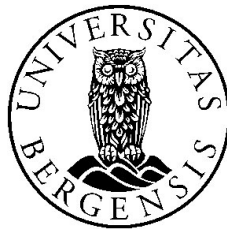


Water & Power

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Abstract

In this thesis, I attempt to explain the development of the international human right to water, and how this has affected opportunities for those that have their rights violated. As the right to water was elevated to an independent human right in 2010, some mechanisms were created to monitor and protect the human right to water. One of the main tools for monitoring the right is the establishment of a Special Rapporteur on Safe Drinking Water and Sanitation. This thesis applied a theoretical framework based on social mobilization and lawfare to investigate how the development of the right has affected opportunities for those that have their rights violated in India. In order to investigate this the thesis is based on the research question:

“Has the elevation of the right to water to an independent human right, strengthened opportunities for those that have their rights violated in India?”

Using a theoretical framework of social and legal mobilization and lawfare, three hypotheses were developed. The first hypothesis is focused the development of the human right to water in relation to social mobilization. The second hypothesis focused on the use of rights based language, following the adoption of the resolution on the right to water. The last hypothesis specifically focuses on the legal and political opportunities for people that have their rights violated. This thesis seeks to explore if we can see a change in opportunity structures following the elevation of the right to water to a human right. The thesis utilizes the method of process tracing and in-detail description, to explore these hypotheses.

The findings indicate that there have been changes to the opportunities for people that have their rights violated in India, especially through the Special Procedures and Universal Periodic Review. The elevation of the right to water to an independent human right has opened up legal opportunities to some extent. However, considering where the right to water stand in a strict legal sense, the Resolution is not legally binding upon states. Thus, the realization of the right to water is dependent on the collaboration of state parties. Social mobilization around water rights in India existed before the adoption of the resolution elevating the right to a human right. The court system in India and cases of public interest litigation has opened up legal opportunities for those that have their rights violated. The right to water stands strong in the Indian legal system, compared to other countries. The right to water is progressive in India, even if India is the country in the world with most people suffering from lack of safe water services.

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Abbreviations

ARWSP- Accelerated Rural Water Supply Programme

CEDAW- Convention on the Elimination of all forms of Discrimination Against Women

CRC- Convention of the Rights of the Child

HRC- Human Rights Council

ICCPR- International Covenant on Civil and Political Rights

ICESCR- International Covenant on Economic, Social and Cultural Rights

MDG- Millennium Development Goals

NRDWP- National Rural Drinking Water Programme

OHCHR- Office of the High Commissioner of Human Rights

PIL- Public Interest Litigation

SDG- Sustainable Development Goals

UN- United Nations

UN Water- United Nations Water

UNDRIP- United Nations Declaration of the Rights of Indigenous Peoples

UNGA- United Nations General Assembly

UPR- Universal Periodic Review

WHO- World Health Organization

Chapter 1: Introduction

Water is not only essential for living a life in human dignity, as stated in the UN General Comment No. 15 from 2002. Access to safe drinking water is vital for human survival. Issues regarding water and sanitation is a quiet crisis affecting billions of people around the world. Over 844 million people lack access to basic drinking water services and 2.3 billion people don't have access to adequate sanitation (WHO, JMP figures: 2017). Of these, 63 million live in India. Inadequate water and sanitation is a major cause of ill health and social problems. Water related diseases is the leading cause of death in the developing world. More people die of water related diseases, than in wars. Children are especially vulnerable, and every year 1.5 million children under the age of 5 die from water related diseases (Langford, 2017, Winkler, 2012). There is thus a pressing need to find ways to deal with the situation globally.

An attempt to address problems around water and sanitation was made by the United Nations General Assembly in 2010, when they adopted Resolution 64/929, explicitly stated that the right to safe drinking water and sanitation is an independent human right. This opened up for mechanisms to promote, protect and monitor the human right to water and sanitation. These mechanisms include the Human Rights Councils Special Procedures, and especially the establishment of the United Nations Special Rapporteur on the right to safe drinking water and sanitation.

Resolution 64/292 on the Human right to water and sanitation elevated the right to safe and clean drinking water and sanitation to a human right, stating that clean and safe drinking water and sanitation is essential for the full enjoyment of life and all human rights. *The resolution calls upon states and international organizations to provide financial resources, capacity- building and technology transfer to provide safe, clean, accessible and affordable drinking water, especially to developing countries* (UNGA, 2010: Res: 64/292). In this thesis, I ask if these efforts to establish a human right to water and the mechanisms to promote and monitor this right has made a difference on the national level. I will investigate this by looking for evidence of the impact this establishment and the following mechanisms has had in India, where these problems are particularly severe. While the UN resolution underscores that water and sanitation are interrelated, the scope of this thesis is focused on the right to water.

1.1 Research question and hypotheses

The title of the thesis, *Water & Power* is carefully chosen. The reason is this: As water is essential for human survival, those who have power over water resources have immense powers over the fate of billions of people. This was a huge motivational factor for the research in this thesis. I wanted to explore if the international human right to water is changing power relations in battles over water, by examining how it is translated and used in the Indian national context.

Therefore, the research question is:

Has the elevation of the right to water to an independent human right strengthened the opportunities for people that have their rights violated in India?

I seek to answer this question by first looking into the international human right to water and sanitation and how it has developed over time. Then, by looking into how it is translated into the largest democracy in the world, India, I want to see if the right is being applied by the government, the courts and the civil society, to look into how water rights is dealt with politically, by the courts and finally by the civil society. Civil society plays an important role in the mobilization for rights by putting pressure on political actors and pushing for change both through the courts, as well as through development of a rights consciousness and agenda setting. By doing this I want to understand some of the mechanisms that come into play (or not) when we follow the international development of the right to water from the international level to a local context. Firstly, by looking at how the international right developed, then by investigating situation in India. To investigate the human rights situation regarding water I follow the mechanisms established to investigate the human rights situation regarding water, which is the special Rapporteur on safe drinking water and sanitation.

Is the international right applied locally? Is there a link from the international human rights system to the activists and people working locally to address violations of the right? I want to understand the role of the United Nations in this through their mechanisms to monitor and protect the right to water in a national context. I want to explore how the international human rights system, through the Special Procedures, are working to secure people's right to water in a national and local context. This is an attempt to follow the development of an international human right all the way from the United Nations General Assembly to a local context, where there is a pressing need for a human right to water.

1.2 The hypotheses

The research of this thesis is based on three hypotheses related to the research question. The first hypothesis is focused on social mobilization. The second is related to the use of a rights based language. The third hypothesis is focused more specifically on social mobilization related to the legal opportunities and political opportunities. As the research is focused on if the development of the human right to water and how this has, or has not, led to more opportunities for mobilization, they are all focused on tracing the development related to the human right to water from the international to the national context. I seek to explore if this development has had an impact in India, or if other factors are considered more relevant.

Hypothesis 1

The elevation of the right to water to an explicit human right has led to an increase in social mobilisation around the right to water in India.

Hypothesis 2

The adoption of the resolution on the human right to water has led to an increase in rights-based language by civil society when addressing water rights in India.

Hypothesis 3

The adoption of the resolution on the human right to water has opened up the political and legal opportunities for people that have their water rights violated.

1.3 Why is this research important?

To build on the issues pointed out the previous sections, research around water and sanitation is important to both collect and to spread information about issues around these topics. The research of this thesis builds on earlier research on the topic, and I use data collected from during my field work in India. Often research around human rights are focused on the international system, or on a specific case or context. Therefore, I'm hoping this thesis will be a step in the direction of bridging this gap between the international level and the more local contexts. By investigating the mechanisms applied by the United Nations through the Special Procedures, I will address how this system works on the ground. The UN system has become highly professionalized, and I'm curious if there is a connection between this system and local activists in India.

By applying a comparative framework for the case study of India, and the country visit by the Special Rapporteur, this study can hopefully be used in further research, and applied to different cases and contexts. As the right to water is still newly developed, it might be valuable to see how water rights can be seen through a comparative lens. So, by trying to untangle the complex international system and look for links to the national and local level, I'm hoping this can open up for further research on the topic.

1.3 The structural outline of the thesis

Following this introduction, *Chapter 2* consists of the theoretical framework. This framework was used to create the hypotheses and presents the core concepts of the thesis. The theory laid out if presents different approaches to law and legal mobilization. *Chapter 2* elaborates on the lawfare typology, the legal foundations for the international right to water and the role of the Special Procedures.

Chapter 3 explains and justifies the research design. It elaborates on the method of process tracing and why this design was selected for answering the research question. This chapter also explains case selection, data collection and different methodological challenges and implications. This chapter also explains the scope and the limitations of this thesis.

Chapter 4 gives an overview of India, and serves as an introduction to the case. It elaborates on the legal and political system in India, and the role of the judiciary.

Chapter 5 consists of the first part of the empirical analysis. Here the right to water in India is describes in detail to give a foundation to understand mobilization around water rights. This chapter elaborate on the right to water in India in the political arena and the legal arena. The first part of this chapter describes the case law regarding and legal foundation for the right to water in India. The second part zooms in on civil society and social mobilization around the right to water. The Coca Cola case is presented in detail, and analyzed through the lawfare theoretical framework.

Chapter 6 consist of part II of the empirical analysis. This chapter analyses the country visit to India by the Special Rapporteur and discuss data collected from informants around mobilization for water rights and the mistrust in the UN system.

Chapter 7 presents the discussion of the main findings. The second part revisits the hypotheses systematically and presents evidence or possible explanations.

Chapter 8 presents the conclusion and implications for further research.

Chapter 2: The theoretical framework

The theoretical framework of this thesis is based on the research question:

Has the elevation of the right to water to an independent human right strengthened the opportunities for people that have their rights violated in India?

The hypotheses to research this question are divided into two main categories; the first two hypotheses focus on social mobilization related to the elevation of the right to water to an explicit human right. The final hypothesis questions the legal and political opportunities following the adoption of the resolution stating that the right to water is a human right. Thus, this chapter will elaborate on theory from legal mobilization literature, the lawfare typology and the legal foundation for the human right to water. First, I will present different approaches to law and legal mobilization, and go further into social mobilization in particular. Building on the legal mobilization literature I will present the newly developed lawfare typology, which will be used to analyse the empirical findings in chapter three and four. As all three hypotheses are focused on social and legal mobilization and opportunities, the theory around these topics gives the foundation for further analysis and discussion.

As the research question is focused on the international human right to water I will elaborate on the development of the right to water and lay out the theoretical framework for the human right to water from the legal sources. I want to explore how these sources and the development of the right to water works within the national and local context. I will start by presenting the resolutions and the mechanisms developed by the international human rights system in detail. I will try to trace the mechanisms applied by the UN to monitor and protect human rights; The Special Procedures, from the international arena to the local context. More specifically the development of the Special Rapporteur on safe drinking water and sanitation following the development of the human right to water. How human rights stand in relation to international law will also be discussed. Changing approaches to water has developed from the neo-liberal approach to water as an economic good to a rights-based approach that developed through the late 1990s and 2000s.

2.1.1 Different approaches to law and legal mobilization

The realist approach to law is focused on the institutions and the direct, tangible effects that can be measured. The realist scope is on lawyers, litigation and judicial impact. A different approach to understanding law is through legal mobilization theory. This theory is focused more on legal ‘naming, blaming and claiming’ by social movements. The focus on legal mobilization moves beyond the instrumental, highly positivist, approach put forward by legal realists. Studies of legal mobilization often look beyond the direct effects of litigation and includes other actors than lawyers. They also look into different contexts than just what happens within the courts (McCann, 2006:21).

The concept of law can be seen through a resource perspective. Here the law is viewed as a resource available for citizens for achieving different goals. The concept of law as a resource is often based on the definition of legal mobilization put forward by Frances Kahan Zemans which states that: ‘*The law is thus mobilized when a desire or want is translated into an assertion of ones’ rights*’ (Zemans, 1983:700). A core element in legal mobilization theory is legal knowledge. Legal knowledge is the starting point for how people perceive their social and legal opportunities. Citizens can interpret the law differently based on their background and knowledge, and individuals might end up reconstructing law to fit their needs and their situation (McCann, 2006:22 & 33). Thus, an important part of legal mobilization is the realization that ones’ rights are being violated.

The legal mobilization theory is not only relevant to a national context, but likewise in relation to human rights and international law. The international human rights system however, do not have an equally strong authoritative legal institution as in the national context. The realist approach to law and legal mobilization has not given much attention to the international human rights system, and the focus of realist theories is often on the national courts. As for the international human rights system, there are not as many direct, immediate and tangible effects to measure, thus the realists approach might not be the most useful way to study these issues. A different entry point might be to see legal mobilization as both a resource and a constraint, that can be used to reconstitute social relations. This approach could be applied to the international human rights system. The constitutive, and more process-oriented approach opens up for new actors and new tools, like how social movements use different political tactics, and not only litigation, to further their case (McCann, 2006:30).

The positivist scholars usually follow a top-down approach, where they seek to outline a set of specific variables that should influence the outcome. On the other side, you have the

process-based approach that emphasize the different contextual factors as well, you do not necessarily have to seek a linear relationship between the variables (McCann, 2006:18, Rosenberg, 1991). Hilson argues, based on case studies of new social movements, that political opportunity structure, or political opportunity, plays an important role, together with legal opportunity. Political opportunity refers to how open or closed the political structures are. Legal opportunity refers to the legal structures, like the laws and state legal funding. Legal opportunity includes more contingent factors like judicial receptivity (Hilson, 2002:242). Political opportunity and legal opportunity can be influenced by several other factors that need to be considered. These factors include personal and financial resources, identity ideas and values. The new social movement literature is more process oriented when it comes to litigation and social movements than the realist literature. The two approaches understand the law in differently depending on their ideological starting point. As mentioned above the top-down approach focuses on the linear relationship between the variables, while the process-based approach emphasizes the different contextual factors and does not necessarily seek a linear relationship between the variables.

2.1.2 Social Movements and Legal mobilization

Like mentioned above, the positivist model of causality is based on finding covariance between the different variables, in an attempt to explain the different outcomes. Changes in the independent variable that is followed by consistent change in the dependent variable is what is significant (McCann, 1996:459, Rosenberg, 1991). The legal mobilization theory takes several contextual factors into account when addressing the impact of the different variables. Like McCann noticed; Analysts must take many different factors into account, like opportunity structures, movement resources and legal consciousness. The rights consciousness is developed through a formulation of the injustices occurring, based on individual rights. The grievances must be formulated in a way that they can be remedied by using existing law. The legal consciousness is therefore dependent on individuals' legal knowledge (McCammon & McGrath, 2015:128-130).

To investigate the choices and strategies applied by actors within the specific context, the different political and legal opportunities available is a good starting point. Bearing in mind, like McCammon noted, that legal mobilization by social movements starts off with the development of a rights consciousness. The impact of the mobilization is dependent on several factors that need to be considered, like the organizational and personal resources and legal knowledge (McCammon & McGrath, 2015:130-131). The legal resources and

development of a rights consciousness is rooted in the individuals' legal knowledge, which is opens up for different interpretations of the existing laws. (McCann, 2006:22) The political opportunities are the possibilities and constraints provided by the political system, that the actors are operating within. Second, the legal opportunities are a combination of the legal structures that give social movements access to institutions and elites and the contingent opportunities that is reflected in the receptivity of the officials in the legal system. (McCammon & McGrath, 2015:131)

2.3 The lawfare typology

Building on the theory of law and legal mobilization, the lawfare typology has been developed in an attempt to capture the phenomenon of legalized contestations over political and social change. It can be conceptualized in two ways. The broad definition of lawfare is: 'All strategies using rights and law as a central tool for advancing contested political and social goals.' The narrow definition of lawfare is focused particularly on court-centered contestations from non-state actors (Gloppen, 2018:7).

In the typology, different types of lawfare can be defined by the actors involved and the strategies applied. The typology divides lawfare into three sub-groups based on actors, and three sub-groups based on the strategies. The different actors can apply all the different strategies, but they might take different form depending on the context. First, looking into the actors, there are three main categories: State lawfare, Opposition lawfare and Insurgent lawfare, or lawfare from below. The strategies applied are divided into the sub-groups: Legislative lawfare, Court-centered lawfare and Societal lawfare. State lawfare is based on governments or states as the main actors. They can apply different strategies, like targeted legislation, or selective law enforcement usually aimed at specific groups. Opposition lawfare is based in the political society, and the lawfare politics are often used by political parties in opposition, applying different strategies like claiming unconstitutionality or illegality to seek change. Finally, lawfare from below is rooted in civil society actors and the different strategies they apply to seek policy change and societal transformation. Civil society organisations can use several arenas to push for their goals. They can use the legal arena and litigation, the political arena through lobbying and influence, and often other more informal arenas through demonstrations and spreading information. (Gloppen, 2018:7-9)

In the narrow definition focused on court-centered lawfare from below is a phenomenon that is adopted more and more by civil society actors using the courts actively to push for change or prevent contested policy reforms. While the narrow definition of lawfare to some extent overlaps with legal mobilization, there are some distinctions. Both the narrow concept of lawfare and legal mobilization refers to the action taken by civil society actors when they use rights and legal institutions in their struggle for social and political rights. There are, however, two distinctions between lawfare and legal mobilization. *Litigation only becomes lawfare if it is part of a broader strategy*. Not all legal mobilization is lawfare, legal mobilization becomes lawfare when it is part of an *ongoing, contentious struggle between organized social interests for (or against) social transformation* (Gloppen, 2018:14)

To summarize, lawfare in the broad sense is all strategies that use rights and law to push for contested social and political goals. The broad definition encompasses strategies applied by state actors, non-state actors and the opposition and civil society. The strategies they use can be focused on legislation, court-centered strategies or lawfare from below. In lawfare from below actors use more informal arenas to push for change. For example, through litigation, lobbying, and societal strategies focused on information and education. The narrow definition of lawfare narrows the scope to focus on civil society actors that use the courts actively to push for change, or prevent contested policy reforms. To some extent, it has similarities with legal mobilization, but it only becomes lawfare if it is part of a broader strategy. To fall within the definition of lawfare in the narrow sense, the legal mobilization has to be part of an ongoing, contentious struggle between organized interest working for, or against, social transformation.

As mentioned above, legal mobilization is focused on opportunity structures. Within the lawfare, typology opportunity structures are divided into four main categories: normative opportunity structure, socio-economic opportunity structure, political opportunity structure and legal opportunity structure (Gloppen, 2018:19-20). To analyse the situation in India regarding water rights, these opportunity structures give a good backdrop for understanding mobilization and strategies applied.

The normative opportunity structure is focused on norms and prejudices. The norms could be social, traditional, religious and cultural. These norms will affect the social context the activists are working within, meaning they play a role for which strategies or tactics that are more or less likely to succeed. To push for change within a certain social context, the activist needs some social and professional recognition. Therefore, looking into the normative

opportunity structures is valuable to understand why some strategies are more or less successful, especially regarding social recognition and support.

Socio-economic opportunity structures are specifically the resources available for activists within the context. This could be both material and social resources that are available directly or through different allies. Socio-economic opportunity structures are especially important when it comes to the activists' capacity for social mobilization.

The political opportunity structure, like explained above, refers to how open or closed the political system is. In lawfare typology this is especially related to the possibilities for successful mobilization through political and legislative channels. A part of this is the political system in itself and how responsive it is, another aspect is political support, and allies within the political system and government, or in opposition.

Finally, the legal opportunities are focused on the legal system and the chances of succeeding through court-centered tactics and strategies. The legal opportunity structures have several important factors. *Access to justice* refers to factors like who can bring cases to which courts, the legal basis for the claims, the costs of bringing cases to court and the procedures that has to be followed. In addition, *the courts responsiveness* is related to the judges' willingness to accept cases, judges' authority, the likelihood of implementation, judges' independence and their track records.

The development of the lawfare typology is an attempt to untangle the complicated puzzle of legal mobilization, social mobilization and tactics applied by different actors to push for social change. It puts forward an analytical framework that can be applied to analyse mobilization strategies, by looking into several important factors. By understanding the opportunity structures within a context, we might be able to understand why some strategies are applied, and others not. This framework will be used to look into the social mobilization around water rights in India.

2.4 Changing approaches to water

There have been different ways to approach the questions regarding water, development and rights. The neo-liberal approach focused on water as an economic good. The approach was developed by economists and later supported by the development banks and the development cooperation agencies (Gupta et al., 2010:296). The international community supported treating water as an economic good, with the intention of minimizing inefficiencies and attempting to ensure water resources for all (Bluemel, 2005:962). There has been some early reference to water related to human rights through the 1979 Convention on the

Elimination of Discrimination Against Women and the 1989 Convention on the Rights of the Child (Langford, 2017:9).

The Dublin statement of 1992 was an attempt to deal with water issues based on this economic approach. The statement supported the idea that water should be recognized as an economic good (Bluemel, 2005:963, Gupta et al., 2010:300, Langford, 2017:10). Even though the Dublin statement is based on the neo-liberal economic approach, it does apply some rights language. One example is that the statement calls attention to: “the basic right of all human beings to have access to clean water and sanitation at an affordable price” (Dublin Statement, 1992 & Chen, 2015:298-299). The right is however linked to access to water at an *affordable price* and does not take into account the situations where people cannot afford to pay for water at all.

In 2000 the Millennium Development Goals (MDGs) were endorsed. The MDGs put forward a target of halving the proportion of people without access to sustainable drinking water and sanitation (UN, 2000: Millennium Development Goals). After the development of the millennium goals, the United Nations kept working on the right to water, and in 2002 the General Comment No. 15 was issued by the United Nations Committee on Economic, Social and Cultural Rights. The General Comment No. 15 marks a shift in the language used when addressing issues regarding water and sanitation. The Comment changes the discourse around water from the neo-liberal and economic perspective to a human right focused dialogue. The Comment explicates the right to water as a subordinate right arising from primary rights in the International Bill of Human Rights. Although the General Comments are not legally binding documents, the General Comments are developed to provide guidance, make normative content clearer, and assist parties to implement their obligations (Bluemel, 2005, Chen, 2015, Gupta et al., 2010, Langford, 2017).

There are several ways to approach the right to water in a human rights perspective: The right to water can be put forward as an implicit right, as an explicit right or as an independent human right. The first developments regarding the human right to water was as an implicit right under the economic, cultural and social rights. The right to water was developed and linked to the right to life, the right to health and the right to non-discrimination (Gupta et al., 2010:297). The General Comment No. 15 from 2002 stated the right to water in more explicit terms. Finally, the United Nations General Assembly elevated the right to water and sanitation to an independent human right in July 2010 through Resolution 64/929

(UNGA, 2010: Res: 64/292).

The Resolution marks a shift in the international community from a mainly economic approach to water and access, to a rights-centred approach to water and sanitation issues. The Resolution can be seen as proof of a growing international will for securing water rights, but the Resolution was not based on a clear international consensus. Although no states voted against the resolution, 41 states including the USA and the UK, abstained from voting (UNGA, 2010: Sixty-Fourth General Assembly).

There have been several critiques of the international rights system and towards the right to water and sanitation. Representatives from the USA criticized the resolution for using a language of a right to water and sanitation that was not rooted in existing international law. Non-state actors, like industry agencies and development banks, were critical of changing the notion of water from an economic good, to water as an independent human right (Gupta et al., 2010: 303). This motion was seen as a way to open up opportunities, especially for vulnerable groups. The legal adoption of the right to water can help convert political intentions, or lack of intentions, into more enforceable rights and state obligations. The human right to water means moving beyond looking at water as a commodity or a service of charity (Bluemel, 2005:973, Gupta et al., 2010:303-304).

The elevation of the right means focusing on the fulfilment of the human right to water by formalizing a system that can provide legal remedies for individuals whose rights are violated. The monitoring of states, and the focus on accountability, requires states to mobilize resources around water services. The adoption of the human right to water brings universal responsibility for states and non-state actors to provide financial assistance, technology transfers and capacity building. This is stated in the General Comment No. 15 and the UNGA Resolution on the right to safe drinking water and sanitation. States are required to respect the right to water, meaning that states should not engage in behaviour that could interfere with individuals right to safe drinking water and sanitation. They are obliged to take active measures to protect this right. This means that the states should actively protect individuals from third party infringements. The international system requires that the states work to fulfil the realization of the right to water. States are hereby required to take active measures to implement the rights through policy making and through mechanisms for monitoring and securing accountability (Gupta et al., 2010:304-305, Langford, 2017:324).

2.5 The International right to water

Dealing with water in a rights-based perspective was largely started in the United Nations through the development of Conventions, Comments and Resolutions addressing water in different ways. This process started to a large extent by deriving the right to water from other rights as it is not mentioned explicitly in the two Covenants on Political and Social rights and Economic, Social and Cultural rights. In this section, I will address the first mentions of water in relation to rights, then I will address how to derive a right from other rights, and the issues followed by doing so. Finally, I will address the development of the international right to water and sanitation by looking into the Comments and Resolutions from the United Nations.

Several international treaties recognize a right to water. The two largest steps taken with regards to recognizing the human right to water and sanitation are the two resolutions from the UN General Assembly and the Human Rights Council from 2010. The legal foundation for the right to water has a long history. The right to water is not recognized in the two most comprehensive covenants of the UN, namely the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. The right to water and sanitation has been linked to both ICCPR and ICESCR, even if it is not explicitly recognized.

Even if the right to water is not explicitly recognized in the two main covenants, it is referred to in other UN conventions. The two main ones are the Convention on the Elimination of Discrimination Against Women (CEDAW) from 1979, and the second one is the Convention of the Right of the Child (CRC) adopted in 1989. Article 14 of the Convention on the Elimination of Discrimination Against Women puts states as the responsible party for ensuring that rural women have adequate living conditions, also related to water (CEDAW, 1979:A/34/180).

In the Convention of the Rights of the Child under article 24; states are obliged to implement children's rights to health, by amongst other things fighting disease and malnutrition. Thus, the convention requires states, inter alia, to secure a provision of water (CRC, 1989:A/24). Both the CEDAW and the CRC are legally binding, which means that states that have ratified these conventions have accepted that they are legally binding upon them. However, both these conventions are restricted when it comes to who has the right to water. Therefore, it is not within these conventions a universal right to water that is legally binding. Thus, these conventions alone cannot be regarded as a sufficient recognition of the right to water in international law (Thielbörger, 2014:57-58). The limited scope and

applicability of these conventions means that we need to look beyond these treaties for a legal foundation for the right to water.

2.5.1 Deriving the right to water from other rights: The right to life

The right to water can be seen as intertwined with other rights that are linked to issues related to water and sanitation. From the Convention of Civil and Political Rights the right to water can be linked to Article 6(1) which refers to *the right to life*. As drinking water is essential for human survival, water for survival can be seen as being covered under the right to life. However, the nature of the civil and political rights that are guaranteed under the ICCPR are often seen as guaranteed if the state refrains from interfering with these rights (Winkler, 2012:49). This would mean that under the right to life, the state is responsible for not interfering with the right to life, and under it the right to water. Therefore, seeing the right to water under the right to life could lead to a lack of obligations for positive actions from the state to secure these rights. Only refraining from interfering, and not taking on any obligation for positive actions, is not enough to secure people's right to water.

When deriving the right to water from a civil and political right, there is a risk of blending the civil and political rights with social and economic rights. This is because the right to water is usually seen as being a part of the second category. However, other researchers like Winkler, argue that the division between these rights do not exist, as human rights are universal, indivisible, interdependent and interrelated (Winkler, 2012:50). From this point of view the blending of civil and political rights with social and economic rights is not considered a problem because they are in fact interdependent and interrelated. In the next two sections I will look into how the right to water can be derived from the economic, social and cultural rights, and the legal-bindingness following these derivations.

2.5.2 Deriving the right to water other rights: Economic, Social and Cultural rights

There are parts of the Covenant on Economic, Social and Cultural rights that can be related to water, even without an explicit reference. Both article 11 and 12 of the Covenant can be related to water. The right to water can be linked to the right to the highest attainable standard of physical and mental health, which comes from article 12 of the ICESCR. As safe drinking water is essential for health, this is not far reached. To realize the right to health, there is a basic need of potable water and safe sanitation facilities. If we are to interpret article

12 in a strict sense, water is only guaranteed under this right as far as is necessary for achieving the highest attainable standard of health, as there is no explicit reference to water under article 12. However, when addressing the General Comment 15. below, the right to health has been an important for deriving the right to water from the social covenant.

The other article of the social covenant that can be related to water is article 11. Article 11 refers to the right to an adequate standard of living, which is quite a comprehensive right, that includes a right to food and housing. Again, there is no explicit mention of water. What is required to achieve an adequate standard of living is not explicitly defined in the covenant, and the specific examples of food, housing and clothes still leaves the right with a broad meaning. Winkler stresses that food, housing and clothes should be viewed as illustrative components, rather than exhaustive listing of the scope of the right to an adequate standard of living (Winkler, 2012:42-43) Even if water is not mentioned specifically, water is not only necessary for survival, but for food preparation, personal hygiene and other household activities. The right to housing stresses three main factors, which are security, peace and dignity. Water is important for living with security and dignity, and we can interpret that included in this right is adequate water and sanitation facilities. However, as this is not explicitly recognized in the covenant, it is important to remember that there is no human right to water and sanitation under the right to an adequate standard of living. Even if the right to water can be linked to these covenants through other fundamental rights there is no reference to an explicit human right to water in either ICCPR or ICESCR. There are, however, still scholars who argue that you can find a human right to water in international law, but that doing so requires a bit of creativity.

2.5.3 What is legally binding and what is not?

The United Nations General Assembly recognized the human right to safe drinking water and sanitation through resolution 64/292. This resolution is the first of its kind to recognize the right to water and sanitation as a universal right that applies to all regardless of race, gender or socioeconomic status. This makes the resolution much more comprehensive than former treaties when dealing with water rights. However, it is important to remember that resolutions from the UN General Assembly are not legally binding, and do not have the status of international hard law. This is made clear in article 10 and 14 in the UN Charter, stating that UNGA Resolutions are ‘recommendations’. This also applies to the Human

Rights Council resolutions, as the HRC is an organ operating under the UN General Assembly (United Nations, 1945:Charter of the United Nations).

2.6 General Comment No. 15

General Comment No. 15 was adopted by the United Nations Committee on Economic, Social and Cultural rights in 2002. The General Comment addresses issues regarding the right to water, which gives more normative content to the right. In the introduction, the comment describes water as a public good that is fundamental for life and health. It stresses that states need to adopt effective measures for the realization of the right to water. In paragraph 2 of the General Comment No. 15. it is stated:

'The human right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses' (ESCR-Committee, 2002: General Comment No. 15, par. 2).

Under the legal bases of the right to water, the Comment gives reference to the two conventions mentioned above, namely the Convention on the Elimination of All Forms of Discrimination Against Women and the Convention of the Rights of the Child. It also gives direct reference to article 16 and 17 of the Covenant of Social, Economic and Cultural Rights. The legal basis of the right to water in the General Comment No. 15 states that the right to water is indispensable for the right to an adequate standard of living under article 11 of the ICESCR. As drinking water is essential for survival, the Comment states that the right to adequate food, clothing as housing will encompass the use of water for domestic and personal purposes. The right to water is linked to the right to the highest attainable standard of health under article 12 of the ICESCR. The Committee has already stated in Comment 14 that under the right to health, there is a right to potable water (ESCR-Committee, 2002:General Comment No. 14, par. 3, 11, 12a, 15, 34 and 51). The Committee stresses that water is required for several purposes outside domestic use. They refer to examples where water is necessary to produce food, to ensure environmental hygiene, to secure livelihoods and for cultural practices. The Committee do acknowledge that water allocation must first prioritize personal and domestic uses to prevent starvation and disease.

2.6.1 Normative content of the right to water: General Comment No. 15

Under the elaboration of the normative content of the right the Comment focuses on the freedoms and entitlements that follow the right to water. The freedoms of the right to water include access to existing water supplies, freedom from contamination and freedom from arbitrary disconnections of water sources. The entitlements focus on the equal opportunities of people to access systems of water supply. The normative content also addresses how water should be viewed and states that:

'Water should be treated as a social and cultural good, and not primarily as an economic good' (ESCR-Committee: 2002, General Comment No. 15, par. 11).

The elaboration of the normative content of the right to water is divided into three main areas: *Availability*, *Quality* and *Accessibility*. Under availability the Comment stresses, as noted above, that water supply for personal and domestic uses must be sufficient and continuous. Under the quality of the water available the Comment stresses that the water available for personal and domestic use must be safe and free from health hazards.

Generally, accessibility means that water facilities and services should be accessible to all without discrimination, and that this is within the states jurisdiction. Under the General Comment they elaborate on this and issues around accessibility are related to four dimensions. The first dimension when it comes to water and accessibility is *Physical accessibility*; The water facilities available must be within a safe physical reach for individuals, both for households, but likewise the workplace and educational institutions. The main focus is physical security, quality of the water, and that the facilities are cultural appropriate and meets privacy requirements. The second dimension is *Economic accessibility*: The economic dimension stresses that water must be affordable and that the cost of water facilities and services must not threaten the realization of Covenant rights. The third dimension is *Non-discrimination*: Which refers to that water must be accessible to all without discrimination, especially the vulnerable and marginalized parts of the population. Finally, the fourth dimension is *Information accessibility*, which states that i accessibility of information regarding water issues is a part of the right.

2.6.2 The state parties' obligations

Part three of the General Comment addresses the states obligations around the right to water. The Committee sets out that the states obligations towards its citizens include: An access to minimum essential water for personal and domestic use, that is without discrimination of any kind. The water has to meet the requirements of being accessible without significant waiting time. It should also meet the requirements of availability under paragraph 37 of the General Comment.

The steps taken by states must be: *'deliberate, concrete and targeted towards the full realization of the right to water.'* (ESCR-Committee, 2002:General Comment No. 15, par. 17)

There are three specific state obligations and that is to *respect, protect* and *fulfil* the right. Under the obligation to respect the right to water states shall not interfere directly or indirectly in the enjoyment of the right. And states should not engage in any activity that limits equal access to water. The obligation to protect include that states should provide protection from third party interventions with the enjoyment of the right to water. Third parties can be individuals, groups or corporations operating within the states jurisdiction. This means, inter alia, that states should take active measures if third parties deny equal access to the water resources through extraction, or pollution, of water resources. The states obligation to fulfil the right to water declares that states should take positive measures for peoples' enjoyment of the right, through facilitation and education. Under paragraph 26 is reads:

'This obligation includes, inter alia, according sufficient recognition of this right within the national political and legal systems, preferably by way of legislative implementation...' (ESCR-Committee, 2002:General Comment No. 15, par. 26)

Part three recognises that there are international obligations regarding the right to water. These include to recognition of international cooperation and assistance regarding water issues. And that parties should respect the enjoyment of the right in other countries. Under this point it stresses that states should not interfere directly, or indirectly, in the enjoyment of the right in other countries.

2.6.3 Critiques of the General Comment No. 15

Looking at the General Comment with a critical view, the first and main point that can arise critique is that the General Comment is not legally binding. It is not a part of hard international law. It must be clear that the comment is an interpretation of the International Covenant of Economic, Social and Cultural Rights. Said easily: The International Covenant of Economic, Social and Cultural Rights is legally binding, but the interpretations are not. If there is no explicit reference to the right to water in the covenant itself, the interpretation that this might be included under one of the other rights is not legally binding in a strict sense. The normative question; if the General Comment, and the right to water, should be a part of hard international law will not be discussed here. The fact that under the General Comment the right is not a part of international law, means that there are no direct legal obligations for states regarding the right to water. The general comment therefore lacks hard instruments for implementation of the recommendations. This is a common more general critique of the international human rights system, that they lack hard instruments for implementations and addressing violations.

The General Comment has been challenged for its normative content. A critique of the normative content of a right is difficult to address, because of the fact that these questions are exactly normative. Stephen Tully is one scholar who has written a critique of the General Comment which addresses the normative content. He critiques the drafting process and the style of The Comment. Tully notes that: 'Legal accountability is disproportionately skewed towards governments notwithstanding the delegation of functional responsibility' (Tully: 2005:63). He challenges the policy justifications that started the shift towards a human rights approach to global water issues. Tully also states clearly that the access to water for personal and domestic use, does not exist under hard international law. Further on he states that the General Comment is too focused on access to water and that it is too state-centric. By stating that the General Comment is too state-centric he argues that this leaves out the roles of multi-national corporations, the role of privatization and of Foreign Direct Investments, when it comes to water (Tully, 2005:16).

Tully's critique is not only aimed at the General Comment, but at the creation of new human rights. The critique of the creation of new human rights, is not something new. Philip Alston already raised this critique in 1984. Tully problematized the trend to interpret and include new rights based on the more fundamental rights. That this could open up for inclusion of things that should not be rights at all, watering down the meaning of rights

(Tully, 2005) This critique is more general and does not only apply to the General Comment No. 15. He uses the General Comment as an example of a larger practice. More specifically he underlines that the right to water is broader than the right to an adequate standard of living. He claims that the fact that the right to water in the General Comment No. 15. is broader than the right it is derived from and that this is logically incoherent. He problematizes the fact that the right to water is so interconnected to other rights. Another problem for Tully is that the right to water is derived from other rights that are already blurry, making the right to water even more blurry. Tully is concerned with what is often referred to as legal derivation of the rights. The logic behind legal derivation is that rights that are derived from other rights, would consist of the same characteristics as the right it is derived from. And following this logic the right cannot be larger, or have a bigger scope, than the right it is derived from (Thielbörger, 2014:69).

The right to water is derived from the social and economic right to an adequate standard of living, and the right to health. Following Tully's logic, the right to water cannot be larger in scope than these two rights seen together. Under this premise he states that the right to water under the General Comment No. 15 is logically incoherent because it encompasses dimensions larger than the right to an adequate standard of living and the right to health (Tully, 2005:461). This critique has however been answered by Pierre Thielbörger, who pin points that a right that is derived from two, or more, rights can be larger than its parents. As Thielbörger explains how he views broadness and acceptance of the right to water related to the two other rights:

'[The right to water] combines different elements of those rights, and this new conglomerate can, of course, exceed each of its parents in broadness or even acceptance. It can just not exceed the sum of both of its parents 'scope' (Thielbörger, 2014:69).

Another critique of the General Comment is that there is a lack of an adequate and specialized institution to oversee and monitor the right to water. There is some disagreement on how valid this critique is, because there are other rights, like the right to an adequate standard of living, that do not have a specialized institution to oversee the implementation of the right. During the last years of the development of the right to water, several specialized institutions and mechanisms has emerged within the UN system. Both through UN Water which was established in 2003, and especially the appointment of a Special Rapporteur on Water and Sanitation in 2011. Thus, the UN do have institutions that are specialized on

monitoring the right to water and sanitation through the Special Rapporteur. This critique is not as valid as it was before these institutions and mechanisms were established. Finally, Tully goes as far as stating that: ‘The impact of a human rights approach to water allocation will be marginal (Tully, 2005:57). He acknowledges the international development, and notes that a recognition of a human right to *access* water is inevitable.

2.6.4 General Comment No. 15 significance

The General Comment can be criticized on several aspects, either as part of a larger critique or based on its normative content. The significance of the Comment also needs to be addressed. The critique of the large scope of the normative content in the General Comment can be seen as a strength as it gives a formulation of both the entitlements, freedoms and obligations of states. The General Comment is the first UN document that is explicitly focused on the right to water. It not only gives normative content to the right, but elaborates on the sources of the right to water, and the interconnection to other rights. The General Comment is a major achievement for the development of the right to water, even if it is not considered hard international law. It builds on scientific sources and refers to acknowledged organizations like the World Health Organization. Making it a solid foundation for understanding the development of right to water in scientific, as well as normative ways.

The General Comment has been influential both within the international human rights system and at the national level. It has been referenced in other general comments by the UN as well as in national judicial decisions (Thielbörger: 2014:67). As the development of the human right to water continued, the General Comment became a good starting point for the foundation of the scope and content of the right. It also plays an important role for putting issues regarding water and sanitation on the agenda internationally, and by pushing for more research and cooperation regarding these issues.

2.7.1 The United Nations General Assembly Resolution: The Human Right to Water and Sanitation

In 2010 the UN General Assembly adopted Resolution 64/292 on The Human Right to Water and Sanitation elevating the right to water to an independent human right. Following the General Comment No. 15 this Resolution was developed to establish an explicit human

right to safe drinking water and sanitation. However, as mentioned above we need to keep in mind that the resolutions from the UN General Assembly are generally not legally binding upon states. The UN charter clearly states that resolutions from the General Assembly are recommendations (United Nations: Charter of the United Nations: 1945). Bearing this in mind I will elaborate further on the content of the resolution. The first part of the Resolution declares the role of the new right in the following way:

'...Recognizes the right to safe and clean drinking water and sanitation as a human right that is essential for the full enjoyment of life and all human rights;' c

The language is clear that the right to water and sanitation is now an independent human right. It does not elaborate on where the right is derived from or the foundations of the right. It states that the right to water is essential for the full enjoyment of life but does not elaborate anything more on what this entails. The resolution, while using a clear language, is vague when it comes to both the scope and the content of the right. This could be due to several factors that I will elaborate further below. Nonetheless, the Resolution is a bit more specific regarding the role of states and organizations, and calls for cooperation between these. The second paragraph the Resolution reads:

'Calls upon States and international organizations to provide financial resources, capacity-building and technology transfer, through international assistance and cooperation, in particular to developing countries, in order to scale up efforts to provide safe, clean, accessible and affordable drinking water and sanitation for all;' (UNGA, 2010:Res 64/292).

States and international organizations play a key role in the realization of the right to water. The Resolution clearly states that states and organisations must work together if they are to be able to provide safe drinking water and sanitation to all. However, the language is still highly recommendation-focused. The resolution does not give a clear responsibility for states to realize the right to water but is more focused on practical steps that can be taken. It does not clearly declare that states should provide safe drinking water, but rather that states and international organisations should *scale up efforts*. This is again quite vague and does not put much pressure on these actors to work for a realization of the right to water. The language that is used in the Resolution is not a strict rights-based language. This does not mean that the elevation of the right to water and sanitation is without content or responsibilities. The r

Resolution is the start of the new human right to safe drinking water and sanitation, which leads to a change in the discourse, and the way we address water rights.

The final part of the resolution addresses the role of the Independent Expert on Human Rights Obligations Related to Access to Safe Drinking Water and Sanitation. The third paragraph reads:

'Welcomes the decision by the Human Rights Council to request that the independent expert on human rights obligations related to access to safe drinking water and sanitation submit an annual report to the General Assembly,¹³ and encourages her to continue working on all aspects of her mandate and, in consultation with all relevant United Nations agencies, funds and programmes, to include in her report to the Assembly, at its sixty-sixth session, the principal challenges related to the realization of the human right to safe and clean drinking water and sanitation and their impact on the achievement of the Millennium Development Goals.' (UNGA, 2010:Res 64/292).

2.7.2 The development and approval of the Resolution

Like mentioned above the resolution is quite vague when it comes to the scope and the content of the right to safe drinking water and sanitation. Here it is interesting to look at the situation around the development and approval of the resolution. The Resolution was passed with 122 nations, of the 192 members, voting in favor of the resolution. No states voted against, but 41 states abstained from voting. It's worth noting that 29 nations were not present at the assembly to vote (UNGA, 2010: Sixty-Fourth General Assembly). So roughly, out of the members that were present, about two thirds voted in favor of the Resolution, and one third abstained from voting. Some of the most outspoken skeptics that abstained from voting were Canada, the UK and USA. The European Union has been outspoken about its skepticism towards of a human right to water. Also, none of the suggestions from the European Union was taken into account in the content of the Resolution. Another aspect of the development and support of the Resolution and the new right; is the economic support by states. The Resolution was mainly sponsored by African and south American states. And in accordance with the skepticism noted above no North-American state or EU member sponsored the Resolution (Thielbörger, 2014:79).

It was a clear division between the attitudes towards the development of the new right to water. While the US, Canada and the European Union expressed concerns, other

representatives were clearly pushing in favor of the new human right to water and sanitation. During the Action on the draft of the Resolution in the General Assembly, the representative from Bolivia stressed that it was not enough to urge states to comply with their obligations, but that they must be urged to protect the right to drinking water and sanitation. (UNGA, 2010: Sixty-Fourth General Assembly) This is one example of how the support for the human right to water at this time was especially backed by South American and African states, but both scholars and activists from India played an important role in the development and support of the right to water.

2.8 Human Right Council Resolution 15/9: ‘Human Rights and Access to Safe Drinking Water and Sanitation’

Following the Resolution from the General Assembly, the Human Rights Council adopted the Resolution on human rights and access to safe drinking water and sanitation in October 2010. The HRC resolution builds on the Resolution from the General Assembly, but it is much more comprehensive. The HRC Resolution, recalls the UNGA Resolution that recognized the human right to safe drinking water and sanitation and other relevant resolutions. It affirms that the right to safe drinking water and sanitation is derived from the right to an adequate standard of living, like mentioned in General Comment No 15. The Resolution stresses that the right is linked with other rights, like the right to the highest attainable standard of physical and mental health, and the right to life (HRC, 2010:Res:15/9).

The HRC resolution goes further in elaborating the role of the states. Here it starts by reaffirming that the states have the primary responsibility in ensuring the realization of human rights, including the right to safe drinking water and sanitation. The language used in this resolution is more detailed and much more comprehensive than the UNGA resolution, especially when it comes to the role and responsibilities of states. The state is responsible for ensuring transparency, non-discrimination and accountability, even if water and sanitation services are delivered by a third party. The fact that the HRC Resolution holds states responsible even if the services are delivered by a third party is very important. This is because the states are responsible for assuring that human rights are respected by third parties within their borders. When it comes to water and sanitation this is highly relevant as water and sanitation services in many cases are not delivered by the state as the main provider.

As mentioned above the HRC resolution is much more comprehensive than the former UNGA Resolution. Paragraph 8 of the HRC Resolution has six points especially elaborating on the state’s responsibilities. The first one is that states should develop tools and mechanisms

for realization of the right, including legislation and sector plans. The second point of paragraph 8 is focused on that state parties should ensure full transparency for the process of the provision of safe drinking water and sanitation services. Thirdly the state has a specific responsibility to pay special attention to vulnerable and marginalized groups. Fourth; human rights should be integrated into processes regarding service provisions. The fifth point is focused on that states should implement a framework for service providers that is in line with human rights obligations. And the sixth and final point is focused on that state should provide accountability mechanisms that can deal with human rights violations (HRC, 2010:Res:15/9).

Paragraph 9 deals with state's obligation in relation with non-state providers. Much similar to the point above that is focused on transparency. Paragraph 9 point b, recalls that States should ensure that non-state service providers: *'Contribute to the provision of a regular supply of safe, acceptable, accessible and affordable drinking water and sanitation services of good quantity and sufficient quality'* (HRC, 2010:Res:15/9).

Like the UNGA Resolution before, the HRC Resolution gives special mention to the role of the Independent expert. The HRC Resolution calls upon the Independent expert on safe drinking water and sanitation to continue her work on clarifying human rights obligations regarding the right to safe drinking water and sanitation. And it states an appreciation for the work done by the Independent Expert, especially through her second annual report regarding states obligations and the obligations of non-state providers of water and sanitation services. (HRC, 2010:Res:15/9).

2.9 Treaties and Customary Law

In this section I will elaborate on the relationship between human rights and international law. As I mentioned in earlier sections of this chapter, Comments and Resolutions are not necessarily legally binding upon states. Thus, I will try to explain how international law can be developed through treaties or through customary law to put these treaties in a legal context. Both treaties and customary law are sources of international law, but they are quite different. I will look into the criteria for a right to be viewed as part of international law and see how the international human right to water fits within these.

International treaties are the main source of international law, customary law is the second source. Customary law is under the ICJ Statute considered a source of international law and might have an even broader reach than the UN treaties, because it would affect states that have not signed these treaties as well. So as the resolutions are not legally binding, there is another way for them to develop as part of international law. (International Court of Justice,

1969 & Thielbörger, 2014:75) There is two ways for customary law to evolve, first is through state practice and second is through a conviction or recognition of a practice as law (*opinio iuris sive necessitatis*). For something to be considered customary law through state practice, the behavior of states must be uniform, consistent, general and over some time. Another aspect is that the practice will be general only if those states that are affected are involved. Other than the criteria mentioned above and the ICJ Statute there is a debate on what that should be considered state practice and *opinio iuris*. Thielbörger assumes that state practice corresponds with a state's actions, while he sees *opinio iuris* as being related to state's declarations and statements (Thielbörger, 2014:76 & Winkler, 2012:67). The behavior must be uniform, consistent, general and over a period of time to be qualified to be considered customary law.

When it comes to the right to water, and human rights in general, in the view of customary law almost all states will be affected. Based on what is mentioned above; that state practice needs to be seen from almost all parties affected, we would seek to see a consistent and general state practice from most states regarding water rights. This is difficult to find and there is a large variation in the way that states deal with the human right to water and sanitation. State have different ways of dealing with water rights and some even chose to ignore them. Another important point is that several states have not signed the International Covenant on Economic, Social and Cultural Rights which has been used as a source of the right to water. And even if all relevant states have signed the covenant we still need to see a consistent state practice, independent of the international covenants. Which we currently do not see today, therefore I will argue that there is limited evidence to show that the human right to water and sanitation should be considered customary law at this point in time.

The UNGA Resolution and the HRC resolution are not legally binding on states and does not create a legally binding human right to water and sanitation under hard international law. The HRC Resolution was adopted without a vote, but still received positive statements from former critical states like the UK and USA. States in the Human Rights Council showed an unanimously positive attitude for the new, more comprehensive Resolution. (Thielbörger, 2014:82). It is important to remember that the Human Rights Council only have 47 members, and that the unanimously positive attitude towards the Resolution only reflects the members represented here and cannot be said to represent an consensus, or *opinio iuris*, from all relevant states. The International Court of Justice has on more than one occasion stated that a single resolution cannot be view as customary law by being 'instant custom'. Customary law must be part of a larger process and does not follow just one single event. (Thielbörger,

2014:82) We can see a change in attitude from several states that happened just within a few months from the adoption of the UNGA Resolution to the adoption of the HRC Resolution. In that sense, we see a growing support of the human right to water and sanitation and this can be viewed as part of a larger process that might lead to the right to water and sanitation to be included in customary law in the future. While this alone does not create an instant custom that can be viewed as customary law.

However, there are events that are pushing the right to water in a positive direction in showing a growing state practice and international focus. The most relevant ones are the Millennium Development Goal Number 7, the General Comment No. 15, the UNGA Resolution of the right to water and sanitation and the HRC resolution on human rights and safe access to drinking water and sanitation. All of these are important proof of more willingness for cooperation and acceptance of water and sanitation rights. Finally, the re-appointment, and new mandate, of the independent expert on safe drinking water and sanitation is important. Especially, the development of the new mandate as Special Rapporteur on safe drinking water and sanitation in 2011. The role of the Special Rapporteur will be discussed in the next chapter.

2.10 Putting the pieces together: Where does the international human right to water stand?

The right to water has been addressed in several international treaties and the right has been developed and derived from the fundamental rights from the two Covenants. The right to water can be seen as interconnected with the right to life, under the Convention on Civil and Political rights, because water is essential for survival. Under the Social, Economic and Cultural rights water is arguably intertwined with the right to health and the right to an adequate standard of living. The right to water was developed and elaborated under the General Comment No 15. in 2002 which focused on the availability, quality and accessibility of water and sanitation facilities. The General Comment stressed that the states have a responsibility to respect, protect and fulfil the right to water. The Comment also pin point that under this responsibility states should adopt political measures and national legislation that is in accordance with the right to water. The General Comment is not legally binding on states and has to be viewed as recommendations for states. However, it showed a shift that might be viewed as the start of water rights moving towards a role in customary law. The right to water might be a part of customary law in the future, but for now the two elements required for something to be considered customary law; state practice and *opinio iuris*, has not been

consistent over time and thus not completely fulfilled at this moment. Therefore, we cannot say that the right to water is a part of hard international law through customary law.

Following up on the General Comment the UN General Assembly Resolution of 2010 and the Human Rights Council Resolution affirmed the human right to water and sanitation. The Council's Resolution explicitly derived the right from Article 11 of the ICESCR; The right to an adequate standard of living. This means that water is viewed as a part of this right together with housing, clothing and food. The right to water can be viewed as a human right under the right to an adequate standard of living, in that case, it only applies to states that are parties of the International Covenant on Economic, Social and Cultural Rights. The Convention on Elimination of all forms of Discrimination Against Women and the Convention of the Rights of the Child also include a reference to water, but these conventions are limited in scope and content. The Resolutions from the General Assembly and The Human Rights Council from 2010 were thus important to declare that the right to water and should be universal for all without any forms of discrimination and that states should have special considerations for marginalized groups.

As for the legal-bindingness of the UNGA and HRC Resolutions; they are not strictly legally binding. If we view the several legal foundations of the right to water together, especially the International Covenant of Economic, Social and Cultural Rights, the CEDAW and the CRC, the right to water has a good legal foundation. There are only a few states have not signed these, and most states could be considered legally bound for a by a right to water in one way or another. It's been showed that the General Comment No. 15 and the two Resolutions from 2010 have been a part of a growing support for water rights, and the international community might be moving towards a situation where the right to water in the future can be viewed as part of customary law, which again would be binding upon states. However, for water rights to be a part of customary law we need to see consistent state practice over time. There is a clear shift towards a positive discourse and growing support for the international human right to safe drinking water and sanitation and most states today are in way one way or another bound by some treaties regarding water rights.

2.11 The Special Procedures: Promotion and protection of human rights

To understand the complexity of the international human rights system and how it works it is helpful to look into how things are organized. In this section I will explain the Special Procedures and the organization of the mechanism of these procedures that lie under the Office of the High Commissioner of Human Rights. As the Special Rapporteur on safe

drinking water and sanitation is one of the main mechanisms to monitor the right to water it is valuable to understand the background of the Special Procedures to understand how the Rapporteur work. I will address issues and complaints of the Special Procedures, but also how critiques of the special procedures can be met. In the final section I will explain the Universal Periodic Review and how this is related to monitoring and holding states accountable for human rights. Finally, I will explain how the Special Rapporteur of safe drinking water and sanitation was established and the role of the Rapporteur. I will start off with a short history of the Special Procedures and the mechanisms available to give some background into the system the Special Rapporteur works within.

2.11.1 The Structure of the Special Procedures

The Special Procedures are mandates created by the Human Rights Council and its predecessor; the Commission on Human Rights. The Special Procedures are implemented by experts entitled Special Rapporteurs, Independent Experts or Working Groups. (Connors, 2017:54) The Office for the High Commissioner of Human Rights is the entity with the authority to promote and protect universal human rights. Part of this work is done through the support of UN human rights intergovernmental and expert mechanisms. The OHCHR supports the Special Procedures through its legal, thematic, policy, methodological and fact-finding expertise. This is done through research and analysis, but also through provision of administrative and logistical servicing (Connors, 2017:64). The Special Procedures are also connected to other human rights mechanisms like the Universal Periodic Reviews and this relationship will be explained further down.

The OHCHR is responsible for the substantive and technical support of the Special Procedures. Therefore, the effectiveness and capacity of the Special Procedures are dependent on the support of the OHCHR. The Office is crucial for ensuring that the Special Procedures are regarded as a coherent human right mechanism. This coordination means that the Special Procedures should not be viewed as just individual responses to thematic and country specific concerns. The mandates receive substantive and technical support from the OHCHR, but the mandate holders are still independent of the OHCHR and the High Commissioner.

The OHCHR's management plan from 2014-2017 was focused on strengthening the human rights mechanisms (United Nations Human Rights Office: OHCHR management plan 2014-2017). As the OHCHR is fundamental for the Special Procedures' effectiveness to fulfil their mandates, the relationship between the OHCHR and the Special Procedures, is focused a lot around resources. Both the financial resources available to support the OHCHR as a

whole, and the financial resources for the Special Procedures in particular, are important. The High Commissioner is committed to provide the same level of support to each of the Special Procedures through the UN regular budget. Funding of the Special Procedures is also done through extra-budgetary contributions. Individual states, or other stakeholders, can economically support individual mandates. There is no obligation to disclose the outside financial support to the OHCHR or to the Human Rights Council. This does raise a question of transparency, and the independent role of the mandate holders (Connors, 2017:76).

2.11.2 The Special Procedures: Country visits by the Special Rapporteurs

In her work on country visits Felice D. Gaer explores how country visits by the thematic rapporteurs can be a sign of states cooperating, rather than complying, with the Special Procedures. She explores how some visits might be evidence of states efforts to prevent critical human rights scrutiny through a tactic of picking and choosing which rapporteurs they invite, and who is blocked. The Human Rights Council emphasis on universality has focused, inter alia, on the Special Procedures (Gaer, 2017: 88).

Mandate holders have developed a practice of visiting countries in person to examine and assess the real-world conditions that fall within their mandate. The country visits can be used to compare how states address similar human rights issues. They can examine the compliance with relevant human rights norms, observe practices and facts and communicate concerns and recommendations for improvement to public officials. The visits have become a marker of a country's cooperation with the UN, and an indicator of accepting scrutiny of compliance with universal human rights standards (Gaer, 2017: 89). The states do accept country visits on a voluntary basis, which can lead to some challenges. First is the challenge of non-cooperation from states, then comes the paradoxical situation that arises as those states that cooperate are more closely scrutinized than those that refuse. A third challenge is that among those who do cooperate some states make choices that deliberately prevent certain kinds of scrutiny. 'The picking and choosing' tactic is explained by Philip Alston: States invite some mandates, that are considered relatively harmless, to show that they cooperate with the Special Procedures, but at the same time they deliberately block certain other mandates (Alston, 2011:274-276). The picking and choosing can open up for questions regarding the universal coverage the mandates seek to carry out in their work. Another question is; if the experts are being manipulated by non-cooperating states in ways that conceal severe human rights abuses. These questions are too comprehensive to be elaborated

on in this thesis, but it is worth noting that when we discuss the Special Procedures related to states cooperation, it is a complex puzzle to untangle and several factors come into play.

2.11.3 Improving country visits and state cooperation with the Special Procedures

As mentioned above non-cooperating states manage to avoid scrutiny in many ways including through picking and choosing harmless topics for investigation. Cooperating states are sometimes under more scrutiny than non-cooperating states. This is something that needs to be addressed regarding how the Special Procedures work to monitor human rights. The focus should not only be on the number of mandate holders that visit. If each mandate holder is as good as any other, this opens up for states to manipulate the situation regarding cooperation (Gaer, 2017:106). The accuracy and verification of facts are becoming increasingly more important, not only to address the real-world situations, but to address the critique from states that mandate holders are biased (Gaer, 2017:128).

State cooperation with the Special Procedures are one of the most important structural determinants of the mechanisms influence and impact (Limon & Piccone, 2014:11-12). The tools available for mandate holders – missions, interactive dialogue with states, communicating with states about allegations – can only be effectively leveraged through cooperation. The mandate holders cannot force states to cooperate, and they have to rely on persuasion and/or mobilizing international pressure (Limon, 2017:142). The Special Procedures has showed a movement from the original promotion of human rights, set out by the Charter of the United Nations, to the protection of human rights. The non-interference in domestic affairs, was to a large extent put aside when the Special Procedures were created. However, the tools available for the mandate holders are still highly dependent on state cooperation. Mandate holders can receive individual petitions and send communications, but they cannot force states to respond. They can conduct fact finding missions and gather information, but they cannot force states to let them into their territories (Limon, 2017:143).

The growing autonomy of the mandate holders in the development of the Special Procedures led to a push-back from states. Three main reforms have assessed the role of the Special Procedures. The first one by the Commission on Human Rights in 1998-2000- The second reform was through the broader UN reforms that took place between 2002-2004. Finally, the third reform was during the Council's creation and the Councils five-year review in 2006 and 2011 (Limon, 2017:143) The focus on cooperation between states and mandate holders has been a recurring theme during all three reforms. Even though the Council urges all states to cooperate with the Special Procedures there is no legal obligation to do so and

therefore no legal sanctions available (HRC, Res 5/2). This means mandates should focus on establishing a relationship with state representatives based on mutual trust and confidence (Limon, 2017:147)

2.12 The relevance of the Universal Periodic Review

The Universal Periodic Review is a process of evaluating the human rights records of all UN member states. The UPR provides an opportunity for states to show how they are working to improve the human rights situation in their country. The UPR is under the Office of the High Commissioner on Human Rights, and is a mechanism applied together with the Special Procedures to assess the human rights situations within a country. The ultimate goal of the UPR is to better the human rights situations in every country and the review is designed to prompt, support and expand the promotion and protection of human rights on the ground (OHCHR, HR Bodies: UPR) This means that the UPR together with the work of the Special Rapporteur can be tools to investigate situations regarding the rights to water.

The UPR encourage states to cooperate with the Special Procedures. States cooperation, or non-cooperation, is detailed in the information prepared for the UPR. The main questions for the UPR related to the Special Procedures are: If the state is willing to issue a standing invitation, if the state is willing to cooperate with one or more Special Rapporteurs, and if the state is willing to accept visits from a specific mandate holder. This makes the Universal Periodic Review a potential arena for ‘naming and blaming’ of states that are unwilling to cooperate with the Special Procedures. One aspect of the UPR which can be criticized is that the questions are often less focused on if the state is willing to in fact implement the recommendations from the mandate holders (Gaer, 2017:104). This critique then refers to than the UPR might be too focused on cooperation, rather than the implementation of the recommendations for how to better the situation on the ground. The recommendations from the mandate holders might be the most relevant regarding which issues needs to be addressed in in a country a specific country. On the other hand, the Special Procedures and the UPR can be viewed as complimenting mechanisms, where the UPR pushed for cooperation, the Special Rapporteurs can focus more on specific issues within a country.

2.13.1 The Resolution for the Independent Expert & the Special Rapporteur

The development of the human right to safe drinking water and sanitation needs mechanisms for addressing implementation and realization. During the development of the right to water the Human Rights Council created a mandate for an Independent Expert on safe water and sanitation. Catarina de Albuquerque was given the role as Independent Expert, and she contributed largely to the development of the content of the right. In this chapter I will look into the resolutions concerning the role of the Independent Expert and the Special Rapporteur. Then I will address the mechanisms and tools the Special Rapporteur can apply to monitor and protect the right to water.

The Independent Expert on safe water and sanitation was appointed by the Human Rights Council in 2008. Resolution 7/22 states that the Independent Expert on the issue of safe drinking water and sanitation would be appointed for a three-year period and the main responsibilities would include: develop dialogue with governments, UN institutions, the private sector, national human rights institutions, civil society organizations and academic institutions. To make recommendations on the realization of the Millennium Development Goals, focused on no. 7 on Ensuring Environmental Sustainability. To undertake a study on further clarification of the content of human rights obligations regarding water and sanitation. To work in close coordination with other special procedures and organs of the Council. And finally, to submit a rapport with conclusions and recommendations. (HRC, 2008: Res:7/22).

In April 2011, the Human Rights Council passed Resolution 16/2 which extended the mandate of the Independent Expert on Safe Drinking Water and Sanitation to Special Rapporteur. Paragraph 4 of the Resolution reads:

'Decides to extend the mandate of the current mandate holder as a special rapporteur on the human right to safe drinking water and sanitation for a period of three years' (HRC, 2010:Res:16/2).

After the two resolutions from the General Assembly and the Council on the human right to water and sanitation in 2010 the independent expert was appointed the new role of Special Rapporteur and the language of the responsibilities changed quite a bit from resolution 7/22 to resolution 16/2. Resolution 16/2 elaborated on the new mandate and the role of the special rapporteur. Paragraph 5 of the resolution starts with saying that the rapporteur should fulfil her mandate by:

'promoting a full realization of the human right to safe drinking water and sanitation by, inter alia, continuing to give particular emphasis to practical solutions with regard to its implementation, in particular in the context of country missions, and following the criteria of availability, quality, physical accessibility, affordability and acceptability; (HRC, 2010:Res:16/2).

One of the main tasks for the independent expert was to elaborate on the content of human rights obligations regarding water and sanitation. After the resolutions and the new human right to water and sanitation, the main task of the Special Rapporteur is to promote the full realization of this right. Resolution 16/2 therefore affirms the right to safe drinking water and sanitation adopted in the resolutions from 2010. Another important role of the Special Rapporteur is to monitor the way the right to water and sanitation is being realized throughout the world, and rapport back on the situations regarding fulfilment of the right. Resolution 16/2 encourages that states cooperate with the Special Rapporteur and respond to requests for information or visits to survey the human rights situation regarding water and sanitation (HRC, 2010:Res:16/2).

2.13.2 The role of the Special Rapporteur on Safe Drinking Water and Sanitation

The Special Procedures are mandates created by the Human Rights Council, and before by its predecessor the Commission on Human Rights. As outlined above the Special Procedures are implemented by experts entitled Special Rapporteurs, Independent Experts or Working Groups (Connors, 2017:54). The Special Rapporteurs use different tools and mechanisms to fulfill their mandate. When Catarina de Albuquerque was appointed as the Independent Expert on water and sanitation in 2008 she started out reporting to the General Assembly on the realization of the MDGs, and she focused on financing issues. Her work was important in collecting best practices, and she developed a set of criteria for identifying good practices related to water and sanitation. As her mandate changed in 2011 from Independent Expert to Special Rapporteur, her work shifted to focus on addressing the implementation of the right to water and sanitation and the fulfillment of the right. Under this she worked on national and local planning related to implementation of the right (Winkler, 2012:261). One of the main mechanisms that the Special Rapporteur make use of to fulfil their mandate of monitoring the rights are the country missions as mentioned above. In the next chapter I will elaborate on the work of the Special Rapporteur related to water rights in the Indian context.

Chapter 3: Method

This chapter lays out the method for researching the question:

Has the human right to water strengthened the opportunities for people that have their rights to water violated in India? Bearing in mind the questions presented in the introduction and the theoretical framework, I will present which method I chose and the reasoning behind it. I will then present arguments for the case selection of this study. Finally, I will explain the data collection process and the scope and limitations of the research.

3.1 Research question and research design

One of the main questions that arose when I was addressing how to investigate my research question was; how do I investigate the human right to water and sanitation in a comparative perspective? Keeping in mind the importance of explaining the choices made, I will explain the method, case selection and data collection process in the next sections. After finding the research question and hypotheses, the next step was to choose the method to investigate these questions and hypotheses. In my research, the questions imply that we are looking for answers beyond mere correlation. Therefore, the first choice made was to conduct a qualitative case study of the topic. Creswell states that the focus of a case study is to develop an in-depth description and analysis of a single case, or multiple cases. Data collection can be done through multiple sources. In this thesis, the main sources used are existing research, legal and political documents, interviews and observations. Following the data collection, the material is then analysed through a description of the case, themes of the case and cross-case themes (Creswell, 2013:104-105).

3.2 Case selection

India is not only the largest democracy in the world, but it is a sub-continent struggling with massive problems related to water and sanitation. Therefore, the human right to water could potentially have a massive impact in India if it is applied and respected. This makes India an interesting case to study, first because of the share number of people affected by water issues and secondly because this case might exemplify different approaches or for mobilization around water rights. One of the main goals of this research is to follow the development of the international right to water from the UN system, to a local context.

Looking into the existing quantitative research India is a clear outlier case with regards to the relationship between democracy and human rights (Beer & Mitchell, 2006).

This makes it an interesting case for a qualitative study that can give valuable insight into the variables affecting the relationship between human rights and democracy. The connection between human rights and democracy can be investigated and exemplified through a study of water rights. Following the development of the right to an independent human right. India is a stable democracy with long democratic traditions. The idea that they should support human rights is well expressed, yet, India has had a long history of human rights violations.

The case was also chosen by a motivation to document parts of the human rights situation in India. By applying comparative framework, I'm hoping that this study can be built on in further research regarding the human right to water in India. Considering the potential impact of change, as they are not doing well with regard to water rights, the impact of 'naming and blaming' might be valuable. Addressing the methods and mechanisms applied by the United Nations Special Procedures put up against the local contexts could potentially give valuable insight to how human rights work within the local context. If it is possible to trace some of the causal mechanisms related to human rights mobilisation in India, we might be able to find some evidence to why the country is doing so poorly regarding human rights. The quantitative factors like a stable political system, and to some extent a collaboration with the UN system is in place in India. Therefore, I chose a qualitative case study to try exploring the human rights situation around water and how mobilization around these rights work.

3.3.1 The method of Process tracing

Process tracing is defined as 'the systematic examination of diagnostic evidence selected and analyzed in light of research questions and hypotheses posed by the investigator.' Process tracing can contribute decisively both to describe political and social phenomena, and to evaluate causal claims (Collier, 2011:823). To evaluate these causal claims and investigate the questions; the method of process tracing is focused on in-detail description. Collier stresses that 'what in a sense is "static" description, is a crucial building block in analyzing the processes being studied' (Collier, 2011:823). For the analysis to not fall short, there is a need for a detailed description of the phenomenon one chooses to study. Thus, in this thesis I describe both the human right to water in depth and present a detailed description of the aspects of the case that will be studied.

As the right to water was elevated to an independent human right in 2010, this gives us a specific point in time which could be seen as a critical juncture. This potential juncture could be supported or not by tracing a potential change in opportunities for people in India after this elevation. By tracing three aspects regarding water rights in India, I want to see if

we can find a change in discourse, language, policies, law and mobilisation during the period where the human right to water was developed from the 1990s and up until today. I decided to focus on describing three main areas regarding the national context, namely government policies regarding water, judicial development and social mobilisation around water rights. In the international context, using the international development of the right as a backdrop, I will investigate the role of the Special Rapporteur on safe drinking water and sanitation. I will look into how the Special Procedures work through the mechanisms of the Special Rapporteur to address the right to water in India. As the Special Rapporteur is one of the main tools used by the UN to monitor the realisation of human rights, I found that this could be a good starting point in trying to link the international human rights system with the national context. As one of the main tasks of the Special Rapporteur is to conduct country visits to investigate human rights situations in a specific country, I will trace the country visit to India by the Special Rapporteur conducted in November 2017. I want to explore what these country visits contain, how the visit was addressed by the Indian government, and how local people and activist in India view these visits. One of the main questions here is if the international system, through the Special Rapporteur, is seen as a valuable tool, or not, for activists working on water rights.

3.3.2 The data collection

Data will be collected firstly by looking at existing research on the topic. I will use legal documents and other official documents from the UN that I will describe and analyse. I will use data collected through field work in India conducted over a period of three weeks based in New Delhi and Kolkata. The data collected here is focused on the country visit of the Special Rapporteur as I investigated how civil society used the Special Rapporteur and what they thought of the relationship between the international human rights system and the local mobilisation for water and sanitation rights. Through both observation, participation and individual informal (unstructured) interviews, data was collected from meeting with civil society, and participation in a formal meeting between the Special Rapporteur and civil society actors in Kolkata. Data was collected from sources with different backgrounds like academics, the Special Rapporteur Léo Heller and his team, Indian journalists, students and local activists. Some data was collected after the visit, through email correspondence with informants. The project is registered and accepted by the Norwegian Centre for Research Data (NSD).

During the field work and during the process of structuring the data and writing the thesis, I decided to anonymize all the informants. This is done mainly to consider their security and that the information gathered might be used in a way that will have consequences for their work, economy or security. During the fieldwork, I got to see for myself how critical the current government are of human rights activists and academics. Travelling to India to collect data about current human rights situation is not without difficulties, part of the field work and conducting research is to find a way to work through these hurdles. I had an interview with the Special Rapporteur lined up during the country visit, but this was cancelled a few weeks before. I was however able to participate in a meeting that was hosted by a civil society organisation I got in contact with while I was in India. This worked as an access point both to the Special Rapporteur and his team, and also to local activists and journalists. The informants that contributed to the data collected were found by the snowball method.

3.4 Scope and limitations of this thesis

During the process of developing the research question and hypotheses the scope of the thesis is constructed. By choosing a theoretical framework and the method for researching the question, the scope of the research becomes clearer. It is important to be aware that the choices made put some limitations on the application of the research. To try to answer my research question in the best possible way I made some choices on what this research will focus on. When the decision to focus on the right to water was made, I limited the focus to the application and translation of the international human right to water and to water rights in India. Water and sanitation are interconnected to some extent, but as this would make the scope of this thesis too extensive, I focused on the right to water. I will mention the right to sanitation where I find it relevant, but the main focus in this thesis is on the right to water specifically.

When focusing on human rights, states are the main actors studied, along with the international system. The reason behind choosing India as a case, is mainly because I wanted to see how the international system and the mechanisms work within a large democracy. To the extent that resolutions and human rights are binding, they are binding upon states. This works well when working on development of the right in the Indian legal system. Some limitations arise by choosing the large democracy of India a case. When I look into mobilization and examples from India, I have to limit the focus to the local context. Thus, the findings from this thesis cannot be viewed as a complete picture of the situation in India. It is imperative to bear in mind that India is filled with a multitude of cultures, traditions and

languages. As India is a federal state some issues and situations are dealt with in different ways within the different states. I will try to overcome some of these issues by applying a comparative framework, and use detailed description of the case. I want to express that the data collected from the informants during this research has to be considered within the context it is collected, with the limitations that follow.

Chapter 4: Overview of India

4.1 The political system and representation

The bicameral system in India is constituted to represent not only India's 29 states and 7 Union territories, but further it is a system that should represent the huge range of cultural, linguistic, religious, national, regional and local interests. The complexity of India's diversity is hard to grasp. The national political discourse is to a large extent shaped around networks related to class, religion or ethnicity. The Lok Sabha (Lower house) with its 545 members have reserved 79 seats for Scheduled Castes and 40 seats for Schedules Tribes. India has universal suffrage and the members of the Lok Sabha are elected through the first-past-the-post system in single-member constituencies. The Rajya Sabha (Upper house) has 245 members, where 12 are appointed by the president and the 233 others are elected indirectly through the assemblies of the states and union territories for a six-year term (India: Constitution and Politics).

4.2 Social networks in India

The subcontinent of India has a long tradition for social networks. And with the countries varieties this has continued to develop to a broad range of different cotemporary social networks today. While some social networks in India are based on the Hindu tradition and history, the push for secularization after the colonialization opened up for a range of social networks. These were based not only on religion, but political, economic and global interests. The democratization process brought along the manifestation of civic ties of the local, regional and national communities in India. India is known for having a dynamic civic culture, and this is reflected in the diverse cultural, ethnic and linguistic heterogeneity of social networks in India. Especially language is a dimension that broadens the national identity and can divide the membership of social networks. Particularly when it comes to the poorer part of the population and the lower-caste groups that might not have the means or opportunities to broaden their language competency (Baker & Peckman: Encyclopedia of Social Networks: India).

4.3 The legal system in India

There are two major legal traditions, namely Civil law and Common law. The Common law tradition started in England during the middle ages and spread to the British colonies. Civil law developed in continental Europe and spread to the former colonies of Spain and Portugal. The major distinction between the two legal traditions is that the Civil law is codified, while Common law tradition is largely uncodified. The codified civil law refers to a system that is based on comprehensive legal codes that are written down and updated. These legal codes state what matters can be brought before a court, legal procedures and the appropriate punishment for different offenses. The uncodified Common law does not have the same comprehensive legal rules and statutes, but is rather based on precedent. Precedent refers to judicial decisions made by the courts in similar cases before. The precedents can be found in a documented case law (Berkeley Law: The Common law and Civil law traditions). Common law, also known as English Common law, spread to India during the colonialization period and British rule.

When India became independent from the British in 1947 the Constitution of India came into force on the 26th of November same year. The Constitution of India is the Supreme law and has chapters on Union and the territories, citizenship, fundamental rights, directive principles of state policy, fundamental duties, the union, the states, the union territories, the panchayats, the municipalities, schedules and tribal areas, and the relationship between these. The constitution assesses elections, special provisions relating to certain classes and official language (Constitution of India, 1947).

The constitution states that India is a federal Union of 28 states, 6 Union territories and 1 national capital territory. The Union and the states both have executive and legislative branches, but law generated at the Union level is always superior to those of the states. The Union territories are ruled by the national government. The Union has a bicameral parliament with the Council of States and House of People. The Union executive is the president, the Prime Minister is the head of the Council of Ministers and is the leader of the majority party. The Prime Minister is more politically powerful than the president (Oxford: Indian Law, Legal System). The Judiciary is independent, and the highest appellate court is the Supreme Court of India. The Supreme Court deals with the legislative powers of the Union and the States. Each state has a High Court, with its subordinate criminal and civil courts (Oxford: Indian Law, Legal System).

4.4 The Indian Judiciary's role: Past and present

The role of the judiciary in India has changed over time. The independence of the judiciary, and peoples' perceptions of the judiciary is important for the legal opportunities. The public image of the judiciary has not been very positive, and reflects that people have an ambivalent relationship with the legal system in India. While the judiciary is in place as part of a functioning democracy, litigation has to a large extent been viewed as infested with dishonesty and corruption. At the same time, the High Courts are viewed as one of the most respected institutions in India (Dembowski, 2001:48). People are not only negative towards the judiciary, and in recent years judicial activism has been viewed as a way to improve human rights, social justice and to counter governmental lawlessness. Issues of judicial misconduct are not uncommon in India, and the integrity and impartiality of the judiciary is often questioned. Additionally, India is known for having one of the slowest legal systems in the world. Dembowski quotes Chodosh to stress this point: *'nowhere, however, does backlog and delay appear to be more accentuated than in modern-day India'* (Dembowski, 2001:48 & 49). This gives us a backdrop of some of the problems with the Indian legal system and the legal opportunities available for actors seeking social change through the court system. I will elaborate further on this regarding water rights in the empirical analysis.

Chapter 5: Empirical analysis

5.1 The right to water in India

The Indian Constitution has no explicit reference to the right to water. However, in India the right to water has been recognized by the courts and there has been a development over time through the case law. The judiciary has for three decades recognized a right to water in India, but even if there has been a recognition of the right to water by the courts, there has been little elaboration of the content of the right. In the Indian context, there is still a need to develop the content of the right to water and a framework that can help with the effective realization of the right. Even without this framework elaborating on the right to water, some points have been stressed as important with regards to these rights. First, there has been little debate around the principle that these rights should be universal, and secondly the main focus in the Indian context has been that the rights should be related to drinking water. The development on the right to water being focused on drinking water is not surprising as clean drinking water is essential to human survival. The right to water started out mostly as a negative right and the first judgements regarding water rights did not use a positive right to water, or even a positive obligation of the government to fulfil the right to water (Thielbörger, 2014:50-51). There has however been a shift towards a more positive interpretation of the right to water, especially regarding the states obligation in recent years. It is clear that without a clear legal framework the courts do not want to overstrain the States financial obligations.

5.2 The legal background

India has no explicit justiciable right to water, and no laws refer to an explicit right to water. The Indian laws dealing with water issues, namely the Indian River Boards Act, the Inter-State River Water Dispute Act, the Water Act on Prevention and Control of Pollution and the Environment Protection Act, do not establish any individual rights to water. These laws, especially the Water Act on Prevention and Control of Pollution of 1974 and the Environment Protection Act from 1986, do however play a role in dealing with pollution of water resources (Thielbörger, 2014:51).

The Environment Protection Act elaborates in the first chapter that: *'Environment includes water, air and land and the inter-relationship which exists among and between water, air and land, and human beings, other creatures, plants, microorganism and property;'* (Environment Protection Act, 1986:Par. 2 a). In the second chapter the Act elaborates that the Central Government has the power to take all measures necessary for the purpose of protecting and improving the quality of the environment and preventing, controlling and abating environmental pollution.

The Constitution of India recognized several of the fundamental human rights laid out in the Universal Declaration of Human Rights, and in 1947 the Constitution was seen as quite progressive. The fundamental rights in the constitution was divided into two categories. The first category is the Fundamental rights which deals with civil and political rights. The second category deals with social and economic rights under what is referred to as; 'Directive Principles of State Policy'. An important difference between the categories is that the Fundamental Rights are justiciable under the constitution. The Directive Principles are principles laid out to guide legislation and Article 37 of the constitution states clearly that:

'The provisions contained in this part shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making law (Constitution of India, 1947: Art. 37).

If the right to water was mentioned in the Constitution, it would most likely fall within the social and economic rights and therefore be a Directive Principle. If the right to water was a part of the Directive Principles, it would also be non-justiciable under the constitution. Nevertheless, the Indian Courts have creatively interpreted the 'right to life', which is a fundamental right under article 21 of the constitution to encompass several social and economic rights, amongst other the right to water. As the right to life is legally enforceable this opens up the legal opportunities regarding the right to water, which in itself would not be enforceable by law. The fact that the right to water is not mentioned under the Directive Principles is what made it possible to link the right to water to the right to life, if the right to water had been a Directive Principle, it might have been almost impossible to link it to the right to life because this would be in conflict with the constitution (Thielbörger, 2014:51-52). In this case the lack of legislation has opened up the opportunity for the courts to link the right to water to a fundamental right and making it legally enforceable, without any explicit

legislation. This creativity from the courts is of course limited but has opened up for the right to water in the Indian system. Still, there are a lot of challenges in India regarding the right to water, and creativity by the courts is not enough. Without a clear legal framework and a political will to protect and fulfil the right, the courts can only do so much. The pressure is high on good governance and implementation of water rights to secure peoples' right to water and sanitation in India.

5.2.1 Public interest litigation in India

Public interest litigation is different from conventional litigation. In conventional litigation, the conflict is usually between two private parties. Public interest litigation however is usually a case where the rights of a group or a larger public have been violated, either through state actions, or inactions. Public interest litigation is not defined by any statute or act, but rather by judges that are responsible to interpret the *intent of public*. Public interest litigation gives a wider description of part III of the Constitution of India, which addresses issues regarding the right to equality, right to life and personality. Public interest litigation has been used to introduce remedies under the writ jurisdiction, and functions to a large degree to seek effective social transformation. As mentioned above, anyone can file a PIL case through a petition. It can either be filed under Art 32 of the Constitution in the Supreme Court, under Art 226 of the Constitution in the High Court, or under sec. 133 of The Criminal Procedure Code to the court of Magistrate. (Bharat, 2017: PIL and difference between 'public interest litigation' and 'private interest litigation')

5.2.2 The evolution of public interest litigation in India and the legal system

Public interest litigation has been on the rise in India since the 1980s both fuelled by peoples' awareness of the rule of law, but also by the activist role assumed by the judiciary. This new activism was fostered by the press covering cases of public relevance regarding PIL and rights (Dembowski, 2001:58). 'Public interest litigation has brought justice to the doors of people who live a hand-to-mouth existence and are illiterate and unorganized' (Dembowski 2001:58, quoting Prakash, 1984:332). Human rights issues and environmental cases have been highly represented in public interest litigation in India. PIL can however be concerned with many different kinds of issues from domestic violence, to industries, and prisoners' rights, to name a few. The judiciary has assumed an activist role and become an ally for

marginalized groups seeking social change in India. The public interest litigation has played an important role in opening up an arena for giving relief for marginalized groups. PIL has also functioned as a way to address and debate government lawlessness and malfunctioning (Dembowski, 2001:59). However, some have stressed that Public interest litigation to a large extent is reliant on legal initiatives from the middle class, because illiteracy and lack of legal knowledge is quite prominent in the large parts of the marginalized groups. This is depriving a large strata of the Indian population access to the courts (Dembowski, 2001:60). Another problem regarding public interest litigation, and all kind of litigation, is that the court administrations in India are known for being slow, and not very efficient. There is an improvement as both technology and administrative reforms have bettered the judicial process in the Supreme Court, but these reforms need to be implemented and followed up in the High Courts as well (Dembowski, 2001:61).

Public interest cases also have an important role by providing transparency. While it does not guarantee relief for those who have their rights violated, it opens up an opportunity for improvement. Public interest litigations force the government to get involved in cases of public interest. And this can again strengthen the sense of public sphere (Dembowski, 2001:62). Public interest litigation can be led either by individuals or organizations going to the courts in the aim of benefiting a society or a group, often underprivileged or poor. Anyone can file a Public interest case, and the one filing the case does not have to be directly involved in the case. Anyone in India could file a case as public litigation on behalf of a group or community. However, Public interest litigation can only be filed against a State Central Government, or a Municipal Authority. Meaning that PIL cannot be filed against only a private party. The case could however involve private parties, when the State Government or Municipal Authority is already involved. One example is when a factory pollutes drinking water, PIL cannot be filed against the factory itself, but the factory could be included when a case is for example filed against the Government of India, the State Pollution Board, or the State Government. Often when PIL cases are filed, NGOs and organizations are involved on behalf of the society or group. The PIL can be filed both in the High Court or in the Supreme Court. (Environmental Law Research and Guidance Foundation India).

Most of the cases regarding peoples' and communities right to water in India has been filed as public interest litigation. This is because the Indian legal system is extremely slow compared to many other countries, and individual cases take many years to go through the court system. Public interest cases can be taken directly to the Supreme Court. Drinking water is the responsibility of the Municipal Corporation. The Supreme Court is responsible for

observing that drinking water is supplied to every citizen. When the Supreme Court is dealing with Public Interest Litigation the rights of the individual must yield for the rights of the general public, or the community. Public interest litigation regarding water rights are focused on communities, villages or the general public. One example where the Supreme Court has intervened regarding water rights was in a case where the capital of Delhi did not have sufficient drinking water. The Supreme Court issued directions that the state of Haryana had to release more drinking water for citizens of Delhi (Environmental Law Research and Guidance Foundation India). One landmark Public interest litigation cases regarding water rights is the M C Mehta v Union of India. In this case the court issued three judgements and several orders regarding pollution of the Ganga basin. The decision by the courts shut down industries that were polluting the Ganga, to secure peoples' right to water. The industries were allowed to reopen only if they controlled the pollution (Bharat, 2017: PIL and difference between 'public interest litigation' and 'private interest litigation').

5.2.3 The development of the right to water in India related to the international right

The right to water in India has developed to great extent independently of the United Nations and Committee on Economic Social and Cultural Rights elaboration of the international right to water. The right to water has developed within the Indian context with little reference to international debate. There are three main arenas where the right to water has developed. First the courts have played an important role in recognizing that there is a right to water from early 1990's and onward. Secondly, at the state level there has been adopted legislation regarding the right to water and its realization. However, there is still a lack of legislation at the Union level. Thirdly, there has been several important policies adopted at the union level in an attempt to realise the right to drinking water in rural areas (Cullet, 2012:57, 61).

5.3.1 The contribution of the courts

A right to water has developed through the court system. As the Indian legal system is based on the Common law tradition explained earlier, this means that rights can be developed through case law. Case law refers to the way a right can be defined through what the courts say and do, giving precedent. So, when precedent is set, meaning that the judiciary recognize a right to water in a court case, this can then be referred to in other cases and opens up the

legal opportunities for mobilization around the right to water. The system interprets and develops rights through the court system with reference to existing legislation. In the Indian context, the courts have recognized the right to water in several cases. Since there is no explicit reference to the right to water in the Indian constitution, the courts have recognised the right as a part of the right to life. Article 21 of the Indian constitution reads:

'No person shall be deprived of his life or personal liberty except according to procedure established by law' (Constitution of India, 1947: Art. 21)

5.3.2 The Case Law and the right to water

In this section I will look into the case law to see how the courts have dealt with the right to water. One of the first examples of court cases addressing the right to water is the case of *Attakoya Thangal v. Union of India* the Kerala High Court observed that:

'...the right to life is much more than a right to animal existence and its attributes are manifold, as life itself. A prioritization of human needs and a new value system has been recognized in these areas. The right to sweet water and the right to free air are attributes of the right to life, for these are the basic elements which sustain life itself.' (*Attakoya Thangal v. Union of India*, 1990)

In the case of *Subhash Kumar v. State of Bihar* where the Supreme Court ruled that:

'[r]ight to live is a fundamental right under Article 21 of the Constitution and it includes the right of enjoyment of pollution free water and air for full enjoyment of life' (*Subhash Kumar v. State of Bihar and others*, 1991)

In *M.C. Mehta v. Kamal nath* in 1996-1997 the Supreme court found that the state is responsible for regulating water supply, but also to prevent health hazards and helping to realize the right to healthy water (Mittal, 2015).

In *State of Karnataka v. State of Andhra Pradesh* (2000) the court rules again that the right to water is a fundamental right under the right to life (Mittal, 2015).

In the case of *Vishala Kochi Kudivella Samrakshana Samithi v. State of Kerala* (2006) the court addressed provision of drinking water and stated that:

'the government 'is bound to provide drinking water to the public' and that this should be the foremost duty of the government' and that 'the failure of the state to 'provide safe drinking water' to citizens amounted to a violation of the right to life' (Vishala Kochi Kudivella Samrakshana Samithi v. State of Kerala, 2006).

From the cases presented above, the first entry point of the right to water in the Indian case law was through Article 21 of the Constitution: 'The right to life'. The second entry point regarding water rights was under Article 47. of the Constitution. Article 47. is one of the Directive Principles in the constitution which stresses that the state is responsible for raising the standard of living and to improve public health, especially through nutrition (Constitution of India: 1947: Art. 47). One example of a case where the court referred to Article 47 of the Constitution is the case of *Hamid Khan v. State of Madhya Pradesh*. In this case the court ruled that under article 47, the state has the responsibility to improve the health of the public providing unpolluted drinking water (Cullet: 2012: 62). However, we must remember that while the courts can refer to the Directive principles in the constitution, you cannot litigate violations of the Directive Principles because they are not enforceable by law. The Directive Principles are there to guide the federal institutions but are not by themselves enforceable by law.

5.4 The legislative framework for the right to water in India

There is a lack of legislation on the national level for addressing water rights, especially regarding drinking water. Drinking water has been a major policy concern for the past decades, but there is still a gap in legislation for addressing the issues. There is no framework for drinking water legislation at the national level when it comes to how the right should be implemented. The national legislation fails to address the right to water directly, which leads to a problem for the courts. At the state level, there is limited legislation addressing comprehensive water rights. As for the legislation at state level regarding water it is usually not specific regarding water rights. Usually the legislation is just addressing water as one of several issues. They often lack a reference to the right to water, or to a set of

principles regarding water rights. Usually the acts are focused on specific tasks like who is responsible for water supply, without any mention of rights (Cullet, 2012:62-63).

There are two main enactments that are passed by through legislation regarding water and water resources. In 1974 the Prevention and Control of Pollution Act was passed. This act is focused on preventing pollution of water resources. The pollution control board, both at the state and union level, was given more functions to investigate and control pollution. The board is especially focused on regulations on industries, or on different operations that could potentially pollute water resources (Mittal, 2015). The second enactment is the Environment Protection Act from 1986 which is focused on pollution and water quality. The act gives the Central Government the authority to set out standards for the quality of the environment, especially related to pollution of the environment (Mittal, 2015).

The right to water in India is not explicitly guaranteed through the Constitution or through legislation. Thus, we need to acknowledge that the right to water is an implied right. The right to water is only asserted through laws that focused on controlling and preventing water pollution. However, the courts have through case law acknowledged the existence of a right to water under article 21 of the Constitution as part of the right to life. The courts are taking the lead, while the legislation still needs to be developed to create a rigid framework for the realization of the right to water.

5.5 Government policies regarding water

The void left by the lack of legislation regarding water rights is to some extent filled by government policies regarding water. The central government stepped in to fill the void of addressing drinking water, and from the 1970s a major policy framework was launched by the Union government. In 1972-73 the Government of India introduced the policy framework Accelerated Rural Water Supply Programme (ARWSP). The central policy framework was aimed at providing safe drinking water to the rural population of India. The objective of the programme was very ambitious, with the main objective being to:

'ensure full coverage of all habitations of the State by selecting suitable source (ground or surface water source) and schemes (hand pump/MWS/PWS¹) in a scientific and cost effective manner so as to ensure supply of the required quality and quantity of water besides ensuring sustainability of sources and schemes' (Accelerated Rural Water Supply Programme, 1999)

¹ MWS: Mini Water Supply, PWS: Piped Water Supply

The Accelerated Rural Water Supply Programme established free drinking water infrastructure throughout large parts of rural India. Surprisingly the policy framework was put in place before the courts started to give a clear recognition of the right to water. Not surprisingly, there is no reference to the right to water in the policy. This does not mean that the policy framework did not have an impact. The ARWSP played a major role in the realization of a basic right to drinking water in rural India (Cullet: 2012:64). The ARWSP presented norms for providing potable drinking water based on litres per capita per day (lpcpd) for individuals. The norms state the quantity and purpose that should be available for individuals which was 40 lpcpd for drinking, cooking, bathing, washing and ablution (Accelerated Rural Water Supply Programme: Guidelines, 1999)

In 1986 the Technology Mission on Drinking Water and related water management was launched as part of the policy framework, giving the policy a Mission approach and in 1999 the Department of Drinking Water Supply was formed under the Ministry of Rural Development, to give more emphasis on the Rural Water Supply Programme. The guidelines for the ARWSP from 1999 clearly states that: ‘The strategies of Rural Water Supply Programme hitherto adopted revolve around the basic premise that provision of safe drinking water is the responsibility of the Government’ (Accelerated Rural Water Supply Programme, 1999).

The realization of the right to water encountered a push back in 2009 when the government introduced a new policy framework called the National Rural Drinking Water Programme (NRDWP). The NRDWP put emphasis on sustainability of water resources in terms of: *‘potability, adequacy, convenience, affordability and equity’* (Ministry of Drinking Water & Sanitation, 2009: NRDWP). The new policy framework drastically reduced the role of the government in the water sector, and moved away from the policy supporting a provision of free drinking water in rural areas. Under the new policy framework, the focus shifted from an individual perspective to a household perspective, moving away from the litres per capita per day for each individual as a norm of measurement. The new policy put households at the centre of the framework regarding provision of water, rather than focusing on individuals, meaning they also move away from talking about individual rights. The new policy has no reference to ‘human rights’ or ‘fundamental rights’. Cullet shows how the new policy frameworks deliberately ignores a rights language by comparing it to the other version proposed which stated that: ‘demand for basic drinking water needs is a fundamental right’ (Cullet, 2012:64).

Another important thing to note is that the new policy changed in the sense that the language used changed from talking about provision to water, to *access* to water. This might seem like a small thing, but the fact is that the government is reducing the responsibilities from providing people in rural areas with drinking water, to giving them the opportunity to *access* drinking water. These are two very different things, and the government is taking active measures to minimize their responsibility regarding provision of safe drinking water. The newest development policy is the Rural Drinking Water, Strategic Plan (2011-2022) which shifts the focus back from the household to the individual, like the first policy framework (Cullet: 2012:64). However, there is still no mention of a human right to water, continuing the trend where the government has halted the development of a framework that could implement the right to water.

5.6 The local dimension and local legislation

When considering the local dimension, there is a need to address local legislation. Two examples are legislation regulating public services in urban areas, and the other is panchayat legislation in rural areas. For the urban legislation, the acts can be either city-specific or state-wide. Water supply in rural areas are usually regulated by the Panchayat Act. The distinction between urban and rural areas in India is important. There are different standards for the realization of the right to water in rural and urban areas. As Cullet notes: ‘both in municipalities and villages there is a form of realization; giving the main power of water supply to the local level. The problem is that they don’t do much more than that, because they don’t get a set of principles of how the right is to be conceived. This is again where the legislation at the national level falls short. There is a direct link between the right to water and what is done at the local level (Cullet: 2012:63).

The national legislation is, like mentioned in the previous section, above the state legislation. Legislation from the Union government the lead when it comes to addressing realization of water and sanitation rights. When it comes to legislation regarding the right to water, it is worth mentioning that while there has been a lack of legislation dealing with the right to water and how this should be understood, there is no legislation that specifically denies the right to water. Having legislation that would have denied the right to water would make mobilisation extremely difficult. There is a need for a legislative framework around the right to water, especially concerning principles for drinking water supply, and the obligations of national and state governments. Policies from the Union level to the state level in some cases have financial conditionality, meaning that in the relationship between the Union level

and state level, policies often come with a financial component in an attempt to push states to implement the policies developed at the Union level. The state is given economic support from the Union level and following this the state is expected to implement the policies. If they do not adopt the framework, they do not get the financial support from the Union level (Cullet, 2012 & 2013).

5.7 Different levels pulling in different directions

This chapter lays out the main developments regarding water focused on three specific contexts. The first is focused on the courts and the development of the right to water through case law, and the elaboration on the right from the judiciary. Secondly, this section addresses water law and the development of legislation regarding water, which has been limited in scope and content. The third section is focused on the development of policy frameworks regarding water and sanitation, and how these have changed in focus and content over time. While the development of the right through acknowledgement from the judiciary and case law, the development of the courts has to be followed up by legislation. The courts are not the place for developing new laws and they rely on the legislators to develop and elaborate on water law. The federal structure of the Indian state must be considered if we want to see consistent laws implemented across states regarding water.

While the policies are more differentiated from law-making and the courts, there is a need for a clear policy framework regarding water. The government has minimized their obligations from provision of water to people to just providing access to water sources. The political bodies have emphasized issues regarding physical water scarcity, the efficient use of water and the notion of affordability. One positive aspect of this is that affordability is one of the main focus areas when addressing realization of the human right to water and sanitation, so there is to some degree a shared idea that issues around affordability should be a part of policy development and political decisions.

Civil society organisations have pushed for a change in the scope and focus on water rights from political actors. Civil society organisations have pushed for a change from focusing on efficiency to focus more on equity and to look beyond physical scarcity while addressing social and economic scarcity. The organisations are highly focused on the actual universal relation of the right for all people, including marginalized groups and poor people. Looking for the political actors to take active measures to foster universal entitlement. The role and mechanisms used by civil society will be addressed further in the next chapter.

5.8 Universal entitlement and the right to free water

The state has a clear duty to provide water, but another question is if the state is responsible to provide free water. During the period of the Accelerated Rural Water Supply Programme from 1972-2009 the goal of the government was to supply free drinking water to everyone in rural areas. The practice has been to provide free water as a way to realize the right to water. This has changed after the new policy framework was introduced in 2009. There has been a change in the language the government uses to talk about the right to water; from a right to provision of water to a right to access.

Some scholars, like Cullet, argue that the right to water should encompass a right to free water to some degree. He argues that the government should be obliged to provide free water at least to cover basic needs linked to life and livelihood (Cullet: 2012:58). As mentioned above, the government in India has under the Accelerated Rural Water Supply Programme provided free water for a large part of the rural population for many years. After the new policy framework came into place in 2009 the government continues to move further and further away from this obligation. There are several arguments both for and against the provision of free water.

The right to free water might seem like taking the right to water too far, but within the Indian context there is already a tradition for the government to acknowledge similar rights, like free education and, to some extent, free food. Because of its history with providing free water infrastructure in rural areas, talking about provision of free water is not something new. The government had taken on the role as provider of the infrastructure for providing free water to its population, especially in rural areas, of course with some exceptions. The shift from this role of core provider to a much more restrained role taking on less and less responsibility for the population's water needs can be problematic. Especially if we are looking at the realization of people's right to water, the large poor population of India face many problems having to prioritize to pay for water that before used to be free. This might have major impacts, as water is essential for survival this must have a high priority, other things like food, shelter, clothes, doctors' visits etc. will have less priority.

The government policies became more focused on the notion of affordability and a willingness to pay. The policies have in the last 20 years moved away from the idea of free water, towards a consensus that everyone should pay for water (Cullet: 2012:68). The idea that people should pay for water is not new and the idea has to a large extent been supported by the international community. One of the arguments have been that if everyone pays for water, the services provided will be better. In the Indian case, some have argued that the poor

might end up paying less for water than what they do now. This is related to the fact that many urban poor people do have to pay for water from private vendors. This is very much limited to this one group of people and do not address the fact that the large population of rural poor are used to having access to free water.

In the 1990s the World Bank addressed questions around willingness to pay for water. The willingness to pay will be dependent on the availability of alternative and traditional sources of drinking water as well as the quality and level of service being provided before the introduction of the reform (Cullet: 2012:69). The World Bank campaigned that water is a scarce resource and needs to be managed as an economic good. This takes us back to the earlier discourse around if water should be treated as an economic good or as a right that should be available to all. The development of the human right to safe drinking water and sanitation was an attempt to move beyond the neo-liberal thinking around water that was prominent in the 1990s. Willingness to pay for water is one aspect, but a large part of the population in India is living below the poverty line. Having to pay for water, and choose between water and other needs, might have a long term negative impact for this part of the population. Willingness to pay for water is of course dependent on the availability of other sources, but if there are no other sources available, the willingness to pay for water will be directly linked to survival and other needs will come second.

Paying for water might have positive impacts, if this leads to development of better systems of provision and better quality of the services provided. The costs of providing free water to such a large population is of course high and if everyone paid for water the cost for the individuals might go down, as some argue. However, I argue that the potential cost of putting people in situations where they have to prioritize between their human needs might be higher. Having to prioritize between water for drinking, cooking and hygiene for example. First, we need drinking water to survive, in many situations we need water to cook food and that means that water for personal hygiene might not be a priority, this has major health impacts. Remembering the large number of people dying each year related to unsafe sanitary conditions we should see the potential dangers in making people choose. So, in this debate it is worth considering the potential long-term costs of people not prioritizing health needs, when talking about the economic aspect. Unfortunately, there is not enough space for going into these long-term costs in detail here, but this is a potential topic for further research on water rights and provision of free water.

5.9 Legislation, policy and the courts: Is it enough?

The right to water is well established in India and the courts recognized the right to water already in the early 1990s. The courts have however not been consistently clear on what the right to water entails, and it has mainly been interpreted as a part of Article 21 of the Constitution; The right to life. As there is no explicit reference to the right to water in the constitution the courts have been creative in creating a precedent making it a part of the right to life. The courts have through case law given a general recognition of the right to water, but they have not elaborated much on the scope or the content of the right. This is also because the courts do not have the primary responsibility for how the right to water should be assessed, this should be done through legislation. Therefore, there is a need for clear legislative principles, and through development of the right to water a framework dealing with drinking water supply can be constructed. The legislation is essential for dealing with the continues work towards realization of the right so that this is not left to the administrative direction of the executive. It is important to remember that legal instruments and a formal framework in itself is not enough to realize the right to water in India. Cullet points out the role of civil society actors as playing a very important in the realization of the right to water (Cullet: 2012:70). Civil society actors campaigning for water rights, pushing for legislation, policy changes or political change, can lead a growing awareness of the right itself and the mechanisms available. Thus, the next section will look into civil society organizations and the mobilization around water right in India.

5.10 Civil Society Organizations and mobilisation for water rights

To illustrate a case of successful mobilization for water rights that used several different tactics and ended up having an international impact I will investigate the Coca Cola case. The case illustrates an example of how peoples' right to water has been violated by a large international company. It illustrates different forms of mobilisation, which groups that are vulnerable, what kind of cases that can be taken to court, and the importance of persistence. First, I will explore the case and what happened, then I will discuss the components of the case and the importance of this type of mobilization. Finally, I will address the case in a social mobilization and lawfare perspective.

5.10.1 The Coca Cola Case

A case that has gotten both national and international attention regarding water rights is the Coca Cola case. Hindustan Coca-Cola Private Beverages Limited, a part of the Coca Cola company opened up a bottling plant in Plachimada in 1999. Plachimada is an area in Kerala, the population mostly consist of indigenouse people, adivasis. Their main occupation is agriculture. The Perumatty Grama Panchayat (Village council) granted the Coca Cola company a licence to start production in 2000. As water is the main ingredient in Coca Cola, the company started drawing large amounts of water from boreholes and wells. Its estimated that the company drew around 510 000 litres of water each day, and for every 1 litre of product produced the company used 3.75 litres of water. On the other side of the production the company produced large amounts of waste water.

Following two years of operation the local community started to protest against the Coca-Cola factory because their operations was causing acute water scarcity in the area, as well as polluting the local water resources. In 2003 the Perumatty Grama Panchayat decided to revoke the company's licence. The Panchayat states that: '...the excessive exploitation of ground water by the Coca-Cola Company in Plachimada is causing acute drinking water scarcity in Perumatty Panchayat and nearby places...' (The Rights to Water and Sanitation: The Right to Water under the Right to Life: India). Not renewing the company's licence was seen as a measure to protect the interest of the local population.

The panchayats decision to revoke the licence of the Coca-Cola company was challenged in court in the case *Perumatty Grama Panchayat v. State of Kerala* in December 2003 (Kerala High Court: *Perumatty Grama Panchayat v. State of Kerala*: 2003). The case was focused around two main topics. The first one was regarding the situation of over exploitation of water resources, in this case the local ground water. The second one was regarding the panchayat's decision to revoke the company's licence. In this case the Justice also refers to Article 21 of the Constitution and the right to life. The Justice stated that the government has a duty to:

'protect against excessive groundwater exploitation and the inaction of the State in this regard was tantamount to infringement of the right to life of the people guaranteed under Article 21 of the Constitution of India' (Kerala High Court, 2003: *Perumatty Grama Panchayat v. State of Kerala*).

The Coca Cola company was directed by the court to approach the Local Self-Government Department of the State Government. The Local Self-Government Department ruled that the Panchayat had exceeded its powers when cancelling the company's licence. The

High Courts ruled that the amount of ground water the company was withdrawing was illegal, but at the same time ordered the panchayat to renew the company's licence as long as they did not withdraw the ground water. What followed was a legal battle that lasted for several years as well as massive local protests against the Coca-Cola company (Rights to Water and Sanitation: The Right to Water under the Right to life: India).

The first protests started in 2002 and were organized through the 'Coca-Cola Virudha Janakeeya Samara Samithy' translated to 'Anti-Coca-Cola Peoples Struggle Committee'. Over 1500 protestors took part in the first demonstrations in front of the factory. The protesters were mainly from the Adivasi population, giving the struggle an indigenous dimension as well. The protestors gained the support of the People's Union for Civil Liberties who arranged a meeting on the 9th of June 2002 to address the situation. The police responded by arresting over 130 protestors. In 2003 local women from the Vijayanagaram village started to protest that their wells were drying up, and that the water that was left was undrinkable because of pollution from the factory. On the 3rd of April 2004 protestors blocked a tanker transporting water to the factory and on the 17th of August 2005 around 100 protestors marched to the gates of the factory where they were met by police. In October the same year, the State Government of Kerala stated that they would support the local activists and challenge the company's right to extract ground water in the Supreme Court. The Health Minister K. K. Ramachandran stated in a press release that: 'the Government will stand by the people in whichever court the company goes. The right over water and air is the right to live. The Government will not allow stopping of these two lifelines of the people' (The Rights to Water and Sanitation: Case against Coca Cola Kerala State: India).

In 2004 two other happenings took place affecting the situation. During the World Water Conference in Pudussery the Plachimada Declaration was adopted. The stated amongst other things that: *'it is our fundamental obligation to prevent water scarcity and pollution and to preserve it for generations... Water is not a commodity. We should resist all criminal attempts to marketise, privatise and corporatise water. Only through these means we can ensure the fundamental and inalienable right to water for the people all over the world'* (Plachimada Declaration: 2004). In February the same year, the Government of Kerala stated that Palakkad district, the district Plachimada is a part of, was drought affected and the government ordered an immediate restriction of the factory's use of groundwater in the area (Ritimo: The Plachimada Struggle against Coca Cola in Southern India: 2011). After year of legal battles, the final call came in 2005 when the new Kerala Groundwater Control and Regulation Act came into effect. Plachimada was categorized as overexploited by the Water

Resource Department, and this led to a full stop of ground water extraction for commercial purposes.

The protest against Coca Cola in Plachimada is not unique, there has been several protests against the company throughout India. Local people and NGOs have protested against factories in Mehdiganj, Kala Dera, Rajistan, Thane and Sivaganga. The protest against the company's use of water resources in Plachimada went international. During the Coca Cola company's annual meeting in on 19th April 2006 protesters gathered outside the building. During the meeting, several shareholders spoke out about situations in India and in Colombia. A suggestion from one of the shareholders was that the company should prepare a report on the potential environmental and public health damage of each of its plants, affiliates and proposed ventures extracting water from areas of water scarcity in India. This suggestion gained little support from the company. And while the international attention was important, the Company did not seem concerned with changing their policies to meet the needs and wishes of protesters.

A recognition of the negative effects the factory had on the local population came in 2010 when the Chief Minister of Kerala stated that the State cabinet was ordering a legal agency to assess compensation for the people affected. The legislative assembly passed a bill in 2011 to establish a tribunal that were to address compensation for the people affected by pollution and water shortage cause by the operation of the Coca Cola factory (The Plachimada Struggle against Coca Cola in Southern India, 2011).

The Coca Cola case illustrates several aspects regarding the right to water. First it shows how a conflict of interest between a corporation and the local people is both politically and legally complicated. This conflict illustrated the complexity of rights when the local village council (the panchayat) tried to protect the interest of the local people against the multinational cooperation. The individual rights are put up against the legal rights of the company and the situation is affected by the division of power between the local council, the state, the Union government and the courts. The different roles and responsibilities had to be untangled during the legal battle that followed the decision of the Panchayat not to renew the licence of the Coca Cola company. The Court system, through the Kerala High Court, did intervene and stated that the panchayat exceeded its power by revoking the licence to the company. This decision shows that the Panchayat cannot take direct measures like revoking a company's licence to protect its local populations rights without any legal decision.

The justice was clear that it is the States' responsibility to protect people from infringement of Article 21 and the right to life. This illustrates the difficult situations around

who should be responsible to protect the local people's rights in conflict with corporate interests that might benefit the state and the government. If the State itself is not securing people's right to life, who is? As we already know, the state is the main actor responsible for protecting fundamental right and human rights. This scenario is interesting because it highlights the problems that might arise when the conflict of interest is between a relatively small group of local people versus a multinational company. The economic interest for the company itself, for the state and for the local government all come into play in a case like this. The state is also the actor responsible for protecting the peoples social and economic rights.

The economic interests of states and corporations versus individual rights is not a new conflict. In recent years there has been a lot of development around Corporate Social Responsibility, and principles regarding how states and businesses should deal with human rights. One example of this is the Guiding Principles on Business and Human Rights endorsed by the United Nations Human Rights Council in 2011. These High Commissioner stated that:

'These Guiding Principles clarify the human rights responsibilities of business. They seek to provide the first global standard for preventing and addressing the risk of adverse human rights impact linked to business activities. If endorsed, the Guiding Principles will constitute an authoritative normative platform which will also provide guidance regarding legal and policy measures that, in compliance with their existing human rights obligations, States can put in place to ensure corporate respect for human rights' (United Nations, 2012:HR/PUB/12/02).

The second thing this case illustrates is the complexity of dealing with water rights. In this case there are several rights and concerns that are interrelated. To start off, we have the fundamental right from Article 21 of the Constitution: the right to life. The justice gave a direct reference to Article 21 in the court case of 2003. Interrelated with the right to life is the right to health. Drinking water scarcity and pollution of drinking water will have an impact on the health of the local population. Another aspect giving this case another dimension is that it related to the Adivasi population, meaning it touches upon indigenous rights as well. Because this case took place in an area where the larger part of the population were indigenous people, (Adivasi), there is an indigenous aspect that needs to be considered as well if we are to address human rights. The connection between water rights and indigenous rights is not always there, but throughout rural India with its many indigenous groups, indigenous rights are in many cases interrelated to questions of water rights and land rights.

Indigenous rights in India are complicated. India does not consider the concept of 'indigenous people' but have recognized 705 ethnic groups as 'Scheduled Tribes'. These Scheduled Tribes are what are considered the indigenous people of India, and according to the UPR session from 2017 this population was measured to 104.3 million people in 2011, which is 8.6% of the total population in India (3rd Cycle UPR of India, 2017: The situation of the rights of indigenous people in India). The fifth and sixth schedule of the Constitution is aimed at protecting the cultural distinctiveness of tribal people within certain areas. So, the Scheduled Tribes do have specific rights under the Constitution. India voted in favour of UN Declaration on the Rights of Indigenous Peoples (UNDRIP), but the fact that India do not recognize tribal groups as 'indigenous peoples' makes it difficult to hold the state accountable for indigenous peoples' rights under the UNDRIP. The complexity of water rights and the fact that it is interrelated to other rights in many cases makes it a puzzle to untangle. There is as noted before a lack of a clear legal framework for dealing with water rights in India. Even though the Judiciary has acknowledged the rights through case law over the past decades, the legislation is lacking and there seems to be a lack of political will to develop the content and scope of right to water, at least under the current government.

5.10.2 Applying a lawfare perspective to the coca cola case

Stated in the theory section, lawfare in the broad definition refers to all strategies using rights and law as a central tool for advancing contested political and social goals. In the typology, different types of lawfare can be defined by the actors involved and the strategies applied. For the Coca Cola case the main actors pushing for social change fall within the Insurgent lawfare (lawfare from below) category. First, I will look into the actors that were involved prior to discussing some of the strategies applied.

To analyse the Coca Cola case in a lawfare perspective we need to address both the main actors involved and the strategies applied to seek change. The Coca Cola case grew over the years to involve several actors and groups, but the demonstrations started with protests from the local Adivasi population. The protests that started in 2002 were organized through the Coca-Cola Virudha Janakeeya Samara Samithy (Anti-Coca Cola Peoples Struggle Committee). The protest started with the local population who organized themselves through the Anti-Coca Cola Committee. So, in this regard this case fits within the Insurgent lawfare category, as the main actors seeking social change was neither the Government nor the opposition, but people based in civil society. There are however many actors involved in this

case, at different levels, playing different roles: From the local councils, to the state government, political parties, the courts, and the international community. It is therefore a puzzle to untangle, but the main actors pushing for change are the local community that found that their rights were violated.

Looking into the strategies applied in this case is highly interesting, because the group was able to apply different strategies and put pressure on several arenas during their struggle. However, not all strategies deemed successful in their own means. The first strategy applied by the locals was to peacefully protest against the company by gathering outside the factory gates. The locals organized themselves in a committee which gave the movement more organizational power. The activists were able to gather support from different groups and political parties as well as the local Panchayat. As the activist C. R. Bijoy states in his article on the Adivasi's struggle against Coca Cola:

'Water for the people and therefore their survival is yet to become the issue for the system as the political-administrative-judicial system is still debating over jurisdiction of power, the scientific validity of the allegations and other such dilatory matters being preoccupied with the issue of 'water for Coca Cola'! This struggle has also become well known by drawing people from all over the world and as a symbol of the struggle against imperialist globalization' (Bijoy, 2004:6).

Bijoy's statement makes an interesting point. When he stresses that the political, administrative and judicial system is debating over the jurisdiction of power. The jurisdiction of power is at the core of issues with how water rights are dealt with in India. There is no clear jurisdiction of power and the lines are blurred. The judicial system, and the courts, play an important role but the political level and the government show little support for human rights in general. They are not working together to adopt a human rights framework for water rights. There is little political will and language supporting a human rights approach to water rights. The administrative level has changed from an active role in provision of water to talking about access to water. Another aspect of power which is clear in the case of India is the power relations existing between the local, state- and national level. This aspect plays a role in blurring the lines of who is responsible for what under which circumstances.

Chapter 6: Empirical analysis part II: The link between the international level and the national level

6.1 Country visit to India by the Special Rapporteur on safe drinking water and sanitation

In Geneva on the 24th of October 2017 a press release was published by the UN relating to the country visit to India by the UN Special Rapporteur on safe drinking water and sanitation.

The Special Rapporteur Léo Heller stated that the purpose of the visit to India was to:

'look at how human rights to water and sanitation are legally recognized and implemented in India at the national, state and local level, and how the provision of water and sanitation services adheres to human rights standards and principles' (Office of the High Commissioner, 2017: Press release 24.10.17)

During the country visits one of the main tasks of the Special Rapporteur is to gather information about the current situation regarding water and sanitation in the country. The Rapporteur is there to monitor the realization of the human right to safe drinking water and sanitation. The Special Rapporteur reports back to the United Nations, and has a role as an advisor for the government regarding the realization of the rights. The information collected and assessed by the Rapporteur is related to the availability, accessibility, affordability, acceptability and safety of water and the sanitation services, nationally and locally. The current status of human rights in the specific country and the realization of thematic rights, is the focus during all country visits by the Special Rapporteur. Depending on the situation in the particular country, the Special Rapporteur usually decides to focus on a particular topic, situation, or group if he finds this to be relevant for the realization of the right within the country.

As for a country like India, because of its size and population, it is impossible to assess the human rights situation in the entire country in just two weeks. Therefore, the Special Rapporteur Léo Heller, decided to focus on some topics and groups in particular. In India, the situation around sanitation services has a huge impact on the population and their rights. Sanitation services and safety around this was chosen as one of the important focus areas for the Special Rapporteur. The focus of the visit is usually dependent on research from the Rapporteur himself or others around the situation around the specific rights within the

country. The focus areas are dependent on the input from civil society organizations and other actors as well as government officials. The contributions from the civil society organizations and activists are especially important in countries like India, where the government is seen as democratic and reliable, but there are still massive human rights violations.

Input from the government does not have to be unreliable, but the governments of usually want to focus areas where they have improved, or are doing well. Therefore, the government might want to lean the focus of the visit to topics or areas where they are doing well. For example, areas they invested in, policies regarding water and sanitation that got funding and areas where they show political will. The civil society is therefore very important to give the Rapporteur insight into different issues and areas where the government might be failing its responsibilities to protect and fulfil human rights. The focus of the visit can be to one or several groups. In the press release the Special Rapporteur stresses that he will give special attention to the right to water and sanitation for women and girls, people with disabilities, Scheduled Castes, Scheduled Tribes and people living in rural areas and informal settlements. The focus on women and girls and persons with disabilities is highly related to realization of water and sanitation rights globally. More specific for India is the focus on Scheduled Castes and Scheduled Tribes, which we have seen have a special role in India. These groups are extra vulnerable for having their rights violated due to massive discrimination and marginalization. There is a link between Scheduled Castes being discriminated through work. Many are hired to work as manual scavengers, which is an occupation highly related to deaths from unsafe working condition.

The preliminary findings and impressions are presented at the end of the country visit at a press conference. Along with the press conference the Special Rapporteur publishes an End of mission statement. The End of mission statement presents an outline of the visit, including which government officials and organizations the Special Rapporteur met during the visit. The statement addresses areas the government is doing well and which areas that need improvement regarding water rights. It contains general concerns, and specifically the situations that should be urgently addressed to better the realization of the human right to water. In the next section I will look into the end of mission statement, and this will be discussed further in the following chapter together with my own findings from India.

6.2 The end of mission statement by the Special Rapporteur

In the end of mission statement the Special Rapporteur presents his preliminary findings at the end of the country visit. The statement includes who he met with during the visit and where he went. In this section I will look into issues the Special Rapporteur decided to focus on during his visit to India. The end of mission statement is a starting point for elaborating on the most pressing issues regarding the realization of the right to water in India. The end of mission statement, together with the findings and the theory laid out in the theory section will be the backdrop to see how the human right to water has affected the opportunities for people in India.

For the India visit he met with several government officials: Ministry of external affairs, Ministry of finance, Ministry of Drinking Water and Sanitation, Ministry of Urban Development, Ministry of Rural Development, Ministry of Housing and Urban Affairs, Ministry of Health and Family Welfare, Ministry of Railways, National Institute of Transforming India, Aayog, National Human Rights Commission, National Commission for Women, National Commission for Scheduled Castes, National Commission for Safai Karamacharis, Delhi Jal Board, Government of Uttar Pradesh, Government of Maharashtra, Government of Manipur, Municipal Corporation of Greater Mumbai and Municipal Corporation of Imphal. The Special Rapporteur and his team visited the larger cities of Imphal, New Delhi, Kolkata, Mumbai and Lucknow, but they also visited several slums and informal settlements as well as villages and small communities. Not only meeting with local villagers, but with civil society actors, local activists and human rights defenders.

The first part of the statement is largely positive and addresses the progressive Indian case law regarding water and sanitation rights. The Rapporteur recognizes that even if the Constitution of India is lacking an explicit human right to drinking water and sanitation the case law has showed how the right to drinking water has been seen as a part of the Article 21; The right to life. India's case law regarding water rights has been progressive for many years. From as early as the beginning of the 1990s the Judiciary has shown how the right to drinking water can be derived from the right to life. Another progressive case from India regarding sanitation is from 2014; The Supreme Court of India affirmed transgender persons' right to their self-identified gender, granting the 'third-gender' equal rights under the Constitution (National Legal Services Authority v. Union of India, 2014) and stating that the Government should provide them with separate toilets.

The Special Rapporteur is positive about the policies implemented by the Government regarding drinking water and sanitation. Especially the Swachh Bharat Abhiyan (Clean India Mission). The Swachh Bharat Abhiyan has an impressive budget and the main goal of the mission is to end open defecation in India by October 2019. The Rapporteur is largely positive to the economic investment in the mission. He acknowledges the political will to implement the policy all the way from the Prime minister and the Central government, to the state governments and down to the local administrative Panchayats. As India is one of the countries in the world with the highest population practicing open defecation this is a highly needed policy for securing public health for its people. However, some issues are raised during the process of implementing this policy and I will get back to this in the next sections.

Further the End of mission statement has three main points for the overall observation during the visit. The first one is concerned with the Swachh Bharat Abhiyan and the gap between this new paradigm and the application of a human rights methodology regarding water rights. The policy is important for the realization of the right, but if a human rights methodology is not applied the policy might not fulfil the obligations following the right. We know the government has shown great political will to implement this policy, but do not show a political will for supporting human rights.

The second point of the end of mission statement is focused on the relationship between water and sanitation, and the different developments of the two parts of the right. As for the Clean India Mission the country has shown a huge development regarding sanitation rights, but it is still a large concern that according to the World Health Organization; unsafe drinking water is causing 68% more deaths by diarrhoea, than deaths from unsafe sanitation services (WHO, 2014: Preventing diarrhoea through better water, sanitation and hygiene).

India has met the Millennium Development Goals regarding drinking water; it was reported that in 2015 92% of the Indian population had access to improved water sources. However, as for the new UN goals; the Sustainable Development Goals, India is still not meeting the requirements for safely managed services. Under the new, stricter criteria, the statement says that only 49% of the rural population have access to water sources that meet the standard required. Between 73 and 86% of the rural population have water available when needed. This is a large improvement, although a lot of work needs to be done to secure access to safe drinking water for all. Again, it is worth noting that there is a distinction between the rural and urban areas with regards to access to safe drinking water.

As for the quality and safety of the drinking water the Rapporteur notes that especially groundwater sources in rural areas are in danger of contamination. In West Bengal, where most of the rural population rely on groundwater, about 38% of the groundwater is polluted by arsenic and fluoride (End of mission Statement, 2017²). As 84% of the rural population rely on groundwater as the main source of drinking water, people are suffering from arsenic poisoning, with large health effects and even deaths. This was an issue that was addressed at the meeting with the Special Rapporteur and civil society in Kolkata. Scientific reports on the content of arsenic and fluoride were presented together with statements from people suffering from arsenic poisoning (Kolkata meeting, 05.11.2017).

Another aspect of water contamination linking the two rights together is faecal contamination of water resources. As sanitation services and wastewater will affect drinking water sources, both issues need to be addressed when working on securing the right to safe drinking water and sanitation. Wastewater management in India is still not meeting standards set forth by the Sustainable Development Goals to ensure realization of peoples' rights to safe drinking water and sanitation. According to the Joint Monitoring Programme by the World Health Organization and UNICEF about a third of the rural population in India are consuming contaminated water. So, again the Rapporteur points out that issues regarding wastewater management, treatment of drinking water and safety around these services still needs to be dealt with. Access to water is therefore not the same as securing peoples' right to safe drinking water.

In the final part of the statement the Special Rapporteur again notes the rapid progress of ending open defecation in India through the Swachh Bharat mission, and he praises the government for their commitment. However, he stresses again that the government needs to implement a human rights perspective to the water and sanitation issues to meet the Sustainable Development Goals and continue to work towards a realization of the human right to safe drinking water. He stresses the need to apply a human rights methodology that considers the normative content of the right. The government need to take active measures to monitor the inequalities in access, so that they are able to address issues of accessibility and discrimination. The goal should be policies based on a national consensus that no one is left behind, no matter gender, disabilities, caste or ethnic group.

² The end of mission statement refers to numbers from the West Bengal Pollution Control Board, 2017

6.4 Affordability and providers of water

Water is actually considered to be relatively affordable in India for both the urban and rural population. There are however informal providers who charge high prices for water, often at the expense of vulnerable groups that lack other options. Some informal vendors transport water from public taps to the slums and charge dwellers for transportation. There is evidence of a ‘water mafia’ that illegally pump up ground water, or connect to the municipal water network, and sell it at high prices to dwellers and poor people in need. The government denies the existence of a ‘water mafia’, but this has been documented through journalistic work and in the statement from the Special Rapporteur (End of Mission Statement, 2017 & Huffington Post, 25.05.2017). However, a clear problem following that the government denies that this problem exists, is that the authorities do little to deal with the situation. One aspect of this is related to the acknowledgement of settlements. If the government would provide water services to the informal settlements, they would acknowledge them as settlements. If they are acknowledged settlements this would lead to obligations from the both the state and municipality to provide services for the people living there.

6.5 Vulnerable groups and limited access

Several factors have proven to lead a lower access and, or more poor quality, of water services. Vulnerable groups are related to gender, as women are less likely to have access to adequate water and sanitation services in India. Second, people with disabilities are a vulnerable group considering their limitations to access water services and issues around discrimination. Certain castes are vulnerable and scheduled tribes have been especially exposed with regards to violations of the right to water. Where you live has an impact on the realization of the right to water as there is a clear division between urban and rural areas. In rural areas piped water is only available to 31% of the population, but in urban areas 69% of the population has access to piped water (Heller, 2017: The End of Mission Statement). Another important factor to remember is that 67.5% of the Indian population live in rural areas, meaning that about 270 million people reside in rural India. So, when addressing the realization of the human right to water, the rural population is a large part of the equation. Related to place of residence, is whether you reside in a formal or informal settlement. Like mentioned above, the urban areas where people reside in informal settlements are vulnerable when it comes to water. This is because they to a large degree lack access to safe drinking water. Informal settlements often lack access to these services as they are not recognized by

the government. If they are not recognized, they will not be provided with the adequate water services, or any services at all.

In rural areas, where most of the population resides, only 49% of the people have access to water on the premises. This means that more than half of the population living in rural India have to collect water either from boreholes, wells, surface water, a public post or at a public tanker (Heller, 2017: The End of Mission Statement). Women and children are often the ones responsible for collecting water to the households, and the cost of this is often high. For children, the cost is that collecting water interferes with time in school. This has a large impact on their opportunities in the future. Children are vulnerable, and their right to safe drinking relates to other rights, like the right to education. As education is a fundamental right under the Indian Constitution (Constitution of India, 1947: Art. 21 a & Right to Education Act, 2009) this should be considered related to issues that interfere with children's possibilities to attend school.

For women in rural areas that do not have access to water on the premise, time spent collecting water impacts their right to equal opportunity. Related to collecting water is the problems around the security of these women and children. The Special Rapporteur received reports of sexual violence against women collecting water in the State of Manipur, and this is likely to happen elsewhere. The aspect of security is an important part of the right to water. It is clearly stated that the services provided should be accessible and safe for all to use. The government has a responsibility to ensure that the realization of the right to water does not put peoples' safety at risk. Women and children are especially vulnerable, and might require other considerations to have their rights protected.

According to the 2011 census, 16.6% of the Indian population falls within the category of Scheduled Castes. 8.6% of the population is consider part of the Scheduled Tribes. Almost 90% of the people that fall within the category of Scheduled Tribes live in rural areas (Census of India, 2011). Few have access to water provided by the government. The availability of safe drinking water is a problem that needs to be addressed. Another component related to government projects. Development and communication like railways, dams and industrial projects in many cases directly, or indirectly, intervene with these peoples' right to water. The Scheduled Tribes are under the Constitution protected so they can live a more traditional life. The large government projects are in several cases threatening this way of life. One example is the Sardar Sarovar Dam project, which highly affected the Adivasi population living in the areas affected. Another example of projects or development interfering with peoples' rights to water is the Coca Cola case discussed above. In the Coca

Cola case the production of Coca Cola caused water scarcity and industrial waste polluted water and crops. As the Adivasi population rely on agriculture to sustain their way of life, this is both interfering with the right to water, and their rights as a Schedules Tribe. Another example was put forward by the Special Rapporteur. He visited villages downstream from the Thoubal Multipurpose Dam project, where they could no longer rely on the river for safe drinking water. When it comes to situations where there are competing interests, like state interests versus vulnerable groups, these peoples' rights need to be considered. Again, the rights of these people need to be considered as a right to water but at the same time as the rights they have as Scheduled Tribes under the Constitution.

The Scheduled Castes have special rights under the Constitution. Many of the people that are considered Scheduled Castes (sometimes referred to as 'untouchables') often reside in slums and informal settlements. These people are especially vulnerable. People living in informal settlements are not provided with services from public water providers. People living in the 'notified' or legally recognized resettlements might have access to public water services a few times a week. This access does mean their needs are met, or that the service provided meets the standards of accessibility. These people have to queue for specific times to get water from the public providers. The disabled, the elderly and children struggle to transport the water back to their households.

India has a large undocumented population. These peoples' rights are often very difficult to track. One example is the group of undocumented Bangladeshi people that live in the former enclaves in Cooch Behar, West Bengal (Meeting with civil society, 2017: Kolkata). These people exemplify issues related to the large undocumented population and their human rights. The Indian government is responsible for ensuring the right to safe drinking water for all people within their territory. All people within the borders of the country is the governments' responsibility when it comes to the human right to water. This responsibility includes foreign and undocumented people. The undocumented Bangladeshi refugees reported that they do not have access to sanitary services and lack access to safe drinking water (Meeting with civil society, 2017: Kolkata). This is a clear breach of the human right to water. Thus, undocumented people in India fall within the group of vulnerable people. The fact that these people are undocumented means their rights are difficult to monitor and the government often do not consider these peoples' rights their responsibility. However, under the human right to water the government is responsible of securing the rights of all people within the state.

6.4 Mistrust and a hope for change

During my participation in the meeting between civil society and the Special Rapporteur on safe drinking water and sanitation in Kolkata on the 05.11.2017 certain issues regarding the relationship between the UN and the local activists were put more into perspective. The local organizations, academics and activists in Kolkata, showed what seemed to be a lack of trust in the UN system (Meeting with civil society, 2017: Kolkata). The human rights activist that arranged the meeting with the Special Rapporteur³ expressed his thoughts about the situation: While his organization did not primarily work on the right to water, no other organizations were interested in meeting with the Special Rapporteur in Kolkata. Thus, he felt it was necessary on behalf of the people of West Bengal to do something. He then took initiative to arrange a meeting inviting academics, organizations, people affected by water issues, journalists and students. The lack of interest from organizations and activists indicates that the Special Rapporteur might not be the most effective mechanism to gather relevant information from affected people. The relationship is not one-sided. Some organizations have limited access to the Special Rapporteur, but this works both ways. If the Special Procedures do not gain access to local groups without the government involvement, he might not get information to get picture of the human right situation in the country.

The Special Rapporteur Léo Heller stressed the importance of the civil society organizations in his final remarks during the Kolkata meeting. He expressed concerns that the government downplays issues raised by the civil society organizations. He noted that the government are eager to talk about the areas where they are doing well, while other issues are excluded from the agenda. He acknowledges the important role that civil society plays in getting input on areas where the government is in violation of the human right to water (Meeting with civil society, 2017: Kolkata). The reports and statements from civil society is a valuable part of information when considering the realization of the right to safe drinking water and sanitation in India. He recognizes that the gap between the situation presented by government officials and civil society is in a way extreme in India (Léo Heller, 2017: Kolkata)⁴.

³ All informants are anonymized, including the organization that hosted the meeting. For more information see appendix 1.1

⁴ For full transcription of this statement see appendix 2.1

Chapter 7: Discussion

In this chapter I will discuss the findings from the empirical analysis. Both findings from the country visit, but more general the relationship between the international system and the local context. I will discuss the situation for the civil society actors that work with water rights to see how, or if, they apply to the international human rights framework. I will address how the international system of rights are perceived. The gap between the international system and the local reality plays a key role in understanding mobilization for water rights in India. The realization of the human right to water relies, to a large extent, on social mobilization around water issues. Bearing in mind the theory laid out before, I will discuss mobilization and perceived opportunities. I will also discuss how the international human rights system by itself does not provide the right lens to view and understand the mobilization of the right to water in India. I will use the lawfare typology to explain mobilization around water rights in India. This framework can be used for further research to understand mobilization around water rights and the different tactics for seeking social change. Finally, I will revisit the hypotheses systematically to see if there is evidence supporting or discarding the hypotheses developed.

7.1 The relationship between the Human Right to Water and The Right to Water in India: Has the right lead to an increase in social mobilization around water rights?

From exploring the legal foundations for the right to water in India, it is clear that the right to water was well established in India before the UN resolutions from 2010. In the court system, the right to water has been referred to and acknowledged by the judiciary since the 1990's. The legal foundation for the right to water from the case law is known for being quite progressive in an international sense. While the right is not explicitly enshrined in the constitution, it has been considered a part of Article 21 and the right to life. The cases that go to court regarding water rights are usually not filed as individual cases, but more often cases of public interest litigation. These cases usually revolve around communities or groups that have had their rights violated. The legal mobilization in India focus on the right to water is related to groups or communities, much more than individuals. This pattern is also present when looking into social mobilization. The focus usually is on a village, a community or different groups like scheduled tribes or scheduled castes. The right to water which is often mobilized through a community or village, one example is the Coca Cola case. Policies regarding drinking water access have moved from an individual perspective, to a household

perspective, and back to the individual perspective again. The focus on provision of water has changed into new policies that focus of access to water sources. These new policies show how the political arena is taking on less responsibility for realizing the right to water. The less responsibility the politicians decide to take on regarding water access, the more closed the political opportunities become. Thus, other arenas might be viewed as more valuable to focus on when it comes to social mobilization for a group or community.

An interesting finding is related to the relationship between the international human right to water and the rights within the national context. This relationship is not as strong as expected. The Indian government and Indian activists were active in the support of the development of the international right to water. Thus, I expected to find reference to the international right within the Indian context. I expected the international right to be applied and referred to by civil society actors. It is already established that the government in India does not support human rights to a large extent. Thus, expectations from the government were more limited, than civil society. From the findings however, the civil society organizations reference to the international right to water, were more limited than expected. It's mostly the larger organizations that apply a language of human rights. The smaller organizations do not refer to the human right water in the same way. The government gives little reference, in most cases no reference, to an international right to water. References to the international human right to water following the resolutions from 2010, are limited. The adoption of the resolution elevating the right to water to an independent human right cannot be viewed as a critical juncture regarding mobilization of water rights in India. This could partly be explained by the governments hostility against human rights, but also by the fact that the right to water was well established in India before the international right was developed.

The local organizations and the government to little extent apply the international right to water. However, some of the larger national and international organizations were more active in using a human rights approach to water rights. There is a division between the international actors, and the national and local actors. The international actors do apply an international rights language to a larger extent. They give reference to the international human right to safe drinking water and sanitation. Compared to the rights based language applied in the local contexts, that do not usually refer to a human right to water. The right to water in India has through the case law and mobilization established as a right to water before the international human right came to be. Thus, we can see that references to the right to water in India, and the mobilization for this right, is largely based on the right developed in relation to Article 21 of the Constitution.

Based on the theory of legal mobilization and the lawfare, it's not surprising that mobilization has been based on the national right, rather than the international right to water. Actors have to develop a rights consciousness to push for change. Following the development of this consciousness, they will use tactics that they consider most likely to lead to success. If mobilization around water rights has proven to be successful by using the constitutional right to life, this will be considered a good strategy to seek social change around water rights. The right to water established by the Indian judiciary therefore works to establish a rights consciousness. This development is not international, but rather constitutional within the Indian context. This consciousness developed before the international rights. Thus, it is likely that more actors are aware of the national right and have the legal knowledge to mobilize around it. From the legal mobilization theory people will seek change only if they see that their rights are violated. From the findings from this thesis it looks like the international human right to water has yet to be developed as part of a rights consciousness. Actors working for change in local contexts in India are more aware of the right to water related to the constitution. This might be explained again by the fact that they already have developed a rights consciousness, and they might not need to apply an international right. It could also be explained by a lack of legal knowledge of the international system. These two points are likely to be connected. A lack of trust in the international human rights system might influence the tactics and strategies applied in the local contexts. I will elaborate on issues the mistrust in the international system in the next section.

7.2 Civil society organizations' trust in the UN framework: Possible explanations for the lack of the international right in the local context

During the country visit of the Special Rapporteur in India I observed two things that were quite interesting. The first one was the lack of information. I observed that little information was available to the general public about the human right to water. From what I could see, little information was available to the smaller civil society organizations regarding the visit of the Special Rapporteur. It seemed that the larger international organizations, like Water Aid India, were intentionally involved. For smaller organizations, and for the local activist, the information was more limited. It could seem that some actors were intentionally excluded from the process. The government seemed willing to cooperate with the larger organizations. The cooperation regarding the country visit seemed to include local organizations and activists to a smaller extent. The governments' lack of cooperation with human rights activists is nothing new. The human rights situation in the country and the

current government's attitudes towards human rights, fits well with this finding. My impression was that one has to actively search for information from the government about the visit. To get information from the UN about the visit, small organizations might have to follow the OHCHR or Special Rapporteurs website. It seemed like many of the smaller organizations did not do this. While the information is available through the UN system, this does not necessarily mean that smaller organizations know where to look. Again, remembering the importance of legal knowledge and resources, there is a gap between the larger organizations and the small organizations that work more locally.

I noticed what seemed to be a gap between the local organizations and the international organizations. Local groups work for water rights often related to a specific village or group. The larger organizations work towards a more general realization of the right, which is more related to the human right to water. Organizations like Water Aid India have more resources available. As this organization is a part of a large international organization, they have an international framework and more resources are available. This means that there are more opportunities available for the actors involved. This indicates that the goals and strategies can be more comprehensive. For small organization, working either on more narrow topics or in a more local context, the lack of resources and knowledge functions as a limitation. One of the main factors here is a lack of information, which is where both the Government and the UN system play a part. A lack of information about the international human rights system itself, and a lack of information about the opportunities available, makes this gap larger. If local organizations are to use and mobilize the international human right to water, they need to have access to information and resources to use the mechanisms available.

As expressed by an activist I talked to in Kolkata after the meeting with the Special Rapporteur: 'Many people lack a belief that the international human rights system can do anything for them. They don't see how the big talk and political promises actually translate into change on the ground for the people that need it the most' (Human Rights Activist, 2017: Kolkata). A lack of trust might mean that they do not feel it is necessary to actively seek information about the opportunities available through UN mechanisms. Thus, they choose to focus their attention and efforts on the ground related to specific issues or situations. This might help explain the lack of big talk of human rights from local organizations. This supports the finding that mobilization around water rights in India in many cases are focused on one topic, one village or one group. Bearing in mind the legal opportunities, these actors have observed that public interest litigation has proven successful regarding legal mobilization for

water rights. Many would therefore choose to focus on the constitutional right to life as these rights are above the international rights. This will be elaborated on further in the next section.

7.4 The international system and the local reality: Local mobilization for change on the ground

I tried to understand the relationship between the UN mechanisms and the people mobilizing for human rights on a local level in more detail. Mentioned above: The local activists that I talked to had limited trust in the international UN system. They did not believe that the UN system alone could create change on the ground regarding water, for the most marginalized people. However, those that already had a legal knowledge about the UN system did feel responsible to do something related to the country visit of the Special Rapporteur. This feeling of responsibility translated into a meeting between local activists and academics and the Special Rapporteur in Kolkata on November 5th 2017.

One way to try to understand this situation further is to look at how the relationship between the international system and local reality is perceived by people mobilizing around water rights locally. And another important aspect of this is to look into how the international human right to water and sanitation is translated into local contexts. An academic working on water rights in India explained the relationship between civil society and the international law in this way:

'(regarding) the relationship between civil society organizations and the law, I guess the underlying reason why UN frameworks don't matter much to most is that they don't see the UN, international organizations, other states, as having been of significant help in their struggles on the ground. This is why there will be a separation between the organizations that engage directly at the policy level (and often are the ones that receive funds from external funders) and those whose engagement is more directly at the local level' (Email correspondence with water rights academic, 2018)

During my talks with the local activists and journalists in Kolkata I got the same impression: The UN mechanisms, and international organizations, are to very little extent viewed as relevant on the ground. Looking into mobilization for water rights I've found that the UN framework is not being utilized much by the local organizations. If human rights are not viewed as relevant for change on the ground the organizations will use other tools and tactics that have proven to be successful in the past. In empirical analysis, several examples of

successful litigation regarding water rights in India were presented. None of the most prominent examples applied a human rights language. This can be explained by the fact that many of these cases happened before the right to water became an explicit human right. The second explanation is that the right to water is already quite strong in the Indian legal system. This implicates that mobilizing for a right to water might be more successful than mobilizing for a human right to water. As mentioned above, a constitutional right to life stands over an international right to water, if they are placed in a hierarchy of rights. India is known for having a progressive judiciary regarding water rights, and the recognition of this right started in the 1990's before the right to water became a human right.

The water rights academic elaborated on how the organizations perceive the relationship between the international system and the local reality in the Indian context:

'The organizations that engage directly at the policy level may see the continuum that is the mainstream understanding of how international law works as a line going from New York/Geneva all the way to a specific village. The latter [organizations engaged more directly at the local level] either don't see this link having a relevance in practice to their work or even worse have experienced situations where external engagement goes against what they are trying to achieve on the ground. This, coupled with the fact that there are no immediate redress mechanisms that Indian organizations can use (say human rights procedures) leads to a situation where it is perceived that if redress is to come, it will either come from the higher judiciary or not come at all and then it is political action that remains the only route. Until recently and for a number of years, the judiciary has been held in very high regard by many organizations and this has helped fostering this perspective that 'justice', if it is to be made by someone will be by judges' (Email correspondence with water rights academic, 2018).

From what the academic explains, it might be valuable to view organizations in at least two groups when addressing their opportunities, their goals, and strategies. There are different approaches to push for change regarding water rights. From the literature on legal mobilization and lawfare these two different types of organizations have different opportunity structures. The organizations directly engaged at the policy level have different opportunities than those that are only involved more directly at the local level. The kind of officials they have access to is different. The personal resources, knowledge and funding varies. If the

organization is directly involved at the policy level they have more opportunities to push for change through lobbying, information, and pushing for policies that directly, or indirectly, have a human rights perspective. Local organizations that work related to a specific situation, might not have the same opportunities to influence policies. Knowing that the human rights approach is not popular with government officials, they might choose not to apply this perspective.

Smaller organizations might believe they can get in trouble by using human rights language. They might also believe that a human rights approach might delay, or limit, their chance of success. This is due to several factors. The most prominent of these: The lack of resources, both financial or human, is one aspect. Limited access to influential people and the political system, might be another. The organizations might not be seeking policy change at all. They might be more concerned with one specific issue or problem, than to a larger policy change. If the perceived policy change is viewed as more costly or difficult, they might seek change in a specific situation concerned with access to water. Hence, different organizations have different goals and view their opportunities very differently. This influences the way they mobilize around water rights.

As mentioned in the theoretical framework, political opportunity is focused on how open or closed the political structure is. Here, it is relevant to ask who the system is open to. Legal opportunities however, might be more rigid where the legal opportunities are focused on aspect like the laws and legal funding. It might be harder to influence legislation, than local policies. However, this is not necessarily the situation for all actors mobilizing around water rights. Larger organizations have different opportunities, than smaller organizations. Thus, the legal and political opportunities vary across the different organizations and contexts. As mentioned above, the fact that the judiciary has been progressive when it comes to water rights in India and the fact that litigation has proven to be successful in several cases, might lead organizations to choose this path first. When seeking social change around water rights organizations view their legal opportunities as more open when mobilizing around the constitutional right to life, rather than the international human right to water.

7.5 Lawfare and water rights: Rights based language, opportunity structures and mobilization strategies

In a lawfare perspective the civil society organizations choose to use different tactics and tools to seek social change. From litigation and legislation, to political lobbying, education and information to demonstrations and public pressure. The examples of court-centered lawfare around water rights in India have been prominent. Actors have used the legal framework available to them through the constitution to push for change. They applied the interpretation of the right to life, and the enforcement of this right, to seek change. The courts have been responsive to cases regarding the interpretation of article 21 to include a right to water. However, change does not necessarily come quickly using the court system.

The court system in India has been plagued by inefficiency. It might take years for cases to go through the court system. The progressive decisions by the judiciary, and the mobilization of the courts, have yet to lead to new laws regarding the right to water. However, the judiciary has taken on an activist role regarding the right to water. This has opened up opportunities for mobilization of the right, independently of the international right. The judiciary has tried to put pressure on the legislators to adopt new laws and develop the right to water. This pressure however, has had little success. The legislative lawfare is lacking to a large extent, when it comes to pushing for new laws regarding water rights. As the court-centered lawfare strategies have proven successful in many cases, this might be the preferred option for actors seeking the most efficient tool for change. Changing laws in India is time consuming, and require a lot of legal and personal resources. While the court-centered tactics have been most prominent, actors are pushing for water rights through societal strategies together with litigation. Rather than choosing to pressure legislators for new laws regarding water, social pressure has been used actively through information and demonstrations. The societal strategies work outside the formal institutions and in many cases, they demand less resources, than litigation or legislative lawfare. While applying several strategies at the same time might lead to a higher chance of succeeding, this could also come at a higher cost. Establishing a consciousness regarding the right to water, and putting the responsibility on the government to uphold this right, has been extremely important in India. Through changing the normative discourses, civil society organizations and activists have mobilized the right to water. Through advocacy and awareness-raising activists have made the right to water a part of the fundamental rights of the people of India.

The right to water has been a part of the political arena several times, but mostly in the local political arenas. In the 2015 election in Delhi, the Aam Aadmi party used water as a part of their campaign, and issued a white paper stating that water was a right. The white paper promised that every household would be connected to piped water. By using a rights language when addressing water issues, the politicians built on the rights consciousness that the civil society worked to develop. This makes water rights a part of the political agenda in this context, namely Delhi. In the national political arena, the language regarding water does not apply a human rights perspective. If they refer to water rights, it is only *water rights* and not of the *international right to safe water*. Looking at the right to water in India through the lawfare perspective has worked to explain some of the mobilization around water rights in India. Lawfare is ‘all strategies using rights and law as a central tool for advancing contested political and social goals’ or narrowly as ‘court-centered contestations from non-state actors’. He found that both definitions can fit when looking into mobilization for water rights in India.

7.6 Revisiting the hypotheses and findings:

| Hypothesis | Support | Evidence, or possible explanations |
|--|----------------------|--|
| <p>H₁: <i>The elevation of the right to water to an explicit human right has led to an increase in social mobilization around the right to water in India.</i></p> | No | <p>As the right to water already was well established in India before the resolution of 2010, the mobilization already had a good foundation. During this research, I have not found that there was a clear increase in social mobilization around the right to water after the elevation of the right to water to a human right. Possible explanations might be the already well-established right to water. This right existed in India from the 1990s. A lack of trust in the UN system could mean that those that mobilize use other tools and mechanisms. The adoption of the resolution is seen as of little relevance to local organization. For those who mobilize locally, a lack of information about the human rights system is also a factor.</p> <p>Alternatively, another explanation for the increase or decrease in mobilization could be related to natural causes as well. For instance, draught, water scarcity and climate. This could be an interesting topic for further research.</p> |
| <p>H₂: <i>The adoption of the resolution on the human right to water has led to an increase in rights-based language by civil society when addressing water rights in India.</i></p> | To some extent | <p>This hypothesis is linked to the former. As seen, the right based language applied by civil society is largely based on the Constitutional rights and not the international human right. This is based on civil society's perceptions of their opportunities and what might be most effective. As constitutional rights stand above international human rights, this is a factor. The right was already well established, meaning that civil society already was applying a rights-based language, even if it was not a 'human rights-based' language.</p> <p>There are however some examples of a rights based language being used more frequently, especially regarding the right to water and sanitation. Following the data presented here, a clear increase following the adoption of the resolution is not shown. However, more of the international organizations, like Water Aid India, are using a human rights-based language. This might be traced back to their resources and support for the international human rights organizations.</p> |
| <p>H₃: <i>The adoption of the resolution on the human right to water has opened up the political and legal opportunities for people that have their water rights violated.</i></p> | Yes (to some extent) | <p>This hypothesis is a little more difficult to address. There is evidence that supports the hypothesis, but also some evidence that support the H₀. The legal opportunities have not changed in a strict sense following the adoption of the resolution. The status of the resolutions is not legally binding upon states in a strict international law. However, there is evidence supporting that opportunities opened up through the Special Procedures for people to report and address issues of violations.</p> <p>There is evidence that would support that larger organizations have more leverage for political pressure and lobbying. International resources are available for larger organizations working on water rights in India. The opportunities have opened up for some, but not necessarily for all. In the local context, there might limited legal knowledge and resources meaning that opportunities, in reality, are not available for the smaller organizations. The adoption of the human right to water can be used as a tool to put pressure on the government. This can be done through the Special Rapporteur or through lobbying and education. However, the evidence indicates that this tactic has been applied by international and national organizations, rather than local ones.</p> |

Chapter 8: Conclusion

The method of process tracing and in-detail description has been applied to the international development of the human right to water and water rights in India. This thesis tries to explain the process regarding the development of water rights internationally, and in India specifically. It seeks to answer how this right can open up opportunities for people who have their rights violated. By applying a theoretical framework of social mobilization and lawfare, together with theory on rights and international law, three hypotheses were developed. These investigate how the human right to water worked within the national context of India. The hypotheses were developed and researched through data from existing research on the topic, official documents, interviews and observations. The data material was collected to answer the research question:

Has the elevation of the right to water to an independent human right strengthened the opportunities for people that have their rights violated in India?

The findings indicate that the elevation of the right to water has strengthened opportunities for people who have their rights violated to some extent. This is done through the development of mechanisms to promote and protect the human right to water. In India, other factors have come into play with regards to the development of the right to water. The right to water was already well established in India before the elevation of the right to an independent human right. Thus, opportunities for mobilization around water already existed through the constitutional right to life. Considering the legal opportunities in India, constitutional rights stand higher than human rights. The Common law system works with precedent, meaning that when the judiciary established a right to water through the case law in the 1990s, legal opportunities opened up. As the legal system is slow and cases take many years, actors found that the use public interest litigation proved to be more successful. Several cases around the right to water were framed in a manner that fit within the conditions for public interest litigation. Thus, most legal cases regarding water rights in India are focused on situations regarding a larger group, rather than violations of the individuals' rights.

The relationship between the UN system and the local reality plays a key role in understanding the opportunities for local activists. The gap between the international level and what happens on the ground is quite prominent. In local areas people do not mobilize around the human right to water. One factor is that the local activists have limited trust in the UN system. They don't see any change on the ground after the elevation of the right to water to a human right. The UN system, with its mechanisms for promoting and protecting human rights, are regarded as irrelevant for local change. Activists and smaller civil society organizations find other ways to mobilize around water, related to the constitutional right, or through local lobbying and political pressure. However, the larger national or international organizations do apply a language of the human right to water. The international organizations are often directly or indirectly linked to the UN system through cooperation and funding. These organizations can act as a mediator between the international system and the government. Yet, the distance from the international level to the local problems relating to water is still clear.

The mechanisms of the Special Rapporteur on Safe Drinking Water and Sanitation has opened up opportunities for people who have their rights violated. By conducting a country visit to India, the Special Rapporteur met with civil society, government officials, academics and marginalized people. The Rapporteur collects information and evidence that is presented to the national government and the United Nations. The mechanism of country visits opens up opportunities for 'naming and blaming', and international pressure towards the Indian government. I found that people that have their rights violated do not have the legal knowledge to use the Special Procedures to push for their goals. The marginalized groups rely on other actors that know how to use the international human rights system to push for change. The Special Procedures lack hard measures, when rights are violated to a large degree, like the right to water is in many parts of India. Thus, mobilizing around constitutional rights again gives a higher chance of remedies for people who are affected.

Despite some limitations with the research conducted in this thesis, the study has provided important insights. This is done by exploring the relationship between the international human rights system and the reality in India regarding the right to water. Both around how the international right has developed, in addition to how the right is not being applied in many cases of violations in India. This does not mean that the human right to water is not important in India. It shows how actors mobilize around water rights considering their legal, political, normative and social and economic opportunities. It correspondingly shows that different actors mobilize in different ways. Pushing for change regarding the right to

water in India can change related to which actors are involved, and how they perceive their opportunities. The power over water, and realization of peoples' right to water in India, exists to a large degree independently of the international human right.

8.1 Implications and Further research

The research for this thesis has several implications. First, it has shown how the lawfare typology can be applied to understand social mobilization around water rights in India. It has shown that the human right to water as a tool that can be applied by actors, but that this is not the preferred tool for mobilization around water rights in India. What determines the strategies and tools applied is the actors perceived rights and the opportunities available. In the Indian legal system, the right to water already has a long tradition. The right consciousness is developed around a constitutional right to water, rather than the international human right.

Second, this research has elaborated on the process around the development of the new human right to water. The legal foundations and the justifications for an international human right to water has been clarified. The legal-bindingness of the right to water is limited with international hard law, thus actors might choose to refer to other more fundamental rights within their national context.

Third, the mechanisms available through the Special Procedures opens up some opportunities for people that have their rights violated. These opportunities are however dependent on the resources and knowledge of these people. As noted, a lack of information and knowledge might deprive a large strata of the Indian population of access to their international rights. These people are to a large extent dependent on others to defend their rights and apply tools of litigation and lobbying of the government. Knowledge and information are thus two major components when addressing opportunities for people who have their right to water violated in India.

Consideration must also be given to the scope and limitation of this thesis. There are several factors and variables that have not been studied here, that could influence the relationships and outcomes. Alternatively, other explanations for the increase or decrease in mobilization. For instance, natural causes like draught, water scarcity and climate. This relationship is not considered in this thesis, but could be an interesting topic for further research.

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Appendix

1.1 A note on anonymizing the informants

Because of the human rights situation in India I chose to anonymize all the sources used in this thesis. Some expressed that they wanted to be anonymized, while others did not express that they wanted to be anonymized. I decided that because of the current political situation in India and other changes that might come, it would be easier and safer for all sources to be anonymized. Some people might be more vulnerable for harassment from government officials or other groups. While the situation for human rights activists in India is well documented from organizations like Human Rights Watch and Amnesty International, other people might be put in situations which might be unfortunate. Considering the ethical guidelines followed as researchers, and the specific guidelines provided by NSD this was therefore a choice I made during the data processing.

2.1 Transcription of the Special Rapporteur Léo Heller's statement during the meeting with civil society in Kolkata

Transcription of the final remarks by the UN Special Rapporteur Léo Heller during the Kolkata meeting

file: VID_20171105_132042

recorded: 05.11.2017: 13:55

Léo Heller:

Thank you [Name of activist], all of you for coming here and sharing your experiences and your cases with me. It was an important meeting. We try to register as much as possible of what you said, we have the written submissions, we have the pen drive and we will try to work more to understand what is the situation here.

The meetings with civil society in India has shown to be very relevant for me because in all countries I visit we always have a kind of point where we have two sides; The government usually are very optimistic and say that everything is very good and that everything is great, even if there are concerns which will be addressed in the next couple of years and everything will be settled. In India, this is not different and I think in India its more extreme; the gap between what the government says and what the civil society raises. Most of the time when we raise some concerns with the government they say; 'No, this is an isolated case, this is minor, this is not relevant, we will address that soon'.

...

From this meeting, I think relevant issues were raised and I think that the issue of drinking water quality is very serious here in this part of the country. Arsenic is something very, very serious that we should take into consideration with priority with the government. I know that it's not a new thing but it's a persistent problem and its very important to listen to someone that was the victim of the process of contaminated drinking water. People that we have seen (today) in places where the only source of water is ground water with arsenic and other contaminants.

I think it was important to listen to situation of access to toilets, the situation of how the national programs are being implemented here in the region and especially issues related to discrimination. I heard the problems of the enclaves and for me there is a part of discrimination to these people that live in the enclaves and are fighting to receive official programmes or the relationship between these communities and the gram panchayats and other authorities, but also the situations related to women discrimination, gender discrimination, as you raised earlier, and the situation of access for people with disabilities to toilets, those elements are very important for me to have a broad understanding of the human rights here, so thank you again, let's keep in touch, especially [Name of activist], thank you.