to **operationalisation**. The eventual aim of Work Package 3 of the FRAME project, of which this report forms a part, is to provide the EU with **conceptualisations** of human rights, democracy and the rule of law that take into consideration the diverse conceptions found in third countries and in other international organisations.

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<sup>3</sup> FRAME Deliverable 3.2, 3-5.

<sup>4</sup> Aaron J Rappaport, ‘Conceptual Analysis in Science and Law’ (2010) University of California Working Paper, 9 <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1660715](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1660715)> accessed 19 December 2015.

<sup>5</sup> See Elisabetta Lalumera, ‘On the Explanatory Value of the Concept-Conception Distinction’ (2014) 8(3) *Rivista Italiana di Filosofia del Linguaggio* 73.

<sup>6</sup> See Charles W Mueller, ‘Conceptualization, Operationalization, and Measurement’ in Michael S Lewis-Beck, Alan Bryman and Tim F Liao (eds), *The SAGE Encyclopedia of Social Science Research Methods* (SAGE 2004) 162ff.

### b) Core and periphery of concepts

The fact that concepts do not have clear boundaries does not mean that they are entirely vague. Hart suggested that concepts have a **solid core and a periphery**. Following Hart, this study will also distinguish between the core and periphery of concepts, determined by comparing the stability vs. dynamicity of the elements.

As Figure 1 illustrates, the conceptual core consists of the more stable elements connected to the particular concept, while the periphery refers to elements which tend to change and be modified in time. By making a distinction between core and periphery elements of the domestic conceptions of human rights, democracy and rule of law, it will be possible to include those conceptions that are perhaps not clearly established or that are contested at different levels, which nevertheless constitute part of the national approach to human rights, democracy and rule of law.

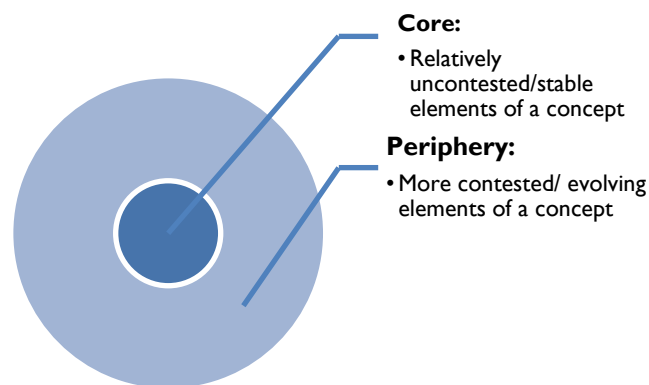


Figure 1: Core and periphery of concepts

## 2. Research questions

The report addresses two main research questions:

1. What conceptions on human rights, democracy and the rule of law can be found at the domestic level of selected third countries?
2. To what extent are conceptualisations of democracy, human rights and rule of law as found in external and internal EU policies similar or different to the domestic conceptions of the selected third countries?

These questions are answered by comparing country reports on domestic conceptions elaborated by FRAME partners from the selected third countries.<sup>7</sup> The coordination of their work and the overarching

<sup>7</sup> The Institutions involved in this report were Centre for Human Rights, University of Pretoria, Institute for Democracy and Human Rights, Pontificia Universidad Católica del Perú; Institute for Human Rights, University of Political Science and Law, China; and the Indian Society of International Law, India. The coordination of their work

analysis was conducted by the Netherlands Institute of Human Rights (hereinafter, the coordinating partner). The country reports followed a case study approach, all addressing the same research questions and deploying the same methods of data collection. Two instruments, the Guidelines for the Country Report (Annex I) and an interview protocol (Annex II), guided the partners in their data collection and analysis.

### 3. Methodology of the country reports

Two main data collection methods were used in the studies: desk research of primary and secondary sources conducted by the local partners and semi-structured interviews.

The **desk research** was guided by the Guidelines for the Country Reports, included in Annex I. The desk research consisted of several steps. Firstly, the researchers delineated the political and legal context of each country. They described the historical background of the country in relation to democracy, human rights and the rule of law, and the international obligations that the State has acquired. By establishing the social context, the researchers were capable of identifying the sources (legal and policy documents, interview participants, surveys and media) that were needed for answering the research questions.

Secondly, all relevant domestic legal and policy documents on democracy, human rights and the rule of law were explored. While laws and policies are the main sources of the country reports, case law and secondary sources, such as literature and doctrine, have contributed to interpretation and analysis.

In addition, the research partners conducted **semi-structured interviews** with policy makers and civil society representatives. These interviews contributed to the interpretation of the primary sources and were guided by the interview protocol attached in Annex II, which highlighted the main themes to be discussed with the participants. The interview participants were selected based on the results of the desk research.

Regarding the methods of analysis, the research partners identified the core and the periphery of concepts of human rights, democracy and rule of law in their country. The researchers either pointed at these elements explicitly, or implicitly by highlighting existing debates and controversies in relation to the recognition or the attributed scope of rights. In addition, the reports examined to what extent the key elements of EU conceptions of human rights, democracy and the rule of law described in Deliverable 3.2 were adopted at the domestic level. This has shown to what extent the countries share EU conceptions, answering the second research question.

### 4. Practical and methodological challenges

Conducting comparative analysis poses practical and methodological challenges, and this study was not the exception. Regarding the practical challenges of comparative analysis, we noticed the language barriers and the lack of established translations of the terminology commonly used in English language

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and the overarching analysis was conducted by Netherlands Institute of Human Rights (hereinafter, the coordinating partner).

to address human rights, democracy and the rule of law. This required a constant communication between the coordinating partner and the research partners in order to make sure that notions were interpreted appropriately, and multiple moments of feedback on initial drafts of the country reports.

Similarly, there were difficulties deriving from the different research culture in each of the countries, which influenced the ability of the partners to include critical analysis and part from mainstream or official discourse in their reports. For instance, the Chinese report included limited critical analysis, especially when compared to the Peruvian or South African reports. Another difficulty related to existing hierarchies within the domestic sphere, which often prevented third country partners from accessing relevant respondents. In some cases, having the coordinating partner establishing the initial contact with the potential respondents and later on introducing the research partners who would interview them, solved problems. This initial reluctance to participate in the project could also be seen as an indication of the human rights culture in the country.

From a methodological point of view, involving researchers from each country benefited the study in two ways. First, it guaranteed a higher level of expertise on domestic conceptions of human rights, democracy and rule of law that would otherwise not be attainable in a short period of time, and secondly, it ensured that those conceptions were understood in context. However, the decision to compare domestic conceptions based on country reports drafted by different experts rather than having a single report drafted by the same group of experts added some complexity to the comparative analysis. The main consequence being that diverse interpretation of the concepts of democracy, human rights and rule of law is more likely to occur when more people are involved. In order to prevent this issue, we submitted clear guidelines, increased communication with the partners and incorporated multiple moments of feedback during the drafting process.



### III. The particular context of the countries under comparison

#### A. Introduction

This section provides a brief historical overview leading to the current the political and legal context of the countries under study. This historical view of the countries indicate that controversies around human rights, democracy and rule of law are not fixed, but linked to a specific stage in a longer process. They can, thus, be better understood if compared to previous stages. This section provides the reader with the basic needed knowledge for understanding the detailed discussions in next sections.

#### 1. China

Current conceptions of human rights, democracy and rule of law in China are based on multiple philosophical and political perspectives that have prevailed throughout its social and political history. Four main periods can be distinguished. They briefly illustrate the changing Chinese position towards national and western conceptions, and the openness toward the international community.

**Imperial China – The Spring and Autumn Period to Qing Dynasty (770 BC- the late 19th century):** Three notions emerged during this period that contributed to the development of the current conception of human rights in China, even though no concept of ‘rights’ was found. The Chinese people understood that in order to create a harmonious community, the emperor should care for his people and individuals should understand and sympathise with each other.

This general idea derives firstly from the ‘people-based thought’, which suggests that the emperor should care for the people and refrain from treating them as slaves. This means that the ruler should respect individual rights and prioritise people’s well-being. This notion is supported by the Confucianism principle that ‘the people are above the monarch’.<sup>8</sup> As such, the combination of both notions set a limitation to the power of the government.

The third theoretical principle contributing to current conceptions of human rights discussed in sections below is the Datong thought, translated as ‘Great Unity’, ‘Great community’, ‘Great Universality’ and ‘Grand Harmony’.<sup>9</sup> It emphasises the notion of the ‘common good’ as a synonym of harmony and the lack of social conflict, calling for mutual respect and mutual help.

**The late 19th century to the May Fourth Movement (1919):** During this period, the bourgeoisie, consisting of landlords, businessmen, bureaucrats and farmers, strived to promote western notions of human rights, democracy and rule of law.

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<sup>8</sup> For more on these perspectives: Joseph Chan, ‘A Confucian Perspective on Human Rights for Contemporary China’ in Joanne R Bauer and Daniel A Bell (eds), *The East Asian Challenge for Human Rights* (CUP 1999); and Phil CW Chan, ‘Human Rights and Democracy with Chinese Characteristics?’ (2013) 13(4) *Human Rights Law Review* 645.

<sup>9</sup> See Albert HY Chen, ‘The Concept of “Datong” in Chinese Philosophy as an Expression of the Idea of a Common Good’ in David Solomon and PC Lo (eds), *The Common Good: Chinese and American Perspectives* (Springer 2014).

The concept of democracy emerged with the First Opium War (Britain's Invasion of China, 1840-1842), when the bourgeoisie and some intellectuals, such as Qichao Liang, Youwei Kang and Fu Yan, introduced the western concepts of Social Contract, Equality and Freedom. Two important events, the Reform Movement of 1898 and the Revolution of 1911, contributed to spread the conception of democracy and republicanism among the public and transformed the autocratic regime.

In addition, Qichao Liang and Sun Yat-sen introduced the term 'rule of law'. The latter proposed the idea of Five-power Constitution, consisting of the three traditional branches, the executive, the legislative and the judiciary, in addition to the supervisory and examination power. This five-branch model reflected a system of checks and balances, which would gradually turn the authoritarian concept of rule by law into a democratic rule of law.<sup>10</sup> Jian Qing points out that the five-branch model follows Chinese tradition only at the implementation level through the adoption of the supervisory and examination powers.<sup>11</sup> The model was adopted by the 1947 Constitution, which outlined a democratic republic and provided citizens with a broad range of political rights,<sup>12</sup> and it is still in place in Taiwan.<sup>13</sup>

Finally, the 'three Principles of the People', also proposed by Sun Yat-sen, also promoted human rights and democracy during this period. These are the principle of nationalism, the principle of democracy and the principle of people's livelihood. The principle of nationalism promotes the self-determination for the Chinese people and also for the minority groups within China. This idea is later reflected in the notion of collective rights and autonomy discussed in sections below. The principle of democracy, sometimes translated as the 'rights of the people,' promotes determining the government by means of election, initiative, referendum, and recall. Finally, the principle of people's livelihood, often translated as 'socialism,' seems to suggest the equalisation of land ownership through a system of taxation.<sup>14</sup> This notion is also connected to the right to subsistence and substantial equality discussed in the sections below.

**May Fourth Movement and the establishment of People's Republic of China (1919- 1949):** In response to the Treaty of Versailles in 1919, the May Fourth Movement erupted, expressing discontent with the domestic situation in China. As a result, the Chinese cabinet fell and the New Culture Movement was established throughout the 1920s and 1930s. The movement installed the rejection of liberal Western philosophy amongst leftist Chinese intellectuals. At the same time, the Russian Revolution inspired more radical lines of thought. This encouraged intellectuals and politicians to combine Marxist ideology with Chinese ideologies, which would provide the theoretical basis for conceptions of human rights, democracy and rule of law during this period.

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<sup>10</sup> 'Five-Power Constitution', *Encyclopædia Britannica Online* <<http://www.britannica.com/event/Five-Power-Constitution>> accessed 11 December 2015.

<sup>11</sup> Jiang Qing, *A Confucian Constitutional Order: How China's Ancient Past Can Shape its Political Future* (Princeton University Press 2012) 45.

<sup>12</sup> Haiting Zhang, 'Traditional Culture v. Westernization: On the Road Toward the Rule of Law in China' (2011) 25 *Temple International & Comparative Law Journal* 355.

<sup>13</sup> Denny Roy, *Taiwan: A Political History* (Cornell University Press 2003) 83.

<sup>14</sup> 'Three Principles of the People', *Encyclopædia Britannica Online* <<http://www.britannica.com/event/Three-Principles-of-the-People>> accessed 11 December 2015.

Two events had significant influence on such conceptions: the foundation of the Communist Party of China ('CPC') in 1921 and the War of Resistance Against Japan (July 7, 1937 – September 9, 1945). The establishment of the CPC had a profound impact on the conceptions of democracy, promoting the notion of People's Democratic Dictatorship, as discussed in Section B (Chapter 3).

**People's Republic of China (October 1949 to the present):** In this period, China joined the United Nations and launched a Reform and Opening Policy that influenced the domestic conceptualisations of human rights and rule of law. The concept of rule of law was included in the report of the 15<sup>th</sup> National Congress of the CPC in 1997, and the National Judicial System has faced reforms with the purpose of ensuring the independence of judges.

Regarding human rights, China has signed several international human rights treaties since the 1980s, (illustrated in Table A), and has participated in the reviews of some of their monitoring mechanisms. Nowadays, China has increasingly active in international community, both from political and economic perspective. In relation to human rights, the exchange with the international community takes place within the UN bodies. Meanwhile, as a result of the international trade with China, human rights dialogues are held between China and other countries, and also with international organisations. As a result, trade treaties may include some provisions that require the Chinese government to protect the environment and respect labour rights. Similarly, China's participation in the World Trade Organization ('WTO') has also contributed to the understanding of human rights and the position of vulnerable groups.<sup>15</sup>

In addition, the Constitution of the People's Republic of China ('CPRC') was adopted at the Fifth Session of the Fifth National People's Congress and promulgated for implementation by the Proclamation of the National People's Congress ('NPC') on December 4, 1982. The most recent constitutional amendment in 2004 has established that 'the state respects and protects human rights'.<sup>16</sup> This is to date the clearest expression of the state's will to the implementation of human rights.

Regarding conceptions of democracy, China established the People's Congress System and the system of regional ethnic autonomy in response to the demands of the people. Similarly, several democratic principles were incorporated to the CPRC.

## 2. Peru

Peruvian conceptions of human rights, democracy and rule of law are embedded in the social and political process that took place since the end of the Spanish colonial rule. There are six main stages in the Peruvian post-colonial socio-political history: oligarchy, military government, first transition to democracy, authoritarianism, second transition to democracy, and finally, democracy.

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<sup>15</sup> See Shaoguang Wang, 'The Social and Political Implications of China's WTO Membership' (2000) 9(25) *Journal of Contemporary China* 373.

<sup>16</sup> Constitution of the People's Republic of China [1982], Art. 33(3).

There are three notions that appear to be central to each of these stages: partisan and civil participation, the protection of civil and political human rights, and the preferred approaches for tackling poverty and economic hardship. The interplay between these notions emphasise the fragile connection between democracy and the protection of human rights in Peru, which can be easily infringed on the one hand, while formally upholding Rule of Law elements on the other.

**Oligarchy (1821 - 1968):** This first stage was characterised by social exclusion and repression of vulnerable sectors such as workers and peasants, with a strong participation of the military. Economic difficulties and the segmentation of the military triggered the mobilisation of civil society and political parties, who called for a 'social and political democratisation' of Peru. In this context, 'democratisation' pointed to equal access, notably, of resources and power. Land Reform started to be seen as an alternative for the redistribution of wealth in the country. There was an increase in the political participation of the society, which later led to conflict and triggered a military response.<sup>17</sup>

**Military Government (1968 - 1980):** Unlike military governments in other parts of Latin America, the military government in Peru, called 'the revolutionary government of the Military Forces', emphasised social, economic and cultural rights by promoting a series of left wing and nationalist measures. Land was expropriated, major public companies were created and a law on land reform was passed, promoting the view that 'land belongs to those working on it'.<sup>18</sup> In relation to cultural rights, Quechua language, spoken by the large majority of indigenous people in Peru, was recognised as official language. However, civil and political rights, particularly freedom of expression, were restricted in this period. The press was severely monitored and reduced, while civil participation was articulated through a vertical structure of participation, the National System of Support of Social Mobilisation (Spanish abbreviation, 'SINAMOS'). Political parties were suppressed.

Nevertheless a new political crisis arose as a result of the weakening of the economy, since regardless of the initial measures adopted, production levels remained low and dependency on export products persisted. This triggered the mobilisation of social movements, unions and students, which led the Military government to call for a Constitutional Assembly (1978). This time, civil unrest and participation derived from the deficiencies of economic and social measures, speeded up the decline of the government and resulted in a new Constitution (1979) and democratic government after holding elections (1980).

**First transition to democracy (1980 - 1990):** During this first transitional period to democracy, the military exited the political arena, while the political parties re-entered the scene. The 1979 Constitution provided a new opportunity to articulate a more inclusive democratic and representative system. Nevertheless, politics and other democratic avenues were not able to channel the social discontent that was rising due to the economic hardship, social inequality and discrimination that the country was facing. The inability of the political parties to represent a segment of the population facilitated the emergence of subversive groups during this period, in particular Sendero Luminoso, which aimed at

<sup>17</sup> Julio Cotler, *Clases, Estado y Nación en el Perú* (Instituto de Estudios Peruanos 2005) 293 and 338.

<sup>18</sup> *ibid* 361-368.

establishing a revolutionary communist government with peasants at its centre. The governments of Fernando Belaunde (1980-1985) and Alan García (1985-1990) had to deal with these issues while coping with a massive internal migration and the need for a new economic model. The inability of the government to deal with those difficulties eroded the democratic process and fuelled the collapse of the partisan system. The legitimacy of the political parties was severely questioned.<sup>19</sup>

**Authoritarianism (1990 - 2000):** This period was characterised by the discredit of political parties, favouring the rise of Alberto Fujimori, who introduced himself as an ‘outsider’ of politics, promoting ‘anti-politics’ and blaming political parties for the lack of economic development. Fujimori endorsed direct participation rather than indirect representation. Once elected, he pursued a liberal market policy and adopted a military strategy towards subversive movements. In 1992, with the support of the military, Fujimori dissolved the Congress and other democratic institutions such as the Judiciary, the Constitutional Tribunal and the Electoral Jury. These measures, however, were supported with 80% of positive votes in the polls.

In response to complaints by the Organisation of American States (‘OAS’), Fujimori called for a new Constitutional Assembly, which was supported by a referendum. The new Constitution,<sup>20</sup> adopted in 1993, was nevertheless drafted without the participation of political parties or social movements. As a result, socio-economic rights, such as the right to education and labour rights were restricted.

The counter-insurgency strategies promoted by Fujimori supported the creation of paramilitary groups, which were responsible for the perpetration of crimes and violation of human rights. Social organisations were under the attack of public, paramilitary and subversive forces. A number of laws were passed allowing for the infringement and limitation of human rights.<sup>21</sup>

**Second transition to democracy (2000 - 2001):** During the third presidential term of Fujimori, social unrest slowly transformed into a movement in response to the economic crisis and the corruption in the government. Union leaders, social movements, students and political parties united in this process, demanding the democratic transformation of the political system. Soon after, Fujimori resigned and went into exile in Japan.

The presidency fell on the president of the Congress, Valentín Paniagua. A Truth Commission was formed, and mandated to investigate all human rights violations taking place during the government of Fujimori. Paniagua supported the rule of law, promoting the separation of powers as a first solution to the political and economic crisis. Political parties were reinstated and appeared willing to voice social

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<sup>19</sup> Martín Tanaka, *Los Espejismos de la Democracia: El Colapso del Sistema de Partidos en el Perú 1980-1995, en Perspectiva Comparada* (Instituto de Estudios Peruanos 1998) 16.

<sup>20</sup> For an English version of the Peruvian Constitution: <<http://spij.minjus.gob.pe/CLP/contenidos.dll?f=templates&fn=default-constitucion.htm&vid=Ciclope:CLPdmo>> accessed 10 December 2015.

<sup>21</sup> For example, since 1993, the National Intelligence Service was established, with the aim of adopting legislation that would ensure the impunity for the human rights violations that were being committed throughout the conflict. Several such laws were passed. For instance, Law N° 26479 on Amnesty was adopted in 1995 and the Law N° 26657 on Authentic Interpretation of Article 112 of the Constitution was passed in 1996, which allowed a third presidential term for Fujimori.

claims. Alejandro Toledo, who led the opposition during the time of Fujimori, was elected president in 2001.

**Democracy (2001 – to date):** In this period, there has been a growing importance of political parties. Civil participation increased, in part due to the decentralisation of the government. Fujimori faced criminal responsibility for the violation of human rights and murder of citizens, and was sentenced to 24 years in prison. In economic terms, the liberal economic model was sustained with some regulation being adopted in relation to transport and communication.

Regardless of these positive aspects, social conflicts have continued to arise. One specific area of conflict during this period relates to the protection of indigenous rights, in particular the right to prior consultation regarding exploitation of resources, which was in tension with the economic policies and the approach to development promoted by the governments.<sup>22</sup> In addition, social inequality remains an important issue affecting most of the population.

This brief overview of the political process of the last 50 years in Peru describes social tensions affecting different human rights in each period. While compliance with social and economic rights seems a struggle throughout the process, violations of civil and political rights were more frequent during the military government and the authoritarian turn in the 1990s. These trends correspond to the jurisprudence of the Inter-American Court and the Human Rights Committee regarding Peru in relation to arbitrary detention, fair trial and the right to life.<sup>23</sup> After a period of attention to violations to civil and political rights, in particular to due process, cases shifted toward the protection of other rights, such as the right to abortion, pensions and the right to prior consultation of indigenous peoples. Social unrest, however, seems to follow economic upheavals, rather than severe violation of civil and political rights.

### 3. South Africa

South African conceptualisations of human rights, democracy and rule of law have been shaped by the country's history of racial segregation, a history that dates back to 1652 when white settlers from the Dutch East India Company first landed in Cape Town. Segregation morphed into a legal system of 'separate development, requiring a division of political power between the people'<sup>24</sup> in 1948 after the

<sup>22</sup> Oscar del Alamo, 'Perú, una Década de Crecimiento, Conflictos y Desigualdad' (2011) 2(2) *Politai Revista de Ciencia Política* 78.

<sup>23</sup> See *Ivcher Bronstein v. Peru* (Competence) Inter-American Court of Human Rights Series C No 54 (24 November 1999); *Tribunal Constitucional v. Peru* (Competence) Inter-American Court of Human Rights Series C No 55 (24 November 1999); *Barrios Altos v. Peru* (Merits) Inter-American Court of Human Rights Series C No 75 (14 March 2001); *La Cantuta v. Perú* (Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 162 (29 November 2006); *Teófile Casafranca de Gómez v. Peru* (Communication No. 981/2001) Human Rights Committee (2003) CCPR/C/78/D/981/2001; *Chira Vargas-Machuca v. Peru* (Communication No. 906/2000) Human Rights Committee (2002) CCPR/C/75/D/906/2000 and CCPR/C/75/D/906/2002.

<sup>24</sup> Daisy M Jenkins, 'From Apartheid to Majority Rule: A Glimpse into South Africa's Journey towards Democracy' (1996) 13(2) *Arizona Journal of International and Comparative law* 463, 484.

National Party won the elections. Apartheid was a legal system that ‘... uncharacteristic of dictatorial regimes ... relied heavily on law as an instrument of political repression’.<sup>25</sup>

In terms of human rights under apartheid, although there was a sense of fairness and natural justice in both the Roman-Dutch and English law traditions, both of which formed the basis of South Africa’s common law, the legislation enacted by the apartheid government overrode these considerations<sup>26</sup> and the protection of civil liberties when they were applicable to South Africa’s majority black population. Legislation enacted to further the objective of racial segregation included: the Population Registration Act 30 of 1950, which further subdivided South Africa’s ‘non-white’ or ‘black’ population into two categories (coloured and black, to which Indian was later added), the Group Areas Act 41 of 1950, which implemented the spatial separation of races by creating different residential areas for different races and was achieved through forced removals and the dispossession of land, the Prohibition of Mixed Marriages Act 55 of 1949, the Reservation of Separate Amenities Act 49 of 1953 etc. It was, as Jenkins identifies, ‘a system of institutionalized violence because apartheid’s architects could only achieve success through the most repressive means of law enforcement’.<sup>27</sup>

In an attempt to appear lawful in the eyes of the international community, the Apartheid government passed legislation with strict compliance to formal procedural requirements. However, as noted by a report published in 1960, ‘...the formal correctness of a legislative measure does not *per se* assure its compliance with the Rule of Law; the absence of the social content in an Act and its incompatibility with the basic principles of human rights makes it devoid of those ethical and moral values.’<sup>28</sup> Furthermore, Budlender explains that: ‘[There are] laws which place such unrestrained powers in the hands of state officials that the exercise of state power is effectively lawless - that is, there is no independent judicial control over the exercise of power.’<sup>29</sup>

The fight of the majority of the population against racial segregation finally bore fruit culminating in the first democratic elections on 27 April 1994 that resulted in the African National Congress (‘ANC’) winning with an overwhelming majority. With 90% of the population having been excluded from political participation, human rights, democracy and rule of law were concepts that lacked meaning in apartheid South Africa to the majority of the population. This history shaped the drafting of the Interim Constitution and subsequently the 1996 Constitution.

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<sup>25</sup> James L Gibson and Amanda Gouws, ‘Support for the Rule of Law in the Emerging South African Democracy’ (1997) 49(152) *International Social Science Journal* 173.

<sup>26</sup> Jeremy Sarkin, ‘The Common Law in South Africa: Pro Apartheid or Pro-Democracy?’ (1999) 23 *Hastings International and Comparative Law Review* 1.

<sup>27</sup> Jenkins, ‘From Apartheid to Majority Rule’ (n 24) 499.

<sup>28</sup> International Commission of Jurists, *South Africa and the Rule of Law* (ICJ 1960), 6 <<http://www.icj.org/south-africa-and-the-rule-of-law/>> accessed 29 June 2015.

<sup>29</sup> Geoff Budlender, ‘Law and Lawlessness in South Africa’ (1988) 4 *South African Journal on Human Rights* 139.

The Constitutional drafting process began with the Multi-Party Negotiation Process ('MPNF') that commenced on 2 April 1993.<sup>30</sup> The 1993 interim Constitution contained a set of constitutional principles<sup>31</sup> that the drafters of the Final Constitution were bound to adhere to.<sup>32</sup> The interim Constitution for the first time provided 'a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex.'<sup>33</sup>

The newly elected ANC government invited South Africans to contribute to the drafting of the Final Constitution by submitting their suggestions. This public participation campaign is said to have reached 73% of all adult South Africans, or 18.5 million people.<sup>34</sup> The principles of the interim Constitution were co-opted into the 1996 final Constitution that firmly entrenches democracy, human rights and rule of law as three of its cardinal principles. Specifically, under its Chapter 1 titled 'Founding provisions' the Constitution asserts that the values underpinning South Africa encompasses the 'advancement of human rights and freedoms', 'supremacy of the constitution and the rule of law' and 'a multi-party system of democratic government'.

*Ubuntu*, often translated as 'humanity', 'personhood' or 'humaneness',<sup>35</sup> is a value that is underlying the post-apartheid constitutional order, which has 'provided a gateway for African ideas and values to infuse South African law'.<sup>36</sup> The concept indicates an African philosophy of humanism, linking the individual to the collective through 'sisterhood' or 'brotherhood'. It is further understood as group solidarity, especially where such solidarity is crucial to the survival of societies with scarce resources. In other words, it means a person can only be a person through others.

Regarding the legal reception of the concept, the Postamble to the 1993 Interim Constitution read:

There is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for ubuntu but not for victimisation.<sup>37</sup>

The preamble to the Promotion of National Unity and Reconciliation Act, the constitutive instrument of the Truth and Reconciliation Commission, also expressly referred to Ubuntu.<sup>38</sup> The notion, promoting

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<sup>30</sup> South African History Online, 'How SA Emerged as a Democracy from the Crises of the 1990s: Settlement' <<http://www.sahistory.org.za/article/negotiations-toward-new-south-africa-grade-12-2>> accessed 29 June 2015.

<sup>31</sup> Constitution of the Republic of South Africa, Act 200 of 1993 ("Interim Constitution"), sch 4.

<sup>32</sup> Christina Murray, 'A Constitutional Beginning: Making South Africa's Final Constitution' (2000-2001) 23 University of Arkansas at Little Rock Law Review 809.

<sup>33</sup> Interim Constitution, Postamble.

<sup>34</sup> Constitutional Talk, April 22-May 8, 1996, No. 3 (reporting on the results of an independent survey by the Community Agency for Social Enquiry (CASE)).

<sup>35</sup> *S v Makwanyane and Another* 1995 (3) SA 391 (CC) para 308.

<sup>36</sup> Tom W Bennet, 'Ubuntu: An African equity' (2011) 14(4) Potchefstroom Electronic Law Journal 30.

<sup>37</sup> Interim Constitution, Postamble.

<sup>38</sup> Promotion of National Unity and Reconciliation Act 34 of 1995.



unity and understanding, became one of the keys to the political settlement of the crimes committed during Apartheid, which offered amnesty to the perpetrators who confessed the truth.

Bennet explains that although there was no solid legal foundation, apart from an aspirational clause in the postamble to the 1993 Interim Constitution, Ubuntu entered the mainstream of legal discourse by a series of judgments in the Constitutional and High Courts.<sup>39</sup> In *S v Makwanyane*, the Constitutional Court held that:

Metaphorically, [ubuntu] expresses itself in *umuntu ngumuntu ngabantu*, describing the significance of group solidarity on survival issues so central to the survival of communities. While it envelops the key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity, in its fundamental sense it denotes humanity and morality. Its spirit emphasises respect for human dignity, marking a shift from confrontation to conciliation.<sup>40</sup>

As such, Ubuntu appears to support restorative rather than retributive justice, promoting social harmony. This is the underlying spirit of current conceptions of human rights, democracy and rule of law in post-Apartheid South Africa.

#### 4. India

This section will present a selection of developments that have taken place since the birth of so-called '(Early) Modern India' in the 18<sup>th</sup> century. It is important to note, however, that the Indian 'philosophical and cultural development' dates back more than 4,000 years.<sup>41</sup> Some pre-1700 context is thus unavoidable to understand the strong link that exists between religion, socio-cultural norms and legal tradition.

**Religious origin (Pre-1700):** The foundation for the concepts that are now known as i.e. democracy, human rights, and the rule of law, can be traced back to the *Upanishads*. These scriptures enumerate the philosophical basis for what has evolved into modern Hinduism and '[...] have continued to influence the life and thought of the various religious traditions'.<sup>42</sup>

Within the *Upanishads*, it is the concept of *dharma* that carries the meaning of righteousness and truth (*satya*). Moreover, as BAU 1.4.14 points out '[t]he law (*dharma*) is the ruling power of the ruling

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<sup>39</sup> Bennet (n 36) 32.

<sup>40</sup> *S v Makwanyane* (n 35) para 308.

<sup>41</sup> See Ralph Buultjens, 'Understanding Modern India' <<http://asiasociety.org/understanding-modern-india>> accessed 5 December 2015.

<sup>42</sup> Patrick Olivelle, *The Early Upanishads* (OUP 2014) 3. One must note that Hindu philosophy distinguishes between Śrutis ("that which is heard") and Smṛtis ("that which is written down"). Śrutis are widely considered to be the most authoritative of the religious texts. The Upanishads are a type of śruti that provide moral and religious guidelines on how to live a virtuous life.

power'.<sup>43</sup> Those who rule are, in other words, still subjected to the authority of *dharma*. The verse continues to highlight that '[t]he weaker also overpowers the stronger *by the law* [...]', once more recognising the authoritative and universal nature of law.<sup>44</sup> The ability to challenge the 'stronger by the law' insinuates that one has a voice. Though grounded in religious tenet at this time and not implying participatory equality per se, it does suggest a most basic form of review and (theoretically) limits the power of those whom rule.

**East India Company (1757 – 1857):** Initially, the East India Company ('EIC'), primarily concerned with profit and still acting as an agent of the Mughal Emperor at this time, avoided interference with local custom as much as possible.<sup>45</sup> When its administrative and political influence increased, however, it could no longer forego fulfilling legislative and judicial functions too.<sup>46</sup> To minimise expenses whilst retaining effective control, the EIC made use of regional intermediaries and adjusted e.g. its legal system to correspond to the local Muslim or Hindu personal laws in use.<sup>47</sup>

In 1828, Governor-General Bentinck liberalised EIC policies to enable universalism and spur a shift in importance from collective to individual rights to occur.<sup>48</sup> Strengthening the individuals' choice intended to liberate the Indian people from '[...] the grip of family, caste and religious community'.<sup>49</sup> Such a profound shift towards individualism and the formalisation of the legal regime was, however, perceived to disregard established socio-cultural and religious traditions, and resulted in the Rebellion of 1857. That revolt, in turn, led the British Parliament to adopt the *Government of India Act 1858*, which liquidated the East India Company and forced a re-organisation the British presence.<sup>50</sup>

**The British Raj (1858 – 1947):** Upon dissolution of the EIC, the British Indian territories were integrated into the British Empire and the most blatant Westernisation practices were halted. The 1857 Rebellion had made clear that the Indian people – both Hindus and Muslims alike – had no interest in foregoing their religious traditions and socio-cultural hierarchies.<sup>51</sup> As a response, the British e.g. increased political consultation on a local level and allowed for the distinction between Anglo-Hindu and Muslim personal laws to remain.<sup>52</sup> In all other fields of law, however, the formalisation initiated under the EIC

<sup>43</sup> Paul Horsch, 'From Creation Myth to World Law: The Early History of Dharma' (2004) 32 *Journal of Indian Philosophy* 423, 437 (Translated by Jarrod L Whitaker). BAU refers to the *Brihadaranyaka Upanishad*.

<sup>44</sup> *id.*

<sup>45</sup> See Donald R Davis, 'A Historical Overview of Hindu Law' in Timothy Lubin, Donald R Davis and Jayanth K Krishnan (eds), *Hinduism and Law: An Introduction* (CUP 2010).

<sup>46</sup> *id.*

<sup>47</sup> Susanne H Rudolph and Lloyd I Rudolph, 'Living with Difference in India' (2000) 71(s1) *The Political Quarterly* 20, 24.

<sup>48</sup> *id.*

<sup>49</sup> *id.*

<sup>50</sup> *Government of India Act of 1858* (21 & 22 Vict. c. 106).

<sup>51</sup> See Rudolph and Rudolph (n 47); Ananta K Giri, 'The Rule of Law and Indian Society: From Colonialism to Post-Colonialism' in Pietro Costa and Danilo Zolo (eds), *The Rule of Law: History, Theory and Criticism* (Springer 2007) 596ff.

<sup>52</sup> *id.*

would continue until '[...] a complete codification of all fields of commercial, criminal, and procedural law [...]'] had been achieved.<sup>53</sup>

The participation of native legal officers in the judicial system was reduced, but there was an increase of Indian involvement in the executive branch.<sup>54</sup> Although Indians were only given positions subordinate to the British and participation was limited to a select few, this development was novel. Democratic governance remained absent, though one could consider a minimal effectuation of (political) rights to have occurred.

A more widespread realisation of political rights and civil liberties commenced when Gandhi took leadership of the Indian National Congress ('INC').<sup>55</sup> Up to that moment, INC membership had consisted of a Westernised elite, who - despite recognising that British policies had taken advantage of Indian wealth - did not resort to political activism.<sup>56</sup> Under Gandhi there was an active push for self-governance (*Swaraj*) that would begin to institutionalise democratic principles.<sup>57</sup>

**Post-Independence (1947 – present):** In the aftermath of WWII, the British Parliament passed the *Indian Independence Act 1947* which finalised the establishment of the Union of India. It wasn't until the adoption of the Constitution in 1950, however, that India officially became a sovereign and democratic republic within the Commonwealth.<sup>58</sup>

The Indian Constitution, as such, safeguards a variety of (individual) fundamental rights that are considered essential to liberal democracies.<sup>59</sup> These rights strive to reverse inasmuch possible the inequalities that had become common under British colonial rule. Though the Constitution itself lists a limited number of rights, several 'non-binding constitutional directives [...] exist [to facilitate their enforcement and] the judiciary has expanded [their] scope to include some [...] basic entitlements indispensable for the enjoyment [of these rights]'.<sup>60</sup> Notwithstanding the progress that has been made in light of India's turbulent colonial history, the effectuation of human rights remains problematic.<sup>61</sup> What becomes clear is that the practical realisation of fundamental rights does not automatically follow from their constitutional inclusion.

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<sup>53</sup> Giri (n 51) 597.

<sup>54</sup> See Rudolph and Rudolph (n 47); Giri (n 51).

<sup>55</sup> Sumit Ganguly, 'Introduction' in Sumit Ganguly, Larry Diamond and Marc F Plattner (eds), *The State of India's Democracy* (JHU Press 2007) ix.

<sup>56</sup> Sugata Bose and Ayesha Jalal, *Modern South Asia: History, Culture, Political Economy* (Routledge 2003).

<sup>57</sup> See Ganguly (n 55); Anthony Parel, *Hindu Swaraj and Other Writings of M. K. Gandhi* (CUP 1997).

<sup>58</sup> See Constitution of India, Preamble.

<sup>59</sup> *ibid* pt III.

<sup>60</sup> See Parliamentary Strengthening <<http://www.parliamentarystrengthening.org/humanrightsmodule/pdf/humanrightsunit2.pdf>> accessed 7 December 2015.

<sup>61</sup> See e.g. Human Rights Watch, 'World Report 2015' <[https://www.hrw.org/sites/default/files/wr2015\\_web.pdf](https://www.hrw.org/sites/default/files/wr2015_web.pdf)> accessed 7 December 2015. See also Table A for an overview of the international human rights treaties that India has ratified to date.

## B. Ratification of human rights treaties.

Generally speaking, the states under review show a strong commitment to human rights based on the ratification of international human rights, as illustrated in Table A. While most countries show willingness to ratify the core instrument, optional protocols ('OP'), particularly those subjecting the States to individual complaint mechanisms, show lower ratification levels.

|                               | China | Peru | South-Africa | India |
|-------------------------------|-------|------|--------------|-------|
| <b>International Treaties</b> |       |      |              |       |
| CAT                           | ✓     | ✓    | ✓            |       |
| OP-CAT (2006)                 |       | 2006 |              |       |
| CEDAW                         | ✓     | ✓    | ✓            | ✓     |
| OP-CEDAW (2000)               |       | ✓    | 2005         |       |
| ICERD                         | 1981  | ✓    | ✓            | ✓     |
| CPED                          |       | 2012 |              |       |
| CRC                           | ✓     | ✓    | ✓            | 1992  |
| OP-CRC-AC (2002)              | ✓     | ✓    | ✓            | ✓     |
| OP-CRC-SC (2002)              | ✓     | ✓    | 2003         | ✓     |
| CRPD                          | ✓     | ✓    | ✓            | ✓     |
| OP-CRPD (2008)                |       | ✓    | ✓            |       |
| ICCPR                         |       | ✓    | ✓            | 1979  |
| ICCPR-OP1 (1976)              |       | ✓    | ✓            |       |
| ICCPR-OP2 (1991)              |       |      | 2002         |       |
| ICESCR                        | ✓     | ✓    | ✓            | 1979  |
| ICRMW                         |       | ✓    |              |       |

Note: Years included in the 'International Treaties' column indicate when an instrument entered into force. Years included in the country-specific columns indicate when the countries signed the treaties but no ratification has followed. See <<https://treaties.un.org/pages/participationstatus.aspx>> for an overview of the ratification status of all UN treaties.

**Table A: Ratification of International Treaties by the countries under review**

Ratification rates of regional human rights instruments, however, are lower, as illustrated in Table B suggests a lower grade of commitment.

|   |
|---|
| <b>China</b>  |
| N/A   |
| <b>Peru</b>   |
| <ul style="list-style-type: none"> <li>The American Convention on Human Rights (1978) <ul style="list-style-type: none"> <li>Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights ('Protocol of San Salvador') (1999)</li> </ul> </li> <li>The Inter-American Convention to Prevent and Punish Torture (1987)</li> <li>The Inter-American Convention on Forced Disappearance of Persons (1996)</li> <li>The Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women ('Convention of Belém do Pará') (1995)</li> </ul> |
| <b>South-Africa</b>   |
| <ul style="list-style-type: none"> <li>AU Convention Governing the Specific Aspects of Refugee Problems in Africa (1974)</li> </ul>   |

- The African Charter of Human and Peoples' Rights (1986)
  - Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2005)
  - Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court of Human Rights (2004)
- The African Charter on the Rights and Welfare of the Child (1999)
- The Constitutive Act of the African Union (2001)
- The African Charter on Democracy, Elections and Governance (2012)

|              |
|--------------|
| <b>India</b> |
|--------------|

|     |
|-----|
| N/A |
|-----|

*Note:* Years indicate when an instrument entered into force.

**Table B: Ratification of regional human rights treaties in countries under review**

## IV. Comparative analysis of interpretations and conceptions

### A. Human Rights

#### 1. Introduction

This section describes the conceptualisations of human rights in China, Peru and South Africa. The main research question this section seeks to answer is what conceptions and perspectives on human rights can be found at the domestic level of these countries. In addition, this section explores what elements belong to the core of the conception of democracy and what elements are more contested/belong more to the periphery. Elements belonging to the core/periphery of the conceptualisations have been identified by explicit references made by the partners and experts in their reports, and sometimes by highlighting the controversies in relation to the rights, their limitations and the lack of practical implementation.

#### 2. Universality of human rights

Although rooted in different theoretical principles, the universal nature of human rights is unquestioned in Peru and South Africa. In the case of China, a strong emphasis on relativism is found, although the universality of human rights is emerging in political discourse. Regardless of the philosophical views of the universalism of human rights, restrictions in relation to whom enjoy human rights within the domestic borders differs in all countries.

Regarding **South Africa**, the rights in the Bill of Rights are universal, belonging to everyone. According to the Constitutional Court, ‘everyone’ means a person within the territorial boundaries of South Africa, irrespective of whether they are citizens.<sup>62</sup> In cases in which the rights are limited to citizens or a narrower category of natural persons (e.g. children), the Constitution explicitly sets out such limitations.<sup>63</sup>

In the **Peruvian** perspective, human rights are a universal entitlement. The notion underlying the universal character of human rights in Peru is that of ‘human dignity’, further supported by the prohibition of discrimination. According to the Peruvian Constitution, it is the goal of the State to protect and promote human dignity.

However, universal entitlement is not translated into a universal capacity to exercise those rights. In some situations, Peruvian law restricts legal capacity of certain groups as a form of limitation of citizenship, such as convicts and other persons deprived from their legal capacity. In addition, in relation to the violent past of the country, members of insurgent groups are often excluded from certain

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<sup>62</sup> *Khosa and Others v Minister of Social Development and Others, Mahlaule and Another v Minister of Social Development* 2004 (6) BCLR 569 (CC) para 47.

<sup>63</sup> See Constitution of the Republic of South Africa, Act 108 of 1996 (“Constitution of South Africa”) ss 3, 19-20, and 28.

benefits, such as reparation measures for the violation of human rights during the last authoritarian government.

In the **Chinese** perspective, the predicated universalism of human rights is associated to capitalism, western values and threats to State sovereignty. China holds today that human rights are of both universal and particular, but there is strong emphasis on the cultural relativism of human rights. The different history, values, culture and social background, suggest that the promotion and protection of human rights cannot follow only one model. Yong Xia warns that if Western's human rights standards are the only measure, the political, economic and cultural conflicts between different countries would be intensified, and the promotion of human rights would be hindered.<sup>64</sup>

This association of the idea of human rights with western values is also translated into political terms, suggesting that the universal/relativist conflict also relates to the capitalist/communist divide. This is also deeply connected to the Chinese emphasis on State sovereignty. The Chinese government held that: '[t]he development of human rights in a certain country, regardless of the extent of its territory, should only be settled by its government considering the demands of the people'.<sup>65</sup>

Regarding the universal application of human rights, the CPRC proclaims that all persons holding the nationality of the People's Republic of China are citizens.<sup>66</sup> Citizens are equal before the law.<sup>67</sup> This limitation of the enjoyment of rights to 'citizens' seems to suggest that foreigners cannot make claims against constitutional basic rights (citizen's rights) that are not explicitly formulated as such.<sup>68</sup> However, Lieu et al consider Chinese constitutional rights as human rights, and invoke article 32 of the constitution to extend them beyond the 'citizen'.<sup>69</sup> Similarly, Mo Jihong sustains that the inclusion of

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<sup>64</sup> Yong Xia, *Origin of the Concept of Human Rights: The Historical Philosophy of Rights* (China University of Political Science and Law Press 2011) 251.

<sup>65</sup> State Council Information Office of the People's Republic of China, 'The Development of Human Rights in China for 50 Years' <[http://www.gov.cn/gongbao/content/2000/content\\_60013.htm](http://www.gov.cn/gongbao/content/2000/content_60013.htm)> accessed 13 May 2015.

<sup>66</sup> CPRC, Art. 33(1). Only two provisions incorporate foreigners to the protection of the Constitution. Art. 32 grants protection of the lawfully given rights and duties of foreigners within China's borders, and Art. 50 recognises rights to foreign ethnic Chinese.

<sup>67</sup> See CPRC, Art. 33(2). The 1980 Nationality Law (10 September 1980) established that persons eligible for Chinese citizenship include:

1. Any person born in China or abroad who can show that either one or both parents is a Chinese national, regardless of "ethnicity" (article 2), unless one or both parents has permanent abode in a foreign country and the newborn obtains a foreign nationality at birth (arts. 4 and 5).
2. Any person born in China whose parents are stateless or of uncertain nationality with fixed abode in China (art. 6);
3. Foreign nationals and stateless persons may obtain Chinese citizenship provided they are a near relative of a Chinese person, have permanently settled in China, or has other legitimate reasons (art.7).

<sup>68</sup> Wei Zhou, *Judicial Remedies and Basic Rights in the Constitution* (Chinese People's Public Security University Press 2003) 27.

<sup>69</sup> Hainian Liu, Lin Li and Morten Kjærum (eds), *Human Rights and Administration of Justice: Collected Papers from the Chinese-Danish Symposium on the Protection of Human Rights in Judicial Work* (China Legal System Publishing House 1999) 6.

‘human rights’ into the Constitution dictates that rights should be made equally applicable to all.<sup>70</sup>

The **Indian** Constitution emphasises the principles of secularism, democracy, the rule of law and the equality of all human beings, notions that have deep roots in India’s ancient civilisation. India has a long heritage with regard to human rights concerns and education predates the history, philosophy and law that was known or evolved in other societies. Some of those values are legacy of Buddhism, later translated into policies by Asoka, who ruled India from c. 268 to 232 BCE. Even when the Indian Constitution does not refer to human rights as universal, the decision to adopt ‘western’ values in the new post-colonial India reflects an ideological agreement with such idea. Moreover, article II of the Commonwealth Charter adopted in 2013, including India, reads as follows:

We are committed to the Universal Declaration of Human Rights and other relevant human rights covenants and international instruments. We are committed to equality and respect for the protection and promotion of civil, political, economic, social and cultural rights, including the right to development, for all without discrimination on any grounds as the foundations of peaceful, just and stable societies. We note that these rights are universal, indivisible, interdependent and interrelated and cannot be implemented selectively. We are implacably opposed to all forms of discrimination, whether rooted in gender, race, colour, creed, political belief or other grounds.<sup>71</sup>

This is a confirmation that the Indian perspective of human rights regards them as a universal entitlement. That said, the Constitution distinguishes some rights as belonging to everybody within the territory of India, and some entitlements of citizens only.

### 3. Indivisibility of rights

The indivisibility of human rights is formally recognised in all countries under review, although to different extent. Regardless of this, in all of them a practical or political preference for civil and political rights (referred to as first generation rights in the past) or economic, social and cultural rights (‘second generation’ rights) is perceived. In addition, another type of ‘indivisibility’ is found in some of the countries under review, that of rights and duties.

In **South Africa**, the Constitution does not divide the bill of rights into first, second and third generation rights. Instead, all the rights are considered as interdependent with none being superior to the other. In the Constitutional Court judgment of *Grootboom*<sup>72</sup>, Justice Yacoob held that:

Our Constitution entrenches both civil and political rights and social and economic rights. All the rights in our Bill of Rights are inter-related and mutually supporting. There can be no doubt that

<sup>70</sup> Jihong Mo, *Globalization and Constitutional Government* (Law Press 2005) 148.

<sup>71</sup> Charter of the Commonwealth (adopted 19 December 2012, entered into force 11 March 2013) <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/136337/Cm\\_8572.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/136337/Cm_8572.pdf)> accessed 18 December 2015.

<sup>72</sup> *Government of South Africa v Grootboom* [2000] JOL 7524 (CC).



human dignity, freedom and equality, the foundational values of our society, are denied those who have no food, clothing or shelter.<sup>73</sup>

However, an argument could be made that to the extent that there is a hierarchy of rights, at the very least the right to life and dignity would be the foremost. The South African Constitutional Court in its judgment considering the right to life and whether this right could be justifiably limited by imposing the death penalty affirmed that 'Respect for life and dignity [...] are values of the highest order under our Constitution.'<sup>74</sup>

Considering that every right is often tied to an obligation, the South African Constitution also stipulates certain individual responsibilities that need to be adhered to. The Constitution provides that every citizen is 'equally subject to the duties and responsibilities of citizenship',<sup>75</sup> which encompasses the duty not to threaten or take the life of another, pay rates and duties for municipal services, and refraining from abusing the rights of others.

The Constitutional changes taking place in **Peru** since 1979 until 1993 show an ambivalent position towards the indivisibility of human rights. A military government that supported the expansion of economic and social rights adopted the Constitution of 1979, and as such, social, economic and cultural rights were recognised, in addition to civil and political rights. This perspective changed with the adoption of the Constitution of 1993, which, adopting a neoliberal approach, abolished several of the socio-economic entitlements recognised in the previous Constitution.

Although the Peruvian Constitution does not address the indivisibility of rights expressly, case law of the Constitutional Tribunal has established in 2005 the indivisibility of human rights, leading to the obligation of the State to respect, protect and fulfil them.<sup>76</sup> Nevertheless, the indivisibility of human rights is not enforced in practice, since civil and political rights are largely undisputed while social and economic rights are regarded as a policy concern in the view of some public authorities, political actors and media.

The Peruvian Constitution makes reference to individual duties in article 38, such as honour the country, protect the national interests and respect the Constitution, but further individual duties apply to public servants alone. However, there is a very important exception: voting rights. In Peru, voting is compulsory, 'a right and a duty'.<sup>77</sup>

The conception of indivisibility of rights in **China** is embodied in several domestic laws, regulations and policies. The CPRC includes civil and political rights, such as the right to vote, freedom of speech, freedom of religion, personal liberty, and social and economic rights, such as the right to work and rest

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<sup>73</sup> *ibid* para 23.

<sup>74</sup> *S v Makwanyane* (n 35) para 111.

<sup>75</sup> s 3(2)(b).

<sup>76</sup> *Manuel Anicama Hernández vs Sentencia de Cuarta Sala Civil de la Corte Superior de Justicia de Lima*. Exp.1417-2005-AA/TC [2005] Tribunal Constitucional del Perú.

<sup>77</sup> Political Constitution of Peru [1993], Art. 31.

and the right to social welfare. Furthermore, China's Human Rights Action Plan 2012-2015 covers human rights such as the right to development, the right to freedom of expression and environmental rights.<sup>78</sup>

Nevertheless, the indivisibility of human rights did not restrict the government from giving priority to certain type of human rights. Xianming Xu points out that considering the large population and unbalanced development in different regions, China has to put economic and social rights in the first place, as a consequence, China has to ensure the people's right to subsistence and the right to development for the purpose of social interests and security.<sup>79</sup>

The CPRC refers to the 'Rights and Obligations of Citizens'. It includes 'obligations' such as the obligation to promote the national unity, the protection of national secrecy and public property, and the obligation to join the army, etc.<sup>80</sup> The interconnection between rights and duties is a basic principle of China's legal system. Malmgren points out that:

The principle of the reciprocal nature of basic constitutional rights and obligations, found not only within Marxist theory but also amply demonstrated under early writing on rights in China,<sup>81</sup> usually described as the 'unity of rights and duties',<sup>82</sup> extends the direct limiting nature of constitutional provisions to citizens and not only to state organs- i.e. giving constitutional rights a direct horizontal effect.<sup>83</sup>

This suggests that Chinese conceptions of the indivisibility of rights relates not only to the interconnection between civil and political rights with economic, social and cultural rights, but also to the unity of rights and duties of individual citizens. In addition to the State, individuals also are obliged to fulfil their responsibilities *vis a vis* their fellow countrymen in order to respect human rights.

The indivisibility of rights in **India** also extends to first and second-generation rights on the one hand, and the connection between individual rights and duties. The indivisibility of human rights emerges from jurisprudence, particularly from the interpretation of the right to life, protected in article 21 of the Indian Constitution. Although economic and social rights, enshrined in the Constitution in the section on Directive Principles of State Policy, appeared as non judiciable, the Indian Supreme Court has established that a number of these as forming part of the right to life, such as the right to livelihood, the right to healthcare and right to education.<sup>84</sup> In *Chameli Singh and Others v. State of Uttar Pradesh and*

<sup>78</sup> State Council Information Office of the People's Republic of China, 'China's Human Rights Action Plan 2012-2015' <[http://www.gov.cn/jrzq/2012-06/11/content\\_2158166.htm](http://www.gov.cn/jrzq/2012-06/11/content_2158166.htm)> accessed 13 May 2015.

<sup>79</sup> Xianming Xu, *The Study of Human Rights* (Vol. II, Shangdong People's Press 2012) 4.

<sup>80</sup> See CPRC [1982], ch II.

<sup>81</sup> See e.g. Liu Shiwei, 'Textbook on Ethics (1905)' in Stephen C Angle and Marina Svensson (eds), *Chinese Human Rights Reader* (Routledge 2001) 37.

<sup>82</sup> See Jianfu Chen, *Chinese Law: Towards an Understanding of Chinese Law, its Nature and Development* (Kluwer 1999) 92; and Jianfu Chen, *Chinese Law: Context and Transformation* (Martinus Nijhoff Publishers 2008) 133.

<sup>83</sup> Otto Malmgren, 'Article 37: The Right to Liberty of Person under the Chinese Constitution' (2013) 2 China-EU Law Journal 35, 41.

<sup>84</sup> See e.g. *Olga Tellis and Others v. Bombay Municipal Corporation and Others* 1986 AIR 180 (SC) paras 32-33; *Delhi Transport Corporation D.T.C v. Mazdoor Congress and Others* 1991 AIR 101 (SC) para 223.

*Another*, the Supreme Court held that:

In any organized society, right to live as a human being is not ensured by meeting only the animal needs of man. It is secured only when he is assured of all facilities to develop himself and is freed from restrictions which inhibit his growth. All human rights are designed to achieve this object. Right to live guaranteed in any civilized society implies the right to food, water, decent environment, education, medical care and shelter...<sup>85</sup>

It appears, then, that even in the absence of an express reference, the Supreme Court understands human rights as indivisible and interdependent. The section below will address some of these rights more in detail.

Regarding the interconnection between rights and duties, great importance is attached to the duties of individuals towards fellow citizens, the State, society, different religious groups and the environment, both in the Constitution and in social norms. A dictum of the *Gita*, the Holy religious text of Hindus, dictates individuals must perform their duties without worrying about the rewards or results.<sup>86</sup> Mahatma Gandhi pointed out that 'all rights to be deserved and preserved came from duty well done.'<sup>87</sup> The 1976 Indian Constitution included a list of fundamental duties in Article 51 A:

- a) To abide by the Constitution and respect its ideals and institutions, the National Flag and the National Anthem;
- b) To cherish and follow the noble ideals which inspired our national struggle for freedom;
- c) To uphold and protect the sovereignty, unity and integrity of India;
- d) To defend the country and render national service when called upon to do so;
- e) To promote harmony and the spirit of common brotherhood amongst all the people of India transcending religious, linguistic and regional or sectional diversities; to renounce practices derogatory to the dignity of women;
- f) To value and preserve the rich heritage of our composite culture;
- g) To protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures;
- h) To develop the scientific temper, humanism and the spirit of inquiry and reform;
- i) To safeguard public property and to abjure violence;
- j) To strive towards excellence in all spheres of individual and collective activity, so that the nation constantly rises to higher levels of endeavour and achievement.

One more Fundamental duty has been added to the Indian Constitution by 86th Amendment of the constitution in 2002, requiring individuals who are a parent or a guardian to provide them with opportunities for education or ward to their children between the age of six and fourteen years.

<sup>85</sup> *Chameli Singh and Others v. State of Uttar Pradesh and Another* 1996 (2) 549 (SCC) para 8.

<sup>86</sup> Bhagavad-Gita, Ch 2, Verse 47.

<sup>87</sup> Government of India, 'The Collected Works of Mahatma Gandhi (Vol. 95)', 137 <<http://www.gandhiserve.org/e/cwmg/cwmg.htm>> accessed 17 December 2015.

#### 4. Civil and political rights

Civil and political rights are formally recognised in all countries under review as a constitutive part of their domestic conceptions of human rights. However, there are differences in the domestic understanding of and the scope attributed to civil and political rights. The different domestic conceptions point to 'core' (well established) and peripheral (controversial) notions. For instance, one element apparently belonging to the 'periphery' of conceptions of civil and political rights in all countries under study is the right to peaceful protest, while the right to life and personal liberty appear to be at the core.

In **Peru**, the stronger footing of civil and political rights is easily perceived both in the socio-political realm and in the Constitution. The Peruvian Constitution recognises the freedom of expression and freedom of the press, and the freedom of association and assembly. The latter includes the right to publicly demonstrate against the authorities. Nevertheless, the right to protest has been questioned in recent times, particularly in connection to claims regarding indigenous and environmental rights.<sup>88</sup> Regardless of a decision of the Constitutional Tribunal confirming that the administrative authority cannot restrict freedom of association and assembly, the police often interfere with the exercise of such freedom. As a result of this, in practice, protesting against violations to indigenous and environmental rights has been criminalised.

The **Chinese** perspective on civil and political rights is traversed by the idea that in semi-feudal China, civil rights were the privilege of a few, and that Chinese people really gained democratic rights after the founding of New China.<sup>89</sup> The Preamble of the CPRC emphasises that '[s]ince [the foundation of the People's Republic of China] the Chinese people have taken control of state power and become masters of the country.'<sup>90</sup> This change in the political positioning of the people, from subject to master, is a first step in the recognition of the people's civil and political rights. This recognition, however, does not necessarily correspond to 'individual' civil and political rights. Here lays the constant struggle between Chinese and western conceptions of civil and political rights that emphasise individual rights against State abuses. In the Chinese conception, the emphasis is put in the unity of the people and the common good, as we discuss in detail in Sections 6 and 7.

Nevertheless, the CPRC provides for a range of political rights to citizens, albeit limited in their scope. Citizens have the right to vote and stand for election, regardless of nationality, race, sex, occupation, family background, religious belief, education, property status, or length of residence, with the exception of persons deprived of their political rights by law.<sup>91</sup> In 1991, the Information Office of the

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<sup>88</sup> These collective rights, discussed in Section IV.6 (Chapter III, under A), are very controversial and often seen as restricting the economic development of the country. This has often led to associate human rights defenders in Peru with a left wing agenda.

<sup>89</sup> State Council Information Office of the People's Republic of China, *Human Rights in China* (White Paper, November 1991), Part II: The Chinese People Have Gained Extensive Political Rights <<http://china.org.cn/e-white/7/index.htm>> accessed 22 September 2015.

<sup>90</sup> CPRC, Preamble.

<sup>91</sup> CPRC, Art. 34.

State Council of the PRC published the White Paper on Human Rights (hereinafter the '1991 White Paper'), with the aim to inform the international community about the Chinese 'position and practice' of human rights.<sup>92</sup> The 1991 White Paper indicates a 'right to express opinions and play a role in the country's political and social life', which is channelled through the system of multi-party cooperation and political consultation under the leadership of the Communist Party.

In addition, the CPRC has recognised the freedoms of speech, the press, assembly, association, procession and demonstration.<sup>93</sup> In the elaboration of the scope of freedom of expression, the 1991 White Paper clarified that such freedom was not be infringed upon by news censorship in China.<sup>94</sup> However, during the seventeenth session of the Working Group on the Universal Periodic Review of the Human Rights Council in 2013, the Chinese government emphasised that 'the exercise of the [fundamental] freedoms shall abide by the Constitution and laws, and shall not harm the national, social, collective interests and the legitimate rights of other citizens.'<sup>95</sup> This statement indicates that, in China, the scope of the basic freedoms is to be delineated within these boundaries.

The CPRC further provides that freedom of the person (personal liberty) is inviolable (article 37). As such, the unlawful detention or deprivation of liberty and the unlawful search of the person are prohibited. Malmgren points out that article 37 does not indicate any remedy to be used with regard to unlawful deprivation of liberty.<sup>96</sup> However, article 41 formulates the basic right to bring forth complaints on rights violations by incorporating the 'right to criticize and make suggestions' and the 'right to make complaints' or charges against any state organ. The Monitoring Committee of the Convention against Torture questions the effectiveness of this provision while mentioning that investigation and rehabilitation for victims of torture is lacking.<sup>97</sup>

The CPRC also recognises the inviolability of the home<sup>98</sup> and the privacy of correspondence.<sup>99</sup> The inviolability of the home does not, however, prevent the interference with family life. The Chinese Constitution establishes the 'duty to practice family planning, educate minor children and support parents.'<sup>100</sup> Chinese birth control policies, discussed in more detail in Section 6, have been criticised for violating the rights of the child and reproductive rights of women. In the 5<sup>th</sup> Session of the Eighteenth Central Committee of the CPC held earlier this year the Chinese government has decided to forgo the one-child family policy, hopefully lifting current limitations by the end of the five-year plan in 2015.

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<sup>92</sup> Eva Brems, *Human Rights: Universality and Diversity* (Martinus Nijhoff Publishers 2001) 50.

<sup>93</sup> CPRC, Art. 35.

<sup>94</sup> See 1991 White Paper (n 89).

<sup>95</sup> UNHRC, 'Report of the Working Group on the Universal Periodic Review – China (Addendum)' (27 February 2014) A/HRC/25/5/Add.1, 10.

<sup>96</sup> Malmgren (n 83) 44.

<sup>97</sup> *ibid* 36. See also UN Committee against Torture, 'Sixth Report of the People's Republic of China on Its Implementation of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (3 April 2014) CAT/C/CHN/5.

<sup>98</sup> CPRC [1982], Art. 39.

<sup>99</sup> *ibid* Art. 40.

<sup>100</sup> *ibid* Art. 49.

Another civil and political right suggesting core and periphery elements is freedom of religion.<sup>101</sup> The double aspect of the religion (belief and worship) is recognised.<sup>102</sup> While freedom of belief is absolute, worship can be limited. The third part of article 36 reads:

The state protects normal religious activities. No one may make use of religion to engage in activities that disrupt public order, impair the health of citizens or interfere with the educational system of the state.

Qianfan Zhang points out that establishing the scope of ‘normal’ is key to understand the scope of religious freedom in China. The main provision regulating the scope of freedom of religion is the Religious Affairs Regulation.<sup>103</sup> It establishes, for instance, that worship can take place only in the previously assigned places, such as temples, churches, etc. The last part of article 36 states that ‘Religious bodies and religious affairs are not subject to any foreign domination’. This last statement suggests that there is an underlying idea that political penetration can take place through religious ideas, leading to surveillance of worshipers. The Committee on the Elimination of Racial Discrimination (‘CERD’) has pointed out that the members of some minority groups do not fully enjoy freedom of religion and recommend that China ensure respect for their rights.<sup>104</sup>

In the case of **South Africa**, the existence of core and periphery elements of rights are formally recognised in section 36, which allows limitations to rights when they are ‘reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom’. Jurisprudence has confirmed this notion:

[T]he limitation of constitutional rights for a purpose that is reasonable and necessary in a democratic society involves the weighing up of competing values, and ultimately an assessment based on proportionality.<sup>105</sup>

The core values of South Africa are set out in section 1 of the Constitution:

- (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms;
- (b) Non-racialism and non-sexism;
- (c) Supremacy of the constitution and the rule of law;
- (d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.

These values were described in the South African case of *Minister of Home Affairs v National Institute for Crime Prevention and the Re-integration of Offenders (NICRO) and others*<sup>106</sup> as ‘of fundamental

<sup>101</sup> *ibid* Art. 36.

<sup>102</sup> On the different approach towards ‘belief’ and ‘worship’ in the Chinese Constitution, see Qianfan Zhang, *The Constitution of China: A Contextual Analysis (1964-)* (Hart Publishing 2012).

<sup>103</sup> Regulations No. 426 on Religious Affairs [2004].

<sup>104</sup> UN Committee on the Elimination of Racial Discrimination, ‘Concluding Observations of the Committee on the Elimination of Racial Discrimination—China (15 September 2009) CERD/C/CHN/CO/10-13, para 20.

<sup>105</sup> *S v Makwanyane* (n 35) para 104.

importance ... inform[ing] and giv[ing] substance to all the provisions of the Constitution.’ It would thus never be justifiable to limit a right in the bill of rights to such an extent that the limitation was a blatant contradiction to the founding values.’<sup>107</sup>

One example of a core and periphery elements of human rights in South Africa relates to the rights to peaceful protest, taking into consideration the proposed amendment to a UN Human Rights Council resolution proposed by Switzerland in 2014.<sup>108</sup> The amendment proposed by South Africa and other nations was that ‘protests should not constitute a threat to national security and the stability of the State’.<sup>109</sup>

In **India**, the roots of freedom of thought can be found in the principles of Buddhism. The Sanskrit Buddhist text called *Tattvasamgraha* holds that Buddha encouraged freedom of thought by stating that ‘my statements should be accepted only after critical examination and not out of respect for me’.<sup>110</sup> Later on, emperor *Ashoka* promoted religious tolerance and equal respect for all religions.<sup>111</sup> The Indian Constitution recognises in article 19 the ‘right to freedom’, which includes the rights:

- (a) to freedom of speech and expression;
- (b) to assemble peaceably and without arms;
- (c) to form associations or unions;
- (d) to move freely throughout the territory of India;
- (e) to reside and settle in any part of the territory of India; [and]
- (g) to practise any profession, or to carry on any occupation, trade or business.

With a view to increasing Government transparency and accountability, and expanding the scope of the freedom of speech and expression, the Parliament has passed the Right to Information (RTI) Act. This act recognises the right of every citizen to seek and obtain information, most importantly, information concerning the rationale behind government decisions and their implementation. It covers the Central and State Governments, the *Panchayat Raj* Institutions<sup>112</sup>, local self-governments, as well as recipients of Government grants. It has given citizens access to information.

<sup>106</sup> *Minister of Home Affairs v National Institute for Crime Prevention and the Re-integration of Offenders (NICRO) and Others* 2004 (5) BCLR 445 (CC).

<sup>107</sup> *ibid* para 21.

<sup>108</sup> UNHRC 25th Session (3 – 28 March 2014), Item 3 ‘Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the Right to Development - The Promotion and Protection of Human Rights in the Context of Peaceful Protests’ (24 March 2014) A/HRC/25/L.20.

<sup>109</sup> UNHRC 25th Session (3 – 28 March 2014), Item 3 ‘Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the Right to Development - The Promotion and Protection of Human Rights in the Context of Peaceful Protests’ (Amendment) (24 March 2014) A/HRC/25/L.20.

<sup>110</sup> See Micheline R Ishay, *The History of Human Rights – From Ancient Times to the Globalization Era* (University of California Press 2008) 30.

<sup>111</sup> Abdulrahim P Vijapur, *Human Rights in International Relations* (Manak Publications 2010) 64-67.

<sup>112</sup> According to the Indian Constitution, a ‘panchayat’ means an institution of self-government constituted under article 243B, for the rural areas. (Art. 243(d)) It is an adjudicating and licensing body in the self-government of an Indian caste. It sits as a court of law, and cases are heard in open meetings in which all members of the caste group

The Indian Constitution protects freedom of religion and expressly prohibits discrimination based on religious grounds.<sup>113</sup> Similar to the other countries under review, this is not an absolute right in India, and it is subject of limitations. Article 25(1) states:

Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion.

Article 21 is devoted to the protection of life and personal liberty. Interestingly, the right to education (compulsory, free and universal) is included in the same provision, confirming the indivisible character of human rights in the Indian perspective. Similarly, the Indian Constitution recognises the right against exploitation, including the prohibition of traffic in human beings and forced labour (Article 23) and the prohibition of employment of children in hazardous employment (Article 24). The idea of exploitation of vulnerability is present in these articles, also highlighting the economic and social dimension of personal liberty.

Regarding the right to vote, which includes the right to be a candidate, contest for, and hold public office, the Indian Constitution allows for restrictions under certain conditions: non-residence, unsoundness of mind, crime or corrupt or illegal practice.<sup>114</sup>

## 5. Economic, social and cultural rights

There is great diversity in the approach toward economic, social and cultural rights among the countries under review. Moreover, controversy on the scope of these rights also takes place within their domestic sphere.

In relation to economic, social and cultural rights, the **Peruvian** Constitution characterises the Peru as a 'social State', which according to the Constitutional Tribunal entails two main aspects: the responsibility of the State in relation to social development, and necessity of having minimum resources for fulfilling those duties.<sup>115</sup> Nevertheless, the 1993 Constitution eliminated some of the economic and social rights that were recognised by the 1979 Constitution, such as the right to attain a quality of life that allows the individuals to ensure their wellbeing (article 2.15), the right to food (article 18) and labour rights.<sup>116</sup>

In recent times, the Peruvian government has started to recognise the interconnection between human rights and the fight against poverty. There seems to be consensus between the state, civil society, Non-

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concerned are entitled to take part. See 'Panchayat', *Encyclopædia Britannica Online* <<http://www.britannica.com/topic/panchayat>> accessed 18 December 2015.

<sup>113</sup> Constitution of India, Arts. 25-28, 15, 16 (2) and (5).

<sup>114</sup> *ibid* Art. 326.

<sup>115</sup> See *More than 5,000 Citizens vs Art. 4 del Presidential Decree 140-2001*. Exp. 0008-2003-AI/TC [2003] Tribunal Constitucional del Perú, para 12.

<sup>116</sup> Inter-American Commission on Human Rights, 'Second Report on the Situation of Human Rights in Peru' (2 June 2000) OEA/Ser.L/V/II.106, para 22.



Governmental Organisations ('NGO') and international organisations about this idea.<sup>117</sup> However, there is disagreement in relation to the manner how poverty should be tackled. These differences are reflected in the political agenda. For instance, some political projects promote mining and extractive industries in order to encourage employment, accelerate economic growth and reduce poverty, even at the expense of environmental and indigenous rights, while other groups give priority to the latter and aim at a sustainable approach to poverty. Similarly, the flexibilisation of the labour market, leading to a reduction of holiday days and unemployment benefits, is considered by some sectors to jeopardise job security and the already diminished labour rights, and as a tool for fighting unemployment by other sectors.

The right to subsistence is the primary and basic element of human rights in **China**. In the narrow sense, it means the right to life and right to have basic living security, in the broad sense, it means long-term survival of a state, nation and its people.

The scope of the right to subsistence challenges the traditional divide between civil and political rights on one hand, and economic, social and cultural rights on the other. It covers the right to life, fundamental freedoms and the respect for human dignity, while at the same time it guarantees basic living standards.<sup>118</sup> Recognised by the CPC, it is 'an interpretation of the right to life according to the domestic situation in China'.<sup>119</sup> The 1991 White Paper on Human Rights in China, reads:

It is a simple truth that, for any country or nation, the right to subsistence is the most important of all human rights, without which the other rights are out of the question. The Universal Declaration of Human Rights affirms that everyone has the right to life, liberty and the security of person. In old China, aggression by imperialism and oppression by feudalism and bureaucrat-capitalism deprived the people of all guarantee for their lives, and an uncountable number of them perished in war and famine. To solve their human rights problems, the first thing for the Chinese people to do is, for historical reasons, to secure the right to subsistence.<sup>120</sup>

Moreover, the scope of the basic living standard protected by this right is dynamic. Early policies toward fulfilment of the right to subsistence consisted on setting 'the task of helping the people get enough to wear and eat on the top of the agenda', and after solving 'the problem of food and clothing', the government must now 'secure a well-off livelihood' by maintaining 'national stability, developing

<sup>117</sup> See e.g. Amnesty International, '¡Exige derechos humanos en la lucha contra la pobreza!' [Call for Claiming Human Rights in Relation to the Fight against Poverty] <<https://www.es.amnesty.org/actua/acciones/objetivos-desarrollo-milenio/>> accessed 19 December 2015; UNDP Peru, 'Reducción de la pobreza' [Poverty Reduction in Peru] <<http://onu.org.pe/temas/reduccion-de-la-pobreza/>> accessed 19 December 2015; Elizabeth Salmón G, 'The Long road in the Fight against Poverty and its Promising Encounter with Human Rights' (2007) 4(7) *Sur – International Journal on Human Rights* 151.

<sup>118</sup> Xi Jieren, *The Encyclopedia Dictionary of the Scientific Development* (Shanghai Lexicographical Publishing House 2007) 667.

<sup>119</sup> See 1991 White Paper (n 89).

<sup>120</sup> See 1991 White Paper (n 89) Part I: The Right to Subsistence - The Foremost Human Right the Chinese People Long Fight For.

productive forces, persisting in reform and opening to the outside world, rejuvenating the national economy and boosting the national strength'.<sup>121</sup>

Chinese law recognises work and education as both a right and an obligation of individuals.<sup>122</sup> Regarding work, it covers labour security, labour conditions, and to the extent that production allows it, remuneration and welfare benefits.<sup>123</sup> Furthermore, the CPRC states that 'work is the glorious duty of every able-bodied citizen', reinforcing constitutional provisions establishing that people with disabilities ('the old, ill and disabled') are provided for by the State and society. The periphery of the right to work seems to relate to the freedom of association and form unions of workers.<sup>124</sup>

Regarding cultural rights in China, the Chinese Constitution recognises the freedom to engage in scientific research, literary and artistic creation and other cultural pursuits. In relation to the development of scientific knowledge, the Chinese government upholds the guideline of 'serving the people and socialism' (1991 White Paper). The state *encourages* and *assists* creative endeavours conducive to the interests of the people (Article 47). The cultural rights of minorities are also formally protected, as discussed in Section 6 below.

In the case of **South Africa**, the 1996 Constitution contains a range of socioeconomic rights including the right of everyone to adequate housing,<sup>125</sup> access to health care services,<sup>126</sup> sufficient food and water,<sup>127</sup> and social security or social assistance for the aged and persons living with disabilities.<sup>128</sup> The socio-economic rights in the Constitution are subject to progressive realisation.<sup>129</sup>

While the socio-economic rights in the Constitution are justiciable,<sup>130</sup> according to the South African Constitutional Court the real issue is how to go about enforcing them in a given case.<sup>131</sup> The jurisprudence of South African courts has interpreted these rights, firstly, in their historical and social context i.e. what injustice of the past is this right attempting to redress, and secondly, the textual context of the right.<sup>132</sup> It was against this backdrop that Justice Arthur Chaskalson, in the case of *Soobramoney v Minister of Health Kwazulu Natal* documented on behalf of a unanimous court that:

We live in a society in which there are great disparities in wealth. Millions of people are living in deplorable conditions and in great poverty. There is a high level of unemployment, inadequate

<sup>121</sup> *ibid.*

<sup>122</sup> CPRC [1982], Art. 42 and 46, respectively.

<sup>123</sup> *ibid* Art. 46.

<sup>124</sup> The Network of Chinese Human Rights Defenders and a Coalition of NGOs, Report Submitted to the Committee on Economic, Social and Cultural Rights (April 2014) para 15.

<sup>125</sup> s 26(1).

<sup>126</sup> s 27(1)(a).

<sup>127</sup> s 27(1)(b).

<sup>128</sup> s 27(1)(c).

<sup>129</sup> See ss 26(2) and 27(2).

<sup>130</sup> Capable of being decided in court.

<sup>131</sup> *Grootboom* (n 72) para 20.

<sup>132</sup> See *Mazibuko and Others v City of Johannesburg and Others* 2010 (4) SA 1 (CC); *Minister of Health and Others v Treatment Action Campaign and Others (No 1)* 2002 (10) BCLR 1075 (CC).

social security, and many do not have access to clean water or to adequate health services. These conditions already existed when the Constitution was adopted and a commitment to address them, and to transform our society into one in which there will be human dignity, freedom and equality, lies at the heart of our new constitutional order. For as long as these conditions continue to exist that aspiration will have a hollow ring.<sup>133</sup>

However, South Africa's jurisprudence on socio-economic rights has rejected the 'minimum core' approach as developed by the UN Committee on Economic, Social and Cultural Rights. In the *Grootboom* case relating to the 'right to have access to adequate housing...' the Constitutional Court held that to provide for a minimum core would raise difficulties as needs would vary depending on the circumstances. In some circumstances provision of land would be necessary, in others, financial assistance in others policies were needed to make it easier for first time homeowners to purchase a house.<sup>134</sup>

In terms of cultural rights, besides describing South Africa as 'one sovereign democratic state',<sup>135</sup> the 1996 Constitution recognises and safeguards the culture represented within that commonality. Specifically, while section 30 provides that '[e]very person shall have the right [...] to participate in the cultural life of his or her choice', section 31 affirms that no individual may be denied the right to form, join or maintain cultural and religious associations. The objective of strengthening cultural diversity is given further impetus with the establishment of the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities.<sup>136</sup> Cultural practices that violate other rights recognised in the Bill of Rights are not allowed.<sup>137</sup>

According to the **Indian** perspective, the State has the duty to provide 'economic, social and political justice', and strive to promote the welfare of people.<sup>138</sup> It recognises several economic, social and cultural rights among the 'the Directive Principles of State Policy' (herein after *Directive Principles*), in part IV of the Constitution. It should be noticed that, according to article 37, these economic, social and cultural rights are not justiciable. However, some of them have been recognised by the Indian Supreme Court as part of the right to life, turning them justiciable as long as they can be connected with the latter right.

The overarching economic right appears to be the 'right to livelihood'. Article 39 of the Indian Constitution reads:

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

<sup>133</sup> *Soobramoney v Minister of Health Kwazulu Natal* 1997 (12) BCLR 1696 (CC) para 8.

<sup>134</sup> *Grootboom* (n 72) para 33.

<sup>135</sup> s 1.

<sup>136</sup> Constitution of India [1949], s 185.

<sup>137</sup> Section 30 provides that 'no one exercising these rights [cultural right and language] may do so in a manner inconsistent with any provision of the Bill of Rights'. Section 31 provides that the right to culture 'may not be exercised in a manner inconsistent with any provision of the Bill of Rights'.

<sup>138</sup> Constitution of India [1949], Art. 38.

- (a) that the citizens, men and women equally, have the right to an adequate means of livelihood.

The Indian Supreme Court held in *Olga Tellis vs. Bombay Municipal Corporation* that the right to life includes the right to livelihood, as no person can live without the means of living. The National Rural Employment Guarantee Act gives priority to the right to livelihood over other economic, social and cultural rights included among the Directive Principles.<sup>139</sup> Finally, the right to livelihood also includes right of succession, protecting the inheritance of property.<sup>140</sup>

The Indian Constitution also recognises the right to work,<sup>141</sup> and a number of labour rights. As such, it includes the right to humane conditions of work and maternity leave,<sup>142</sup> and the right of workers to participate in management of industries.<sup>143</sup> It also recognises the right to a living wage that allows for 'a decent standard of life and full enjoyment of leisure and social and cultural opportunities'.<sup>144</sup> As such, article 43 seems to raise the standard of just pay above the usual 'minimum wage'. The Constitution also recognises the right to public assistance in case of unemployment, old age, sickness and other cases of 'undeserved want'.<sup>145</sup> As commented in the previous section, the right to work has been considered as connected to the right to a livelihood and a constitutive element of the right to life, allowing for judicial interpretation.

With a similar line of argumentation, the judiciary has held that the right to water is part of the right to life, and thus a fundamental right.<sup>146</sup>

Also in connection to Article 21 securing the protection of life and personal liberty, the Constitution of India grants protection and promotion of the right to food. Article 47 of the Directive Principles states that 'the State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties'. In 2012 the Parliament passed the National Food Security Act, which confers a legal right to cheaper grains, such as rice, wheat and coarse grains, to some sectors of the population. This complements the existing system of public food distribution, which sells food below market prices to low-income families and give nutritional support to women and children. In 2014, Dr. Manmohan Singh, then Prime Minister of India, expressed his concern about the malnourishment of the Indian population in spite of the adopted laws and policies.<sup>147</sup>

<sup>139</sup> *Centre for Environment and Food Security v. Union of India* 2011 (5) 676 (SCC) [681].

<sup>140</sup> *Madhu Kishwar v. State of Bihar* 1996 AIR 1864 (SC).

<sup>141</sup> Constitution of India [1949], Art. 41.

<sup>142</sup> *ibid* Art. 42.

<sup>143</sup> *ibid* Art. 43A.

<sup>144</sup> *ibid* Art. 43.

<sup>145</sup> *ibid* Art. 41.

<sup>146</sup> See *A.P. Pollution Control Board II v. Prof. M.V. Nayudu and Others* 2000 INC 711 (SC); *State of Karnataka v. State of Andhra Pradesh* 2000 INC 271 (SC); *Narmada Bachao Andolan v. Union of India* 2000 (10) 664 (SCC).

<sup>147</sup> See Kounteya Sinha, 'Malnourishment a National Shame: Manmohan Singh' *The Times of India* (Mumbai, 11 January 2012) <<http://timesofindia.indiatimes.com/india/Malnourishment-a-national-shame-Manmohan-Singh/articleshow/11443478.cms>> accessed 17 December 2015.

The right to education was introduced in article 45 of the Indian Constitution, also as a Directive Principle of Policy. The 2002 amendment to Indian Constitution introduced this right among the fundamental rights, brought into force with effect from April 1, 2010.<sup>148</sup> Since the amendment, the right to education is fully judiciable, unlike other economic, social and cultural rights which depend on a connection with the right to life.

It is also interesting to note the emphasis put by the Constitution on the secular character of education. In this regard, article 28. (1) reads:

No religious instruction shall be provided in any educational institution wholly maintained out of State funds.

In addition, the Constitution reaffirms the principle of non-discrimination in relation to education in particular. Article 29 (2) reads:

No citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them.

In India, education is thus, free, equal, secular and compulsory between the age of 6 and 14 years of age. In line with this delineation of the right to education, the Indian Constitution recognises a number of cultural rights to minorities, including the right to impart and receive culturally appropriate education.<sup>149</sup> In addition, cultural and educational rights of minorities are provided in Articles 29 guaranteeing the protection of language, script or culture of minorities.

## 6. Collective and group rights

Deliverable 3.1 described the emphasis on individual rights put by western notions of human rights. This emphasis was also perceived in Deliverable 3.2, in relation to European conceptions. In all the countries discussed in this report, however, we found that the notion of collective rights is very much present. Collective rights are deeply connected to minorities, which are often ethnic groups and communities of farmers and peasants. Nevertheless, these conceptions of collective rights pointed to different meanings and implications.

In the realm of collective rights, recognising collective property rights seems to be particularly controversial. For instance, the American Convention of Human Rights recognises the right of everyone to property in article 21,<sup>150</sup> and the Inter-American Court of Human Rights has interpreted this article as allowing for a communal or collective right of indigenous people. According to the jurisprudence of the Court, indigenous property is based on the special spiritual link between indigenous peoples and their lands and their traditional system of land ownership, which is not centred on the individual but on the

<sup>148</sup> See Constitution of India [1949], Art. 21(A) included by the Constitution (86th Amendment) Act, 2002, s. 2.

<sup>149</sup> *ibid* Art. 30.

<sup>150</sup> American Convention of Human Rights, Art. 21.

group and the community.<sup>151</sup> In the *Moiwana* case, the Court extended the notion of collective property rights to other groups of individuals as right holders.<sup>152</sup> The African Commission on Human and Peoples' Rights has a very similar interpretation of the property rights of indigenous people.<sup>153</sup>

As party to Inter-American system, **Peru** has formally recognised collective rights of indigenous peoples. Peasant and indigenous communities have been recognised as legal entities, and their cultural identity must be respected.<sup>154</sup> However, collective indigenous property rights, even when legally recognised, have remained very controversial, and as such, a peripheral notion in domestic conception of human rights. Moreover, the promotion of these collective rights is associated with left-wing ideologies, while positions against collective rights seem to be taken as 'pro development', regarded as liberal.

The same can be said about environmental rights. Regardless of having legally recognised the right to a healthy environment,<sup>155</sup> and having held a 12-day Climate Summit in 2014,<sup>156</sup> these rights appear in the eyes of some groups as preventing economic progress.<sup>157</sup> No other collective right is discussed at domestic level. In such context, collective rights in Peru appear to constitute the periphery of human rights.

The **Chinese** perspective on collective rights shows unique conceptualisations. Regarding collective property rights, it is necessary to consider the general system of land ownership. China adopted a set of rules conforming to the socialist system of public ownership. As such, there are essentially two kinds of land property in China, state property and collective property. Rural land, including the land allocated for housing purposes and the farmland, are collectively owned. Farmers are part of the collective community and have property rights to their land, but with restrictions.<sup>158</sup> In 2002, the Law on Land Contracts in Rural Areas of China granted these collectives of farmers long-term land-use rights in rural areas. Thus, while the link between collective property rights and indigenous peoples in Peru was a spiritual one, in China, it is a productive and economic one.

<sup>151</sup> *Mayagna (Sumo) Awas Tingni Community v. Nicaragua* (Judgment) Inter-American Court of Human Rights Series C No 79 (31 August 2001) paras 148-149, and 153; *Yakye Axa Indigenous Community v. Paraguay* (Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 125 (17 June 2005) para 143.

<sup>152</sup> *Moiwana Village v. Suriname* (Preliminary objections, Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 124 (15 June 2005) para 132, 134; The Court has upheld this position in *Saramaka People v. Suriname* (Preliminary objections, Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 172 (28 November 2007) para 102.

<sup>153</sup> *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya* (Communication No. 276/2003) African Commission on Human and People's Rights (2009) para 209.

<sup>154</sup> Political Constitution of Peru [1993], Art. 89.

<sup>155</sup> *ibid* Art. 22(2).

<sup>156</sup> See <[http://unfccc.int/meetings/lima\\_dec\\_2014/meeting/8141.php](http://unfccc.int/meetings/lima_dec_2014/meeting/8141.php)> accessed 19 December 2015.

<sup>157</sup> See El Comercio, 'Tensión entre Nativos y Pluspetrol: Las Claves del Conflicto' [Tension between Indigenous Peoples and Pluspetrol: Key to the Conflict] (Lima, 22 February 2015) <<http://elcomercio.pe/peru/loreto/tension-entre-nativos-y-pluspetrol-claves-conflicto-noticia-1793722>> accessed 2 July 2015. For a detailed discussion of the issue in the Americas, including Peru, see: Carlos Quenan and Sébastien Velut, *Los Desafíos del Desarrollo en América Latina* [Development Challenges in Latin America] (Institut des Amériques 2004).

<sup>158</sup> Law of the People's Republic of China on Land Contracts in Rural Areas [2002].

Two other important concepts require elaboration in the discussion of collective rights in China: the principle of autonomy of ethnic minorities and the principle of unity of the people.

The CPRC grants formal 'autonomy' to 'collectives', namely ethnic minorities living in concentrated communities. The principle of autonomy of collectives has been further developed by three White Papers. The 2000 White Paper on National Minorities Policy and Its Practice in China (hereinafter '2000 White Paper') holds that the system of regional autonomy for ethnic minorities conforms to the conditions and historical traditions of China.<sup>159</sup> It points out that regional autonomy for ethnic minorities is a basic policy and part of the political system of China. It consists of the integration of ethnic and regional factors and the combination of political and economic factors. It is practiced in areas where people of ethnic minorities live in concentrated communities under the unified leadership of the state. Autonomous areas for ethnic minorities in China include autonomous regions (where people of one ethnic minority live in concentrated communities), autonomous prefectures (where two ethnic minorities live in concentrated communities) and autonomous counties (several ethnic minorities live in concentrated communities; people of an ethnic minority with a smaller population live in concentrated communities within a larger autonomous area; people of one ethnic minority who live in concentrated communities in different places). Ethnic townships are a supplement to the system of regional autonomy.

Autonomous regions constitute legal entities enjoying rights by themselves. The 1991 White Paper recognised autonomous regions the right to adopt special policies and flexible measures; apply for permission to make alterations or desist from implementing resolutions, decisions, orders and instructions made by the central government.<sup>160</sup> In addition, the adoption of positive measures for the realisation of economic, social and cultural rights in the autonomous regions are given special consideration in national policies.

The second principle, that of unity, is particularly relevant for the discussion of collective rights. While these, in the form of collective property and autonomy of the communities, have been granted to minorities and farmers, these must be in balance with the interest of the Chinese people as a whole. The 2000 White Paper states:

The practice of regional autonomy in China should be beneficial to the unification of the country, social stability and the unity of all ethnic groups; it should also benefit the development and progress of the ethnic group that practices autonomy and assist in national construction.

The 2000 White Paper clarified what is understood by 'unity among ethnic groups', that is 'a relationship of harmony, friendship, mutual assistance and alliance among ethnic groups in social life and mutual

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<sup>159</sup> State Council Information Office of the People's Republic of China, *National Minorities Policy and Its Practice in China* (White Paper, June 2000), Part III: Regional Autonomy for Ethnic Minorities <<http://www.china.org.cn/e-white/4/>> accessed 22 September 2015.

<sup>160</sup> See 1991 White Paper (n 89) Part VII: Guarantee of the Rights of the Minority Nationalities.

contacts'. The principle of unity seems to be at the core of the Chinese system, providing a counter-balance and limiting the principle of autonomy of the nations.

Regarding environmental rights, the CPRC states that all natural resources are owned by the state, although it suggests that law allows collectives to own natural resources as well.<sup>161</sup>

The idea of collective rights in **South Africa** has a different footing than that in Peru and China. In this case it is the concept of Ubuntu, discussed in Section 3 (Chapter III, under A). According to Cornell,

Ubuntu implies a form of belonging together that is not based on a social contract, and is certainly not rooted in any notion of national homogeneity. Part of the substantive revolution implies different conceptualizations of what it means to belong to the new South Africa, one that takes us beyond some of our current thinking about the basis of a national legal system in which law is primarily rooted in the state.<sup>162</sup>

Thus, Ubuntu is not applicable exclusively to a specific sector of the population, such as indigenous peoples or ethnic minorities, but to the South African people as a whole. It infuses all human rights with a collective spirit. It emphasises group solidarity for the common survival.<sup>163</sup>

However, the lens of Ubuntu can give rise to certain tensions, since individual rights have to be reconciled with collective rights. This is because the value of Ubuntu only emphasises the interests of the individual to the extent that those interests serve the interests of the community at large. For example in the *AZAPO* case dealing with amnesty for human rights violations during apartheid the Constitutional Court, with reference to the postscript of the 1993 interim Constitution held that 'the Constitution made a deliberate choice, preferring understanding over vengeance, reparation over retaliation, ubuntu over victimisation.'<sup>164</sup> The Court held that the granting of amnesty for gross human rights violations was constitutional.

The constitution of **India** grants group rights, under Articles 25 to 30, to every religious, cultural and linguistic minorities. Nevertheless, Indian conception of the right to the environment is perhaps the most innovative.

Following a long tradition of environmental awareness, the Indian Constitution also recognised the right to clean environment. Article 48A of the Constitution calls the State shall to protect and improve the environment and safeguard forests and wildlife of the country. Similarly, Article 51A imposes a duty on individuals to protect and improve the natural environment including forests, lakes, river, and wildlife and to have compassion for living creatures. As a result of the combination of these provisions, both the

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<sup>161</sup> CPRC, Art. 9.

<sup>162</sup> Drucilla Cornell, *Law and Revolution in South Africa: Ubuntu, Dignity and the Struggle for Constitutional Transformation* (Fordham University Press 2014) 13.

<sup>163</sup> Dalene M Swanson, 'Ubuntu: An African Contribution to (Re)search for/with a "Humble Togetherness"' (2007) 2(2) *Journal of Contemporary Issues in Education* 53.

<sup>164</sup> *Azanian Peoples Organisation (AZAPO) and Others v President of the Republic of South Africa and Others* 1996 (8) BCLR 1015 (CC) para 19.



'State' and the 'citizens' are now under a positive obligation to conserve, protect and improve the environment, effectively capturing the cross-generational dimension of the right. Every generation owes a duty to all succeeding generations to develop and conserve the natural resources of the nation in the best possible way. In addition, the Parliament passed the Environment Protection Act ('EPA') in 1986, which vests the central government the power and responsibility to undertake measures in order to ensure a healthy and safe environment, including awareness raising about environmental pollution and its implications, monitoring the operations of industries and stipulating the safeguards that these must adopt to minimise pollution.<sup>165</sup>

In light of these provisions, the Indian judiciary has played a critical and positive role in the development of environmental jurisprudence.<sup>166</sup> Three mechanisms have been very useful in the process. Firstly, Public Interest Litigation ('PIL') has been effectively deployed for bringing violations to environmental laws before the Court.<sup>167</sup> For instance, the *Doon Valley Case (Rural Litigation and Entitlement Kendra Dehradun vs. State of Uttar Pradesh)* was concerned with the conflict between environment protection and industrialisation in the Doon Valley. Recognising that right to life, under Article 21 of the Constitution, includes the right to a wholesome environment, the Indian Supreme Court ordered to close of all but eight of the limestone quarries in the Valley as the excavation of limestone was affecting the perennial water springs. This case was the first of a long series of cases calling for the enforcement of the fundamental right to environment protection.<sup>168</sup>

Secondly, on cases concerning environment, the Supreme Court has enunciated the doctrine of 'Public Trust', which establishes that certain common properties such as rivers, seashores, forests, and the air, are hold by the Government in trusteeship for the free and unimpeded use of the general public. In the case of *M.C. Mehta vs. Kamal Nath*, the Court held that the State by leasing ecologically fragile land had breached public trust.<sup>169</sup>

Finally, it should be pointed out that in 2010, the National Green Tribunal was established for the effective and expeditious disposal of cases relating to environmental protection and conservation of forests and other natural resources including enforcement of any legal right and giving relief and

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<sup>165</sup> Other relevant Acts are e.g. the Wildlife Protection Act of 1972; the Water (Prevention and Control of Pollution) Act of 1974 (amended in 1988); the Water (Prevention and Control of Pollution) Cess Act of 1977 (amended in 1991); the Air (Prevention and Control of Pollution) Act of 1981 (amended in 1987); and the Public Liability Insurance Act of 1991.

<sup>166</sup> See e.g. *M.C. Mehta v. Union of India* 1987 AIR 1086 (SC).

<sup>167</sup> See Bharat Desai, 'Enforcement of the Right to Environment Protection through Public Interest Litigation in India' (1993) 33 Indian Journal of International Law 27; CM Jariwala, 'The Directions of Environmental Justice: An Overview' in Shashi K Verma and Kumar Kusum (eds), *Fifty Years of the Supreme Court of India – Its Grasp and Reach* (OUP 2000); and Surya Deva, *Public Interest Litigation in India: A Critical Review* (2009) (28)1 Civil Justice Quarterly 19.

<sup>168</sup> See *Rural Litigation and Entitlement Kendra, Dehradun v. State of Uttar Pradesh* 1987 AIR 359 (SC).

<sup>169</sup> *M.C. Mehta v. Kamal Nath* 1997 (1) 388 (SCC).

compensation for damages to persons and property. It is a specialised body equipped to handle environmental disputes involving multi-disciplinary issues.

## 7. Approach to equality, diversity and vulnerable groups

In this section we discuss the approach taken by the countries under review towards equality and diversity. Several provisions at domestic level deal with specific groups within the general population. The term ‘vulnerable group’, however, did not seem to be explicitly used. All countries under review adopt a similar overarching approach: that of equality. They also include a prohibition of discrimination based on different listed grounds. It is interesting to note that all countries promote the adoption of temporary positive measures in order to achieve equality, and allow for permanent positive measures for specific groups.

In **Peru**, the main applicable provision for the protection of diversity is article 2.2, which entails the prohibition of discrimination based on ‘race, sex, language, religion, opinion, economic class or other status.’<sup>170</sup> Sexual orientation is not explicitly included as a ground of discrimination in this enumeration, although claims based on such ground, or any other non-enumerated ground, need to be framed as to falling under the ‘other status’. There are few additional provisions in the Peruvian Constitution protecting vulnerable groups. Article 4 grants special protection to children, adolescents, mothers and abandoned elderly people.<sup>171</sup> In addition, the Constitution establishes that peasant and indigenous communities must have their cultural identity respected.<sup>172</sup>

Furthermore, the government of Peru has established quotas for the political representation of indigenous peoples, peasants and women, promoting their participation at the level of local governments.<sup>173</sup> No measures seem to have been adopted for the special protection of non-indigenous minorities, migrants, people with disabilities or LGBTI people.

In relation to diversity and vulnerable groups, **South Africa** also follows the model of recognising equality before the law and banning discrimination, in addition to positive measures to achieve equality. Section 9 of the South African Constitution contains an equality clause protecting formal and substantive equality. The Constitution thus goes beyond entrenching equality of opportunity but also equality of results, as held in the case of *Daniels v Campbell*:

The concept of equality must be understood in a substantive, rather than in a formal sense. Promoting substantive equality requires an acute awareness of the lived reality of people’s lives and an understanding of how the real life conditions of individuals and groups have reinforced vulnerability, disadvantage and harm.<sup>174</sup>

<sup>170</sup> Political Constitution of Peru [1993], Art. 2(2).

<sup>171</sup> *ibid* Art. 4.

<sup>172</sup> *ibid* Art. 89.

<sup>173</sup> *ibid* Art. 88.

<sup>174</sup> *Daniels v Campbell* 2003 (9) BCLR 969 (C).

Discrimination based on ‘race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth’, is prohibited. In line with this prohibition, there is constitutional protection for freedom of religion, belief and opinion in article 15.1 and 15.2; freedom of expression in article 16; language and culture in article 30 and the rights of cultural, religious and linguistic communities in article 31. In terms of positive measures, for instance, quotas have been established in the judiciary, meant to broadly reflect the racial and gender composition of South Africa.<sup>175</sup>

The protection of human rights in South Africa takes into account its historical past, which suppressed the rights of the majority population because of their race and as such, multiculturalism is now celebrated and promoted in the Constitution, declaring that all are equal under the law. Thus, today, South Africa’s protection of diversity is extensive. However, this protection of diversity is often in contrast with the attitudes of ordinary South African citizens. As noted by Mowewa:

The Irish had a referendum on gay rights for the first time, one would wonder what would happen in South Africa if there would be a referendum on gay rights because if you talk to the department of justice they will tell you about how they are battling great intolerance at the community level, so it seems there is this disjuncture between the liberal values, human rights values of the constitution and the lived realities on the ground, which makes me want to understand the dynamics to what extent is the constitution a reflection or an embodiment of societal values that are actually shared.<sup>176</sup>

Prima facie, the **Chinese** approach to diversity and specific groups seems very similar to the Peruvian and South African one, although with special characteristics. It recognises the equality of its citizens and promotes positive measures in order to achieve substantial equality. The CPRC also incorporates attention to specific groups. These are women, ethnic minorities, the ‘old, ill and disabled’, children, mothers. Nevertheless, there are groups that are excluded from any form of systematic legal protection. This is clearly the case of migrant workers from rural areas, asylum seekers and LGBTI people.<sup>177</sup>

Regarding ethnic minorities, the CPRC also upholds the principle of equality before the law.<sup>178</sup> According to the 2000 White Paper, equality among ethnic groups means that, regardless of population size, level of economic and social development, folkways, customs and religious beliefs, every ethnic group is a part of the Chinese nation, having equal status, enjoying the same rights and performing the same duties according to law.<sup>179</sup> Equality is impregnated by Chinese and communist principles, and as such, the Paper points out that ‘equality among ethnic groups is the precondition and basis for unity.’ Equality

<sup>175</sup> Constitution of South Africa [1996], s 174(2).

<sup>176</sup> Interview with Dr. S Mowewa (Department of Political Science, University of Pretoria, 8 June 2015).

<sup>177</sup> UN Committee on the Rights of Persons with Disabilities, ‘Concluding Observation on the Initial Report of China, Adopted by the Committee at its Eighth Session’ (15 October 2012) CRPD/C/CHN/CO/1, para 21.

<sup>178</sup> It should be noted that in Chinese the term *minzu* (民族), although it often indicates ethnicity it is commonly translated as ‘nationality’.

<sup>179</sup> See 2000 White Paper (n 159) Part I: A United Multi-Ethnic Country.

and unity among ethnic groups is proclaimed as the basic policy principle for resolving ethnic problems tensions.

The 2000 White Paper pointed out that the Chinese government has adopted ‘special policies and measures to effectively realise and guarantee the right to equality among all ethnic groups’.<sup>180</sup> The 1991 White Paper on Human Rights had previously clarified that in addition to equal rights, minorities also ‘enjoy some special rights accorded to them by law’.<sup>181</sup> The majority of these temporary positive measures aim at the economic development of the regions,<sup>182</sup> although the 1991 White Paper points out that the Chinese Government ‘respects the traditional culture and customs of minority nationalities, supports various minority arts, and encourages minority people to participate in artistic and sports activities.’ Several measures adopted in this regard according to the 1991 and 2000 White Papers appear as permanent measures.<sup>183</sup>

Having said that, the principle of ‘unity’ is crucial in order to delineate ethnic minorities’ rights. In light of the multiple ethnicities that form the Chinese population,<sup>184</sup> China declares itself as ‘a unitary multinational state’. The Chinese government states that there are ‘socialist relations of equality, unity and mutual assistance’ among the different ethnicities. The CPRC declares that in order to protect ‘the unity of the nationalities, it is necessary to combat big-nation chauvinism, mainly Han chauvinism, and to combat local national chauvinism.’<sup>185</sup> In this regard, the 2000 White Paper explains that in order ‘to prevent and eliminate big-ethnic-group chauvinism and inequality in the ideological field, the relevant departments and organs of the Chinese government have worked out special provisions to strictly

<sup>180</sup> *ibid* Part II: Adherence to Equality and Unity Among Ethnic Groups.

<sup>181</sup> See 1991 White Paper (n 89) Part VII: Guarantee of the Rights of the Minority Nationalities.

<sup>182</sup> 2000 White Paper (n 159) Part IV: Promoting the Common Development of All Ethnic Groups.

<sup>183</sup> *ibid* Part V: Preservation and Development of the Cultures of Ethnic Minorities. For instance, ethnic minority people can take all culture and religious related holidays. Furthermore, materials needed for the production of the daily necessities or luxury articles are provided in certain amounts by the government. Finally, it points out that to preserve the traditional cultures of the ethnic minorities, the state has formulated plans for collecting, editing, translating and publishing documents the protecting historical monuments, scenic spots, rare cultural relics and other important items.

<sup>184</sup> See State Council Information Office of the People’s Republic of China, *China’s Ethnic Policy and Common Prosperity and Development of All Ethnic Groups* (White Paper, September 2009) <[http://www.china.org.cn/government/whitepaper/node\\_7078073.htm](http://www.china.org.cn/government/whitepaper/node_7078073.htm)> accessed 22 September 2015. The 2009 White Paper established that:

‘there are 56 ethnic groups identified and confirmed by the Chinese Central Government, namely, the Han, Mongolian, Hui, Tibetan, Uygur, Miao, Yi, Zhuang, Bouyei, Korean, Manchu, Dong, Yao, Bai, Tujia, Hani, Kazak, Dai, Li, Lisu, Va, She, Gaoshan, Lahu, Shui, Dongxiang, Naxi, Jingpo, Kirgiz, Tu, Daur, Mulam, Qiang, Blang, Salar, Maonan, Gelo, Xibe, Achang, Pumi, Tajik, Nu, Uzbek, Russian, Ewenki, Deang, Bonan, Yugur, Jing, Tatar, Drung, Oroqen, Hezhen, Moinba, Lhoba and Jino. These minorities have been identified by taking into account the ‘conditions both past and present and in accordance with the principle of combination of scientific identification and the wishes of the given ethnic group, regardless of its level of social development and the sizes of its inhabited area and population.’ These minority peoples are mainly concentrated in provinces and autonomous regions such as in Inner Mongolia, Xinjiang, Ningxia, Guangxi, Tibet, Yunnan, Guizhou, Qinghai, Sichuan, Gansu, Liaoning, Jilin, Hunan, Hubei, Hainan and Taiwan’.

<sup>185</sup> CPRC, Preamble.

prohibit contents damaging ethnic unity in the media, publications, and literary and art works.<sup>186</sup> Combatting chauvinism and protecting 'diversity in unity' appear as two of the principles justifying infringements on the freedom of expression. This begs the question as to what extent the cultural rights of minorities are challenged in view of promoting unity and combating chauvinism. Unfortunately, the answer can only be found by looking at the implementation of the rights, which exceeds the purpose of this report on theoretical and abstract conceptions.

Beside ethnic minorities, other groups of people are also the targets of continuous special protection in China. The CPRC grants such protection to the family, particularly to mother and child.<sup>187</sup> However, this protection takes a particular character in Chinese policy, since population growth has been controlled by the adoption of a strict family planning policy that includes delaying marriage, postponing having children and giving birth to fewer children.<sup>188</sup> According to the 1991 White Paper, the aim of the policy is to promote the economic and social development of people and the people's right to enjoy a better life.<sup>189</sup> The 'right to subsistence', discussed in Section 5 as paramount right, can be further delineated in relation to this policy. In addition, the 2000 White Paper pointed out that a more lenient childbirth policy was implemented with minority peoples than with the Han people, confirming that positive equality measures are adopted in Chinese policy.

The equal rights for women are recognised in article 48 of the Chinese Constitution, and full agreement appears to exist in this regard. Women enjoy equal rights with men in all spheres of life and the principle of equal pay for equal work is included in the Constitution. Measures for achieving such equality, have been implemented, particularly in the field of education.<sup>190</sup> In addition, Beijing hosted the UN's Fourth World Conference on Women in 1995, and every five years since then. Having said that, the CEDAW Committee has raised attention to the lack of access to justice and exposure of women to violence.<sup>191</sup> Also, women's reproductive rights and access to reproductive health is reported to remain severely curtailed under China's family planning regulation, suggesting that although equality of women's rights can be considered as a core element of Chinese human rights conceptualisations, reproductive rights of women are not among them.<sup>192</sup>

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<sup>186</sup> See 2000 White Paper (n 159).

<sup>187</sup> CPRC, Art. 49.

<sup>188</sup> See 1991 White Paper (n 89) The general principle was that of 'one family, one child', yet families can have a second child after an interval of several years. This policy is expected to come to an end this year, allowing couples to have two kids. See Communist Party of China, 'Bulletin of the 5th Plenary Session of 18th CPC Central Committee' <cpc.people.com.cn/n/2015/1029/c399243-27755578.html> accessed 15 November 2015.

<sup>189</sup> 1991 White Paper (n 89) Part VIII: Family Planning and Protection of Human Rights.

<sup>190</sup> State Council Information Office of the People's Republic of China, Progress of Human Rights in China in 2014 (White Paper, June 2015) <[http://www.gov.cn/zhengce/2015-06/08/content\\_2875262.htm](http://www.gov.cn/zhengce/2015-06/08/content_2875262.htm)> accessed 16 June 2015.

<sup>191</sup> People's Daily Online, 'Leading the Women's Cause Open up a Bright Future' <<http://gs.people.com.cn/n/2015/1013/c360943-26770894.html>> accessed 15 October 2015.

<sup>192</sup> See Human Rights Watch, 'World Report 2013: China' <<https://www.hrw.org/world-report/2013/country-chapters/china-and-tibet>> accessed 10 December 2015.

The CPRC also established in article 45 that people have the right to material assistance from the state and society when they are old, ill or have disabilities. In the case of members of the armed forces with disabilities, their subsistence is afforded by the State 'and society'. Similarly, the Constitution points that 'the state and society' tend to the work, subsistence and education of the blind, the deaf and other disabled citizens. This suggests that the long-term protection of vulnerable peoples is a collective responsibility, shared by society as a whole. One limitation highlighted by the Committee on the Rights of Persons with Disabilities is the lack of attention to the willingness and autonomy of people with disabilities in the formulation of policies protecting them, and the need to promote their integration into communities and the society.<sup>193</sup>

**India** shows different historical perspectives towards equality and diversity, rejected today by the Indian Constitution. During the Vedic period, equality of all human beings was reiterated with no one being superior or inferior. However, later on, India traditionally upheld a division of society based on ethnic and class differences. The Indian caste system was derived from the assumption that there are fundamental and unchangeable differences in the status and nature of human beings. These differences justified the caste system, with different rights attached to each of them. The universal application of a common set of rights for all people in a given society, at the same time, was not considered as part of the cosmology.<sup>194</sup> According to Rubin, the Laws of Manu (Manusmriti), which introduced the caste system, saw the institutionalisation of castes as a legitimate human inequality.<sup>195</sup> Persons belong to one of the four *varnas*, or strata (literally, 'colour'): the *Brahmins* (priests), *Kshatriyas* (warriors-rulers), *Vaishyas* (cultivators and traders) and *Shudras* (servants of the other three strata). Caste belonging derives primarily from birth, and attributes a particular set of duties – dharma, or code for conduct, to a particular stratum.

The traditional caste system appears in direct conflict with provisions currently found in the Indian Constitution. Firstly, the caste distinction clashes with the prohibition of non-discrimination of article 15, which holds that 'the State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.' Secondly, it is contrary to the substantial equality approach found in the Constitution, which calls the state to take positive action in order to improve the situation of certain groups. Article 15(4) explicitly clarifies that the principle of non-discrimination does not prevent the state from adopting any:

Special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.<sup>196</sup>

<sup>193</sup> See CRPD/C/CHN/CO/1 (n 177).

<sup>194</sup> Ralph Buultjens, 'Human Rights in Indian Political Culture' in Kenneth W Thompson (ed), *The Moral Imperatives of Human Rights: A World Survey* (University Press of America 1980) 112-13.

<sup>195</sup> Barnett R Rubin, 'India' in Jack Donnelly and Rhoda E Howard (eds), *International Handbook of Human Rights* (Greenwood Press 1987).

<sup>196</sup> Constitution of India [1949], Art. 15(4).

The protection of marginalised groups like the Scheduled Castes ('SCs'), the Scheduled Tribes ('STs') and the Other Backward Classes ('OBCs') has resulted in the adoption of quotas for employment, education, participation in the Parliament, the State Assemblies and local and urban governments.

A similar conflict between tradition and current perspectives on diversity are found in relation to women. Although during the Vedic period women held an important role in religion and society, enjoying equal education and performing religious tasks, the Laws of Manu introduced the subjugation of women of all castes to men. In the early 19<sup>th</sup> century, however, social reformers like Raja Ram Mohan Roy, rejected that mandate. Similarly, Keshav Chander Sen promoted women's education and inter-caste marriage, and began a campaign against child marriage. Currently, the Indian Constitution upholds the equality between men and women through the prohibition of non-discrimination of article 15, and also by specific provisions, such as article 39 (d), which recognises the right to equal pay for equal work. Similar to the provisions on marginalised groups, positive measures are also recommended in the case of children and women.<sup>197</sup>

The right to equality, as embodied in the Indian Constitution today, includes the equal protection of the law,<sup>198</sup> the prohibition of discrimination,<sup>199</sup> equality of opportunity in matters of public employment,<sup>200</sup> the abolition of untouchability<sup>201</sup> and the abolition of titles.<sup>202</sup> In addition, and similar to the perspective adopted by the other three countries under review, India promotes substantive equality. Article 38(2) reads:

The State shall, in particular, strive to minimise the inequalities in income, and endeavour to eliminate inequalities in status, facilities and opportunities, not only amongst individuals but also amongst groups of people residing in different areas or engaged in different vocations.

This legal recognition of equality is confronted by the *Hindutva* ideology, which is contrary to the concepts of pluralism, secularism and the accommodation of cultural diversities. It holds the idea that people belonging to Semitic religions – Muslims, Christians and Jews – constitute a hostile 'other', whose loyalty to India is questioned. The Bharatiya Janata Party, the current national government, subscribes to this ideology.

## 8. Actors in the protection and promotion of human rights

Regarding the protection and promotion of human rights, NGOs, social movements and civil society organisations play an important role in the implementation of the bill of rights in **South Africa**. Besides lobbying government to adhere to the human rights provisions set out in the Constitution, these networks engage in advocacy campaigns as a means of raising awareness on citizens' rights and provide

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<sup>197</sup> *ibid* Art. 15(3).

<sup>198</sup> *ibid* Art. 14.

<sup>199</sup> *ibid* Art. 15.

<sup>200</sup> *ibid* Art. 16.

<sup>201</sup> *ibid* Art. 17.

<sup>202</sup> *ibid* Art. 18.

legal aid to victims of human rights violations and their relatives.<sup>203</sup> The contribution of the Foundation for Human Rights ('FHR') in South Africa is worth mentioning. Launched in 1996, the Foundation, which has established itself as 'one of the primary indigenous grant makers to the human rights sector' has contributed towards strengthening NGOs and social movements which seek to advance socioeconomic rights.<sup>204</sup> In order to safeguard the rights of vulnerable and marginalised communities, the FHR has established a litigation fund to support public interest litigation on issues such as HIV/AIDS, migrants' rights, domestic violence, and welfare issues (eg. social grants and child maintenance).<sup>205</sup> Public institutions such as the South African Human Rights Commission and the Public Protector, discussed further below in the rule of law section, also play an important role in the promotion and protection of human rights in South Africa.

In **Peru**, the National Coordinator of Human Rights, an NGO, has been instrumental in human rights promotion since 1985. Several other civil associations are also very active in this field.<sup>206</sup> Among public institutions, the Public Office of Legal Counsel is particularly relevant for the protection of human rights.

In **China**, the Seventh Bureau of the State Council Information Office of the PRC (hereinafter referred to as the 'Bureau of Human Rights')<sup>207</sup> is a public entity charged with the external promotion of China's policies in the field of human rights. The Bureau for Letters and Calls<sup>208</sup> is also an official organisation mainly dealing with the facts reports, proposals, opinions and complaints to the people's governments or its working departments at various levels. The China Society for Human Rights Studies, mostly funded by the China Foundation for Human Rights Development, is an NGO member of the Committee on Non-Governmental Organizations (CONGO), focusing on research, trainings and education, and providing advice on human rights. It participates in United Nations activities and international conferences.<sup>209</sup> Nevertheless, it is still under the guidance of the State Council Information Office.

In **India**, the proliferation of NGOs in India is seen as a direct consequence of the failure of other democratic institutions, particularly its political parties, in the provision of avenues of political participation.<sup>210</sup> Some NGOs specialise in training women representatives or groups seeking political participation. NGOs are engaged in providing information, guidance, and support to elected representatives or aspirants for local-government office can begin to resemble political parties in certain

<sup>203</sup> See Alnoor Ebrahim, 'Accountability in Practice: Mechanisms for NGOs' (2003) 31(5) World Development 813.

<sup>204</sup> Foundation for Human Rights, 'History' <<http://www.fhr.org.za/about/history/>> accessed 3 November 2015.

<sup>205</sup> *ibid* 'Projects' <<http://www.fhr.org.za/index.php/projects/>> accessed 8 November 2015.

<sup>206</sup> Among others, one should mention the Comisión Andina de Juristas; Instituto de Defensa Legal, el Centro para la Mujer Peruana Flora Tristán, la Asociación Pro Derechos Humanos, la Comisión Episcopal de Acción Social, el Movimiento Manuela Ramos, Estudio para la Defensa de los Derechos de la Mujer, Sociedad y Discapacidad, Amnesty International Peru; Lima's Homosexual Movements, el Instituto Internacional de Derecho y Sociedad, el Instituto de Democracia y Derechos Humanos de la Pontificia Universidad Católica del Perú.

<sup>207</sup> State Council Information Office of the People's Republic of China <<http://www.scio.gov.cn/zfbps/index.htm>> accessed 10 October 2015.

<sup>208</sup> Bureau for Letters and Calls <<http://www.gjxfj.gov.cn/>> accessed 10 October 2015.

<sup>209</sup> China Society for Human Rights Studies <<http://www.humanrights.cn/html/rqyjh/>> accessed 10 October 2015.

<sup>210</sup> Rob Jenkins, 'NGOs and Indian Politics' in Niraja G Jayal and Pratap B Mehta (eds), *The Oxford Companion to Politics in India* (OUP 2010) 412.



respects. In doing so, they strengthen grass root democracy by helping local bodies' representatives to effectively implement grassroots projects in the *panchayats*.<sup>211</sup> Furthermore, the work NGOs like People's Union for Civil Liberties (PUCI) and People's Union for Democratic Rights (PUDR) is directly linked to the protection of human rights by PIL at the Supreme Court. As such, NGOs are important players in the process of recognition and promotion of constitutional rights of poor citizens who are unaware of their rights or have no means to access justice.

## 9. Comparison with EU conceptualisations

This overview of domestic conceptualisations on human rights revealed several differences with EU conceptualisations, and a few similarities.

Regarding the theoretical notions underlying human rights conceptions, the reliance on 'human dignity', present in the **European conception, was also found as basis of Peruvian** conceptions of human rights. The **Indian** perspective of human rights refers to 'the dignity of the human', but it is also infused by own traditional notions that promote 'harmony and the spirit of common brotherhood amongst all the people of India'. Similarly, in addition to human dignity, **South African** and **Chinese** conceptions give precedence to domestic notions such as the principle of *Ubuntu* in South Africa and the principle of *unity* in China. The theoretical underpinnings of human rights making reference to 'brotherhood', *Ubuntu* and *Unity*, found in these three latter countries, introduce a collective dimension that is less prevalent in European conceptions. The inherent character of human dignity, which is to a great extent connected to the *individual* human, can explain the European emphasis on *individual* human rights.<sup>212</sup> On the contrary, such individualism is moderated in the case of South Africa, China and India by the notions that rely on the spirit of community, allowing a group oriented reading of human rights.

In relation to the notion of universality of human rights, this idea is explicit in the Constitutions of **Peru** and **South Africa**. In **India**, although no express reference to universality is found in the Constitution, it has embraced western values and adopted a universal approach to human rights. Claims about a 'universal yet relative' perspective was only found in **China**. The Chinese relativism aims at 'adapting' notions of human rights, which are perceived as western notions rather than universal, to the traditional Chinese and communist values, and protect Chinese sovereignty. Regarding the personal scope of human rights, **Peru**, **South Africa** and **India** formally extend human rights to everybody within their national borders, explicitly indicating when rights are limited to citizens only, while **China** only guarantees the rights of citizens, similar to the **EU Charter**.

Similarly to **EU** conceptions, all countries under review recognised, albeit formally, the indivisibility of human rights. In practice, however, certain rights prevailed in their political agenda and appeared to be very much in connection with their social and political context. Generally speaking, **Peru and South**

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<sup>211</sup> *ibid* 422.

<sup>212</sup> For a more elaborated discussion on the principle of human dignity see FRAME Deliverables 3.1 and D. 3.2; See also Christopher McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' (2008) 19(4) *European Journal of International Law* 655.

**Africa** emphasised civil and political rights, and economic, social and cultural rights were regarded as rights of 'progressive realisation'. The indivisibility of rights is also recognised in **India**, particularly through case law.

Another distinction between **European** conceptions of human rights and those of the countries under review relates to the recognition of rights and corresponding duties of individuals. Unlike EU conceptions that emphasise the 'rights', in three of the countries under review, there is great importance attached to the duties of individuals towards fellow citizens, the State, society, different religious groups, and the environment. This dual construction, rights/duties, is found in the **South African, Chinese, Indian and Peruvian** Constitution. For instance, in the case of **China**, education and work are 'rights and duties' stipulated in the Constitution. The duty-first approach is the hallmark of **Indian** traditions. For instance, the Indian Constitution calls individuals to protect the environment and 'to strive towards excellence in all spheres of individual and collective activity, so that the nation constantly rises to higher levels of endeavour and achievement'. In all cases, the interconnection between human rights and duties is key.

Regarding the level of recognition and importance attached to each set of values, all countries under review have their own position. The **Chinese** Constitution recognises both sets of rights, however, economic rights take clear precedence over civil and political rights. This is both in terms of importance and moment of realisation. Contrary to the view that civil and political rights are of immediate implementation and economic rights call for progressive realisation, China regards the 'right of subsistence', which can be considered an elaborated version of the right to life, as the most important and urgent. The scope of this right, however, is not fixed and changes with time. Civil and political rights depend upon the progress and attainability of this basic right. Nevertheless, in the Chinese perspective, a very basic set of civil and political rights appears to have been immediately achieved by the foundation of the Peoples' Republic of China, which turned people into 'masters' rather than subjects of the State.

In the case of **Peru**, civil and political rights were gained during the oligarchic regime after liberating from the Spanish rule, while economic, social and cultural rights were only introduced during a military government. Moreover, civil and political rights appear at the core of human rights, while social and economic rights appear in constant debate. In fact, some civil and political rights are questioned only when exercised in connection to some economic rights. For instance, protests around labour rights have led to questioning the freedom of expression and assembly and even criminalise demonstrations. This shows that the scope of labour rights is still undetermined in Peru, with elements such as job certainty and unemployment benefits at the periphery, and at the same time, this illustrates the interconnection between civil and political rights, and economic, social and cultural rights. Having said that, economic, social and cultural rights are justiciable.

**South Africa**, on the other hand, emphasised civil and political rights in the immediate period following the end of apartheid, and since then, it has adopted what appears to be a more balanced approach toward both generation of rights, recognising them as justiciable rights.

**India** recognised both sets of rights in the postcolonial Constitution of 1949, yet only civil and political rights were established as susceptible of judicial interpretation. Economic, social and most cultural rights were introduced as 'directive principles'. The right to education and the right to cultural language and a culturally appropriate education were later on introduced as a fundamental rights. Regardless of this, the Indian Supreme Court has drawn interconnections between core civil and political rights and some economic and social rights, treating both sets of rights as indivisible and interdependent, transforming economic, social and cultural rights into judicable entitlements. Since then, preference for one or the other type of right is not easily perceived. The Indian Supreme Court has addressed a number of rights as forming part of the right to life. Some of these rights, like right to livelihood, the right to work and the right to water, are actually social and economic rights. Among these, the right to livelihood is the basis, and dependent on other rights, such as the right to work. This approach shares some similarities with the Chinese right to subsistence, since it includes the right to water and food, in addition to work and education. However, it also includes the right to environment.

The **European** perspective toward collective rights appears to be connected to the idea of intergenerational equality and solidarity. This intergenerational discourse is strongly perceived in **India**, yet only regarding the right to environment as, transcending the individual and the present time. Having said that, this review of domestic conceptualisations shows that environmental rights are addressed at domestic level in all countries. Nevertheless, the main feature of the countries under review is the connection between collective rights and the recognition of minorities. The domestic conception of 'minority' in each country has a direct bearing on what collective rights are recognised and the approach to diversity taken by the countries under review. The review shows that there are different meanings attached to the notion of 'minorities' since it is shaped in the light of the historical past of the countries.

In the case of **South Africa**, the traditional notion of minority, a category of people differentiated from the social majority, is challenged by the fact that it is the majority of the black population that has been put in a disadvantaged position by the privileged white minority during the Apartheid regime. Post Apartheid, collective rights are connected to the principle of *Ubuntu*, and the view of all people as forming a spiritual community. Similarly, in **India**, social distinctions were based on racial differences and institutionalised in the caste system, which contributed to a deeply unequal society. Religious, cultural and linguistic minorities in India are, to a large extent, seen as marginalised groups. In both countries, the link between the colonial past in **India** and the Apartheid regime in **South Africa** and the disadvantaged positioning of minorities today is commonly perceived. Today, **both countries** recognise cultural rights to ethnic and religious groups.

In the case of **Peru**, minorities relate to indigenous groups, and consequently, collective rights are granted to minorities and rural communities and immediately associated with collective property rights. In the case of **China**, it refers to all ethnic minorities, which in the Chinese terminology are normally referred to as 'nationalities' forming the Chinese nation. Regional autonomy appears as the collective right of ethnic communities, consisting of the possibility to adopt their own policies and alter or amend the mandate of the central government. Three principles emerge in the discussion: the property regime, and the principles of autonomy and unity. These are, however, limited by the interest of the nation as

united entity. This Chinese conception is in contrast to the **European** perspective, in which collective rights in relate to minority rights but normally limited for the protection of individual rights.

The differences amongst these countries and with the EU lays not so much in the meaning attached to minorities but in the consequences that such recognition seems to entail. While in **South Africa** a political will towards the realisation of the protection of collective rights seems to follow from recognition, in the case of **Peru**, the recognition of collective rights is rather formal. In the case of **China** and **India**, the recognition of collective rights also entails adopting positive measures to realise them. **India** adopts a similar approach. Contrary to this view, although the EU recognises the rights of ethnic minorities<sup>213</sup> and has adopted positive discrimination especially in relation to the Roma minority in some EU member states,<sup>214</sup> the autonomy of cultural identities is a controversial issue in **Europe**. Illustrations of the European tactful position towards autonomy are the Catalan self-determination referendum held in 2014,<sup>215</sup> the discussions surrounding independence claims of the Veneto<sup>216</sup> and the Flemish separation movement.<sup>217</sup>

The overarching approach towards equality and diversity is shared by all countries under review and the European perspective. The starting point is the recognition of equality of individuals, followed by a prohibition of discrimination. Similar to the **EU**, the enumeration of grounds of discrimination is used by **Peru**, **South Africa** and **India**. **China** explicitly prohibits discrimination against 'ethnic minorities', yet does not mention additional grounds. Regarding sexual orientation, it was expressly included as a ground of discrimination only in **South Africa**. This formal legal recognition, however, does not seem to be socially supported.

While the inclusion of positive measures as a means of realising equality is clearly perceived in **Chinese and Indian** laws and policies, this is more limited in **South Africa and Peru**. As commented above, the adoption of positive measures is framed in the particular context of each country, as a counter measure towards the unequal social position inherited from previous regimes. In that regard, the approach seems to differ from the **European** one, which rather than considering the structural nature of inequality, it enquires after difference in treatment between analogously placed persons, and relies on freedom and autonomy in order to achieve equality. Equality seems to be assumed as the 'normal' situation in

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<sup>213</sup> See Art. 2 TEU.

<sup>214</sup> For an overview of the situation of Roma in EU member states see FRA, *The Situation of Roma in 11 EU Member States* (Publications Office of the European Union 2012).

<sup>215</sup> See Arthur Mas, 'The Catalan People have Spoken. Will the Spanish Government Listen?' *The Guardian* (London, 5 October 2015) <<http://www.theguardian.com/commentisfree/2015/oct/05/catalan-people-spanish-government-catalonia-independence-election-madrid>> accessed 19 December 2015.

<sup>216</sup> See Michael Day, 'From the Grand Canal to Juliet's balcony, a 'Yes' from Veneto to cutting ties with Rome can blaze a trail for Scotland' *The Independent* (London, 16 March 2014) <<http://www.independent.co.uk/news/world/europe/from-the-grand-canal-to-juliets-balcony-a-yes-from-veneto-to-cutting-ties-with-rome-can-blaze-a-9194820.html>> accessed 19 December 2015.

<sup>217</sup> See Paul Belien, 'Crisis in Belgium: If Flanders Secedes Wallonia Disintegrates' *The Brussels Journal* (Brussels, 9 September 2007) <<http://www.brusselsjournal.com/node/2433>> accessed 19 December 2015.

Europe, while inequality derived from historical structural arrangements, is still very visible in the countries under review.

The adoption of (temporary) positive measures for realising equality in **all countries** include women, and ethnic minorities, including indigenous peoples. In all countries under review, such measures include quotas promoting their inclusion in education, the labour market and political representation. Measures aiming at the special protection of 'vulnerable' groups include children, the elderly and people with disabilities.

## B. Democracy

### 1. Introduction

This section describes the conceptualisations of democracy in **China, India, Peru** and **South Africa**. The main research question this section seeks to answer is what conceptions and perspectives on democracy can be found at the domestic level of these countries.

FRAME Deliverable 3.1 provided an overview of different models of democracy.<sup>218</sup> The most minimal conception conceives of democracy as an 'institutional arrangement for arriving at political decisions in which individuals acquire the power to decide by means of a competitive struggle for the people's vote.'<sup>219</sup> Other models of democracy – including the liberal; majoritarian; participatory; deliberative; and egalitarian models – add elements to this minimum definition.<sup>220</sup> FRAME Deliverable 3.2 examined what conception of democracy the EU adheres to. It found that there are five principles which are central to the EU's conception of democracy, laid down in Articles 9-12 TEU: equality, representation, participation, transparency and deliberation.<sup>221</sup> Therefore partners were asked to reflect on how these 5 principles, plus the right to vote and free elections as well as the general idea of good governance, play a role in their domestic system.

It bears repeating what was emphasised in Deliverable 3.1, namely that liberal conceptions of democracy are dominant in the literature,<sup>222</sup> and that researchers should resist the temptation to automatically and uncritically adopt one specific model as the norm. Indeed, that is one of the aims of the present comparative study, namely to challenge the reader's own assumptions about the concepts under review. To that end, in this chapter, we have created a specific section on 'country specific democratic principles and practices' (see *infra* 2(d)). With the inclusion of this section, this chapter recognises that there is no uniform set of democratic principles that China, India, Peru and South Africa have adopted.

In what follows, we first discuss the right to vote and free elections (see *infra* 2(a)); then the principles of representation and participation (see *infra* 2(b)); then democratic equality (see *infra* 2(c)); and then the country-specific democratic principles and practices. After examining the democratic principles, we briefly turn to the ways in which these are implemented in practice and what democratic deficits occur in the countries under review (see *infra* 3). As with the previous chapter on human rights, this chapter closes with a comparison with EU conceptualisations.

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<sup>218</sup> FRAME Deliverable 3.1, 20.

<sup>219</sup> *ibid* 19.

<sup>220</sup> *ibid* 20.

<sup>221</sup> FRAME Deliverable 3.2, 40-41.

<sup>222</sup> FRAME Deliverable 3.1, 19.

## 2. Democratic principles

### a) Right to vote and free elections

**South Africa's** first election with universal suffrage, in 1994, was widely applauded as remarkable, signifying an evolution from apartheid dictatorship to a state of non-racial democracy.<sup>223</sup> In the following elections of 1999, 2004, 2009 and 2014, the country has journeyed further along the path to democratic consolidation. The Constitution provides that elections should be free and fair, and the principle of majority choice is upheld.<sup>224</sup> The South African Constitutional Court has affirmed<sup>225</sup> that the right to vote is vested in all citizens, but that it is not absolute as it is also subject to the limitation clause.<sup>226</sup> When the Constitutional Court had to decide whether or not an Act of Parliament<sup>227</sup> that limited prisoners' right to vote in the national elections was consistent with the constitutional value of universal enfranchisement, the Court held that because the relevant provisions of the Act<sup>228</sup> were not supported with clear and convincing reasons, they should not be used as a conduit to disenfranchise a group of citizens. In this case, the government had attempted to justify the limitation of the right to vote by contending that they had limited resources and could not afford the cost. This justification proved insufficient because the Government was able to organise voting for those prisoners that were not sentenced or those serving sentences with fines that were in prison because they were unable to afford the fine. The Court thus held that it did not seem too disproportionate to require that this be extended to prisoners that were sentenced and serving jail term.<sup>229</sup>

In **Peru**, there are several provisions in the Constitution outlining the domestic conceptualisations of democracy. Firstly, and inspired by the recent history of the country, Article 43 declares Peru a 'democratic, social, independent and sovereign State'. This reference to democracy found in the Constitution indicates that no political regime, understood as the political institutions and procedures that form the public authority,<sup>230</sup> may promote an authoritarian government or dictatorship. It should also be pointed out that in addition to democracy, two other notions are emphasised: the 'social' nature of the contract, and State sovereignty.

<sup>223</sup> Dale T McKinley, 'Democracy, Power and Patronage: Debate and Opposition within the African National Congress and the Tripartite Alliance since 1994' (2001) 8(1) Democratization 183.

<sup>224</sup> Adam Habib and Rupert Taylor, 'Political Alliances and Parliamentary Opposition Post-Apartheid South Africa' (2001) 8(1) Democratization 207.

<sup>225</sup> See *Minister of Home Affairs v NICRO* (n 106).

<sup>226</sup> *ibid* para 25. The Constitution disqualifies the following citizens from voting: (i) anyone below the age of 18 (sec 46(1)(c)); (ii) anyone declared to be of unsound mind by a court (sec 47(1)(d)); and (iii) anyone convicted of an offence and sentenced to more than 12 months imprisonment without the option of a fine (sec 47(1)(e)).

<sup>227</sup> Electoral Act 73 of 1998.

<sup>228</sup> *ibid* ss 8(2)(f), and 24B(1) and (2).

<sup>229</sup> *Minister of Home Affairs v NICRO* (n 106) paras 66-67.

<sup>230</sup> Maurice Duverger, 'Personalizzazione del Potere o Istituzionalizzazione del Potere Personale' [Personalisation of Power or Institutionalisation of Personal Power] in Maurizio Vaudagna (ed), *Il Partito Politico Americano e l'Europa* [The American Political Party and Europe] (Feltrinelli 1991).

The Peruvian conceptualisation of democracy is characterised by free, periodic and independent elections, with equal participation of its citizens.<sup>231</sup> The vote is personal, equal, free, secret and compulsory until 70 year of age. In recent times, several measures have been adopted in order to enhance the transparency of the voting process at local and national level, and in doing so, strengthen democracy.<sup>232</sup>

**India** is the largest democracy in the world, in terms of number of inhabitants. The country adopted universal suffrage when it became independent. Nowadays more than 800 million people are eligible to vote in India, making national elections a mammoth effort of planning. The Indian Constitution enshrines the democratic principles on which the country is built. Somewhat similar to the above-mentioned Article 43 of the Peruvian Constitution, the preamble to the Indian Constitution declares India to be a 'Sovereign Socialist Secular Democratic Republic'. Article 326 of the Constitution provides for universal suffrage of all citizens of 18 years and older. It also provides that the legislature can disqualify people from the right to vote on the grounds of non-residence, unsoundness of mind, crime or corrupt or illegal practice. Voters elect officials on three levels of government (discussed below in the next section).

Lastly, **China** is a unique case when it comes to voting and elections. It is clear that 'democracy' is used in Chinese official documents as a positive term. Democracy is also perceived positively by the Chinese people, survey results show.<sup>233</sup> Since the socialist system was established in China, democracy in that country is interpreted as the people's democratic dictatorship led by the working class and based on the alliance of workers and peasants, which is in essence the dictatorship of the proletariat. Often the term democracy is used together with 'socialist', as when President Xi Jinping observed in 2012 that 'the road to a politics of socialist democracy will continue to broaden'.<sup>234</sup>

According to Article 34 of the Chinese Constitution, all citizens who have reached the age of 18 shall have the right to vote and stand for election, regardless of ethnic status, race, sex, occupation, family background, religious belief, education, property status or length of residence, except persons deprived of political rights according to law. However, elections in China work very differently than elections in

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<sup>231</sup> Article 31 of the Peruvian Constitution states that Peruvian citizens have 'the right to be elected and to elect their representatives in accordance with the conditions and procedure determined by the organic law'. In addition, it is noted that the 'vote is personal, equal, free, secret and required up to seventy years'. In accordance with Article 2 which states that 'every Peruvian citizens is entitled to participate, individually or collectively, in political, economic, social and cultural life of the nation. Citizens have, according to law, rights of election, removal or revocation of authorities, legislative initiative and referendum'.

<sup>232</sup> For instance, the changes have been adopted in the National Office of Electing Process (ONPE), the National Jury of Elections (JNE) and the National Registry of Identification and Civil Status (RENIEC) in order to reinforce their autonomy.

<sup>233</sup> Jie Lu, 'Democratic Conceptions and Regime Support among Chinese Citizens' (2012) Asian Barometer Working Paper Series No. 66 <<http://www.asianbarometer.org/publications/115280e76396df0ac17170a8648f134a.pdf>> accessed 16 October 2015.

<sup>234</sup> Zhou Qi and Andrew J Nathan, Political Systems, Rights and Values in Nina Hachigan (ed), *Debating China: The U.S.-China Relationship in Ten Conversations* (OUP 2014) 49.



other parts of the world. The so-called minimal definition of democracy,<sup>235</sup> namely that government power holders are elected via free and competitive elections, does not apply to China. Local People Congresses are directly elected, but all higher levels of Congresses are elected by the next level of the Congress.

### *b) Representative and participatory democracy*

The **South African** democratic model, as laid down in that country's Constitution, is based on both representative and participatory democracy. In *Doctors' For Life*,<sup>236</sup> the Constitutional Court noted that through the 'constitutional provisions that require national and provincial legislatures to facilitate public involvement in their processes'<sup>237</sup> [...] the people of South Africa reserved for themselves part of the sovereign legislative authority that they otherwise delegated to the representative bodies they created'.<sup>238</sup> This means that although South Africa is a representative democracy, and representatives are elected every four years in the national and provincial elections, it is also a participative democracy allowing citizens to engage in the drafting of legislation by requiring that both the National Assembly and the National Council of Provinces 'facilitate public involvement'. This was construed in the case *Doctors for Life* as involving two aspects: 'the first is the duty to provide meaningful opportunities for public participation in the law-making process. The second is the duty to take measures to ensure that people have the ability to take advantage of the opportunities provided.'<sup>239</sup>

While from a Western perspective **China** is seen as a single-party regime, China has developed a system called 'multi-party cooperation'. This is enshrined in the Constitution as follows: 'multi-party cooperation and political consultation system under the leadership of the Communist Party of China shall continue to exist and develop for a long time to come' (para. 10 of the Preamble). Apart from the CPC, there are eight political parties in China.<sup>240</sup> A 2007 white paper entitled 'China's Political Party System', published by the State Council Information Office, has described the system.<sup>241</sup> In this system of cooperation, the CPC holds the leading and ruling position, while the eight democratic parties participate in and deliberate on state affairs. The relationship between these parties and the CPC is based on political cooperation rather than political competition aimed at assuming State power. In this cooperative political relationship, the CPC is at the helm of the State while the other parties jointly participate in the administration of State affairs. A consensus on socialism is the political foundation of this multi-party cooperation system.

<sup>235</sup> See also FRAME Deliverable 3.1.

<sup>236</sup> *Doctors for Life International v Speaker of the National Assembly* 2006 (12) BCLR 1399 (CC).

<sup>237</sup> ss 118(1)(a) and 72(1)(a) respectively.

<sup>238</sup> *Doctors for Life International* (n 235) para 110.

<sup>239</sup> *ibid* para 129.

<sup>240</sup> Namely the Revolutionary Committee of the Chinese Kuomintang (RCCK); the China Democratic League (CDL); the China National Democratic Construction Association (CNDCA); the China Association for Promoting Democracy (CAPD); the China Peasants and Workers Democratic Party (CPWDP); the China Zhi Gong Dang (CZGD); the Jiu San Society and the Taiwan Democratic Self-Government League (TSL).

<sup>241</sup> State Council Information Office of the People's Republic of China, 'White Paper on China's Political Party System' <<http://www.china.org.cn/english/news/231852.htm>> accessed 15 May 2015.

In **Peru**, mechanisms of indirect democratic representation and civil participation are provided for in the Constitution.<sup>242</sup> Political parties, movements and alliances are formally recognised as organisations representing the popular will.<sup>243</sup> The functioning of these political entities must follow the democratic principles established by law.<sup>244</sup> Another dimension of democratic representation in Peru relates to the institutional division into national and sub-national spheres. The people's interests must be represented at both levels, with periodic and independent elections.

Regarding participation, Peruvian law establishes that citizens can equally participate in public, economic, social and cultural life individually or in association with others.<sup>245</sup> They can elect and remove authorities, and have the right to promote laws and referendum. These possibilities, however, seem to remain at the periphery of democracy since they are rarely used by the people.

**India's** Constitution enshrines both the principles of representation and participation. The Parliament of India consists of two houses: the *Lok Sabha* (the House of the People) and the *Rajya Sabha* (the House of the States). The *Lok Sabha* consists of 545 members: 543 are directly elected and two are nominated by the President of India from among the Anglo-Indian community. The term of this house is five years, unless it is dissolved before the end of its five year mandate or extended because of emergency conditions on the advice of the Prime Minister (the latter has happened only once, during the Emergency of 1975-76). The *Rajya Sabha*, which has some features of the US Senate, consists of 250 members, of whom 12 are nominated by the President for their 'special knowledge or practical experience' in literature, science, art, or social service. In a significant departure from the American model of upper house, its membership is based on population; smaller States have one member, and the bigger States have more members. For example, Uttar Pradesh has 31 members. These members are not directly elected by people; they are elected by the members of respective Legislative Assemblies of the States. They have a term of six years. Every two years one third of the members of this house retire. The Parliament is designed to be an instrument of democratic accountability. Vote of confidence, or no-confidence, zero hour questions to ministers, the Public Accounts and Estimates Committees are tools of this accountability. The President of India is elected by members of both Houses of Parliament and by members of the Legislative Assemblies of the States (Article 54 of the Constitution).

The historic 73<sup>rd</sup> Constitutional Amendment of 1992 introduced local self-governments (*Panchayat Raj* Institutions). This was done in order to deepen Indian democracy and make it more truly representative and participatory. Though this is not a typical example of direct democracy, it contains elements of direct democracy in that it seeks wider local participation in the day-to-day running of local affairs. The *Gram Sabha*, provided under Article 243 (A) of the Constitution, consists of persons registered in the

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<sup>242</sup> Political Constitution of Peru [1993], Art. 31.

<sup>243</sup> *ibid* Art. 35.

<sup>244</sup> Art. 35 establishes that citizens may 'exercise their political rights individually or through political organisations such as parties, movements or associations, according to the law'.

<sup>245</sup> *ibid* Art. 31.

electoral rolls relating to the village living within the realm of the *Panchayat* at the village level. The *Gram Sabha* has been designated as the counterpart of the State Legislature in its powers and functions at the village level. To this extent, it is direct democracy in operation. Similarly, the 74<sup>th</sup> Constitutional Amendment (1992) provided for elected urban governments, such as the Municipalities, the Cooperative Societies, and the Scheduled and Tribal Areas.

### c) Democratic equality

According to section 19 of the **South African** Constitution, every citizen has the right to form and participate in political parties. The rights of citizens to vote in elections and stand for public office are also entrenched.<sup>246</sup> While it is claimed that the importance of ethnicity and race in general elections is diminishing and the importance of the independent voter is intensifying,<sup>247</sup> in practice South Africa still remains a divided society.<sup>248</sup>

The representation and participation of women in the legislature also falls within the principle of democratic equality. The number of women in the National Assembly compares favourably with other parliaments globally. In terms of percentage of women in parliament, South Africa as of 1 September 2015, ranks 8 out of 190 counties (166 out of 396 members of the National Assembly are women).<sup>249</sup> The greater number of women in both the National Assembly and the provincial legislatures are from the ruling ANC. This surge can be linked to the 'employment of the party list electoral system along with the ANC's policy of a one-third quota of women on its national and provincial electoral lists'.<sup>250</sup> Other political parties in the legislature have not emulated the lead of the ANC in adopting a women's quota.

In **China**, Article 1 of the Constitution provides that 'The People's Republic of China is a socialist state under the people's democratic dictatorship led by the working class and based on the alliance of workers and peasants.' This raises the question of how to understand the 'people's democratic dictatorship'. Who are meant by 'people' in this concept? 'People' is a political concept, distinct from the legal concept of 'citizen'. All persons holding the nationality of the PRC are citizens, while the people means the basic members of a society with the working people as its main body and does not include the persons who have been deprived of political rights according to law.

The **Peruvian** Constitution establishes that all citizens 'have the right to be elected and elect their representatives'. The equal right to vote was introduced, as commented in Section 2(a) (Chapter IV,

<sup>246</sup> s 9.

<sup>247</sup> Robert Mattes and Jessica Piombo, 'Opposition Parties and the Voters in South Africa's General Election of 1999' (2001) 8(3) Democratization 101.

<sup>248</sup> Holger Dix, '20 years of Democracy and the Fifth Parliamentary Elections in South Africa' (2014) KAS International Reports No. 6 <[http://www.kas.de/wf/doc/kas\\_38103-544-2-30.pdf?140618134407](http://www.kas.de/wf/doc/kas_38103-544-2-30.pdf?140618134407)> accessed 18 December 2015.

<sup>249</sup> Inter-Parliamentary Union, 'World Classification' <<http://www.ipu.org/wmn-e/classif.htm>> accessed 17 December 2015.

<sup>250</sup> Louise Vincent, 'A Question of Interest: Women as Opposition' (2001) 8(1) Democratization 127, 131.

under B), by the Constitution of 1979, which extended the right to illiterate people, previously excluded. In addition, quotas for the participation of women, young persons and indigenous peoples in public life have been established.<sup>251</sup> Nevertheless, several difficulties for achieving substantial equality have been found in practice and the representation of the groups' interests in the political sphere remains limited.<sup>252</sup> In the case of the women's quota, a weak political representation of women in senior positions remains at sub-national level.<sup>253</sup> In the case of indigenous quota, there have been cumbersome procedures for effective implementation and this has led to perverse incentives that exclude certain indigenous people from political representation.<sup>254</sup> In the case of the young quota, age discrimination problems remain.<sup>255</sup> In short, while these actions have strengthened these groups as political authorities, it has not necessarily strengthened the representation of their interests and some features of discrimination remain in the management of political and public affairs.

**India** first gained experience with reserved seats in parliament when it was still under British rule. The Government of India Act of 1935 reserved seats for groups on the basis of amongst others, sex, profession, race, religion and 'social backwardness'.<sup>256</sup> Following independence, the Constitution included several provisions that guarantee the political representation of socially disadvantaged groups. More precisely, Article 330 reserves seats for SCs and STs in national Parliament (*Lok Sabha*), and Article 332 does the same for the Legislative Assemblies of the States. According also to these provisions, the number of seats reserved should reflect the groups' proportion in the population (as determined by censuses). In practice, around 15-16% of the *Lok Sabha* is reserved for Scheduled Castes and 8-9% for Scheduled Tribes. Only members from the designated groups can stand for election of the reserved seats. The entire electorate can vote for them. Thus the reservations have had 'a profound effect on the Indian political landscape': it has changed the identity of the legislator – approximately a quarter of

<sup>251</sup> Law N° 26859 on the Organisation of Elections [1997] promoting gender equality quotas; Law N° 28869 on Municipal Elections [2006] promoting participation of young peoples. Finally, Resolution N° 277-2002-JNE on Gender Quotas and Native Communities in Local Elections [2002] established the so called «indigenous quota» for local elections.

<sup>252</sup> See Alicia Del Aguila and Milagros Suito (eds), *Participación Electoral Indígena y Cuota Nativa en el Perú: Aportes para el Debate* [Indigenous Participation and Indigenous Quota in Peru: Points for Debate] (Jurado Nacional de Elecciones 2012); Sandro Venturo, *Contrajuventud: Ensayos Sobre Participación Política en Lima* [Counter-Youth: Essays over Political Participation in Peru] (Instituto de Estudios Peruanos 2001). See also Dirección Nacional de Educación y Formación Cívica Ciudadana, Reporte Sobre Resultados de la Encuesta de Acoso Político a Candidatas Regionales en las Elecciones Regionales y Municipales 2014 (JNE 2014) <<http://portal.jne.gob.pe/Anuncios/Reporte%20EAPCR%20-%20ERM2014.pdf>> accessed 18 December 2015, for a report on sexual harassment against female political authorities.

<sup>253</sup> Iris Jave and Diego Uchuypoma, *¿Quién Dijo que Sería Fácil? Liderazgo Político de Regidoras Jóvenes en Lima* [Who said it would be easy? Political Leadership of Young Female Activists in Lima] (Instituto de Democracia y Derechos Humanos de la Pontificia Universidad Católica del Perú 2013).

<sup>254</sup> See Del Aguila and Suito (n 252).

<sup>255</sup> See Venturo (n 252).

<sup>256</sup> Mona Lena Krook and Diana Z O'Brien, 'The Politics of Group Representation: Quotas for Women and Minorities Worldwide' (2010) 42(3) Comparative Politics 253, 267.

legislators come from reserved seats.<sup>257</sup> This appears also to have had a positive effect on the democratic engagement of people from disadvantaged groups: voter turnout rates for the *Lok Sabha* are consistently higher amongst Dalits (ex-untouchables) than amongst the upper castes.<sup>258</sup>

The representation of women in Indian democracy is a different matter. The 1950 Constitution did not reserve seats for women, but Constitutional amendments of 1992 reserved one-third of seats in local government (*Panchayat Raj* Institutions) for women. The picture is different at State and national level. The percentage of women in Indian parliament is 10.9% according to the latest UN Development Programme ('UNDP') Gender Inequality Index.<sup>259</sup> In 1996 a bill to amend the Constitution was proposed to introduce similar provisions for the national parliament.<sup>260</sup> Since then at every subsequent meeting of the *Lok Sabha* a similar bill has been introduced, but never adopted for lack of support from male members from Parliament. The politically progressive India is lagging behind other democracies, including Bangladesh, with adopting women's quota in politics. Nevertheless, several States such as Andhra Pradesh, Bihar, Chhattisgarh, Himachal Pradesh, Jharkhand, Kerala, Madhya Pradesh, Maharashtra, Odisha, Rajasthan, and Tripura have amended their respective Acts to provide 50% reservation for women in local bodies.

#### d) *Country-specific democratic principles and practices*

This section will discuss specific democratic principles and practices which distinguish the four countries under review.

An important feature of **South Africa's** democratic reality is that it makes use of traditional leaders ranging from chiefs to kings, who operate both at the national and provincial level. During the apartheid regime, traditional leaders were maligned as puppets of the government largely because they had 'become civil servants, to be hired, fired, paid and, if necessary, created by the government'.<sup>261</sup> Although there were some within the ANC that argued that the 'the role of the chiefs [...] will be replaced by democratic institutions founded on the organs of people's power',<sup>262</sup> the ANC, post-1994, has sought to restore the position of traditional leaders by 'acknowledg[ing] their status and role as full participants in national affairs'.<sup>263</sup>

<sup>257</sup> Rohini Pande, 'Can Mandated Political Representation Increase Policy Influence for Disadvantaged Minorities? Theory and Evidence from India' (2003) 93(4) *The American Economic Review* 1132, 1133.

<sup>258</sup> Jean Drèze and Amartya Sen, *An Uncertain Glory: India and its Contradictions* (Princeton University Press 2013) 251.

<sup>259</sup> See <<http://hdr.undp.org/en/content/table-4-gender-inequality-index>> accessed 10 December 2015.

<sup>260</sup> Krook and O'Brien (n 256) 267.

<sup>261</sup> Ineke van Kessel and Barbara Oomen, 'One Chief, One Vote: The Revival of Traditional Authorities in Post-apartheid South Africa' (1997) 96(385) *Africa Affairs* 564.

<sup>262</sup> Mzala, *Gatsha Buthelezi: Chief with a Double Agenda* (Zed Books 1988) 224 quoted in van Kessel and Oomen (n 261) 565.

<sup>263</sup> Nelson Mandela (Presidential address at inauguration of National Council of Traditional Leaders, Cape Town, 18 April 1997) <[http://mandela.gov.za/mandela\\_speeches/1997/970418\\_tradlead.htm](http://mandela.gov.za/mandela_speeches/1997/970418_tradlead.htm)> accessed 8 November 2015.

Instead of being phased out as relics in post-apartheid South Africa, traditional leaders have demanded and obtained constitutional guarantees for their representation and position in the national, provincial and local administration. It is against this backdrop that the Constitution affirms that the state should adopt national legislation which sets out the status and role for chiefs as an institution at the local level on issues affecting local communities.<sup>264</sup> About 40 percent of the people of 'South Africa and 17 percent of its territory are ruled by traditional authorities. These 17 million subjects of chiefly rule are governed by about 800 traditional leaders'.<sup>265</sup> Today within South Africa, 'traditional leaders exercise governmental functions which range from the provision of services to the preservation of law and order to the allocation of tribal land held in trust'.<sup>266</sup> Though such authority is subject to national government, 'they provide a system of localized government to rural communities'.<sup>267</sup> In terms of accountability, chiefs are not directly accountable to their subjects, but rather to the Department of Cooperative Governance and Traditional Affairs, which oversees and regulates their operations.<sup>268</sup>

In **China**, the idea of *consultative democracy* has made headway. President Xi Jinping has referred to this idea in several speeches in 2014.<sup>269</sup> Consultative democracy has been described as the idea that 'leaders are chosen and major decisions made through consultations between existing rulers and their subordinates'.<sup>270</sup> Proponents of this concept hold that it has deep roots in Chinese history.<sup>271</sup> What is more, consultative democracy is seen as advantageous because it is relevant for the whole political process and not just the election phase.<sup>272</sup> It entails the creation of platforms at the local level where the

<sup>264</sup> s 212.

<sup>265</sup> van Kessel and Oomen (n 261) 561.

<sup>266</sup> Yvonne Mokgoro, Alastair McIntosh and Charmaine French, *Traditional Authority and Democracy in the Interim South African* (Konrad-Adenauer-Stiftung 1994) 63.

<sup>267</sup> *ibid* 64.

<sup>268</sup> Department of Cooperative Governance and Traditional Affairs <<http://www.cogta.gov.za/sites/cogtapub/Pages/Home-Page.aspx>> accessed 8 November 2015.

<sup>269</sup> Cary Huang, 'China's Xi Jinping Supports 'Democracy'... but not in the Western Sense' *South China Morning Post* (Hong Kong, 24 September 2014) <<http://www.scmp.com/news/china/article/1599068/xi-supports-democracy-not-western-sense?page=all>> accessed 18 December 2015.

<sup>270</sup> Qi and Nathan (n 234) 50.

<sup>271</sup> The Government's 2015 White Paper on human rights states that:

'Consultative democracy is a form of democracy unique to China's socialist democratic politics. China's fine traditional culture provides a profound political and ideological wellspring for this new-type consultative democracy. In 2014, centred on building a moderately prosperous society in an all-around way, comprehensively deepening reform, governing the country with the rule of law and running the Party with strict discipline, the country gathered strength, explored with consultative democracy in greater width and depth, strengthened the function of democratic supervision, continued to strengthen consultation among political parties, in the people's congresses, governments, the Chinese People's Political Consultative Conference (CPPCC) and people's organizations, and at the community level. Efforts were made to build a complete consultation democracy system with proper procedures, and expand channels for citizens to participate in state and social governance in an orderly manner, all of which improved the scientific and democratic level of decision-making'. See 2015 White Paper (n 190).

<sup>272</sup> Qi and Nathan (n 231) 50. See also Li Jing, 'Democracy is not a Decoration, Xi Jinping says in Speech to CPPCC' *South China Morning Post* (Hong Kong, 22 September 2014) <<http://www.scmp.com/news/china/article/1597706/democracy-not-decoration-xi-jinping-says-speech-cppcc?page=all>> accessed 18 December 2015. Xi has been

public can participate in public affairs.

The key concept distinguishing the **Peruvian** system is ‘decentralisation’, a model channeling peoples’ claims and yielding subnational representation and better accountability. From a technical point of view, decentralisation has facilitated the transfer of power from national level to the local level, and has increased public funding, reaching out to the communities. As a result, decentralisation has promoted citizen participation as a tool for local management, yet for this reason is perceived as a technical measure aiming at more effective management of resources rather than as a political participation. It is regarded as a set of rules and practices derived from common sense; dismissing the political element and focuses on technical issues, carrying out consultations or dispute resolution regardless of the interests, resources and dynamics of power between local and / or regional players.

One of the most salient features of **Indian** democracy, the guaranteed representation of historically disadvantaged groups, has already been discussed in the preceding section. In some ways, the principle of group representation can be seen as part of the broader underlying Indian concept of *democratic socialism*. In 1976 the original preamble of the Indian Constitution, which dated from 1949, was amended to include the term ‘socialist’.<sup>273</sup> The preamble now states that India constitutes a ‘Sovereign Socialist Secular Democratic Republic’. The term ‘socialist’ refers to the ideal that socialism will be attained through the democratic process. This ideal goes back to Nehru, who strove for social justice and equality and injected these ideals into the articles of the Constitution.<sup>274</sup> As Granville Austen has observed: ‘The Indian Constitution is first and foremost a social document. The majority of its provisions are either directly aimed at furthering the goals of the social revolution or attempt to foster this revolution by establishing the conditions necessary for its achievement.’<sup>275</sup>

### 3. Democratic deficits

Levinson has remarked that ‘[a] democratic deficit occurs when ostensibly democratic organisations or institutions in fact fall short of fulfilling what are believed to be the principles of democracy.’<sup>276</sup> The question of democratic deficits is therefore primarily one of practice rather than of concepts: a democratic deficit occurs when the conceptual principles of democracy are not fully operationalised in practice.

*This section will adhere to a country-specific rather than a thematic structure. One common problem is corruption (mentioned in the reports regarding China, India and South Africa), but, apart from that, the difficulties China, India, Peru and South Africa are facing in terms of developing and deepening*

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quoted as saying that: ‘Democracy is defined not only by people's right to vote in an election but also the right to participate in political affairs on a daily basis.’

<sup>273</sup> With the same amendment (no. 42), the term ‘secular’ was also added to the preamble.

<sup>274</sup> Sheetal Parikh, ‘Enshrining a Secular Idol: A Judicial Response to the Violent Aftermath of Ayodhya’ (2005) 37(1) Case Western Reserve Journal of International Law 85, 92.

<sup>275</sup> Granville Austin, *The Indian Constitution: Cornerstone of a Nation* (OUP 2000) 50.

<sup>276</sup> Sanford V Levinson, ‘How the United States Constitution Contributes to the Democratic Deficit in America’ (2007) 55 Drake Law Review 859.

*democracy cannot readily be captured under common denominators. The views expressed below are from the FRAME partners, based on FRAME research. It should be emphasised that the nature of democratic deficits is contested and below we just present one view. The most obvious example of diverging views is China. Western views on China's democratic deficits tend to differ greatly from Chinese views on democratic deficits.*

#### *a) South Africa*

The preceding section has shown that in South Africa key democratic principles are recognised. However, many problems arise in the implementation of these democratic principles. Despite the great strides South Africa has made towards democracy since the end of Apartheid, the country is confronted with startling inequalities, corruption, lack of transparency and a host of other economic and social shortfalls which are perceived to pose a threat to the country's young democracy.<sup>277</sup> In accessing the notion of democracy in South Africa, the key consideration is not whether democracy will continue to exist; the main concern is over the quality of that democracy. The question arises whether the above-mentioned constitutional provisions which are crafted to safeguard equality and good governance, ensure that deliberation and effective participation are operationalised suitably. Regrettably, there is ample evidence that this is not the case.

#### *Transparency*

South Africa has a Promotion of Access to Information Act 2 of 2000 ('PAIA') which aims '[t]o give effect to the constitutional right of access to any information held by the State and any information that is held by another person and that is required for the exercise or protection of any rights'.<sup>278</sup> However, there is concern that other legislation such as the Protection of State Information Act, 1982, may be used by government to undermine access to information. A controversial Protection of State Information Bill was passed by Parliament in November 2012 but was sent back to Parliament for reconsideration by President Zuma. The main criticism against the bill is that it provides a parallel regime to PAIA and criminalises action taken in the public interest.<sup>279</sup>

#### *Nepotism*

The government is implementing a policy called black economic empowerment ('BEE') meant to address the economic inequality between the white minority who benefited from apartheid and the black majority. There is concern BEE is mainly benefiting a small elite with good connections to the ruling ANC party.<sup>280</sup>

<sup>277</sup> Eddy Maloka, "'White' Political Parties and Democratic Consolidation in South Africa' (2001) 8(1) Democratization 227.

<sup>278</sup> Promotion of Access to Information Act 2 of 2000, Preamble (*Emphasis added*).

<sup>279</sup> Nelson Mandela Foundation, 'What is Still Wrong with the Protection of State Information Bill?' (Press Release, 10 October 2013) <<https://www.nelsonmandela.org/news/entry/what-is-still-wrong-with-the-protection-of-state-information-bill>> accessed 8 November 2015.

<sup>280</sup> See Yvonne Mokgoro, 'Traditional Authority and Democracy in the Interim South African Constitution' (1996) 3 Review of Constitutional Studies 60.



### *Traditional leadership*

Some argue that, 'the role of traditional authority is problematic because such authority has not been acquired democratically and has been fundamentally patriarchal'.<sup>281</sup> The relationship between the liberal democratic model of democracy and traditional leadership is not without tension. As Mowewa argues, 'the tension between traditional authority and authority of a constitutional democracy is that realizing certain rights within the South African constitution such as equality may give rise to disagreement within a traditional concept, particular in regards to issues of gender'.<sup>282</sup> However, despite such potential disparities within constitutional law and traditional authority, 'a significant sector of rural societies, particularly in the former homelands, still cherishes the system. Some progressive traditional leaders also still maintain the loyalty and respect of their communities'.<sup>283</sup>

Nonetheless, the powers of chiefs are not absolute. This point was affirmed by Nelson Mandela in 1996 when he said that 'we want to advise the traditional leaders in our country to abandon the illusion that there can ever emerge a constitutional settlement which grants them powers that would compromise the fundamental objective of a genuine democracy'.<sup>284</sup> It is against this backdrop that the Traditional Leadership and Governance Framework Act 41 was adopted in 2003 to regulate their activities. The Act calls on traditional leaders to use customs and customary law to promote equality, prevent unfair discrimination and advance gender representation in the paramountcy.<sup>285</sup> Subsequently, an illegitimate king or queen whose actions militate against the democratic values of the state may be withdrawn by the President in consultation with the kinship and queenship council and other relevant actors.<sup>286</sup>

### *b) China*

What follows below is the view of the Chinese FRAME-partner on democratic deficits in China.

For the development of China's democracy, the proportion of community-level deputies to people's congresses, particularly those elected from among workers, farmers and intellectuals who can represent the interests of their own groups, should be raised, while that of deputies from among leading Party and government officials should be reduced. The organisational system for organs of state power should be improved. The age mix of the members of the standing committees and special committees of people's congresses should be improved and the areas of their expertise should be widened. The proportion of the full-time members of these committees should be raised. Deputies to people's congresses and members of these committees should enhance their capability to perform their duties pursuant to law. Community-level organisations of various types should also get involved to integrate government administration and community-level democracy.

<sup>281</sup> *ibid* 62.

<sup>282</sup> Interview with Dr. S Mowewa (n 176).

<sup>283</sup> Mokgoro, McIntosh and French (n 266) 63.

<sup>284</sup> van Kessel and Oomen (n 261) 584.

<sup>285</sup> Traditional Leadership and Governance Framework Act of 2003, para 4.

<sup>286</sup> *ibid* paras 5-6.

China and its government should make the exercise of power more open and standardised, and increase transparency of Party, government and judicial operations and official operations in other fields and should improve the systems of inquiry, accountability, economic responsibility auditing, resignation and dismissal to ensure that the people oversee the exercise of power and that power is exercised in a transparent manner.

### c) Peru

The formal rejection of authoritarianism, incorporated in the Constitution in the transition period to democracy by the newly elected governments, was meant to create distance from the Fujimori regime, which had been characterised by political centralism and the weakening of representative institutions and partisan culture. The new Constitution promoted the values of decentralisation, representation and participation. This attempt, however, resulted in a gap between the institutions and the *real politik*, due to the lack of legitimacy of state institutions, the popular discontent with political parties and the lack of attention to social inequality.<sup>287</sup>

Probably, the main limitation found in the Peruvian system today relates to the lack of trust in public institutions. The American Barometer indicates that popular support for democracy in Peru has decreased in the last 10 years.<sup>288</sup> This distrust reaches also the Catholic Church, the Army and the political parties. Such discontent has been fuelled by high organised crime rates, corruption and economic stagnation.<sup>289</sup> The weakening in political representation has contributed to this problem as well.

Unfortunately, decentralisation and promotion of civil participation have not been able to re-establish trust in institutional democracy. The paradox here lays in the fact that participation has been promoted as 'apolitical and technical' mechanism of local administration.<sup>290</sup> Similarly, the decentralisation discourse ignores the political dimension of participation, and rather focuses on technical issues, agreement and conflict resolution, without taking into account the interests, means and power dynamics found at local level.<sup>291</sup> As a result, decentralisation has introduced a new dynamic at the local level, but without stimulating and supporting representative institutions such as political parties.

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<sup>287</sup> Alberto Vergara, *El Choque de los Ideales: Reformas Institucionales y Partidos Políticos en el Perú Post-fujimorato* (IDEA Internacional 2009) 20; Martín Tanaka, *La Participación Ciudadana y el Sistema Representativo* (PRODES 2007) 3.

<sup>288</sup> Patricia Zárate, Julio Carrión and Elizabeth Zechmeister, *Cultura Política de la Democracia en Perú y en las Américas, 2014: Gobernabilidad Democrática a través de 10 años del Barómetro de las Américas* (Instituto de Estudios Peruanos 2014) 95.

<sup>289</sup> *ibid* 97.

<sup>290</sup> María Isabel Remy, *Los Múltiples Campos de la Participación Ciudadana en el Perú: Un Reconocimiento del Terreno y Algunas Reflexiones* (Instituto de Estudios Peruanos 2004) 165.

<sup>291</sup> Romeo Grompone, *La Participación Desplegada en la Política y la Sociedad: Temas Olvidados, Nuevos Enfoques* (Red para el Desarrollo de las Ciencias Sociales en el Perú 2007) 18.

Discontent with politics and political parties have continued to affect the Peruvian institutional and normative system. Some authors attribute these issues to the failure of politicians to represent the interests of the people. Pease argues that politicians do not represent the interests of the people that elected them, people do not enjoy any benefits, there is scarce accountability for such failures and are not offered alternatives for the future.<sup>292</sup> Hence, the breach between social claims and the public administration of resources remains wide open. For instance, the reduction of poverty has not yet achieved a reduction of social inequality. Inequality, measured in Gini coefficient, has increased between 2004 and 2007, regardless of the economic growth. The annual budget assigned to areas such as education and public health remains very limited.

Social inequality and the increase in the level of social conflict in the last two decades, especially due to environmental concerns for the presence of extractive industries in different parts of the country, have concrete consequences on democracy in Peru. The Truth and Reconciliation Commission has also indicated this social tension as leading to severe social, economic and political gaps, which hinder and challenge both the consolidation and the future of the Peruvian democratic system. Transitional societies face the challenge of constructing a democratic identity that promotes peace and equal development. To date, in spite of economic growth, public satisfaction with the democratic system has decreased.

#### d) India

India's democracy has been hailed as a success-against-the-odds-story.<sup>293</sup> There have been more than six decades of free elections, with universal adult suffrage. Democracy has taken root in India, and democratic institutions have been consolidated. Kohli writes that: 'Among poor countries of the world, India stands out as the most significant country that has successfully harnessed [the urge towards self-government] into a functioning democracy. How and why India has succeeded is thus a question of considerable scholarly and general interest.'<sup>294</sup> Yet the effectiveness of this democracy is contested.

While the Supreme Court and the Election Commission of India staunchly uphold democratic values, the elected representatives and the executive are arguably mostly responsible for the democratic deficit. To start, the role of Parliament is in decline. The successive sessions of Parliament have been shortened. There has been a sharp reduction in number of sittings. In 2012, the *Lok Sabha* had only 74 sittings, whereas, it had 103 (1952), 151 (1956), 51 (1999), 77 (2006), and 87 (2010) sittings in earlier years. This has affected its law making function. For instance, in 1952, 82 bills were passed and in 2006, 65 bills and in 2011 only 36 bills were passed.<sup>295</sup> The actual days of sitting – or in other words, the time Parliament

<sup>292</sup> Henry Pease, *Reforma Política: Para Consolidar el Régimen Democrático* (Fondo Editorial de la Pontificia Universidad Católica del Perú 2008) 12.

<sup>293</sup> See Atul Kohli (ed), *The Success of India's Democracy* (CUP 2001) 1.

<sup>294</sup> *ibid* 4.

<sup>295</sup> Mahendra P Singh, 'The Decline of the Indian Parliament' (2015) 14(3) *India Review* 352, 364-65.

spends deliberating over laws—have been dropping steadily,<sup>296</sup> and are now only a third of what they were in the 1950s, even though travel and communication are far easier today than they were in the India of a half-century ago. Worse still, a dramatic increase in adjournments means that less official business than ever before can be conducted. A large number of bills are not debated at all; most are passed by the voice vote, and without recording how individual Members of Parliament ('MPs') voted. This dilutes transparency and accountability of the representatives to the electors.<sup>297</sup>

Since the late 1980s, the decline of Parliament has further continued due to an unprecedented increase in corruption. In the fifteenth *Lok Sabha* elected in 2009, 30% of MPs had criminal cases pending against them in courts. Among the two main national parties – the Indian National Congress and the Bharatiya Janata Party – the percentage of tainted members stood at 21% and 38 %, respectively. The situation got worse in the 16th *Lok Sabha*, elected in 2014, with MPs with criminal charges going up to 34%.<sup>298</sup>

Another problem is that there is a lack of inner-party democracy. Most of the political parties in India, whether national, regional or local, do not hold periodic elections to elect office bearers, like President, Vice-President, and General Secretaries. These practices across all parties weaken the democratic values of parliamentary institutions.

It bears emphasising, however, that the degree of democratic deficit varies greatly amongst regions. Indian democracy presents a diverse picture. Because of different histories of caste reform movements, democracy in South India is held to be deeper than in the North.<sup>299</sup> In Southern States democracy is marked by more political participation and significant achievements on the social development front.<sup>300</sup> The State of Kerala has been particularly successful in the political and economic integration of non-dominant classes.<sup>301</sup> The frequent inter-caste and inter-community (Hindu-Muslim) conflicts and violence in North Indian States, coupled with the lack of political participation of minority and subordinate groups, has weakened democratic institutions in these States. That democracy in the State of Kerala works better than in the rest of India is in large part because individuals have been equipped with the basic human capacities required for citizenship. Literacy in Kerala was 100 % in 2001, whereas for rest of India it was around 64.84 %. Kerala had made policy of providing universal primary education as a priority. Circulation of newspapers in Kerala was the highest in India. There was greater political participation of marginalised groups like women and *dalits*. This reflected in voter participation in elections, as their participation rate was 15 to 20 % higher than the national average. According to Heller, the democracy in Kerala bears a strong resemblance to European social democracies.<sup>302</sup>

<sup>296</sup> Devesh Kapur and Pratap B Mehta, 'The Indian Parliament as an Institution of Accountability' (2006) UNRISD Programme Paper No. 23 <<https://casi.sas.upenn.edu/sites/casi.sas.upenn.edu/files/bio/uploads/The%20Indian%20Parliament.pdf>> accessed 17 December 2015.

<sup>297</sup> Singh (n 295) 367-369.

<sup>298</sup> *ibid* 363.

<sup>299</sup> Patrick Heller, 'Degrees of Democracy – Some Comparative Lessons from India' (2000) 52 *World Politics* 484, 486.

<sup>300</sup> *id.*

<sup>301</sup> *id.*

<sup>302</sup> Heller (n 299) 517.

#### 4. Comparison with EU conceptualisations

Comparing the EU's conceptualisation of democracy with **South Africa's** conceptualisation, we see little divergence. Article 1(a) of the South African constitution states that the republic is a democratic state founded on the values of 'Human dignity, the achievement of equality and the advancement of human rights and freedoms.' Article 1(d) goes on to state that it is also founded on the values of 'Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.' These values are all similar to the EU's democratic principles, laid down in Articles 9-12 TEU and discussed in Deliverable 3.2.

The main difference lies in the role that South Africa has assigned to traditional leaders. Unlike the EU model of democracy, South Africa recognises both constitutional authority and traditional authority. During the drafting of the South African Constitution, traditional leaders believed that their cultural rights were being neglected. As Meer and Campbell observe, 'during the initial negotiations and drafting of the Constitution, the issue of the institution of traditional leadership proved to be a particularly problematic issue, middle ground had to be found between the ancient institution and the new principles of equality'.<sup>303</sup>

The conception of democracy in **Peru** also seems to stem from very similar principles as those found at EU level. At the core, we find the principle of free, periodic and independent elections, decentralisation and transparency. Participation seems to appear more in the periphery, since although it is formally supported, in practice, mechanisms for civil participation have not been supported. Similarly, in spite of quotas, ethnic minorities, young people and women are still underrepresented. The main distinction with EU conceptualisations of democracy seems to relate to the distrust on political parties and partisan participation more generally. This suggests that the public arena is constructed as non-political but a matter of technical administration.

The **Indian** conceptualisation of democracy shows many similarities with the EU's conceptualisation. Similar to the EU, the principles of free elections, universal suffrage, representation, and participation are all deeply entrenched in India. The English heritage is apparent in India's democracy.<sup>304</sup> Dann has argued that comparing the EU with India requires an appreciation of postcolonial theory, and he emphasises 'the necessity to sensitize Western perceptions of Indian law as to their colonial frames of reference'.<sup>305</sup>

Contrasting the EU with India, particularly noteworthy is the extensive Indian experience with fostering the political representation and participation of socially disadvantaged groups. It has been claimed that

<sup>303</sup> Talia Meer and Craig Campbell, 'Traditional Leadership in Democratic South Africa' (2007) Durban and Cape Town: Democracy Development Program, 4 <<http://ddp.org.za/information-material/articles/Traditional%20Leadership%20in%20Democratic%20South%20Africa.pdf>> accessed 23 June 2015.

<sup>304</sup> Philipp Dann, 'Federal Democracy in India and the European Union: Towards Transcontinental Comparison of Constitutional Law' (2011) 44 *Verfassung und Recht in Übersee* 160, 166.

<sup>305</sup> *ibid* 165.

the Indian experiment with increasing minority representation in politics is ‘by far, the most radical’ of all countries in the world.<sup>306</sup> Drèze and Sen note that resonance of democratic principles is especially high amongst underprivileged groups, as measured by voter-turnouts.<sup>307</sup> Fostering the representation of socially under-privileged groups, can be seen as part of India’s commitment to democratic socialism, which – as mentioned above – is written into the preamble of the Constitution.

Finally, the **Chinese** conceptualisation of democracy diverges widely from the EU conception of democracy. Chinese notions related to democracy are extremely difficult for Europeans to grasp. A working paper of Asian Barometer discusses what appears from a Western liberal perspective as a paradox: Chinese people consistently show a high rate of support for their one-party regime, and at the same time they accept and support democracy as the best form of government in China.<sup>308</sup> What explains this finding is that Chinese do not view free and competitive elections as a core element of democracy, whereas this is often termed the ‘minimal’ definition is Western liberal thought.<sup>309</sup> According to Andrew Nathan, Chinese persons of influence who are calling for democracy ‘are not advocating competitive elections for top posts.’<sup>310</sup> The above-mentioned principle of ‘multi-party cooperation’ does not challenge the undisputed leadership of the Communist Party of China. Nathan observes that many Chinese ‘believe that systems based on political competition foster division and reward selfishness.’<sup>311</sup> For the Chinese, democracy also means the realisation of every citizen’s economic and social rights.

Both **India** and **China** have included a commitment to socialism explicitly in their Constitution: as was mentioned above, the preamble to the Indian Constitution declares the country to be a ‘Sovereign Socialist Secular Democratic Republic’, while Article 1 of the Chinese Constitution provides that ‘The People’s Republic of China is a socialist state under the people’s democratic dictatorship led by the working class and based on the alliance of workers and peasants.’ While making no mention of socialism, the **Peruvian** Constitution does lay down that the country is a social state. The preamble to the **South African** Constitution mentions social justice as one of the values on which the country is established.

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<sup>306</sup> Pande (n 257) 1132.

<sup>307</sup> Drèze and Sen (n 258) 251.

<sup>308</sup> See Lu (n 232).

<sup>309</sup> See FRAME Deliverable 3.1.

<sup>310</sup> Andrew Nathan, ‘China’s Political Trajectory: What are the Chinese Saying?’ in Cheng Li (ed), *China’s Changing Political Landscape: Prospects for Democracy* (Brookings Institution Press 2008) 39.

<sup>311</sup> id.

## C. Rule of Law

### 1. Introduction

This section describes the conceptualisations of the rule of law in China, India, Peru and South Africa. The main research question this section seeks to answer is what conceptions and perspectives on the rule of law can be found at the domestic level of these countries.

FRAME Deliverables 3.1 and 3.2 noted that, generally speaking, two core functions of rule of law can be identified: to protect people from the government (this is the traditional take on the rule of law) and to protect people from each other (this is a more recent addition).<sup>312</sup> The following UN definition of the rule of law has gained wide recognition:

[The rule of law is a] principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.<sup>313</sup>

Deliverable 3.2 examined what elements of the rule of law can be found in EU law. In particular, the report observed that in the case law of the European Court of Justice several elements of the rule of law are indicated: legality, legal certainty, prohibition of arbitrariness of the executive powers, independent judiciary, effective judicial review including respect for fundamental rights, and equality before the law.<sup>314</sup> How China, India, Peru and South Africa interpret these elements will be discussed below. What emerges clearly from European law is that the EU conception of the rule of law includes both formal and substantive elements. Deliverable 3.2 also discussed what rule of law conceptions can be found in EU external action. It found that the EU advocates a thick understanding of the rule of law, and that it usually links the rule of law with democracy and human rights in its external action.

In what follows, we first discuss the distinction between thin and thick conceptions of the rule of law, and whether Chinese, Indian, Peruvian and South African approaches might be characterised as ‘thick’ or ‘thin’ (see *infra* 2). Then different elements of the rule of law will be discussed (see *infra* 3), starting with formal elements and moving to more substantive ones: legality, prohibition of arbitrariness of the executive, judicial independence and judicial review, equality, and fundamental rights. As with the previous chapters on human rights and democracy, this chapter closes with a comparison with EU conceptualisations.

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<sup>312</sup> FRAME Deliverable 3.2, 28.

<sup>313</sup> Report of the Secretary-General, ‘The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies’ (2004) UN Doc S/2004/616, para 6.

<sup>314</sup> FRAME Deliverable 3.2, 31-32.

## 2. Thin/formal and thick/substantive approaches to the rule of law

FRAME Deliverable 3.1 discussed the distinction between thin/formal and thick/substantive conceptions of the rule of law.<sup>315</sup> Briefly put, a *thin/formal approach* to the rule of law conceptualises the rule of law in terms of the formal attributes the law must possess in order to function effectively. A thin approach to the rule of law entails that the Government must govern through law (rule by law) and that the law must possess certain formal attributes (e.g. laws must be clear, prospective, general, public and relatively stable). Crucially, such an approach makes no demands regarding the content of law. A *thick/substantive conception* of the rule of law contains the same minimum elements, and then adds requirements about the content of law. There are many varieties of thick conceptions of the rule of law. Some varieties emphasise that the content of law should be democratically promulgated (thus including democracy as an element of the rule of law), others also include individuals' fundamental rights and even elements of social welfare.<sup>316</sup> Deliverable 3.2 analysed the EU's conception of the rule of law, which is clearly a thick/substantive one.<sup>317</sup>

The question now arises whether the Chinese, the Indian, the Peruvian and the South African approach to the rule of law can best be characterised as 'thin' or 'thick'.

In **South Africa**, the former apartheid regime clearly adopted a thin/formal approach to the rule of law: it operationalised a racist ideology through legal norms. The apartheid regime was committed to upholding the rule of law, but the law sprang from a parliament voted by the enfranchised segment of the community – only adult whites. Law was used as a weapon to perpetuate apartheid. In post-apartheid South Africa, however, the rule of law is seen in a much more substantive manner. The foundation of post-apartheid South Africa rests on Chapter 1 of the 1996 Constitution. It sets out among others the founding values of the Republic which include the 'supremacy of the Constitution and the rule of law', and further guarantees 'equality and the advancement of human rights and freedoms'. The content of the law and the way in which the law is now democratically promulgated is totally different from the past. Indeed, South Africa's current conception of the rule of law is similar to the thick conception of the UN.

How best to describe the rule of law in **China** is a complex question, which has occupied many Chinese as well as European and American scholars.<sup>318</sup> The rule of law concept is contested within China. Two major schools of thought can be distinguished: first there are those who argue that the conception of the rule of law has Chinese characteristics, based on the country's history and culture. Importantly, this is the position taken by the CPC, as will be discussed further below. Second, there are Chinese scholars

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<sup>315</sup> FRAME Deliverable 3.1, 28.

<sup>316</sup> *ibid* 28-29.

<sup>317</sup> See FRAME Deliverable 3.2.

<sup>318</sup> See e.g. Randall Peerenboom, 'Varieties of Rule of Law: An Introduction and Provisional Conclusion' (2004) UCLA Research Paper No 03-16 <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=445821](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=445821)> accessed 18 December 2015.



who conceive of the rule of law from a Western angle, believing that the rule of law is universal.<sup>319</sup>

The notion that a State should be governed under the rule of law is developing rapidly in China in recent years. In 1999, the Constitution of the PRC was amended to include a paragraph on the rule of law: 'The People's Republic of China practices ruling the country in accordance with the law and building a socialist country under the rule of law' (CPRC 1982, Art. 5(1)). This was a major breakthrough in the history of Chinese rule of law. Nonetheless, the constitution of China still does not clearly define the rule of law. During the 4<sup>th</sup> plenary session of the 18<sup>th</sup> CPC Central Committee (October 2014), the rule of law was assigned for the first time as theme of the conference. The report of this conference states that:

The major tasks are to improve the socialist rule of law with Chinese characteristics, in which the Constitution is taken as the core, to strengthen the implementation of the Constitution, to promote administration by law, to speed up building a law-abiding government, to safeguard judicial justice, to improve judicial credibility, to promote the public awareness of rule of law, to enhance the building of a law-based society, to improve team building and to sharpen the CPC's leadership in pushing forward rule of law.<sup>320</sup>

These are all elements that point to a thin/formal conception of the rule of law, as they do not stipulate anything regarding the content of the laws. Yet, although the main tasks that are listed in this document all point to a thin conception of the rule of law, there are also some statements that imply a thicker rule of law notion. Thus, the report speaks of the importance of improving the quality of legislation: 'We must stick scrupulously to the idea of putting the people first in legislation and making legislation for them, put into effect the core socialist values, and make sure every piece of legislation is in keeping with the spirit of the Constitution, reflects the will of the people, and is supported by them.'<sup>321</sup>

In **Peru**, the rule of law is normally termed 'Estado de Derecho', in line with the German doctrine of

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<sup>319</sup> See Yong Xia, 'What is Law, the Source, the Value and the Admonitions' (1999) 4 China Social Sciences 117. Xia argued that the rule of law should include the following ten admonitions:

- 1) There are universal laws;
- 2) The law is known to the public;
- 3) The law may be expected;
- 4) The law shall be clear;
- 5) No inherent contradiction in law;
- 6) The law may be predictable;
- 7) Legal stability;
- 8) The law is above the government;
- 9) Judicial authority;
- 10) Judicial justice.

<sup>320</sup> See Communist Party of China, 'Bulletin of the 4th Plenary Session of 18th CPC Central Committee' <<http://www.chinapeople.com/peoplele/pqrty/pqrtyinfo.aspx?pid=4044>> accessed 1 June 2015.

<sup>321</sup> Communist Party of China, 'Communique of the 4th Plenary Session of the 18th CPC Central Committee' <[http://www.china.org.cn/china/fourth\\_plenary\\_session/2014-12/02/content\\_34208801.htm](http://www.china.org.cn/china/fourth_plenary_session/2014-12/02/content_34208801.htm)> accessed 1 June 2015.

‘Rechtsstaat’.<sup>322</sup> For this reason, the ‘rule of law’ in Peru implies a domestic understanding of ‘Rechtsstaat’. Rubio Correa indicates that this doctrine promotes a model of the State in which power is not absolute, but regulated by laws established a priori.<sup>323</sup> Similarly, Chanamé suggests that Rechtsstaat is a model of political organisation with equilibrium among and limitations to the public authority and government.<sup>324</sup>

The Constitutional Tribunal has recognised the following elements as constitutive of the ‘Rechtsstaat’, which will also be discussed further below: legality,<sup>325</sup> separation of powers,<sup>326</sup> independent and impartial judiciary,<sup>327</sup> and freedom, security, property and equality before the law.<sup>328</sup> This might suggest that Peruvian conceptualisations of the rule of law are formal, including only a few civil and political rights. Nevertheless, a substantive approach to Rechtsstaat has been developed by means of the concepts of ‘Social and Democratic State’, and ‘Constitutional State’. Judge Prado Saldarriaga explains:

Today more than identifying the rule of law as linked to compliance with the laws and respect organs of the State and the State independence; we also speak of a constitutional state where the primacy of law implies the compatibility of public life and decisions of the public authorities with what the Constitution defines in its political construction. It had been pointed out, already in the Constitution of 79, that a social and democratic state of law is connected with the welfare state, which at present is being tempered by the advance of globalization.<sup>329</sup>

Article 43 of the Constitution has allowed the Peruvian system to embrace a more substantive view of the Rechtsstaat. In line with this, the Constitutional Tribunal has confirmed that the doctrine of Social Rechtsstaat calls for the respect, protection, guarantee and promotion of all fundamental rights.<sup>330</sup> Similarly, constitutional judge García Toma holds that the Social and Democratic Rechtsstaat ‘facilitates the integration and democratisation of the State and social unity.’<sup>331</sup> In sum, the Peruvian Rechtsstaat is a means of political organisation of the State and a means towards social equality.<sup>332</sup> The Peruvian

<sup>322</sup> See Joseph Raz, ‘El Estado de Derecho y su virtud’ [Rechtsstaat and its Value] in Miguel Carbonell, Wistano Orozco and Rodolfo Vásquez (eds), *Estado de Derecho* (Siglo Veintiuno Editores 2002) 17; Luigi Ferrajoli, ‘Pasado y Futuro del Estado de Derecho’ [Past and Future of Rechtsstaat] in Miguel Carbonell (ed), *Neonstitucionalismo(s)* (Trotta 2009) 13.

<sup>323</sup> Marcial Rubio Correa, *El Sistema Jurídico: Introducción al Derecho* (Pontificia Universidad Católica del Perú 2009) 38.

<sup>324</sup> Raúl Chanamé Orbe, *Diccionario Jurídico Moderno* (Primero publicado en 1995, 2004) 375-377.

<sup>325</sup> *César Tineo Cabrera vs sentencia de Tercera Sala Penal para Procesos con Reos Libres de la Corte Superior de Justicia de Lima*. Exp. 00156-2012-PHC/TC [2012] Tribunal Constitucional del Perú, para 5.

<sup>326</sup> *Pedro Andrés Lizana Puelles vs Jurado Nacional de Elecciones*. Exp. 5854-2005-PA/TC [2005] Tribunal Constitucional del Perú, para 27.

<sup>327</sup> *National Public Prosecutor vs Algunas Disposiciones de la Ley 28665*. Exp. 0001-2006-AI/TC [2006] Tribunal Constitucional del Perú, para 70.

<sup>328</sup> *More than 5,000 Citizens* (n 112) para 11.

<sup>329</sup> Interview with Víctor Prado Saldarriaga, Juez de la Corte Suprema de Justicia (20 May 2015).

<sup>330</sup> *Manuel Anicama Hernández* (n 76) para 32.

<sup>331</sup> *id.*

<sup>332</sup> *id.*

conception of the rule of law is therefore fairly thick.

The term ‘rule of law’ does not appear in the **Indian** Constitution, but its essence pervades the text as an underlying principle.<sup>333</sup> The Supreme Court has declared the rule of law to be one of the basic features of the Constitution, not subject to constitutional amendment.<sup>334</sup> It has been said that the rule of law runs like a ‘golden thread’ through the Constitution.<sup>335</sup> Indian courts use the term rule of law frequently in their judgments. The Indian rule of law conception is thick, as besides the ‘thin’ requirements like legality and the prohibition of arbitrariness as will be further discussed below, it is ‘deeply bound to the ways in which fundamental rights stand conceived.’<sup>336</sup> That is to say that, Indian rule of law conceptions also enable far-reaching state action in the field of fundamental rights.<sup>337</sup>

Central to Indian rule of law conceptions is the Constitution. Sujit Choudhry has described the background and central tenets of the Indian Constitution, which is worth quoting at some length:

It is sometimes said that the Indian Constitution institutionalized a national and a social revolution. The national revolution was the establishment of the institutions and procedures of democratic self-government for a newly empowered democratic majority, including federalism and parliamentary democracy. In this sense, the Indian Constitution is a decidedly postcolonial constitutional text, akin to the American Constitution. But it is also a charter for the transformation of a deeply hierarchical and unequal society. Long before the British colonial experience, political, economic, and social power had been held in the hands of the very few, with inequalities structured along the intersecting grounds of caste, religion, ethnicity, and income. One of the basic objectives of the Indian independence movement was to harness the state to redress centuries of neglect, exploitation, and discrimination experienced by the Indian masses at the hands of the powerful. These two constitutional agendas were interconnected. A democratic and independent India--the national revolution--was the prerequisite to the social revolution, since it would put political power into the hands of the oppressed.<sup>338</sup>

What transpires from this quote, is that India’s version of a ‘thick’ rule of law conception, is prompted by the national and social revolutions that the country aspired to at the end of British colonial rule.

<sup>333</sup> Surya Deva, ‘Rule of Law in India: An Overview’ (2010) Rule of Law Working Paper Series Nr. 10 <<http://wikis.fu-berlin.de/display/SBprojectrol/India>> accessed 7 December 2015.

<sup>334</sup> *Indira Nehru Gandhi v Raj Narain* 1975 AIR 2295 (SC); *S.P. Gupta v Union of India* 1982 AIR 149 (SC).

<sup>335</sup> Soli J Sorabjee, ‘Rule of Law: A Moral Imperative for South Asia and the World’ (Brandeis University, 2010) 3.

<sup>336</sup> Upendra Baxi, ‘The Rule of Law in India’ (2007) 6(4) *Sur – International Journal on Human Rights* 6, 15.

<sup>337</sup> *ibid* 15-16.

<sup>338</sup> Sujit Choudhry, ‘Living Originalism in India? “Our Law” and Comparative Constitutional Law’ (2013) 25(1) *Yale Journal of Law and the Humanities* 1, 9-10.

### 3. Elements of the rule of law

The text below discusses different elements of the rule of law, starting with formal elements and moving to more substantive ones.

#### a) Legality

In **South Africa**, Section 2 of the 1996 Constitution expressly guarantees that the ‘Constitution is the supreme law of the Republic’ and any legislation or act incompatible with its provisions shall be nullified, unless otherwise it is expressly set out in the Constitution. As a constitutional state, all three branches of government – the legislative, the executive, and the judiciary – are subject to and bound by the Constitution’s provisions. The supremacy of the Constitution marks a stark departure from the apartheid regime, where parliament was sovereign above the law.<sup>339</sup> In terms of legality, the various courts, and specifically the Constitutional Court can test the validity of state actions.

The notion of legality is also strongly anchored in **China**. There is a well-known legal proverb which says that ‘There must be laws to go by, the laws must be observed and strictly enforced, and law-breakers must be prosecuted’. According to the 2014 CPC report, the notion of a ‘socialist rule of law with Chinese characteristics’ entails that the country should be ruled in line with the Constitution. It also entails that the Communist ‘Party not only has to govern the country in accordance with the Constitution and laws, but also has to ensure that its self-governance is in line with its own rules and regulations.’<sup>340</sup>

Article 1 of the **Peruvian** Organic Law for the Judiciary holds that the principle of legality indicates that authorities, public servants and the Executive Power are subject to the Constitution, the laws and other norms of the legal system. Judge Prado highlights that authorities are subject to the Constitution and the relations between citizens are also framed by the Constitution.<sup>341</sup> This element belongs to the core of Peruvian conceptualisations of Rechtsstaat.

In **Peru**, corruption is understood as a form of abuse of power and systematic violation of the principle of legality.<sup>342</sup> Corrupted public representatives, for instance the police, member of the judiciary, or legislators, are clearly perceived as acting in violation of what the law mandates. In addition, corruption is considered to erode the legitimacy of public institutions.<sup>343</sup> Nevertheless, this social condemnation of corruption is not necessarily reflected in the mechanisms of control of the authorities. For instance, although judicial procedures seeking the accountability of public authorities are, by Constitutional law, open to the public (article 139-4), private citizens have no access to files of criminal investigations on

<sup>339</sup> David Dyzenhaus, ‘The Past and Future of the Rule of Law in South Africa’ (2007) 124(4) South African Law Journal 734.

<sup>340</sup> Communist Party of China, ‘Communique of the 4th Plenary Session’ (n 321).

<sup>341</sup> Interview with Víctor Prado Saldarriaga (n 329).

<sup>342</sup> Perú, *Plan Nacional de Lucha Contra la Corrupción 2012-2016* (Presidencia del Consejo de Ministros 2013) 36.

<sup>343</sup> *Fiscal de la Nación vs Algunas Disposiciones de la Ley 29703*. Exp. 0017-2011-AI/TC [2012] Tribunal Constitucional del Perú, para 15.

cases of corruption.<sup>344</sup> The Code of Criminal Procedure established that criminal investigations, including the suspicion of corruption, are secret and reserved from the public. Similarly, the Constitutional Tribunal has held that documents in judicial procedures are part of the privacy of public authorities under investigation.<sup>345</sup> This ambivalence between what the law mandates and the remedies to enforce that, weakens the initial perception of a very strong legality principle as constitutive of the Peruvian Rechtsstaat.

Legality is also enshrined in the **Indian** Constitution. Article 13 stipulates that all laws that are inconsistent with Part III of the Constitution, on fundamental rights, are void. In addition, 'the courts have held that any executive action without the support of a valid law will be void'.<sup>346</sup>

### *b) Prohibition of arbitrariness of the executive*

Following decades of racial suppression, one of the paramount demands that influenced **South Africa's** democratic transition was the institutionalisation of checks and balances on each of the three branches of government.<sup>347</sup> Consequently, each organ checks the power of other branches to ensure that no one branch becomes too powerful. Under the 1996 Constitution, the concept of democracy is not defined merely by the mandate of the popularly elected parliament to dismiss decisions of the executive, but rather, that the decisions and actions of government be restricted by a bill of rights, an autonomous judiciary and other institutions established under Chapter 9 of the Constitution to guard democracy, human rights and rule of law.<sup>348</sup> The role of these Chapter 9 institutions is basically to 'strengthen constitutional democracy' by ensuring 'accountability, responsiveness and openness' by exercising external review of key areas of government.<sup>349</sup> In recent years there has been criticism by government representatives and the ruling party, the ANC, that the judiciary is interfering too much with government policy. The Public Protector, one of the Chapter 9 institutions, has also been heavily criticised by members of the ANC following a crackdown on corrupt practices.

Problems arise in South Africa at the level of implementation rather than at the level of conceptualisation. One example is the government's complete disregard of the court order issued by the

<sup>344</sup> Political Constitution of Peru [1993], Art. 139(4) reads: 'Information in judicial proceedings regarding responsibility of public servants, crimes committed through the press, and those relating to fundamental rights guaranteed by the Constitution, are always public.'

<sup>345</sup> *Yvan Montoya Vivanco vs Quinta Sala Civil de Lima*. Exp. 03065-2012-PHD/TC [2013] Tribunal Constitucional del Perú, para 5.

<sup>346</sup> See Deva, 'Rule of Law in India: An Overview' (n 333) referring to the cases of *Kharak Singh v State of Uttar Pradesh* 1963 AIR 1295 (SC); *Bijoe Emmanuel v State of Kerala* 1987 AIR 748 (SC).

<sup>347</sup> Roger Southall, 'Opposition in South Africa: Issues and Problems' (2001) 8(1) Democratization 1.

<sup>348</sup> These institutions are the Public Protector; the South African Human Rights Commission (SAHRC); the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (CRL Rights Commission); the Commission for Gender Equality (CGE); the Auditor-General; the Independent Electoral Commission (IEC); and an Independent Authority to Regulate Broadcasting.

<sup>349</sup> s 1(d).

Gauteng High Court with regard to President Omar Al-Bashir in June 2015.<sup>350</sup> This case is not unique and especially at the provincial level, the South African government has disregarded Court orders.<sup>351</sup> Particularly problematic is the province of the Eastern Cape, 'widely regarded as South Africa's most dysfunctional province'.<sup>352</sup> Therefore, the Law Society of South Africa has raised the alarm bells regarding 'the clear trend [which is] emerging of undermining the rule of law and disregarding court orders'.<sup>353</sup>

In **China**, according to the Economist and some Western scholars, the CPC's 2014 turn to the rule of law is motivated by the campaign against corruption.<sup>354</sup> 'The Central Committee has decided to make local courts more impartial and to penalise officials for telling judges what to decide.'<sup>355</sup> The New York Times reported that 'China's leaders see improving the legal system not simply as a way to control society but as a way to rein in wayward bureaucrats'.<sup>356</sup> Corruption has become such an issue, that party leaders have started to see it as a real threat to the existence of the CPC.<sup>357</sup> In 2013, the Central Commission for Discipline Inspection handled 172,000 corruption cases and investigated 182,000 officials.<sup>358</sup> President Xi Jinping has got rid of two prominent leaders: 'former Politburo Standing Committee member Zhou Yongkang, who controlled China's security and law enforcement apparatus for 10 years, and former Vice Chairman of the Central Military Commission Xu Caihou, who was in charge of military personnel affairs for a decade'.<sup>359</sup>

Corruption is a problem of operationalisation rather than conceptualisation, however. As a matter of conceptualisation, the prohibition of arbitrariness of the executive is not a core part of the Chinese rule of law. There are no provisions in Chinese law that prohibit the arbitrariness of the executive power.

<sup>350</sup> Joe S Clarke, 'South Africa's Failure to Arrest Omar al-Bashir 'is Betrayal of Mandela's Ideals' *The Guardian* (London, 24 June 2015) <<http://www.theguardian.com/global-development-professionals-network/2015/jun/24/south-africas-failure-arrest-al-bashir-not-in-keeping-mandelas-ideals>> accessed 9 October 2015.

<sup>351</sup> AfriMAP and Open Society Foundation for South Africa, *South Africa: Justice Sector and the Rule of Law* (OSF 2005) 29.

<sup>352</sup> *id.*

<sup>353</sup> The Law Society of South Africa, 'Statement on Rule of Law and Court Orders' (18 June 2015) <<http://constitutionallyspeaking.co.za/law-society-statement-on-rule-of-law-and-court-orders/>> accessed 25 June 2015.

<sup>354</sup> 'Rule of law in China – China with Legal Characteristics' *The Economist* (Brussels, 1 November 2014) <<http://www.economist.com/news/leaders/21629383-xi-jinping-invoking-rule-law-thats-risky-him-and-good-china-china-legal>> accessed 27 September 2015. See also Matthieu Burnay, 'The Socialist Rule of Law with Chinese Characteristics: Zooming-Out of a Triangle?' (Séminaire du Centre de Recherche en Science Politique, Brussels, 2 December 2015) 32 [On file with author].

<sup>355</sup> See 'Rule of law in China – China with Legal Characteristics' (n 354).

<sup>356</sup> Paul Gewirtz, 'What China Means by 'Rule of Law'' *New York Times* (New York, 19 October 2014) <[http://www.nytimes.com/2014/10/20/opinion/what-china-means-by-rule-of-law.html?\\_r=0](http://www.nytimes.com/2014/10/20/opinion/what-china-means-by-rule-of-law.html?_r=0)> accessed 18 December 2015.

<sup>357</sup> Burnay (n 354) 32.

<sup>358</sup> Cheng Li, 'Fourth Plenum Has Opened Up Discourse on Constitutionalism, Governance' (Brookings 2014) <<http://www.brookings.edu/research/articles/2014/11/fourth-plenum-discourse-constitutionalism-governance-li>> accessed 18 December 2015.

<sup>359</sup> *id.*

Nevertheless, there is a ‘reasonableness of administration’ doctrine in Chinese law.<sup>360</sup> In order to raise awareness of the Constitution and make sure that officials know their responsibilities under the Constitution, China has recently established the constitutional oath, which officials have to take before they enter into office.<sup>361</sup> The Chinese Constitution lays down the rule that the administrative organs of the state shall be responsible to the NPC (the national legislature) and under the supervision of the NPC,<sup>362</sup> and all state organs must abide by the Constitution and the law.<sup>363</sup>

In **Peru**, the Constitutional Tribunal has considered the principle of ‘legal certainty’ (*seguridad del derecho*) as constitutive of Rechtsstaat. Legal certainty in the Peruvian perspective, protects the possibility to predict the future conduct of the public authorities in relation to situations that have been previously considered in the laws. This is expected to protect impartiality and prevent the arbitrary use of power.<sup>364</sup>

Legal certainty also informs the criminal law principle of *nullum crime sine lege*, that indicates that nobody can be sentenced for an act or omission that was not been previously established by law as a crime. Similarly, legal certainty is also connected to the principle of natural judge.<sup>365</sup>

In **India**, the Constitution limits the government in its use of power and the arbitrary use of power is prohibited. The Constitution specifies and limits the subject matters on which both the central and the state legislatures can make law (Articles 246, 248-254).<sup>366</sup> A system of checks and balances has been put in place, with a strong role for the judiciary as will be further discussed below.

### c) *Judicial independence and judicial review*

According to Section 165 (2) of the **South African** Constitution, the courts are autonomous and subject only to the Constitution and the law, and no state organ or person should interfere in their operations. The Constitution however obliges organs of the state to assist, through legislative and other measures, to enhance the accessibility, dignity, effectiveness, impartiality and independence of the courts.<sup>367</sup> In the exercise of their powers, the courts are obliged to apply the Constitution and the law impartially and

<sup>360</sup> See Law of the People’s Republic of China on Administrative Penalty [1996], Art. 4(2): ‘Creation and imposition of administrative penalty shall be based on facts and shall be in correspondence with the facts, nature and seriousness of the violations of law and damage done to society’.

<sup>361</sup> See National People’s Congress Standing Committee, ‘The Pledge Regulation in Constitution in the Form of Legislation’ <<http://cpc.people.com.cn/n/2015/0625/c64387-27205747.html>> accessed 25 June 2015.

<sup>362</sup> See CPRC, Art. 3(3) reads: ‘All administrative, judicial and procuratorial organs of the state are created by the people’s congresses to which they are responsible and by which they are supervised’.

<sup>363</sup> *ibid* Art. 5(4), ‘All state organs, the armed forces, all political parties and public organizations and all enterprises and institutions must abide by the Constitution and the law. All acts in violation of the Constitution or the law must be investigated.’

<sup>364</sup> *ibid*.

<sup>365</sup> See Political Constitution of Peru [1993], Art. 139(3); *Colegios de Notarios de Junín vs Ley 27555*. Exp. 0016-2002-AI/TC [2003] Tribunal Constitucional del Perú, para 4.

<sup>366</sup> See Deva, ‘Rule of Law in India: An Overview’ (n 333).

<sup>367</sup> s 165(4).

without fear, favour or prejudice.<sup>368</sup> For this reason, in interpreting the Constitution, a court of law must promote the core principles that underlie an open and democratic society based on equality, freedom and human dignity.<sup>369</sup> South African courts and lawyers therefore have to make value judgments in every case in order to determine the meaning or spirit of the legislature. This is due to the fact that guidelines for legal interpretation are still to a great extent not codified.

In **China**, the judiciary is under the supervision of the NPC. Yet, judicial independence is written into the Chinese constitution. Article 4 of the Organic Law of the People's Courts of the PRC, which states that: 'The people's courts shall exercise judicial power independently, in accordance with the provisions of the law, and shall not be subject to interference by any administrative organ, public organization or individual.' In other words, judicial independence is thought to be consistent with party control of the courts.<sup>370</sup> The official Chinese standpoint is that the Communist 'Party's leadership is the most essential feature of socialism with Chinese characteristics and the most fundamental guarantee for socialist rule of law in China.'<sup>371</sup> According to the Chinese Constitution, leadership by the Party means mainly political, ideological and organisational leadership (CPRC 1982, preamble). Judicial independence and professionalism are key points of the 2014 rule of law reform.

As to judicial review: Chinese judges have no power to review whether the laws adopted by the NPC violate the Constitution. The judiciary may only review whether government has violated administrative law. Also, legal persons do not have the opportunity to invoke provisions from the Constitution in court. In Western scholarship, this has been called China's 'lack of Constitutionalism'.<sup>372</sup>

In **Peru**, the Peruvian Organic Law for the Judiciary, article 16 indicates that all judges are independent and no political authority or judicial superiors can interfere in their function. According to the Constitutional Tribunal, judicial independence is the autonomous capacity to exercise and apply the law. In this respect, two dimensions are recognised: 'external independence', meaning the independence from the other public powers, and 'internal independence', that is, independence within the judiciary itself.<sup>373</sup>

Nevertheless, some aspects of the independence of the judiciary seem at the periphery. Firstly, the Constitutional Tribunal holds the exclusive power to decide on the constitutionality of norms and acts.<sup>374</sup> Secondly, the legislative power can initiate criminal accusations against public authorities. This accusation has in practice the value of a criminal indictment by the Congress, since neither the public prosecutor nor the judge can expand or reduce the terms of the accusation. As a consequence, the

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<sup>368</sup> s 165(2).

<sup>369</sup> s 39(1)(a).

<sup>370</sup> Nathan (n 310) 28.

<sup>371</sup> Communist Party of China, 'Communique of the 4th Plenary Session' (n 321).

<sup>372</sup> Burnay (n 354) 41-42.

<sup>373</sup> *Fiscalía de la Nación vs Ley* 28665. Exp. 004-2006-PI/TC [2006] Tribunal Constitucional del Perú, para 18.

<sup>374</sup> Giovanni Priori, 'El Proceso en el Estado Constitucional' in Pontificia Universidad Católica del Perú, *Constitución y Proceso* (Ara 2009) 18.



Constitutional Tribunal held that such provision is in violation of the principle of independence of the judicial power since it prevents the judge from evaluating the elements of the case that can justify initiating a procedure.<sup>375</sup> Finally, the executive power determines the budget of the judiciary. The Constitutional Tribunal held that the independence of the judiciary implies that it should be able to present a planned annual budget to the executive without having it amended. It also called the legislative power to draft a law establishing a mechanism of coordination between the executive and the judiciary for the elaboration of such budget.<sup>376</sup>

In **India**, Article 50 of the Constitution lays down the principle of judicial independence: ‘The State shall take steps to separate the judiciary from the executive in the public services of the State.’ Moreover, judicial review is a key element of the rule of law in India. Baxi has observed that ‘[t]he instances of judicial invalidation of statutes far exceed in number and range the experience of judicial review in the Global North.’<sup>377</sup>

The Supreme Court has taken on an extremely active role in the governance of the country. Much has been written about this in the academic literature.<sup>378</sup> Manoj Mate has claimed that: ‘Among global constitutional courts, the Supreme Court of India is arguably one of the most assertive and powerful high courts in matters of governance and policy-making.’<sup>379</sup> The Supreme Court has developed a distinctive model of judicial constitutional review, called the ‘*Basic Structure*’ doctrine. Under this doctrine, the Supreme Court has ‘asserted the power to invalidate amendments that abrogate ‘basic features’ of the Indian Constitution as defined by the Court.’<sup>380</sup> This doctrine was developed against the background of series of conflicts with the Indira Gandhi government in the 1970s.<sup>381</sup> The key case is *Kesavananda Bharati v. Kerala* (1973).<sup>382</sup> According to the doctrine, Parliament cannot enact amendments to the Constitution that alter the basic structure of the constitution. By now, the list of features that are considered to belong to the basic structure of the Constitution is a long one, although, ever since the *Kesavananda* case, judges have differed of opinion on what features might be considered basic features. It has been argued that only broader structural principles – such as the rule of law, the principles of separation of powers, secularism, and sovereignty – rather than particular constitutional

<sup>375</sup> See Political Constitution of Peru [1993], Art. 100; and *66 Congresistas de la República vs inciso j) del artículo 89 del Reglamento del Congreso de la República*. Exp. 0006-2003-AI/TC [2003] Tribunal Constitucional del Perú, para 17.

<sup>376</sup> In this sense, in order to promote judicial Independence, point 1 of the Plan for the Management and Modernisation of the Judiciary 2015-2016 recommends to promote a constitutional reform allowing the Judiciary to have a Budget of 3% of the National Budget as a minimum. (Plan for the Management and Modernisation of the Judiciary 2015-2016. Víctor Ticona Postigo). See also *Poder Judicial vs Poder Ejecutivo*. Exp. 004-2004-CC/TC [2004]. Tribunal Constitucional del Perú.

<sup>377</sup> Baxi (n 336) 19.

<sup>378</sup> See e.g. also Baxi (n 336); Drèze and Sen (n 258); Manoj Mate, ‘The Rise of Judicial Governance in the Supreme Court of India’ (2015) 33(1) Boston University International Law Journal 169.

<sup>379</sup> Mate (n 378) 171.

<sup>380</sup> Manoj Mate, ‘State Constitutions and the Basic Structure Doctrine’ (2014) 45(2) Columbia Human Rights Law Review 441.

<sup>381</sup> Mate, ‘The Rise of Judicial Governance in the Supreme Court of India’ (n 378) 171.

<sup>382</sup> *Kesavananda Bharati v State of Kerala* 1973 (4) 225 (SCC).

provisions, are basic features.<sup>383</sup> ‘Rule of law’, ‘equality’, ‘fundamental rights’, ‘secularism’, ‘federalism’ and ‘democracy’ have all been recognised as part of the basic structure.<sup>384</sup>

#### d) *Equality before the law*

In **South Africa**, it is recognised that, for any constitutional state to thrive, it is essential that the different segments of the population within its borders enjoy equal opportunities, rights and freedoms. Section 9 of the South African Constitution avows that every individual is equal before the law and shall be entitled to equal benefit and protection of the Constitution. The state may not unfairly discriminate directly or indirectly against anyone on the basis of sexual orientation, gender, sex, disability, religion, belief, conscience, colour, birth, language, marital status, race, social origin, age, culture and pregnancy.<sup>385</sup> South Africa remains however one of the most unequal states in the world. There are ongoing efforts to transform both the public and private sectors until they attain a reasonable proportions or representivity of racial groups.<sup>386</sup>

In **China**, equality before the law is guaranteed article 33(2) of the Constitution, which states that ‘All citizens of the People's Republic of China are equal before the law.’ Article 5(4) of the Constitution also states that, ‘No organization or individual is privileged to be beyond the Constitution or the law.’ This principle can also be found in other laws such as Criminal Law and Criminal Procedure Law.

As commented in previous sections, the **Peruvian** Constitution recognises the equality before the law in article 2.2. Moreover, the Constitutional Tribunal has indicated the principle of equality before the law as constitutive of the Rechtsstaat.<sup>387</sup> Although this is a core principle in Peruvian legislation, in practice, some vulnerable groups remain in the periphery. For instance, gay couples do not enjoy the right to marry and family life.<sup>388</sup> A proposal for a law recognising the right to marry for gay couples as an element of equality before the law was rejected by the Commission on Justice and Human Rights of the Congress.<sup>389</sup>

<sup>383</sup> Mate, ‘State Constitutions and the Basic Structure Doctrine’ (n 380) 484.

<sup>384</sup> Baxi (n 336) 19.

<sup>385</sup> s 9(3).

<sup>386</sup> See Economic Development Department, ‘Broad-based Black Economic Empowerment’ <<http://www.economic.gov.za/about-us/programmes/economic-policy-development/b-bbee>> accessed 3 September 2015.

<sup>387</sup> Art. 2(2); and see *Luis Miguel Sirumbul Ramos y 8.438 ciudadanos y Congresista de la República del Perú vs Congreso de la República*. Exp. 0009-2007-PI/TC – 0010-2007-PI/TC. [2007]. Tribunal Constitucional del Perú, para 20.

<sup>388</sup> UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III), Art. 16 (forming part of Peruvian law by means of the Fourth Temporary and Final Disposition of the Constitution) and article 4 of the Peruvian Constitution.

<sup>389</sup> Proposed Law N° 2647/2013-CR, establishing Same Sex Civil Unions. See El Comercio, ‘Bruce Afirma que la Unión Civil es una Lucha por la Igualdad’ [Bruce holds that Civil Union is a Fight for Equality] (Lima, 10 March 2015) <<http://elcomercio.pe/politica/congreso/bruce-afirma-que-union-civil-lucha-igualdad-noticia-1796674/>> accessed 10 June 2015.

In **India**, equality before the law and equal protection of the law is also considered part of the rule of law.<sup>390</sup> These principles are laid down by Article 14 of the Constitution (further discussed supra Subsection 7, under human rights).

### e) *Fundamental rights protection*

In today's **South Africa**, it is clear that the state has a duty to protect fundamental rights and that fundamental rights are inextricably related to the rule of law. The Constitutional Court has held that 'in a constitutional democratic state, which ours now certainly is, and under the rule of law (to the extent that this principle is not entirely subsumed under the concept of the constitutional state) citizens as well as non-citizens are entitled to rely upon the state for the protection and enforcement of their rights.'<sup>391</sup>

**Indian** conceptions of the rule of law are deeply bound to Indian conceptions of fundamental rights.<sup>392</sup> Pointing to the provisions in the Constitution that enshrine fundamental rights, Baxi remarks that '[t]he Indian ROL stands [...] normatively conceived not just as a sword against State domination [...] but also a shield empowering [...] "progressive" state intervention in the life of civil society.'<sup>393</sup> Prominent tool in this is *Public Interest Litigation* ('PIL').<sup>394</sup> In the 1980s, the Supreme Court 'developed a new non-adversarial form of public interest litigation . . . aimed at correcting governance failures and human rights abuses.'<sup>395</sup> According to Justice Sujata V. Manohar, the concept of PIL has been borrowed from the United States.<sup>396</sup>

What animated the Court's activism was an ethic of 'social egalitarianism'.<sup>397</sup> Under the PIL system, issues of locus standi, burden of proof, time constraints, and legal aid have all been construed in a way that benefits the victims of human rights violation. PIL is concerned generally with redressal of damage to the public at large. Sometimes petitions are filed to secure group rights, e.g., in the case of bonded labour, where individuals are hardly in a position to come forth to assert their rights before the court.<sup>398</sup> The achievements of PIL are debated in the literature.<sup>399</sup> The Indian FRAME partner considers it a constitutional revolution, unparalleled anywhere in the world.

<sup>390</sup> See Deva, 'Rule of Law in India: An Overview' (n 333).

<sup>391</sup> *De Lange v Smuts* 1998 (3) SA 785 (CC) para 31.

<sup>392</sup> Baxi (n 336) 15.

<sup>393</sup> *ibid* 16.

<sup>394</sup> *ibid* 19-20. Baxi thinks this is a misnomer and calls it 'social action litigation'.

<sup>395</sup> Mate, 'The Rise of Judicial Governance in the Supreme Court of India' (n 378) 171.

<sup>396</sup> Sujata V Manohar, 'Judiciary and Human Rights' (1996) 36(2) *Indian Journal of International Law* 40, 53.

<sup>397</sup> Mate, 'The Rise of Judicial Governance in the Supreme Court of India' (n 378) 214.

<sup>398</sup> The Supreme Court has permitted PIL litigation in many cases, including *Sunil Batra v. Delhi Administration* 1980 AIR 1579 (SC); *Kadra Pahadiya and Others v. State of Bihar* 1981 AIR 939 (SC); *PUDR and Others v. Union of India* 1982 AIR 1473 (SC); *Dr. Upendra Baxi and Others v. State of Uttar Pradesh and Others* 1982 (2) 308 (SCC); *Vina Sethi v. State of Bihar* 1983 AIR 339 (SC); *Bandhua Mukti Morcha v. Union of India* 1984 (3) 161 (SCC); *Olga Tellis and Others* (n 84); *Rakesh Chand Narain v. State of Bihar* 1989 AIR 348 (SC); and *Narmada Bachao Andolan* (n 146).

<sup>399</sup> See e.g. Baxi (n 336); Varun Gauri, 'Fundamental Rights and Public Interest Litigation in India: Overreaching or Underachieving?' (2010) 1(1) *Indian Journal of Law & Economics* 71; and Pritam K Ghosh, 'Judicial Activism and

In **Peru**, the protection of fundamental rights, besides equality, as a constitutive part of rule of law is still in the early stages. The Constitutional Tribunal is becoming a valuable tool in the modernisation of the constitutional Rechtsstaat, having addressed concrete issues in this respect, such as the right to due process,<sup>400</sup> the right to life,<sup>401</sup> the right to property,<sup>402</sup> and the right to honour.<sup>403</sup>

Finally, in **China**, it is not clear to what extent the protection of fundamental rights is considered to form part of the rule of law. There are some official documents that suggest that human rights and the rule of law are connected, but these statements are not very strong.<sup>404</sup> Several Chinese scholars have connected the rule of law with human rights. For example, Xian Ming Xu, the former principal of China University of political science and law, said that, 'the essence of the rule of law is human rights'.<sup>405</sup> This is not the official standpoint of the government, however.

#### 4. Comparison with EU conceptualisations

On the conceptual level, the EU differs considerably from **China** in its thinking about the rule of law. While Chinese views on legality and equality before the law do not seem to differ much from the EU's views on these elements, it is clear that the notion of a 'socialist rule of law with Chinese characteristics' is very different from the EU's conception of the rule of law. In essence, the difference lies in the notion of separation of powers. In China, checks and balances are applied very differently, and the different branches of government are much more closely held together as the NPC creates both the judiciary and the administration. The judiciary remains under the supervision of the NPC. What is more, as was stated above, there are no provisions in Chinese law that prohibit the arbitrariness of the executive power. Compared to the EU's view that all actions of public authorities must not be arbitrary or disproportionate, the EU conception is much thicker than the Chinese.

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Public Interest Litigation in India' (2013) <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2285517](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2285517)> accessed 18 December 2015.

<sup>400</sup> *Walter Segundo Gaspar Chacón Málaga vs La Resolución de la Cuarta Sala Penal*. Exp. 3509-2009-PHC/TC [2009]. Tribunal Constitucional del Perú.

<sup>401</sup> *Acción de Lucha Anticorrupción vs el Ministerio de Salud*. Exp. 02005-2009-PA/TC [2009]. Tribunal Constitucional del Perú.

<sup>402</sup> *Pontificia Universidad Católica del Perú vs la Sentencia de la Octava Sala Civil de la Corte Superior de Justicia de Lima*. Exp. 03347-2009-PA/TC [2009]. Tribunal Constitucional del Perú.

<sup>403</sup> *Pavel Huamaní Contreras vs la Resolución de la Sala de Derecho Constitucional y Social de la Corte Suprema de Justicia de la República*. Exp. 06411-2007-PA/TC [2007]. Tribunal Constitucional del Perú. For discussion see César Landa, 'Sentencias Fundamentales del Tribunal Constitucional Peruano' [Fundamental Judgments of the Peruvian Constitutional Tribunal] Instituto de Investigaciones Jurídicas de la UNAM <<http://biblio.juridicas.unam.mx/libros/8/3514/14.pdf>> accessed 17 December 2015.

<sup>404</sup> The 2015 White Paper (n 271) reads: 'China's human rights will not be able to make progress without the construction of core socialist values. They are supplementary to each other. Since the 18th CPC National Congress, core socialist values, namely, prosperity, democracy, civility, harmony, freedom, equality, justice, the rule of law, patriotism, dedication, integrity and friendship have been advocated, fostered and implemented in all sectors of society'.

<sup>405</sup> Xian M Xu, 'The Essence of the Rule of Law is Human Rights: An Explanation of the History of Human Rights' *People's Court Daily* (Beijing, 16 September 2002) 1.

However, since the 2014 CPC Central Committee meeting, it appears that China is on the road towards assigning the rule of law a more prominent role in its government. Perhaps China moves towards a somewhat thicker conception of the rule of law. However, the extent of the recent rule of law reform should not be overestimated: it is clearly not meant to negotiate a separation of powers. Xi Jinping has said that the discussion had ‘nothing to do with implementing the rule of law as an independent check on Party power’.<sup>406</sup>

Similar to the EU, the PRC accepts the universality of the rule of law. During the 2014 CPC Central Committee meeting it was stated that ‘[t]he rule of law is a symbol of the development of the political civilization to a certain historical stage, it is a condensation of human wisdom for all peoples to aspire and pursuit.’<sup>407</sup> At the same time, the PRC also argues that ‘The rule of law of a country is determined by and adapted to the national conditions and its social system.’<sup>408</sup> This is in fact not so far removed from EU statements on the rule of law, which also acknowledge that – while the rule of law is universal – its precise content may vary per state.<sup>409</sup> In the final analysis, it appears that in modern day China the rule of law is viewed more as an instrument (to reign in corruption, for example, and to attain the desired social system) than as an end in itself. At least on the level of rhetoric, the EU emphasises the rule of law more as an end in itself.

The European and **South African** conceptions of the rule of law, on the other hand, appear to be quite similar. Like the EU, the South African conception of the rule of law is thick. From a European perspective, problems arise in South Africa at the level of implementation rather than at the level of conceptualisation.

Regardless of terminology, the European Rule of Law and the **Peruvian** core elements of the conceptualisation of ‘Rechtsstaat’ seem to be quite similar. It is in the elements of the periphery where differences can be found. The principle of legality is at the core of the conceptualisation, yet it also includes anti-corruption policies since laws and case law indicate the close connection between corruption and the violation of legality. Some of the anti-corruption measures, however, lay at the periphery of the conceptualisation. Regarding the protection of fundamental rights, Peru connects this notion to the doctrine of ‘Social Democratic State’ or ‘Constitutional State’. In addition, the principle of legal certainty is also useful for preventing the abuse of power by the authorities, although connected to the idea of predictability of the law and the institutions. Furthermore, both perspectives place the independence of the judiciary at their core. However, the independence of the judiciary from the executive in terms of funding, from the congress in criminal procedures against authorities, and from the Constitutional Tribunal in the interpretation of the Constitution appear in the periphery. Similarly,

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<sup>406</sup> See Burnay (n 354) 34.

<sup>407</sup> See State Council Information Office of the People’s Republic of China, ‘The Report on the Development of Rule of Law in China’ <[http://www.gov.cn/zwggk/2008-02/28/content\\_904648.htm](http://www.gov.cn/zwggk/2008-02/28/content_904648.htm)> accessed 6 June 2015.

<sup>408</sup> *ibid* 22.

<sup>409</sup> See e.g. Commission, ‘A New EU Framework to Strengthen the Rule of Law’ (Communication) COM(2014) 158 final, 4: ‘The precise content of the principles and standards stemming from the rule of law may vary at national level, depending on each Member State’s constitutional system.’

while equality before the law is at the core in both perspectives, vulnerable groups lay at the periphery of the Peruvian perspective, particularly in relation to LGBTI rights.

Upendra Baxi has suggested that **Indian** institutions of governance are quite similar to European institutions, due to continuities with India's colonial past.<sup>410</sup> Indian rule of law conceptions also share many elements with the EU's conception, including legality, prohibition of arbitrariness of the executive, judicial independence, equality before the law and effective judicial review including respect for fundamental rights. Both the Indian and the EU conception are 'thick'.

Nevertheless, Baxi explains that Indian conceptions of the rule of law are actually quite distinct from the European notions. According to him, Indian rule of law 'offers revisions of the liberal conceptions of rights'.<sup>411</sup> Kadambi has remarked that socialism is at the heart of the identity of the Constitution.<sup>412</sup> This is also reflected in the preamble of the Constitution, which – as discussed above in the part on democracy – refers to India as a socialist democratic republic. Like the South Africa Constitution, the Indian Constitution has a 'transformative identity',<sup>413</sup> in the sense that it codifies both a national and social revolution as explained by Choudhry (discussed supra 2, under rule of law).<sup>414</sup> The social revolution aspect – to put political power in the hands of the repressed and to transform a deeply unequal society – is put in practice by Public Interest Litigation (discussed supra 6, under human rights), and is arguably also reflected in the Supreme Court's basic structure doctrine (discussed supra 3(C), under rule of law). Public Interest Litigation and the basic structure doctrine as part of judicial review are two of India's most distinctive contributions to the rule of law concept. Both are a product of India's very active Supreme Court in ensuring human rights, democracy and rule of law.

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<sup>410</sup> Baxi (n 336) 13.

<sup>411</sup> *id.*

<sup>412</sup> *id.*

<sup>413</sup> Rajeev Kadambi, 'The Supreme Court of India's Jurisprudence on Social Rights, Welfare, and Secularism' (2011)

43 *The George Washington International Law Review* 813, 821.

<sup>414</sup> Choudhry (n 338) 9-10.

## V. Conclusion

This report addresses two main questions. In the first place it has discussed what conceptions of human rights, democracy and rule of law are found at the domestic level in four countries from different corners of the world: China, India, Peru and South Africa. In the second place it has compared these domestic conceptions with the EU's conceptions of human rights, democracy and rule of law.

### **Lessons from the comparative exercise**

The comparative aspect of this study asks for meta-reflections on the process of researching and writing this report. Several challenges encountered during the research process illuminate important aspects of the content of this report.

The first reflection concerns the position of the author in the comparison and the familiarity with the country under study. While South African conceptions of human rights, democracy and rule of law appear largely familiar to a European audience, China, India, and Peru present notions and perspectives that are more divergent – and perhaps uncomfortable – compared to those found at the EU. The comparative exercise has challenged the assumed conceptions of the FRAME authors of this report, and – ideally – should also challenge the assumed conceptions of the reader. In other words, the comparative aspect of this report should encourage readers to question their own conceptions of human rights, democracy and rule of law.

The second reflection concerns the different emphasis that is put on the three concepts under review. The chapter on human rights is longer than the chapters on rule of law and democracy. This is a direct reflection of the amount of information on each of the three concepts we received from China, India, Peru and South Africa: all partners elaborated more on human rights than on the other two concepts. There is a lesson to be learned here: the heightened attention to the concept of human rights is actually a reflection of the system of international relations generally and EU foreign policy in particular. Human rights occupy a privileged position in international relations. The degree of standard setting on human rights – by means of binding international treaties and authoritative soft law instruments – is not matched for democracy and rule of law.

The privileged position of human rights can be viewed both as a drawback and as an advantage. During an interview in Brussels in September 2014, a member of the European External Action Service ('EEAS') remarked that it is more comfortable for the EU to engage with third-country partners on human rights than rule of law or democracy, because there is a common framework to draw on, namely the Universal Declaration of Human Rights (UDHR) and – at a minimum – the two International Covenants.<sup>415</sup> The member of the EEAS expressed the opinion that this allowed the EU to get into a less confrontational

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<sup>415</sup> Interview with EEAS official (Brussels, September 2014) [On file with authors].

engagement on human rights than on the other two concepts, since the human rights framework applies to all (including the EU itself). However, seemingly contrasting views have also been expressed in the literature. That is, it might also be an advantage for rule of law and democracy work that these concepts are more open-ended and less clearly outlined in international instruments. This is, for example, the view taken by Mathieu Burnay regarding the rule of law in China:

the rule of law can appear as a useful principle to frame China's policies and reforms. In contrast with democracy and human rights, the rule of law, in fact, does not have a strong connotation anchored in constraining international rules (e.g. Universal Declaration on Human Rights) or ideologies (e.g. Liberal Democracy). The rule of law therefore leaves much scope for interpretation and can more easily be presented as a homegrown concept.<sup>416</sup>

Burnay suggests that, in China, human rights are more perceived as a Western invention than the rule of law. This raises the question – which was not further studied in this report – whether there is more conceptual contestation in EU foreign policy platforms regarding human rights, than there is on democracy and rule of law.

#### **Comparing EU conceptions with China, India, Peru and South Africa**

Chapter IV of this report – more particularly sections A9, B4 and C4 of Chapter IV – compared the EU's conceptualisations of human rights, democracy and rule of law with the domestic conceptualisations found in the four countries under review. Broadly speaking, we note that what seems to animate the differences in conceptualisation are diverging views on social justice and the role of the state in achieving that. In the four countries under review, experiences of poverty, inequality and struggles for independence have helped shape and drive the domestic conceptions of human rights, democracy and rule of law. In contrast, an important – if not the most important – driving factor behind the EU's turn to human rights, democracy and rule of law has been market integration.

As regards *human rights*, this report has found that there is a more group-oriented reading of human rights in **China, India** and **South Africa** than in the EU. This is at least partly due to differing conceptual underpinnings: in these countries there is somewhat less reliance on human dignity, and more on concepts like Ubuntu, unity and spiritual brotherhood. As regards the notion of universality, only **China** argues for a 'universal yet relative' perspective. The Chinese relativism has the purpose of 'adapting' human rights to the Chinese and communist values, and protect Chinese sovereignty. China only guarantees the rights of citizens, similar to the EU Charter. Similarly to **EU** conceptualisations, all countries under review formally recognised the indivisibility of human rights. In practice, however, certain rights prevail in their political agenda depending on their social and political context. Generally speaking, **Peru and South Africa** emphasised civil and political rights, and economic, social and cultural rights were regarded as rights of 'progressive realisation'. The indivisibility of rights is also recognised in

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<sup>416</sup> Burnay (n 354) 33-34.



**India**, particularly through case law. In that country, preference for one or the other type of right is not easily perceived. The Indian Supreme Court has addressed a number of socio-economic rights as forming part of the right to life. In **China**, economic rights take clear precedence over civil and political rights. Contrary to the view that civil and political rights are of immediate implementation and economic rights call for progressive realisation, China regards the 'right of subsistence', which can be considered an elaborated version of the right to life, as the most important and urgent. Another distinction between European conceptualisations of human rights and those of the countries under review relates to the recognition of rights and corresponding duties of individuals. Unlike EU conceptions that emphasise the 'rights', in **South Africa**, **China** and **India**, great importance is attached to the duties of individuals towards fellow citizens, the State, society, different religious groups, and the environment.

This review of domestic conceptions shows that collective rights of minorities and environmental rights are addressed at domestic level in all countries. **India** and **South Africa** recognise rights to ethnic groups, **Peru** recognises collective rights of indigenous minorities, while in **China** collective rights are granted to minorities and rural communities. The difference lays in the consequences that such recognition seems to entail. The review also highlights the different understandings and uses of the notion of 'minorities', crucial for addressing not only collective rights, but also the approach taken by the countries in relation to diversity. In the case of **Peru**, minorities relate to indigenous groups, while in the case of **China**, it refers to all ethnic minorities. In the **Chinese** terminology though, ethnic minorities are normally referred to as 'nationalities'. In **India**, religious, cultural and linguistic minorities are, to a large extent, seen as marginalised groups and currently enjoy the collective right to language and education, and are the target of affirmative actions. The overarching approach towards equality is shared with the European perspective by all countries under review. The equality of individuals is the starting point, followed by a prohibition of discrimination. Similar to the EU, the enumeration of grounds of discrimination is used by **Peru**, **South Africa** and **India**. **China**, on the other hand, explicitly prohibits discrimination against 'ethnic minorities', yet does not mention additional grounds. The recognition of sexual orientation as a prohibited ground for discrimination, strongly endorsed in the EU policies, seems to lag behind in the countries under review, since it was expressly included as a ground of discrimination only in **South Africa**, but without social support in practice.

As regards *democracy*, FRAME Deliverable 3.2 elaborated that five principles are central for the EU: equality, representation, participation, transparency and deliberation. This report has found that **South Africa**, **Peru** and **India** all hold similar conceptions of democracy as the EU. At the same time, these countries have distinctive elements in their concept of democracy. What distinguishes **South Africa** is the role it has assigned to traditional leaders. South Africa recognises both constitutional authority and traditional authority. **India's** conception of democracy is distinguished by the extensive attention paid to fostering the political representation and participation of socially disadvantaged groups. Fostering the representation of socially underprivileged groups can be seen as part of India's commitment to democratic socialism, which is written into the preamble of the Constitution. The **Chinese** conception of democracy diverges widely from the EU conception of democracy. China does not view free and competitive elections as a core element of democracy. The Chinese principle of 'multi-party cooperation' does not challenge the undisputed leadership of the Communist Party of China. For the

Chinese, democracy also means the realisation of every citizen's economic and social rights. Both **India** and **China** have included a commitment to socialism explicitly in their Constitution. While making no mention of socialism, the **Peruvian** Constitution does lay down that the country is a 'social state', suggesting a theoretical preference for a welfare model, which is nevertheless not reflected in practice. The preamble to the **South African** Constitution mentions social justice as one of the values on which the country is established.

As regards *the rule of law*, this report has found that the EU shares core minimal/'thin' elements with all four countries under review. **Chinese**, **Indian**, **South African** and **Peruvian** views on legality and equality before the law do not appear much different from the EU's views. On the other elements of the rule of law, conceptual divergences occur. Particularly as regards **China**: it is clear that the notion of a 'socialist rule of law with Chinese characteristics' is very different from the EU's conception of the rule of law. In essence, the difference lies in the notion of separation of powers. In China, there is very little separation of powers, checks and balances are applied very differently, and the different branches of government are much more closely held together as the NPC creates both the judiciary and the administration. It appears that in modern day China the rule of law is viewed more as an instrument (to reign in corruption, for example, and to attain the desired social system) than as an end in itself. At least on the level of rhetoric, the EU emphasises the rule of law more as an end in itself.

Similar to the EU, **South African**, **Peruvian** and **Indian** conceptions of the rule of law can all be characterised as 'thick'. From a European perspective, problems and divergences arise in **South Africa** at the level of implementation rather than at the level of conceptualisation. Regardless of terminology, the European Rule of Law and the **Peruvian** elements of the conceptualisation of 'Rechtsstaat' seem to be quite similar. Regarding the protection of fundamental rights, Peru connects this notion to the doctrine of 'Social Democratic State' or 'Constitutional State'. Both in terms of institutions of governance and in terms of conceptions, **India** shares many elements of its approach to the rule of law with the EU. This is partly an inheritance from India's colonial past. Nevertheless, Indian conceptions of the rule of law are quite distinct from the European notions, as they are based on a commitment to a national and social revolution. The social revolution aspect – to put political power in the hands of the repressed and to transform a deeply unequal society – is put in practice by Public Interest Litigation and is arguably also reflected in the Supreme Court's basic structure doctrine. Public Interest Litigation and the basic structure doctrine as part of judicial review are two of India's most distinctive contributions to the rule of law concept. Both are a product of India's very active Supreme Court in ensuring human rights, democracy and rule of law.

### Implications for policy and remaining questions

Though EU foreign policy is not as such the object of study of this report, the broader goal of the FRAME project is to develop suggestions to strengthen the EU's efforts to promote human rights, democracy and rule of law. This report has clearly shown that some elements of the domestic conceptions of human rights, democracy and rule of law in China, India, Peru and South Africa are widely different from the EU's conceptions, although there is also much shared ground. Without doubt, EU external policies should be sensitive to possible conceptual differences and indicate awareness of these differences in their conceptualisations of human rights, democracy and rule of law. It remains problematic when the

EU attempts to impose its own conceptions of human rights, democracy and rule of law on third-countries. EU policy that focuses on upholding the values that countries themselves profess likely has more chance of success. In other words, EU policy relying on a conceptualisation that resonates with domestic conceptions is more likely to have an impact. This can figure as a working hypothesis for Deliverable 3.5, which examines EU Human Rights Dialogues as a case study of EU external action.

An enduring challenge is to distinguish compliance/implementation from abstract conceptions. FRAME Deliverable 3.2 recognised that concepts emerge in practice and that practice is informed by concepts, in other words that conceptions and operationalisation inform each other.<sup>417</sup> An assumption that will have to be verified in Deliverable 3.5 is that EU foreign policy focuses primarily on issues of concrete state implementation/compliance with human rights, democracy and rule of law, rather than on more theoretical questions of the concepts used. However, state compliance with human rights, democracy and rule of law, or the lack of compliance, does not necessarily tell us much about the abstract notions and how these are supported or challenged. This is something to keep in mind. It also raises the question of when contestation or friction in policy exchanges – for example between EU and Chinese officials – occurs, it occurs because both sides adhere to different conceptions of human rights, democracy and rule of law, or whether friction is prompted by other factors (such as economic interests). This report takes the first step towards a more effective and rich dialogue, it clarifies what is meant by human rights, democracy and rule of law at domestic level, which conceptual elements and abstract notions are associated to them. As such, it provides basic elements for building a common language, reflecting shared interests.

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<sup>417</sup> FRAME Deliverable 3.2, 5.

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### 4. FRAME

- FRAME Deliverable 3.1
- FRAME Deliverable 3.2



# Annexes

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## I. Guidelines for Country Reports

**Authors:** Lorena Sosa and Alexandra Timmer, Netherlands Institute of Human Rights (UU)

**Date:** March 2015

### A. Description of the Deliverable

#### **Description of the deliverable in the FRAME project description**

*The content and interpretation of the concepts of human rights, democracy and the rule of law in various third countries differs to varying degrees from the EU-held convictions, which partly explains the contestation of EU policies by some of these third countries. Different conceptions and perspectives on human rights, democracy and the rule of law will be analysed through the examination of primary and secondary literature, interviews with policy-makers, civil society and business representatives, an assessment of available survey material and an assessment of media sources (two leading national newspapers). To achieve this aim, partners from Peru, South Africa, India and China will be involved in the gathering and analysis of data. In order to assure a solid framework for comparison, a detailed case study format and data collection methods will be developed by partner 8 in cooperation with the partners from third countries.*

#### **Interpretation of the tasks ahead**

The first task in this report is to outline how China, India, Peru and South Africa conceptualize human rights, democracy and rule of law. This means that the main features of these countries' usage of these three concepts will have to be identified and summarized by the partners from these countries. In order to achieve this task country reports will be elaborated by each third country research partner. The main research question guiding the country reports reads as follow:

*"What conceptions and perspectives on human rights, democracy and the rule of law can be found at the domestic level?"*

In a next step, this report needs to compare these countries' conceptions with the EU's interpretation of human rights, democracy and rule of law (as outlined in Deliverable 3.2). The goal of the comparative analysis is to identify the differences and the commonalities between the EU and the selected countries as regards the conceptualization of human rights, democracy and rule of law. The comparative analysis, based on the reports of the partners, is primarily a task for the UU. To facilitate the comparative analysis, the partners will address a secondary research question in the country reports:

*"To what extent are conceptualizations of democracy, human rights and rule of law as found in EU policies similar or different at the domestic level?"*

A secondary goal of the comparative analysis is to discover to what extent differences in conceptualization matter. Third countries regularly contest the EU's policies on human rights, democracy and rule of law: to what extent is this the result of differences in conceptualization of these concepts?

## **B. National Report Guidelines**

The UU kindly asks you to write your report using the following structure, and replying to the following questions. In order to facilitate the comparative analysis, **please make sure you address all questions** that are listed below.

### **1. Socio-legal Context (contextual boundaries)**

#### **a) Historical background**

*Please describe the historical background of your country's support of human rights, democracy and rule of law. This will allow readers to better understand the context of your country's conceptualization of human rights, democracy and rule of law.*

- ➔ Which are the most important historical experiences/events that have shaped your country's view on human rights, democracy and rule of law? (Please address each of these areas separately)
- ➔ What cultural/religious/philosophical principles should be taken into account when interpreting your country's view on human rights, democracy and rule law?

Length: approx. 2 pages/1000 words

#### **b) The national legal system**

*Please provide an introduction to your country's legal system by briefly explaining the key features of the national legal system that are essential to understand your country's legal framework regarding human rights, democracy and rule of law.*

- ➔ What provisions are there in your country's Constitution about human rights, democracy and rule of law?
- ➔ In federal systems, it would be necessary to outline how legal competence regarding human rights law is distributed among different levels of government.
- ➔ How is the division of responsibilities between central government and decentralized governments?
- ➔ Please describe the main aspects of the judiciary system in your country (structure, election of judges, main procedures) and the access to justice (main mechanisms of redress and protection)
- ➔ What provisions are there in your country's Constitution addressing diversity and/or vulnerable groups (e.g. racial or ethnic minorities, women, asylum seekers, migrants, people with a disability, LGBTI people, etc.)

- ➔ Who are the actors in the field of Human Rights and what is their relation to the government (e.g. NGO's, National Human Rights Institutes) when it comes to promoting and protecting human rights?
- ➔ What are the guardian institutes that uphold the rule of law (e.g. police; judiciary; military)?
- ➔ What are the main democratic institutions in your country (local elected government; provincial government; Parliament, etc.)?

Length: approx. 4 pages/2000 words

### **c) International obligations**

*Please provide an overview of the international legal obligations of your country on the terrains of human rights, democracy and rule of law.*

- ➔ Briefly list which international human rights treaties your country has ratified or where the ratification process has been started (mention the state of this process). Please include any reservations made by your country.
- ➔ Please describe your country's stance on human rights, democracy and rule of law in international UN fora:
  - Mechanisms in which your country participates (HRC, CEDAW, etc) and type of participation (periodic review, country reports, missions, individual communications)
  - Key points from reports delivered, individual opinions, etc., if available. What are the main points in the dialogue?

Length: approx. 2 pages/1000 words

## **2. Conceptualizations of Human Rights, Democracy and the Rule of Law**

### **a) Conception of Human Rights**

#### **(1) Domestic conceptualizations**

The main research question guiding this section is: *"What conceptions and perspectives on human rights can be found at the domestic level?"*

- ➔ What elements belong to the "core" (meaning the more stable and well-established elements) of your country's conception of human rights? What elements belong to the "periphery" (meaning the more dynamic and contested elements) of your country's conception of human rights?

In answering these questions, please make sure to address the following topics:

- Universality of human rights
- Indivisibility of rights
- Civil and political rights
- Social, cultural and economic rights

- Environmental rights and collective rights
- Human rights of ‘vulnerable’ groups (e.g. racial or ethnic minorities, women, asylum seekers, migrants, people with a disability, LGBTI people, etc.)

Please answer these questions based on the analysis of legal and policy documents (primary sources), with the aid of case law and secondary literature. Interviews, survey results and media can be used in the interpretation of the primary sources as well. Please be explicit about your sources (laws, interviews, etc.).

Length: approx. 4 pages/2000 words

## (2) Comparison with EU conceptualizations

Deliverable 3.2 has outlined the EU’s conceptions of human rights, democracy and rule of law. In order to facilitate the comparative part of Deliverable 3.3, this section is dedicated to exploring the following guiding question: *“To what extent are conceptualizations of human rights as found in external and internal EU policies similar or different at the domestic level?”*

In answering this question, please make sure to address the following topics:

- Universality: how does your country’s view on universalism compare to that of the EU?
- Indivisibility: how does your country’s view on the indivisibility of human rights compare to that of the EU?
- Civil and political rights: how does your country’s view on civil and political rights compare to that of the EU?
- Social, cultural and economic rights: how does your country’s view on social, cultural and economic rights compare to that of the EU?
- Environmental rights and collective rights: how does your country’s view on environmental rights and collective rights compare to that of the EU?
- Vulnerable groups and diversity: how does your country’s view on the rights of ‘vulnerable groups’ (e.g. minorities, asylum seekers, people with a disability, LGBTI people etc) compare to that of the EU?

Length: approx. 2 pages/1000 words

## b) Conception of Rule of Law

### (1) Domestic conceptualizations

The main research question guiding this section is: *“What conceptions and perspectives on rule of law can be found at the domestic level?”*

- ➔ What elements belong to the “core” (more stable and well-established) of your country’s conception of the rule of law?
- ➔ What elements belong to the “periphery” (more dynamic and contested) of your country’s conception of the rule of law?

In answering these questions, please make sure to address the following topics:

- Legality (in the sense that government and individuals are bound by law)

- Democratic process of enacting laws
- Legal certainty
- Prohibition of arbitrariness of the executive powers
- Independent judiciary
- Effective judicial review including respect for fundamental rights
- Efforts to accommodate diversity or vulnerable groups (e.g. racial or ethnic minorities, women, asylum seekers, migrants, people with a disability, LGBTI people etc.) in judicial response
- Access to justice or effective remedies for vulnerable groups (e.g. racial or ethnic minorities, asylum seekers, migrants, people with a disability, LGBTI people etc.)
- Equality before the law
- Consistency with international law

Please answer these questions based on the analysis of legal and policy documents (primary sources), with the aid of case law and secondary literature. Interviews, survey results and media can be used in the interpretation of the primary sources as well. Please be explicit about your sources (laws, interviews, etc.).

Length: approx. 4 pages/2000 words

## (2) Comparison with EU conceptualizations

Deliverable 3.2 has outlined the EU's conceptions of human rights, democracy and rule of law. In order to facilitate the comparative part of Deliverable 3.3, this section is dedicated to explore the following guiding question: *"To what extent are conceptualizations of rule of law as found in external and internal EU policies similar or different at the domestic level?"*

In answering this question, please make sure to address the following topics:

- Thin or thick conception: in general would you describe your country's conception of the rule of law as 'thin' or 'thick'?
- Legality: how does your country's view on legality compare to that of the EU?
- Democratic process of enacting laws: how does your country's view on the requirement that laws need to be democratically enacted compare to that of the EU?
- Legal certainty: how does your country's view on legal certainty compare to that of the EU?
- Prohibition of arbitrariness of the executive powers: how does your country's view on the prohibition of arbitrariness of the executive powers compare to that of the EU?
- Independent judiciary: how does your country's view on the independence of the judiciary compare to that of the EU?
- Effective judicial review including respect for fundamental rights: how does your country's view on judicial review compare to that of the EU?
- Equality before the law: how does your country's view on equality before the law compare to that of the EU?
- Consistency with international law: how does your country's view on consistency with international law compare to that of the EU?

Length: approx. 2 pages/ 1000 words

### c) Conception of Democracy

#### (1) Domestic conceptualizations

The main research question guiding this section is: *“What conceptions and perspectives on democracy can be found at the domestic level?”*

- ➔ What elements belong to the “core” (more stable and well-established) of your country’s conception of the democracy?
- What elements belong to the “periphery” (more dynamic and contested) of your country’s conception of the democracy?

In answering these questions, please make sure to address the following topics:

- Right to vote and free elections
- Democratic equality (including gender equality)
- Representation
- Participation (direct and indirect)
- Efforts to promote representation and participation of vulnerable groups (e.g. racial or ethnic minorities, women, asylum seekers, migrants, people with a disability, LGBTI people etc.)
- Transparency
- Deliberation
- Good governance

*In addition, please elaborate on the following questions:*

- ➔ How would you describe your country’s model of democracy?
- ➔ What kinds of democratic deficits do you see in your country?

Please answer these questions based on the analysis of legal and policy documents (primary sources), with the aid of case law and secondary literature. Interviews, survey results and media can be used in the interpretation of the primary sources as well. Please be explicit about your sources (laws, interviews, etc.).

Length: approx. 4 pages/2000 words

#### (2) Comparison with EU conceptualizations

Deliverable 3.2 has outlined the EU’s conceptions of human rights, democracy and rule of law. In order to facilitate the comparative part of Deliverable 3.3, this section is dedicated to explore the following guiding question: *“To what extent are conceptualizations of democracy as found in external and internal EU policies similar or different at the domestic level?”*

Length: approx. 2 pages/1000 words

### C. Style, language and length

This report should conform to the standards laid down in the **FRAME Research Quality and Style Guide** (available on the intranet and attached for your convenience).

The **Oxford Standard for Citation of Legal Authorities (OSCOLA)** should be used for the purpose of **citing sources in footnotes** or in the bibliography. You will find the OSCOLA style guide here: <http://www.law.ox.ac.uk/publications/oscola.php>

Please draft your report directly into the **FRAME ‘Deliverable report template’** available on the intranet (see Files>Templates>Deliverable report template) and attached for your convenience.

The reports should be balanced, written in neutral language and contain no unsubstantiated statements. All sources of data/information included as text or tables/diagrams should be fully referenced. Quotation marks should be used for *verbatim* citation. When paraphrasing is too close to the original source, please opt for a quotation instead. When directly discussing a legal or policy document, please cite the document itself rather than a secondary source.

If data/information are available online, please provide the Internet addresses (with date accessed); where data are available in both English and national language, please provide the address of the English version.

The **length of each sub-section is detailed in the questionnaire. A page should consist approximately of 500 words:** i.e. when it says ‘length approx. 4 pages’ this means roughly 2000 words.

## II. Interview Protocol for FRAME Deliverable 3.3

**Author:** Lorena Sosa, Netherlands Institute of Human Rights

**Date:** March 2015

This interview protocol accompanies the National Report Guidelines for Partners of Deliverable 3.3. Partners are welcome to combine the interviews relating to Deliverable 3.3 with interviews planned in relation to other work packages. Interviews will be semi-structured in nature, giving flexibility to the interviewer to explore themes emerging during the interviews. The basic themes suggested here aim at providing some general overview of how conceptualizations of democracy, human rights and rule of law are understood by the interviewees, and provide the researcher with insight for writing the country report. Nevertheless, there may be specific topics not covered by this protocol that the researcher would like to address with specific interviewees given their expertise, for instance, or additional themes that may be better for capturing the specific views of the country. You are kindly asked to address such topics in addition to the ones here suggested.

### A. Formal aspects of the interviews:

As regards interviews, please conform to the FRAME Research Quality and Style Guide:

- Before conducting an interview, participants must be informed that their identity will remain confidential if they so wish.
- Participants must be informed about the purpose of the interview, the purpose of the project and the topics that will be discussed.
- Participants must be informed that they can refuse to provide answers or stop the interview when they consider it necessary.

- Ideally, each interview should be tape-recorded, for which the participants have to give their consent.
- Transcripts and/or recordings of interviews should be kept for future reference. These can be made anonymous or kept confidential when this was agreed with the participant.

#### **B. Number of people to be interviewed**

We kindly ask all partners to interview a minimum of 5 people.

#### **C. Selection of the participants**

Please make sure you identify who the relevant participants are based on the delineation of the socio legal context of the country report, with particular attention to the domestic national legal system and the international obligations of the State.

- Policy makers: interviews should be conducted with persons who are the main responsible for the elaboration and adoption of laws and policies in your country. Ideally, selected participants should belong to different levels of policy making (senior to junior).
- Civil society representatives: at least two interviews should be conducted with important public opinion makers, and/or staff members from the more active NGOs pursuing human rights, democracy and rule of law related claims.

#### **D. General interview themes**

##### **1. Socio-legal Context**

###### ***a) Historical background and national legal and policy system***

- Address the historical background of your country's support of human rights, democracy and rule of law
- Address the cultural/religious/philosophical principles which are relevant for interpreting the country's view on human rights, democracy and rule law
- Who are the actors in the field of Human Rights and what is their relation to the government (e.g. NGO's, National Human Rights Institutes) when it comes to promoting and protecting human rights?
- What are the guardian institutes that uphold the rule of law (e.g. police; judiciary; military)? And do they have specific guidelines related to that?
- What are the main democratic institutions in your country (local elected government; provincial government; Parliament, etc.)?

###### ***b) Domestic conceptualizations on Democracy, Human Rights and Rules of Law***

- What conceptions and perspectives on human rights can be found at the domestic level?
- What conceptions and perspectives on rule of law can be found at the domestic level?
- What conceptions and perspectives on democracy can be found at the domestic level?