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Assessing factors influencing human rights around the world: three case studies

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Executive Summary

Under the auspices of the FP7 project Fostering Human Rights among European Policies (FRAME), this report is part of Work Package 2 on 'factors which enable or hinder the protection of human rights'.

A more comprehensive understanding of the internal and domestic contextualization of historical, legal, political, economic, social, ethnic, religious, and technological factors hindering or facilitating human rights protection in third countries is vital for the continuous endeavor of the EU to promote human rights in its external actions. The purpose of this report is to deepen this understanding. The report contains three studies on the dynamics and interactions of factors hindering or enabling the protection of human rights in selected third countries. The following countries, from three different continents, have been selected: India, South Africa and Peru. From this country-based contextualisation of factors a case study was chosen for each country highlighting the influences of factors in a particular human rights area.

Chapter II focuses on India and evidences that various factors impede the realization of human rights in the country. The study zooms in on economic, social and political factors, which are often structural in nature and which prevent individuals and groups from accessing institutional mechanisms for the enforcement of human rights. The chapter includes a case study on 'encounter killings', which in India are generally referred to as those incidents in which there is a loss of life of individuals in the hands of police and security forces when they resort to use of force for the purpose of maintaining law and order.

Chapter III assesses the current human rights situation in South Africa by setting out the historical, political, legal, economic, social, cultural, religious, ethnical and technological factors that both enhance and militate against the promotion of human rights. Against the backdrop of the legacy of apartheid and the country's socioeconomic challenges, the chapter provides an evaluation and literature review of the various constraints that impede against the promotion of basic rights in South Africa. The chapter proceeds to a case study of factors that impede the realisation of socioeconomic rights and the role of NGOs and social movements to remedy the situation through protest, advocacy and litigation.

Chapter IV analyses factors facilitating and hindering human rights protection in Peru. The chapter provides an overview of historical, legal, political, economic, ethnic, religious, and technological factors facilitating or hindering the promotion and protection of human rights in the country. The chapter then focuses on identifying the social and institutional factors that explain the weak participation of civil society directly involved in human rights policies. Three cases of national councils involved in promoting and protecting human rights are object of analysis: the national human rights council, the national health council, and the national education council.

The results emerging from the case studies feed into the overarching theme of the Work package 2, namely factors that facilitate or hinder human rights protection in the EU, and among its internal and external policies. The report affirms the need for a holistic and contextualised approach to factors hindering and enabling human rights in third countries. The factors explored in each selected case study are in many respects intertwined and inter-related in contextualized dynamics. This complex intersection requires that the EU in its external actions pay careful attention to the factors that come into play in each country and their societal contextualisation. The report also illustrates the complex role played by civil

society in third countries, and demonstrates that the EU in its endeavours to support the human rights agenda of civil society in third countries, would have to pay careful attention to the diversity of factors which in each country puts limitations to or offer possibilities for civil society.

List of abbreviations

AEC	Anti-Eviction Campaign
African Charter	African Charter on Human and Peoples' Rights
ALP	AIDS Law Project
ANC	African National Congress
ARVs	Anti-retroviral drugs
AU	African Union
AZT	Zidovudine
BBBEE	Broad-Based Black Economic Empowerment
CCG	Concerned Citizens Group
CGE	Commission for Gender Equality
CLRDC	Community Law and Rural Development Centre
CNE	National Education Council
CNS	National Health Council
CoRMSA	Consortium for Refugees and Migrants South Africa
COSATU	Congress of South African Trade Unions
CRC	Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
ECOSOC	Economic and Social Council
EIB	Intercultural Bilingual Education
EIDHR	European Instrument for Democracy and Human Rights
FHR	Foundation for Human Rights
GEAR	Growth, Employment and Redistribution Strategy
HAART	Highly active antiretroviral therapy
HDI	Human Development Index
HRBAD	Human rights based approach to development

HRC	Human Rights Committee
ICT	Information and communication technology
ILO	International Labour Organisation
JNE	National Jury of Elections
LGBTI	Lesbian, gay, bisexual, transgender and intersex persons
LPM	Landless People's Movements
MINEDU	Ministry of Education
MSF	Médecins Sans Frontières
MTCT	Mother-to-child HIV transmission
NDA	National Development Agency
NEDLAC	National Economic Development and Labour Council
NEHAWU	National Education, Health and Allied Workers Union
NGOs	Non-Governmental Organisations
NHRC	National Human Rights Commission
NP	National Party
ONGEI	National Office of Electronic and Informatics Government
ONPE	National Office of Electoral Processes
PATAM	Pan-African Treatment and Access Movement
PEN	National Educational Project
PETS	Public Expenditure Tracking System
PIR	Poverty and Inequality Report
PMA	Pharmaceutical Manufacturers Association
PUCP	Pontifical Catholic University of Peru
PwDs	Persons with disabilities
RENIEC	National Registry of Identification and Civil Status

SAHRC   South African Human Rights Commission

SAHRINGON   Southern Africa Human Rights NGO Network

SCO-LA   Civil Society Organisations and Local Authorities

SCs   Scheduled Castes

SECC   Soweto Electricity Crisis Committee

STs   Scheduled Tribes

SWP   Social Watch Program

TAC   Treatment Action Campaign

UDF   United Democratic Front

UN   United Nations

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I.   Introduction

A.   Background

Under the auspices of FRAME, the present report is part of Work package 2 and closely linked to the [Report on factors which enable or hinder the protection of human rights](#) (Lassen et al., 2014, hereinafter 'report D 2.1'), as well as other reports written with a point of departure in this report.

The aim of report D 2.1 was to provide a mapping of the historical, political, legal, economic, social, cultural, religious, ethnical and technological factors that facilitate or hinder human rights protection in the EU, amongst its internal and external policies. With a focus on access to fundamental rights, and taking into account the challenges brought about by globalisation, the report contains an assessment of the current knowledge about each factor, the internal and external dimensions of factor policies, and the impact of each factor on human rights protection. The report points to challenges and gaps in EU policies, instruments, and implementation strategies that, in the context of the factors, need further exploration and analysis.

Report D 2.1 provides the framework for the [Report on in-depth studies of selected factors which enable or hinder the protection of human rights in the context of globalisation](#) (Report D 2.2.; Lassen et al., 2015). This report scrutinises some of the challenges and factors identified in report D 2.1 as in need of additional investigation and analysis. A third report, [D 2.3](#), singles out one particular factor introduced in D 2.1, namely the technological factor (ICTs).

The focus of the above-mentioned reports is the EU and its external and internal human rights policies. They explore how a number of key factors in a dynamic interaction with EU policies and instruments hinder or enable these policies, their creation, efficacy and impact. The reports also show how policies and instruments have a bearing on the factors in concrete contexts, whether in the EU Member States or outside the EU. Although the reports include a contextualisation of the factors at the global level, identifying issues in which the context of globalisation hinder or enable the protection of human rights in the EU's external and internal policies, the main objective of these reports was not to examine factors in particular third countries.

Two other reports in Work package 2 have a different point of departure vis-à-vis the study of factors facilitating or hindering human rights protection. Report D2.4 contains a '*quantitative* analysis of factors hindering or enabling the protection of human rights.' The report builds on the extensive literature in comparative politics, international relations and political economy which aims to explain variation in the protection of human rights across countries. The report introduces new analytic techniques to analyse data and compare countries.

The report on quantitative analysis of factors is supplemented by the present report which offers a *qualitative* analysis of factors in selected third countries.

Thus, the present report aims at complementing the other reports of Work Package 2 by means of adopting a qualitative focus on the dynamics of factors hindering or facilitating human rights protection

in selected third countries. Furthermore, whereas the reports D 2.1, D 2.2, D.2.3 predominantly have EU policies as their reference point, the present report will reverse the focus and take its point of departure, not in EU policies but in selected third countries, and the factors and policies of these countries.

B.   Three case studies in selected third countries

With a view to complementing and deepening the analyses of the reports of Work package 2, in this report three in-depth qualitative case studies on the dynamics and interactions of factors in selected third countries have been conducted. The following countries, from three different continents, have been selected: India, South Africa and Peru.

The case studies were drafted independently from each other. The author of the case study of India is Srinivas Burra, Assistant Professor, Faculty of Legal Studies, South Asian University. The authors of the case study of South Africa are Bright Nkrumah, Researcher, and Magnus Killander, Associate Professor, Centre for Human Rights, Faculty of Law, University of Pretoria. The authors of the case study of Peru are Carmela Chàvez, Diego Uchuypoma, Bruno Castañeda, Renato Constantino, Instituto de Democracia y Derechos Humanos de la Pontificia Universidad Católica del Perú.

The focus of these studies is not, then, on the EU's external human rights policies, but rather on significant historical, political, cultural, social, ethnic, legal, economic, religious and technological factors which within the selected countries facilitate or hinder the human rights protection in the country. From this national contextualisation of factors a case study is chosen for each country highlighting the influences of factors in a particular area.

The fact that the EU human rights policies are not the focus of this report does not mean that the analyses are not relevant for these policies. On the contrary, a more comprehensive understanding of the internal and domestic contextualisation of factors hindering or facilitating human rights protection in selected third countries is vital for the continuous endeavour of the EU to promote the protection of human rights in its external actions. The reports of Work Package 2 reveal that the EU's human rights policies in third States are frequently not implemented in an effective and consistent way. The adopted policies and guidelines have the potential to strengthen and institutionalise the EU's human rights policies and thereby to ensure a more systematic and effective approach to promoting respect for human rights in third States. However, the in-depth studies of selected factors (D 2.2) indicate that there frequently is a considerable gap between the EU's progressive external policies on human rights and the implementation of these policies in practice. One of the means by which to close this gap is exactly to increase the understanding of the factors facilitating and hindering the promotion and the strengthening of democracy and human rights in third countries.

Moreover, the authors of the present report have in their case studies chosen to look at dynamics involving both factors and human rights actors which are highly relevant to the EU in its external human rights policies. To give an example, the EU considers civil society a vital player in the promotion of human rights and democracy, and the study of civil society dominates two of the three case studies of the report.

C.   Methodology

The report is based on desk studies, anchored in the contributions of partner universities in the selected third countries.

The points of departure of the report, as a whole as well as of each chapter, are the factors hindering or enabling the protection of human rights. In order to create a common framework of understanding, the authors of the report have used report D 2.1. as a starting point. For the purpose of the reports, the term 'factor' has been defined (in D2.1) "as an element, circumstances or distinguishing feature which significantly enables or hinders protection of human rights".

All chapters start with an overview of factors which facilitate or hinder the promotion and protection of human rights in the countries in question. This overview is followed by a case study.

The case studies make use of primary and secondary sources, including where relevant, interviews with relevant human rights actors. The case studies have been based on relevant national, and international human rights sources, for instance international human rights treaties, regional and national policy documents, case law, opinions, reports from monitoring bodies, and documentation from national institutions and civil society. Depending on the topics and factors under scrutiny, the use of these types of sources vary from chapter to chapter. Therefore, the method used in relation to the different factors is explained in the introduction of each chapter.

D.   Contents of the report

Chapter I, the Introduction, contains the main preface to the reading of the report.

Chapter II is a case study of India. The chapter aims at evaluating and critically analyzing the situation of protection of human rights in India with a specific example of allegations of extrajudicial killings and the response of the Indian judiciary and the National Human Rights Commission. Based on an overview of the constitutional and institutional mechanisms that exist in India for the protection of human rights, the chapter discusses some of the economic, social and political factors in India that play a significant role in the realization of constitutionally and statutorily given human rights and how some of these aspects are hindering the protection of human rights. The chapter in particular focuses on an important dimension of threat to right to life, namely extrajudicial killings, which are generally referred to as 'encounter killings' in India.

Chapter III focuses on South Africa, assessing the factors that hinder or enhance the protection and promotion of human rights in South Africa, with a particular focus on the role of non-governmental organisations (NGOs) and social movements in the realisation of socioeconomic rights. The chapter begins with a general outline of the historical, legal, political, economic, ethnic and religious, and technological factors which influence the level of human rights protection in South Africa. Then follows an analysis of factors that impede the realisation of socioeconomic rights and the role of NGOs and social movements to remedy the situation through protest, advocacy and litigation.

Chapter IV zooms in on factors facilitating and hindering human rights protection in Peru. The chapter provides an overview of historical, legal, political, economic, ethnic and religious, and technological factors facilitating or hindering the promotion and protection of human rights in the country. The chapter then focuses on identifying the social and institutional factors that explain the weak participation of civil society directly involved in human rights policies. Three cases of national councils involved in promoting and protecting human rights will be the object of analysis: the National Human Rights Council, the National Health Council, and the National Education Council.

Chapter V, Conclusion, contains a summary of the chapters as well as recommendations, which emerge from the case studies and which can feed into one of the overarching themes of Work Package 2, namely factors that facilitate or hinder human rights protection in the EU in its external policies.

II.   Case study in selected third country: India

A.   Introduction

Discourses around human rights constitute an important aspect of governance in almost every country. The substance and form of these rights may vary from context to context, however, it is argued that certain fundamental aspects of these rights remain universal and inalienable. At the intentional level also, the rights discourses are to a large extent centered on the developments in international human rights law. Thus human rights frameworks have become an important component of most of the constitutions and statutory provisions. In India like many democratic countries human rights discourse constitutes an important part of the governance. What are considered as universal and inalienable human rights are argued as translated into constitutional rights and legislative enactments in India. Human rights become futile without effective institutional mechanisms for their enforcement. Thus along with constitutional and legislative corpus of human rights, India also has in place institutional mechanism which are intended to enforce human rights.

The present chapter is aimed at evaluating and critically analyzing the situation of protection of human rights in India with a specific example of allegations of extrajudicial killings and the response of the Indian judiciary and the national human rights commission. Section B provides an overview of the constitutional and institutional mechanisms that exist in India for the protection of human rights. It also discusses some of the economic, social and political factors in India that play a significant role in the realization of constitutionally and statutorily given human rights and how some of these aspects are hindering the protection of human rights. Section C focuses on an important dimension of threat to right to life i.e., extrajudicial killings, which are generally referred to as 'encounter killings' in India. This section identifies the problem of extrajudicial killings and analyses the response of the national human rights commission and the Indian judiciary. Section D provides conclusions.

B.   Human rights protection in India: Key issues and factors

India's governance based on rule of law and constitutional supremacy defines its engagement with the rights discourse and the protection of human rights. For citizens of India the rights framework available is the Indian constitution and statutory frameworks which are realizable through the courts of law. Central to the understanding of rights in India is the set of fundamental rights provided in the Indian constitution. Fundamental rights are provided with an effective remedial mechanism through writ jurisdiction of the higher courts i.e., high courts and the supreme court of India. These fundamental rights are provided in part III of the constitution of India.

The rights contained in part III of the Indian constitution are predominantly civil and political in nature. They are therefore formulated in a negative language to prohibit or regulate the power of the State from denying or restricting individual liberty. The economic and social rights as they are understood in their broader meaning are excluded from these justiciable rights. The economic and social rights framework is included in the directive principles of State policy which constitutes part four of the Indian constitution. As these directive principles are aspirational in nature they are formulated in a positive language and guide the state to take positive steps towards their realization. They are not justiciable as fundamental rights. All fundamental rights are not applicable to all. Some are applicable to citizens only and others are

applicable to citizens and non-citizens also. Generally, the rights conferred by articles 14, 20, 21, 22, and 25 to 28 are available to both citizens and non-citizens. The category of rights which is available to the citizens only includes articles 15, 16, 19, and 29.

India is a party to some of the important international human rights treaties.[1] India also made reservations and declarations to these treaties. Because of its dualist model of effectuating international law at the domestic level, realization of human rights as enshrined in these international human rights treaties is not directly possible for citizens of India. Thus for an ordinary citizen of India the most effective mechanism is to resort to the domestic law mechanisms available. As stated above the important framework that is available for Indian citizens is the constitution of India. The part that deals with the rights of citizens which are known as fundamental rights is part three of the Indian Constitution. The fundamental rights as enshrined in the Indian constitution are essentially those human rights which are justiciable before the courts of law. These rights along with other statutory rights provided in various legislation like criminal law constitute the rights framework for the citizens of India.

As discussed earlier the rights framework under the Indian constitution and other Statutes is applicable to all without any discrimination, with an exception of non-citizens in respect of some rights. Therefore in the event of violation of any of the rights provided in the constitution and in other statutes they can be enforced through the judicial mechanisms. However, despite the existence of a fairly comprehensive rights mechanism and institutional framework it can convincingly be said that violation of human rights in India is an everyday reality.

There are various economic, social and political factors which hinder the realization of human rights. Issues like economic inequality and inhuman caste system are part of lived experiences of large section of Indian population. Lopsided development programmes involving exploitation of natural resources like mining are leading to large scale displacement of people, particularly scheduled tribes and scheduled castes and other backward castes. Poverty acts as a formidable hindrance to the realization of human rights.

1.   Economic factors

Like many developing countries, India's large percentage of population is poor and marginalized. The reasons for poverty are multifold which include historical reasons like feudalism and colonialism and concentration of wealth and landholdings in a few and continuing policies of the successive governments,

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[1] India is a party to six out of the nine core human rights treaties. It became a party to the International Convention on the Elimination of All Forms of Racial Discrimination on 3 December 1968; International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights on 10 April 1979; Convention on the Elimination of All Forms of Discrimination against Women, on 9 July 1993; Convention on the Rights of the Child on 11 December 1992; and the Convention on the Rights of Disabled Persons, on 1 October 2007. India is not a party to the Convention against Torture and other Inhuman and Cruel treatment or Punishment, 1984; Convention on the Rights of Migrant Workers and their Families, 1990 and the Convention on Enforced Disappearances, 2006 (see OHCRC, 2016).

which adversely are affecting the poor and the marginalized. It is argued that the process of globalization and liberalization of economy is increasing the gap between the rich and the poor (see Bhattacharyya, 2013). Due to the ascendance of the neoliberal policies the State is receding from the economic and social welfare measures. The State's withdrawal from welfare measures like health and education is further marginalizing the poor and the disadvantaged who are already at the receiving end of the economic and social policies due to the structural inequality (see Kumar, 2014). Due to these systemic maladies large sections of the people are subjected to every day violence in the form of hunger, illiteracy and discrimination.

The recent legislation by the Indian State is an implied acceptance of this glaring reality. These legislative measures include the National Rural employment Guarantee Act 2005 and the National Food Security Act 2013. The National Rural employment Guarantee Act 2005 was brought in to

> 'provide for the enhancement of livelihood security of the households in rural areas of the country by providing at least one hundred days of guaranteed wage employment in every financial year to every household whose adult members volunteer to do unskilled manual work'.

In 2013, the government of India adopted another important national legislation in the form of National Food Security Act 2013 which is intended to bring in place food security programme. The act seeks, according to its preamble, to

> 'provide for food and nutritional security in human life cycle approach, by ensuring access to adequate quantity of quality food at affordable prices to people to live a life with dignity and for matters connected therewith or incidental thereto'.

The act is intended to provide for coverage of up to 75% of the rural population and up to 50% of the urban population for receiving subsidized foodgrains under Targeted Public Distribution System, thus covering about two-thirds of the population.

These legislative measures are meant for extending economic support to the poor and the marginalised. However, they also reflect the fact that there is a large section of Indian people who live in dire poverty.

2.   Social factors

Caste system is a major social factor that constitutes an important impediment towards the realization of constitutionally and statutorily given rights.[2] Caste system is very peculiar to Indian social reality though it is prevalent across South Asia. It is very much linked to Hindu religion as it emerged from the Varna system derived from Hinduism. The peculiar character of caste system is that it is hierarchically structured. It is division of labourers with certain forms of labour being seen as superior to the other/s. The worst

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[2]For historical and social analysis of caste, see for example Ambedkar (2014). For contemporary understanding of caste, see for example Teltumbde (2014).

form of the caste system is that the lowest category of castes is considered as 'untouchables' who are not touched by other upper castes.

The constitution of India plays a significant role in dealing with caste discrimination. The gravity of the problem can be viewed from the fact that the fundamental rights of the Indian Constitution specifically deal with it in different ways. Article 15, the right to equality, prohibits discrimination based on caste along with other grounds of discrimination.[3] Most importantly it provides for reservations to the lower castes which work as affirmative action in education and employment. The Constitution of India provides for the positive discrimination for the lower caste people through reservations in the areas of government employment and higher education (articles 15(4) and (16(4)). Article 17 of the Constitution also abolishes untouchability and its practice in any form is forbidden. Similarly article 17 prohibits untouchability.[4] Along with these provisions there are other legislative measures which deal with specific aspects of atrocities against scheduled castes and scheduled tribes.

There are other laws, both Central and State, which provide for safeguards to Scheduled Castes (SCs) and the Scheduled Tribes (STs). Some of these emanate from the various Constitutional provisions. An illustrative list of such laws is: the Protection of Civil Rights Act, 1955; the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989; the Bonded Labour System (Abolition) Act, 1976; the Child Labour (Prohibition and Regulation) Act, 1986; the Employment of Manual Scavengers and Construction of Dry Latrines (Prohibition) Act, 1993. There are other acts and regulations in force in different States to prevent alienation of land belonging to SCs/STs. In some States such provision exists in the Land Revenue Code. There are also acts and regulations in force in different States for prevention of alienation of land belonging to SCs/STs (National Commission for Scheduled Castes, 2012: 16).

New economic and developmental policies are adding to the historically and socially ingrained caste discrimination. Large scale investments for exploitation of natural resources are concentrated in forest areas in India which are abode to tribal population. Due to these development projects large numbers of tribal people are getting alienated from their lands, livelihood and cultural life.

3.   Political factors

Indian polity and governance is considered quasi federal system. For various historical (which includes colonial past), political and economic reasons there have been demands for autonomy within Indian State or secession from it. There are also economic and political mobilizations like Maoist movements. These assertions sometimes resort to violent forms of resistance to Indian armed and security forces leading to loss of life in these confrontations.

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[3]Article 15(1) 'The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them'.
[4]Article 17, Abolition of Untouchability: 'Untouchability' is abolished and its practice in any form is forbidden. The enforcement of any disability arising out of 'Untouchability' shall be an offence punishable in accordance with law.

A combination of economic, social and political factors is leading to the deprivation of human rights to large section of India population. However, the deprivation of rights is not going uncontested. Political and civil society groups continue to highlight the situation and take them to the notice of the successive governments. Human rights groups in post-independent India played a significant role in highlighting the human rights violations. These groups became active during the national emergency declared in 1975. Civil and political rights were curtailed during the national emergency and this led to the consolidation of rights discourse in the Indian context. Economic deprivation and social discrimination also led to several political movements asserting the rights of the poor and socially discriminated. Sometimes the political mobilization is taking place as a violent resistance to the Indian security and armed forces.

C.   Encounter killings and right to life and the responses of the NHRC and the Indian judiciary

The economic, social and political factors which impede the realisation of human rights lead to social unrest and political mobilisations. When this takes place in an organised way it is seen as a challenge to the normal governance. When it takes the shape of organised armed assertion and resistance the State tends to deal with such situations aggressively. In India it is apparent that there have been several political mobilisations which are in the form of armed assertions. This can be witnessed in places like Kashmir and northeastern States of India where there are nationality movements, and in central parts of India where there is a Maoist movement. To deal with these situations police and other security forces are deployed. It is alleged and in several instances it is established that police and security forces indulge in violations of human rights.

Right to life is guaranteed by the Indian constitution as a fundamental right. Any deprivation of right to life should be in accordance with the procedure established by law. Thus statutory framework and institutional safeguards are established to effectively realize this right. Right to life is manifested in various forms and whenever matters involving allegations of threat to right to life emerge the necessary remedial mechanism comes into play through the process of judicial intervention.

One of the important and controversial aspects of the threat to right to life is alleged to take place in 'encounter killings' (see Human Rights Watch, 2009: 91-99; Pelly, 2009: 199-210). In India the killings which are generally referred to as 'encounter killings' are those in which there is a loss of life of individuals in the hands of police and security forces when they resort to use of force for the purpose of maintaining law and order. The incidents of loss of life of this nature mostly happen in the contexts where armed violence is resorted to by certain political and other groups and sometimes by individuals accused of committing crimes (Burra, 2012: 15-17). The legal justification for such use of force by the law and order machinery emanates from the right of self defence which is permitted under the law.

When such incidents take place civil society and human rights groups argue that the use of force in most of the cases is disproportionate and they are not investigated and prosecuted in accordance with law. In some incidents some civil society and human rights groups and individuals have taken up the matters to

the National Human Rights Commission (NHRC) and the higher judiciary. NHRC and the courts have dealt with these matters on several occasions.

In encounter killings the police and the security forces resort to use of force leading to the death of others allegedly to protect themselves from the use of force by the other side. The contentious issues involved in it are both procedural and substantive.

Under the Indian law the State machinery including the law and order personnel have the limited scope to deprive the right to life of an individual by way of causing death. This is possible in two ways. The first situation is by way of judicial pronouncement imposing capital punishment which is permitted under the law in respect of specific crimes. The second possibility is that security forces can resort to use of force leading to the deprivation of life under the right of self defence provided under the Indian Penal Code. Indian penal code provides for the possibility of use of force for the purpose of self defence which is applicable to all citizens.

Private defence justifications and the scope of this general exception to criminality are enumerated in Sections 96 to 106 of the Indian Penal Code. Sections 96 and 97 are preambular in scope; Section 98 enumerates the right of private defence against the conduct of a person of unsound mind and other disabilities that would otherwise constitute the conduct of such person as a non-offence. Section 99 explains the non-derogable principle that the right of private defence in no case extends to the inflicting of more harm than it is necessary to inflict for the purpose of defence. This doctrine of proportionality covers the gamut of the right of private defence. The provisions of Section 100 outline the right of private defence of the body extending to causing of death; the provisions of Section 101 to causing any harm other than death; the provisions of Section 103 the right of private defence of property extending to the causing of death; and the provisions of Section 104 explain the right of private defence extending to the causing of any harm other than death where the offence, the committing of which, or the attempting to commit which, be theft, mischief or criminal trespass, other than of the nature described in Section 103. Section 105 defines the point of commencement and continuance of the right of private defence of the property. Section 106 defines the right of private defence against deadly assault which reasonably causes the apprehension of death extending to causing harm to an innocent person if the person exercising the right of private defence be so situated that he cannot effectively exercise that right without risk of harm to an innocent person.

The crux of these provisions is that an individual has the right of self defence under which she or he can use force even to the extent of causing death of others when her or his life or property is under threat of attack. Thus the two situations in which the State machinery has the power to deprive a person of her/his right to life are: the imposition of capital punishment and the use of force under right of self defence by the security forces. However, there is a fundamental difference between these two situations: the imposition of capital punishment takes place after the due process of law and in the case of self defence it takes place without any such process. Thus the killings by security forces under the right of private defence effectively take place without the due process of law. Killings by security forces which are normally referred to as encounter killings are legally justified under this right of self defence. The

implications of these killings should be the cause of concern from the point of view of protection of basic human rights as it empowers the State machinery to indulge in taking away the life of an individual which otherwise would amount to clear violation of basic right to life. Hence it becomes imperative that extraordinary precaution is expected to be exercised by those who resort to the use of force under self defence. It is more so in the case of police and security apparatus as they are supposed to be defending the rights of citizens. Therefore the courts in India time and again held that article 21 of the Constitution of India guarantees right to live with human dignity. Any violation of this human right should be viewed seriously as the right to life is the most important right guaranteed by article 21 of the Constitution. This right is available to every person and the State has no authority to restrict that right without meeting the requirements of law.

While dealing with organized armed movements as well as with ordinary criminals it is found that Indian security forces resort to use of force leading to deaths. Taking note of the gravity of the issue human rights groups on several occasions approached the National Human Rights Commission (NHRC) and courts for remedies.

The NHRC while dealing with complaint 234 (1 to 6)/ 93-94 and taking note of grave human rights issues involved in alleged encounter deaths, decided to recommend procedure to be followed in the cases of encounter deaths to all the States. Accordingly, the then Chairperson of NHRC, wrote a letter dated 29-3-1997 to all the Chief Ministers recommending the procedure to be followed by the States in cases of encounter deaths. The procedure recommended by the NHRC in 1997 was as follows (National Human Rights Commission, 1997):

> A. When the police officer in charge of a Police Station receives information about the deaths in an encounter between the Police party and others, he shall enter that information in the appropriate register.

> B. The information as received shall be regarded as sufficient to suspect the commission of a cognizable offence and immediate steps should be taken to investigate the facts and circumstances leading to the death to ascertain what, if any, offence was committed and by whom.

> C. As the police officers belonging to the same Police Station are the members of the encounter party, it is appropriate that the cases are made over for investigation to some other independent investigation agency, such as State CID.

> D. Question of granting of compensation to the dependents of the deceased may be considered in cases ending in conviction, if police officers are prosecuted on the basis of the results of the investigation.

However, in 2003 the NHRC was of the view that the experience in the past six years in the matters of encounter deaths was not encouraging. The Commission found that most of the States were not following

the guidelines issued by it in the true spirit. It was of the opinion that in order to bring in transparency and accountability of public servants, the existing guidelines required some modifications. Accordingly the NHRC recommended modified a procedure to be followed by the State governments in all cases of deaths in the course of police action (National Human Rights Commission, 2003). The procedure modified in 2003 is as follows:

A. When the police officer in charge of a Police Station receives information about the deaths in an encounter between the Police party and others, he shall enter that information in the appropriate register.

B. Where the police officers belonging to the same Police Station are members of the encounter party, whose action resulted in deaths, it is desirable that such cases are made over for investigation to some other independent investigating agency, such as State CBCID.

C. Whenever a specific complaint is made against the police alleging commission of a criminal act on their part, which makes out a cognisable case of culpable homicide, an FIR to this effect must be registered under appropriate sections of the I.P.C. Such case shall invariably be investigated by State CBCID.

D. A Magisterial Inquiry must invariably be held in all cases of death which occur in the course of police action. The next of kin of the deceased must invariably be associated in such inquiry.

E. Prompt prosecution and disciplinary action must be initiated against all delinquent officers found guilty in the magisterial enquiry/ police investigation.

F. Question of granting of compensation to the dependents of the deceased would depend upon the facts and circumstances of each case.

G. No out-of-turn promotion or instant gallantry rewards shall be bestowed on the concerned officers soon after the occurrence. It must be ensured at all costs that such rewards are given/ recommended only when the gallantry of the concerned officer is established beyond doubt.

H. A six monthly statement of all cases of deaths in police action in the State shall be sent by the Director General of Police to the Commission, so as to reach its office by the 15th day of January and July respectively. The statement may be sent in the following format along with post-mortem reports and inquest reports, wherever available and also the inquiry reports:

1. Date and place of occurrence

2. Police Station, District.

3. Circumstances leading to deaths:

i. Self defence in encounter

ii. In the course of dispersal of unlawful assembly

iii. In the course of effecting arrest

4. Brief facts of the incident

5. Criminal Case No.

6. Investigating Agency

7. Findings of the magisterial Inquiry/enquiry by Senior Officers:

a. disclosing in particular names and designation of police officials, if found responsible for the death; and

b. whether use of force was justified and action taken was lawful

The NHRC in 2010 found that most of the States were not following the recommendations issued by it. The NHRC again considered the issue and found the need for further modification of guidelines issued in 2003. Accordingly it carefully considered the matter and revised the guidelines. The guidelines revised in 2010 are as follows (National Human Rights Commission, 2010):

A. When the police officer in charge of a police station receives information about death in an encounter with the police, he shall enter that information in the appropriate/ register.

B. Where the police officers belonging to the same police station are members of the encounter party, whose action resulted in death, it is desirable that such cases are made over for investigation to some other independent investigation agency, such as State CBCID.

C. Whenever a specific complaint is made against the police alleging commission of a criminal act on their part, which makes out a cognizable case of culpable homicide, an FIR to this effect must be registered under appropriate sections of the I.P.C. Such case shall be investigated by State CBCID or any other specialized investigation agency.

D. A magisterial enquiry must be held in all cases of death which occurs in the course of police action, as expeditiously as possible, preferably, within three months. The relatives of the deceased, eye witnesses having information of the circumstances leading to encounter, police station records etc. must be examined while conducting such enquiry.

E. Prompt prosecution and disciplinary action must be initiated against all delinquent officers found guilty in the magisterial enquiry/police investigation.

F. No out-of-turn promotion or instant gallantry rewards shall be bestowed on the concerned officers soon after the occurrence. It must be ensured at all costs that such rewards are given/recommended only when the gallantry of the concerned officer is established beyond doubt.

G. (a) All cases of deaths in police action in the states shall be reported to the Commission by the Senior Superintendent of Police/Superintendent of Police of the District within 48 hours of such death in the following format:

1. Date and place of occurrence

2. Police station, district

3. Circumstances leading to death:

(i) Self-defence in encounter

(ii) In course of dispersal of unlawful assembly

(iii) In the course of effecting arrest

(iv) Any other circumstances

4. Brief facts of the incident

5. Criminal case No.

6. Investigating agency

(b) A second report must be sent in all cases of death in police action in the state by the Sr. Superintendent of Police/Superintendent of Police to the commission within three months providing following information:

1. Post mortem report

2. Inquest report

3. Findings of the magisterial enquiry/enquiry by senior officers disclosing:

(i) Names and designation of police official, if found responsible for the death:

(ii) Whether use of force was justified and action taken was lawful:

(iii) Result of the forensic examination of 'handwash' of the deceased to ascertain the presence of residue of gun powder to justify exercise of right of self defence; and

> (iv) Report of the Ballistic Expert on examination of the
> weapons alleged to have been used by the deceased and
> his companions.

As stated above encounter killings involve taking away the right to life of citizens by the police without the due process of law. Therefore it becomes imperative that every loss of life in encounter killings should be established before the court of law as death caused due to the exercise of force under private defence and it is not an excessive use of force or extra judicial and arbitrary killing.

The major concern of the human rights groups in encounter killings has been the way these killings are dealt with by the police personnel. It is alleged that after the encounter killings police conduct formal investigation and conclude that it was a legitimate use of force under self defence and the matter is closed without further proceedings before the court of law. They are of the view- which is legitimate and legally tenable argument - that every encounter death should be registered and investigated and tried before the court of law like any other murder and the police have the onus to prove that they were genuine encounters and the use of force was proportionate and justified under the provisions of private defence. Thus the human rights groups sought clarification from courts of law in the backdrop of several cases of such encounters killings where no judicial proceedings were undertaken to their logical conclusion. In one of such cases the High Court of Andhra Pradesh clarified certain important aspects involved in the issue. In *AP Civil Liberties Committee (APCLC) rep. by its president S Subhash Chandra Bose and ors vs Government of AP rep. by its Principal Secretary, Home Department and ors,* the High Court of Andhra Pradesh held that where a police officer causes the death of a person, the first information report shall be registered and shall be investigated. It further held that the obligation to disclose the identity of the police officers involved in the operation is absolute and there is no immunity from such obligation.

The High Court of Andhra Pradesh held in this case that:

> 'where a police officer causes death of a person, acting or purporting to act in discharge of official duties or in self-defense as the case may be, the first information relating to such circumstance (even when by a Police/Public Official; whether an alleged perpetrator is named or not) shall be recorded and registered as FIR, enumerating the relevant provisions of Law, (Under Section 154(1) Cr.P.C.) and shall be investigated (Under Section 156/157 Cr.P.C)'.

The Court also said:

> 'the existence of circumstances bringing a case within any of the Exceptions in the Indian Penal Code including the exercise of the right of private defense (a General Exception in Chapter IV IPC), cannot be conclusively determined during investigation. The opinion recorded by the Investigating Officer in the final report forwarded to the Magistrate (Under Section 173 Cr.P.C), is only an opinion. Such opinion shall be considered by the Magistrate in the context of the record of investigation together with the material and evidence collected during the course of

investigation. The Magistrate (notwithstanding an opinion of the Investigating officer, that no cognizable offence appears to have been committed; that one or more or all of the accused are not culpable; or that the investigation discloses that the death of civilian(s) in a police encounter is not culpable in view of legitimate exercise by the police of the right of private defense), shall critically examine the entirety of the evidence collected during investigation to ascertain whether the opinion of the Investigating Officer is borne out by the record of investigation. The Magistrate has the discretion to disregard the opinion and take cognizance of the offence Under Section 190 Cr.P.C'. (Case *AP Civil Liberties Committee (APCLC) rep. by its president S Subhash Chandra Bose and ors vs Government of AP rep. by its Principal Secretary, Home Department and ors.* 2009(2)ALD1.

In another important case involving the allegations of encounter killings the Supreme Court of India further clarified on the matter. The issue involved in this case was the genuineness or otherwise of nearly 99 encounters between the Mumbai police and the alleged criminals resulting in death of about 135 persons between 1995 and 1997. The Supreme Court issued 16-point guidelines to be followed while investigating police encounters in the cases of death as the standard procedure for thorough, effective and independent investigation (Supreme Court of India, 2014):

1) Whenever the police is in receipt of any intelligence or tip-off regarding criminal movements or activities pertaining to the commission of grave criminal offence, it shall be reduced into writing in some form (preferably into case diary) or in some electronic form. Such recording need not reveal details of the suspect or the location to which the party is headed. If such intelligence or tip-off is received by a higher authority, the same may be noted in some form without revealing details of the suspect or the location.

(2) If pursuant to the tip-off or receipt of any intelligence, as above, encounter takes place and firearm is used by the police party and as a result of that, death occurs, an FIR to that effect shall be registered and the same shall be forwarded to the court under Section 157 of the Code without any delay. While forwarding the report under Section 157 of the Code, the procedure prescribed under Section 158 of the Code shall be followed.

(3) An independent investigation into the incident/encounter shall be conducted by the CID or police team of another police station under the supervision of a senior officer (at least a level above the head of the police party engaged in the encounter). The team conducting inquiry/investigation shall, at a minimum, seek: (a) To identify the victim; colour photographs of the victim should be taken; (b) To recover and preserve evidentiary material, including blood-stained earth, hair, fibers and threads, etc., related to the death; (c) To identify scene witnesses with complete names, addresses and telephone numbers and obtain their statements (including the statements of police personnel involved) concerning the death; (d) To determine the cause, manner, location (including preparation of rough sketch of topography of the scene and, if possible, photo/video of the scene and any physical evidence) and time of death as well as any pattern or practice that may have brought about the death; (e) It must be ensured that intact fingerprints of deceased are sent for chemical analysis. Any other fingerprints should be located,

developed, lifted and sent for chemical analysis; (f) Post-mortem must be conducted by two doctors in the District Hospital, one of them, as far as possible, should be In-charge/Head of the District Hospital. Post-mortem shall be video-graphed and preserved; (g) Any evidence of weapons, such as guns, projectiles, bullets and cartridge cases, should be taken and preserved. Wherever applicable, tests for gunshot residue and trace metal detection should be performed. (h) The cause of death should be found out, whether it was natural death, accidental death, suicide or homicide.

(4) A Magisterial inquiry under Section 176 of the Code must invariably be held in all cases of death which occur in the course of police firing and a report thereof must be sent to Judicial Magistrate having jurisdiction under Section 190 of the Code.

(5) The involvement of NHRC is not necessary unless there is serious doubt about independent and impartial investigation. However, the information of the incident without any delay must be sent to NHRC or the State Human Rights Commission, as the case may be.

(6) The injured criminal/victim should be provided medical aid and his/her statement recorded by the Magistrate or Medical Officer with certificate of fitness.

(7) It should be ensured that there is no delay in sending FIR, diary entries, panchnamas, sketch, etc., to the concerned Court.

(8) After full investigation into the incident, the report should be sent to the competent court under Section 173 of the Code. The trial, pursuant to the chargesheet submitted by the Investigating Officer, must be concluded expeditiously.

(9) In the event of death, the next of kin of the alleged criminal/victim must be informed at the earliest.

(10) Six monthly statements of all cases where deaths have occurred in police firing must be sent to NHRC by DGPs. It must be ensured that the six monthly statements reach to NHRC by 15th day of January and July, respectively. The statements may be sent in the following format along with post mortem, inquest and, wherever available, the inquiry reports: (i) Date and place of occurrence. (ii) Police Station, District. (iii) Circumstances leading to deaths: (a) Self defence in encounter. (b) In the course of dispersal of unlawful assembly. (c) In the course of affecting arrest. (iv) Brief facts of the incident. (v) Criminal Case No. (vi) Investigating Agency. (vii) Findings of the Magisterial Inquiry/Inquiry by Senior Officers: (a) disclosing, in particular, names and designation of police officials, if found responsible for the death; and (b) whether use of force was justified and action taken was lawful.

(11) If on the conclusion of investigation the materials/evidence having come on record show that death had occurred by use of firearm amounting to offence under the IPC, disciplinary action against such officer must be promptly initiated and he be placed under suspension.

(12) As regards compensation to be granted to the dependants of the victim who suffered death in a police encounter, the scheme provided under Section 357-A of the Code must be applied.

(13) The police officer(s) concerned must surrender his/her weapons for forensic and ballistic analysis, including any other material, as required by the investigating team, subject to the rights under Article 20 of the Constitution.

(14) An intimation about the incident must also be sent to the police officer's family and should the family need services of a lawyer / counselling, same must be offered.

(15) No out-of-turn promotion or instant gallantry rewards shall be bestowed on the concerned officers soon after the occurrence. It must be ensured at all costs that such rewards are given/recommended only when the gallantry of the concerned officers is established beyond doubt.

(16) If the family of the victim finds that the above procedure has not been followed or there exists a pattern of abuse or lack of independent investigation or impartiality by any of the functionaries as above mentioned, it may make a complaint to the Sessions Judge having territorial jurisdiction over the place of incident. Upon such complaint being made, the concerned Sessions Judge shall look into the merits of the complaint and address the grievances raised therein.

These cases before the NHRC and the higher courts of India reflect the gravity of the issue. It is to be noted that encounter killings continue to be reported despite these judicial pronouncements. However these pronouncements make the police and other security forces accountable to their actions before the court of law.

In several instances of encounter killings the NHRC also awarded compensation to the families of those who were killed. What is to be underlined in the context of NHRC guidelines is that it had to revise them twice to make them as comprehensive as possible. This shows that the State law and order machinery continued to find ways and means to avoid accountability in situations of encounter killings. The NHRC had to revise its guidelines based on its experiences in dealing with cases of encounter killings. The Supreme Court's judgment in 2014 is also a reflection of the fact that these incidents continue to happen despite the judicial interventions.

D.   Conclusion

Human rights occupy a significant space in discourses on good governance around the world. There has been a steady growth in the international human rights frameworks. It happens mainly in the form of adoption of international human rights treaties. India is a party to some of the core human rights treaties. However, these human rights treaties cannot be directly enforced in India due to the dualist nature of the international law implementation in the country. Thus the rights enshrined in the Indian Constitution and other statutes become vital and realizable rights. The important set of human rights available in India is

in the form of fundamental rights provided in chapter three of the Indian constitution. The Supreme Court and high courts in India have jurisdiction for enforcement of these fundamental rights. Thus for the effective enforcement of rights provided under the constitution and other statutes institutional mechanisms are also established.

Despite the existence of legal framework and institutional mechanisms, violation of human rights is an everyday reality in India. There are various factors which impede the realization of human rights which include economic, social and political factors. These factors are largely structural in nature, which prevent people from accessing institutional mechanisms for the enforcement of human rights. These structural inequalities also lead to certain political formations seeking systemic changes. Along with these political formations there have also been demands for secession and other forms of assertions.

Right to life is an important constituent of human rights. Extrajudicial killings by State security and armed forces pose a major challenge to the protection of right to life. In India security and armed forces on occasions resort to use of force leading to the death of people. These killings are invariably justified under the right of self-defense provided under the Indian law. However, often in such cases normal judicial process is not strictly followed for the purpose of proving the fact that the use of force actually takes place for the purpose of self-defense only and not otherwise. In response to several complaints by human rights groups and individuals NHRC formulated certain guidelines that should be followed whenever encounter killings take place. The NHRC revised these guidelines twice to make them comprehensive and effective. Similarly the Indian judiciary also dealt with cases involving encounter killings. In one of such cases the Supreme Court of India also formulated 16 point guidelines as requirements to be followed in the cases of encounter killings.

These responses from the NHRC and higher judiciary restrain the security and armed forces and help protect human rights in general and right to life in particular. However, it needs to be underlined that as long as structural issues like economic, social and political factors are not addressed as they are, it may not be possible to achieve comprehensive protection of human rights with case specific and context specific enforcement measures.

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III. Case study in selected third country: South Africa

A. Introduction

The chapter begins with a general outline of the legal, political, economic, ethnic and religious factors which influence the level of human rights protection in South Africa. Based on desktop research (literature review and available data) the chapter conducts a brief examination of the contemporary knowledge on the influence of these factors on the advancement of human rights in the country. Since it is impossible to consider all factors in detail in a report of this nature we have chosen to focus on one particular area in a case study that follows the general overview, namely, factors that impede the realisation of socioeconomic rights and the role of non-governmental organisations (NGOs) and social movements to remedy the situation through protest, advocacy and litigation.

1. Methodology

The chapter is based on a literature review on South Africa's historical evolution, political dynamics, legal system, economic development, social structure, cultural practices, religious freedom, ethnic diversity and technological factors impacting on socioeconomic rights.

2. Outline

The chapter is divided into four sections, including an introduction and a conclusion. The report will be structured as follows:

Section A is the introduction.

Section B examines nine overarching factors which may enhance or militate against the realisation of human rights (with focus on economic and social rights) in the context of South Africa. Since the current socioeconomic rights challenges can only be understood and appreciated against the country's historical background, the effect of apartheid will be elucidated. This will include an assessment of the institutionalisation of discriminatory norms and practices and the legacy of this regime. The section also includes analysis of the (i) political factors such as corruption; (ii) legal factors encompassing the Constitution, the South African Human Rights Commission and the courts; (iii) economic factors including the impact of neo-liberalism and high cost of service delivery; (iv) social factors comprising poverty and inequality in South African society; (v) cultural factors such as virginity testing and male circumcision; (vi) religious factors focusing on condemnation of key human rights principles by religious leaders; (vii) ethnical factors including xenophobic attacks on African migrants; and (viii) technological factors covering the role of the media in combating HIV/AIDS and poverty.

Section C focuses on NGOs and social movements. This section provides an overview of the aspects of South African NGOs and social movements which hinder and/or promote socioeconomic rights. It will include determining whether NGOs and social movements have played a positive role in the advancement of socioeconomic rights in the country. The assessment in this section will encompass an overview of the historical, political, legal, economic, social, cultural, religious, ethnical and technological factors which positively or negatively impact on the role of NGOs and social movements in the promotion of human

rights in South Africa. This section will first begin with a general assessment of the evolution, mandate and role of (international, (sub) regional and national) NGOs and social movements within the scope of human rights promotion. The section will then zoom in on the role of one social movement (Treatment Action Campaign (TAC)) and assess how the diverse factors hinder or promote access to health (as a social and economic right) in South Africa.

Section D, Conclusion, contains a summary and reflections of the various sections and the most essential insights to be gained from the operations of NGOs and social movements, and recommendations for further study. The chapter concludes that over the last two decades, whereas there has been a significant advancement in the areas of civil and political rights, many South Africans are still confronted with socioeconomic hardships. The conclusion asserts that most of these socioeconomic setbacks such as high unemployment rate, chronic hunger, high HIV/AIDS rate and poor service delivery are all the legacies of the apartheid regime which was riddled with racial discrimination and preferential treatment of the whites over the blacks. Besides this historical factor, there are other political, legal, economic, social, cultural, religious, ethnical and technological factors which have either positively or negatively influenced the realisation of human rights in South Africa.

B. Human rights protection in South Africa: key issues and factors

1. Introduction

South Africa is often perceived in the rest of the world as the 'poster child' of human rights (Langford et al., 2013: 1). The 1996 Constitution and several other pieces of legislation provide for a broad range of civil and political rights, as well as justiciable socioeconomic rights (Borer 2003: 1103). Moreover, the Constitutional Court and other branches of the judiciary have provided jurisprudence which has given helpful interpretations of human rights, including socio-economic rights (*Government of the Republic of South Africa & Others v. Grootboom and Others; Minister of Health and Others v. Treatment Action Campaign and Others; Khosa & Others v. Minister of Social Development and Others)*. Although considerable progress has been recorded on many human rights indicators (for example freedom of expression, political participation and freedom of association), unemployment is pandemic, and access to basic necessities such as quality education, basic services, affordable food and housing remains highly unequal on the basis of class, location, race and sex (Langford, 2008: 3-4). Other key setbacks relate to the general human rights discourse and practice itself, such as state non-compliance with ground-breaking court decisions (Huchzermeyer, 2003: 89).

2. Key factors impacting on South Africa's human rights regime

Regardless of provincial or municipal differences, a number of factors cut across the catalogue of human rights in South Africa, and greatly impact on the advancement of basic rights and freedoms of individuals. These factors also significantly impact on the national and provincial institutions vested with the mandate to ensure the realisation of rights. Among the most evident are historical, political, legal, economic, social, cultural, religious, ethnical and technological factors. This section maps how these factors enhance or hamper the protection and promotion of human rights in South Africa.

a)   Historical factors

This section maps out the historical landmarks that have been enhancing or hindering the promotion of human rights in South Africa. The section points out past events which have shaped the political and socioeconomic standards of South Africa until now. The section sheds light on the exclusionary nature of the apartheid regime and how the disadvantaged black Africans responded to the socioeconomic circumstances and events of the time in ways which have had an impact on the current human rights situation in the country. Against this backdrop, the recent developments of key human rights norms and institutions which have sprung up (directly or indirectly) due to the past circumstances and events will be discussed (Lassen et al., 2014: 5).

Discussions relating to human rights in post-apartheid South Africa generally hinge on the legacy of apartheid, and its human rights atrocities. Apartheid was a policy of segregation which was used by the National Party (NP) to canvass for votes in the 1948 elections (Posel, 1991: 1). The election victory of the party triggered the operationalisation of this system, which encompassed further entrenchment of preferential treatment for the white population whilst disempowering the non-white population (Baldwin-Ragaven et al., 2000: 227-228; Bond, 2004: 4). In his succinct description of the apartheid regime, John Dugard (1978: 73) observes that:

> '[a] vast web of statutes and subordinate legislation confine the African to his tribal homeland and release him only in the interest of the agricultural and industrial advancement of the white community. When he visits a "white area" as a migrant labourer he does so on sufferance, shackled by the chains of legislation and administrative decision.'

White population groups did not only benefit from a highly compartmentalised education system, but also job reservations in the public service and private sectors (Wilson, 1996: 2).

Marked by its key 'divide and rule' policy, the apartheid was strategically designed to safeguard white dominance and hegemony by classifying non-white populace along ethnic and racial lines (Gibson, 2004: 5-6). The matching majority was classified into several minority groups, as a measure to prevent unified mass resistance movement, and avert any opposition or threat to the white minority (Baldwin-Ragaven, 2000: 230). This classification along with the unfair distribution of resources exacerbated the white racism and associated condescending attitude towards the blacks (Carrim, 2006: 17).

The election and inauguration of Nelson Mandela as the country's president during the last week of April and the first week of May 1994 marked South Africa's successful transition into democracy (Adler and Webster, 1995: 75; Sarakinsky, 2001: 191). It is against the backdrop of this peaceful transition that Adler and Webster assert that '[f]rom all appearance, South Africa seems to be a textbook case of democratization' (Adler and Webster, 1995: 76). It is important to intimate that, irrespective of the peaceful political transition, these historical factors have had long lasting influence on other fundamental political, legal, economic, social, cultural, religious, ethnical and technological factors (Seekings, 2007: 1; Bond, 2014: 5).

b)   Political factors

The question of what are the political factors encompasses a broad range of political activities which enhance or hinder the protection of human rights. These activities comprise for example the activities of politicians and public officials in derailing government effort towards the enhancement of basic service delivery.

In 2014 the African National Congress (ANC) and its leader Jacob Zuma won a second term in office, but the landslide victory was tainted by the report of Thuli Madonsela (the public protector) accusing the president of misusing state funds in upgrading his private residence in Nkandla, KwaZulu Natal. This report merely represents 'an upswing in reported corrupt activity at a national, provincial, and local government level' (van Vuuren, 2014: 4).

A critical observation made by Corruption Watch (2014: para. 5) shows that in South Africa '[c]orruption swallows up huge amounts of money every year.' Majority of these funds arguably are meant for 'service delivery'. This implies the provision of basic yet, essential services, such as key public security functions, water sanitation, roads, housing, waste management and sewage facilities (Corruption Watch, 2012: para. 1). For instance, Corruption Watch (2014: para. 11) reporting on water-related maladministration intimated that of the 62 reports received, the most commonly named type of corruption is linked to procurement or tenders awarded to family and friends. Other types of corruption reported (according to the think-tank) are abuse of power by political appointees, employment, mismanagement and bribery.

Nonetheless, van Vuuren (2014: 8) does not limit the cause of South Africa's poor service delivery to corruption alone. He links this sorry state of affairs to a plethora of interconnected factors stretching from lack of political leadership and poor human resource management. These recurrent political factors plague local government across the board, from the smallest villages to mid-level towns and large cities as well.

c)   Legal factors

This section discusses the legal factors that can facilitate or hinder the protection of human rights in South Africa.

The adoption of the 1996 Constitution demonstrated a strong commitment by the ANC led government to safeguard human rights. In order to redress the past racial injustice, the Constitution provides for a list of civil and political rights including the rights to equality before the law, human dignity and life, freedom from forced labour, freedom of religion or belief, freedom of expression, political rights, freedom of movement and the right to protest (Secs 9-19). The Bill of Rights also sets out a catalogue of economic and social rights as a conduit around which to improve the living condition of the people. Amongst the list of guaranteed socioeconomic rights are the rights to trade, labour relations, environment, property, housing, health care, food, water, social security, education, occupation and profession (Secs 22-29). The Constitution subjects the implementation of these provisions to the monitoring of judicial and quasi-judicial scrutiny.

In spite of the fact that the Constitution is hailed by some scholars as extending both civil/political and social/economic rights to individuals, some of these rights are watered down with the inclusion of

limitation clauses (Crush, 2001: 110-111; Madlingozi, 2013: 534). Many of the socioeconomic rights are limited to the state being required to adopt 'reasonable measures' within available resources (see eg. section 26(2)).

Chapter 9 of the Constitution oblige the state to establish a number of independent institutions (otherwise known as Chapter 9 institutions) with the mandate of supporting and consolidating constitutional democracy. Two such institutions are the South African Human Rights Commission (SAHRC) and the Commission for Gender Equality (CGE) (Hassim, 2003: 505-506). Besides being entitled to educate the public on human rights issues, they have the mandate to monitor, receive and investigate complaints from the public and make recommendations and reports on matters relating to human rights and gender discrimination (HRC Act 54 of 1994; CGE Act 39 of 1996). Also the courts play a crucial legal role in providing redress for human rights abuses (Case 2010: 1). The highest court in the land, the Constitutional Court, has delivered several landmark civil and political rights judgements ranging from the right to equality, rights of arrested, detained and accused persons, and the right to vote. For example, (i) it held that the death penalty is in violation of the right to life (*S v. Makwanyane & another*), (ii) juvenile whipping as a criminal penalty constitutes cruel, inhuman and degrading treatment (*S v. Williams*), (iii) the state should ensure that prisoners enjoy the right to vote (*August and Another v. Electoral Commission and others*). The Constitutional Court has also handed down leading judgments on socioeconomic rights as noted above. Irrespective of these gains, access to legal aid for the poor, particularly in rural areas remains a major constraint. The government-funded legal aid system faces serious budgetary constraints. Consequently, there is a serious lack of access to legal representation, especially in areas of poor service delivery and evictions. To some extent this is remedied by pro bono legal representation by law firms, NGOs and university legal aid clinics.

The examination of legal factors have demonstrated that civil, political, economic, social and cultural rights are firmly entrenched in the Constitution. The Bill of Rights therefore provides extensive rights to individual and groups rights. Nonetheless, the Constitution contains several claw-back clauses which limit the enjoyment of fundamental socioeconomic rights. To ensure that these rights are effectively operationalised, the Constitution obliges the State to establish independent monitoring institutions with the broad mandate of ensuring government's compliance with the existing human rights instruments. It is against this backdrop that the SAHRC and the courts have educated and decided on ground-breaking human rights cases over the last two decades.

d)   *Economic factors*

The aim of this section is to set out the economic factors favourable to or hampering the promotion of human rights in South Africa (Lassen et al., 2014: 57). For purposes of this section, economic factors are defined as those conditions with respect to resource allocation and endowments (capital, labour, land and natural resources) that impact on human rights outcomes. Considering that economic policies and institutional transformation are usually due to broader changes in economic contexts, the selected factors under assessment in this section represent a combination of broader trends affecting specific policy transformation. Such policy transformation together with other causes (political, legal, social and religious) may impact on the economic rights such as the right to work, the right to adequate living standards and social security. Economic transformations will potentially influence access to institutions

and may contribute to the marginalisation of specific groups in the conduct of public affairs. This section assesses specific economic factors in post-1994 and its impact on human rights conditions in the country. It should, however, be noted that even if economic policy was directed towards decreasing poverty and increased respect for socioeconomic rights, pervasive corruption in the public sector remains a serious challenge and have by some accounts increased in recent years (Newham, 2014; see discussion under political factors above).

As anticipated by many, the immediate post-apartheid South Africa was characterised by high levels of poverty and economic inequality, generally not common in an upper middle income country (Adato, Carter & May, 2006: 2). This economic imbalance was succinctly captured in the 1998 Poverty and Inequality Report (PIR) submitted to then Deputy-president Thabo Mbeki (May, 1998: 53). The report estimated that the country was economically two sided worlds: on the one hand, was the world of white South Africans with Human Development Index (HDI) equivalent to that of Italy and Israel. On the other, was the world of black Africans in which the HDI rested between the HDI of Swaziland and Zimbabwe (May, 1998: 53-54).

This pattern led to a movement headed by the ANC government to adopt preferential economic policies with the objective of reversing the poverty trend of millions of black South Africans.[5] One of such policies is the Broad-Based Black Economic Empowerment (BBBEE) Act 53 of 2003. According to this policy, any entity obtaining a license from, or doing business with the State had to help incentivise black-owned businesses with equity or procurement benefits (Hoffman, 2008: 88). Even though BBBEE as an affirmative action is clearly required given South Africa's history its implementation has been criticised for mainly enriching a small, politically well-connected elite (Tangri & Southall, 2008: 699; Ponte, Roberts & Van Sittert, 2007: 933-934; Southall, 2007: 68).

e)   *Social factors*

The composition and structure of a society has an impact on the enjoyment of human rights. Social factors encompasses the structure and set-up of the society which hierarchically position persons and individuals belonging to specific social groups and influence economic participation and distribution of resources, reputation and wealth (Lassen et al., 2014: 84). However, even though the South African Constitution espouses equality for all individuals within its borders (equal access to labour, education, politics, culture and market), on the ground the reality looks somewhat different. In many provinces in South Africa, the right to equality of certain groups is only seldom breached, but systematically and structurally disadvantaged in many sectors of society. The section will now address the question of what are the social factors which enable or prevent the promotion of human rights in South Africa.

Post-apartheid South Africa provides an interesting case study in which to assess the social factors hindering or promoting human rights. It has one of the most progressive constitutions and yet, people who have a disability face constant discrimination in society (Loeb et al., 2008: 311). The 1996 Constitution guarantees equality and non-discrimination for persons with disabilities in several fronts (sec 9).

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[5] Some of the economic policies are the Competition Act 89 of 1998; Employment Equity Act 55 of 1998; Preferential Procurement Policy Framework Act 20854 of 2000.

Irrespective of these provisions, many persons with disabilities (PwDs) are excluded from mainstream society. In South Africa, persons with special needs are often denied opportunities, services and normal community life. Members of society, including government officials, property developers, architects and employers are often not sensitive to disability issues and often discriminate against PwDs (Loeb et al., 2008: 311-312). This vulnerable group is therefore denied opportunities to access education, to decent employment and to contribute to society on equal terms (Yeo & Moore, 2003: 589).

Further, lack of physical access to, and within public and private buildings is another barrier contributing to the on-going social exclusion of PwDs from mainstream society. Some facilities and built spaces in contemporary South Africa are not structured to provide the necessary assistance this vulnerable group require to access them (Maart et al*.,* 2007: 368). The lack of, or denial of access denies opportunities for this vulnerable group to participate in the society on an equal level with their able-bodied counterpart (Loeb et al., 2008: 320).

Overall, post-apartheid South African remains a deeply unequal society (Adato, Carter & May, 2006: 226). The social dimensions of this contemporary inequality in South African society are structured in terms of racial, ethnic or hierarchy of unequal classes (Seekings, 2003: 1). In contemporary South Africa, class inequalities are visible. While the evolution of the black people elite and 'middle class' is highly evident in the country, numerous black Africans are confined to an 'underclass' of poverty, social exclusion and unemployment (Ferguson, 2007: 72). Ironically, at the end of apartheid, most white South Africans have retained the privileged status and benefits bestowed on them by the apartheid system (Carter & May, 1999: 2). Very few white people are downwardly mobile (Adato, Carter & May, 2006: 227). This goes to suggest that most white South Africans are rich (and healthy) because they own assets from which they derive an income (from interest, profit or rent) or have well-paid jobs (Klasen, 1997: 52). Conversely, huge numbers of black people are poor (and less healthy) mainly because they lack assets that generate income or have no (or poorly-paid) work (Charlton et al., 2001: 31-32). This dichotomy regarding who commands high wages for their work and owns assets provides a clear indication of past practices of dispossession and racial discrimination (Seekings, 2003: 2). Therefore, the current social inequality reflects the class structure and a deeply unequal society in South Africa.

f)   Cultural factors

This section examines those cultural conditions which may facilitate or hinder the realisation of human rights in South Africa. Since the scope of cultural factors that may have human rights implications is potentially vast and extremely diverse, the section will pay particular attention to those topical cultural issues which have substantial impact on women's right and gender equality including the impact of culture on the enjoyment of the rights of lesbian, gay, bisexual, transgender and intersex (LGBTI) persons. The section concludes with the observation that culture is a double edged sword; it holds both the potential to enable, or conversely, hinder the promotion of human rights in South Africa and beyond.

Every society has its own cultural norms, beliefs and religious practices which guide its social grouping on how they behave and live (Vincent, 2001: 130). Although some of these customs and religious heritages are beneficial to a group and individual identity, some practices are harmful and directly breach the dignity of members of the community, especially women and the girl child (Wadesango, Rembe & Chabaya, 2011:

121). For instance, in South Africa, there are discriminatory beliefs that sexual intercourse with a young virgin girl can cure HIV/AIDS (Vincent, 2006: 132). This belief has arguably contributed to the increased sexual violence against the girl child causing huge psychological scars on the victims (Wadesango, Rembe & Chabaya, 2011: 121-122).

An additional factor which infringe on the human rights of women is the payment of bride price (*lobola*) (Ozler, Berk, and Hoogeveen, 2005: 7). Girls are thus brought up with the knowledge that they are a source of wealth for their family and the upbringing they receive at home is designed to usher them into marriage. As a result, young boys grow up with the notion that their sisters have no rights to the properties in the household, thereby depriving women of access to family properties (Vincent, 2006: 132).

Equally, many ethnic groups in South Africa have placed high premium on virginity of girls, specifically for marriage purposes (Leclerc-Madlala, 2001: 533-534). The lack of such status, in some cultures, could affect a *lobola* (bride-price) or a marriage (Leclerc-Madlala, 2002: 87). Virginity testing of young girls do not only violate the constitutional rights to dignity of these young girls, but also their rights to privacy (Scorgie et al., 2009: 267).

Male circumcision is widely practised among some ethnic groups. Poor hygienic practices have led to deaths and injuries after circumcisions at some initiation schools. However, this does not mean that this cultural practice should be abolished. It has been established that men who have been circumcised are less likely to acquire HIV (Scott, Weiss & Viljoen, 2005: 89). It should also be noted that apart from the act of circumcision, young men are taught fidelity and how to have a responsible livelihood at the initiation schools (Connolly, 2002: 789). What is important is thus to ensure that circumcisions are done in a safe environment while maintaining the positive cultural elements of the initiation into adulthood.

South Africa is one of a few countries which explicitly includes sexual orientation as a prohibited ground of discrimination in its constitution. The setback, nonetheless, is that there is a gap between the legal domain and the cultural domain. Hate crimes based on sexual orientation or gender identity are common. One form is what has become known as corrective rape. This refers to a situation where an LGBTI person is raped as a means of correcting their sexual orientation. Most victims of this cultural practice are black lesbians (Okafor, 2013: para. 3).

Despite its irreparable damage to the life and dignity of victims, this cultural practice is ongoing since the practice of homosexuality is regarded by many as un-South African and 'exclusive to the white man and his culture' (Okafor, 2013: para 9). By distancing black South African culture from homosexuality, these individuals attempt to marginalise black LGBTI persons from their own culture.

g)   Religious factors

Religious factors which promote human rights include religious beliefs or practices which promote tolerance and respect for cultural diversity, and combat all forms of inequalities and extremism. Conversely, certain religious beliefs have festered discrimination and intolerance vis-à-vis different beliefs and concepts and practices. For this reason, the section will assess the state of freedom of religion or belief in the South African Constitution compared with the practice of religious freedom, and combined

with the indications of serious constraints with intolerance and discrimination on the basis of women's rights and sexual orientation.

The South African Constitution places emphasis on equality, human dignity, individual rights, and also displays sensitivity to religious rights (Coertzen, 2002: 185; Goodsell, 2007: 109). In view of the fact that the Bill of Rights provides an expansive list of rights and civil liberties to groups (women and LGBTI persons) who have in the past been discriminated against, a number of religious groups have criticised laws that guarantee rights (including abortion, sterilisation and sexual orientation and gender identity) which are contrary to their beliefs and practices (Amien, 2006: 730; Du Plessis, 2009: 13). Religious freedom according to former Chief Justice Arthur Chaskalson, 'is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination' (*Solberg case*: para. 92).   Religious freedom does not only entail fairness and even-handedness in terms of diverse religions, but could also be interpreted as basically a person's right not to be forced to do anything against his or her religious beliefs (or non-beliefs) (Du Plessis, 2009: 16). The constitutional entrenchment of religious rights, therefore protects individuals from beliefs and activities that are so conspicuously religious such as preaching, proselytizing, assembling or congregating and witnessing (Du Plessis, 2001: 442).

The Bill of Rights encompasses provisions allowing abortion, which has received strong opposition from some Christian groups (Patel & Myeni, 1998: 736-737; Zwang & Garenne, 2009: 109).[6] The Constitution also guarantees non-discrimination on the basis of sexual orientation which have equally triggered strong displeasure from the Christian and Muslim camps (Du Plessis, 2001: 13; Amien, 2006: 748-749). Also, provisions relating to an individual's 'right to bodily and psychological integrity, which includes the right […] to security in and control over the body' has been identified as contradictory to traditional belief and practices of the indigenous African population (Sec 12; Du Toit, 2006: 681).[7]

The 1996 Constitution is the first national constitution globally to prohibit discrimination on the basis of 'sexual orientation' (Sec 9(3); Du Toit, 2006: 681-682; Christiansen, 1999: 997). While the South African courts have adopted progressive judgments prompting legislative reform, societal acceptance of homosexuality remains a challenge (Croucher, 2002: 315; Bonthuys, 2008: 482; Graziano, 2004: 302; De Vos & Barnard, 2007: 795). Attempts by the gay and lesbian community to advance their rights are challenged by the strength of both African and Afrikaner conservative churches which have displayed virulent anti-gay sentiments in the country (Christiansen, 1999: 1000).

On a positive note, the various religious groups offer a uniquely effective community structure to mitigate the social impact of the HIV/AIDS epidemic, especially within the context of faith-based initiatives (Garner, 2000: 41). For instance, the Pentecostal Church, a popular denomination across much of South Africa, serves as an example of a highly involved religious organisation in fighting HIV/AIDS (Haddad, 2005: 30).

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[6] See, for instance, 1996 Choice on Termination of Pregnancy Act which allows every woman the right to have legal termination of pregnancy.

[7] Some of these practices include male circumcision, female genital mutilations and virginity testing which are practised by some South African ethnic groups which are clearly in conflict with the aforementioned provision.

Through their respective sermons, church leaders make a concerted effort to relay a message of fidelity and/or abstinence as a way of preventing the spread of the epidemic. According to Speakman (2012: 3) this attempt has recorded considerable positive results, especially as evidence shows that 'Pentecostal churches significantly reduced levels of extra- and premarital sex among its members.' It is therefore valid to conclude here that religion has both the potential to enhance socioeconomic rights (specifically in the area of the right to health), and conversely hinder the realisation of human rights.

h)   *Ethnic factors*

Ethnicity implies a distinction, perspectives or shared cultural practices that distinguish a group of people from another. Often, common traits such as history, territorial possessions, religion and language are often used as the common characteristics of various ethnic groups (South African History Online, 2015: para. 7). South Africa has a great ethnic diversity with 11 official languages broadly corresponding to ethnic groups that have traditional areas which they inhabit. During the apartheid era some of these lands were designated as nominally independent States.

The focus of this section is to set out the ethnic factors which may hinder or enable the promotion of human rights in South Africa. Ethnic factors may be interpreted as matters related to ethnicity which has an effect on the realisation of basic rights. The nature of South African society and its demography, political atmosphere and legal architecture has an influence on the promotion of individual and group rights. The section will assess how ethnicity or race in its socioeconomic context has an impact on the realisation of basic rights by groups or individuals of specific ethnic or racial origin. In this section, focus will be on intolerance or discrimination against foreign nationals which has frequently resulted in xenophobic attacks.

As mentioned, South Africa has a long history of discrimination and prejudice (Sarkin, 1998: 628). One of the several legacies of apartheid is that of intolerance in terms of ethnicity, nationality and other 'differences' (Consortium for Refugees and Migrants South Africa (CoRMSA) 2010: 1). More than twenty years after its transition into democracy, the country is still struggling to find suitable means to adequately deal with regular incidents of xenophobic attacks, racism, sexism, homophobia, Islamophobia and anti-Semitism (Seekings, 2008: 1-2). Unfortunately, in light of the high crime rates in the country, policy makers often dismiss most of these occurrences as being merely 'criminal and an unfortunate part of life in South Africa' (CoRMSA 2010: 3). This attitude fails to identify the enormous impact such discriminatory-related violence has on the victims' broader community, and the victim in particular. This situation derails social cohesion and fails to provide protection for victims against crimes triggered by discrimination and prejudice.

A typical example of this prejudice-related violence is the latest wave of xenophobic attacks on foreign nationals in the KwaZulu Natal province (Aljazeera, 2015: 1). The attacks were arguably triggered by a remark made in a speech by the Zulu King - Goodwill Zwelithini – who called on migrants to leave the country. Five people were reportedly killed and around 1000 men, women and children fled their homes and shops (Aljazeera, 2015: 1). No one has been held accountable. This inaction has resulted in a culture of impunity for hate crime offenders and a general perception that hate crimes are not in breach of the Constitution (Hate Crimes, 2015: 8).

The section has elaborated on some of the ethical factors which inhibit or enhance the promotion of human rights in South Africa. The South African Constitution espouses equality for all individuals who live within its borders. The same section 9 of the Constitution interprets equality as the equal enjoyment of all rights, benefits and freedoms. Nonetheless, behind the veil of these constitutional promises, the rights of foreign migrants have constantly been abused. The xenophobic attacks against migrants do not only breach their rights to dignity and equality, but also their rights to life which is equally guarded under section 11 of the South African Bill of Rights.

i)   *Technological factors*

Technological factors in this report refers to issues related to the use of information and communication technology (ICT) which have an influence on the way groups and individuals are able to enjoy their fundamental rights. Considering that it is a vast and not clearly defined concept ICT includes any form of communication application or device. According to Lassen et al. (2014: 144) ICT encompasses 'radio, television, cellular phones, computer and network hardware and software, satellite systems and so on, as well as the various services and applications associated with them' Considering that the scope of technological factors with potential impact on human rights is diverse and extensive, the section focuses on the impact of radio and television on cross-cutting issues such as women and children's rights.

Technological factors encompass the use of information and communication technology (ICT) that have potential human rights impacts. The (electronic and print) media in South Africa function in an environment where freedom of the press and expression is guaranteed (Wasserman, 2010: 567). Suffice it to say, however, that the right to freedom of expression does not include advocacy of hatred on the basis of ethnicity, religion, gender, race, war propaganda and incitement of imminent violence (Liebenberg, 2001: 29). After 1996, the media has played a fundamental role in raising awareness and disseminating information to the general public on issues relating to human rights and development (Crush, 2001: 103). It has specifically contributed to the fight against poverty by providing regular and systematic information on poverty eradication programmes. In light of the widespread illiteracy in South Africa, community radio contributes significantly to dissemination of information to poor communities, especially in rural areas (Fourie, 2002: 18). Topical issues on these stations include children's rights, HIV/AIDS and violence against women (Wasserman, 2010: 567).

In contrast, threats to individual privacy in South Africa are greater now than ever envisaged. (Global) technologies and convergence enhance the dissemination of information, but also pose huge threats to individual and group confidentiality (Wall, 2004: 20-21). Accessible technological advances such as, electronic media have placed enormous opportunities for surreptitious surveillance in the hands of both government and ordinary persons who harvest private information for their own use (Kshetri, 2009: 141). Although section 14(d) of the South African Bill of Rights guarantees that everyone has the right not to have 'the privacy of their communications infringed', this provision has not been effectively enforced. One of the greatest concerns is the worrying rise of cybercrimes. This is a practice where attackers harvest the personal details (private information, credit card details and passwords) of individuals from their computers which is used to withdraw money from the victim's account (Wall, 2004: 20).

The section has attempted to discuss some of the technological factors which might hinder or enhance the promotion of human rights in South Africa. In terms of promotion of human rights, the emphasis was on the role of the media which continues to serve as a medium for education and dissemination of information on issues such as HIV/AIDS, poverty and women's rights. On the contrary, other technological factors such as electronic media have been abused by cyber attackers to hack the data and defraud victims. The section concludes with a call for an effective security measure to combat cyber-attacks.

3.   Conclusion

The first part of this chapter has illustrated some of the current conditions which enable or hinder human rights within the context of South Africa by mapping the historical, political, legal, economic, social, cultural, religious, ethnical and technological factors that both positively and negatively impact on the enjoyment of rights. In light of the lurking legacies of apartheid, and its effect on the enjoyment of both first and second generation rights, the aforementioned sections provided a brief overview of the various factors and their effect on the fundamental rights policies within South Africa, as well as the barriers and constraints which require further interventions from government.

C.   The role of NGOs and social movements in the realisation of socioeconomic rights

Non-Governmental Organisations (NGOs) and social movements have been a driving force for the reconstruction and development of human rights during and, in post-apartheid eras. Many of these NGOs and social movements have formed alliances and networks to educate, lobby, and conduct advocacy around a range of sectors including socioeconomic rights issues, gender equality, HIV/AIDS, disability rights, forced evictions and access to information. The next section describes the activities of NGOs and social movements which may hinder or enhance the realisation of human rights since the transition into democracy in 1994. The section does not purport to be a comprehensive review of all the NGOs and social movements (and their respective activities) in South Africa. Instead, the case studies and examples have been selected to demonstrate some of the key activities of these networks which may have an influence on the enjoyment of basic rights, with specific focus on socioeconomic rights in the country.

1.   Introduction

On 27 April 1994, a new page in the political history of South Africa was opened (Matthews, 2011: 100). The day represents the moment when many front-runners of the country's non-governmental organisations (NGOs) and anti-apartheid social movements entered the hallways of political power (Mckinley, 2001: 183). Similar to what usually transpires in new liberated regimes, the excitement of the power shift led many to anticipate that the necessity for confrontational social struggle with the government had ended (Ballard et al., 2006: 397). This belief, somewhat, informed and hampered grassroots mobilisation for social struggles for a number of years after apartheid (Von Holdt, 2002: 283). Nonetheless, some struggles did occur. Labour struggles exploded immediately after the first universal suffrage elections in 1994 (Ballard et al., 2005: 615).

The initial antagonistic relationship between NGOs-social movements and the state during the apartheid era was generally replaced by cordial engagement in the post-apartheid period (Habib & Taylor 1999: 73). This shared partnership between the state, on one side, and the NGOs and social movements on the other

side, was partly made possible by the new regime's attempt to create an enabling environment for effective political participation of these networks (Mathews, 2011: 93-94).

Consequently, the National Economic Development and Labour Council (NEDLAC) Act No. 35 of 1994 was adopted that allowed NGOs and social movements to register, and be adequately represented on the newly constituted NEDLAC's development chamber (Ballard et al., 2005: 615). The state-NGOs partnership was further strengthened through the formation of public funding agencies such as the National Development Agency (NDA) to provide financial and logistical support to NGOs and social movements via NEDLAC (Habib & Taylor, 1999: 74-75). Many organisations further benefitted from being assigned with development projects on behalf of the state which cemented their relationship with the latter (Matthews, 2011: 93-94).

However, in sharp contrast to other liberated regimes (for instance Algeria and Zimbabwe) where the transitional celebration lingered on for several years, in South Africa, new social movements evolved rapidly. Their evolution mainly coincided with the June 1999 democratic elections which ushered in the Thabo Mbeki regime (Mattes & Piombo, 2001: 101). Mbeki's administration specifically recorded the upsurge of social movements and protest on numerous fronts. These movements were triggered by three different but related developments. First, some of the social struggles were targeted at one or more of the government's socioeconomic policies. For instance, the Mbeki government's initiative (Growth, Employment and Redistribution Strategy (GEAR)) to embark on trade liberalisation and adopt economic growth as the means for advancing social justice received opposition (Ballard et al., 2005: 615). Second, protests were mobilised against the government's inaction in areas of service delivery. Notable cases in this area include the birth of the Treatment Action Campaign (TAC) and the Landless People's Movements (LPM) which respectively addressed the State's failure to adequately respond to HIV/AIDS and the slow pace of land redistribution (TAC, 2015a: 1; LPM, 2015: 1). Finally, social movements from the townships emerged to directly oppose government's introduction of certain austere measures such as high tariffs and other stringent service delivery polices. The activities of movements in this category specifically resulted in confronting government's attempts to cut off unpaid electricity services and evict residents. These movements included the Concerned Citizens Group (CCG), the Anti-Eviction Campaign (AEC) and the Soweto Electricity Crisis Committee (SECC), mobilised in poor and marginalised communities to oppose national, provincial and local government's initiatives to evict residents and cut off water and electricity (Habib & Taylor, 1999: 76-77).

The variety as well as the sheer number of these social resistances provides the motivation to assess the role of these NGOs and social movements in the realisation of socio-economic rights in the country. This section is divided into six sub-sections. Part two sets out the theoretical underpinnings of NGOs and social movements. Part three conducts a mapping exercise of recent social movements in the country. This part will be used to determine what has triggered the emergence of NGOs and social movements, who are the key actors, why they have adopted adversarial approaches, and essentially, what impact their tactics and strategies can have in advancing socioeconomic rights in South Africa. It is anticipated that a number of NGOs and social movements challenge issues of social exclusion, socioeconomic deprivations; specifically matters which sit at the intersection of respect for basic rights and redistribution of state resources (Mckinley, 2001: 184-185). These issues include poverty, poor service delivery, education, housing, water,

electricity, sexuality, gender, labour status and access to land. Part four examines the specific role of the Treatment Action Campaign (TAC) in the advancement of the right to health, while part five assesses the barriers faced by NGOs and social movements in carrying out their mandate of promoting economic and social rights. Here, the section will categorise these constraints into historical, political, legal, economic, social, cultural, religious, ethnical and technological factors which underpin the operationalisation of the activities of these networks. Part six sets out the conclusion and recommendations.

2.   Theoretical underpinnings of NGOs and social movements

Common traits of NGOs include the following: (i) they are autonomous of the State, and independent of any commercial organisations and political parties; (ii) their formation and participation is voluntary; (iii) their existence is structured, and they render accountability to donors and members; (iv) they are created to act in the public interest; and (v) they do not pursue the commercial interests of their members (Van Tuijl, 1999: 493-494).

The size of NGOs varies from relatively small to large organisations (Teegen, 2004: 463-464). Thus whereas some NGOs may be composed of hundreds and thousands of professionals and members, others might have very few of both. The mandate of these organisations ordinarily encompasses two essential areas of competence, primarily advocacy and operational activities (Mercer, 2002: 5-6). The latter NGOs in South Africa usually engage in issues concerning service delivery such as water and sanitation, housing, health and education. The former (advocacy NGOs) are mainly concerned with influencing public opinion generally and specifically influencing the policies and programmes of the state (Johri, 2013: 2).

In terms of practice, typical human rights NGOs engage in all or some of the following activities, (i) lobbying both inter-governmental and domestic authorities; (ii) gathering, analysing and disseminating information; (iii) engaging in 'naming and shaming' of perpetrators of human rights abuse ; (iv) providing legal aid or advocacy for relief to victims of human rights violations and their dependents; (v) influencing the domestication of international human rights standards (Ebrahim, 2003: 817-818).

In South Africa, there is a vast number of NGOs engaged in the advancement and protection of human rights both at the domestic and international levels (Collingwood, 2006: 439). Some NGOs exercise a wide mandate from both first generation rights (issues relating to access to information, access to justice, rights of migrants and prisoners) and second generation rights (rights to food, housing, water, education, health and electricity).

Like NGOs, there is no common understanding on the meaning of social movements. In his work 'State and civil society' Gramsci (2006: 72) alluded to the fact that NGOs and social movements should be understood outside the powers of the State. Social movements could therefore be envisaged as encompassing 'a series of demands or challenges to power holders in the name of a social category that lacks an established political position' (Tilly, 1985: 735-736). Madlingozi expanded this definition by averring that social movements are

> 'collectives of marginalised actors who develop a collective identity; who put forward change-oriented goals; who possess some degree of organisation; and who engage in sustained, albeit episodic, extra-institutional collective action' (Madlingozi, 2013: 533).

Social movements in a minimal sense exist mainly in a society where there are free associations, and 'not under tutelage of state power' (Taylor, 1991:120). In a stronger sense, these bodies often exist in a state which can effectively structure itself, to enable these organisations to function effectively. The movements encompass organisations and networks, concentrated on transforming one or more political and/or socioeconomic situation in the society within which they operate (Polletta, 2001: 283-284). It is, however, essential that one exercises caution in order not to categorise all unorganised resistance or (otherwise known as the) 'rebellion of the poor' as social movements (Alexander, 2010: 25).

Social movements are socially and politically distinguishable from general spontaneous community resistance or protests. Distinct from social movements, such social resistance generally (i) lack some amount of coalition; (ii) are not based on popular essential social structure (which encompasses a set of individuals or organisations); (iii) do not develop a collective identity; and (iv) lack the capacity to sustain opposition against the state and other actors (Madlingozi, 2013: 534-535). However, some of this social resistance meets the threshold or features of social movements as set out above, while others do not. Most of the groups in the latter category have either not formed a distinctive collective identity or are not popularly located (Alexander, 2010: 26). Yet, even these community protests possess the potential to evolve into an organised social movement eventually (Madlingozi, 2013: 554).

Therefore, considering that social movements often initiate and coordinate resistance to the government in a coherent and organised manner, the chapter will confine itself only to such movements. The chapter seeks to assess the role of NGOs and social movements in the realisation of socioeconomic rights in South Africa. Before we proceed, however, it is essential to intimate that the contribution is not designed to assess the successes or failures of such a role, neither is it designed to glorify or criticise the said role. Rather, the chapter aims to set out what NGOs and social movements have done and could do in the area of socioeconomic rights advancement, by highlighting the constraints they encounter and their future prospects. However, it is necessary to set out the role of NGOs and social movements in the advancement of socioeconomic rights at the global arena first.

3.   Role of NGOs and social movements

a)   *NGOs and social movements at the international level*

Historically, the evolution and proliferation of NGOs and social movements at the international level corresponded with the development of international human rights standards (normative frameworks and institutions) (Mubangizi, 2004: 324). It is however, not simple to state with exact certainty which one precedes the other.

NGOs and social movements were arguably very instrumental in the drafting of the 1945 United Nations (UN) Charter and the 1948 Universal Declaration of Human Rights (Finger, 1999: 1). These organisations did not only play a pivotal role in entrenching human rights provisions in the UN Charter, but also lobbied for the inclusion of human rights language in the final drafts of both treaties (Finger, 1999: 2).

Due to the extensive role played by NGOs and social movements in the adoption of the UN treaties, the UN Charter clearly earmarks a role for these organisations in the UN system. The Charter under article 71 provides that

'The Economic and Social Council [ECOSOC] may make suitable arrangements for consultation with nongovernmental organizations which are concerned with matters within its competence. Such arrangements may be made with international organizations and, where appropriate, with national organizations after consultation with the Members of the United Nations concerned'.

This provision has been operationalised by ECOSOC though Resolution 1296 (XLIV) of 1968. The Resolution categorises NGOs and social movements into three groups. Category I encompasses NGOs and social movements with focus on activities of ECOSOC; those with less interest in ECOSOC activities in Category II; whiles Category III (otherwise known as Roster) for those NGOs and social movements that might be consulted on *ad hoc* basis (Finger, 1999: 2).

It is worth noting that, apart from the UN Charter, other international treaties, specifically human rights treaties explicitly provide for the role of NGOs and social movements. For instance, the Convention on the Rights of the Child (CRC) widely entrenches the participation of NGOs and social movements in the operationalisation of its provisions. Specifically, article 22(2) obliges State parties to cooperate with NGOs and social movements to protect and assist refugee children to trace their parents and/or other members of the family. Further, NGOs and social movements are encouraged to play a leading role in monitoring states compliance of the CRC. The Committee on the Rights of the Child established under article 43 has a division called the NGO Group (NGO Group, 2010: 1). The Group is a global network of seventy-seven global and national NGOs and social movements which promotes the full realisation of the CRC and its Optional Protocol at the domestic level, by raising public awareness and advocacy on the essence of these instruments (NGO Group, 2010: 1).

The Convention on the Rights of Persons with Disabilities (CRPD) equally affirms the role of NGOs and social movements in the protection and advancement of the rights of persons with disabilities. Specifically, section 32(1) obliges States to partner with 'relevant international and regional organizations and civil society, in particular organizations of persons with disabilities' promoting the rights of persons with disabilities. Article 33(3) of this same treaty further affirms that 'Civil society, in particular persons with disabilities and their representative organizations, shall be involved and participate fully in the monitoring process.'

NGOs and social movements therefore play a fundamental role in securing sustainable human rights advancement at both international and domestic levels. They serve as agents of change in society, specifically by supplementing government's efforts through provisions of services and technical support to government, capacity building of citizens, and advocating for policy reform. In light of these roles, States are expected to create an enabling environment for NGOs and social movements to exist and function (Matthews, 2011: 100-101).

The above observation indicates that the fertile political ground at the UN level has made it possible for the role of these organisations to be entrenched in fundamental human rights instruments. These instruments have in turn given recognition to the role of NGOs and social movements in key UN human rights institutions. Thus, three factors – social, cultural or ethnical –have played a key role in the evolution,

proliferation, recognition and effective participation of NGOs in the global human rights governance system.

b) *NGOs and social movements at the regional level*

At the regional level, NGOs and social movements play a central role within the African human rights system. Their active involvement is not only due to the proliferation of these organisations interested in human rights issues, but arguably, due to the nature and high level of human rights abuses, specifically socioeconomic deprivations prevailing on the continent.

At the African Union (AU) level, the African Commission on Human and Peoples' Rights (which is the monitoring body of the African Charter on Human and Peoples' Rights (African Charter)) has recognised the importance of NGOs and social movements in the advancement of human rights. It has therefore, as of September 2015, granted observer status to 477 NGOs with an interest in its activities (ACHPR, 2015). The increase in numbers perhaps provides an indication that there is a close collaboration between the Commission and these organisations. This relationship is fundamental, considering that it provides a platform for social movements and NGOs to submit communications and make oral submissions before the African Commission (Mubangizi, 2004: 325).

In terms of seeking reparations for victims of human rights violations, the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights (Protocol) equally recognised the role of NGOs and social movements as instrumental actors in bringing complaints before the Court. Article 5(3) of the Protocol entitles 'relevant Non-Governmental organizations (NGOs) with observer status before the Commission, and individuals to institute cases directly before it, in accordance with article 34 (6) of this Protocol'. This provision further provides an indication that the African Court similarly recognizes their important role, and therefore accords relevant NGOs and social movements *locus standi* to submit applications.

The above analysis shows that NGOs and social movements are very fundamental in the advancement of human rights, specifically socioeconomic rights at both global and regional levels. The dimension of this chapter does not lend itself to a detailed analysis of the contribution of these organisations in all the regional and international human rights norms; suffice it to say that NGOs and social movements do not merely initiate and engage in the drafting of regional and global human rights standard setting, but are also key actors in the operationalisation of these normative frameworks.

c) *Subregional NGOs and social movements*

At the sub-regional level, the activity of Southern Africa Human Rights NGO Network (SAHRINGON 2015) is worth citing. SAHRINGON has as its prime objective to ensure that governments in the Southern Africa subregion operationalise their human rights commitments towards the realisation of socioeconomic rights in their countries and beyond. The operations of the organisation hinges on three prime programs, namely the Social Watch Program (SWP), the Public Expenditure Tracking System (PETS) and Promoting Positive Attitudes Towards Refugees Program.

An exhaustive discussion of the activities and functions of every international human right NGO working in South Africa is not possible. Suffice it to say that such activities and operations augment and generally boost the role of domestic NGOs and social movements to which we now turn.

d)   *NGOs and social movements at the domestic level*

The evolution and proliferation of NGOs and social movements in South Africa is arguably linked to the historical factors (circumstances and events) which pertained during the apartheid era. The poor human rights conditions, social exclusion, poverty and racial discrimination within this regime triggered the emergence of organisations and movements with the aim of combating these injustices. Below is an overview of how these networks evolved and the extent of their political, legal and socioeconomic factors has had on the enjoyment of rights in South Africa.

An effective assessment of the role of NGOs and social movements in the protection and promotion of socioeconomic rights in South Africa can be realised in light of the country's unique historical experience (a past riddled with socioeconomic deprivation and institutionalized discrimination). It is important to emphasize that the manner in which South African NGOs and social movements operated transformation after 1994. The rapid transition in the national political environment triggered an abrupt emergence and mushrooming of several NGOs and social movements after apartheid (Klein, 2011: 96). Arguably, this factor explains why the country has one of the most highly developed and vibrant social movements and NGO sector on the continent.

South Africa's transition into new constitutional dispensation, and the formation of new democratic institutions, came with new setbacks, specifically in the areas of socioeconomic rights. These new challenges contributed to many social movements and NGOs shifting their focus from political struggle to socioeconomic issues. This transition partially explains the increase in the number of human rights NGOs and social movements in South Africa over the last two decades. Therefore, as of January 2013, a total of 85000 NGOs and social movements were registered in South Africa (TimesLive, 2013: 1). A detailed discussion of each of these organisations would not be possible. The chapter will only attempt to select and elaborate on some of the leading human rights NGOs and social movements with a view of understanding the contribution these institutions have made in advancing socioeconomic rights in South Africa.

e)   *NGOs and social movements in South Africa*

Leading international human rights NGOs such as Amnesty International and Human Rights Watch have highlighted human rights violations in South Africa in their reports, including in relation to the realisation of socio-economic rights (Amnesty International, 2014/2015: 332-334); HRW 2015).

Grantmaking institutions such as the Foundation for Human Rights (FHR) play an important role in building strong NGOs and social movements. Through its promotion of participatory democracy, FHR (2015) has sought to empower marginalised and vulnerable groups, such as the poor to access their rights.

A number of NGOs founded at the height of apartheid such as Black Sash, Lawyers for Human Rights and the Legal Resources Centre continue to play an important role in the democratic era through advocacy and litigation (Black Sash, 2015; LHR, 2015; LRC, 2015). University based research and advocacy centres

include the Dullah Omar Institute at the Western Cape (formerly the Community Law Centre), the Centre for Human Rights at the University of Pretoria. Some such centres, for example the Centre for Applied Legal Studies at Wits University and the Centre for Child Law at the University of Pretoria are involved in strategic litigation before South African courts. University-based legal aid clinics and pro bono work of commercial law firms also play an important role in securing access to justice for the poor. Some NGOs have been established to assist particular groups such as women and the disabled with legal assistance and advocate for their rights (see eg. WLC, 2016). Apart from organisations and movements which deal with particular groups, there are others that focus on specific socioeconomic rights issues such as access to housing, water, labour relations, health care and environment.

Community education such as that provided by the Community Law and Rural Development Centre (CLRDC) among disadvantaged communities in the Kwa-Zulu Natal province is an important factor in addressing poverty and the realisation of socio-economic rights (CLRDC, 2015). Faith-based NGOs also play an important role in empowering vulnerable and marginalised groups to participate effectively in democratic governance (see eg Diakonia Council of Churches, 2015).

Regarding health care, the role of the Treatment Action Campaign (TAC), which campaigns for greater access to antiretroviral drugs for persons living with HIV/AIDS in the country, cannot be overlooked. Through public awareness and litigation, the TAC made major gains in the court case (*Minister of Health v. Treatment Action Campaign*) where the court ordered the state to remove restrictions that hindered access to Nevirapine in order to reduce mother-to-child transmission of HIV (TAC, 2015a: 1). The next section now turns to critically examine the role of the TAC in enhancing the availability, affordability and use of HIV/AIDS treatment in South Africa (TAC, 2015b: 1).

4.   Treatment Action Campaign and access to Nevirapine

The discussion below takes a closer look at the historical political, economic, social, cultural and legal factors which may promote or hinder the promotion of human rights, within the context of the right to health in South Africa. The text shows that the enjoyment of the right to health is inextricably linked to the existence of the historical, political, economic, social, cultural and legal factors pertaining in the country. Consequently, the case study on the TAC and access to Nevirapine seeks to demonstrate how the various factors combined to increase the rate of HIV transmission and at the same time, served as a panacea for preventing mother-to-child transmission of the virus.

In South Africa, the leading cause of mortality is AIDS (Matthews, 2011: 99). Compared to other countries, South Africa has the highest prevalence of HIV/AIDS with 270 000 HIV/AIDS related deaths and 5.6 million people living with HIV in 2011 (AIDS Foundation of South Africa, 2014a). The pandemic has not only imposed wider socioeconomic cost on the state, but also tragic consequences on poor families. In economic terms, there could be a loss of income as a result of time spent on illness or death of a family member due to HIV/AIDS.

HIV/AIDS serve as a source of poverty and food insecurity, considering that in situations where an entire family depends on a small income, the extra cost of medication places an undue burden on the poor family (Boulle and Avafia, 2005: 14). In terms of caring for the sick and the orphan children, it is usually women

who bear the commitment besides their economic and domestic obligations (Boulle and Avafia, 2005: 14-15). The social and economic costs of HIV/AIDS are aggravated by social realities comprising denialism, exclusion, fear of violence and social stigmatization (Matthews, 2011: 105). The tragic death of a 36 year old woman, Gugu Dlamini, summarizes the extent of these complications (Matthews, 2011: 105-106). In December 1998, following Ms Dlamini's disclosure that she was HIV positive, the woman was beaten to death outside a bar (locally known as a shebeen) in an informal settlement near KwaMashu in the eastern part of the KwaZulu-Natal province (AIDS Foundation of South Africa, 2014b: 1). In this settlement, approximately 30 percent of the inhabitants were then living with HIV/AIDS (Associate Press, 1998: 1).

The death of the victim (survived by her 13-year daughter) brought together several churches, community leaders and movements to launch an HIV/AIDS campaign termed the KwaMashu Aids Action Forum (Matthews, 2011: 105-106). The objective of the forum was to disseminate information at the grassroots level on how to prevent HIV, how the virus is contracted and how to manage the virus once it has been transmitted (Matthews, 2011: 105-106).

Irrespective of the socioeconomic implications and the dreadful loss of human life as a result of this health crisis, the initial response of the South African government to the HIV/AIDS pandemic was very slow (AidsMap, 2008: 1). For instance, the then president Thabo Mbeki raised several questions relating to whether HIV can develop into AIDS and if anti-retroviral drugs (ARVs) were effective and safe remedies (The Guardian, 2008: 1). Whilst many persons living with HIV/AIDS succumbed to the disease, he continually denied knowing any patient who had died of AIDS (Boulle and Avafia, 2005: 14-15). Consequently, the institutional denialism in South Africa led to lack of access to ARVs for persons living with HIV/AIDS in the country (Matthews, 2011: 106-107).

a)   The case for access to ARVs
On 10 December 1998, international Human Rights Day, served as a catalyst for NGOs and social movement activism to challenge the government's lack of action to address the HIV/AIDS pandemic (Boulle and Avafia, 2005: 15). On this day, on the steps of St George's Cathedral in Cape Town, a few persons protested and demanded ARVs for people living with HIV/AIDS (Matthews, 2011: 95). By the end of the demonstration, more than 1000 people had signed up as supporters and the new NGO, the Treatment Action Campaign was formed (Matthews, 2011: 95).

The formation of TAC was grounded on the uniqueness of South Africa's post-apartheid regime where socioeconomic concerns were brought to the fora (Fouries, 2006: 130). The Constitution of TAC sets out the primary objective and strategies of the organization (Heywood, 2003: 278). Specifically, clause 4 indicates that the organization (i) will advocate for equal and fair access to affordable health care for all persons living with HIV/AIDS; and (ii) use all available means (including campaigns, lobbying, litigation and protest) to remove all forms of constraints that hamper access to treatment for people living with HIV/AIDS (Mbali, 2005: 213-214:).

To effectively operationalize these objectives, the organization's advocacy unit creatively framed access to ARVs for persons living with HIV/AIDS as a socioeconomic rights issue (Mbali, 2005: 213). This was done by invoking the right to health language and values set out under article 27 of the South African

Constitution (Achmat, 2004: 79). The organization, therefore, draws its legitimacy to act for and on behalf of persons living with HIV or AIDS not just from abstract human rights values, but from the national Constitution (Heywood, 2009: 15).

TAC primarily relies on grassroots activism for its operations. From its initial 15 members, the organisation expanded to over 16,000 members, 267 branches and 72 full time staff members (TAC, 2015b: 1). These members perform the roles of organizing events, attend branch meetings, mobilize community members and are active members in campaigns and protests (Friedman & Mottiar, 2005: 511-512).

Because of the nature of its objective, it commands great solidarity in the various communities and thus manages to mobilize support to openly confront government policies and programmes (Achmat, 2004: 78). Considering that accountability is essential for the survival of any organisation, TAC, at the end of the year, organizes its Annual Congress where the national TAC leadership provides a detailed account of the organisation's performance to the many members who participate in the event (TAC, 2015c: 1; Achmat, 2004: 80).

Another main strategy of TAC has been the forging of an alliance with other domestic and international NGOs and social movements. At the international level, TAC's global initiatives and partnerships have evolved as well (Boulle and Avafia, 2005: 34).

Internationally, TAC has forged close alliance with international NGOs and social movements, such as Médecins Sans Frontières (MSF)/ Doctors Without Borders (Matthews, 2011: 108). The partnership between TAC and these international actors has been significant and useful. For instance, MSF has played a key role in the formation and operationalisation of TAC as an organisation. Specific interventions provided by MSF includes (i) training of TAC staff; (ii) provision of direct service to members of TAC; (iii) bringing ARVs into South Africa; (iv) providing direct technical support to TAC (Achmat, 2004: 76-77).

At the African regional level, the primary objective of TAC has been to enhance collaboration of HIV/AIDS activists at the (sub)regional level using the Pan-African Treatment and Access Movement (PATAM – established in 2002) as the conduit (Friedman and Mottair, 2004: 511). The use of TAC's experience to form a federation of activists under the framework of PATAM has been a major achievement by TAC. The latter has over the years helped to shape the operations of the former, leading to a continual sharing of information on HIV/AIDS concerns through PATAM's email list server (Boulle and Avafia, 2005: 15). The experience of TAC has to a great extent provided great impetus to the operations of other like-minded NGOs and social movements in Africa, specifically in developing their technical expertise on HIV/AIDS related concerns (Achmat, 2004: 84).

At the domestic level in South Africa, TAC has built a close partnership with the AIDS Law Project (ALP) (Friedman and Mottair, 2004: 512-513). The latter has consequently litigated for and on behalf of TAC on HIV/AIDS related cases. Also, the Congress of South African Trade Unions (COSATU) (the largest and strongest trade union federation in the country) with more than 1 million members is one of the domestic partners of TAC (Nelson Mandela Centre of Memory, 2015: 1). The partnership between these two players has been significant considering that it provides a clear indication of how allies with somewhat different objectives can continue to work together to address a common problem (Boulle and Avafia, 2005: 15).

Further, TAC has partnered with other NGOs and social movements such as the Children's Rights Centre; the National Education, Health and Allied Workers Union (NEHAWU); the AIDS Consortium; and other religious associations such as the South African Council of Churches (Mbali, 2005: 215).

In terms of financial support, TAC does not accept funding from the South African government or pharmaceutical companies (TAC, 2015a: 1). It receives financial support from a small pool of international donors including the South African Development Fund (or Arca Foundation), MSF, the European Coalition of Positive People, and the Australian Foundation of AIDS Organisations (Friedman and Mottair, 2004: 516).

The utilization of human rights standards entrenched in its Constitution and creatively using human rights language is in consonance with the personal experiences of the TAC's chairperson, Zackie Achmat (Fourie, 2006: 163). In the latter years of the anti-apartheid struggle, Mr. Achmat was originally a vibrant member of the United Democratic Front (UDF), which called for a non-violent approach of political activism (demonstration and strikes) to end apartheid (Robins, 2010: 3). Thus members of the UDF invoked the existing law to challenge every single component of the arbitrary and racist regime which the apartheid government failed to abolish (de Waal, 2006: 36).

Therefore, armed with its past experience, TAC constructed its fight for Nevirapine on social and economic rights principles entrenched in the 1996 Constitution of South Africa (Achmat, 2004: 84). During litigation, TAC's partnership with the ALP, specifically the latter's Law and Treatment Access Unit, was worthwhile (Matthews, 2011: 100).

Like its partner, TAC, the experience of ALP on human rights issues also evolved from its anti-apartheid struggle (Achmat, 2004: 76). Like Achmat, the head of ALP, Mark Heywood, was an active member of the United Democratic Front and participated in the anti-apartheid uprising (AIDS Law Project, 2007: 3). In order to improve the socioeconomic conditions that exacerbate the spread of HIV/AIDs of the poor and advance the rights of persons living with HIV/AIDS, the organisation relies on a range of legal strategies to transform human rights principles from their abstract form into practical realities (AIDS Law Project, 2007: 4). ALP therefore partnered with TAC to disseminate and train people affected or living with HIV/AIDS on human rights law and how they can use the legal framework to safeguard their rights (Fourie, 2006: 163).

b)   TAC and access to health care

In 2001, the Pharmaceutical Manufacturers Association (PMA) of South Africa, representing 39 international companies filed a suit in the South African High Court (Matthews, 2011: 100). The case concerned the extensive mandate which had been handed to the Minister of Health to issue mandatory licenses allowing the importation of certain medicine in order to cut down the price of these pharmaceutical products (South African Medicines and Related Substances Control Amendment Act, 1997).

The case attracted a lot of public attention considering that access to ARVs for treatment of HIV/AIDS including medicines such as Zidovudine (AZT) had been restricted by the high price of those pharmaceutical products in the country (Mbali, 2005: 215-216). Yet, prior to the hearing of the case in the High Court, President Thabo Mbeki who opened the Thirteenth International AIDS Conference on 9-14

July 2000, in Durban, South Africa, intimated that it is not AIDS, but rather, extreme poverty which is the leading killer in sub-Saharan Africa (Matthews, 2011: 94-95). This assertion was quickly rebuffed by then South African High Court judge, Justice Edwin Cameron who had for some time declared publicly his HIV-positive status (Achmat, 2004: 76-77).

The Conference laid the foundation for bringing together social protest and litigation in a concerted manner, and as well as grassroots mobilization and international NGOs in opposition to the PMA case (Achmat, 2004: 76-77). The conference shed light on the link between HIV/AIDS and access to medicine advocacy (Cameron and Berger, 2005: 356).

TAC, at the opening of the case in the High Court, requested to intervene as *amicus curiae* (Achmat, 2004: 76-77). The organisation's intervention provided the stimulus which transformed the "dry" legal action into a human rights issue (Matthews, 2011: 95). TAC's collaboration with other global NGOs such as Oxfam and MSF mounted pressure on PMA to eventually withdraw its legal action (Mayne, 2002: 249).

After the abandoning of the PMA case due to adverse public opinion and intense media attention, TAC and its partner COSATU attempted to utilize the National Economic Development and Labour Council (NEDLAC) as a stakeholder forum to negotiate with the government a strategic plan to roll out mother-to-child HIV transmission (MTCT) prevention and highly active antiretroviral therapy (HAART) throughout the country (Matthews, 2011: 94-95).

Even though NEDLAC agreed on an operational plan that would potentially cut down by approximately 3 million the number of HIV related deaths between 2002 to 2015, the Mbeki regime refused to endorse it (Matthews, 2011: 100). This triggered a national campaign orchestrated by TAC and COSATU, which eventually compelled the government to announce in November 2003 an Operational Plan for HIV and AIDS Care and Treatment for South Africa to operationalize the MTCT and HAART (Fouries, 2006: 166). Nonetheless, the operationalisation of this scheme remained slow (Matthews, 2011: 100-101). This section has demonstrated that legal factors when reinforced with social factors (such as grassroots mobilisation) and technological factors (intense media attention) may result in the advancement of socioeconomic rights (including the right to health).

c) *Minister of Health & Others v Treatments Action Campaign & Others*

Nevirapine was the most effective ARV for the prevention of mother-to-child HIV transmission and was regarded as an important element of triple medication therapy for pregnant women with HIV/AIDS (Mbali, 2005: 216). It is owned by the German pharmaceutical company Boehringer Ingelheim. The company in 2001 offered to donate at no cost Nevirapine to South Africa (Matthews, 2011: 100). This offer was rejected by the State (The Guardian 2008: 1).

The government subsequently failed to implement a full Nevirapine treatment programme for HIV infected pregnant women on the basis that the treatment will not prevent infected mothers from passing on the virus to their babies through breastfeeding (Heywood, 2003: 278). The Ministry of Health further stressed that the effectiveness and side-effects of the Nevirapine have not been adequately assessed and it lacked adequate logistics to monitor the treatment programme (Matthews, 2011: 100).

For this reason, TAC in partnership with other NGOs and social movements (including Dr. Haroon Saloojee, Institute for Democracy in South Africa, the Children's Rights Centre, the Community Law Centre, Cotlands Baby Sanctuary, First *Amicus Curiae*, Second *Amicus Curiae*, and Third *Amicus Curiae*), in July 2002, filed a lawsuit in the Pretoria High Court in *Minister of Health & Others v. Treatment Action Campaign & Others* (Matthews, 2011: 100-101).

The case concerned the refusal of the health sector to make Nevirapine accessible and not stipulating a timeline for a nationwide programme to prevent mother-to-child infection of HIV (Friedman and Mottair, 2004 : 516). The applicants (TAC & others) argued that when measured against the Bill of Rights set out in the 1996 Constitution, the restriction placed on access to Nevirapine was unreasonable (Mbali, 2005: 219). They further averred that the Constitution obliges the state and its agencies to act to ensure the full realization of the fundamental rights in the Constitution, specifically sections 27(1), 27(2) and 28(1).

The court held in favour of the applicants. It held that sections 27(1) and (2) of the Bill of Rights imposes an obligation on the State to use available resources to adopt and operationalize comprehensive and coordinated programmes to progressively realize the rights of pregnant women and their babies to have access to MTCT in order to combat HIV (Matthews, 2011: 101). It further averred that in accordance with section 28(1)(c), the State is obliged to ensure that children's rights to have access to health services is also realized. The State was ordered to remove the constraints that hinder the pharmaceutical product from being accessible to persons living with HIV/AIDS for the purpose of decreasing the risk of MTCT of HIV (Matthews, 2011: 102).

By invoking the Bill of Rights to improve access to Nevirapine, TAC and its partner NGOs and social movements had created an alternative legal and moral framework for understanding the link between access to medicine, the right to health and the right to life (Friedman and Mottair, 2004: 516-517). This case has transformed the debate not only around access to health care services in South Africa, but globally.

The right to have access to Nevirapine has come to be recognised as an inalienable right tied to the right to life (Mbali, 2005: 232). TAC is therefore widely hailed as one of the most successful NGOs, providing a blue print on how to combine mass action, mobilization and litigation to advance the realization of socioeconomic rights in South Africa (Friedman & Mottiar, 2005: 511). The approach used by the TAC has relevance beyond AIDS and health in general. The case provides an indication that legal factors (litigation) and social factors (human rights campaigns) can be used by disadvantaged communities to induce the government to act and improve access to water, social security, sufficient food, education, employment and housing (Heywood, 2009: 27).

5.   Problems and prospects

To set out and discuss all NGOs and social movements working in the field of socioeconomic rights in South Africa is practically impossible. Suffice it to say, many of these organisations play an essential role in the advancement and realization of socioeconomic rights in South Africa. However, this role has to be assessed in view of the constraints and factors that hinder their operations. It is these hindrances, in addition to the prospects, that we now shift our attention to.

a)   *Problems*

The factors which hinder the effective functioning of NGOs and social movements in the promotion of human rights may be diverse and multi-faceted. Consequently, in view of the fact that this section cannot exhaustively set out all the factors which may be at play, the section will consider only the dominant factors influencing the operationalisation of the networks.

Concerning political and legal factors, human rights NGOs and social movements ordinarily strive to advance socioeconomic rights and monitor their operationalisation through advocacy, advice, research, investigations and training (Mubangizi, 2004: 328). A majority of these networks operate in challenging and somewhat antagonistic localities. These organisations, by their very nature have to engage, and/or occasionally confront, the government which is normally complicit in or accidentally liable for the deprivations of socioeconomic rights (Kenworthy, 2012: 661-662).

Regarding political factors, NGOs and social movements, at times work in conditions which are riddled with political violence and intimidation (Ballard et al., 2006: 411). In South Africa, despite a relatively favourable political climate and a functional judiciary, most NGOs and social movements continue to be confronted with enormous challenges in fulfilling the needs of poor communities who often turn to them for intervention (Friedman & Mottiar, 2005: 532).

Regarding legal factors, many NGOs and social movements in Africa and at the global level have been criticised for their penchant to concentrate mainly, if not solely, on first generation rights (such as the freedom of expression, political participation, death penalty and arbitrary detention) (Ballard et al., 2005: 615).[8] Human rights organisations in South Africa are not exempt from this criticism (Kenworthy, 2012: 662). It has been asserted that this emphasis is due to the notion that whereas donors are more inclined to first generation rights, they are often less interested in providing support to initiatives tailored towards advancing socioeconomic rights (Mubangizi, 2004: 325-326). It is encouraging, nonetheless, to observe that most NGOs and social movements in the country are presently expanding their operations to include socioeconomic rights (Kenworthy, 2012: 661). There has been a considerable transition towards the advancement of these rights, especially in land rights, health care, education, poverty alleviation and housing (Alexander, 2010: 26). It is important that this new shift is sustained.

In terms of economic factors, based on a short survey of the operations of some selected NGOs and social movements (with the aim of examining the overarching problems faced by these networks in achieving their objectives), the issue of lack of adequate resources and funding was cited as the key constraint (CLRDC, 2015: 1). Due to the diminishing donor support, these organisations have not been able to construct, improve and strengthen capacity in several sectors of socioeconomic rights advancement (Kenworthy, 2012: 667-668). This setback has negatively impacted on the activities of NGOs and social movements resulting in (a) lack of advocacy; (b) poor campaigning; (c) inadequate monitoring of human rights violations; (d) insufficient networking; (e) inadequate promotion of knowledge and understanding of domestic, (sub)regional and international human rights standards; (f) shortage of experts to conduct

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[8] Undoubtedly, (as demonstrated in the TAC case) there are some social movements and NGOs which focus primarily on socioeconomic rights. Yet, the figure of such organisations (organisations with focus on economic and social rights) is very low compared to those with focus on civil and political rights (Mubangizi, 2004: 325-326).

investigations into abuses; (g) lack of fundraising; (h) lack of communication and media skills; (i) poor organizational, management and administrative skills (Ballard et al., 2006: 411).

Further on economic factors, the problem of inadequate logistics has been exacerbated by the over-reliance on donors. That is, most NGOs and social movements heavily depend on foreign or international donors (Mubangizi, 2004: 326). Unfortunately, although there has been a new shift at the local level (with a considerable number of local NGOs and social movements focusing on economic and social rights), still most foreign funders arguably assume that, socioeconomic rights education and activism (such as the right to food and housing) are not too relevant (Banks, Hulme & Edwards, 2015: 707-708). Regrettably, at the domestic level, there is very little philanthropic network to turn back to (Mubangizi, 2004: 326-327). Against this backdrop, it is imperative to point out that a number of NGOs and social movements have closed down due to inadequate funding (Mubangizi, 2004: 327). One of such defunct organisations is the Human Rights Committee (HRC) of South Africa. Launched in 1988, the HRC was vibrant in monitoring and disseminating information on socioeconomic rights in three provinces (Eastern Cape, KwaZulu-Natal and Western Cape) (Mubangizi, 2004: 326). The organisation was also influential in vigorously lobbying the state on the drafting and operationalisation of effective socioeconomic rights policy instruments (Mubangizi, 2004: 327).

In relation to historical, social, cultural and ethnical factors, societal divisions and tribal disparities remain another major barrier to the operations of NGOs and social movements in South Africa (Mubangizi, 2004: 328). This specific setback may be traced to the unique history of South Africa which was saddled with clashes and racial hostilities (Alexander, 2010: 25-26). For this reason, the activities of NGOs and social movements are affected by class, ethnic and racial dissension which becomes evident in the scepticism which surrounds these networks in the communities within which they function (Von Holdt, 2002: 283-284).

Moreover on political factors, the success of NGOs and social movements is often contingent on the political allegiance of the supporters or opponents within a specific community (Kenworthy, 2012: 663). An additional aspect to the role of politics is that, while the constitutional and democratic transitions of the 1990s opened the political space relevant for NGOs and social movements to pursue their objectives, such organisations which are seen not to partner with the incumbent government, are gradually being sidelined or relegated to the background (Madlingozi, 2013: 535). The ANC has since apartheid considered (and treated) NGOs and social movements as crucial partners for the country's development. However, as noted by Fioramonti (2010: 52) '[o]n various occasions, the watchdog role of advocacy NGOs [is] openly attacked by the ANC leadership' including accusation of 'not being democratically accountable to citizens and [...] servicing the interests of foreign powers'.

On social and ethnical factors, most NGOs and social movements are located in metropolitan areas, instead of rural areas where the most deprived and vulnerable often reside (Mubangizi, 2004: 327-328). Metropolitan areas have their own dynamics, and usually do not represent the poor service delivery that the poor populations in rural areas often face (Habib & Taylor, 1999: 80-81). This rural-metropolitan dichotomy is worth mentioning, considering that while NGOs and social movements in rural areas have to address socioeconomic issues confronting uneducated rural masses, urban based organisations draw

their support from educated urban residents (Mubangizi, 2004: 327). Consequently, the chances of obtaining government compliance are far more likely with the latter (Kenworthy, 2012: 661-662). This arguably explains why networks which have strived to create or set up branches in rural areas have operated with relatively minimal success.

As socio-political factors, a major source of hindrance to the effective operationalisation of NGOs and social movements for the promotion of human rights in South Africa is the lack of coordination between the organisations. Presently, there are 85000 human rights NGOs and social movements (TimesLive, 2013: 1), and how they relate to each other can easily erect barriers to their effectiveness.

Further domestic socioeconomic NGOs and activists seem to have the belief that they do not benefit immensely from their relationship with their international partners (Mubangizi, 2004: 328). There is another form of tension which exists between domestic and international human rights organisations. Considering that there has been a proliferation of NGOs and social movements in the recent past, international organisations have found themselves competing with the former for similar sources of donor support (Matthews, 2011: 101).

Also as to social and economic factors, at the domestic level, there is competition among NGOs and social movements, especially those networks which lack clear aims and policy objectives (Mubangizi, 2004: 328). In their quest to attract funding, some organisations have the proclivity of broadening their goals, and taking on several issues. This situation often does not only create an overlap in programmes, but also generates undue competition when seeking for donor funding (Klein, 2011: 96-97). It is therefore essential that NGOs and social movements clearly set out their aims and objectives in order to effectively address the needs of the communities they seek to assist, while avoiding the overlap and excessive competition over funding (Mubangizi, 2004: 327-328).

b)   Prospects

Although these challenges exist, the future prospects of NGOs and social movements in enhancing socioeconomic rights in South Africa are bright. Nonetheless, the success of these organizations will be dependent on a number of factors, such as:

i.   Political factor: The enhancement of democratization and the level of government commitments to acknowledge the role of NGOs and social movements in the advancement of socioeconomic rights

ii.   Social factor: The degree to which poverty and inequality can be addressed

iii.   Legal factor: The degree to which information on socioeconomic rights can be disseminated

iv.   Economic factor: The degree to which funding can be secured.

v.   Technological factors: the degree to which pharmaceutical companies can make prescription drugs more accessible to the poor by lowering their prices

It is important to indicate that all these factors have to be perceived as goals requiring both short term and long term plans. NGOs and social movements, on the one hand, and government on the other, have to adopt effective strategies to realize each of the aforementioned goals (Madlingozi, 2013: 554).

Regarding the issue of inadequate funding and resources, this will require both short and long-term strategies. The continuous lack of funding can be overcome through a better NGO and social movement coordination and networking (Mubangizi, 2004: 328). Yet, such networks should be centred on specific socioeconomic rights issues, such as food, housing, health and education. This is because organisations with focus on specific issues have better chance of thriving than those with an all-encompassing human rights mandate (Mubangizi, 2004: 328-329).

It is imperative to emphasise that NGOs and social movements continue to safeguard and advance socioeconomic rights in South Africa. Their activities should lead to improving people's access to information on basic (economic and social) rights, which is relevant for the realisation of these rights. Although the fact remains that some NGOs and social movements face constant financial and logistical constraints, all indications that those networks which concentrate on specific thematic socioeconomic area have a better chance of succeeding.

D.   Conclusion

The chapter has assessed the current human rights situation in South Africa by setting out the historical, political, legal, economic social, cultural, religious, ethnical and technological factors that both enhance and militate against the promotion of human rights. Against the backdrop of the gloomy legacies of apartheid, and the country's socioeconomic challenges, the chapter has provided an evaluation and literature review on the effect of the South Africa's Constitution, and the various constraints which impede the promotion of basic rights.

The following present the main aspects of the factors which enable or hinder the protection of human rights in South Africa. Generally, it can be reiterated that the various factors enumerated in this chapter do not stand alone, but rather are 'intertwined to varying extents in effecting the facilitation and hampering of human rights policies' in the country (Lassen et al., 2015: 167). Nonetheless, it has not been the focus of this report to conduct an exhaustive mapping of the interaction and overlap between the various cross-cutting themes assessed in the body of this chapter. The following are some reflections on the factors explored in this chapter.

1.   Summary and essential recommendations

First on *historical factors*, the chapter identifies historical factors (events and circumstances) which have been enhancing or facilitating the promotion of human rights in South Africa. The section traces the historical landmarks from apartheid till now, setting out the country's successful transition into democracy. The chapter describes the apartheid policy of segregation which implemented affirmative action on behalf of whites, while disempowering the black and other non-white populations. Also, the apartheid regime's unfair distribution of resources, where whites enjoyed considerable privileges such as better educational system and quality service delivery have contributed to enhancement of the socioeconomic livelihood of most white South African compared to their fellow black South Africans. The

section further argues that South Africa responded to its historical events or circumstances in a manner which somewhat had a positive influence on its contemporary human rights situation (specifically in terms of the enjoyment of civil and political rights). These positive effects are evidenced in the adoption of progressive instruments and establishment of institutions to match contemporary human rights challenges.

Second on *political factors*, the chapter notes that corruption has negatively affected service delivery at the municipal, provincial and national levels. This is largely because funds meant for housing, clean water, adequate food and nutrition, and sewage facilities are often embezzled. Other political factors which militate against the enjoyment of quality service are insufficient human resource management and lack of political leadership.

Third on *legal factors*, the South African Constitution provides adequate safeguards for the protection and promotion of civil, political, social, economic and cultural rights. The Bill of Rights provides adequate protection for the rights of LGBTI persons, social security, labour relations, forced evictions, access to food and water. The Constitution, nonetheless, places limitations on the enjoyment of key economic and social rights such as the right to education, food and housing. Nonetheless, the full enjoyment of the rights (in most cases socioeconomic rights) in the Constitution has been compromised by limitation clauses. For instance, the realisation of the rights to food, water, health, housing and social security are subject to the conditional clauses of 'progressive realisation' and within the 'available resources' of the State. In terms of operationlisation, the Constitution has mandated the courts and the SAHRC to monitor government's compliance of the respective provisions set out in the Bill of Rights. The courts and the SAHRC have contributed through adjudication, advocacy, education, lobby and litigation respectively to promote human rights. However, despite initiatives by government and civil society, access to justice remains a challenge in particular for the poor and other disadvantaged groups.

Fourth on *economic factors*, the chapter takes as its focus the neoliberal structure of the South African economy and the BBBEE. The chapter indicates that, on the one hand, the neo-liberal economic stance adopted in the post-apartheid era has compromised the economic situation in the country. The chapter argues that this position has not only led to excessive privatisation thereby increasing prices of essential service delivery, but also, contributed to reducing the quality of these services. On the other hand, the chapter shows that the introduction of the BBBEE has improved the economic conditions of some black South Africans who were deprived from economic benefits during apartheid. In contrast, the section also indicated that the poor operationlisation of this once promising economic policy has exacerbated the poverty situation of most blacks considering that wealth has been amassed by the politically well connected. Further the neo-liberal nature of the economy has also arguably led to poor service delivery and increased prices of healthcare, housing, sanitation and education. It is therefore imperative that the State effectively implements the affirmative action (BBBEE) which holds so much promise for improving the standard of living of the marginalised communities.

Fifth on *social factors*, the section focuses on persons with disability (PwDs) and the rate of inequality prevalent in South African society. It asserts that the 1996 Constitution firmly protects the right of persons with disability from discrimination on all grounds, including education, labour, culture and politics. Yet, on

the ground, many PwDs suffer discrimination in terms of lack of access to public buildings and benefiting from other opportunities available to able bodied persons. It is therefore imperative that the state adopts measures to ensure that PwDs equally benefit from all forms of state resources, including buildings and other essential services. Further, on the aspect of social inequality, South Africa remains a highly unequal society. This inequality is structured along racial and ethnic lines with white South Africans enjoying most of the privileges which existed under apartheid while numerous black Africans are confined to unemployment, poverty and social exclusion (Klasen, 2000: 33).

Sixth on *cultural factors*, the section assesses those customs and traditional practices which hamper or enhance human rights. It highlights that there are some beneficial and harmful cultural beliefs and practices. The section concludes that while some cultural practices are beneficial to the advancement of human rights, others (virginity testing, *lobola* and violence against women) hinder the promotion of human rights. It is recommended that the State adopts steps to enhance useful cultural beliefs and practices while combating harmful ones.

Seventh on *religious factors*, the section takes as its starting point the religious freedom which has been entrenched in the 1996 Constitution of South Africa. The section proceeds to shed light on the attitude of religious leaders on sections of the Bill of Rights which guarantees some human rights including abortion and LGBTI. The section shows that while the Christian and Muslim communities have raised strong opposition to these rights, they also play a far reaching role in combating HIV/AIDS in the country. It is important to intimate that whilst support programmes being provided by these religious groups are helpful but not enough, they also have a role to play in combating the stigmatization associated with HIV.

Eight on *ethnical factors,* the section highlighted the constitutional protection for all individuals living in South Africa, irrespective of their race, ethnic background, tribe and nationality. However, due to the country's history of racial and ethnic prejudice and high unemployment rate, many South African nationals have been hostile towards African migrants. This condition has often degenerated into xenophobic attacks resulting in deaths. Even though these attacks weaken social cohesion, the government has failed to institutionalise adequate measures (in the form of policies and institutions) to curtail further attacks on migrants. The section concluded that it is imperative for the State to adopt a comprehensive plan to ensure effective cohesion and integration of migrants into the South African society.

Finally ninth on *technological factors*, the section discusses the media and cybercrime. It indicates that radio and television provide useful information often to marginalised communities on basic rights and liberties. Regarding the media, the section shows that it has been a useful platform for advocacy, awareness creation, education and dissemination of useful human rights information to the public. Through their programmes on poverty eradication, HIV/AIDS, children and violence against women, the networks have contributed to the promotion of human rights, reduction of poverty and reducing the transmission of HIV/AIDS through abstinence and fidelity. In contrast, the increase in cybercrime has led to several South Africans being defrauded of their incomes and assets through the activities of hackers.

2.   NGOs and social movements

From the onset, it should be noted that the recent history of South Africa's anti-apartheid struggle impacted greatly on how the country has established a culture of social activism with regards to socioeconomic rights issues. The country's past has also influenced how NGOs and social movements adopt and use principles of basic rights in articulating their agenda.

The collapse of apartheid moreover had a short-term negative impact on NGO and social movement activism. The post-apartheid regime led to numerous skilled and talented former social activists who were trusted for their commitment to the anti-apartheid struggle, abandoning social activism to take up government appointments in the new ANC regime. Nonetheless, early hopes that the appointment of the former activists to the new South African government would inform the policy-making process, ensure fairer systems and enhance the realisation of socioeconomic rights were tempered by the realisation that these former activists were unwilling to criticise government policies and programmes.

In contrast, those social activists who remained in the NGOs and social movement communities in the post-apartheid era, and those who subsequently joined them, became progressively skilled in tackling socioeconomic concerns. Thus, compared to most other NGOs and social movements from other sub-Saharan African, the South African experience is way ahead, considering that the former have been slower to obtain the required expertise on rights issues that would enable them to effectively address socioeconomic concerns such as housing, water and health (Matthews, 2011: 93).

NGOs and social movements in South Africa have over the years campaigned vigorously to enhance access to water, education and health care. These networks have provided interventions on several fronts to address the plight of vulnerable groups (such as women, children, asylum seekers, persons living with disabilities and HIV/AIDS. The strategies of these organisations to protect and promote socioeconomic rights include forming coalitions, creatively constructing issues around socioeconomic rights, and using legal strategies developed during the apartheid era.

The impact of these NGOs and social movements, have been felt not only in South Africa, but even at the global level, indicating to the international community the role that these organisations can play in the eradication of poverty, access to housing, education and health. Specifically, TAC's widespread advocacy campaigns, court victory and their subsequent impact on the lives of persons living with HIV/AIDS are worth citing. TAC's success as organisations has enabled South Africans to have access to cheaper medicines, prevention of MTCT and enhanced government sponsored Nevirapine rollout programme (Boulle and Avafia, 2005: 62).

This chapter has attempted to assess the factors which enhance and hinder the role of NGOs and social movements in the advancement of socioeconomic rights in South Africa. On the one hand the role of these organisations has been promoted by the country's progressive constitution, favourable political climate and vibrant judicial system. On the other, these organisations face challenges spanning from poor coordination, insufficient funding, hazy objectives, and lack of proximity to affected communities.

Even though these factors militate against their operations, the contribution of these organisations in the protection and promotion of socioeconomic rights in South Africa cannot be overemphasised. It is

significant to stress that the realisation of socioeconomic rights in the country has undergone a huge paradigm shift from a past riddled with gross human rights violations to a present that acknowledges and seeks to enhance socioeconomic rights.

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IV.   Case study in selected third country: Peru

A.   Introduction

As noted in the introduction to this report, it seeks to complement other studies of key factors in the interaction developed between policies and instruments of the EU, its creation, effectiveness and impact on third countries. In that sense, in the Peruvian case, although different factors such as cultural, economic, religious or technology are analysed, it has prioritized to deepen the qualitative analysis of institutional factors and political partners regarding the implementation of human rights policies and strengthening of democracy. This chapter will focus on identifying these factors that explain the weak participation of civil society associations and organisations directly involved in human rights policies. In particular those factors that are part of the main concerns of international cooperation between the European Union and Peru. This cooperation will be influenced by contextual factors that will determine its impact on the promotion and strengthening of democracy and human rights in Peru.

It is worth stating that closer relations began to develop between the European Union and Peru in 1993 within the context of establishing regional relations with countries of the Andean Community. They were later strengthened through the Rome Declaration of 1996 that was then replaced by the Political Dialogue and Cooperation Agreement between the European Union and the Andean Community (and its member countries) in 2003 (see further EEAS, 2015a).

Within these frameworks, several areas of priority have been laid out, including macroeconomic and financial matters, human rights, the environment, climate change, technology, migration and the fight against narcotics and related crimes. In the case of human rights issues, the EU cooperation policies towards Peru are designated as "thematic cooperation". There are four areas of cooperation, where the Civil Society Organisations and Local Authorities (SCO – LA) Programmes and the European Instrument for Democracy and Human Rights (EIDHR) stand out (see further EEAS, 2015b).

In this sense, we can consider that the EU values participation of civil society as a key supporting factor in the promotion of both human rights and democracy. That is why this report focuses on exploring how the limitations of civil society in the Peruvian case can influence the development of human rights policies (see further EEAS, 2015b).

We have identified that civil society organisations are usually invited just as observers, but there is a lack of possibilities for advocacy in the policy cycle. In Peru, we have identified that, in most cases, civil society organizations participate as observers in the policy-making processes, in search of a dialogue and social legitimacy for its implementation; however, also we found institutional spaces between the State and civil society in which most directly affect the formulation, implementation and evaluation of these policies. We believe that these spaces are those that can provide more knowledge about how contextual factors influence policies to strengthen EU cooperation on issues of human rights and democracy. In this study we detail three cases of national councils involved in promoting and protecting human rights: the national human rights council (from the Ministry of Justice and Human Rights), the national health council (from the Ministry of Health), and the national education council (from Ministry of Education). These three cases are presented as institutionalized spaces where civil society and the State dialogue on policies that allow

the promotion and observance of human rights in Peru. The first of which is a core institution for implementing human rights in national and local policies. The other two cases revolve around two basic social rights that are the right to healthcare and the right to education.

1.   Methodology

In studying these cases we follow a research tradition set by the Institute of Democracy and Human Rights of the Pontifical Catholic University of Peru (PUCP) in which detailed studies were carried out between 2014 and 2015. This research included a mixed methodology approach, combining institutional analysis with in-depth interviews. The first part describes and analyses the factors that influence the formulation and implementation of policies on human rights in the country. The second part describes three cases of national councils to generate advocacy by civil society in formulating policies. It analyses how State capacity also influences to enhance citizen participation and how they influence other factors described in the first part of the report. Finally, conclusions are drawn about how international cooperation can help to strengthen the Peruvian civil society as a key player in the formulation and implementation of policies in human rights.

B.   Human rights protection in Peru: key issues and factors

Having passed through a period of transition to democracy, Peru has achieved significant gains since the end of its authoritarian regime in 2000. Poverty reduction, macroeconomic stability, a return to the rule of law and institutional reforms after the Fujimori government have been key factors in the advancement of democracy and human rights in the country. Nevertheless, there is still much progress to be made as claimed by human rights groups, and high levels of social unrest related to the extractive industries (the principal contributors to GDP) indicate cracks in the social and cultural structures established over those years.

As the 2015 annual report from Amnesty International states:

> There have been attacks against activists and government detractors. There are reports of excessive use of force by police. The rights of indigenous peoples to be duly consulted and to give their free and informed prior consent have not been respected. Sexual and reproductive rights were not guaranteed. Impunity has continued to be a cause for concern (Amnesty International, 2015).

Human Rights Watch has corroborated the same tendency in a 2014 report, stating:

> Public protests against large-scale mining projects and other private sector and government initiatives in Peru often lead to confrontations between protesters and police in which civilians are killed or wounded by police or army gunfire. While these confrontations resulted in fewer fatalities in 2013 and 2014 than in 2012, there has been little progress in investigating deaths and injuries, and recent legislation has further weakened police and army accountability. Judicial investigations into grave human rights abuses committed during Peru's armed conflict continue, but progress in trials has been slow and limited (Human Rights Watch, 2015).

Thus, it is considered that a major issue left outstanding on the human rights agenda relates to the lack of a culture and practice of inclusion in equitable conditions between the State and civil society in Peru. Here we encounter a paradox in that, on the one hand, official spaces have been created for decision-making with mechanisms of public participation that, albeit with some difficulty, contribute to the formation and implementation of public policy. On the other, however, these are still not sufficient for driving processes of legitimation of policy, especially in the case of core policies on human rights. This view is shared by important institutions such as *Mesa de de Concertación para la Lucha Contra la Pobreza* (Table for the Fight against Poverty) stating that while statistics show a drop in poverty levels, the perception of Peruvians is that this has not occurred as they still lack adequate mechanisms of inclusion and participation (UNDP, 2015).

For this reason, in the first section we will analyse structural aspects that underlie this problem with a view towards a key factor involved, namely, the inadequacy of formal mechanisms of social participation in the formation and implementation of human rights policies.

1.   Historical Factors

The transition to democracy carried out in Peru at the end of the twentieth century marks an important historical point to analyse the limitations in preserving human rights. Although it is true that the weakness of the State has historically been a common trait in Peru (Lopez, 2004: 210), within the context of contemporary political history there is evidence of numerous human rights violations.

Once elected, Fujimori began an economic programme of market reforms that led to the dismissal of an enormous number of public servants as well as cutbacks in labour rights in the private sector. Furthermore, a subversive strategy was employed by the armed forces, which violated a range of rights such as freedom of expression, freedom of assembly and freedom of political participation, among others (Lopez, 2004: 31). In 1992 a self-coup was carried out, dissolving the Congress of the Republic and shutting down other institutions like the National Jury of Elections and the Constitutional Court. Unfortunately, with the discrediting of political parties, the economic crisis, and with internal armed conflict taking place, opinion polls carried out after the coup revealed that nearly 80% of the public approved the measures taken (Tanaka, 1998: 16). Nevertheless, with international pressure mounting, elections were eventually convened to establish a constituent assembly mandated to draft a new constitution and organising a new round of elections.

On the one hand, this government was characterised by the political leadership of the president, in alliance with technocrats that drove free market reforms. On the other hand, a government structure developed around the Intelligence Service in 1993 - a political apparatus that functioned to generate legislative changes guaranteeing government impunity as it committed human rights violations over the course of the civil conflict. As a result, in 1995 the Law of Amnesty (Law no. 26479) was approved (Comisión de la Verdad y Reconciliación, 2003: 60). Later, in 1996 the Law of Authentic Interpretation of article 112 of the Political Constitution (Law no. 26657) was enacted permitting a third mandate for Fujimori based on the fact that the 1993 Constitution was not yet valid when he was elected in 1990.

The dissemination of videos and audio recordings revealing the corruption within the Intelligence Service to ensure Fujimori's re-election in 2000, combined with the continued recession and civil society's demonstrations against human rights violations throughout the 1990s, eventually led to the mobilisation of diverse sectors of Peruvian society (political parties, university directors, and unions) against the Fujimori regime (Tanaka, 2005: 22-27). Once the presidential advisor Vladimiro Montesinos' influence in the scandal became known, Fujimori attempted to clear himself of responsibility, initiating a search for his advisor all the while arranging his exile and subsequent resignation in Japan (Pease, 2003: 23).

The rise of Valentín Paniagua from president of Congress to president of the Republic represents the beginning of the transition to democracy in Peru. In this context the human rights movement, both at national and international level, led to the formation of the Commission of Truth (which later became the Commission of Truth and Reconciliation). Paniagua confronted the political and economic crises, seeking to re-establish the rule of law and the separation of powers. Alejandro Toledo, one of leaders of the *Marcha de los Cuatro Suyos* against the Fujimori regime, was elected to office in the 2001 general elections. Toledo then implemented a number of institutional reforms promoting decentralisation (Law of Decentralisation; Law of Regional Elections) and civic participation. Additionally, macroeconomic policies towards the market economy were sustained, however reforms were undertaken in the communication and transport sectors, as well as in the political framework (Law of Political Parties).

In the 2006 general elections, Alan García (PAP) was elected. However, the runner-up Ollanta Humala received 40% of votes. Humala and his *Gana Peru* party held a radical position over the course of the campaign, questioning the distribution of funds during the period of economic growth and challenging the traditional parties such as PAP. Moreover, it is important to note that major incidences of social unrest emerged during the terms of García and Toledo. For example, in 2009, the Bagua Conflict revealed that the approach of García's government to development unequally favoured resource extraction and limited State regulation (Grompone, 2009: 3).

Another important moment in the transitional period relates to the human rights violations that occurred during the Fujimori government. In 2009, a twenty-five year custodial sentence was handed down to Fujimori for his role as co-perpetrator in the crimes of homicide and bodily harm in the *Barrios Altos and La Cantuta* cases, as well as the incidents of aggravated kidnapping against the journalist Gustavo Gorriti and entrepreneur Samuel Dyer Ampudia in the basements of the Army Intelligence Service in 1992. Thanks to this case judgement, the country became an emblematic example for prosecuting an ex-president for human rights violations. However, this has not had a lasting effect at a national level. Similarly, Fujimori's party continues to pardon its former leader for his actions, minimising them and ignoring the human rights violations during his regime.

Ollanta Humala and the daughter of Alberto Fujimori, Keiko Fujimori, faced-off during the second round of elections in 2011. Their polarised positions led Humala to take a strong stance in favour of the human rights movement in order to avoid a return to "Fujimorism", *Fujimorismo*, and he succeeded in gaining alliances. For Humala, these coalitions shifted his economic and political standing as he had maintained a critical stance on the market economy. Meanwhile Fujimori appealed to the image of the saviour that her

father had cultivated during his regime. Humala was elected after adjusting his discourse from one of "large-scale transformation" to one of a "roadmap" to strengthening state institutions towards improving economic redistribution in the country.

2. Political Factors

The political reforms that followed the period of transition served as a reaction to the excesses of the preceding period. This fact demonstrates a political-institutional disagreement in that an effort was made to form a government in direct opposition to that of the Fujimori era, without taking into account the social fragmentation, and the crisis of political parties and State institutions (Vergara, 2009: 3). In this sense, widespread distrust of the country's political institutions is one of the greatest issues affecting Peruvian democracy. This can be seen in the numerous opinion polls such as *Barómetro de la Américas* (Barometer of the Americas) which in its last edition showed that support for democracy has continued to fall over the past 10 years (Zárate, 2014: 95). Furthermore, data indicates that victimisation from organised crime and rates of corruption, as well as economic stagnation have seriously affected developments in democracy in recent years (Zárate, 2014: 97).

In the face of processes aimed at promoting civic participation and decentralisation over the last two decades, political mediation between social demands and the management of public resources has not been possible. In the same way, even if a reduction in poverty has occurred, existing inequalities have not improved – evidenced by a rise in the Gini Coefficient between 2004 and 2007 despite economic growth. This is partly due to limited resources being assigned to sectors like education and public health. For example, even though between 1999 and 2009 estimated public spending in education rose to 68% in real terms, its contribution in regard to gross national product went from 3.1% to 2.8% (Del Alamo, 2011: 82).

To some extent community participation has been promoted as a localised, technical and non-political approach to administration – seen as common sense practices and regulations (Remy, 2004: 165). However, dominant discourses in the process of decentralisation continue to exist without taking into account the interests, resources and dynamics of power of local and/or regional actors (Grompone, 2007: 18).

Nevertheless, through certain situations we can indeed affirm that the democratic system is beginning to take effect. Certain institutions represent forms of *horizontal control*. The Peruvian Ombudsman, for example, contributes to strengthening the democratic system by defending and promoting the rights of citizens. It is therefore not surprising that of all institutions related to horizontal accountability, this one has become one of the most trusted by citizens (Lanegra, 2011: 49). In the same way, institutions of the electoral administration system, such as the National Office of Electoral Processes (ONPE), the National Jury of Elections (JNE), and the National Registry of Identification and Civil Status (RENIEC), have been strengthened through greater autonomy and by achieving their objectives. In recent years these institutions have promoted the promulgation of the Project of Electoral Codes and Procedures in order to confront deficiencies in the Peruvian electoral system and political parties.

The Peruvian Constitution recognises the citizens' political rights to free and equal elections[9], as laid out through various mechanisms that protect the enjoyment of those rights.[10] Quotas relating to gender, indigenous and youth are in place to ensure equal conditions for political participation.[11] The rates of participation from these groups of the population are seen to have grown. However, there is also evidence to suggest that substantial representation of these groups and their specific needs is not present. In regards to the gender quota, women continue to be poorly represented in governmental positions at the local level (Jave & Uchuypoma, 2013: 82). As for the indigenous quota, processes have been difficult to comply with and it was doubtful whether the incentives put in place work in creating an indigenous political representation elite (Del Aguila & Suito, 2012: 14). Finally, for the youth quota there is still an issue of generational discrimination reflected in the relegation of applications from young people to the last places of their parties (Venturo, 2001: 43).

3. Legal Factors

The Peruvian Political Constitution is the supreme judicial standard by which Peru's institutional framework functions. It carries out the central purpose of defending the individual and his/her dignity (art. 1), and emphasises the fundamental duty of the State to guarantee the preservation of human rights (art. 44). Additionally, a range of human rights are recognised in the constitution, particularly with regard to vulnerable groups. In this sense, article 2(2) declares that no one should be discriminated for reasons of origin, race, sex, language, religion, opinion, economic situation, or any other reason. Additionally, article 4 of the Constitution states that the State especially protects children, adolescents, mothers and the elderly from neglect. Similarly, there is recognition of the legal existence of peasant and indigenous communities, as well as respect for their cultural identity, in Article 89. Article 88 protects the right to land property. Furthermore, in accordance with Article 149, peasant and indigenous communities can exercise special jurisdiction within the framework of their self-determination and the protection of their customary law, as long as these powers take place within their territory and do not violate fundamental rights. Additionally, in accordance with obligations from the Convention 169 of the International Labour Organisation (ILO), Peru has enacted a law and a regulation for the application of free, prior and informed consultation – Law no 29875, on the right to prior consultation for indigenous peoples, recognised in Convention 169 of the ILO – in order to guarantee the collective rights of these groups. All these provisions should be interpreted simultaneously with article 3. This article states that this list does not exclude other human rights guaranteed by the constitution, and others rights related to human dignity, sovereignty of the people, the democratic rule of law, and the republican form of government.

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[9] According to article 2, 'every Peruvian citizen has the right to participate in the political, economic, social and cultural life of the Nation. The citizens have, according to the law, the right of election, removal or repeal of authorities, by legislative initiative or referendum'.

[10] Ley N° 26859, Ley Orgánica de Elecciones.

[11] In 1997 the Law no. 26859 promoting the gender quota is promulgated. In the same way, in 2006 the Law no. 28869 promoting the youth quota is promulgated. Finally, through the Resolution no. 277-2002-JNE, a call for a 'indigenous quota' is established for the 2002 local elections. All fees apply to the lists applying for elected office. The gender quota is 30% and applies to all levels of government. The indigenous quota is 15% and applies to regional and provincial governments that have been identified indigenous population. The youth quota is 20% and applies only to local governments.

For example, through that article the Constitutional Court was able to recognise the right to water (Cases *STC N° 06534-2006-PA/TC; STC N° 06546-2006-PA/TC; STC N° 01573-2012-PA/TC; STC N° 03333-2012-PA/TC*) and the right to truth (Case *STC N° 2488-2002-HC/TC*). In the listed human rights, article 3 of the Constitution contains a clause in which the principles of the rule of law not only permit but demand the opening of the catalogue of fundamental rights. In this regard, water requires particular attention. International Human Rights Law and the Constitutional Court of Peru have assigned it the category of both a human right. Also, even though it is not in the Constitution, the Constitutional Court recognised it as a fundamental right.

Finally, the fourth Final and Transitory Provision Provisions determine that the standards of the constitution regarding human rights and liberties are in accordance with the Universal Declaration of Human Rights and the international instruments ratified by Peru in article 55, wherein it is stated that the treaties must be fulfilled by the State through national law. In this sense, we can affirm that the protection of human rights is not hindered through the judicial system, but rather, a constitutional framework exists in accordance with the international framework. With that in mind judges should apply International Human Rights Law in their decisions.

As it has been stated in 'Report D4.3 Case Study: National Human Rights Institutions'[12], the Peruvian Ombudsman is a constitutionally autonomous body tasked with the role of protecting basic rights of the person and the community. These actions are carried out in accordance with article 162 of the Constitution. The Ombudsman receives the complaints, consultations and requests of people nationwide who feel their rights have been breached. Reports are drawn up with recommendations and appeals towards authorities that benefit from the persuasive power and technical, juridical, and ethical expertise of the body. Additionally, since 1985 civil society has been represented through the work of the National Coordinator of Human Rights.

The protection of political rights is carried out by the National Jury of Elections, as identified in Article 178(4). Moreover Article 202 establishes that the Constitutional Tribunal is the ultimate authority on constitutional processes and on interpreting constitutional regulations.

The judicial system and its entities can be seen to be integrated within the jurisdictional bodies. The Judicial Power hierarchy is headed by the Supreme Court of Justice; and followed by the Superior Courts of Justice of the 33 districts; the Specialised and Mixed Courts of the provinces; Licensed Courts of Peace; and finally the Courts of Peace. Article 139(3) of the Constitution recognises the right to due process and effective jurisdictional protection. In order to guarantee these rights, Peru's judicial system has a range of procedures and mechanisms of reparation at the constitutional, civil and levels.[13]

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[12] In peer review process.

[13] In this regard, the Constitution states in article no. 200 that in constitutional matters intervention can occur in processes of habeas corpus, refuge, habeas data, unconstitutionality, popular action, and acts of noncompliance. However, in civil matters the Civil Procedure Code recognises the following contentious processes: process of knowledge, abbreviated process, summarised process, precautionary process and the process of execution. In this regard, in criminal matters there are two valid procedural systems in the country. On the one hand, a semi-inquisitive procedural system regulated by the Code of Criminal Procedures of 1944. On the other hand, an accusative procedural system that better promotes due process, regulated by the Procedural Code of 2004. Finally, article no.

Regarding the Peruvian State and International Law, there has been a commitment to human rights obligations through the ratification of several treaties. As a member of the Inter-American System of Human Rights, Peru has ratified the majority of the treaties established by the System and recognises the judicial authority of the Inter-American Court of Human Rights. That is, Peru most of the Inter-American treaties.[14] Additionally, in the United Nations Framework Peru has ratified all the human rights treaties.[15] Finally, Peru also ratified the Rome Statute in 2001.

4.   Economic Factors

Peru has experienced a period of economic growth since the end of the 1990s, due mainly to a rise in international prices of raw materials (América economia, 2015), low levels of inflation, and stable debt and exchange rates (ProInversión, 2015). This constitutes more than 15 years of growth in which GNP rose to an average of 6% between 2004 and 2014, to levels higher than the average for Latin America (ProInversión, 2015).

This growth owes much to the extraction sector, and in particular to mining which represents more than 50% of foreign currency, 20% of fiscal earnings, 11% of Gross Domestic Product, and the largest sector for foreign investment (El Comerico Economía, 2015). Similarly, for example, employment from the mining sector during 2015 grew by 8.73% compared to 2014 according to the Ministry of Energy and Mines (Gestión, 2015).

However, in Peru there are still many economic and social inequalities. In the case of education, although there have been advances regarding the issue of literacy, extremely high disparity remains between the regions of the coast facing the Andes and the Amazon (La Republica, 2015a). In rural residential zones, almost 46% of the population is affected by poverty and rural inhabitants are three times more likely to be poor than urban inhabitants (Oxfam, 2014). Finally in the case of vulnerable groups, 17% of Peruvian children suffer chronic malnutrition, a figure that doubles for children in rural areas where almost 32% are affected in their growth (UNICEF, 2013).

Because of this Peru has taken steps towards reducing poverty in recent years. Poverty levels have been reduced from 23.9% to 22.7% between 2014 and 2015, while extreme poverty levels have been reduced from 4.7% in 2013 to 4.3% in 2014. These achievements are due in more than 80% of cases, the budget allocated to social policies. Unfortunately, this budget still depends on the extractive sector.

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148 of the Constitution recognises the contentious administrative process. This process is regulated in turn by the Law 27584.

[14] The American Convention on Human Rights, The Additional Protocol on Human Rights in Matters of Economic, Social and Cultural Rights, the Inter-American Convention on Forced Disappearance of Persons, the Convention against Torture, the Convention on Persons with Disabilities, and the Convention on Violence against Women.

[15] Convention for the Elimination of All Forms of Racial Discrimination, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention for the Elimination of All Forms of Discrimination against Women, the Convention against Torture, the Convention on the Rights of the Child, the Convention of the Rights of Migrant Workers and Members of their Families, the Convention on the Rights of Persons with Disabilities, and the Convention for the Protection of All Persons from Enforced Disappearance.

5.   Cultural Factors

Many changes have taken place in the State's organisational structure regarding indigenous matters in recent years. Regarding this it is necessary to point out that many of these changes have come about through circumstances of conflict (civil unrest), as well as advocacy strategies carried out by indigenous and international actors, and economic reasoning on the part of state technocrats (Alza & Zambrano, 2014: 65). This change can be perceived, for instance, through the actions of the Ministry of Culture that in recent decades has created policies which celebrate cultural diversity, regarding these as contributing to a strategy of development (Ministerio de Cultura, 2014: 11).

Beyond these advances, challenges continue to manifest in intercultural policies laid out by the State. Some authors point out that social policies aimed towards promoting greater social inclusion in Peru have managed to incorporate cultural minorities, thus breaking down the relationship between ethnicity and socioeconomic inequality. Nonetheless, cultural exclusion continues to be seen in the lack of attention paid to cultural identity. This is can be seen especially in the justice, health and education policies that lack an intercultural vision (Llórens, 2011: 4).

In order to address these issues, the Ministry of Education has presented a National Plan of Intercultural Bilingual Education (EIB) to be revised through a process of prior consultation by indigenous communities. This consultation is intended to appeal to the particular knowledge, practices and values of Peru's diverse local and regional cultures. Moreover, it is important to state that the recent enactment of the Supreme Decree no. 003-2015-MC (28 of October of 2015), which approves the National Policy for the Extensive Intercultural Approach in Peru, supports State actions that guarantee the fulfilment of the right to cultural preservation, as well as fighting discrimination. Cultural preservation means that the public policies must take into consideration the different customs of indigenous people in Peru. It is expected that these normative frameworks and public policies can lead to greater democratic governance and respect for cultural diversity.

6.   Religious Factors

Peru is rooted in a distinctive religious tradition with up to 80% of the population declared catholic (El Comerico Economía, 2012) and a notable increase in evangelical churchgoers. Beyond the cultural dimension of this religiosity, churches and their major leaders have the capacity to significantly influence political organisations in matters of LGBT rights and the rights of women. Thus, these groups had played important roles as pressure groups in the legislative debate regarding regulations that permit same-sex civil unions (see PROMSEX, 2015), as well as in the decriminalisation of abortion in cases of sexual assault. As a result of this pressure, none of the bills were approved, leading to major demonstrations of public disapproval (Publimetro, 2014). Evidentially, it is extremely difficult to hold national debates about the rights of sexual minorities or sexual and reproductive rights without falling into the sphere of these powerful ideologies. In this sense, the impact of religion has diminished the opportunity to advance on such rights.

It must also be recalled that the Truth and Reconciliation Commission found that the Catholic Church and the evangelical groups helped the population during the armed conflict (Comisión de la Verdad y

Reconciliación, 2008: 460). However, this did not happen in the most damaged zone, Ayacucho, and it was due to the political beliefs of the bishop at that time, Juan Luis Cipriani, who nowadays is the Archbishop of Peru.

7.   Ethnic Factors

Over the last two decades we have witnessed an exponential increase in social unrest in Peru. As demonstrated in the Final Report of the Commission of Truth and Reconciliation, serious social, economic and political cleavages in Peru continue to inhibit the consolidation of a democratic regime that in turn keeps the country from achieving necessary changes. The challenges faced by emerging societies related to authoritarianism and armed conflicts are linked to a desire for improved democratic institutions, to achieve and sustain peace and equal development. Unfortunately, this has not been achieved. As a result, the economy has grown but dissatisfaction towards the democratic regime has also increased (Zárate et al., 2014: 119).

The Bagua conflict between indigenous leaders and the national police force during the García Government resulted in 34 fatalities. Following these incidents, the Law of Prior Consultation was implemented and investigative bodies for assessing environmental impacts were strengthened. The Vice Ministry of Intercultural Affairs, subsector for matters of indigenous people and intercultural affairs of the Ministry of Culture, has the authority to arrange and coordinate public policy related to the implementation of this right to consultation, in accordance with whichever State entity corresponds to the matter in question. Up until now, more than 17 processes of consultation are underway. Ten of these processes are related to bids for contracts for hydrocarbons, eight of which have ended in dialogues and four of which remain ongoing (Defensoria del Pueblo, 2014).

The problems have arisen from the identification of indigenous peoples to be consulted during the implementation of the right. In this sense, the first problem arose when publishing a database of the indigenous peoples of Peru. On the one hand, the database appeared to exclude some indigenous groups from the country's mountainous areas (*quechuas* and *aimaras* in particular). This caused the initiative to lose legitimacy and generated controversy from a range of indigenous organisations. On the other hand, when it was found that the geographic locations of the indigenous peoples mostly coincided with areas planned for mining concessions by the Ministry of Economy and Finance, the government softened its stance on prior consultation procedures in these zones to reducing the procedures, for example, for the development the environmental impact studies (Gálvez & Sosa, 2013: 2).

These issues have led to a range of consequences, such as the resignation of three Vice-Ministers of Intercultural Affairs (Gálvez & Sosa, 2013: 2). At the same time, social unrest has not decreased in recent years despite new strategies being deployed to prevent and control such manifestations (Bedoya, 2013: 3). Ultimately, a situation of State instability and insufficient redistribution of capital remains in place (Chaparro et al., 2013: 2). Nonetheless, advancements have been made in recognising cultural diversity and improvements have been made by the State in implementing prior consultation as an assurance of the rights of indigenous peoples in Peru.

8.   Technological Factors

Since 2001 the National Office of Electronic and Informatics Government (ONGEI), the Specialised Technical Authority and the rector of the National Informatics System have been operating. Their principal role is to implement the 'Peruvian Digital Agenda', in force since 2011 and orientated towards developing Electronic Government projects for the State (Perú Gobierno Electrónico, 2015). Unfortunately, there has been no evaluation of its progress up to 2015.

According to experts, the biggest challenge lies in the lack of institutional power in the governing body, the ONGEI (La Republica, 2015b), allowing close monitoring of public information, as well as expensive rates on internet connectivity for users. These institutions are most closely linked to the private business sector such as the press, the banks, and marketing and sales. Likewise, although channels for communicating political opinion and civil movements exist, these are particularly restricted to urban and coastal zones. It is estimated that only 40% of the population has access to the internet and even within this figure large breaches in connectivity exist. For instance it is estimated that only 11% of rural homes have an internet connection (in comparison to almost 50% of urban homes) (Instituto Nacional de Estadistica e Informatica, 2015), while the figure stands at 1.4% for indigenous homes (Gestión, 2014).

Because of the rurality of the country, better communication systems would actually improve the life conditions of many people. The Government has not yet adopted enough measures in order to have an open access government. This hinders the accountability of the State. Precisely to strengthen the accountability of the Peruvian State, the Peruvian government has been part of the "Partnership for Open Government" initiative since 2011 with the countries of the United States of America and Brazil, pledging to increase transparency on the activities of the State, supporting and promoting citizen participation, implementing high standards of professional integrity in public administration and increase access and use of new information technologies. Although a biannual Action Plan of Peru (2012 and 2013) was approved at the time, it is currently running the second Plan of Action of Peru from 2014 to 2016. This initiative has been considered as an axis of the National Policy on Modernization of Public Administration within the Presidency of the Council of Ministers. This plan has included the participation of civil society, public institutions and business sector. Among its findings, it stated that although strengthened transparency tools such as portals of public agencies, there are other elements such as greater involvement of the Congress and local and regional governments to implement measures to open government (Perú Gobierno Abierto, 2013). As today, there has not been much debate on how technology might affect fundamental rights.

9.   Conclusion

Until now, we have not addressed the social factors that deal with the implementation of human rights policies as this will be detailed in the following section. Generally speaking, a convergence of historical, political and socio-cultural factors thwart the proliferation of human rights-minded cultures and practices. As will be elaborated below, what is essentially needed is an institutional foundation for dealing with these conflicts so that progress can be made towards democratic governance and greater consideration for basic rights. While there are positive elements in the economic and legal factors, these are also limited by other historical, ethnic and political factors.

But this situation is also part of what is happening in Latin America. Economic and political changes in the last 15 years have had a positive impact on human rights; however, historical and structural factors do not allow consolidating these achievements. That is why it is necessary to analyse contemporary socio-political processes and dynamics to economic growth. The development of public institutions alongside civil society organisations could contribute to greater levels of legitimacy and effectiveness for policies that are designed precisely to motivate processes of change, greater social inclusion, and State transparency. Strengthening the capacity of the State and civil society organizations can help to reduce levels of social unrest and generate a culture of social dialogue and consensus.

The description of these factors allows us to outline some limitations found in political processes to generate and ensure access to rights. Unfortunately, structural problems such as discrimination or racism are still present in Peruvian society. For example, in the case of sexual and reproductive rights, the political power of the Catholic Church to veto new reforms that favour the rights of women is important. Similarly, problems are encountered around the implementation of prior consultation with indigenous peoples when determining the viability of a mining project. Similarly, limitations exist in the process of reform after the democracy driven transition. Promoting citizen participation has been limited to generate new bureaucratic processes that are not considered the weakness of political parties. The weakness of the system of representation has shown gaps between social demands and public policies. Based on the case studies we would like to highlight that these factors have consequences in policy processes to generate greater access to rights. Public policies require social and political legitimacy in the process of elaboration and implementation. In the next section we present cases of national councils of the sectors of health, education and justice to illustrate how these factors influence the processes of policy-making in human rights in Peru.

C.   The role of civil society in promoting human rights in Peru: the case of participation in national councils.

1.   Introduction

In recent years one of the major milestones in the advancement of human rights is their recognition as fundamental elements that have to be the cornerstone of the actions of States and public institutions. These actions demand the establishment of policies oriented towards public intervention that considers how their success is determined by proper application of human rights (United Nations, 1993: art. 26; 10-11). In this scenario, it is important to recognise the contribution of non-governmental organisations and the need for governments to establish mechanisms of dialogue and cooperation (United Nations, 1993: art. 38).

In this way, and following United Nations policy, a human rights based approach to development (HRBAD) constitutes

> 'a *methodological instrument* that utilises a discourse of constitutional and international human rights theory, but which in turn incorporates a political dimension in the analysis: that of public decision making adopted through public policies of the State, which makes itself primarily

responsible for the protection of rights and which places the citizen at the centre of the decision-making process' (Alza, 2014: 54).

This approach has three fundamental characteristics: (i) when formulating development policies and programmes the fulfilment of human rights should be the central objective; (ii) citizens are identified as the primary beneficiaries of these initiatives, as well as the rights and (State) entitlements they include. Efforts should be made to give citizens the capability to demand their entitlements or create the conditions for their provision; and (iii) ensure that development initiatives in every sector are oriented towards fulfilling the principles and regulations laid out in international human rights treaties (Alza, 2014: 55).

The HRBA combines a technical view of development processes, interventions and policies (of which it is necessary to create indicators to measure their progress), with a political view (which seeks to understand de facto power relations in relation to international standards) (Acebal Monfort, 2011: 5-6). These two elements make it possible to consider the structural causes for a lack of respect of rights. Furthermore, in order to gain social legitimacy it is necessary to drive processes of participation. Civil society is seen as a key actor in generating effective social consensus as it has an important role as mediator between the community (with their respective needs and agendas) and the State's public institutional power and interests (Oxhorn, 2014: 225). This role is particularly relevant in societies where the interests of large numbers of disadvantaged people are not well represented in the decisions of elites. The actions of civil society can look to instigate amendments and reforms from the State (Oxhorn, 2014: 214). As Oxhorn points out:

> 'The fact that civil society organisations are self-founded and enjoy a certain level of autonomy among other actors, and particularly the State, implies that these organisations effectively represent their members. It is this representative dimension that legitimises these organisations, and not just their respective members, but other actors too. This in turn means that the organisations can be effective interlocutors in relations between the population of a country and members of civil society affiliated with the State.' (Oxhorn, 2014: 215).

We understand civil society as a

> 'social fabric formed by a multiplicity of entities that manifest by place and function, which coexist peacefully but collectively resist state subordination, while also demanding inclusion into national political structures' (Oxhorn, 1995: 250-277).

This phenomenon brings with it the possibility of defining and defending collective interests and priorities, though with a tendency to promote inclusive democracies and respect for rights (Oxhorn, 2014: 211-230). Professor Philip Oxhorn, who is a prominent theorist of civil society in Latin America, points out that one of the main characteristics of civil society is its ability to mediate conflicts. The organisations that make up civil society allow communities greater access to common goods as well as create understanding with other divergent social groups. He states that

'the level of trust found between members of a community, its shared history and experience, have a lot to offer in the search for an inclusive democratic government. However trust is not the same as agreement, and shared histories and experiences are open to different interpretations, even if they serve to create fruitful dialogues […] therefore civil society revolves around a mechanism of mediating conflicts and ensuring that the interests and priorities of people representing different organisations are considered.' (Oxhorn, 2014: 220).

In this sense, relations between the State and civil society are reflected in the social construction of citizenship based on a demand for the extension of rights and the subsequent pressure on the State to protect them (Oxhorn, 2014: 221). As Oxhorn also highlights, democratic governance is only possible if there is a condition of respect between the community, civil society and the State. This is particularly important in situations of transition to democracy and in the democratisation of resources.

Thus, it is essential to understand the importance of mechanisms of dialogue, participation and/or policy formation within contexts like the European Union where the policies are developed with human rights in mind. As stated in FRAME research report Deliverable 2.1, human rights constitute a political phenomenon for a number of reasons. First, they are defined in political contexts by political actors. Furthermore, they are used as political instruments of vindication for the sake of citizens, redefining power relations between the state and social actors and demarcating points in history (such as in the cases of human rights violations) (Lassen, 2015: 17). Thus, we refer to a multidimensional phenomenon that in its most socio-political aspect alludes to power relations, institutional transformations through exercises of citizenship, and the formation of new identities.

This model of governance has been harshly criticised by a number of experts for creating a false sense of inclusion, thus avoiding the possibility of political and ideological conflicts and stemming the types of popular mobilisation often led by NGOs (Deluchey, 2014: 36). This position is based on the fact that the presence of NGOs in the joint councils, that will be referred later, has not resulted in the expected political outcomes (Deluchey, 2014: 38). What is certain is that important spaces are created for these organisations to influence public policies on human rights.

As experts in socio-political processes in Latin America have pointed out, we have reached a moment in global development in which the public reach of traditional national actors (political, institutional and social) has waned (Garretón et al., 2004: 72). This area has been overwhelmed by the socio-political processes of structural adjustment during the 1990s resulting in a reduction of rights protection by the State. In this sense it is important to understand the nexus between major global tendencies, the tendencies of these actors, and local processes, thus confronting the tensions and contradictions in the development models of countries in order to make them more economically viable, more democratic, more socially progressive, and more culturally genuine (Garretón et al., 2004: 73). For this reason, Garretón points out the need to tackle the challenge of social democratisation, which means to address a) issues involving social cohesion caused by exclusion and social fragmentation; b) the extension of citizenship and the institutions that validate it; and c) issues of participation (Garretón et al., 2004: 87).

The first of these causes is linked to the growth of informal labour and urban degeneration which has led to growing levels of income inequality, but also to an improved capacity to influence collective action (Garretón et al., 2004: 88-91). In this context, policies of assistance for the poor (such as policies of equity, social inclusion) do not sufficiently generate cohesion, nor guarantee the larger demands of citizens (Garretón et al., 2004: 92). Thus, participation should be understood not just as the capacity for mobilisation but also as creating spaces for decision-making. This appears to be a key factor in achieving social democratisation, strengthening democracy and protecting human rights.

A central hypothesis of this report is that with greater spaces for citizen participation in institutional areas of civil society, better possibilities for developing policies in human rights exist, thereby leading to greater social legitimacy and political viability. To further this argument we analyse three cases of national councils which constitute institutionalised and autonomous spaces acting as advisory bodies for the State, and which under a range of institutional models include mechanisms of participation from civil society. These include the National Council of Human Rights, which is charged with negotiating the human rights agendas of other government sectors at the national and local level, the National Health Council and the National Education Council. These three cases have been chosen due to their institutional importance in relation to driving public policies pertaining to human rights.

2. Institutional Models: The case of the councils in human rights

a) The National Education Council

The National Education Council (CNE) was founded in the 1980s (law no. 23384 of 1982, already revoked) as an autonomous body within the Ministry of Education with the mission to

> 'systematically study and evaluate the performance of the education system and opine on the country's education policy with the aim to uphold and contribute towards its betterment' (art. 126).

However, in 1995 the Fujimori government, under a new constitutional framework and with majority in Congress, dissolved the CNE as a body of the Ministry of Education (MINEDU) via D.S 051-95-ED. For years, education policy was produced, applied and monitored exclusively by the executive of the MINEDU in situations of social conflicts with organisations (student unions), civil associations of educators and entities of civil society. These were the years of military intervention in the public universities as part of a process of 'national pacification' undertaken to end the armed conflict. This was also a period of economic liberalisation in the field of education, permitting and promoting private investment with the promulgation of D.L. 882.

With the 2000 political transition the CNE was re-established in 2002 through law no. 28044. This was part of the measures taken towards democratic transition soon after the fall of Fujimori as an attempt to create a specialised advisory space within the education sector. Accordingly, during the mandate of Nicolás Lynch, D.S 007-2002-ED was promulgated, thus formally reinstating the National Education Council – made up of 25 councillors both male and female, of diverse origins, and representatives of civil society, private promotors, teachers unions, teacher networks, national organisations, etc.

The functions of the CNE were established/laid down by the General Law of Education (Consejo Nacional de Educación, 2015) with the primary objective of producing and carrying out educational policies, as well as opening a space for their deliberation. While financially dependent, the CNE is an autonomous institutional space. Every six years the Ministry invites recognised persons from the educational sector to make up the CNE. The short-term nature of the team helps the body to remain impartial as the period does not coincide with the terms of government, such that the appointment of ministers does not fall in line with the appointment of councillors. This also allows greater space for autonomy in the execution of institutional activities.

Since its formation, the CNE has been charged with the task of developing a National Educational Project (PEN). The project was designed, evaluated, and finally enacted in 2007, marking the beginning of a long-term public education policy. This policy will be revised in 2021 with input from the CNE's technical advisory. Furthermore, this project should become a platform for the decentralisation of the educational sector as regional governments gain greater control of the management and administration of basic education.

The CNE is made up of 25 councillors and a board of directors whose positions are renewed every 3 years with alternating terms for the president and vice president. These positions are assigned by consensus. This system allows for internal coalitions to be maintained between council members (allowing, for example, internal exchanges between the role of president and vice president), cycles of leadership and new institutional directions.

Since its creation there have been three administrative periods. The first one, between 2002 and 2008, was mainly tasked with developing the National Educational Project (PEN), which led to an extended process of decentralised public consultation spanning three years. This was enacted via RS 001-2007-ED as a national policy in education in which three strategic objectives were laid out (translating to a further 30 policies by 2021). These objectives involve: equal educational opportunities and outcomes; advancements in relevant areas of learning; better prepared teachers; decentralised and democratic administration; quality higher education and a community of educators. This policy will be valid until 2021, with the development and evaluation of a new proposal becoming the responsibility of the council's second board of directors.

During the second administrative period, from 2008 to 2014, the CNE was dedicated to promoting good administrative practices in accordance with regional government. In this period, the process of transferring responsibility for educational matters to local governments began. It also worked to develop pedagogical materials, enabling teachers to achieve better learning outcomes. Towards the end of 2015 the CNE reached its third period and now must continue to develop administrative and management capacities in the sector.

Over almost 10 years of operation, the CNE has been characterised by an ability to maintain a good level of consensus among its council members – made up of a diverse range of educators, educational entrepreneurs, academics and other experts. A good example of this consensus was the response that the institution provided in a debate over reforming a teaching law in 2007, when a few months after the

establishment of the PEN, the Law of Public Teaching Career (law 29062) was put forth as an attempt to organise the legal framework of the working regime of teachers.

This law was driven by the Aprista government and was criticised by the CNE. The council released a statement in which it asked that the proposal involved 'the General Law of Education and the National Educational Project as fundamental references, without which perspective on its objective may be lost' (Consejo Nacional de Educación, 2008: 38). It also added

> 'The Law of Public Teaching Career should permit sound professional performance – both inside and outside of the classroom – and the learning goals of students be the central criteria for promotions, determining remuneration, and the continuation of employment' (Consejo Nacional de Educación, 2008: 38).

Similarly, in its institutional bulletin certain points in the process of implementation requiring improvement were highlighted. For example, this law did not integrate aspects of evaluation in the development of teaching process, and thus would create two parallel systems (the old Law of Teaching and the new Public Teaching Career) (Consejo Nacional de Educación, 2007). Only a few months following this statement and in the midst of a nation-wide union strike, the CNE presented a message 'to the teachers of Peru, stating that

> 'The CNE understands and laments the feelings of incredulity and distrust [...] over the sincerity of proposals to promote the professional and life quality of teachers and to improve your work conditions, established explicitly in the law of Public Teaching Career, and call on you […] to discuss an agenda between the various sectors of the educational community in order to guarantee that the law of Public Teaching Career is fulfilled adequately and transparently'.

Even though the law was eventually enacted (with little success in terms of establishing a public teaching career, leading to a reform in 2012) (Ministerio de Educación, 2009), the CNE can certainly be perceived as a decisive factor in continued relations with teaching professionals.

Despite conflicts between the State and educators and conflicts within the CNE itself (new leadership brought about a turn in the institution's position resulting in rejection of the law's implementation), a forum was established with active participation from civil society to develop improved teaching performance. Further, this not only allowed for better relations with teacher networks (such as the unions) that felt affected by the new regulations, but a channel of communication, however tense, could be maintained with the MINEDU which also sent a representative. In this, a new proposition was made for both class-based activities and the design of teaching degrees.[16] This resulted in devising a new regulation, the law of Teaching Reform[17], which was approved in 2012 when an ex-councillor and president of the CNE between 2005 and 2008 became Minister of Education. In this sense, we should

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[16] Interview with Yina Rivera, technical assistant of the CNE in teaching development, granted for this research.
[17] This matter is important not only because less than a quarter of teachers have passed from one system to another, but also for improving certification toward a better quality of education (Peru Debate, 2015).

emphasise the important role that the CNE has had as a space for participation and formulation of new policies in the last 13 years, as well as promoting negotiation between a range of social and institutional actors in matter of state policy. It has taken into account different approaches such as disability and indigenous rights in education.

b)   The National Health Council

While the National Health Council (CNS) has existed as a body of the National System of Health Services since the end of the 1970s (Decree-Law 22365 of 1978), only since 1990 has it been defined as the coordinating body of the National Health System under the direction of the Ministry of Health, following the Law of Organisations and Functions of the MINSA (D.L. 584). In this context, under the Law 27813 SE it is specified that the system's mission is to coordinate the process of application of national health policy, promoting collective and decentralised participation. However, it was during the period of democratic transition in 2000, in coordination with guidelines set out by the National Accord in its policy no. 4 'Institutionalisation of dialogue and deliberation' that the Executive undertook to install spaces for negotiating the design, implementation and evaluation of public policies. It was within this instance that the National Health Council truly began to function. The CNS primarily functions in two ways: a) as consultative body for public policies requiring approval, and b) ensuring that this consultation is carried out in a democratic and inclusive manner with participation from both civil society and government sectors. It should be emphasised that, although the CNS has a consultative function, the ministerial administrations submit matters to consultation at their own discretion. Nonetheless, the CNS does not only act as a consultative authority, it also has capacity to propose regulations. While it may not generate regulations, its ability to take the initiative in these matters requires important consideration.

The composition of CNS was designated by the Supreme Decree no. 004-2003-SA. In this, article 5 states that the council should be comprised of a total of 12 members that represent the following institutions: the Ministry of Health with two members (the Minister of Health who presides and a second representative), the Vice Ministry of Sanitation, Social Health Insurance, the Association of the Municipalities of Peru, Sanitation of the Armed Forces, Health Service of the National Police of Peru, healthcare services of the private sector, the National Assembly of Rectors, the Medical College of Peru, civil servants of the sector, and community social organisations.

With this configuration, half of the members come from positions that depend on the Executive, while the other half originate from diverse public and private spaces: universities, a professional college, municipalities, companies, health sector servants and civil society. This demonstrates that civil society's participation holds a minority position within the CNS. In fact, civil society can only hold the seat reserved for community social organisations and seek to represent the specific interests of groups in vulnerable situations. In this way, it is difficult for representatives of groups in vulnerable positions in civil society to present their case. Their only opportunity for participation would be indirect, through consensual candidacy (which can represent diverse interests) and through working in the National Committees.

The CNS operates through the National Committees which promote open dialogue events and technical opinions to drive work in healthcare. Within the CNS there are 20 committees. In the same way, the law has established that the National Council and the Regional and Provincial Councils together form the

Coordinated and Decentralised National Health System. Each regional government has the authority to decide the appropriate organisations for the health sector in its area. Thus, the health sector demonstrates a legitimate process of decentralised coordination as feedback flows between central bodies and regional ones.

Furthermore, it should be noted that the Executive holds the majority in terms of determining the healthcare agenda and can carry it out without the need to open up a space for dialogue. In fact, the Executive is influential in the process of establishing agendas and dynamics. It is within the context of the committees that civil society puts forward its interests and this is also the space for complaints, propositions and monitoring.

c)   *The National Human Rights Council*

The Peruvian State created the National Council of Human Rights by means of the Supreme Decree no. 012-86-JUS in 1986, within the Ministry of Justice. Subsequently, through the law 29809 'Law of the Organisation of the Ministry of Justice and Human Rights' the Ministry of Justice was reformed. Today it is the Ministry of Justice and Human Rights. Within its jurisdiction are the Department of Policies and Administration of Human Rights and the Department of International Affairs, while it also coordinates the Technical Secretariat of the National Council of Human Rights, the Human Rights Commission (CONADIH) and the National Commission against Discrimination.

At present the CNDH is comprised of representatives of the following entities: the Presidency of the Council of Ministers, Ministry of Foreign Relations, Ministry of Defence, Ministry of the Interior, Ministry of Education, Ministry of Women and People at Risk, Ministry of Health, Ministry of Development and Social Inclusion, Ministry of Labour and Employment, Ministry of Energy and Mines, Ministry of the Environment, Ministry of Culture, the Public Ministry, the Judiciary and the Ministry of Justice and Human Rights; with the Vice Minister of Human Rights and Access to Justice presiding over the Council. Additionally, the following institutions carry out advisory roles: The Ombudsman, the National Coordinator of Human Rights, the Episcopal Conference of Peru, the Evangelical Council of Peru, the Confederation of Private Business Institutions, and the Peruvian Press Council.

The functions of the CNDH include: a) contributing to strengthening the country's democratic institutions so as to consolidate the rule of law; b) proposing necessary measures to the Executive Branch to keep in line with commitments made to international agreements on human rights; c) contributing to building respect for people's human rights, established through constitutional regulations; d) providing guidance to the Executive Council in the development of policies, programmes, projects and plans in matters of human rights, especially in reference to the National Human Rights Plan which will be approved by Supreme Decree by vote at the Council of Ministers; e) providing opinions on requested matters; and f) proposing measures and actions to the authorities,civil servants, and the greater society, that are considered important for the promotion and protection of human rights.

Through the years it has become apparent that there has been poor coordination with civil society within institutionalised spaces. This is because civil society is represented by only three delegates within the council – one each formed by members of the Catholic and Evangelical churches, and one by the National

Coordinator of Human Rights – who as observers have a voice in all discussions, but not the right to vote in the decision-making process that full members enjoy. As a result, when conflicts or disagreements arise, the proposals and decisions made by civil society are put aside or even omitted by the Council. This was the case in 2008 during the Alan García Government when article 9 of the CNDH regulations was modified through the Supreme Decree no. 008-2008-JUS, thus suspending organisations of civil society.[18]

In terms of output, the main contribution made by the CNDH was the development of two National Human Rights Plans, the first of which was enacted in 2005 (Supreme Decree 017-2005-JUS), and the second one in 2013. The purpose of these documents was to establish State policies that reflected long term commitments (beyond the incumbent government's term) in favour of the advancement of human rights in the country. Therefore the National Human Rights Plan primarily functioned as a vital tool for guiding and regulating the State's development of public policies relating to human rights (Supreme Decree 021-2010-JUS).

Some conclusions can be made about the efficiency of the National Human Rights Plan's implementation. The plan was projected as a cross-sector instrument and as a space of coordination in the CNDH formed by sector representatives of the Executive, an observer, the Ombudsman, three members of civil society: a representative each of the Catholic Church and Evangelical Church through the Episcopal Council of Social action and the National Evangelical Council respectively, and one representative of the National Coordinator of Human Rights, which in this period consisted of 68 human rights bodies from NGOs and social organisations. Formally the plan was valid for 5 years, until 2010, but was prolonged until 31 December 2011 under the argument that it should be designed and approved by the incoming government (further reading, see Bregaglio, Chávez, and Constantino, 2014). The first relates to how poorly the plan has been adopted by the sectors responsible for its execution. This is evidenced by the failure of State structures to coordinate action between sectors and establish political leadership. Secondly, although it has become apparent that the plan has not been implemented well at a national level, repercussions have been felt at a regional level. That said, support for this process comes mainly from social organisations and NGOs which, while not constituting a singular organisational body, share a common voice. In the same way, it has been seen that one of the greatest issues in implementing the PNDH has been the suspension of a process of participation. There is a lack of an institutional environment and commitment to accountability to civil society on the part of the State, as well as a clear political will to maintain human rights at the centre of broader government policies.

The second plan was delayed by three years and promulgated in 2014. In many ways the document reiterated state actions that were already in process - such as the National Plan for Electronic Government, the Combined Health Plan, the New Procedural Labour Law, the National Public Security Plan, or the law promoting healthy eating for children and adolescents etc., without necessarily proposing new initiatives (IDEHPUCP, 2015a). In this sense, there has been notable absence of recognition of the

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[18] This situation motivated complaints from human rights organisations. In spite of those complaints, the situation was maintained for three of the five years of implementation of the PNDH, being modified recently on March 12 2011, during a governmental election period. Through this modification the social organisations retreated to core of the Council, then joined as full members of the Ministries of Work and Social Advancement, Environment, Energy and Mines, as well as a representative of the Presidency of the Council of Ministers.

rights of vulnerable groups like LGBTI, thereby missing the opportunity to address serious issues like hate crimes and other specific forms of discrimination. This has to do with the religious factor and its force in directing policies in Peru.

3.   The Social Legitimacy of Civil Society

The National Councils that we have analysed thus far are thought of as consultative spaces for the development of policies within and across sectors (in the case of the Human Rights Council), and rely on varying processes of consolidation. Furthermore, the functions of these institutions constitute more than the original outlines laid out for them at their inception. There are underlying practices, values and discourses in the regulations and procedures that they carry out. That is to say, 'in every organisation there is an (hidden) institution (Barriga, 1979: 24-25). In this, the functional structure of an organisation is only as important as 'the implicit things […] that do not appear immediately, but that impart meaning' (Barriga, 1979: 24-25). Therefore, an organisational body is made up of 'models, functions, means, objectives, that is to say, everything that constitutes its concrete, formal and immediate existence' (Barriga, 1979: 24-25).

It should be noted that these National Councils do not correspond to the so-called 'human rights institutions'[19] – which applies better to the Ombudsman, for example – but rather represent platforms for social participation within the public policy cycle in order to give them greater legitimacy. The platforms seek not only to improve mechanisms of transparency and accountability, but to extend democratic spaces in countries where the political systems lack proper representation (Villafuerte, 2014: 75). Many authors advocate the presence of such spaces in order to 'repair breaches in equality and the absence of development through political, social and technical consensus' (Villafuerte, 2014: 80).

As we have stated, we can help communities to break from marginalisation and enrich democratic processes while strengthening community spirit (Oxhorn, 2014: 225).

Although each of the three cases features different goals and dynamics, they have certainly managed to propose concrete institutional action in recent years (with various levels of legitimacy). Most of these are found in the National Education Project (PNE), and to a lesser degree, the Combined National Health Plan. It is interesting to note that these bodies have supported formal and informal mechanisms in proposal debates, succeeding in incentivising cooperation that transcends the political sphere in order to obtain public benefits that go beyond individual interests. In turn, this generates new modes of collective action that revolve around 'intention'(to satisfy general or particular demands), degrees of influences (local projects versus influence in public policy), mechanisms (social audits, local councils and public planning,

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[15] In accordance with the Committee of Economic, Social and Cultural Rights of the United Nations, this is understood as the human rights institutions 'ranging from national human rights commissions, to mediating offices and defenders of public interest and other human rights, to défenseurs du peuple and ombudsmen'. Additionally, it is stated that the institution tends to be 'established by the government, enjoy a high level of autonomy with respect to executives and legislature, fully account for international human rights regulations applicable to country of in question, and is charged with carrying out various activities to promote and protect human rights' (ESRC Committee, 1998: para. 2).

community councils), and principal areas of action (labour, community, education, unions, policies) (Wiesenfeld & Sanchez, 2012: 225-243). These modes are important not only for the actors themselves, but also for improving the public arena – inevitably formed by civil society and the State.

Within their function as spaces for consultation, two factors can be highlighted. First, while keeping in accordance with their regulative guidelines, the CNE and the CNS both go beyond their functions as consultative bodies and instead take on the capacity to propose regulations. While none of these bodies have the authority to approve regulations, their ability to take initiative in matters is important to consider, especially as it promotes participation from civil society.

This same quality cannot be found in the National Human Rights Council as the role that civil society organisations have in decision-making is greatly limited by their lack of inclusion as full members. Thus, initiatives proposed by this body, such as the Human Rights Plan 2014-2016, do not enjoy proper legitimacy and are criticised by representatives of civil society, members of the Council (Coordinadora Nacional de Derechos Humanos, 2014a), members of academia that specialise in human rights (such as the IDEHPUCP) (IDEHPUCP, 2015b), and even the Ombudsman itself (Coordinadora Nacional de Derechos Humanos, 2014b).

The election period is another important factor in the process of creating legitimacy. In countries like Peru that features a low level of institutionalisation, it is important that bodies have sufficient time to begin operating effectively. This is especially relevant for public policies that seek to have a lasting effect regardless of political changes. In this regard, it is important to note that disruptions to the workings of these bodies owe more to the ministerial changes that have taken place than to change in organisations of civil society.[20] In the case of civil society, it can be said that longer periods allow them to maintain a fixed agenda, although this limits input from other groups. On the other hand, shorter periods allow for quick replacements but disruptions in the agenda.

To be sure, social organisations hold important social capital in the Peruvian context.[21] Since the 1990s they have been preparing themselves with proposals for universal, inclusive and democratic policies, at least in the fields of education and healthcare, and this has allowed the National Councils (with certain limitations) to fulfil their role as effective spaces for consultation and proposals.

In this sense, it is important that institutional reforms are carried out in the National Human Rights Councils that go beyond the recommendations already given (in 2010 the then Executive Secretary Stephen Haas carried out the 'Report regarding the evaluation of the National Human Rights Plan 2006-2011', in which a number of recommendations were made on political and institutional processes which resulted in various institutional reforms but in no way mentioned the participation of civil society), and which better reinforce the capacity to negotiate policies.

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[20] As demonstrated, it can be stated that in 14 years of institutional life the National Labour Council has been presided over by 16 different ministers.
[21] Take as an example the case relating to the transitional justice of the National Coordinator of Human Rights (see Youngers, 2003).

4.   State capacities and public policies

Some studies have indicated other ways to describe State capacity in regards to the implementation of public policies. Studies like those of Mann (1984), Skocpol (2007), Geddes (1990) or Fukuyama (2004) have identified a range of variables for analysing State power. In this, the concept of State capacity has been defined as 'the ability of professional bureaucracy to implement public policies without external influence' (Bersch, Praca y Taylor, unpublished: 2).

Nonetheless, if we wish to carry out a deeper analysis of State capacity we must consider that the State is not a single entity, but rather is fragmented and its degree of efficiency varies greatly. In this sense, it is necessary to consider variables such as efficacy and autonomy. The first is understood as the capacity to implement policies, while the second is understood as the absence of influence from external actors (Dargent, 2012: 16). It is also important to keep in mind that in the region we are dealing with, the design and implementation of policies takes place within a political system that incorporates a wide range of actors with complex relations determined by their individual roles and interests (Bersch, Praca y Taylor, unpublished: 12). In the Peruvian case, it is necessary to understand how these processes take place in a context of institutional instability and crisis of political representation.

Beyond the changes that have manifested in modern political systems, political parties continue to be considered the principal outlets for social demands. In Peru these political organisations have broken down, thus preventing them from maintaining a stronger presence and relegating their functions to the election setting. In spite of this, the democratic system has remained within the formal sphere and there appear to be new modes of carrying out policies in the country (Levitsky & Cameron, 2003: 1-33). New political organisations emerge at the local level or coalitions of independents. Both of which recognise these new dynamics and how to manage them, making use of greater openings in the system and lower institutionalised representation (Zavaleta, 2014: 3).

In this context, regional studies demonstrate the dynamics of actors concerned with the formulation and implementation of public policies. For example, we can see how political institutions (constitutional and electoral regulations) shape the roles, incentives and interactions between principal actors (Scartascini et al., 2011: 5). It is necessary to state that in the Peruvian context it is still possible to question why the Central Reserve Bank has a high capacity to carry out its functions, while the Ministries of Health and Education have significant problems in performing theirs (Dargent, 2012: 10).

In a study of the Peruvian parliament Mujica (2012: 14) demonstrates that political parties may have limited control over members of congress (and often these members do not have major political experience as evidenced by their lack of knowledge of the legislative proposals discussed). However there are a large number of legal devices which are not discussed and these can be considered open arenas for politicisation (Mujica, 2012).

With this in mind, it should be mentioned that in Peru networks of technocrats have developed in areas of the State that are not found to be highly politicised. Many of these networks suggest a macroeconomic perspective, influenced in part by international cooperation, international organisations and think tanks.

The return of democracy and the drive for decentralisation in Latin American has led to an increase in social policies. Following CEPAL, in the last decade social spending appears to have risen more than 50% in terms of GDP (Scartascini et al., 2015: 15).

The problem of increasing technocracy in the State sectors is that this leads to fewer controls on accountability (Durand, 2006: 190). This is a problem because when large-scale reforms are put forward they are not met with significant support in the political arena, nor do they receive public opinion. Moreover, when the issue is politicised the reform is either inadequate or fails (Cerna, 2015: 3). For this reason we can see that the technocracy has the capacity to drive institutional changes, but it is important to consider the quality of political representation achieved. A study carried out by Cuenca, Barrantes and Morel (2012) demonstrates that a reduction in inequality in the regions of Arequipa and Cajamarca has been marked by the formation of political coalitions and investment in education (Barrantes et al., 2012: 65).

Nevertheless, in more politicised areas, such as the education and transport sectors, political actors tend to have a certain degree of influence. These differences are not just found between sectors. As stated by Dargent (2012) in a study by Vargas (2010), the Regional Directors of Education of Huancavelica achieve better results thanks to greater commitment from political authorities, despite the fact that they have similar sectoral issues to the Regional Directors of Education of Ayacucho (Vargas, 2012: 121). In the same way, in a study by Ponce de León (2012) it is shown how political authorities are subject to the pressures of public opinion, as well as the need to negotiate with involved actors like companies and the unions.

In this context it is important to analyse claims made by Levistky and Murillo (2012: 48), who state that institutions (legislative reforms and public policies) with moderate ambitions are less likely to run up against opposition from powerful actors who use informal vetoes, and thus are more likely to hold. On the other hand, more ambitious institutions are likely to threaten the interests of powerful actors and therefore are less likely to be upheld in the political system. These authors conclude that in societies that face high levels of social and political inequality, more ambitious institutional reforms can benefit from more active citizenship and a greater presence of civil society – that is, alternative forms of agency (Levistky & Murillo, 2012: 38-39).

From the Peruvian perspective, studies like that of Alza (2012) demonstrate a need to consider the problems reformers (public servants) face in proposing more ambitious reforms, and that it is necessary to drive smaller reforms within each government sector (Alza, 2012: 74). However, the factors that undermine the implementation of public policies can be found in illegal actors and 'brown areas'[22] of the Peruvian state (O Donnell, 1993: 6). Studies like the PNUD (2009) show how within the country there are varying degrees of state density (Programa de Naciones Unidas para el Desarrollo, 2009: 54). Precisely for this reason, the margins of the State present a context for diverse illegal economic activities such as drug trafficking, organised crime, illegal mining and illegal logging. These 'brown areas' are not only defined by the activities of organised groups that commit criminal acts, but also by the limitations of State control at

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[22] Refers to a degree of state presence, understood as an effective and efficient bureaucracy, which maintains the rule of law and is functional within its territory.

the moment of developing strategies to contain social conflict (Panfichi 2011: 93) and produce limited protection for the human rights, for example, in the case of Ilave (Puno), in which the people murderer an authority due to corruption allegations without justice you found guilty.

In the Peruvian context we can make a similar assessment to that of Vergara (2012) where, on one side, there is the consolidation of a sector of converted technocrats who fortuitously became guarantors of continued reforms in certain 'open arenas'. On the other side, the crisis of representation prevents progress beyond polarising reforms, or worse still, reforms that never receive public opinion but rather remain within the domain of the technocrats (Vergara, 2012: 3). In this context, reforms that are proposed to strengthen the State's human resources are not accomplished. It can also be seen that meritocratic reforms that have emerged in the last five years demonstrate polarising disagreements between technocrats and unions (Gálvez & Cavero, 2014: 4).

5.   Conclusions

One of the first conclusions we reach in this brief study is that the National Councils emerge and/or are strengthened in periods of democratic openings. In these periods it is important to develop public policies that are not only discussed internally but also validated and legitimised socially as mechanisms of democratic reinforcement. In this scenario, civil society has played a fundamental role in the process of supporting and directing action during the establishment of these policies, and further, in situations with very limited institutional support they have acted as channels for civilian demands for the preservation of human rights, demonstrating technical and political capacity for public influence. As noted in the description of the historical and political factors, the process of democratic transition reforms promoted institutionalisation and strengthening of citizen participation and decentralisation. Considering these frames, boards of health and education have had to interact with these policy proposals. In this regard, in the case of health, the power structure of civil society have served to have a greater impact at regional and local level. If health was seen as the weight of the share settled in the incidence of civil society from regional and local committees. On the one hand, in the case of education, the National Education Project has been considered as the framework for the development of regional education projects. On the other hand, in a country like Peru whose national framework adheres (at least in the formal sense) to international treaties on human rights, it is important to implement policies that include human rights as forms of action within the State. These policies must involve the development of institutional capacities, public resources, planning processes and accountability. Moreover, within their design, debate, elaboration and follow-up, a culture of civic consultation must be incorporated. Here it is that legal factors described above, directly affect the institutionalisation of councils as spaces to discuss public policies in education, health and human rights. It is worth mentioning that many of the signed treaties and conventions to which it has acceded and ratified the Peruvian State has been made since the transition to democracy as an example of legal security in order to prevent crimes and abuses of the Fujimori period.

These processes can only occur in institutionalised spaces that bring about mechanisms of shared responsibility between society and the state. In this sense, established institutional mechanisms like the national councils appear to be adequate as they represent important examples of a model that has worked since the transition to democracy. In this sense, the study of cases also shows that these areas

should be strengthened and expanded in other sectors involving the protection and promotion of human rights. This is an important opportunity for international cooperation, if there is sufficient interest in encouraging policies in human rights through democratic governance. The kind of balance that many models of governability propose appear to be found in the processes identified in this work. Similarly, we can establish that institutional models play a fundamental role in the development of initiatives for greater participation, allowing for increased levels of commitment and technical proposals in the public policy cycle. This in turn appears to have greater impact on whose efficiency, permitting processes of implementation by institutional and non-institutional actors, including at the decentralised level (local government). In this way, the cases of the National Councils demonstrate approaches that make it possible to aspire to more ambitious policies on the condition that political and social actors are involved, seeking a balance in negotiations between the technocracy and civil society and, above all, building a framework of incentives (institutional reinforcement) for cooperation.

The cases analysed demonstrated how the institutional models are also influenced by the factors described above. On the one hand, the problems of citizen participation that seem to be in no other representative institutions have been strengthened as politicians or has not adheived to empower citizens' rights. On the other hand, the power structure of some actors, such as the Catholic Church, still permeating policy and creates the risk of rights violations. For example, while the National Human Rights Plan was legitimated by civil society during its preparation, this was published with different contents to those discussed with civil society, excluding the rights of LGBTI population.

Finally, and despite economic growth owing primarily to natural resource extraction, the influential technocracy has not succeeded in generating significant reforms, save for some important initiatives in the Peruvian state (for example from the education sector more recently). Additionally, the issues of representation continue to present serious limitations as evidenced in high indices of social conflict. The 'democracy without parties' or the 'automatic pilot' have not led to a stronger State capacity, and even less, attention to problems of political representation.

D.   Conclusion

As we noted in our introduction, the EU has prioritized the strengthening of civil society in the framework of its cooperation policies in Latin America. As shown in this report, in the Peruvian case, there are several factors that limit public participation; one of the main findings is the existence of few or weak institutionalised spaces to develop such participation. The transition to democracy served to boost the citizens' participation; however, this was not understood from the analysis of the empowerment of civil society. Problems of legitimacy of political and social actors were not considered.

In addition to these problems, we find (historical, political, economic, cultural, ethnic and religious) factors that influence how these processes can present progress and limitations. We found, for example, in the case of the National Human Rights Plan that these can be influenced by other actors with veto power such as the Catholic Church. Similarly, in the case of the implementation of the right to prior consultation of indigenous peoples, the State must find a balance between protecting the rights of indigenous peoples and the promotion of the extractive sector, particularly mining.

However, the case studies also show that there are opportunities for citizen participation in which, with power quotas for civil society, can legitimize and promote public policies that protect rights such as education or health.

Around the States in Latin America, some studies already identified the need to strengthen civil society in order to make it a key player in promoting policies, such as education, health or justice. In that sense, we consider it positive that the EU cooperation has as one of its objectives to strengthen civil society in public policy advocacy of human rights. These initiatives should consider those factors outlined in this report, in order to generate an effective involvement of civil society in the development of policies on human rights, while strengthening their implementation by having social and political legitimacy.

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V.   Conclusion

A more comprehensive understanding of the internal and domestic contextualization of historical, legal, political, economic, social, ethnic, religious, and technological factors hindering or facilitating human rights protection in third countries is vital for the continuous endeavor of the EU to promote human rights in its external actions. This report has aimed at deepening this understanding. Thus the report contains three studies on the dynamics and interactions of factors hindering or enabling the protection of human rights in selected third countries. The following countries, from three different continents, were selected: India, South Africa and Peru. From this country-based contextualisation of factors a case study was chosen for each country highlighting the influences of factors in a particular human rights area.

It is beyond the scope of this report to undertake an extensive comparative analysis of the three case studies. Nevertheless, some cross-cutting themes and challenges which have emerged from the case studies will be further discussed below after a brief summary of the subject matter of the three studies.

A.   Summary

Chapter II focused on India. Various factors impede the realization of human rights in India. The study zoomed in on economic, social and political factors, which are often structural in nature and which prevent individuals and groups from accessing institutional mechanisms for the enforcement of human rights. The chapter proceeded to a case study on 'encounter killings', which in India are generally referred to as those incidents in which there is a loss of life of individuals in the hands of police and security forces when they resort to use of force for the purpose of maintaining law and order. Economic, social and political factors which impede the realisation of human rights may lead to social unrest and political mobilisations, which in turn may lead to situations where police and other security forces are using force. In several instances it has been alleged that police and security forces indulge in violations of human rights, and civil society and human rights groups have argued that the use of force in most of the cases is disproportionate and that they are not investigated and prosecuted in accordance with law. In some incidents, civil society, human rights groups, and individuals have brought the cases to the attention of the National Human Rights Commission (NHRC) and the higher judiciary. NHRC and the courts have dealt with these matters on several occasions. The responses from the NHRC and higher judiciary aim at restraining the security and armed forces and protecting human rights in general and the right to life in particular. However, the study shows that as long as structural issues, linked to economic, social and political factors, are not sufficiently addressed, it may not be possible to achieve comprehensive protection of human rights with case specific and context specific enforcement measures, in this case with regard to 'encounter killings'.

Chapter III assessed the current human rights situation in South Africa by setting out the historical, political, legal, economic, social, cultural, religious, ethnical and technological factors that both enhance and militate against the promotion of human rights. Against the backdrop of the legacy of apartheid and the country's socioeconomic challenges, the chapter provided an evaluation and literature review of the various constraints that impede against the promotion of basic rights in South Africa. The chapter proceeded to a case study of factors that impede the realisation of socioeconomic rights and the role of NGOs and social movements to remedy the situation through protest, advocacy and litigation. The study shows that, on the one hand, the role of these organisations has been promoted by the country's

progressive constitution, favourable political climate and vibrant judicial system. On the other hand, these organisations face challenges spanning from poor coordination, insufficient funding, hazy objectives, and lack of proximity to affected communities. The chapter concludes that even though a number of factors militate against their operations, the contribution of these organisations in the protection and promotion of socioeconomic rights in South Africa cannot be overemphasised. The realisation of socioeconomic rights in the country has undergone a huge paradigm shift from a past riddled with gross human rights violations to a present that acknowledges and seeks to enhance socioeconomic rights.

Chapter IV analysed factors facilitating and hindering human rights protection in Peru. The chapter provided an overview of historical, legal, political, economic, ethnic, religious, and technological factors facilitating or hindering the promotion and protection of human rights in the country. The chapter then focused on identifying the social and institutional factors that explain the weak participation of civil society directly involved in human rights policies. Three cases of national councils involved in promoting and protecting human rights were object of analysis: the national human rights council, the national health council, and the national education council. The study illustrated the legal, historical, political, economic, cultural, ethnic and religious factors directly affecting the institutionalisation of councils as spaces to discuss public policies in the area of education, health and human rights, and demonstrated that a strengthening of the capacity of the State and civil society organizations can help to reduce levels of social unrest and generate a culture of social dialogue and consensus. Established institutional mechanisms like the national councils appear to be important examples of a model that could be expanded to other sectors involving the protection and promotion of human rights. The chapter points to the opportunity for international cooperation to support the effective involvement of civil society in the development of human rights policies.

B.   Cross-cutting themes and recommendations

As stated above, a more comprehensive understanding of factors hindering or facilitating human rights protection in selected third countries has the potential to strengthen the impact of the EU's human rights policies in its external actions. Thus, one of the means by which to close the gap between the high aspirations of the EU human rights policies in external policies and the impact of these policies (as demonstrated in other reports of WP 2) is exactly to deepen the understanding of the factors at work in third countries. Each of the case studies of the report looks at the dynamics involving both factors and human rights actors that are highly relevant to the EU in its external human rights policies. Notably, the EU considers civil society a vital player in the promotion of human rights and democracy, and the study of civil society takes up an important part of the report.

Among the cross-cutting themes and challenges which have emerged from the case studies are the following:

First, the studies affirm the need for a holistic and contextualised approach to factors in third countries. The factors explored in each selected case study are in many respects intertwined and inter-related in contextualized dynamics. Thus all three case studies have demonstrated the intersection of a diversity of factors, for instance legal, religious, historical, social and economic. This is the case, both in relation to

social and economic rights, as illustrated in the case study of South Africa, and in the case of political and civil rights, as illustrated by the case study of India. This complex intersection requires that the EU in its external actions pay careful attention to the factors that come into play in each country and their societal contextualisation.

Second, the studies have illustrated the complex role played by civil society in third countries, the ability of civil society to play an extensive role in creating a human rights agenda, and the huge challenges often encountered by civil society in playing that role. In this context, it is interesting that the case study of Peru points to the potential of international cooperation, including cooperation with the EU, to strengthen civil society as a key player in the formulation and implementation of human rights. It is promising that the EU in its external actions, recently reinforced in the Human Rights Action Plan 2015-2019, gives priority to the support of civil society in third countries. In order to support the operationalisation of the human rights agenda of civil society, this report has illustrated that the EU would have to pay careful attention to the diversity of factors which in each country puts limitations to or offer possibilities for civil society in this endeavour.

Bibliography

The following pages contain selected bibliographies for each chapter of the report. For full bibliographies, please refer to the table below.

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I.   Introduction

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