

Constitutionalising Rights to Water and Sanitation: International Norm Diffusion or Local Politics?

Mathea Loen



Master's thesis

Spring 2020

Department of Comparative Politics
University of Bergen

ABSTRACT

Water constitutes the foundation of human life. Without water, no one survives. In 2010, the United Nations General Assembly adopted Resolution 64/292 recognising the Human Right to Water and Sanitation. Subsequently, constitutionalisation of the Water and Sanitation rights has proliferated, and 31 countries have now constitutionalised the right to water and sanitation. This thesis seeks to understand the impact of this international norm development, and specifically whether and how international norm development led to the proliferation of water and sanitation in national constitutional texts.

I conduct a comparative analysis of all constitutions and an in-depth study of the Kenyan constitution-making process. The comparative study finds an increase in human rights language around provisions of water and sanitation in constitutions, supporting the hypothesis of change in language over time. The case study suggests that the international norm development to some extent do influence constitutionalisation of rights to water and sanitation, confirming the second hypothesis. It also reveals other factors of influence, such as the South African constitution, local and regional human rights- and water movements, and the Kenyan people.

FOREWORD

I would not have been able to finish this project without help and support from people around me and for this I am very grateful. I would like to express my thanks to

My Interviewee – for trusting me and for providing me with valuable information;

My supervisor Siri Gloppen – for all the support, help, the great conversations, the passion for this thesis and for never giving up on me;

Members of the Water Rights Project – for welcoming me with open arms, for inputs, comments, suggestions and advice;

Method gurus Mikael Johannesson and Rebecca Shiel – for providing indispensable help and patience;

Arjan Schakel – for being exceptionally understanding and supportive when I have been struggling to balance “project work” and “thesis work”;

The University of Bergen and employees at the Department of Comparative Politics – for providing excellent education, a strong support system, and for being cooperative and attentive to students;

My dear friends in HQ – for keeping me sane, for all the support and for making every workday fun;

My gym buddies and partners in life, Ragnhild and Ingrid – you guys are beyond amazing;

Sofie – your company got me through those last few days;

My family – for always being there for me and for supporting and loving me no matter what;

And last but not least, thank you James – without you I could not have done this.

Mathea Loen

Bergen, 2 July 2020

ABBREVIATIONS

CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CESCR	Committee of Economic Social and Cultural Rights
CKRC	Constitution of Kenya Review Commission
CoE	Committee of Experts
CRPD	Convention on the Rights of Persons with Disabilities
HRC	Human Rights Council
HRtWS	Human Right to Water and Sanitation
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic Social and Cultural Rights
IMF	International Monetary Fund
INGO	International Non-Governmental Organisation
IO	International Organisation
MDGs	Millennium Development Goals
NGO	Non-Governmental Organisation
OHCHR	Office of the High Commissioner for Human Rights
Res.	Resolution
SDGs	Sustainable Development Goals
SR	Special Rapporteur
TAN	Transnational Advocacy Network
UN	United Nations
UNCRC	United Nations Convention on the Rights of the Child
UNGA	United Nations General Assembly

TABLE OF CONTENT

CHAPTER 1 INTRODUCTION	1
1.1 Research Question.....	2
1.2 Hypotheses.....	3
1.3 Structure of the Thesis	4
CHAPTER 2 THEORY	6
2.1 The Role of Norms.....	7
2.1.1 The Norm Concept	7
2.2 Norm Emergence and Diffusion	8
2.2.1 The Power of Human Rights	8
2.2.2 The Life Cycle of Norms.....	9
2.2.3 International Organisations and Transnational Advocacy Networks	11
2.3 Mechanisms.....	13
2.3.1 Conditions for Norm Diffusion and Variation in Outcome.....	15
2.4 Water Discourse.....	17
2.4.1 International Realm	19
2.4.2 Neo-liberal Realm.....	20
2.4.3 Human Right Realm	21
2.5 Diffusing the HRtWS.....	22
CHAPTER 3 RESEARCH DESIGN AND DATA	24
3.1 Research Design.....	24
3.1.1 Combining multiple methods and data	25
3.1.2 Case selection	26
3.2 Scope and limitations	27
3.2.1 Studying Causality.....	27
3.2.2 Studying Norm Diffusion and Discourse	28
3.2.3 Data Availability.....	30
3.3 Data.....	31
3.3.1 HRtWS paragraphs in Constitutions.....	32
3.3.2 Kenyan Constitution Making Process	33
3.3.3 Expert Interview	35
3.3.4 Cross-national data	36
3.3.4.1 Variables	37
3.3.4.2 Model Specification.....	40
3.4 Validity and Reliability.....	41
CHAPTER 4 THE DEVELOPMENT OF THE RIGHT TO WATER AND SANITATION.....	44
4.1 The Right to Water and Sanitation as Component of the Right to Health and Life	44
4.1.1 Explicit Mentions of the Right to Water and Sanitation in Existing Documents.....	45
4.1.2 Lack of Universality	46
4.1.3 The Human Right to Sanitation	46
4.2 Water as Right to Sustainable Development and Environment	47
4.3 Mobilisation for an Independent Right to Water and Sanitation	49
4.3.1 The Human Rights Council and Office of the High Commissioner for Human Rights.....	49
4.3.2 Building Political Consensus.....	50
4.4 UNGA Res. 64/292.....	52
4.4.1 The Bolivian Initiative.....	52
4.4.2 Disagreements in the Process	53
CHAPTER 5 COMPARATIVE CONSTITUTIONAL ANALYSIS	56
5.1 Constitutionalising the Right to Water and Sanitation.....	56
5.2 Constitutional Language	58

5.2.1 Discursive Variation	58
5.2.2 Quantitative Analysis.....	62
5.3 Effects of Norm Diffusion	67
5.3.1 Constitutional Language and Norm Diffusion	67
5.3.2 Penalised Maximum Likelihood Regressions	67
5.4 Discussion	70
5.4.1 Texts and Variation in Constitutional Language	70
5.4.2 Mechanisms Influencing Language Adoption.....	74
CHAPTER 6 CASE STUDY OF KENYA.....	77
6.1 Tracing the Right to Water and Sanitation in the Kenyan Constitution	77
6.1.1 A Dramatic Decade in Kenya.....	77
6.2 Analysis of Documents from the Kenyan Constitution Making Process.....	79
6.2.1 Documents from the Constitution Making Process	79
6.2.2 Results.....	80
6.2.3 External Influence.....	85
6.3 Discussion	87
6.3.1 Political Disagreement and Instability.....	87
6.3.2 Civil Society and Public Participation	88
6.3.3 Socialisation and the Role of South Africa.....	89
6.3.4 From Economic Discourse to Human Rights Discourse	90
CHAPTER 7 CONCLUSION.....	92
7.1 Summary	92
7.2 Implications.....	93
7.3 Further Research	94
LITERATURE.....	95
APPENDIX.....	101

TABLES AND FIGURES

Table 1 The Three Stages of a Norm	10
Table 2 State Structures, and Pathways and Agents for Norm Diffusion	15
Table 3 Theoretical Arguments and Norm Diffusion Mechanisms	23
Table 4 Bayesian Evidence Tests for Process Tracing	29
Table 5 Dependent Dichotomous Variables and Distribution of Positive Outcome	37
Table 6 Overview of Variables	40
Table 7 Cross Tabulation of Dependent and Discrete Independent Variables	41
Table 8 Toward Global Consensus on the Explicit Statement of a Human Right to Water?	51
Table 9 Normative Content of the Rights to Water and Sanitation in Constitutional Paragraphs.....	61
Table 10 International Documents used in Similarity Analysis.....	65
Table 11 Similarity between National Constitutions and International Documents on HRtWS	66
Table 12 Penalised Maximum Likelihood Models: The Effect of Socialisation Mechanisms on Constitutional Language.....	69
Table 13 Water and Sanitation Topics in Constitutional Review by Frequency	81
Table 14 Water and Sanitation in Constitutional Review by Actor	82
Table 15 Water and Sanitation in Kenyan Draft Constitutions Over Time	84
Figure 1 World Map of Constitutions with the Rights to Water and Sanitation.....	57
Figure 2 Timeline of HRtWS at National and International Level.....	58
Figure 3 Type of Paragraph in Constitution and Year for Constitutionalisation	59
Figure 4 20 Most Frequent Words in Constitutional Paragraphs.....	63
Figure 5 Marginal Effects in Five Penalised Maximum Likelihood Models.....	70

CHAPTER 1 INTRODUCTION

The aim of this thesis is to understand the domestic impact of international norm making by studying constitutionalisation of the human right to water and sanitation comparatively and in-depth. The recognition of the explicit and independent human right to water and sanitation (hereafter HRtWS) in 2010 culminated decades of advocacy and work. A number of actors have worked long and hard to create an international human right framework for the right to water and sanitation.

The resolution calls upon states and international organisations to increase and intensify measures for the provision of “safe, clean, accessible and affordable drinking water and sanitation for all” (General Assembly 2010, 899), specifically addressing the 884 million people who lack access to safe drinking water, and 2.6 billion people who lack access to basic sanitation. The resolution emphasises the indispensability of access to safe and clean water and sanitation, and that states and international organisations are obliged to provide financial resources, capacity and technology to the realisation of the human right to water and sanitation.

Elevating the right to water and sanitation as an independently recognised human right anticipates certain effects. Human rights go beyond averages and they mandate efforts towards specifically vulnerable groups such as women, people with disabilities, children, refugees, prisoners and nomadic communities (Langford 2005, 277). Human rights norms are powerful and have a special position in the international community, calling for monitoring and reporting mechanisms (UN Water n.d). Special procedures mechanisms such as the Independent Expert and subsequently the UN Special Rapporteur on the Rights to Safe Drinking Water and Sanitation have a mandate from the United Nations Human Rights Council to perform country visits, conduct thorough studies on the topic and write reviews and report to the UN General Assembly annually (OHCHR n.d-b). In other words, recognising the human right to water and sanitation is anticipated to change provision, legislation, regulation and protection, and improve the actual access to water and sanitation for those needing it the most.

Although human rights often anticipate changes in the way we deal with issues, measuring and identifying the extent to which they have done so is difficult. The requirement to “progressively realise” the right by using “maximum available resources” does not specify detailed strategies for management and increased fulfilment (Baer 2017b, 25). Whether resolutions and general comments are legally binding, is under dispute (Schutter 2014). This can limit their utility and effectiveness in enhancing access to water and sanitation (Thakur

2010). It is thus particularly interesting and important to trace their effects. At the national level, “there is a positive relationship between countries with better economic rights provisions in their constitutions and a higher demonstration of government effort toward fulfilling economic rights” (Baer 2017b, 25). Constitutionalising socio-economic rights enables courts to interpret legislation and develop the rules of the common law and to adjudicate constitutional and other challenges to state measures that are intended to advance those rights (Mubangizi 2006, 6). The development and proliferation of international norms to national constitutions and policy making is an important field of research, and this thesis seeks to study how and when states adopt international norms into their national constitution, in this case regarding the right to water and sanitation.

1.1 Research Question

The human rights literature is concerned with the material effects of international human rights norms (i.e. actual outcomes such as increased coverage, policy implementation or jurisprudence), political effect (e.g. changes in how decisions are made and by whom), and judicial effects (changes in jurisprudence) but also with their symbolic effects, or how human rights norms affect the way in which we talk, think about and address a problem or an issue. Research on how the international norm change that took place with the adoption of UNGA Resolution 64/292 in 2010 has affected access to water, policies, and litigation strategies is still equivocal, ten years later (Shiel, Langford, and Wilson 2020). However, there is a paucity of rigorous research on the discursive and symbolic effects, which is why I have chosen to study the effects of international human rights norms on domestic constitutional *language*. Moreover, the causal proximity from the main explanatory variable (recognition of international human right to water and sanitation) to human rights language in constitutions is greater than to material and political outcomes, where the potential number of intervening variables are higher.

The first part of the thesis studies the emergence of the rights to water and sanitation in constitutions across the world. Before the international norm development started, only four countries – Uganda, Gambia, Ethiopia and South Africa – had constitutionalised the right to water. During the international development some countries adopted the rights to water and sanitation in their constitutions, however, many more countries constitutionalised right to water and sanitation after the international community had voted in favour of a resolution in 2010. That a ‘new’ human right is adopted in contemporary time is a unique opportunity to study

how the human right came into being and which forces were used to create support and consensus around it. It also makes a good study object for understanding how a ‘new’¹ human right norm is diffused across different political and legal levels and political entities and what effects this diffusion has. The research question for this thesis is therefore as follows: *Did the recognition of the Human Rights to Water and Sanitation in 2010 influence the constitutionalisation of the norm at national level, and if so, how?*

I will answer this research question by combining a comparative analysis and a case study of Kenya which adopted a new constitution in 2010, in which the right to water and sanitation was included. The comparative analysis examines all countries with the right to water and sanitation in their constitution, and the case study focuses on the Kenyan constitution making process. Both parts are predominantly based on text analysis of international documents, constitutional paragraphs and the documents from the constitution making process. The aim is to better understand patterns of norm diffusion by getting an overview of the constitutionalisation of the right to water and sanitation worldwide, and an in-depth understanding of the mechanisms that cause norm diffusion to generate discursive changes at the national level.

1.2 Hypotheses

The hypothesis in this thesis is: “there has been a normative change in the right to water at the level of national constitutions, and this change is caused by norm diffusion from the international to the national level”.

The hypothesis can be separated into two more specific hypotheses of which the first anticipates variation in constitutional language at national level regarding the right to water and sanitation before and after the norm development at international level. The second hypothesis assumes that the changes in constitutional language at national level can be explained by international norm development. Hypothesis one is descriptive, assuming a particular variation, whilst hypothesis two argues that the variation is caused by international norm development

¹ It is disputable that the HRtWS is a new human right. As Chapter 2 will demonstrate, the rights to water and sanitation have been interpreted as human rights under the International Convention on Social, Economic and Cultural Rights as a component of the Right to Life, Right to Health and Right to an Adequate Standard of Living.

which encompasses a causal relationship between the independent variable and the dependent variable (Gerring 2012, 107). I elaborate more on these arguments in section 2.5.

The first, descriptive, hypothesis will be answered by comparing constitutions that include the right to water and sanitation. A text analysis of the constitutional paragraphs and metadata about the constitutions and countries will be conducted to study variation in discourse before, during and after the development of the international norm on the human right to water and sanitation. More specifically, I study the language that is used in the paragraphs, references to the international documents related to HRtWS, and the varying definitions of water and sanitation.

The second hypothesis is causal². It calls for an in-depth study of the constitutionalisation process in order to establish the nature and direction of norm diffusion. Kenya is used as a case study in this thesis, and I trace the human right to water and sanitation-norm through the constitutional making process. I study documents related to the constitution making process, such as reports from meetings with the constitutional review commission.

1.3 Structure of the Thesis

The next chapter presents theories of norm diffusion. I utilise a number of theories to explain how norms are diffused and the roles of different actors in norm diffusion. Chapter two also presents the discourse that revolves around access to water and sanitation in documents from international treaties, conventions and reports. The methods and data sources that are used in this thesis are explained and discussed in chapter three. I rely on several sources of data and use a variation of strategies to analyse the data, including text analysis, interview and regression models.

The fourth chapter provides the first empirical analysis. I present how the rights to water and sanitation have developed in international documents, from early appearances where the access to water was discussed as something that was desired but not an obligation for states to provide for, to the independent and explicit recognition of the human right to water and sanitation in 2010. I elaborate on the mobilisation around the recognition of a human right to water and sanitation and discuss some of the main actors that were involved in this movement.

² “When there is an implicit or explicit claim that a factor generates variation in an outcome the argument will be regarded as causal” (Gerring 2012, 107).

Here, I also discuss how water and sanitation came to be combined as one right. Until recently, the right to sanitation, to the extent that it received focus, was linked to the right to housing, health and human dignity, rather than to water (Winkler 2016, 1350; 1353). This analysis is based on an expert interview and primary data.

The legal international development of the right to water and sanitation as described in chapter four coincides with the development of the discourse around water presented in chapter two. Three competing discourses can be distinguished: a discourse perceiving water as a resource of which the ownership and utilisation must be regulated by international agreements and conventions; a neo-liberal discourse seeing water as a commodity subject to privatisation and the free market; and a human rights discourse incorporating water into international documents on socio-economic human rights. Over the past two decades, the international legal development has become more and more prone to the notion of the rights to water and sanitation as human rights.

Chapter five presents the comparative study of all the constitutions in the world with regard to their mention (or not) of the right to water and sanitation, whilst chapter six presents the case of Kenya. In Chapter 5, I present results from a qualitative and quantitative text analysis in addition to a cross-national panel regression model that examines country level factors related to the constitutionalisation of the right to water and sanitation. Chapter six traces the constitution making process in Kenya based on documents and report from the Constitution of Kenya Review Commission (CKRC). Chapter seven provides some concluding remarks about the research conducted and suggestions to further research on the topic.

CHAPTER 2 THEORY

This chapter presents the theories on norms and norm diffusion that exist in the literature, before going on to discuss Gupta, Ahlers, and Ahmeds' (2010) categorisation of water discourse, which is useful when seeking to understand the how the norms manifest in the language of international documents and reports. Lastly, I present four arguments about the norm diffusion of the HRtWS. The arguments are based on the theoretical framework and water discourse literature presented in this chapter, selecting the parts of the theories that do apply to the scope conditions of the research question.

Existing norm diffusion theories have mainly developed through empirical research. Constructivist and socio-institutional scholars such as Checkel, Finnemore, Adler and Grigorescu (Park 2006, 344) have studied norm diffusion from a variety of international organisations (IOs), the Council of Europe, the World Bank, the International Committee of the Red Cross, The European Union, NATO and the Organisation for Security and Cooperation in Europe. These empirical studies illustrate how IOs are important actors for norm diffusion (Barnett and Finnemore 1999, 705-706).

Norm diffusion literature is not only concerned with human rights norms. Ratner (2000) studied how the OSCE High Commissioner of National Minorities promotes and diffuses norms to stop ethnic conflict, increase tolerance and spread understanding (Park 2006, 348). Finnemore's study of UNESCO suggests its role in establishing science bureaucracies in developed states redefined these states' norms and expectations with regards to science, and that the redefined norm of having a science policy bureaucracy was spread to a large number of countries (Finnemore 1993, 576).

Both authors identify factors and mechanisms that explain norm diffusion in their cases. Ratner argues that the organisation's institutional structure, its informal normative framework and the High Commissioner's work has been extremely important for understanding the organisation as a 'norm diffuser'. Finnemore highlights UNESCO's role in arranging conferences, publishing studies on science policy issues, and sending consultants to help set up a science policy bureaucracy as important measures for this norm diffusion (Finnemore 1993).

2.1 The Role of Norms

State behaviour and state interest are central topics in political science and international relations. Traditionally, international relations has been dominated by the realist approach which explain state behaviour based on rationalist and material interests (Wendt 1992, 393; Adler 1997, 321). Assuming that all states have national interests and wish to maximise these, all actions and choices made will be based on calculations that find the most favourable option. From this perspective it is theoretically possible to calculate and therefore predict behaviour and actions.

Newer approaches suggest that it is not just cost benefit-calculations that regulate behaviour and determine states' decisions. Norms and ideas are additional features that influence national interests and state behaviour. In fact, Sikkink argues that ideas and norms have important and independent powers in the shaping of behaviour and national interests (Sikkink 1993, 140). This is how, according to Adler (1997, 332), one can explain that states act in a manner which is irrational or disadvantageous for material outcomes.

Constructivists see the international system as socially constructed, and within this social construct there are ideational and social phenomena, norms and rules. It is a system in which actors' identities and interests can be formed and changed, and norms and values proliferate across states and shape state behaviour and the interaction between actors (Finnemore 1996, referred to in Park 2006, 343; Finnemore and Sikkink 1998, 887-888; Brinks, Gauri, and Shen 2015, 290). With this constructivist approach (Park 2006, 342), we cannot just explain irrational behaviour based on norms, but additionally, there are strong arguments for how and why norms and ideas actually regulate behaviour.

2.1.1 The Norm Concept

A norm can be defined as “a rulelike prescription which is both clearly perceptible to a community of actors and which makes behavioural claims upon those actors” (Finnemore 1993, 566). *Behavioural claims* refer to anticipated change in or maintenance of a certain behaviour by parties that share the norm. Norms come with a list of what is appropriate behaviour, and what is inappropriate behaviour, and endorsing a norm will generate impetus with appropriate behaviour (Finnemore and Sikkink 1998, 891; Risse, Ropp, and Sikkink 1999, 7). *Prescriptions*, which are strong recommendations or instructions, which are similar to, but different from *rules*, indicates that actors will follow these behavioural claims (Risse, Ropp,

and Sikkink 1999, 8). Non-compliance or behaving inappropriately will often generate reprisals in some way, such as pressure from other actors in the international realm or softer means such as naming and shaming which is an often-utilised tool in international relations. When laws and regulations are not sufficient to regulate behaviour, especially at the international level which consists of sovereign states, norms are a great substitute to regulate behaviour and other features of the political sphere (Finnemore and Sikkink 1998, 888).

2.2 Norm Emergence and Diffusion

2.2.1 The Power of Human Rights

The literature on norms offers many theoretical insights into how norms emerge, change and proliferate. Some of the most prominent theories of norm emergence and diffusion will be discussed in this section. This section will mainly be concerned with human rights norms, but as is evident from the literature, other norms can be subject to diffusion as well. Therefore, examples and theories will also be drawn from other thematic areas of political science and international relations. The first theoretical framework that will be discussed here is offered by Risse, Ropp and Sikkink. In their book *The Power of Human Rights* (hereafter referred to as POHR), Risse, Ropp and Sikkink develop a theory of five phases through which human rights norms are internalised among states (1999, 2).

The five phases are repression, denial, tactical concessions, prescriptive status and habitualisation. States that are at the first phase of the spiral are disregarding their citizens' rights and repress any actors who try to challenge the authorities by invoking these rights. In the second phase, the state denies human rights abuses. The first and second phase are characterised by non-compliance of human rights norms. In both situations, a state can be aware of an existing human right norm but chooses to disregard or deny them. A state will deny their human rights violations if they do not believe in these norms, and if the benefits of not complying outweigh the consequences. Norms and ideas do not always coincide with rational logic of material interests, so when following prescription is not deemed as rational and the state can withstand the pressure from other states, they do exactly that.

When the cost-benefit calculation shifts and the cost of denying is greater than the benefits, the state will move in to phase three – and make a tactical concession. Arguably, when the state first starts to show commitment to human rights, it is in order to relieve pressure from other states and international and domestic human rights organisations (Risse, Ropp, and

Sikkink 1999, 12). The idea of “getting away with” human rights abuse by making tactical concessions can be perceived as instrumental adaptation of human rights norms, but the decision to make the tactical concession is based on logic of appropriateness. The state knows that adopting the norms is the appropriate behaviour (Goodin, March, and Olsen 2013, 1), and will therefore make this concession. The POHR authors argue that once the state has opened up for a discussion on human rights, it will eventually start to work toward compliance. Either because the human rights norms “lead to a change in (collective) identities which in turn leads to a change in (instrumental) interests or whether interests lead to a change in norms which in turn lead to a change in identities” (Risse, Ropp, and Sikkink 1999, 10). In other words, it might become the state’s interest to follow the norm because their identity has changed to one where they believe in the validity of the norm, or their identity changed as a consequence of changed interests. It is the argumentative and moral discourse³ that generates these changes, and eventually validates the norm (Risse, Ropp, and Sikkink 1999, 16). It is the phase where the identity or interests change and the state adopts the norm that is of main interest in this thesis, in other words, the moment when the norm is accepted as legitimate and the appropriate behaviour.

The fourth and fifth phases constitute institutionalisation and habitualisation of human rights. The state becomes a part of the international society. This is the end of the socialisation process. “Human rights norms can only be regarded as internalized in domestic practices, when actors comply with them irrespective of individual beliefs about their validity” (Risse, Ropp, and Sikkink 1999, 16). Human rights norms are then incorporated in the “standard operating procedures” of domestic institutions. This type of internalisation process can be conceptualised as independent from changes in individual belief systems. Actors follow the norm, because it is the normal thing to do, and “whether they are convinced of its moral validity and appropriateness or not is largely irrelevant for habitualisation processes” (Risse, Ropp, and Sikkink 1999, 17).

2.2.2 The Life Cycle of Norms

Finnemore and Sikkink have also been studying norms, especially where they come from and how they change (Finnemore and Sikkink 1998, 887-888). They have created a theory which

³ This is what Checkel describes as persuasion; “an activity or process in which a communicator attempts to induce a change in the belief, attitude, or behaviour of another person (...) through the transmission of a message in context in which the persuadee has some degree of free choice” (Checkel 2001, 562).

describes a norm’s life cycle which consists of three stages, namely norm emergence, norm cascade and internalisation. The stages, including the main actors, motives and mechanisms for each stage are presented in table 1 below. Each stage in a norm’s life cycle is described by the main actors, the motive for their actions and the mechanisms with which the change is created (Finnemore and Sikkink 1998, 898). The first stage, in which the norm is created, is characterised by two elements, namely norm entrepreneurs and organisational platforms. The norm entrepreneurs call attention to or create an issue by using specific language. According to Finnemore and Sikkink, norms never arise in a vacuum and the new norms therefore emerge in a space with competing normative frameworks. The organisational platforms are spaces, either physical or abstract, from which norm entrepreneurs promote the norms. They are often IOs, NGOs or other transnational structures (Finnemore and Sikkink 1998, 898-899). As illustrated in the table below, in this stage the norm entrepreneurs will use persuasive power to make other actors adopt the norm.

Table 1 The Three Stages of a Norm

	<i>Stage 1</i> <i>Norm emergence</i>	<i>Stage 2</i> <i>Norm cascade</i>	<i>Stage 3</i> <i>Internalisation</i>
<i>Actors</i>	Norm entrepreneurs with organisational platforms	States, international organisations, networks	Law, professions, bureaucracy
<i>Motives</i>	Altruism, empathy, ideational commitment	Legitimacy, reputation, esteem	Conformity
<i>Dominant mechanisms</i>	Persuasion	Socialisation, institutionalisation (at the international level), demonstration	Habit, institutionalisation

Credit: Finnemore and Sikkink (1998, 898).

Whilst the norm is emerging, it comes to a tipping point when a critical mass of states has adopted the norm, and from now the norm is spread to states at a higher rate, and without domestic pressure. There are few empirical approaches that explain when the tipping point occurs, but numerous empirical narratives suggest that the tipping point rarely occurs until one third of the total states in the system adopt the norm (Finnemore and Sikkink 1998, 901). Moreover, some states have a greater moral stature than others when it comes to specific norms. Critical states are “those without which the achievement of the substantive norm goal is compromised” (Finnemore and Sikkink 1998, 901). If such a “critical state” adopts the norm, the tipping point may come sooner, and if the critical state does not adopt the norm, the tipping point may not happen at all. Alternatively, institutionalising the norm in international rules or

organisations will take the norm from stage one, across the threshold and over to stage two (Finnemore and Sikkink 1998, 900).

The norm institutionalisation at the international level helps cascading the norm by “clarifying what, exactly, the norm is and what constitutes violation (often a matter of some disagreement among actors) and by spelling out specific procedures by which norm leaders coordinate disapproval and sanctions for norm breaking” (Finnemore and Sikkink 1998, 900). The United Nations is the most prominent international organisation (IO), being the foundation for the Universal Declaration of Human Rights, The International Covenant on Civil and Political Rights (ICCPR) and The International Covenant on Economic, Social and Cultural Rights (ICESCR). Where treaties exist, the entry into force of the treaty may be a useful proxy for the critical mass necessary to reach the tipping point towards norm cascade. IOs are essential for providing these proxy treaties (Finnemore and Sikkink 1998), as will be discussed more thoroughly in section 3.2.3 and 3.3.

During the second stage of the life cycle, international socialisation is the main mechanism for norm diffusion or contagion. Socialisation comes in different forms such as emulation, praise and ridicule. Emulation and praise are used towards actors that advocate and follow the norm whilst ridicule is used towards the actors who do not follow the norm. These mechanisms can be performed by states, IOs, NGOs and other network members (Finnemore and Sikkink 1998, 902).

2.2.3 International Organisations and Transnational Advocacy Networks

As demonstrated above, IOs often participate in norm diffusion. IOs are important institutions in international relations regardless of the approach one takes. However, the role of agency and process is receiving more attention in the constructivist literature (Checkel 2001, 557). States are the main actors in the realist narrative, but IOs are created to reiterate the goals and interests of the states that created them (Wendt 1992, 392). Realist and liberalist traditions perceive IOs as structures that can, to some extent, be manipulated by other actors (states), but they are not actors themselves.

Constructivists agree that IOs are created and shaped by states (Wendt 1992; Adler 1997; Finnemore and Sikkink 1998; Barnett and Finnemore 1999; Cortell and Davis Jr. 2000; Park 2006; Brinks, Gauri, and Shen 2015). But unlike realists, they perceive social entities, including IOs as independent agents, or actors, and holders of norms, interests and goals.

Moreover, they are autonomous entities, they can gain authority from rational-legal legitimacy, expertise and information (Barnett and Finnemore 1999, 707). Most importantly, IOs shape state behaviour by diffusing international norms to states (Finnemore 1996, referred to in Park 2006, 343).

Therefore, it is important to also take into account IOs roles and how their behaviour influences norms and norm development. A good example is the role IOs play in the international peace and security arena. Peace and security are strongly related and linked to democratisation and human rights. Here, IOs have “license to intervene almost anywhere in an authoritative and legitimate manner” (Barnett and Finnemore 1999, 714). Barnett and Finnemore argue that IOs act as conveyor belts for the transmission of norms and models of “good” political behaviour (1999, 712-713). Information and expertise generate power and capacity which they will use to steer states in whichever direction they want, and to create boundaries for inappropriate behaviour (Finnemore and Sikkink 1998, 899). From a human agency perspective, IOs act as agents of socialisation by using mechanisms such as pressure and monitoring compliance to proliferate and transfer the norms from one place to another (Finnemore and Sikkink 1998, 902). The authors of POHR also argue that IOs play an important role in diffusion norms by generating reprisals (Risse, Ropp, and Sikkink 1999).

Alongside international organisations, the literature emphasises the importance of networks of activists for norm diffusion, especially the human rights issue (Keck and Sikkink 1998). These activist networks have been labelled transnational advocacy networks (or TANs) and are characterised by the unique organisational structure which “promote causes, principled ideas, and norms, and they often involve individuals advocating policy changes that cannot be easily linked to a rationalist understanding of their “interests” (Keck and Sikkink 1998, 8-9). TANs are made up of a number of actors, but the actors can vary from network to network. Common actors include international and domestic nongovernmental research and advocacy organisations, local social movements, foundations, the media, churches, trade unions, consumer organisations, intellectuals, parts of regional and international intergovernmental organisations and parts of the executive and / or parliamentary branches of governments.

Keck and Sikkink identify three strategies TANs use for influence: persuasion, socialisation and pressure (1998, 16). These are not unique to TANs, norm diffusion theories emphasise these strategies as mechanisms for norm diffusion among other movements and groups. However, the means they use to achieve socialisation, persuasion and pressure differs

from other actors, and include information, symbolic, leverage and accountability politics. TANs create or reframe issues by mobilising information from their members around the world and transforming or adding symbolic aspects to the issues. “They promote norm implementation by pressuring target actors to adopt new policies and by monitoring compliance with international standards”.

2.3 Mechanisms

Diffusion, by a standard definition, is the "transfer or transmission of objects, processes, ideas and information from one population or region to another" (Checkel 1999, 85). The *mechanisms* that generate the transfer of norms are the main concern for the next section. Methodologically, a mechanism is conceptualised as the link between the independent and the dependent variable. Constructivist scholars offer a number of theories of norm diffusion, including diffusion mechanisms. The type of mechanism applied within a context or for a certain topic will depend on the opportunity structures provided in that particular case. The opportunity structure depends on many factors including political institutions, capacity, resources and knowledge (Keck and Sikkink 1998, 7).

What causes a norm to diffuse from one place to another? An important notion for social constructivists is interaction (Checkel 2001, 560). Interaction enables social learning and argumentative persuasion⁴. Checkel defines social learning as "a process whereby agent interests and identities are shaped through and during interaction". Argumentative persuasion as is defined as "an activity or process in which a communicator attempts to induce a change in the belief, attitude, or behaviour of another person (...) through the transmission of a message in context in which the persuadee has some degree of free choice" (Checkel 2001, 561-562). I believe that social learning and argumentative persuasion are two important mechanisms for the human right to water and sanitation. These mechanisms are generic and can be applied to state actors, NGOs, IOs or civil society actors.

Cortell and Davis offer mechanisms that explain how international norms affect state behaviour. They distinguish between direct and indirect mechanisms of which the former includes providing solutions to coordinate problems, reducing transaction costs, providing a

⁴ Checkel's term 'argumentative persuasion' will in this thesis be treated as equivalent to persuasion as a mechanism presented by Finnemore and Sikkink (1998) and persuasion in the third stage of the spiral model (Risse, Ropp, and Sikkink 1999).

language and grammar of international politics and constituting the state actors themselves. Indirect mechanisms work via domestic political processes and are conditioned on domestic norm salience and legitimacy and the context in which the polity exists (Cortell and Davis Jr. 2000, 65-66). These conditions will be discussed more thoroughly in the section below.

The opportunity structure generates a variety of strategies for norm diffusion. Checkel studied the tendency within the Council of Europe to influence the human rights regime and to create shared understandings of citizenship and the rights of minorities (Checkel 1999). His research focuses on finding and demonstrating empirically the mechanisms which cause norms to diffuse from international to national level, but he also discusses that the effects of the mechanisms, and that the diffusion's constitutive effect itself is conditioned on domestic structures and cultural match (Checkel 1999, 90-91). He has conducted a case study of Germany, in which, as he argues, domestic norms and their effect on elite preferences is very internalised and will erect barriers in Germany to the diffusion of regional norms on membership.

Checkel differentiates between bottom-up and top-down processes which denotes from which way the norm reaches the political authorities. They go via non-state actors and policy networks, or elite decisionmakers, respectively (Checkel 1999, 88). The domestic structure of a state will influence which mechanisms are present and effective. Checkel identifies four different state structures, which are presented in table 2 below. A characteristic of liberal states is that elites have a constrained role and are less influential (Risse-Kappen, 1991 referred to in Checkel 1999, 89). Policy making is characterised by participation from non-state actors and civil society. The non-state actors will therefore also play the most important role in domestic empowerment and possible domestic adoption of global norms. The elites, on the other hand, are less prone to learning because of the politicised situation (Mendelson 1993; Pierson 1993, 617-18; Levy 1994; Reiter 1996; Anderson 1991; Hall 1993 referred to in Checkel 1999, 89).

In state-above-society structures, society and the state are separated to a greater extent, and the civil society have few opportunities to influence policy and decision making. Elite learning is thus essential for norm diffusion from the international level. These types of states are often less politicised due to the distance between the power holders and the rest of the society, and in such a depoliticised setting, individuals are also more likely to be open for learning (Checkel 1999, 89).

Table 2 State Structures, and Pathways and Agents for Norm Diffusion

<i>Liberal</i>	<i>Corporatist</i>	<i>Statist</i>	<i>State-above-society</i>
Societal Pressure on Elites	Societal pressure on Elites (primary) and Elite Learning (secondary)	Elite Learning (primary) and Societal Pressure on Elites (secondary)	Elite Learning

Table 2: Dominant mechanisms empowering international norms at national level for different domestic structures. Credit: Checkel (1999, 90)

Germany is considered a corporatist society, which, according to his theoretical argument, facilitates mainly societal pressure, but also to some extent elite learning. He demonstrates these pathways in the German case. The case of dual citizenship has been lifted up as a case through societal pressure from a number of actors such as commissioners of foreign affairs, churches, trade unions, minority organisations, grass root organisations with help from academics, public figures and the press (Checkel 1999, 99-101). Social learning mechanisms have worked via the federal commissioner’s office Cornelia Schmalz-Jacobsen’s in two ways; her contact with and exposure to international work; and among the “young, wild” CDU politicians arguing in favour of dual citizenship because of extensive discussions with foreigner’s organisations and churches (Checkel 1999, 101-102).

In sum, norm diffusion literature emphasises socialisation, interaction and persuasion as important mechanisms for transferring ideas and beliefs. These mechanisms can work top-down via elite learning, or bottom-up via societal pressure. The norms can also be diffused to and from a number of actors – NGOs, international organisations, transnational advocacy networks, states and civil society groups.

2.3.1 Conditions for Norm Diffusion and Variation in Outcome

Checkel argues that the literature has little understanding of conditions which influence norm diffusion (Checkel 1999, 85). By conditions, I mean contextual factors that influence the extent to which mechanisms lead to norm diffusion, and in which manner the norm is adopted. Some contextual factors will challenge the diffusion of certain norms, whilst other factors cause the norm to change when it has been adopted in a specific state. In order to understand which causal mechanisms that produce which effects under which conditions, intensive empirical study is required. Only in this way can one understand how IOs work to spread norms and policies, and their effect (Barnett and Finnemore 1999, 715).

According to Checkel, constructivists lack this understanding for contextual factors. He claims that when constructivists consider agents, they normally focus on international norm-

makers, and neglect domestic norm-takers. They will therefore oversee how domestic actors will interpret norms differently and thus the outcome will vary in different states. “Lacking a theory of domestic agency, constructivism thus overpredicts international normative influence and cannot explain cross-national variation in the constitutive impact of systemic norms” (Checkel 1999, 85). Domestic actors and their interpretation of norms is one factor affecting norm diffusion. This process, vernacularisation, is discussed below in this section. I will first present the conditions for diffusion that are discussed in literature.

Checkel presents five conditions under which argumentative persuasion an effective mechanism for norm diffusion (2001, 562). He argues that argumentative persuasion is more likely to be effective when 1) those on the receiving end are in a new environment (facing a new issue, a crisis, or serious policy failure); 2) do not already have an institutionalised norm that is inconsistent with the new norm; 3) if those diffusing the norm belong to the same group as the receiver, and 4) a strong figure of this group; and 5) use deliberate arguments to advocate their case. On the other hand, a politicised environment in which the two parts interact can have a negative impact on the effect of argumentative persuasion (Checkel 2001, 562-563).

Going back to Cortell and Davis, they claim that domestic salience or legitimacy of the norm will affect the extent to which the norm can diffuse and internalise domestically from the international level (2000, 66). They argue that the level of norm salience, which they define as the “prescription for action in situations of choice”, highlights the varying strength of international norms within domestic political context (2000, 68-69). States in which salience is high, the probability of choosing to comply with or adopt the norm, is higher than in states with lower salience.

This argument is strongly in line with what Checkel calls cultural match, which he defines as “a situation where the prescriptions embodied in an international norm are convergent with domestic norms, as reflected in discourse, the legal system (constitutions, judicial codes, laws), and bureaucratic agencies (organizational ethos and administrative procedures). So defined, cultural matches vary across issue areas” (Checkel 1999, 86). To better understand and examine cultural match, Checkel presents two solutions: A social construction of identity-model which examines the degree of cultural match between global norms and domestic practice (Meyer and Strang 1993, 503-504, referred to in Checkel 1999, 86) and that researchers pay greater attention to the adopter’s experience, norms, values and

intentions when studying diffusion. For example, Risse, Ropp and Sikkink describes how cultural match is important for diffusing human rights norms:

We argue that the enduring implementation of human rights norms requires political systems to establish the rule of law. Stable improvements in human rights conditions usually require some measure of political transformation and can be regarded as one aspect of liberalization processes. Enduring human rights changes, therefore, go hand in hand with domestic structural changes (Risse, Ropp, and Sikkink 1999, 3-4).

Domestic culture and structure will also affect the way in which norms are made in the vernacular (Merry 2005). The process of vernacularisation considers the way in which universal norms are particularised when they are diffused from international to national level, based on the local social and political realities of the state to which the norm is diffused (Brinks, Gauri, and Shen 2015, 290). It is originally a term that generally describes a process of appropriation and translation (Merry 2005, 219). In the specific context of human rights, it describes how domestic actors “selectively translates apparently universal aspirations into a much more localised version deeply grounded in local social and political realities. The extent to which they are universal, or particular, or effective, is a function of this process of vernacularisation” (Brinks, Gauri, and Shen 2015, 290).

To summarise, there are some conditions that will increase the likelihood of successful norm diffusion, and others that will make it less likely. Norm diffusion is more likely in cases in which the domestic structures, culture and legal traditions coincide with the norm that is being diffused. If the new norm must compete with an already existing norm or actors within the society that oppose the new norm, it is less likely that the norm will be empowered in within the society.

2.4 Water Discourse

The way language and speech is used to express views and perceptions is completely unique for humans (Chilton 2004, 5). Sharing common views and perceptions is, according to Aristotle, important aspects of the political society, indeed it is what makes a state (The Politics, 1253a7, translated by T. A. Sinclair, 1992, referred to in Chilton 2004, 5). This way, we can perceive discourse or linguistic action, in the words of Aristotle, as a form of political expression or behaviour both on a micro- and a macro-level. On the macro level, Hague et al

emphasises that constitutions and law are also discourse – these are written discourses of a highly specific type.

Fairclough defines *discourse* as

a count noun, as a category for designating particular ways of representing particular aspects of social life (e.g. it is common to distinguish different political discourses, which represent for example problems of inequality, disadvantage, poverty, “social exclusion”, in different ways). The category of „discourse“ in this second sense is defined through its relation to and difference from two other categories, „genre“ and „style“ (2012, 453-454).

With this definition in mind, I will present three categories of discourses on water and sanitation in which the perceptions and views differ. It is fair to assume that changes or variation in discourse therefore constitute changes in perceptions and opinions. For example, Simmons argues that “a change in the language governments use when discussing politics related to the rights practice” demonstrates a redefined or new norm’s prescriptive status within a state (Simmons 2013, 53). The first sign of an international norm’s domestic impact is its appearance in the domestic political discourse.

In this thesis I argue that res. 64/292 was part of a change in the normative human rights approach to water and sanitation. Norms never arise from a vacuum (Finnemore and Sikkink 1998, 897), and assuming that the resolution was a part of a new human rights discourse, it is useful to understand the existing normative context and the varying discourses on water and sanitation. Gupta, Ahlers, and Ahmed (2010, 295-297) distinguishes between three approaches and discourses that deal with the issue of water scarcity and lack of basic sanitation. These are 1) water in international law, 2) water as an economic good, 3) and water as a human right. These discourses take different approaches to accountability mechanisms, goals and underlying logics and languages (Baer 2017b, 33). The list is not exhaustive, Gupta, Ahlers and Ahmed point out, as water has also been a part of the sustainable development discourse, and security discourse in relation to conflicts and crisis. These discourses are reflected in a variety of international (and transnational) documents and events, and in the following section I present some of the main points from each of these discourses based on some of the events and documents (Gupta, Ahlers, and Ahmed 2010).

2.4.1 International Realm

The international law discourse that Gupta, Ahlers and Ahmed describe includes international and regional conventions and laws on transboundary water and international drainage basins. The discourse is characterised by equitable and reasonable utilisation of water resources and participation among the member states (Gupta, Ahlers, and Ahmed 2010, 295), and there is no discourse on the human right to water.

For example, the 1966 Helsinki Rules state that “Each basin State is entitled, within its territory, to a reasonable and equitable share in the beneficial uses of the water of an international drainage basin” (Helsinki Rules, Article IV). The 1997 United Nations Convention on the Law of Non-Navigational Uses of International Watercourses (UN Water Course Convention) reiterate that “Watercourse States shall participate in the use, development and protection of an international watercourse in an equitable and reasonable manner. Such participation includes both the right to utilize the watercourse and the duty to cooperate in the protection and development thereof, as provided in the present Convention” (UN Water Course Convention, Article 5).

The documents themselves claim that the purpose of these agreements are, amongst other things, to facilitate development and conservation of the international water, managing increased demand for water and mitigating the increased pollutions. Gupta, Ahlers, and Ahmed argue that this discourse has little focus on and prioritisation of water for human consumption or in relation to health. However, both of the aforementioned conventions do emphasise that the distribution of water resources must take into account economic and social needs of the basin or member states⁶. Newer documents have increasingly focused on rights by pointing out that people have a “right of access to water”, in a sufficient, safe, acceptable, physically accessible and affordable manner, and that states should aid their residents to meet their needs (Gupta, Ahlers, and Ahmed 2010, 295-296).

The discursive characteristics of these laws and agreements are the focus of sharing and distributing water resources, with no priority of human consumption but with a hint of consideration of water for social and economic needs.

⁵ UN Water Course Convention. Preamble.

⁶ ILA (International Law Association). 1966. Report of the Fifty-Second Conference, Helsinki, 447–533.

London: ILA. Article V and V(e).

UN Water Course Convention. Article 6.1(b)

2.4.2 Neo-liberal Realm

The neo-liberal discourse discussed by Gupta, Ahlers and Ahmed (2010) stems from economists and is strongly connected to the privatisation of public services that swept the world in the 1990s. It was thought that privatisation would better deal with increased water shortage, lack of sanitation facilities, and reduction in water-borne disease (Baer 2017b, 3). Neo-liberalists argue that privatisation of infrastructure and social services and commodification of water is thought to improve efficiency, drive down prices, and thus progress access to water and sanitation (Langford and Winkler 2014, 247; Robbins 2003, 1074). In developing countries, commodification and privatisation of services has also been a way to address weak state capacity which causes public services to be very inefficient, and characterised by lack of competition, unaccounted-for-consumption, weak billing, political inferences and corruption (Bond 2008, 5; Baer 2017b, 5).

The neo-liberal discourse is evident in documents from international conferences, conventions and development plans. Principle four of the Dublin Statement declares that “*Water has an economic value in all its competing uses and should be recognised as an economic good*”⁷. In Agenda 21, water is perceived as a finite natural resource requiring protection, but also as a necessary means for development and health, and therefore, regulating it as an economic good is the best solution⁸. When the eight Millennium Development Goals (MDGs) were adopted in 2000, the problem of water scarcity was still viewed as one that would be solved by a market-based approach and by transnational corporations (Robbins 2003, 1073).

Privatisation was especially something that occurred in developing countries due to pressure from foreign governments and international development banks (Baer 2017b, 1). Development agencies and banks would use privatisation of services as a requirement for aid and foreign direct investment, and commodification was a part of the structural adjustment programs offered by the IMF and the World Bank (Baer 2017b, 4). Subsequently, an anti-privatisation movement has grown as a response to the neo-liberal policies and their main concern is the inability of low-income groups to pay for water, the vulnerability of people living in rural areas where laying pipes is economically unfavourable for private water companies, and the increasing monopoly of European multinational water companies. Baer argues that the

⁷ Dublin Conference on Water and Environment. Principle 4 Preamble.

⁸ United Nations General Assembly, Report of the United Nations Conference on Environment and Development, 1992, A/CONF.151/26/Rev.1

shift to privatisation spawned the movement for a human right to water and sanitation (Baer 2017b, 6-8). The movement entails transnational networks of CSOs and human rights advocates on national, regional and international level whom utilise human rights discourse to fight for their cause.

2.4.3 Human Right Realm

It can be difficult to say exactly *when* the human right discourse in international documents developed and proliferated, but before 2010 there were no legally binding documents that stated that there is a human right to water and sanitation. Prior documents were characterised by ‘oughtness’ that might have had a normative value, but in no instance did they include an obligation for states to provide water service or a universal right that all people are entitled to. Transnationally, the water rights movement in Latin America, Asia and Africa started in the late 1990s (Baer 2017a, 96).

Gupta, Ahlers and Ahmed differentiates between developments in water policy arena and human rights arena (Gupta, Ahlers, and Ahmed 2010, 296-297). Water policy discourse emphasises the right to *access* water and sanitation, such as in the Rio Declaration (Agenda 21), the 1994 Cairo Population Conference and 1996 Habitat II Conference in Istanbul⁹. It is also used for international events and targets meant to increase access to water and sanitation. The International Drinking Water Supply and Sanitation Decade (1981–1990) is one such example. The MDGs, one of which was to “halve, by 2015, the proportion of the population without sustainable access to safe drinking water and basic sanitation” another (United Nations n.d-a). The SDGs where the goals are to realise adequate and equitable access to water and sanitation¹⁰ is also an example.

As illustrated in subchapter 2.1, in the human right arena, the right to water and sanitation can be explicit or implicit (Razzaque 2004, 16-18). Traditionally, the right to water and sanitation has been interpreted implicitly under other socio-economic rights such as the right to health, the right to housing and the right to an adequate standard of living in many

⁹ United Nations General Assembly, Report of the United Nations Conference on Environment and Development, 1992, A/CONF.151/26/Rev.1;

United Nations, Report of the International Conference on Population and Development, 1994, A/CONF.171/13/Rev.1;

United Nations, United Nations Conference on Human Settlement (Habitat II), 1996, A/CONF.165/14

¹⁰ UN General Assembly, Transforming our world: the 2030 Agenda for Sustainable Development, 25 September 2015, A/RES/70/1.

frameworks of legally binding human rights instruments (Winkler 2016, 1371). This is also human rights discourse, but not an explicit discourse on the human right to water and sanitation. The explicit human rights discourse developed later in human rights treaties and humanitarian law (Gupta, Ahlers, and Ahmed 2010, 295), most prominently in res. 64/292 in 2010.

However, the already existing and broadly accepted framework around water and sanitation as components of other socio-economic rights gives the new human right to water and sanitation an advantage in the battle for recognition (Finnemore and Sikkink 1998; Baer 2017a, 97). Reframing the issue as a human right might generate new measures to advocate for increased water provision (Keck and Sikkink 1998, 27). The explicit reference has also been reaffirmed several times since 2010 by both the HRC and the UNGA (Winkler 2016, 1371).

2.5 Diffusing the HRtWS

I will in this section present four arguments on the HRtWS built upon the existing theories and empirical evidence presented above. The arguments form the basis for the hypotheses presented in section 1.2 and are summarised and presented in table 3 below.

1. Firstly, I argue that the HRtWS is a new norm in the sense that the language used to when referring to water and sanitation has developed from a neoliberal and international law discourse to a human right discourse. The discourse in documents referring to water and sanitation suggests that there has been a change from viewing water and sanitation as a commodity or a resource subject to equal distribution, to a human right.

2. The HRtWS has developed over the past decades, but I argue that the UNGA adoption of res. 64/292 was a tipping point which led to norm cascade. In other words, the HRtWS is not a new right. The right to water has been interpreted as a right under the ICESCR as essential for the right to life, an adequate standard of living and health, and sanitation is often perceived as a an assumption for human dignity (Winkler 2016). Finnemore and Sikkink refer to the institutionalisation in specific sets of international rules and organisations (1998, 900). Although res. 64/292 is not a legally binding document, it could be argued that a resolution adopted without any votes against the resolution represents great acceptance among the states, marking the transformation to norm cascade. In the second stage of the norm's life cycle, the norm is spread to the domestic level through mechanisms that cause institutionalisation and habituation of the norm nationally, for example in constitutions.

3. The third argument made is that the adoption of res. 64/292 and the subsequent norm cascade caused this norm to diffuse to domestic arenas and has been constitutionalised in some countries, one of which being Kenya. The norm has spread to through a number of mechanisms which are presented in table 3 below. The table is a symbiosis of existing norm diffusion mechanisms presented earlier in this chapter and the theoretical arguments that I make, generating a new framework for understanding norm diffusion of the HRtWS.

4. In this particular instance I argue that constitutionalising the right to water and sanitation with a human rights discourse is an unmistakable evidence of norm adoption. Particular types of discourse and norms can internalise in society in a variety of ways, and I argue that constitutionalisation is one way for a norm to manifest domestically.

Although there is a lot of literature on norm diffusion and the diffusion of human rights language, these arguments and hypotheses distinguish themselves for several reasons. First of all, the arguments encompass the development of one (or two) specific human right(s). Comparatively, the arguments presented by Risse, Ropp and Sikkink (1999), Elkins, Ginsburg and Simmons (2013) concern intricate charters and conventions of rights. Arguably, the diffusion of one specific right, which is, according to many human rights scholars, in line with the existing human rights discourse, is easier than creating consensus around a whole charter or convention. Unlike the spiral model which describes how a state goes from ignorance and repression of human rights to acceptance and conformity, the arguments presented here describe how water and sanitation goes from being subject to neoliberal or international law-discourse to human rights discourse.

Table 3 Theoretical Arguments and Norm Diffusion Mechanisms

	<i>Norm diffusion</i>	<i>Norm internalisation</i>
<i>Actors</i>	States, international organisations, networks	Law, professions, bureaucracy
<i>Dominant mechanisms</i>	Socialisation, institutionalisation, demonstration	Habit, institutionalisation
<i>Level</i>	International, national and transnational	National level
<i>Top down mechanisms</i>	Visit from the Special Rapporteur Socialisation Elite decisionmakers and elite learning	Constitutionalisation
<i>Bottom-up mechanisms</i>	Societal pressure	
<i>Conditions</i>	The actors' legitimacy	Cultural match Domestic salience and legitimacy Rule of law (structural conditions)

CHAPTER 3 RESEARCH DESIGN AND DATA

3.1 Research Design

The explorative nature of the topic for this thesis required me to be openminded in the design of the research and methodology. The topic is broad and very complex, and I found it necessary to utilise multiple data sources, data types, collection methods and analyses. This is known as multimethod or mixed method (Fearon and Laitin 2008, 758). In this thesis I combine text data from constitutions and the constitution making process in Kenya, macro-level data from a large number of countries, an in-depth interview, informal interviews with experts, and existing empirical research. Additionally, I combine qualitative analyses of texts and events, and statistical analyses of constitutions, texts and countries. In this way, I am able to study this topic in the matter that gives the best result given the limitations on data availability and quality.

To answer the research question “*Did the recognition of the Human Rights to Water and Sanitation in 2010 influence the constitutionalisation of the norm at national level, and if so, how?*”, I first conduct a comparative study of the HRtWS countries, $N= 29$, and a large-n analysis of 193 countries, and secondly, I study constitutionalisation of the rights to water and sanitation in the case of Kenya.

The population study of the 31 countries with water and sanitation-language in their constitution is a text analysis of the constitutional paragraphs. My hypothesis is that there is a difference in the HRtWS language in these constitutions based on when the constitution was adopted. Those who adopted prior to the international discourse development will have less human rights discourse and vice versa. The paragraphs were first studied manually and categorised based on the type of HRtWS language and then through a statistical similarity analysis in RStudio. The large-n regression model tests the theories of norm diffusion on constitutionalisation of HRtWS. Here, I rely on multiple data sources. I expect that presence of norm diffusion mechanisms has a positive effect on constitutionalisation of HRtWS.

Kenya was chosen as the within-case because it adopted a new constitution a few weeks after the res. 64/292 which did include the right to water and sanitation, and the constitution making process started in the same year as the CESCR adopted General Comment No. 15. I examine documents from the constitution making process and trace the water- and sanitation articles in debates, hearings and meetings surrounding the writing of the constitution and the draft constitutions. I hypothesise that the international norm has diffused to Kenya, and that the

result of this diffusion is the constitutionalisation of the right to water and sanitation in Kenya in 2010.

3.1.1 Combining multiple methods and data

Multi- or mixed method is gaining ground in political science but is also subject to critique (Goertz 2016, 3; Kuehn 2013, 53). The literature that exists on multimethod research scrutinises the term ‘multi’ and questions what this really encompasses, and which combinations of methods qualify as multimethod (Goertz 2016). An overview of methods taught in methodology courses implies that the combination of any two methods is multimethod¹¹. However, “(a)lmost all the pairwise combinations of methods would have no methodological or applied literature to discuss”, and therefore, Goertz argues that multimethod must consist of a within-case causal inference and cross-case causal inference, which combines large-n data with small-n data (Goertz 2016, 6-7).

A point of incongruence in the methodology debate is the enhanced rigour and credibility, and the limitations of conducting multimethod, of which some are presented below along with the measures I took in order to minimise the shortcomings. Scholars who advocate for multimethod argue that all methods have inherent limitations, and that the complementary effects of combining two methods surpasses the potential challenges this possesses. Moreover, the possibility of making rigorous causal inferences increases by using multimethod. Statistical analysis can highlight causal or correlating relationships between variables. Large-n analyses point to general patterns, and have greater analytical value when testing hypotheses (Ragin 1987, 77; Kuehn 2013, 56). A within-case analysis can explore and test observable and unobservable causal mechanisms by generating “empirical knowledge on decision-making processes, actors and how their interactions produce the outcome of interest” (Kuehn 2013, 56) and is superior for generating new hypotheses and theoretical models (Goertz 2016, 8). The case study overcomes the statistical analysis’ lack of studying causal mechanisms and can enhance internal validity of causal claims, whilst the statistical analysis is used to generalise findings to a larger population.

¹¹Goertz revised methodology courses at Institute for Qualitative and Multi-Method Research, the Inter-university Consortium for Political and Social Research, and the European summer schools and found that fifteen different methods are taught. For the whole list see (Goertz 2016, 5).

Multimethod has its strength in its ability to deal with equifinality. Multiple explanations for a phenomenon is a common issue that political scientists have to deal with (Gerring 2012, 216; Goertz 2016, 18; Ragin 1987, 78). The problem can be to determine which of the alternative explanations are actually causing the outcome of interest, or to separate several causal explanations from each other (known as the issue of multicollinearity). For example, it can be difficult to evaluate whether the international norm development led to a national norm development including constitutionalisation of the HRtWS, or national development generated the international development that led to the adoption of res. 64/292.

Additionally, having multiple causal paths can lead to overdetermination of the effect one explanatory factor has on the outcome (Goertz 2016, 18;21). “Multimethod research comes into play because he thinks there are multiple—and not mutually exclusive—causal mechanisms that explain the significant correlation” (Pevehouse 2005, referred to in Goertz 2016, 11). Applying a combination of methods deals to a large extent with this problem of equifinality. The large-n statistical analysis or qualitative comparative analysis (QCA) is utilised to identify multiple variables that correlate with the variable under scrutiny, and that can cause the outcome of interest. Subsequently, the within-case analysis can illuminate the causal mechanism of interest. In order to test the causal mechanisms of interest, the alternative explanations should be excluded in the case study. Practically, this means choosing a case in which the main theoretical explanatory factor and the outcome of interest are present, but the confounding variables are absent. Picking the case for within-case analysis is therefore a delicate task that should follow certain guidelines and criteria, and this is discussed in detail in section 4.1.2.

3.1.2 Case selection

For the reasons mentioned in section 4.1, the within-case should be selected carefully. The scope conditions are limited to countries with constitutions that include the right to water and sanitation. These have been identified through the Comparative Constitution Project’s online constitution database. It is important to select a case where the dependent and main independent variables of interest are present. When doing a nested analysis, choosing a case that lies close to the regressor is beneficial (Lieberman 2015, 252; Rohlfing 2008, 1494). It lets you probe deeper into the mechanisms and determine whether there is a causal link between dependent and independent variables and that the hypothesised causal direction matches the direction in

the case. Although I do not perform a nested analysis in this thesis, I will still apply the guidelines for choosing the within-case.

Kenya is a very relevant country for studying norm diffusion because of the timing of the new constitution, and thus a good case for the in-depth study. The new constitution with the right to water and sanitation was developed in parallel to the international development of the right to water and sanitation. The constitution was adopted in 2010. In fact, it was passed in a referendum only weeks after the adoption of res. 64/292 in the UNGA, at a time of very high norm diffusion activity. I therefore assume that Kenya is very likely to be subject to diffusion. The constitution making process started in the early 2000s, around the same time as General Comment No. 15 was issued. I also believe Kenya has other characteristics that make it highly susceptible to norm diffusion and thus a particularly good case to study. Kenya is a country with high civil society participation, they are active at the international level and also has strong attachments to countries that might have been important in the norm cascade process. South Africa, which included the right to water in their constitution in 1996 is an influential country on the African continent when it comes to socio-economic rights. Additionally, Ethiopia and Uganda, which both border Kenya were very early with constitutionalising the right to water.

Choosing Kenya as a case was also a pragmatic. The fact that they have a website with documents from the constitution making process available at everyone's disposal is very beneficial. Moreover, English is one of two official languages in Kenya, so the documents were already in a language I understand. There were only a couple of documents in Swahili and by using google translate I could establish that these were either not relevant, or the same as an English document. The final constitution is uploaded in both Swahili and English.

3.2 Scope and limitations

3.2.1 Studying Causality

The theories on norm diffusion are criticised because of their lack of agency understanding and mechanisms that generate the diffusion (Checkel 1999, 84). Checkel argues that scholars studying norm diffusion use an epidemic or epidemiological model in which “contact between possessors of a trait and those who lack it is considered sufficient for explaining diffusion; patterns or similarities found in different areas are taken as evidence that diffusion has occurred” (Checkel 1999, 86). In social science in general, there is an assumption that the

simultaneous presence of two phenomena, hypothesised effect and outcome proves a causal relationship. The scholars who reject this notion argue that mechanisms are crucial for making causal inferences, otherwise the relationship must be considered correlational.

A minimalist definition of causality is that a change in the independent variable generates a change in the dependent variable relative to what would otherwise be, given certain background conditions and scope-conditions. Ontologically, the independent variable, generates the effect through a pathway or process of intermediary variables by which effects, known as causal mechanisms (Gerring 2012, 199). Norm diffusion mechanisms are thus the intermediary variables by which international norm development influence the discourse and norms at national level. Additionally, the independent variables must precede the outcome:

There is a cause and effect, and “they are contiguous in time and place, and (...) the object we call cause *precedes* the other we call effect” (Hume 1978 [1739], 155, referred to in Brady 2008, 223, original emphasis).

The problem with mechanisms, according to positivists, is that mechanisms are unobservable, meaning that the mechanism that generates the change in may not be visible to the naked eye, thus it is not measurable and quantifiable. Unobservable mechanisms can be decisions and actions, thought processes or other sorts of human agency that are difficult to observe and measure. King, Keohane and Verba (hereafter KKV) argue that one of the requirements for good research is that the theories that are being studied are falsifiable (King, Keohane, and Verba 1994, 7-8). By this they mean that the implications are observable and can be measured (Johnson 2006, 230). Granted that theories must be observable and falsifiable, and KKV’s definition of causality as the variation in when takes different values, causal factors and mechanisms can be excluded, and descriptive inferences are sufficient to make causal inferences (Johnson 2006, 228). These challenges related to mechanisms and causation are rooted in philosophical questions about scientific methodology, and touch upon queries that have been discussed within the discipline for decades.

3.2.2 *Studying Norm Diffusion and Discourse*

With this in mind, it is necessary to discuss some of the limitations to this thesis, and the theoretical scope conditions that apply to the research conducted in the following chapters. For the second hypothesis, I anticipate a causal relationship between norm diffusion language changes in constitutions at national level (Gerring 2012, 204). By taking Johnson’s and other

pragmatists’ approach to causality, it is necessary to identify the causal mechanisms generating the changes in language at national level. The theories of norm diffusion presented in Chapter 3 present socialisation and argumentation mechanisms as the general mechanisms for norm emergence and cascade, and I argue that these mechanisms also generate the language in constitutions at national level. How do we then study these mechanisms?

Scholars of norm diffusion emphasise the need for intensive empirical research, such as process-tracing and in-depth case studies (Barnett and Finnemore 1999, 715; Checkel 1999). Process tracing, the process of examining “intermediate steps in a process to make inferences about hypotheses on how that process took place and whether and how it generated the outcome of interest” (Bennett and Checkel 2015, 6) aims at identifying the intervening causal process between and . Process tracing is the use of evidence from within a case to make causal inferences about causal explanations of the case (Bennett and Checkel 2015, 4;6). It yields so-called diagnostic evidence which can be used to test our hypotheses. These tests are based on the Bayesian logic of using evidence to update a belief about different explanations’ likelihood of actually explaining the phenomena under scrutiny (Bennett and Checkel 2015, 16). How valuable the evidence is depends on its ability to make certain and unique predictions (Van Evera 1997, 31). Hypotheses can pass four different types of tests, based on the “four possible combinations of (non-)uniqueness and (un)certainty (Bennett and Checkel 2015, 17). These are illustrated in table 4 below.

Table 4 Bayesian Evidence Tests for Process Tracing

	<i>Non-unique</i>	<i>Unique</i>
<i>Uncertain</i>	Straw-in-the-wind	Smoking gun
<i>Certain</i>	Hoops	Doubly decisive

Credit: Van Evera (1997, 31-32).

The weakest type of evidence is the one that cannot identify a certain explanation of the phenomenon nor establish a unique explanation. If the evidence suggests that the hypothesis is the only plausible explanation (unique), but cannot identify the relationship with certainty, we deal with smoking-gun evidence. Oppositely, evidence supporting a hypothesis that is not unique but certain, passes the ‘hoops’-test. If the evidence is both certain and unique, we have the strongest type of evidence – it is doubly decisive (Bennett and Checkel 2015).

Simmons, on the other hand, emphasises the need for more rigorous and well-informed quantitative research on human rights, where inferences are based on statistical evidence

(Simmons 2013, 49; 53). In her chapter “From Ratification to Compliance: Quantitative Evidence on the Spiral Model”, she calls for a quantitative approach to discursive changes:

Testing this [...] require a kind of quantitative research that so far has been rare [...]: actual textual analysis of a relevant corpus of government statements, press releases, documents, speeches and debates that would demonstrate a change in the language governments use [...]. PoHR should expect (but to my knowledge no researchers have produced) evidence [...] (Simmons 2013, 52-53).

In other words, discourse and discursive changes should be studied by quantifying text. Simmons points out that carefully and critically conducted quantitative research has great potential to test “whether understandings generated from case studies can be generalized”, granted that assumptions are tested, and inherent limitations are considered (2013, 43). I argue that language in constitutional texts that are similar to and use the same formulations as international documents implies diffusion of the HRtWS-norm. I have categorised words and phrases from the texts, and the categories are linked to the different discourses on water and sanitation. Presence of or change in the water categories will therefore constitute discourses and changes in discourse.

This thesis is an attempt to synergise these two approaches – I study texts assumed subject to norm diffusion by following Simmons’ example, and conduct an intensive case study in order to identify the mechanisms that are hypothesised to generate the outcome of interest (Brady 2008, 220).

3.2.3 Data Availability

Studying norms and norm diffusion at both international and national level require a lot of data, some of which is easily accessible whilst some is harder to locate and collect. For the international process, I collected almost all resolutions adopted by the UNGA and HRC on water and sanitation and other international documents related to water and sanitation. These documents are valuable for studying the ‘final’ results of the negotiations and discussions that have taken place within the UN and other international organisations. However, a lot of the negotiations over resolutions actually occur in informal meetings, and thus these would be ideal to trace the origin of these norms and discourses. Unfortunately, these meetings are not documented, and that information is thus not that easily accessible. I was able to get one in-

depth interview with an expert on the field, as well as more informal conversations with experts, and this provided an insight into the process and the stakeholders.

In order to study the discourse on water and sanitation in Kenya I use documents from the constitution making process. It is likely that potential human rights discourse will manifest in these documents. I also wanted to collect data from the media in Kenya. Media had an important role in the process, they tracked the process thoroughly and was the main disseminator of records from the CKRC's proceedings, including subtitles for visual content and sign-language (Kindiki 2007, 10). "The media were invited to all activities and hearings, and transport was provided for them if the meetings were held at relatively inaccessible places" (Cottrell and Ghai 2007, 10). Drafts were also published in the newspapers in both English and Swahili. Media articles would be an ideal place to get a grasp of the public opinion on the constitution and the discourse on human rights. I attempted to scrape four of the biggest news agencies in Kenya – Nairobi News, Capital FM, The East African and Daily Nation – but this was unfortunately not doable, and thus I have a gap in the data that limits the analysis.

Nevertheless, the large amounts of documents and data that have been collected will offer insight into the discourse on water and sanitation in Kenya, and how the norm on water and sanitation as human rights have appeared and diffused internationally and institutionalised nationally. That does not mean that I am able to identify the causal relationships empirically, and I must exercise much caution when making inferences.

3.3 Data

Texts can generate a lot of data and information about events, opinions and processes, regarding for example localisation, duration and frequency, it is particularly important to have substantive text when studying discourse and language (Spencer et al. 2014, 271). However, dealing with text data requires considerable attention towards contextual aspects and aspects regarding the source of the text. On the other hand, compared to an interviewee which might be influenced by the interviewer, when working with text data, we do not have to deal with reactivity, recollection errors or self-presentation.

The benefit of qualitatively analysing text is the opportunity to collect more data after starting the analysis if the data already collected does not provide the information sought. I have utilised this flexibility to build up the in-depth analysis step by step. The text data has

been collected in three stages. In the first stage I collected the constitution texts from all countries in the world. Secondly, I located, downloaded and reviewed international documents related the development on the water and sanitation rights. All documents from UN bodies, committees and branches have been accessed from the Dag Hammarskjöld Library / United Nations Digital Library (United Nations 2017). Data from the interviews are transcribed and transformed into text data as well. This way, the information provided in the interview can be analysed in a similar way as original text data. Finally, I collected documents from the constitution making process in Kenya. Documents from the mobilisation of the right to water and sanitation specifically was then collected as a supplement for understanding how activists worked towards bringing the right to water and sanitation on the agenda in the within-case.

3.3.1 HRtWS paragraphs in Constitutions

The constitutional texts are collected from the Comparative Constitution Project (Comparative Constitution Project n.d). The website includes the constitutional texts for nearly every national constitution in the world, previous constitutions and the constitutions of several historical political entities. The Comparative Constitution Project has 198 in force and draft constitutions available from their website (Comparative Constitution Project n.d) Firstly, the search word “water” gave an overview of all constitutions with the word in it. Secondly, manual review of each constitution let me exclude any constitutions in which the word “water” was mentioned in irrelevant contexts¹². I present all relevant articles related to water in appendix 1, and for the sake of simplicity, I will refer to these constitutional paragraphs by the name of the country or the constitution. The texts have been prepared, coded based on certain criteria and analysed qualitatively and quantitatively. The analysis is based on revision of the constitutional paragraphs and I register whether each category is present in the text. Thus, I can count which and how many countries utilise the different language categories within their constitutions.

The first step is to distinguish between water- and sanitation language. As mentioned above, all water references should be related to human consumption and utilisation. The sanitation-category includes references to sanitation, sewer or sewage system and hygiene. These phrases are referring to human consumption and utilisation, including public and private company buildings. Subsequently, I identify three sub-categories under the water category.

¹² For example, several constitutions refer to national territory as water of territorial sea, internal sea water, water of rivers and lakes and underground waters. Water is also mentioned with regards to agriculture, land and property.

They are *state obligations*, *right* and *human right*. State obligations is widely defined as any reference to a state's responsibility to both secure access to water and protect the right to water¹³. In those cases where the state has an obligation to protect or guarantee the right to water, I register the text in the *right* category. The *right* category can also include references to water as a component of other rights such as health, life and an adequate standard of living, and I do not distinguish between these in the analysis. However, I do provide a discussion of the texts in which water is referred to as a component of another right. Within the *human right* category, I include references to “fundamental”, “universal” and “inalienable” rights, in addition to literal mentions of “human right”. These phrases are strongly connected to and associated to “human right” as human rights are fundamental, universal and inalienable. I present an overview of the full coding in appendix 2.

3.3.2 Kenyan Constitution Making Process

To gain insight into the constitution-making process in Kenya, an online source of documents from the process was located (Katiba Institute n.d). This primary source of information has been supplemented with secondary literature and existing literature. The Katiba website contains documents on the drafting process between 2002 and 2010. There are several versions of constitutional drafts and minutes from a variety of meetings, including open meetings for the public; committee meetings; with religious, organised and civil society groups; reports from the Constitution of Kenya Review Commission (CKRC) and Committee of Experts (CoE) and academic papers. These documents have been collected from the website with web scraping, a method that automatically loads data and information into RStudio.

I used the R-package *rvest*¹⁴ to scrape these documents into RStudio. The initial plan was to use quantitative text analysis on these documents to study similarities in language on the rights to water and sanitation. However, after reviewing them manually it became clear that conducting a sentiment analysis would not be appropriate. There are too many diverging topics and too few units for a quantitative analysis to generate fruitful information. Therefore, the data was coded and categorised manually. The first step was to generate data on the occasions when water and sanitation were topics during the constitutional review. Similar to the constitutional

¹³ There are multiple formulations used here, including states' obligations to fulfil the right to water, to progressively realise the right, to guarantee the right, to provide access to water, to provide water, and to conserve and facilitate rational use of water.

¹⁴ Wickham, Hadley. 2019. “rvest: Easily Harvest (Scrape) Web Pages. R package version 0.3.4”. URL: <https://CRAN.R-project.org/package=rvest>

paragraphs, search words such as “water”, “sanitation” “sewer” and “sewage” enabled me to exclude the documents that do not mention water and sanitation. Out of 271 documents¹⁵ downloaded from the Katiba Archive, 84 had any reference to *water*, and 48 had reference to *sanitation*. The documents containing either the word *water* or *sanitation* or both make up the sample that has been analysed¹⁶.

The sample has been coded based on a code scheme that was developed during the initial examination. The code scheme is developed with the intention of measuring frequency of reference to water and sanitation, and substantive content from the review process. The documents have been dated, and the dates are primarily based on dates stated in the documents, in the titles of the documents or the documents’ URL addresses. For documents without a full date, (i.e. just year), day and month was entered based on other information or the first day of the year was entered (January 1st).

Some variables are dichotomous indicating that a certain reference is mentioned in the text. Other variables are categorical and describes type of document and actors. I present the full coding scheme in appendix 3. For simplicity’s sake, documents are coded as 1) different versions of constitutions (including old and draft constitutions), 2) paper, 3) report, or 4) working document. The report group includes both verbatim reports from meetings and reports written by the committees in the aftermath. I coded the actors into nine categories as can be seen in appendix 3, but also sorted these groups into four societal groups: the *state* actors (CKRC, special committees within the CKRC, CoE and parliamentarians), organised *civil society* (NGOs and CSOs), the *people* (individuals and representatives of groups) and *professionals* (legal and other scholars). There is also a category for *no actors*.

Water and sanitation have been mentioned in different contexts, and I use the following categories to sort the data: *rights; minorities and marginalised groups; provision; low income groups; custody; water as natural resources* or in relation to environment; *geography and accessibility; and health*. Those documents that mention the *international* level in any way were sorted in two categories; documents that are positive to the international laws and norms and the need to respect those, and documents that agree to implement but emphasised the

¹⁵ A few of the documents are written in Swahili, and these have been excluded because I have been unable to translate them.

¹⁶ Not the texts that refer to water in other capacities such as national territory, territorial sea, internal sea water, water of rivers and lakes and underground waters, or in contexts such as agriculture, land and property.

importance of Kenyan traditions and laws. Names of NGOs, civil society actors and other groups have also been noted when they have been provided.

3.3.3 Expert Interview

When using in-depth qualitative interviewing, researchers talk to those who have knowledge of or experience with the problem of interest. Through such interviews researchers explore in detail the experiences, motives, and opinions of others and learn to see the world from perspectives other than their own (Rubin and Rubin 2012, 3 in Yeo et al. 2014, 178).

In order to gain more in-depth knowledge of the processes of adopting the resolution on the HRtWS, I interviewed an expert on the topic. Hearing perspectives and experiences from experts is a very good way to gain in-depth knowledge and understanding about a topic (Yeo et al. 2014, 178). The interview in this thesis offers valuable knowledge and insights from the process of the General Assembly adopting res. 64/292 and the earlier work done by the HRC. As I have shown in Chapter 3, human agency and the mental processes that actors go through are of utmost importance in norm diffusion theories. The interviewee offers insights and experiences about the thoughts and ideas, the evaluations and concerns, and the decisions that stakeholders and decision-makers make that we cannot find elsewhere.

When planning the interviews, I consulted a six-stage guide which gives a detailed review of how to conduct a good interview (Yeo et al. 2014, 187-190). The stages correspond to six phases of an interview, from arriving at the interview and introducing yourself, to what should be done after the interview. When arriving at the venue for the interview, it is important for the researcher to quickly establish a relaxed and friendly environment by introducing themselves and the research topic. To the extent possible, the researcher should also explain the aim of the research and the interview itself. Formalities such as receiving informed consent, inform about confidentiality, anonymity and the possibility to withdraw from the interview should also be done before the interview starts.

The first step of the interview itself is to gain some contextual background information about the interviewee. Questions about their work, their relation to the research topic and other background information is important for evaluating the data generated from the interviews. Then, the interview moves on to the main part. The questions I prepared for the interviews aspired to be non-leading, clear and open (Yeo et al. 2014, 191-194). This is important in order to get correct and valid answers and not to lead the interviewee. Follow-up questions or

questions about elaboration should be asked when it seems natural. Yeo et al. advise to end the interview on a positive note, and by opening up for the interviewee to raise points that they feel are important. After the interview is finished, it is important to thank the interviewee for their participation and explain how the information they have given will be used in the research (Yeo et al. 2014, 189-190).

The interviewee worked in the realm around the HRC and Independent Expert on the Issue of Human Rights Obligations Related to Access to Safe Drinking Water and Sanitation. For the sake of anonymity and confidentiality, no further description of the respondent will be given. I conducted the interview in the following way. After an introduction of myself and the purpose of the interview, I provided the respondent with information about their right to withdrawal from the interview, anonymity and confidentiality. The interviewee asked to be anonymised, which has been done. I asked for consent to record the interview, which I got. I explained the topic and research question of my thesis before I asked the respondent about their experience in the field. Then, the interview took a semi-structured, almost unstructured form. I had prepared a few topics and formulated some questions for the interview and made sure that the conversation touched upon those topics and questions without following a strict order or form (Yeo et al. 2014, 183;188). I also followed up with questions that occurred then and there, based on prior answers from the respondent. After the interview was done, the recordings were transcribed and stored so that the information could be revised whilst writing (Brounéus 2011, 140). After submitting the thesis, the transcription and recordings will be deleted.

3.3.4 Cross-national data

Recall hypothesis two (“the changes in discourse at national level can be explained by international norm development influencing the discourse at national level”). In chapter three, I argue that the norm diffusion from international to national level has happened through certain norm diffusion mechanisms. In chapter five, I test the effect of norm diffusion mechanisms on water language in constitutions in 193 countries over a period of 22 years. I have operationalised the norm diffusion terms presented in table 3 in section 2.5 which I believe are important for explaining norm diffusion in this particular context.

I use data collected from multiple sources to operationalise the norm diffusion mechanisms. They are presented in table 6, along with the sources, coding scheme and the mechanisms they represent. As discussed in section 3.2.1 above, measuring unobservable

mechanisms is problematic, and in section 4.5.1 I elaborate and argue that the variables chosen for the model capture the mechanisms of interest. However, some mechanisms are inappropriate or indefensible to quantify, and I will therefore exclude them from the model.

Regression models can be an important component of a more encompassing research design, if done correctly (Rohlfing 2008). The variable-oriented and case-oriented¹⁷ approaches to research have different properties and are useful for different types of studies, but combining strategies “provides a methodological foundation for resisting these seemingly inherent theoretical and metatheoretical biases” (Ragin 1987, 70). The regression model based on a large number of observations will give an overview of the general patterns of constitutionalising HRtWS in a global scale and whether norm diffusion does affect the language used in the constitution.

3.3.4.1 Variables

I estimate five models with binary outcome variables. The dependent variables measure the water and sanitation language present in a state’s constitution. Each dependent variable is an indicator of whether a certain type of language is present in the constitution and have been constructed from the qualitative text analysis in chapter 5. The variables are based on the categorisation rationale provided in section 3.3.1 on the analysis of constitutional texts. I present the dependent variables and distribution of positive outcomes in table 5 below.

Table 5 Dependent Dichotomous Variables and Distribution of Positive Outcome

	No language	State obligation	Right	Human right	Total	Sanitation*
n	3897	77	172	99	4246	118
%	91.70	1.81	4.05	2.33	100.00	2.77

Note: The table illustrates the number of observations with the outcome 1. The first four variables indicate how forceful the water-language is and can be ranked from least forceful (no language) to most forceful (human right). Sanitation represents an individual category of sanitation-language in the constitution.

Source: Comparative Constitution Project. The categorisation is my own and has been done independently from the Comparative Constitution Project.

By separating the water-language into several categories based on how forceful the language is, I can make direct comparison between the categories. I will also be able to compare the probability of having each type of language in the constitution. Some of the constitutions

¹⁷ These terms are presented by Ragin (1987). He describes the case-oriented method as a classic comparative method that comprehensively examine historically defined cases and phenomena, whilst a variable-oriented method seeks to generalise explanations and inferences (1987, 53-54).

have references to more than one language-category, and in those cases I have coded the more forceful language, because I expect norm diffusion to cause more forceful language. Sanitation-language is studied parallel to the water-language, because there has been a parallel but independent right- and norm development. However, the variation in language is less evident, and therefore I choose to just have one binary variable indicating whether sanitation is present in the constitution (1) or not (0).

Mechanisms of argumentative persuasion have been excluded in the model for two main reasons. Firstly, the literature on argumentative persuasion (theory of communicative action) does not offer any good measurements of persuasion because “linking reformulated bargaining positions to changes in preferences is a complex and subtle task that cannot be properly solved by simply interviewing the involved decision-makers” (Moravcsikin 2001, 236 referred to in Grobe 2010, 9). However, for lack of a better alternative, this might be the only option for measuring persuasion, but it does not mean that the information collected is appropriate for a statistical model. This brings me to the second point – the regression I run in chapter five contains too many observations, and it would not be fruitful to conduct an interview for this model.

The models presented in chapter five thus focus on socialisation mechanisms. The independent variables have been operationalised with the intention of capturing the ontological properties of the concepts that have causal power and that are used to explain the mechanisms. Inspired by Martha Finnemore’s examination of UNESCO and their role in establishing science policy bureaucracies, I test ‘visit from the Special Rapporteur on The Human Right to Safe Drinking Water and Sanitation’ as the first socialisation mechanism. UNESCO promoted and advocated for science policy bureaucracies by sending consultants to their member states, and in the same manner, sending an expert on the Human Right to Water and Sanitation to countries will create interaction through which interests and identities are shaped. The variable *SR Visit* is an indicator of whether the state has been visited by this mandate (Independent Expert before 2008 and Special Rapporteur since 2008).

Arguably, the Committee of Social, Economic and Cultural Rights adopted and accepted the norm of a human right to water in sanitation in 2002 with General Comment No. 15. The committee consists of 18 experts from UN State Parties elected on four years terms. The countries that are represented in the CESCR may have been subject to the norm and exposed to norm diffusion. I test whether *CESCR Membership* is a socialisation mechanism of

norm diffusion. Moreover, I test the impact of voting in favour of res. 64/292. These mechanisms influence the domestic decision-makers top-down. In contrast, the societal pressure mechanism works bottom-up. In societies where there is more civil society participation, I assume that the possibility for societal pressure is higher, and I therefore add the *Civil Society Participation* variable from Varieties of Democracy (V-Dem). It is not a very specific variable in terms of measuring the actual societal pressure for adopting the HRtWS-norm, but it specifies the extent to which civil society is able to put pressure on the authorities.

To control for cultural match, I use the multiplicative polyarchy index score from V-Dem and a dummy variable for signing the ICESCR. As the data spans over time, each state is only coded 1 on *ICESCR-Sign* from the year the covenant is signed. The literature on human rights in constitutions emphasises the role of ICESCR on diffusing human rights to national constitution, and I therefore use this variable to measure and control for cultural match (Elkins, Ginsburg, and Simmons 2013, 63). The multiplicative polyarchy index, or *Democracy*-variable measures to what extent the electoral principle of democracy is achieved. It is made up of stem-variables that measure a variety of aspects of democracy and is formed by multiplying these variables. It takes into account freedom of association, clean elections, freedom of expression, elected executive and suffrage. The V-Dem Dataset offers many definitions and operationalisations of democracy, but the multiplicative polyarchy index was chosen over the others¹⁸. This is mainly because the variables from which the index is made up matches the democratic aspects as defined by Dahl (1971). The alternative variables each focus on one aspect of democracy, and individually they are “an essential element of any other conception of representative democracy” (Teorell et al. 2019, 45 in Coppedge, Gerring, Knutsen, Lindberg, Teorell, Altman, Bernhard, Fish, Glynn, Hicken, Lührmann, Marquardt, McMann, Paxton, Pemstein, Seim, Sigman, Skaaning, Staton, Cornell, et al. 2020). The *Democracy*-variable thus takes into account several of these aspects in one variable and offers a more holistic measurement of a country’s democracy score. In table below, each of the independent variables are listed along with the coding values and sources. The full source references are listed in appendix 4.

¹⁸ Changing the democracy-variable could be a good way to test model robustness but have not been done in this instance. In that case I would have run the same model with different democracy-variables and examined the extent to which the goodness of fit for the whole model changes and compared the effect of each estimated variable.

Table 6 Overview of Variables

Variable	Norm diffusion concept	Values	Source
<i>Top down mechanisms</i>			
Visit from the Special Rapporteur	Socialisation	0 = No visit 1 = Visit	UN Water
CESCR Member	Socialisation	0 = Not member 1 = Member	CESCR (OHCHR) Website
Vote in General Assembly	Socialisation	0 = Abstained 1 = Absent 2 = Vote in favour	UN Press
<i>Bottom up mechanisms</i>			
Civil society participation	Societal pressure	Interval 0-1	Varieties of Democracy Dataset
<i>Controls</i>			
Democracy (Multiplicative polyarchy index)	Cultural match	Interval 0-1	Varieties of Democracy Dataset
ICESCR Signatory Part	Cultural match	0 = Not signatory part 1 = Signatory part	OHCHR

3.3.4.2 Model Specification

For models with binary outcome variables, it is necessary to fit logistic models. In section 5.3 I present five logistic models with five different dependent variables, one for each type of paragraph including no language. Compared to a least square model, the residual, ϵ , in a binary dependent variable regression is not assumed to be normally distributed, nor continuous (Dougherty 2016, 369). Thus, we apply a maximum likelihood (ML) estimation which estimates the joint probability density¹⁹ based on all possible values of ϵ . We estimate a value that maximises the likelihood function for each value of ϵ , and according to the maximum likelihood principle, we select the one that gives the observations the greatest joint probability density (Dougherty 2016, 393), in other words, the model that best explain the outcome for each observation. The coefficients, β , which are estimated in an ML model show the effect on the dependent variable, Y , if the independent variable, X , changes by one unit (Finch, Bolin, and Kelley 2014, 129). It is possible to calculate the odds ratio for each independent variable as well. The odds ratio is interpreted as the likelihood of the target category of Y being observed²⁰ if X changes by one unit.

An issue that arises with the data set created is the lack of adequate case numbers on certain values of the variables. This is termed the sparse data bias, and often occurs in models estimating maximum likelihood of odds ratio, such as logistic regressions (Greenland,

¹⁹ Joint probability density is obtained by multiplying the probability density estimated for the each observation of the explanatory variable X in the full sample (Dougherty 2016, 391-392).

²⁰ The outcome of interest, which in this case is 1.

Mansournia, and Altman 2016, 1). In the data on HRtWS, the sparse data bias applies to both dependent and independent variables. Greenland, Mansournia, and Altman (2016, 2) highlight the following features that contribute to sparse data: any of the variables have a narrow distribution or categories that are very uncommon; variables almost perfectly predict the outcome; and variables almost perfectly predict the exposure.

Table 7 below offers a tabular examination of three categorical independent variables and the five binary dependent variables. As we can see in table 7 below on the total distribution of the dependent variables, the outcomes are extremely eschewed towards not having any water- and sanitation language. It is evident that the odds ratio estimated from this data will be severely biased towards outcome = 0. Secondly, the explanatory variables predict the outcome quite perfectly, see for example that among the countries with human right language, all of the observations have signed the Social Covenant. I will therefore estimate a ‘rare event’-logit model, or a penalised maximum likelihood estimation method in order to reduce this sparse data bias (Coveney 2008; Greenland, Mansournia, and Altman 2016).

Table 7 Cross Tabulation of Dependent and Discrete Independent Variables

	Human right		Right		State		Sanitation		No language		
	0	1	0	1	0	1	0	1	0	1	
Total distribution	4147	99	4074	171	4169	77	4128	118	349	3897	
SR Visit	0	3975	90	3918	147	3988	77	3963	102	315	3728
	1	172	9	156	25	181	0	165	16	34	147
CESCR Member	0	3745	92	3678	159	3775	62	3741	96	314	3523
	1	402	7	396	13	394	15	387	22	35	374
Vote in General Assembly	0	3621	1	3589	11	3595	27	3606	16	33	3567
	1	44	22	80	8	44	22	66	0	52	36
	2	482	76	405	153	530	28	456	102	264	294
ICESCR Signature	0	825	0	2655	102	2713	44	2706	51	203	2554
	1	3328	93	1419	70	1456	33	1422	67	146	1343

3.4 Validity and Reliability

Data quality is evaluated on two criteria. Reliability is evaluated by looking at the procedures for collecting the data and conducting the analysis. Making sure that the data is authentic and representative and limiting bias are essential precautions for enhanced reliability (Grønmo 2004, 220). This can be done by examining the authors of the texts and the texts’ place of origin

and publication, the interviewee's background and inherent biases, by comparing the data collected to existing literature on the topic, and by verifying intersubjectivity and stability (Grønmo 2004, 224).

When data is reliable, different parts of the material should be stable over time and consistent with data collected by other researchers. If there are great discrepancies to the existing theories and empirical evidence, it is important to be sceptical towards the data. Testing how reliable the information retrieved from text is can be more challenging when dealing with qualitative data compared to quantitative data because of the researcher's proximate and encompassing role when selecting, collecting and coding the data.

Similarly, redoing an interview at a different time or with a new interviewer can prove to be very challenging. The interviewee might remember what he or she said in the previous interview and might change some of their answers because they said something they regret or that they later changed their mind on. It is also problematic to test intersubjectivity. All researchers have some inherent biases that can influence the questions they ask, how they behave, the chemistry they have with the interviewee and the way they interpret the data. The researchers can end up with dissimilar data that leads to dissimilar inferences. It is essential that the researcher is transparent and clear about the methods and measures used for collecting and analysing qualitative data.

The website from which the constitutions have been collected is open and available to anyone. The constitutions that are not already provided in English have been translated by the project. The documents from the drafting process in Kenya is collected from the Katiba Institute website which is run by the state bureaucracy and the national library.

Validity looks at whether the data collected and used actually fits the study's intention. It is an evaluation of the correspondence between the abstract concepts used to describe certain phenomena and relationships in the real world, and the operationalised variables. By differentiating between internal and external validity, it is possible to evaluate the applicability of concepts and the concurrent measurements within the case(s) that is studied, and the generalisability to the whole population.

For example, I have collected constitutions from all countries in order to study change in constitutional language with regards to water and sanitation-paragraphs. The categories have been discussed with several other student-peers at the Department of comparative politics. I

have also tested intersubjectivity by having others code the data without knowing the results of my coding, and the test show very high coincidence.

The research question and hypotheses in this thesis are general in the sense that I want to make inferences about norm diffusion and constitutional language across all the countries with water and sanitation constitutionalised, and I must therefore make sure that the concepts and phenomena I study are similar or identical in all cases in order to make general inferences²¹. There are always contextual factors that needs to be taken into consideration. Not all concepts and phenomena act and apply to all cases, and by using a narrow concept or definition, it might not be possible to apply the same theories and concepts to a large number of cases. Similarly, *stretching* the concepts to make them more inclusive makes them vague and less informative, and there will be more noise that can disturb the analyses (Sartori 1970, 1034).

Although the constitutional texts are analysed quantitatively as well as qualitatively, I deal with a small number of texts and the analysis is characterised by in-depth inferences and contextual understanding, traits that are associated with qualitative research. Qualitative research is often perceived as less rigorous and more prone to human error (Curry 2017, 117). It is important to note that the findings in the qualitative analysis could be a result of human bias. Researchers know what they are looking and can choose (consciously or not) to only look at evidence that support their argument, and they risk making inferences on a false foundation.

As presented in chapter five, the qualitative and quantitative text analyses point to diverging results, which can suggest that the inferences are subject to so-called confirmation bias. The qualitative analysis does suggest that later constitutions do, to a larger extent, contain human rights discourse, whilst the quantitative analysis reject those findings. However, a computer is only processing the information you provide it, excluding all other information and contextual aspects that a human analyst will be aware of. Therefore, it could also be argued that the qualitative analysis manages to include a more contextual understanding that provides a more realistic and nuanced result.

²¹ “The wider the world under investigation, the more we need conceptual tools that are able to travel!” (Sartori 1970, 1034).

CHAPTER 4 THE DEVELOPMENT OF THE RIGHT TO WATER AND SANITATION

The United Nations General Assembly (UNGA) recognition of the right to safe and clean drinking water and sanitation as a human right happened in 2010, however, issues regarding water access have been a component of international rights development for several decades. Rights to water and sanitation have been derived from the Right to Health, the Right to Life and the Right to an Adequate Standard of Living. They have also been mentioned explicitly in conventions protecting particularly vulnerable groups in society (women, children and persons with disabilities²²). These Conventions recognise that rights to water and sanitation exist, but they lack universality. Water has also been a part of the right to development and environment. Sanitation has to a lesser extent received attention and has been surrounded by taboo, but the recent developments suggest that sanitation increasingly is put on the international agenda. The anticipated norm diffusion is not just a consequence of the resolution from 2010 but something that has evolved over time parallel to the development that lead up to the independent recognition in 2010. It is therefore important to understand how the right to water and sanitation developed and unfolded over time.

4.1 The Right to Water and Sanitation as Component of the Right to Health and Life

The earliest international human rights document in is the 1948 UN Universal Declaration of Human Rights (Ekeløve-Slydal 2014, 22). It does not explicitly mention the right to water or sanitation, but the right to water has been derived from article 25 which recognises the right to an adequate standard of living²³. Similarly, the International Covenant on Economic, Social and Cultural Rights (ICESCR) of 1966 recognises the right to an adequate standard of living²⁴ and the right to health²⁵. The rights provided for in the ICESCR have general application, and

²² United Nations General Assembly, Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979, A/RES/34/180;

UN General Assembly, Convention on the Rights of the Child, 20 November 1989, A/RES/44/25; UN General Assembly, Convention on the Rights of Persons with Disabilities, 24 January 2007, A/RES/61/106.

²³ United Nations General Assembly, Universal Declaration of Human Rights, 10 December 1948, A/RES/217(III), article 25: "Everyone has the right to a standard of living adequate for the health and well-being of himself".

²⁴ United Nations General Assembly, International Covenant on Economic, Social and Cultural Rights (ICESCR), 16 December 1966, A/RES/220(XXI), article 11: "The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions".

²⁵ United Nations General Assembly, International Covenant on Economic, Social and Cultural Rights (ICESCR), 16 December 1966, A/RES/2200A(XXI), article 12: "The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health."

thus provide a general, although indirect basis for the rights to water and sanitation (Winkler 2016, 1369). As stated by the United Nations Committee for Economic, Social and Cultural Rights (hereafter CESCR) in the 2002 General Comment No. 15:

the use of the word “including” indicates that this catalogue of rights was not intended to be exhaustive. The right to water clearly falls within the category of guarantees essential for securing an adequate standard of living, particularly since it is one of the most fundamental conditions for survival²⁶.

Although the rights to water and sanitation were not explicitly recognised as independent human rights until 2010, it is evident that they have been derived from other rights, and already existed in the international legal framework (Brown, Neves-Silva, and Heller 2016, 662).

4.1.1 Explicit Mentions of the Right to Water and Sanitation in Existing Documents

Certain human right conventions and documents explicitly mention the right to water, such as the Convention on Elimination of Discrimination against Women (CEDAW), the Convention on the Rights of the Child (UNCRC), the Convention on the Rights of Persons with Disabilities (CRPD) and General Comment No. 6 of 1995. Although explicitly mentioned, the right is still presented as an element of other human rights; the right to adequate living conditions²⁷ and highest attainable standard of health²⁸. Disabled people are also entitled to clean water services as a measure for realising the right to an adequate standard of living and social protection as stated in the CRPD²⁹, and General Comment No. 6 reiterates the access to adequate water as a part of the principle on independence from United Nations Principles for Older Persons³⁰. These treaties once again illustrate how water is an essential component of other rights issues,

²⁶ UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant), 20 January 2003, E/C.12/2002/11

²⁷ United Nations Convention on the Elimination of All Forms of Discrimination against Women. A/RES/34/180, article 14: “State Parties (...) shall ensure to such women the right: (h) To enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications”.

²⁸ United Nations Convention on the Rights of the Child. A/RES/44/25, article 24: “recognize the right of the child to the enjoyment of the highest attainable standard of health” and that “States Parties shall pursue full implementation of this right and, in particular, shall take appropriate measures (c) (...) through the provision of adequate nutritious foods and clean drinking-water (...)”.

²⁹ UN General Assembly, Convention on the Rights of Persons with Disabilities, 24 January 2007, A/RES/61/106, article 28 2(a): “To ensure equal access by persons with disabilities to clean water (...)”

³⁰ United Nations General Assembly, United Nations Principles for Older Persons, 16 December 1991, A/RES/46/91;

UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 6: The Economic, Social and Cultural Rights of Older Persons, E/1996/22, 5 (32): “Attaches great importance to this principle, which demands for older persons the rights contained in article 11 of the Covenant”.

for example, for meeting primary health care needs and how the right to water is derived from the right to an adequate standard of living and the right to health.

4.1.2 Lack of Universality

An issue that rises with some of the pre-2010 declarations and conventions is the lack of universality. CEDAW, CRC and CRPD target certain societal groups - women, children and persons with disabilities, respectively. The lack of universality reoccurs in the Millennium Declaration, in which the goal is “to halve the proportion of the population without sustainable access to safe drinking water and basic sanitation” (Gupta, Ahlers, and Ahmed 2010, 296;300; United Nations n.d-a; Thielbörger 2014). Similarly, the anti-privatisation movement argues that treating water as an economic good and letting water companies control distribution and management of water can marginalise and exclude the poorest population who are unable to pay for water services (Gupta, Ahlers, and Ahmed 2010, 300).

4.1.3 The Human Right to Sanitation

The right to sanitation is less frequently mentioned in international declarations, treaties and documents and has to a larger extent been neglected in discussions at the international level but is nonetheless of critical importance. Poor or lack of sanitation facilities is highly associated with contamination and pollution of public spaces, water and the environment in general, constituting a public health issue (Winkler 2016, 1335). Additionally, open defecation, stigma around menstruation keeping girls from going to school and child deaths caused by diarrhoea –all related to poor sanitation – illustrate the importance of human dignity in this matter. In the literature, the right to sanitation is closely linked to rights to health, life and human dignity.

Although there is a taboo around sanitation, and the lack of funding has limited improvements, sanitation is becoming less and less stigmatised and receives more attention and financial funding (Winkler 2016, 1348). The General Comment no. 15 on the right to water interprets sanitation as a crucial feature of the right to water, stating that having access to adequate sanitation “is one of the principal mechanisms for protecting the quality of drinking water supplies and resources”³¹. However, CESCR did not recognise sanitation as an individual

³¹ UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant), 20 January 2003, E/C.12/2002/11, art. 29

right. Similarly, the Millennium Declaration of 2000 originally excluded sanitation (Winkler 2016, 1347). Target 7.C which is to “Halve, by 2015, the proportion of the population without sustainable access to safe drinking water and basic sanitation” only appeared after the Johannesburg Summit in 2002³².

Still, we can trace sanitation back to 1977 and the Mar del Plata report from the UN Water Conference. The conference was devoted to creating a plan for administrating water resources in order to “improve the economic and social conditions of mankind (...), ensure a better quality of life and promote human dignity”³³. The participating parts declared that “The decade 1980-1990 should be designated the international drinking water supply and sanitation decade and should be devoted to implementing the national plans for drinking water supply and sanitation (...)”³⁴. Sanitation is also mentioned in relation to health and the specific situation of women³⁵ in the same report. Agenda 21 target sanitation as an important aspect of environment and development, especially when it comes to health, protection from diseases and sustainable waste-management³⁶. However, like with access to water, sanitation has not been regarded as a right until very recently.

4.2 Water as Right to Sustainable Development and Environment

During the last three decades, water has also been addressed implicitly as an important aspect of more general international issues. Agenda 21 from the 1992 United Nations Conference on Environment and Development emphasises the two-fold role of water as a natural resource subject to protection and management, and as essential for development and necessary for assuring health³⁷. The Dublin Statement from 1992 states that “fresh water is a finite and

³² United Nations, Report of the World Summit on Sustainable Development, 26 August – 4 September 2002, A/CONF/199/20: “Sanitation is intimately linked to good health and, for many, survival. There is no justification for the 6,000 deaths of children that happen every day as a result of insufficient or deficient sanitation facilities. The need to come up with concrete plans of actions to reduce the number of people – 2.4 billion – who do not have adequate sanitation was mentioned as one of the priorities of the World Summit on Social Development. The usefulness of time-bound targets to achieve this in the medium and long term was emphasized”

³³ United Nations, Report of the United Nations Water Conference, 1977 E/CONF.70/29, Chapter 1

³⁴ United Nations, Report of the United Nations Water Conference, 1977 E/CONF.70/29, art. 15

³⁵ United Nations, Report of the United Nations Water Conference, 1977 E/CONF.70/29, art.16 (p) and 55 (d)

³⁶ United Nations General Assembly, Report of the United Nations Conference on Environment and Development, 1992, A/CONF.151/26/Rev.1, para. 7.35

³⁷ United Nations General Assembly, Report of the United Nations Conference on Environment and Development, 1992, A/CONF.151/26/Rev.1, para. 18.47

vulnerable resource, essential to sustain life, development and the environment”³⁸. The Cairo Conference on Population and Development in 1994 also discusses the importance of the right to an adequate standard of living as a component of sustainable development, and that the right to water and sanitation is included³⁹. Providing an adequate standard of living and sustainable development involves eradicating poverty, increasing economic growth, combatting water-borne diseases and other illnesses caused by poor water and sanitation facilities. Adequate quantities of safe water and effective management of waste are also part of equitable and sustainable human settlement development, as stated in the report from the United Nations Conference on Human Settlement (Habitat II)⁴⁰.

The link between the right to water and sanitation and sustainable development in recent years is most evident in the 2000 Millennium Declaration⁴¹ and the 2030 Agenda for Sustainable Development⁴². The 2030 Agenda for Sustainable Development presents 17 Sustainable Development Goals (SDGs) and 169 targets which guide the decisions that international, regional and national authorities take for the next 15 years⁴³. Their objective is to give guidance in decision making in order to realise human rights, achieve gender equality and empower women and girls. Both water and sanitation were included in Goal 6. of the SDG, target 6.1 and 6.2 reads: “By 2030, achieve universal and equitable access to safe and affordable drinking water for all” and “By 2030, achieve access to adequate and equitable sanitation and hygiene for all and end open defecation, paying special attention to the needs of women and girls and those in vulnerable situations”⁴⁴.

The SDGs envision “A world where we reaffirm our commitments regarding the human right to safe drinking water and sanitation and where there is improved hygiene; and where

³⁸ International Conference on Water and the Development, The Dublin Statement on Water and Sustainable Development, 1992, Principle No. 1

³⁹ United Nations, Report of the International Conference on Population and Development, 1994, A/CONF.171/13/Rev.1, Principle 2

⁴⁰ United Nations, United Nations Conference on Human Settlement (Habitat II), 1996, A/CONF.165/14, Principle 1 and 2

⁴¹ UN General Assembly, United Nations Millennium Declaration, 18 September 2000, A/RES/55/2

⁴² UN General Assembly, Transforming our world: the 2030 Agenda for Sustainable Development, 25 September 2015, A/RES/70/1.

⁴³ The 2030 Agenda for Sustainable Development succeeded the MDGs from 1 January 2016

⁴⁴ UN General Assembly, Transforming our world: the 2030 Agenda for Sustainable Development, 25 September 2015, A/RES/70/1: GOAL 6. Ensure availability and sustainable management of water and sanitation for all.

food is sufficient, safe, affordable and nutritious”⁴⁵, which also reiterates the new focus on sanitation as a human right.

As illustrated, the right to water and sanitation has been recognised implicitly as ‘subordinate and necessary’ to achieve other human rights such as the right to health, the right to housing, the right to life and the right to development (Gupta, Ahlers, and Ahmed 2010, 297). The right to water explicitly mentioned in the conventions mentioned above is also perceived as a component of other socio-economic rights. The independent mention and recognition of the right to water and sanitation marks a juncture in the development – human rights have a universal and unconditional application and they facilitate efforts towards specifically vulnerable groups such as women, people with disabilities, children, refugees, prisoners and nomadic communities (Langford 2005, 277).

4.3 Mobilisation for an Independent Right to Water and Sanitation

4.3.1 The Human Rights Council and Office of the High Commissioner for Human Rights

In 2006, the Human Rights Council (HRC) gave the Office of the High Commissioner for Human Rights (hereafter, The High Commissioner) mandate to conduct “a detailed study on the scope and content of the relevant human rights obligations related to equitable access to safe drinking water and sanitation under international human rights instruments”⁴⁶. This was the first of three stages the HRC had planned for the HRtWS. The next step was to appoint an independent expert that would develop a dialogue with stakeholders, work on best practices related to access to safe drinking water and sanitation and make recommendations to help realise Millennium Development Goal No. 7⁴⁷. Lastly, they would advocate for an independent and explicit recognition of the right to water and sanitation (Winkler 2016). Germany and Spain advised this three-step initiative. They have also been driving forces behind other HRC resolutions, and in the transnational water advocacy group Blue Planet Project. The German Development Cooperation has also played an important role in water governance reform in Kenya, and I will come back to this in chapter 6.

⁴⁵ UN General Assembly, Transforming our world: the 2030 Agenda for Sustainable Development, 25 September 2015, A/RES/70/1, Introduction, para 7.

⁴⁶ Human Rights Council, 27 November 2006, Human rights and access to water, A/HRC/DES/2/104.

⁴⁷ Human Rights Council, 28 March 2008, Human Rights and access to safe drinking water and sanitation, A/HRC/RES/7/22.

For the study, the High Commissioner collected written submissions from stakeholders such as states, NGOs, IGOs and human rights institutions and held consultations (OHCHR 2007). The study terminated in 2007 with a report stating that there are several international human rights instruments that refer to drinking water and sanitation, both legally binding treaties and non-binding documents⁴⁸. The study does not refrain from private provision of water and sanitation services; however, they do not present water as a primarily economic good⁴⁹. The report concludes that there is in fact, a human rights obligation related to drinking water and sanitation based on existing human rights instruments, but that

the debate is still open as to whether access to safe drinking water and sanitation is a human right, notably in relation to the following points: (a) whether access to safe drinking water is a right on its own or whether obligations in relation to access to safe drinking water and sanitation are derived from other human rights, such as the right to life, the right to health, the right to food or the right to an adequate standard of living; (b) the normative content of human rights obligations in relation to access to sanitation⁵⁰.

In conclusion, the High Commissioner states that “it is now time to consider access to safe drinking water and sanitation as a human right”⁵¹. Evidently, the development of a human right to water and sanitation had been ongoing for some years before res. 64/292 in 2010, and the HRC was a major participant contributing to and pushing for this development (Personal Communication 2020). The HRC appointed Catarina Albuquerque as “The Independent Expert on the Issue of Human Rights Obligations Related to Access to Safe Drinking Water and Sanitation” (hereafter The Independent Expert) in 2008⁵². The Independent Expert worked to raise awareness of water and sanitation and mobilise the support of these issues as human rights (Winkler 2012, 11).

4.3.2 Building Political Consensus

The HRC and Independent Expert has had a lot of focus on building political consensus around the right to water and sanitation, and the process of working towards a recognition of the right

⁴⁸ United Nations General Assembly, Annual Report of the United Nations High Commissioner for Human Rights and Reports of the Office of the United Nations High Commissioner for Human Rights and the Secretary-General, 16 August 2007, A/HRC/6/3, para 4

⁴⁹ United Nations General Assembly (n 50), para 52

⁵⁰ United Nations General Assembly (n 50), para 46

⁵¹ United Nations General Assembly (n 50), para 66

⁵² Human Rights Council, 28 March 2008, Human Rights and access to safe drinking water and sanitation, A/HRC/RES/7/22, para 2

to water and sanitation was therefore scheduled to go on for several years. A lot of informal meetings with NGOs and civil society organisations were held, consultative meetings allow states with different objections or worries to express them and come up with solutions (Personal Communication 2020). The Independent Expert worked especially hard during her first years in the mandate to advocate for the necessity of having an explicit right to water and build consensus around this idea (Personal Communication 2020). Table 8 below lists international and regional declarations, resolutions and other documents in which water and sanitation are explicitly discussed as individual rights or as components of other socio-economic rights. It is an illustration of the development towards consensus regarding the explicit human right to water, and it is clear that a lot of work had been done on an explicit statement of a human right to water already before 2010.

Table 8 Toward Global Consensus on the Explicit Statement of a Human Right to Water?

Year	Declarations (D), Resolutions (R), Comments (C), and Treaties (T)	Number of Parties
1979	Convention on the Elimination of All Forms of Discrimination Against Women (T)	186 (excluding USA, Iran, Somalia, Sudan, Nauru, Palau and Tonga).
1989	Convention on the Rights of the Child (T)	192 (excluding USA and Somalia).
1994	Cairo Population Conference (D)	177 countries accepted the declaration
1996	Habitat II (D)	171 countries
2001	Committee of Ministers to Member States on the European Charter on Water Resources	47 countries
2002	Agenda 21	All participating countries
2002	General Comment (C)	145 countries
2006/2008/ 2009	Non-Aligned Conference (D)	All participating parties
2006	First Africa-South America Summit (ASA) (D)	65 countries
2007	First Asia-Pacific Water Summit (D)	37 countries
2008	Third South Asian Conference on Sanitation (D)	8 countries
2010	UNGA Resolution (R)	122 countries

Credit: Gupta, Ahlers, and Ahmed (2010).

The Bolivian initiative to adopt a resolution recognising the human right to water and sanitation was a sudden development that traversed the developments planned by the HRC (Baer 2017a, 100; Personal Communication 2020). Water and sanitation activists did not object to the UNGA resolution, but as I discuss in the next section, some countries did have worries about the procedures leading up to the recognition and the lack of consensus when adopting res. 64/292 in 2010, including some of the countries that played an important role in HRC's work towards recognising an independent right to water and sanitation (Personal Communication 2020). It is evident that for the HRC and the Independent Expert political consensus was extremely important.

4.4 UNGA Res. 64/292

4.4.1 The Bolivian Initiative

The 64th session of the United Nations General Assembly was held on the 28th of July 2010. In this session the Bolivian representative proposed a draft resolution A/64/L.63/Rev.1 which had been introduced to the general assembly representatives only shortly before (Personal Communication 2020). The Bolivian representative, Mr. Solón, addressed the assembly firstly, by summarising some core functions that water has for humans, and emphasising that water is absolutely essential for survival:

Allow me to begin my introduction of draft resolution A/64/L.63/Rev.1* by recalling that human beings are basically made of water. Approximately two thirds of our bodies is composed of water; 75 per cent of our brains is water, and water is the main vehicle for the electrochemical transmissions within our bodies. Our blood circulates throughout our bodies like water flowing in a network of rivers. The water in our blood helps transport nutrients and energy throughout our bodies. Water also carries away waste products excreted by our cells. Water helps regulate body temperature. The loss of 20 per cent of the body's water can lead to death. We can survive for several weeks without food, but we cannot survive more than a few days without water. Water, without a doubt, is life (A/64/PV.108).

He continued by contextualising the right to water as part of the right to health as recognised by the World Health Organisation (WHO), the right to life in the Universal Declaration of Human Rights, and the right to an adequate standard of living in the ICESCR, but encouraged full and independent recognition of the human right to water and sanitation.

It is not a coincidence that Bolivia took the initiative for this resolution at the international level. Nationally, Bolivia had had issues regarding water for some time, and they would become the pioneer for the international HRtWS-campaign. The water industry in Bolivia had undergone massive privatisation reforms in the 1990s as a measure of reducing public expenditure and increasing water management and efficiency (Baer 2017b, 110). By pressure from the World Bank, the Bolivian government sold the water system in Cochabamba to a private water company, Aguas del Tunari. The reforms failed and Bolivia experienced increasing prices for water and sanitation services and water scarcity became more widespread. This caused unrest, and the leading Coalition for the Defence of Water and Life organised strikes, demonstrations and highway blockades. The water war in Cochabamba ended when the Aguas del Tunari executives fled the city, the national government turned in their decision and revoked the contract with the private water company (Baer 2017b, 113). A similar

experience occurred in El Alto and La Paz⁵³. When Evo Morales was elected president in 2006, he made it his mission to work for the right to water and sanitation and to “shift water policy away from a private model to a public, participatory, rights-based model” (Baer 2017b, 14). Today, Bolivia is one of the most prominent actors in the anti-privatisation movement. Maude Barlow, a water rights activist and co-founder of the Blue Planet Project worked as a senior advisor for Miguel D’Escoto Brockmann, the then-President of the General Assembly (Baer 2017a, 100). She united with the Bolivian representative to the UN and Bolivian President Morales in taking charge to get this resolution adopted in the UN.

The draft resolution was co-authored and sponsored by several additional countries⁵⁴, but the Independent Expert also contributed with a very important aspect in the draft. In the original draft proposed there was no reference to sanitation, and the Independent Expert worked hard in the weeks leading up to the plenary meeting to get sanitation included in the resolution. She spoke to the Bolivian representative regularly, firstly to get sanitation in the draft, and then to make sure that it stayed there. When the resolution was eventually put up for vote, they also agreed to make one more change in the draft, namely, to change the wording of the first paragraph from “Declares” to “Recognizes”⁵⁵. This was a way to acknowledge the existing statements regarding the right to water and sanitation, and to anchor the new resolution in the international human rights law that already existed (Personal Communication 2020).

4.4.2 Disagreements in the Process

On the July 28th 2010, the resolution was submitted for a vote in the assembly, being adopted with a majority of 122 countries voting for the resolution, no votes against, and 41 countries abstaining. Several countries spoke in the assembly before and after the vote, sharing their concerns about the process of recognising the right. The countries that spoke up were mostly worried about procedural issue of this resolution, not the content itself (Personal Communication 2020), but several of them pointed out that they would vote in favour of the

⁵³ The private company in charge of water and sanitation services was awarded Bolivia’s “best firm” whilst simultaneously charging US\$445 for new water and sanitation connections in a city in which the average monthly income per capita was US\$80 (Baer 2017b, 116).

⁵⁴ Angola, Antigua and Barbuda, Azerbaijan, Bahrain, Bangladesh, Benin, the Plurinational State of Bolivia, Burkina Faso, Burundi, the Central African Republic, Congo, Cuba, Dominica, the Dominican Republic, Ecuador, El Salvador, Eritrea, Fiji, Georgia, Guinea, Haiti, Madagascar, Maldives, Mali, Mauritius, Nicaragua, Nigeria, Paraguay, Saint Vincent and the Grenadines, Samoa, Saint Lucia, Saudi Arabia, Serbia, Seychelles, Solomon Islands, Sri Lanka, Timor-Leste, Tuvalu, Uruguay, Vanuatu, the Bolivarian Republic of Venezuela and Yemen.

⁵⁵ UN General Assembly, 28 July 2010, The human right to water and sanitation, A/RES/64/292, para 1

resolution despite these limitations, including Germany, Spain and Hungary. Germany and Spain, two of the main drivers of the right to water and sanitation in the HRC, expressed their worries regarding the procedure of drafting the resolution. They felt that a UNGA resolution was cutting across the process that was occurring in Geneva (where the HRC Headquarters is located), and that the process of recognising the HRtWS in the GA was rushed (Personal Communication 2020). Hungary also expressed the concerns they had “regarding the text and the way it was negotiated”⁵⁶. Other countries, such as the US and the UK decided that the lack of transparency when drafting the resolution, and the premature recognition without considering the full legal consequences were strong reasons to abstain from voting, and therefore decided to do so⁵⁷.

Although res. 64/292 was adopted with some objection, a majority of countries voted in favour of the resolution. After all, it seems like advocates of the right to water and sanitation were happy that it was finally recognised as an independent right (Personal Communication 2020). After res. 64/292 was adopted, the HRC picked up the thread, and in October 2010, they adopted a resolution which refers to res.64/292 and

affirms that the human right to safe drinking water and sanitation is derived from the right to an adequate standard of living and inextricably related to the right to the highest attainable standard of physical and mental health, as well as the right to life and human dignity (A/HCR/RES/15/9).

The question whether the right to water and sanitation actually is two distinct human rights had already been up for discussion in 2010 for the UNGA resolution and a subsequent HRC resolution in 2013. In 2013, the HRC attempted to implement the distinction, but this was put to a stop by the US. They had sponsored the resolution and threatened to withdraw their support if the resolution separated the rights. Germany and Spain, who drafted the resolution then took a step back and accepted the temporary defeat. In 2016, the HRC could also adopt resolution 15/9 which

⁵⁶ UN General Assembly, General Assembly official records, 64th session: 108th plenary meeting, Wednesday, 28 July 2010, New York, page 7

⁵⁷ UN General Assembly, General Assembly official records, 64th session: 108th plenary meeting, Wednesday, 28 July 2010, New York, page 8

affirms that the human rights to safe drinking water and sanitation are closely related, but have features that warrant distinct treatment in order to address specific challenges in their implementations⁵⁸ (original emphasis).

⁵⁸ United Nations General Assembly, Resolution adopted by the Human Rights Council on 29 September 2016, 5 October 2016, A/HRC/RES/33/10;
United Nations General Assembly, Resolution adopted by the Human Rights Council 15/9 Human rights and access to safe drinking water and sanitation, 6 October 2016, A/HRC/RES/15/9

CHAPTER 5 COMPARATIVE CONSTITUTIONAL ANALYSIS

5.1 Constitutionalising the Right to Water and Sanitation

In this chapter I study constitutionalisation of the right to water and sanitation on a general level. A comparative population study has been conducted on all constitutions with water and sanitation rights. Hypothesis one, “there is variation in discourse in constitutions with regards to the right to water and sanitation before and after the norm development at the international level”, is firstly tested with a qualitative text analysis of the constitutional paragraphs in all countries that have constitutionalised the right to water and sanitation. Secondly, a computational text analysis has been conducted to test language differences with a similarity analysis and a cluster analysis. I anticipate that countries that should have been subject to norm diffusion will have similar texts and that they cluster together and separate from texts that constitutionalised the rights before international development had started.

In the third section I test whether and which type of paragraph countries adopt with a regression model of all countries. The types of paragraphs have been identified through the qualitative text analysis and will be explained before the regression model is presented. Here, hypothesis two, “international norm development and norm diffusion explain these discursive changes” is tested. Norms are diffused by a number of mechanisms, and depending on which diffusion mechanisms, the norm might internalise differently. The mechanisms themselves can be nearly impossible to quantify, and I have therefore used a quantifiable variable that is expected to be proximate to the mechanism of norm diffusion. The second hypothesis is also tested more thoroughly in the case study of Kenya in chapter 6.

First, the findings from the text analyses are presented. The in-depth text analysis suggests that the discourse in pre-2002 constitutions focused more on a state’s obligation to provide access to water, and less about individuals’ rights. Diametrically opposite are the post 2010-constitutions where individual rights, human rights and unalienated rights are the main focus. In the second part, I use quantitative text analysis to re-test the findings from the qualitative analysis. I test similarity between the texts with the ‘jaccard’-similarity method and estimate three clusters based on the algorithm K-means. The regression analysis in section three suggests that the socialisation mechanisms increase the likelihood of having certain paragraphs.

The 31 countries that have constitutionalised the right to water and sanitation are illustrated in the map (figure 1) below. As can be seen from the map, the constitutions are geographically proximate, with the majority being located on the African continent, and in

Central and South America. The exceptions are Iceland, Hungary and Slovenia in Europe, Nepal and the Maldives in Asia and Fiji in Oceania. The wide temporal and spatial perspective allows me to see variation between countries over time, which enables a contextual understanding of the constitutionalisation of the right to water and sanitation as well as highlighting commonalities or patterns.

Figure 1 World Map of Constitutions with the Rights to Water and Sanitation

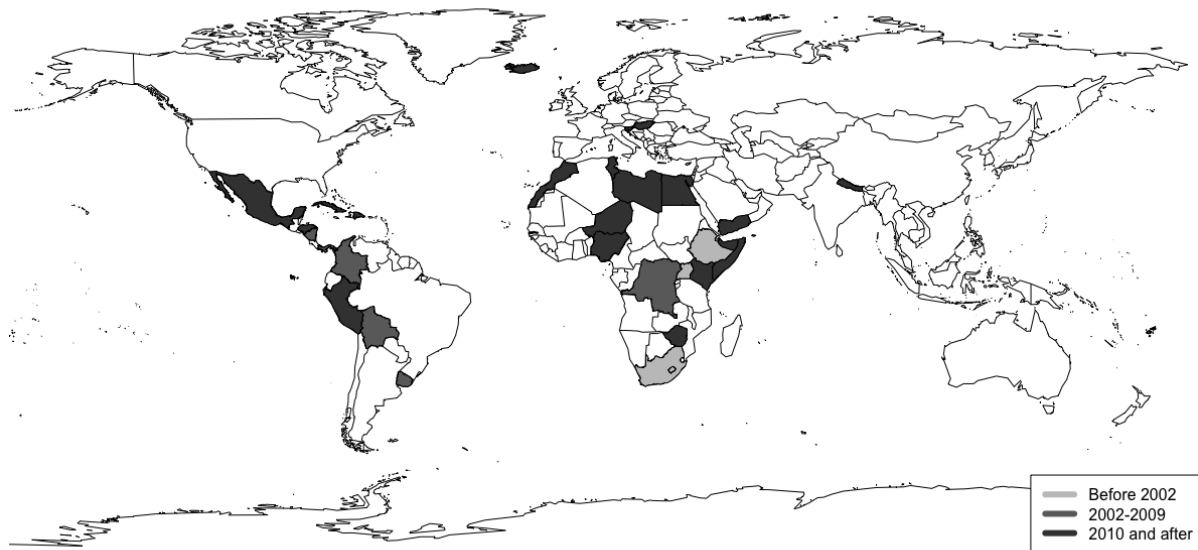


Figure 1: World map illustrating which countries that constitutionalised the rights to water and sanitation. Map created in RStudio with the package ‘maps’. Data: Comparative Constitution Project (n.d)

I separate the countries into three groups based on the timing of constitutionalisation. I base the pre-2002 group on the countries constitutionalising the right to water before General Comment No. 15 and consists of four countries. These are also presented in figure 2 below. Another seven countries are added to the timeline between 2002-2009. This group consists of many countries that were active in the water movement and advocated for an internationally recognised right. I thus separate them from the countries that adopted the right after 2009. The post-2009 group consists of eighteen countries. Figure 2 also denote the main international events in the development of the HRtWS.

Figure 2 Timeline of HRtWS at National and International Level

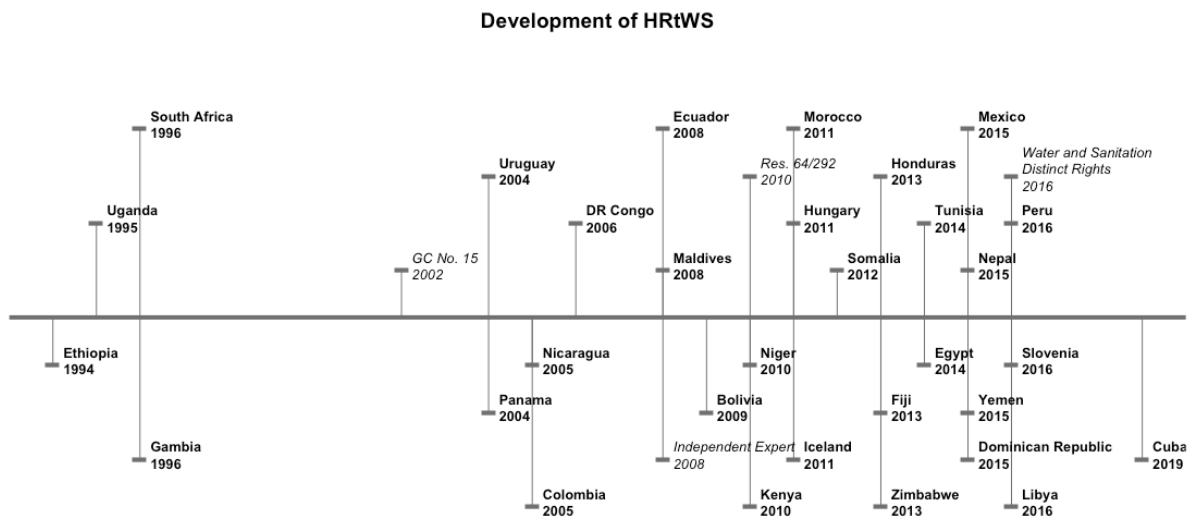


Figure 2: A Timeline of the HRtWS at national and international level. The main events in the international norm development are marked in italic. At the national level, the countries with paragraphs of HRtWS in their constitutions are denoted in bold. Timeline created in RStudio with the package ‘timelineS’. Data: Comparative Constitution Project (n.d) and United Nations (2017)

5.2 Constitutional Language

5.2.1 Discursive Variation

One can categorise the paragraphs into different types, depending on the constitutional language of water and sanitation. I distinguish between paragraphs in which the state has *obligations* to provide water to their citizens; there is a *right* to water; there is a *human right* to water; and *sanitation* is also included (either in the same paragraph or an individual paragraph). Figure 3 below illustrates the occurrence of these types of paragraphs (hereafter HRtWS-paragraphs).

The first countries constitutionalised the right to water between 1994 and 1996. In all four constitutions, the state is recognised as the responsible party for providing water: “To the extent the country’s resources permit”⁵⁹, “The State shall endeavour to”⁶⁰, “The state must (...) achieve the progressive realisation of each of these rights”⁶¹. More importantly, the constitutional texts of Uganda and South Africa say that “all Ugandans enjoy”⁶² and “everyone

⁵⁹ Ethiopian constitution, art. 90-1

⁶⁰ Gambian constitution, art. 216-4

⁶¹ South African constitution, art 27-2

⁶² Ugandan constitution, art. XIV b)

has”⁶³ the right to water, emphasising that there is an individual right to water. The constitutions of Ethiopia and Gambia also recognise that individuals are entitled to water. However, the focus is on the state’s role to provide water to its citizens.

Figure 3 Type of Paragraph in Constitution and Year for Constitutionalisation

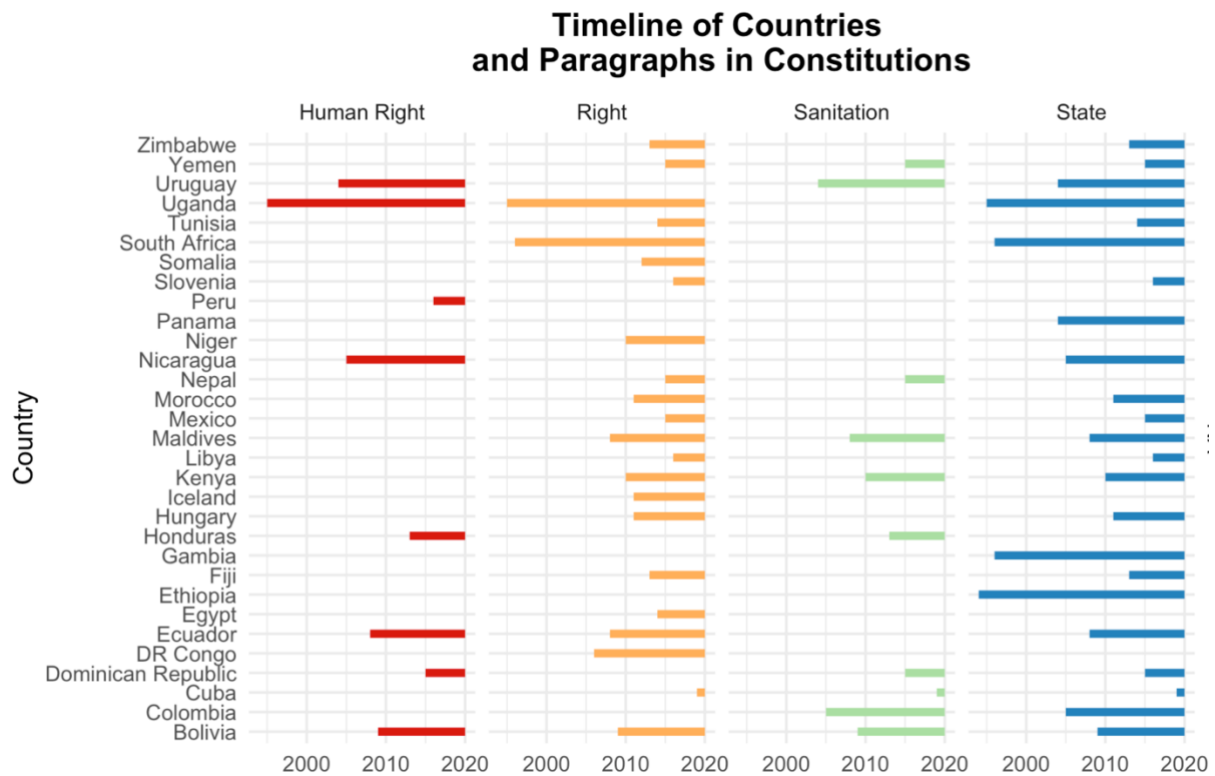


Figure 3: Timeline of Countries and Paragraphs in Constitutions. The Types of Paragraphs are Human right, Right, Sanitation and State obligation. The x-axis illustrates a timeline from 2000-2020 for each type of paragraph and the coloured vertical bars illustrate when each paragraph was adopted in each country. Timeline created in RStudio with the package ‘timelines’. Data: Comparative Constitution Project (n.d)

From 2004 to 2009, another eight countries constitutionalised the right to water. The geographical foci moved from Sub Saharan Africa to Central and Latin America, including Panama, Uruguay, Colombia, Nicaragua, Ecuador and Bolivia, in addition to the Democratic Republic of Congo and the Maldives. The number of countries that emphasise the individuals’ right to water increases from the first cluster of countries to the second. Six out of eight countries express that there is a *right* to water, some of which even refer to a *human right* to water. However, a majority of the constitutional articles also emphasise that it is the state’s obligation to realise the right and provide access to water.

⁶³ South African constitution, art. 27-1

After 2010, there is an acceleration of amendments or new constitutions that recognise the right to water with a total of nineteen countries in ten years. This time, geographical affiliation is less evident, there are countries in six continents with the right to water included in the constitution, but still, the majority are located in Africa and Central and South America. All of these constitutions mention access to water as a right that everyone has, and five of them also include the right to sanitation. Comparing to the pre-2002 constitutions, many more constitutions frame the right to water as a human right, or an inalienable, fundamental or universal right. Evidently, there is variety of language used in the paragraphs and the rights language seems to increase over time.

The normative content of the right, or definition of water and sanitation, is another aspect of these paragraphs that should be highlighted. Examples such as right to safe water, affordable water or water in adequate quantities encompasses different normative obligations and rights (Winkler 2016, 1380). In international documents such as res 64/292, the definition they use is safe, clean, accessible and affordable drinking water and sanitation for all.

This definition emphasises the different aspects of the right as it is interpreted from the Right to Life, Right to Health and Right to an Adequate Standard of Living. The HRC's subsequent resolutions have a more explicit language of these different aspects and how they are linked to the rights to an adequate standard of living, health, life and human dignity. Similarly, Pierre Thielbörger breaks the right(s) to water down to availability, quality and accessibility, reflecting the right to life, health and standard of living (Thielbörger 2014, 3). The different aspects of the right to water and sanitation has also been emphasised by Winkler (2016).

These “adjectives” have also been identified to better understand the language variation over time, and table 9 below illustrates the normative content of the rights to water and sanitation in the three groups. The qualitative categorisation of these adjectives suggests that there is some variation over time in the adjectives used in the paragraphs on water and sanitation. However, the cluster analysis presented in section 5.2.2 does not support this claim. The pre-2002 countries use the words “clean”, “safe” and “sufficient”. Ethiopia, Uganda and Gambia refer to “clean”, the latter two countries use “clean and safe water”, all of which can be associated with water quality. Following Thielbörger's categorisation, it reflects the right to health. In seven constitutions, the right to water is presented as a component of other rights

such as health or life. South Africa refers to sufficient water and food, which reflects the right to an adequate standard of living as described in the ICESCR.

Table 9 Normative Content of the Rights to Water and Sanitation in Constitutional Paragraphs

Pre-2002	2002-2009	2010 and after
Clean	Potable	Reasonable standards
Safe	Drinking	Adequate quantities
Good management	Natural resource	Potable
Sufficient	Basic	Drinking
	Clean	Equitable
	Access	Safe
		Clean
		Sufficient
		Healthy
		Acceptable
		Affordable

Table 9: Normative content of the Rights to Water and Sanitation based on year of constitutionalisation. Result of qualitative text analysis of the constitutional paragraphs on the Rights to Water and Sanitation. Data: Comparative Constitution Project (n.d)

Between 2002 and 2009 Uruguay, Colombia and DR Congo use the words “drinking water” or “potable water”. Drinking or potable water indicates that there is focus on water for human consumption. This coincides with the focus on water for human consumption in Gupta, Ahlers, and Ahmed (2010) human rights discourse. In the same period, “clean water” reappears in Ecuador and the Maldives. Bolivia is evidently the country with the most adjectives and references to different aspects of the right to water. Article 373 refers to water as a fundamental right to life, and that water shall be used and accessed on the basis of principles of solidarity, complementariness, reciprocity, equity, diversity and sustainability”.

As a result of an increase in constitutions with the right to water and sanitation, after 2010, there is more variation in adjectives. Some are clear and explicitly refer to rights, such as the Cuban constitution: “All people have the right to water. The State works to guarantee access to potable water and to its sanitation, with the required compensation and rational use” and in Tunisia: “The right to water shall be guaranteed. The conservation and rational use of water is a duty of the state and of society”. Other paragraphs are largely associated to aspects of the right to water and sanitation as it is presented in the international documents and as components of the right to health or life.

The Mexican amendment from 2015, for example, says that “(...) Any person has the right of access, provision and drainage of water for personal and domestic consumption in a *sufficient, healthy, acceptable and affordable* manner” (my emphasis), which resembles the

wording of res. 64/292 in which states and IOs are called upon to “provide safe, clean, accessible and affordable drinking water and sanitation for all”. These adjectives are associated with reoccurring phrases that have been utilised in several human rights documents at the international level (Winkler 2016, 1380). As discussed above, these adjectives symbolise different aspects of the right, such as the economic aspect (affordable), the health aspect (healthy, clean, safe) and the human dignity aspect (acceptable), highlighting the holistic discourse of a human right.

5.2.2 Quantitative Analysis

Text is an excellent data source but requires pre-processing in order to transform large amounts of unstructured text into a structured body that can be analysed and used to draw conclusions (Kwartler 2017, 9). “Text mining represents the ability to take large amounts of unstructured language and quickly extract useful and novel insights that can affect stakeholder decision-making” (Kwartler 2017, 17). After collecting the text that is required based on the inquiry, in this case the constitutional paragraphs, I uploaded these texts to RStudio and performed a set of common pre-processing tasks including lowering text, removing punctuation, stripping extra whitespace, removing numbers and commonly used terms such as “the” “a” and “in” (Kwartler 2017, 39). Finally, the terms have been weighted based on the term frequency – inverse document frequency (TFIDF)-method, represented by ⁶⁴. Instead of simply counting the frequency of a term, the TFIDF-method measures the term frequency within the text and the term frequency in the corpus as a total, by finding the relative frequency of words in a specific document compared to the inverse proportion of that words over the entire document corpus (Ramos 2003, 2).

Figure 4 below shows the frequency of words in the paragraphs. As expected, *water* is the most frequent word, with *right* coming second. *Human* occurs only eight times, as does *sanitation*, one for each constitution with the right to sanitation. In other words, the word *right* occurs without the prefix *human* in most cases. We can also see that words related to other socio-economic rights also occur often, such as *life*, *food* and *health*. It is clear that there are strong associations between both the terms in themselves, and the substantive meaning behind the words. Food and health are also mentioned more frequently than adjectives describing

⁶⁴ Where $tf_{i,j}$ is the number of occurrences of i in j , df_j is the number of documents containing i , and N is the total number of documents.

water quality, such as adequate and clean, and sanitation in general. This also suggests that water is still associated with other socio-economic rights and that sanitation still lacks focus. Other words associated with sanitation, such as sewage system and hygiene do not make it in to the top 20 most frequent words.

Figure 4 20 Most Frequent Words in Constitutional Paragraphs

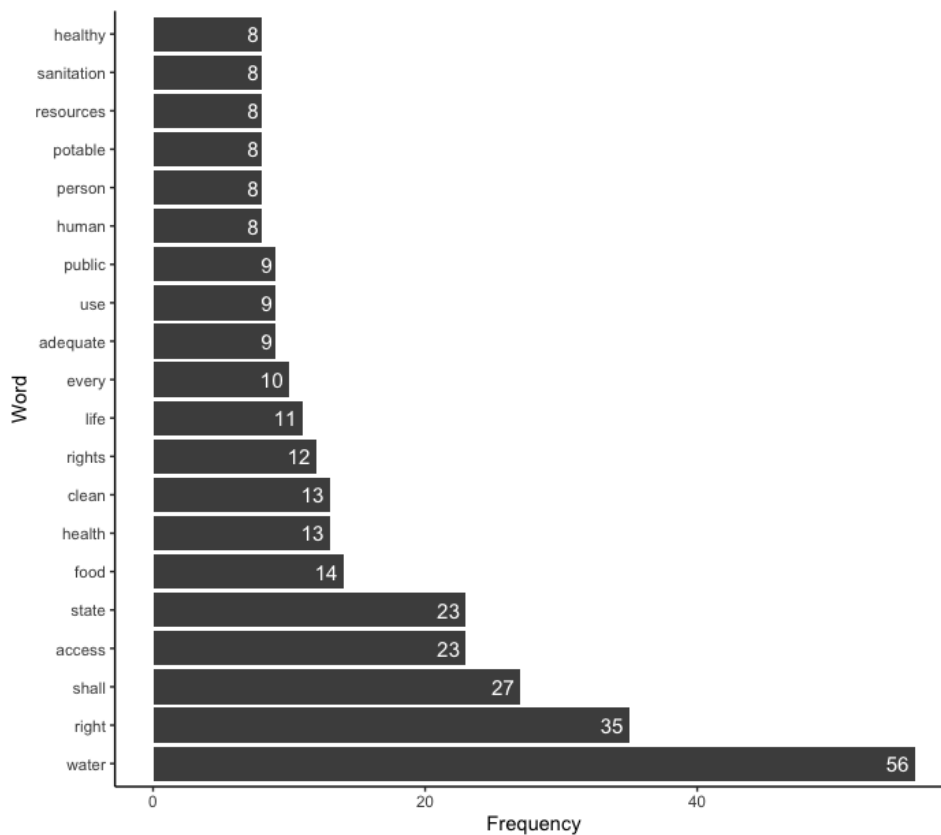


Figure 4: This figure shows the frequency of the 20 most frequent words in paragraphs on HRtWS among 31 constitutions. Data: Comparative Constitution Project (n.d)

This does not, however, provide us with any information about the language difference between countries over time. I use cluster analysis to estimate groups of similar texts across the corpus. The cluster analysis identifies patterns in the corpus, clusters together texts with similar patterns and divide them into a pre-specified number of groups. As illustrated in the previous section, those countries that constitutionalised the right to water and sanitation at later stages of the international development are more likely to use the phrases “human right”, “universal right”, “inalienable right” or “fundamental right”. I thus expect the countries from the later wave of constitutionalisation to be clustered together. The first four constitutions refer to rights to a lesser extent, and I therefore expect that they will be clustered together as well. In other words, to strengthen hypothesis one, I expect this analysis to cluster together texts

from the same period or group (before, during or after). I therefore specify that I want three groups of clusters, k , and then run the analysis.

The k-means algorithm selects a random point as the centroid for each cluster k , and all documents are assigned to the closest centroid. The sum of the distance to the centroid is used to assign the centroids the values of the average distance sum. This will rearrange the documents to the clusters from which the sum of distances is the lowest (Kwartler 2017, 131). I have tested that the number of clusters, k , gives a very low level of within sum of squares (withinss)⁶⁵, which can be seen in appendix 5a. I could have increased the number of clusters further to get an even lower withinss, but that contradicts the purpose of this analysis which was to test whether the three groups of countries would cluster together. Moreover, when testing only two clusters, the countries in cluster 1 and 2 are merged into one cluster, leaving the remaining countries in the same cluster as before.

The result shows that there is no time-conditioned pattern in the constitutional texts. They are clustered together across time (and space). Additionally, it does not seem to be any clustering regarding how forceful the language is. The first cluster only consists of two states' paragraphs, Bolivia and Slovenia. The second cluster is just Ecuador, and the last cluster contains the remaining 28 countries. A table of the clusters including the top 10 words for each cluster can be found in appendix 6. The top 10 words in each cluster are also fairly similar, suggesting that there is little variation between the three clusters. A figure illustrating the betweenness for different numbers of clusters, k , can be seen in appendix 5b. *Water* receives the highest score in all three clusters, and *right* comes second in cluster one and three, but is still in top ten in cluster two.

Lastly, I use a similarity analysis to examine how similar the constitutional texts are to each other and the international documents with human rights discourse. The international documents that have been analysed are presented in table 10 below. I do expect that there will be similarity between the international documents and the constitutions that to a larger degree use human rights discourse, such as Bolivia, Ecuador and Mexico. Hopefully, the similarity analysis will also show a higher similarity between countries from the same groups. The 'TextReuse'-package offers two varieties of pairwise comparison between every pairing of documents in a corpus. The 'jaccard similarity' assumes that the pairwise comparison is

⁶⁵ The squared sum of distances within a cluster. The lower the score is, the stronger the pattern within the cluster. Contrarily, the 'betweenness' or between sum of squares measures the squared sum of distances between clusters .

commutative, and thus offers the same similarity value for ‘Bolivia x Cuba’ and ‘Cuba x Bolivia’. Alternatively, the similarity function is directional, and the function includes a measurement of which terms Bolivia has borrowed from Cuba, and the other way around. This will not yield the same similarity value for the two directions (Mullen 2020).

Table 10 International Documents used in Similarity Analysis

Document number	Resolution
2200A/XXI	International Covenant on Economic, Social and Cultural Rights
34/180	Convention on the Elimination of All Forms of Discrimination against Women
44/25	Convention on the Rights of the Child
55/2	United Nations Millennium Declaration
61/06	Convention on the Rights of Persons with Disabilities
64/292	The Human Right to Water and Sanitation
CAB/LEG/24.9/49	African Charter on the Rights and Welfare of the Child
E/C/12/2002/11	General Comment No. 15: The Right to Water

Table 11 below presents the ‘jaccard similarity’ between the constitutional paragraphs on water and sanitation and international documents related to the HRtWS. A full table including all pairs of texts is presented in appendix 6. The highest similarity value between any texts is 0.308 and is between Somalia and Zimbabwe. These constitutional paragraphs were adopted in 2012 and 2013, respectively, so the temporal proximity might explain the similarity between these two paragraphs. When looking at the resolutions and their similarities towards the constitutional paragraphs, the highest scores are between res. 64/292 and Bolivia, and res. 64/292 and Honduras. These both have a similarity value of 0.006. The similarity between res. 64/292 and Bolivia does not come as a big surprise, as Bolivia was the main drafter of the resolution. Still, it is interesting to see that it manifests in this analysis. The Honduran constitution from 2013 also provides a human right to water and sanitation in their constitution, which is closely related to the resolution from 2010 and can explain the similarity between the two texts. Although the similarity value is relatively low, the total corpus contains 3416 words⁶⁶ after the pre-processing, and that definitely reduces the probability of higher similarity.

⁶⁶ Pre-processing includes removing stop-words such as “the” and “a”. This reduces the number of words in the data matrix from 5261 to 3416.

Table 11 Similarity between National Constitutions and International Documents on HRtWS

<i>Resolution</i>	<i>2200A/XXI</i>	<i>34/180</i>	<i>44/25</i>	<i>55/2</i>	<i>61/106</i>	<i>64/292</i>	<i>CAB/LEG/24.9/49</i>	<i>E/C/12/2002/11</i>
Bolivia	0.002	0.001	0.002	0.002	0.002	0.006	0.003	0.003
Colombia	0	0	0	0	0	0.001	0	0.0001
Cuba	0.001	0.0003	0.0003	0.001	0.0002	0.002	0.0004	0.0004
Dominican Republic	0.002	0.001	0.002	0.002	0.001	0.004	0.001	0.001
Dr Kongo	0.001	0.001	0.001	0.001	0.0002	0.002	0.0004	0.001
Ecuador	0.003	0.002	0.001	0.0003	0.002	0.005	0.002	0.002
Egypt	0.0003	0.0003	0.0003	0.0003	0.0001	0.001	0.0004	0.0001
Zimbabwe	0.0003	0.0003	0.0003	0.0003	0.0001	0.001	0.0004	0.0003
Ethiopia	0	0	0	0	0.0001	0	0.0004	0
Fiji	0.002	0.001	0.001	0.001	0.0004	0	0.0004	0.001
Gambia	0	0.0003	0.0002	0.0003	0.0001	0	0.0002	0.0003
Honduras	0.002	0.001	0.001	0.001	0.001	0.006	0.002	0.001
Hungary	0.004	0.001	0.002	0.002	0.001	0.003	0.002	0.001
Iceland	0.001	0.0003	0.001	0.001	0.0002	0.003	0.001	0.001
Kenya	0.0003	0	0.0002	0	0.0001	0	0.0002	0.0004
Libya	0.0003	0.0003	0.0002	0.0003	0.0002	0.003	0.0002	0.0001
Maldives	0.001	0.0003	0.001	0	0.0002	0	0.0004	0.0001
Mexico	0.0003	0.0003	0.001	0.0003	0.0001	0	0.0004	0.001
Morocco	0.001	0.001	0.001	0.001	0.001	0.002	0.001	0.001
Nepal	0.001	0.0003	0.001	0.001	0.0005	0.002	0.001	0.0001
Nicaragua	0.001	0.0003	0.001	0	0.0004	0.001	0.001	0.001
Niger	0.0003	0.0003	0.001	0.0003	0.0002	0.001	0.001	0.0004
Panama	0.0003	0	0.0002	0	0.0001	0	0	0.0001
Peru	0.0003	0	0.0003	0	0.0001	0	0	0.0004
Slovenia	0.001	0.001	0.001	0.0003	0.001	0.002	0.002	0.001
Somalia	0.0003	0.0003	0.0003	0.0003	0.0001	0.001	0.0004	0.0001
South Africa	0.001	0.001	0.001	0.001	0.0005	0.002	0.001	0.0004
Tunisia	0.0003	0.0003	0.0002	0.0003	0.0001	0.002	0.0002	0.0003
Uganda	0.0003	0	0.002	0.001	0.0002	0.001	0.001	0.0003
Uruguay	0.0003	0.0003	0.0002	0	0	0	0	0.0003
Yemen	0.0003	0.0003	0.001	0.0003	0.0005	0.001	0.001	0.001

5.3 Effects of Norm Diffusion

5.3.1 Constitutional Language and Norm Diffusion

In this section I present the model on constitutional language and socialisation mechanisms. What type of paragraph do countries adopt and does the type of paragraph vary depending on what norm diffusion mechanisms they have been exposed to? I have fitted a model for a large-n sample (N=193) over 22 years. Based on the norm diffusion theories I presented in table 3.5, I expect countries that are more involved in and interact with international agencies and institutions working with HRtWS are more likely to have a HRtWS-paragraph. I expect that visit a from the Special Rapporteur, representation in the CESCR, favourable vote for res-64/292 and high civil society participation will have a positive effect on the language-variable in the model. As presented in section 4.5.1, I use dichotomous dependent variables for measuring HRtWS-language in the constitution. The variables represent how forceful the language is, ranging from *no language* to *human rights-language*.

The independent variables measuring socialisation mechanisms have been presented and discussed in section 3.3.4.1. I test the effect of country visits from the Special Rapporteur, membership in the CESCR, vote behaviour in the General Assembly for res. 64/292 and the level of civil society participation. I also control for being a signatory part of the ICESCR and the level of democracy in the country. I expect all variables to have a positive effect on the dependent variables indicating water- and sanitation language in the constitution in model 2-5 in the table below.

5.3.2 Penalised Maximum Likelihood Regressions

In the second part of section 5.3, I present the results from the logistics regressions. To make sure that I use the model that best predicts the outcome, I first ran and compared a normal maximum likelihood (ML) and a penalised maximum likelihood (PML) model⁶⁷. The log likelihood for both models is denoted in table 12 below. As we can see from table 12, the likelihood is higher in the penalised ML model, which means that the joint estimated probability density is better estimated for the variables in the models. Thus, the results from the PML models are presented. I also present the odds ratio for each variable in table 12. For comparison, appendix 8 provides the estimated coefficients and p-values. In model one, the

⁶⁷ For the penalised maximum likelihood model, I used the ‘firthlogit’ command in STATA from Coveney (2008). Documentation and syntax can be downloaded from <https://ideas.repec.org/c/boc/bocode/s456948.html>

dependent variable *no language* takes value 1 if the country has no water language in the constitution. The anticipated effects of socialisation mechanisms should therefore go the opposite direction in model 1 compared to the rest of the models.

When studying the first model in table 12 below, we see that on the contrary to my assumptions, *CESCR membership* and higher score on the *democracy*-index increases the odds of having no language in the constitution. The former variable is not significant, and the result is therefore not generalisable. The baseline has a significantly higher odds of not having any water- and sanitation language than having language. Increase on the *SR visit* and *civil society participation* variables decreases the likelihood of having *no language* in the constitution. In other words, the country is more likely to have language if they have been visited by the Special Rapporteur and if they have a higher value on the *vote*-variable. These variables are both significant on a 1 per cent level. The second model shows the odds for having *state obligations* in the constitution. Here, *CESCR membership*, *vote* and *democracy* all have positive and significant effects on having state language. For example, the odds are four times higher for *state language* with a one unit increase on the *democracy*-index. *SR visit* and *civil society participation* both have a negative effect, and the odds of having *state language* therefore decreases with a one unit increase on these variables.

Model 3 and 4 give fairly similar results. *SR visit* *vote* and *civil society participation* all have a positive and significant effect on having *right* and *human right* language. These results imply that some socialisation mechanisms influences the national constitutional language. *CESCR membership* and *democracy* are negative in both models, which means that higher *democracy* score or *membership in the Committee* give lower odds of having *right* and *human right* language in the constitution. These results contradict the hypothesis of norm diffusion and mechanisms generating language changes on the national level. The *ICESCR signature* variable is not significant in either of the first four variables, and the odds are very arbitrary.

In the fifth and last model, *SR visit*, *vote* and *civil society participation* have a positive effect on *sanitation* language. The odds are higher for *sanitation* language if the country has been visited by the Special Rapporteur, and the higher the score on *vote* and *civil society participation*, the higher the odds of having *sanitation* language. *ICESCR signature* does have a positive and significant effect in this model. *CESCR membership* and *civil society participation* do not have significant effects.

Table 12 Penalised Maximum Likelihood Models: The Effect of Socialisation Mechanisms on Constitutional Language

	Model 1	Model 2	Model 3	Model 4	Model 5
	No language	State Obligation Language	Right Language	Human Right Language	Sanitation Language
	()	()	()	()	()
SR Visit (0,1)	0.205*** (0.059)	0.074* 0.107	10.229*** 3.423	3.163*** (1.327)	3.656*** (1.303)
CESCR Member (0,1)	1.681** (0.424)	2.043** (0.666)	0.342*** (0.128)	0.762 0.326	1.064 (0.328)
Vote in General Assembly (0-2)	0.119*** (0.010)	2.870*** 0.350	10.795*** (1.619)	8.111*** (1.372)	8.006*** (1.299)
CS Participation (0-1)	0.088*** (0.041)	0.030*** (0.023)	15.475*** (9.042)	528.016*** (487.269)	0.733 (0.471)
ICESCR Signature (0,1)	0.901 (0.152)	0.982 0.271	1.125 0.235	1.187 (0.293)	1.758** (0.404)
Democracy (0-1)	10.285*** (3.944)	4.175 ** 2.953	0.058*** (0.028)	0.056*** (0.031)	0.517 (0.279)
Constant	164.552*** (49.863)	0.054*** (0.017)	0.001*** (0.001)	0.000*** (0.000)	0.004*** (0.002)
Log likelihood Penalised ML Models	-646.203	-311.140	-382.120	-276.483	-327.405
<i>Log likelihood (Normal ML model)</i>	-656.962	-318.226	-391.818	-284.623	-336.771

Table 11: Models with five dependent variables are presented. The table presents the odds ratio for each variable and the standard error. P- and z-values are not included.

Note: The constant estimates baseline odds. Data: See appendix 4

* - p<0.10, ** - p<0.05, *** - p<0.01

Figure 5 Marginal Effects in Five Penalised Maximum Likelihood Models

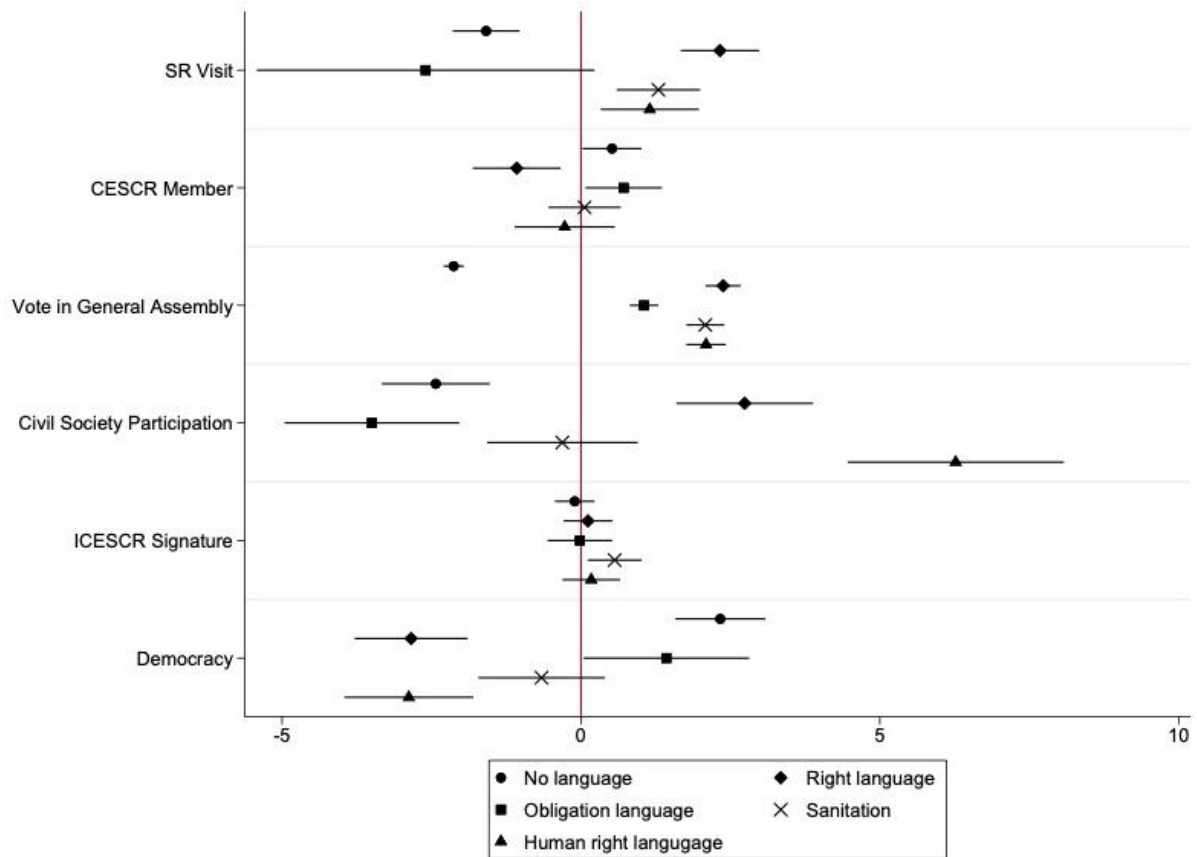


Figure 5: Marginal effects of four logit models. Estimates illustrate the increase or decrease of probability for outcome to be 1 for each unit increase in the independent variable. Data: See appendix 4

As there is a difference in probability for the outcome to increase or decrease depending on which value the explanatory variable takes, we estimate marginal effects to see how the probability increases or decreases when the independent variable increases with one unit. For example, we see that an increase on the *vote*-variable (voting in the general assembly on res. 64/292), increases the likelihood of having water- and sanitation language in all the models with language in them, and decreases the likelihood of having no language. All of the estimations are significant, and thus we can say that there is a significant increase in likelihood of any water- and sanitation language in the constitution if the country has a higher score on the *vote*-variable, and an increase in likelihood of having no language if the score is lower.

5.4 Discussion

5.4.1 Texts and Variation in Constitutional Language

In this section, I discuss the results in previous sections, and comment on the hypotheses formulated in chapter 1. I find support for hypothesis one (“there is variation in discourse at

national level regarding the right to water and sanitation before and after the norm development at the international level”) in the qualitative text analysis. The quantitative analysis, on the other hand, somewhat weakens the argument about time-conditioned discursive variation. When testing hypothesis two (“the changes in discourse at national level can be explained by international development influencing the discourse at national level”), I find some evidence suggesting that international norm diffusion does in fact correlate with domestic human right discourse. Some of the mechanisms I test have a positive and significant effect on domestic constitution language, whilst others do not.

The qualitative text analysis suggests that the pre-2002 paragraphs are characterised by state obligation, whilst the frequency of right and human rights language increases over time in the 2002-2010 and post-2010 groups. Seven constitutions have a human rights-paragraph, of which 42.86 per cent are from the 2002-2009 period and the same per cent are from 2010 and after. The remaining 14.29 per cent from before 2002 constitute one country, Uganda, in which “The State shall endeavour to fulfil the fundamental rights of all Ugandans” including access to clean and safe water. Sanitation is not mentioned in a national context before Uruguay amends their constitution in 2004, including both the human right to water *and* sanitation. However, the 2002-2009 group constitute 40 per cent of the sanitation-paragraphs, with the remaining 60 per cent being in the 2010 and after-group.

The cluster analysis suggests that it is harder to distinguish the texts between the three groups. It shows no support that constitutional paragraphs with the right to water and sanitation at the same time are more similar to each other than to paragraphs adopted at different times. The cluster analysis does show that some texts are more like each other, of which some are from the same time-period (pre-2002, 2002-2009, post-2010), but this does not seem to be a significant pattern. The first cluster contains the Bolivian and Slovenian texts, whilst the second one is only Ecuador. It is not surprising that the Bolivian and Ecuadorian texts are dissimilar to the majority of the corpus. Their constitutional paragraphs, which both include human rights-language and sanitation were adopted only one year apart, and they have both been active in advocating for the HRtWS at the international level, including authoring and sponsoring res. 64/292. However, other supporters of res. 64/292 such as Nicaragua, Uruguay and Dominican Republic, DR Congo and Fiji have been added to the remaining cluster.

The Slovenian text also uses forceful language. Although the constitution does not use *human* right, it establishes a *right* to drinking water, and prohibits commodification of water.

The paragraph was added to the Slovenian constitution in an amendment in 2016 on its 25th anniversary. As only one out of three constitutions in Europe, it is more likely that the human right-norm came from the international or transnational level. The similarity to the Bolivian constitution also suggests that the Slovenians found some inspiration there.

The draft resolution was authored predominantly by Bolivia, and an additional five of eight states in the 2002-2010 group were sponsors of the draft resolution on the HRtWS. These include Uruguay, Nicaragua, DR Congo, Ecuador and the Maldives. All of these states use more forceful language in their constitutional paragraphs. As illustrated in figure 3, the four Latin-American countries use human rights-language, whilst DR Congo and the Maldives have rights-language, which suggests that these states had adopted, or were in the process of adopting, the HRtWS-norm in their own countries before the adoption of res. 64/292. This does not reject a hypothesis of norm diffusion from international to national level, it just means that the potential diffusion happened before the resolution was adopted in 2010.

For example, the 2002 General Comment No. 15 could have been a catalysing factor for constitutionalising sanitation. In 2004, two years after General Comment No. 15 on the right to water, where sanitation was also addressed in a human right language, the Uruguayan constitution was amended and the right to water and sanitation was enshrined (Shiel, Langford, and Wilson 2020, 1). The timing suggests that there is a link between the international and nation development. However, Uruguay has a very long history of water right activism and focus on good public provision of water and sanitation (Murray and Spronk 2019, 202). Interestingly, Uruguay has never been a member of the CESCR, which weakens the argument of norm diffusion via socialisation in the international realm. Norm diffusion could have happened through other mechanisms such as transnational activist networks, in which in-depth examination of transnational activists in Uruguay would be important for understanding where the norm came from and how it proliferated in the Uruguayan society. The constitutional amendment in Uruguay can also be a result of national mobilisation that happened concurrently with, but independently from, the international events.

Some of the co-authoring countries did not constitutionalise the right to water and sanitation until after 2010; Fiji in 2013, the Dominican Republic in 2015 and Cuba in 2019. Thus, we must ask why they were joining and supporting a resolution of which the content was not provided for/institutionalised in their own legal structures? It could just be political inertia;

many constitutions are rigid, meaning that constitutional amendments rules are strict⁶⁸ and the amendment processes are very time consuming (Albert 2014, 918-919; Lijphart 2012, 204;207; Ginsburg and Melton 2015, 691).

As I have illustrated in section 5.2, the qualitative analysis finds a distinct variation in the language used across time depending on their engagement at the international level and especially in the UNGA. On the other hand, the quantitative analysis does not find an as distinct pattern. It would be wrong to assume that there is no connection between the draft-sponsors and the fact that most of them already had implemented the right to water and sanitation domestically. The empirical analysis from this chapter suggests that there is a relationship between international norm development and national language change. However, based on the results from the analysis in this chapter, I cannot identify the causal direction of the relationship. In some cases, the national water and sanitation paragraphs succeed the international norm development, which suggests that the HRtWS-norm came from elsewhere. According to Baer (2017a, 95;98), the water justice movement worked in a different way than traditional human rights advocacy for civil and political rights, mainly due to globalisation. Instead of targeting violating states with the help of global actors, the water justice movement is a transnational movement seeking to strengthen the role of the state to fulfil the socio-economic rights, and it was important for them to create an internationally recognised HRtWS framework and mechanisms for international aid (Baer 2017a).

Nevertheless, this can be categorised as norm diffusion, albeit from the domestic arena to the international arena, and not the other way around as anticipated in hypothesis two. This notion also supports an argument that suggests that IOs act as norm consumers as well as norm diffusers (Park 2006, 343). IOs are, as discussed earlier, autonomous structures that can create their own interests and agendas, yet they often get their ideas come from other actors. Park argues that states, non-state actors and transnational advocacy networks provide create and spread norms that are consumed by international organisations (Park 2006, 353-354). The countries that were not part of the norm development might have been influenced by international norm diffusion over time.

⁶⁸ For example, constitutional amendment rules often include high voting thresholds in the legislative body or in referendums. Lijphart differentiates between two-thirds majority, less than two-thirds (but larger than ordinary majority) and supermajority requiring more than two-thirds (2012, 207). Ginsburg and Melton illustrate that half of the world's constitutions require either legislative supermajority or referendum, and a third of all constitutions requires both supermajority and referendum (2015, 690).

5.4.2 Mechanisms Influencing Language Adoption

The regression models suggest that there are socialisation factors that affect the likelihood of a country adopting water- or sanitation language in their constitution. According to the theoretical argument I presented in section 2.5, these socialisation factors are mechanisms that cause norm diffusion. The models confirm this argument, however, in the sample, some of the countries had already adopted water- and sanitation language before they were visited by the Special Rapporteur and voted in the General Assembly. Thus, the results could also be interpreted as those countries that had already adopted the norm and had (or were about to) constitutionalise the rights were more likely to vote in favour of the resolution or be visited by the Special Rapporteur.

For the countries that constitutionalised before the international norm development accelerated (pre-2002 countries), there are alternative explanations for the inclusion of the water and sanitation rights. It might be the result of local or regional water movements or a part of a larger struggle towards better socio-economic conditions. As I discuss in chapter six, South Africa included the right to water in their constitution in 1996. A long history of inequality and poverty led to the adoption of a constitution that aimed to transform the South African society. In other words, the constitution included an encompassing set of socio-economic rights in addition to civil and political rights. Yet, it is not the objective of this thesis to explain the pre-2002 constitutions, but rather the ones from during and after the norm development. The latter constitutions are the ones assumed to be influenced by norm diffusion mechanisms.

The Special Rapporteur mandate was established in 2008, under the name Independent Expert on the issue of human rights obligations related to access to safe drinking water and sanitation. The mandate's tasks were "to identify, promote and exchange views on best practices", and work on "the further clarification of the content of the human rights obligations" in relation to access to safe drinking water and sanitation. The country visits were not a part of the original mandate, but a tradition that developed after the Independent Expert was invited to a country visit in Egypt (Personal Communication 2020). Today, country visits are regularly conducted to examine the situation of the realisation of the human rights to safe drinking water and sanitation. During such meetings, the Independent Expert meets "with prime ministers, members of the judiciary and legislative branches, civil society organisations, officials from water and environment agencies at national and local levels, school children, representatives of relevant UN specialised agencies and programmes, academic institutions and the private sector" (Baer and Gerlak 2015, 1532).

The countries with water- and sanitation language in their constitution that have been visited by the Special Rapporteur are Egypt, Kenya, Mexico and Uruguay. Egypt is the only country where the visit happened before the constitutionalisation occurred, in 2010 and 2012 respectively. The timeline is thus opposite to the hypothesised causal relationship, but there is still a significant correlation between the Special Rapporteur visits and constitutions' language regarding human rights to water and sanitation.

The regression models also show a positive association between water- and sanitation language and voting in the General Assembly. There are just a few countries with water- and sanitation language that abstained from voting or were absent during the plenary meeting, namely Ethiopia, Fiji, Gambia, Kenya and Uganda. The majority voted for the resolution, and two thirds – Cuba, the Dominican Republic, Egypt, Honduras, Hungary, Iceland, Libya, Mexico, Nepal, Niger, Peru, Slovenia, Somalia, Tunisia, Yemen and Zimbabwe – did so before adopting the rights at national level. These and several other countries that voted in favour of the resolution did so despite them not having a national legal foundation, which suggests that the mobilisation around water and sanitation at national level must have had some influence on these countries. The mobilisation for recognising the rights to water and sanitation as human rights by the HRC may have caused more countries to be exposed to the idea of water and sanitation as human rights, and over time become more and more likely to adopt a similar idea.

Contrary to what was expected, ICESCR Signature does not have a significant effect on water-language. It does have a moderately significant effect on sanitation-language. Thus, I do not find much support for the argument based on Elkins, Ginsburg, and Simmons (2013) notion of constitutional convergence caused by international norms. Studies on constitutional convergence point to an increasing similarity in constitutional texts over time. One explanatory factor is globalisation and increased interaction between countries. The speed at which countries exchange and share ideas, thoughts, values and interests has increased in the previous century (Giddens 1990). Elkins, Ginsburg and Simmons point to international documents and their normative impact on converging constitutional documents (2013, 63). Following this argument, constitutional convergence is a result of norms from the international level.

One alternative explanation to the converging constitutions and the increasing number of constitutions with rights to water and sanitation is that they have happened in a context of increased water scarcity because of population growth, urbanisation, climate change and pollution. The prospect of future population growth, accessibility of freshwater resources and

so on also suggests that the water scarcity problem is one that will keep increasing. When the ICESCR and other earlier documents were written, water was perceived as an infinite resource and one that would not be subject to conflicts or war. Thus, the increased legal focus on water comes with increasing contestation around access and provision of water.

As explained in the introduction, international human rights norms often lack legal binding. Baer and Gerlak (2015, 1529) even argue that res. 64/292 and HRC resolutions on the right to water are vague and lack specific guidelines for implementation. The hope that constitutionalisation will cause an increase in access can make countries more prone to domestically institutionalise rights, or at least provide greater opportunities for litigating rights violations.

Another explanation that is important to take into consideration is the general trend for constitutionalising socio-economic rights. The earliest constitutions in use today are over two hundred years old, written before socio-economic rights had become generally recognised, and the most important one of which was property rights. Since then, provision of socio-economic rights in constitutions has become more and more common. South Africa is a prime example on how socio-economic rights can be enshrined into a constitution, and the constitution did not enter into force until 1996.

CHAPTER 6 CASE STUDY OF KENYA

6.1 Tracing the Right to Water and Sanitation in the Kenyan Constitution

In this chapter I study the constitution making process in Kenya and trace the water and sanitation-language through the documents and reports from constitutional meetings and hearings. The new Kenyan constitution was adopted by referendum on the 4th of August 2010. In the Bill of Rights, article 43 on Economic and Social rights explicitly states that all Kenyans have the right “to reasonable standards of sanitation” and “to clean and safe water in adequate quantities”⁶⁹. The Kenyan constitutional review process spun over a long time, concurrently as the international level introduced, mobilised around and adopted a human right to water and sanitation norm.

The theoretical arguments presented in section 2.5 expect that the HRtWS has diffused to national arenas over the years leading up to 2010, including to the Kenyan constitution. I therefore expect that the documents will show an increase of discourse on water and sanitation from 2002 and towards 2010. However, two weeks before the new constitution was adopted, Kenya abstained from voting over res. 64/292 in the UNGA, and the Kenyan representative to the UN did not explain why Kenya decided to abstain during the session. The reluctance to vote in favour of an international recognition of the right accounts for an interesting puzzle.

In this chapter I present the analysis of the constitution-making documents and the results from the analysis. The documents have been analysed both quantitatively and qualitatively. First, the results from the text analysis are presented, and secondly, I discuss the texts within the context of the political, societal and geographical situation in Kenya. Before the analysis is presented in section 6.2, I give a brief introduction to the constitution making process. This introduction lays out the main participating actors in the drafting process which are potential consumers and diffusers of human rights norms. It also provides an insight into the opportunity structures that existed around the drafting period that may have had an effect on the inclusion of the rights to water and sanitation.

6.1.1 A Dramatic Decade in Kenya

The Kenyan constitutional reform was part of a larger struggle for democracy and economic reforms which began in the 1980s (Mati 2012, 68; Cottrell and Ghai 2007, 3). In 1991, three

⁶⁹ Kenya: The Constitution of Kenya [Kenya], Entered into force on 27 August 2010.

constitutional amendments were adopted with liberalising intentions. Presidential and multiparty elections were reintroduced to Kenya after the president had amended the constitution to ban all parties in 1982 (Kindiki 2007, 153). Unfortunately, the opposition was unable to mobilise enough support for the 1992 election, and incumbent party and authoritarian leader of 19 years Daniel Arap Moi remained in power (Chitere et al. 2006).

In 1997, after pressure and mass protests from civil society, the president and government agreed to make certain constitutional and legal reforms through cooperation with the oppositional parties' newly established Inter Parties Parliamentary Group (IPPG) (Kindiki 2007, 153; Chitere et al. 2006; Mati 2012, 70-71). In 1998, the Constitution of Kenya Review Act was enacted and the CKRC was sworn in two years later (Mati 2012, 70-71). Initially, the Commission's task was to review the then-current constitution from 1969, but eventually the constitution ended up being replaced. The CKRC was also responsible for providing civic education, seeking the issues and views of the people, and preparing a draft constitution for a National Constitutional Conference (NCC) (Cottrell and Ghai 2007, 6).

The constitution making process commenced three years after the Act was signed and it was planned to conclude in a new constitution in 2002, and the NCC was scheduled for October the same year (Cottrell and Ghai 2007, 1). The Draft Constitution of Kenya was prepared and presented by the CKRC in September 2002. Due to political instability and power turnover after the 2002 presidential election, the review process and NCC was prolonged until 2004. The NCC reconvened in March 2004 (Cottrell and Ghai 2007, 6-7) and The Draft Constitution of Kenya, popularly referred to as the Bomas Draft after the place where the conference was held, was adopted by the NCC in 2004.

The courts ordered a referendum on the adoption of the Bomas Draft as a new constitution. However, the government made sure that changes were allowed to be made in the draft before the referendum, and by the time the referendum was held, the draft had changed extensively. The Bomas draft was now replaced by the Wako Draft⁷⁰, after Attorney General Amos Wako who was the main author of the new draft (Chitere et al. 2006, 1). A referendum in 2005 concluded in a rejection of the Proposed New Constitution.

The constitutional review process was once again put to a halt in 2007 due to the violent aftermath of the presidential election in December. The election was suspected to have been

⁷⁰ The Bomas draft changes so much that it was decided to give the new draft a new name. This way, they could distinguish between the two draft editions.

rigged by the incumbent president Kibaki and eventually, international election observers confirmed that election manipulation had been attempted by both Kibaki and the opposing candidate Odinga. Massive demonstrations broke out, causing violence and killings (Klopp 2009, 143). The international community stepped in and facilitated negotiations between the two opposing sides, aiming to create peace, solve the political crisis and address other long-term issues such as the constitutional reform (Klopp 2009, 147).

The National Accord facilitated a new Constitution of Kenya Review Act of 2008. The Act gave the Committee of Experts (CoE) the task of studying the previous drafts and proposals, identify contentious issues⁷¹, to collect the public's views on contentious issues, conduct research and propose solutions for these contentious issues, and finally create a "harmonised draft" constitution. The Act gave the CoE one year to perform their duty, but the committee was not appointed until March 2009, thus giving them only nine months to produce the draft. Among the CoE members were three foreigners including the South African constitution expert Christina Murray. The referendum was held on 4 August 2010 and almost ten million Kenyans cast their vote in the election, of which 68 per cent of the valid votes accepted the new Constitution. The new constitution entered into force on the 27th of August the same year.

6.2 Analysis of Documents from the Kenyan Constitution Making Process

6.2.1 Documents from the Constitution Making Process

As mentioned in the chapter introduction, I expect that there will be language on the right to water and sanitation in the documents from the constitution making process. Parallel to the intensification and cumulation of the international norm development, I expect that the documents will show an increase in discourse on water and sanitation. Simultaneously, neoliberal discourse of water is anticipated to decrease from 2002 as the focus moves away from water commodification and private water companies, and over to the state's role in securing water for everyone. I found that all the drafts contain an explicit right to water, and most of them also sanitation, which altered some of my expectations to the drafts. However, it is expected that there will be reference to international human right norms in the reports, and that the obligation and Kenya's commitment to follow and fulfil these norms are emphasised.

⁷¹ Contentious issues were defined as "issues which are contentious or not agreed upon in the existing draft constitutions".

Additionally, I expect to find some evidence of socialisation mechanisms. Societal pressure from citizens and organised groups will likely manifest in public hearings and briefings where these groups are present. The CKRC and CoE are the most likely elite groups to be exposed to elite learning, and I thus expect that there are references to international documents, resolutions and treaties on the right to water and sanitation.

In order to say that the constitution making process in Kenya was characterised by human rights discourse on the issue of water, I need to find references that are associated with this discourse in the documents. The documents have been categorised based on a number of water-related topics that I present in the next section. Some of these topics are more strongly associated with human rights discourse than others. The results from this analysis will be used to review the second hypothesis, “the changes in constitutional language at national level can be explained by international norm development influencing the constitutional language at national level”.

6.2.2 Results

Out of the 271 documents, 84 refer to water in the context of interest⁷², which is 31 per cent of all documents and further analysis has been done for these 84 documents. Just 17.71 per cent of all documents mention sanitation (48), or 57.14 per cent of the documents in the analysis. The first document is dated 26th of March 2001 and the last one 5th of December 2011, which cover most of the time period of interest. The Constitutional Review Act was adopted in 1997, and it is possible that documents exist from this period where water was also discussed.

The frequency of the topics related to water and sanitation is presented in table 13 below. Water and sanitation were most frequently discussed as rights. 63 documents refer to water as a *right*. Comparatively, sanitation is discussed as a *right* in 27 documents. The references have not been coded more specifically, and thus includes references to water as a resource that citizens have the *right* to access, that water is a *right*, or a human *right*. The second highest frequency for water is *groups*, whilst for sanitation it is *provision*. The *groups* reference is mainly marginalised groups, minorities and socio-demographic groups. The inequality in Kenya is highly contingent on geography and socio-economic status. Especially in certain areas

⁷² That means I have excluded documents that refer to water in other contexts such as territory and seas. I also exclude document that are irrelevant to the research question, such as a document containing the previous Kenyan constitution.

the level of poverty and water scarcity is much higher, and this is often mentioned in the documents. Right to *access* water is often utilised by state actors. Whether this is a conscious choice of wording, because it allows states to transfer their obligations to private actors (Barlow 2013, 30-31 in Baer 2017a, 101) is not confirmed. Provision is also often mentioned as the responsibility of the state, and they also talk about water as natural resource and part of the environment which must be protected and of that which utilisation should be sustainable.

In several of the drafts, the right to sanitation is a component of the right to housing, which explains the high frequency of references to *housing*. The provision and groups-references to water is similar in the context of sanitation. However, sanitation is also brought up in relation to the *groups* of people in extremely deplorable living conditions in Nairobi.

Table 13 Water and Sanitation Topics in Constitutional Review by Frequency

<i>Water</i>	<i>N</i>	<i>Sanitation</i>	<i>N</i>
Right	63	Right	27
Groups	33	Provision	26
Access	30	Housing	11
Provision	29	Access	10
Natural resources	15	Low income	7
Environment	9	Health	5
Low income	7	Groups	4
Health	4	Custody	2
Custody	1		
Total documents	84		48

Table 13: Data: Katiba Institute (n.d)

Several of the documents in this analysis are verbatim reports from public hearings and meetings held over a period of two years around the country. The meetings were platforms for the public to speak about what they wanted in the constitution. The meetings always consisted of representatives from the CKRC, but the meetings had different topics, and some were hosted especially for certain groups such as religious groups, women’s representatives and children. This was meant to increase public participation, but also to give different groups an arena to lift their considerations and inputs. As we can see from table 14 above, documents that include *people* (individual citizens or representatives for specific groups) often discuss water as a *right*, for specific *groups* (minorities and marginalised groups), *access* and *provision*. It is evident from the CKRC’s final report that the people

expected that the new Constitution would take into account the needs and aspirations of the disadvantaged and marginalised members of society. In many respects, they expected the new Constitution to solve a myriad of socio-economic problems and create a drastic improvement in

their livelihood, especially alleviate poverty, eradicate corruption, create employment opportunities and provide adequate food, shelter, health, education, water and land for every Kenyan.

The people were also highly concerned with marginalised groups and the lack of equality among sociodemographic groups. They express their concerns with people in the Northern districts of Eastern, North- Eastern and Rift Valley Provinces in which people “are deprived of the same chances for education, of access to water and of security in comparison with those in most other parts of the country”. Similarly, poor and marginalised groups are “are deprived of access to basic needs especially education, medical care, housing, transport, sanitation” and “lack access to basic amenities such as water, food and shelter”.

It is also evident by table 14 below that organisations and individual citizens participated extensively in the review process. In total, an NGO, CSO, individual persons or combination are present in 21 documents, which is 25 % of the 84 documents with water references. It is very likely that this number is similar for the remaining 187 documents, and that the public and organised civil society took part in many of the meetings and hearings (Cottrell and Ghai 2007, 2). The review committee appointed in 2000 is present during the whole data period, whilst the Committee of Experts which was appointed in 2009, first appears on 17 November 2009 when the first Harmonised Draft was ready.

Table 14 Water and Sanitation in Constitutional Review by Actor

<i>Topics</i>	State Actors	NGOs, CSO	People	(Legal or other) Professionals	No actor
<i>Water</i>					
Right	71	11	13	6	5
Groups	39	7	8	3	2
Access	34	5	6	1	3
Provision	37	5	7	4	0
Natural resource	21	3	3	0	2
Environment	12	1	3	0	1
Low income	6	0	2	0	0
Health	5	0	2	0	1
Custody	1	0	0	0	0
<i>Sanitation</i>					
Right	25	10	5	2	6
Provision	33	8	1	2	4
Housing	24	3	0	1	1
Access	10	6	1	2	0
Low income	7	7	6	0	0
Health	5	4	3	1	0
Groups	4	3	3	0	0
Custody	2	1	1	0	1

Table 14: Language categories for water and sanitation in constitution making reports. Note: State Actors include the CKRC, Sub-Committees, CoE, Parliament. Data: Katiba Institute (n.d)

The calculations here do not take into account that several actors may be present in the same document generating a higher number of observations than numbers of documents, and some of the topics have higher frequency than in the table above. See for example “health” which occurs eight times in table 14 above but is only mentioned in four documents (see table 12). If both CKRC and NGO were present at one meeting, health is counted twice, and if two or more topics related to water and sanitation are mentioned in the same document, the actor(s) present in the document will be counted in each topical category.

Multiple draft constitutions were written during the constitutional review period in Kenya, including the Wako Draft, which was rejected in a national referendum in 2005 and the Bomas Draft. Among the 89 documents, 23 are different versions of the draft constitutions in addition to the final Constitution of Kenya. These drafts constitute excellent platforms to observe the particular discourse on the human right to water and sanitation. As is illustrated in table 14 below, all of the drafts include articles on the rights to water and sanitation, albeit in varying formats.

The first draft is the CKRC Official Draft which was presented in 2002 before the NCC was initially scheduled to happen. The Bill of Rights includes two paragraphs, one for water and one for sanitation. It also includes a paragraph which specifies the state’s duty to take measures for achieving “the progressive realisation of the rights guaranteed (...)”. Both the Bomas Draft and the Wako Draft, from 2004 and 2005, also include two paragraphs on water and sanitation, one for each right. The Bomas Draft has its name from the place where the NCC was held and is very similar to the CKRC Draft, but one difference of interest is that the Bomas Draft also provides special paragraphs for marginalised groups and people held in custody on the right to access water and sanitation.

There is also great similarity between the Bomas and Wako drafts as illustrated in table 15 below. This suggests that the social and economic rights were not the Attorney General main concerns when they reviewed and changed the Bomas draft prior to the scheduled referendum in 2005. However, the Wako draft does not include a section in the Bill of Rights which targets minorities and marginalised people specifically, and in which the access to water is emphasised as essential as an affirmative action, nor the paragraph on people held in custody and their right to sanitation.

The Wako draft was, as mentioned above, rejected by the people of Kenya in a referendum in 2005. The Committee of Experts was appointed to sort out the contentious issues

from the previous drafts. The paragraphs on rights to water and sanitation prevailed in the drafts presented by the CoE, but as we can see from table 15 below, the Parliamentary Select Committee, which was appointed with the CoE and consisted of 27 members from various political parties, did not include these rights in the draft that they sent to the CoE, which suggests that the political elite were less concerned with these rights.

The constant presence of the rights to water and sanitation suggests that the development of this article, and the idea of including it in the constitution was present from the start of the process, whilst the inconsistency of formulation suggests that there has been some disagreement as to how to approach the rights to water and sanitation. Sanitation has for a long time been a part of the human rights discourse as a component of the right to housing (Winkler 2016, 1353), and the notion of sanitation as an individual right has increased since 2002 and Res. 64/292. Paradoxically, in the last few drafts and the final constitution, the right to sanitation is listed together with the right to housing: “43. (1) Every person has the right to – (b) accessible and adequate housing, and to reasonable standards of sanitation”.

Table 15 Water and Sanitation in Kenyan Draft Constitutions Over Time

<i>Document name</i>	<i>Main authors and supporters</i>	<i>Date</i>	<i>Paragraph on Water</i>	<i>Paragraph on Sanitation</i>	<i>Other paragraphs</i>	<i>Govt. level</i>	<i>International References</i>
CKRC Official Draft	CKRC	NA (2002)	YES	YES	NO	NO	YES
Bomas Draft	CKRC, adopted at the NCC	20.10.2004	YES	YES	Affirmative action(water); People held in custody (sanitation)	YES	YES
Wako Draft	Attorney General and Government Parties	01.09.2005	YES	YES	NO	YES	YES
Harmonised Draft	Committee of Experts	17.11.2009	YES	Part of Right to Housing	Affirmative action (water)	YES	YES
Revised Harmonised Draft	Committee of Experts	08.01.2019	YES	Part of Right to Housing	Affirmative action (water)	YES	YES
Draft from PSC to CoE	Parliamentary Select Committee	29.01.2010	YES	NO	NO	YES	YES
Draft from CoE to PSC	Committee of Experts	23.02.2010	YES	Part of Right to Housing	Affirmative action (water)	YES	YES
Constitution of Kenya	Committee of Experts	04.08.2010	YES	Part of Right to Housing	Affirmative action (water)	YES	YES

Table 15: Data: Katiba Institute (n.d)

6.2.3 External Influence

The most interesting findings in the documents is the presence of external actors that advocate for the rights to water and sanitation. On 1st of August 2002, CKRC hosted a workshop on Human Rights in Nairobi. The CKRC and the Standing Committee on Human Rights were present in addition to actors that may have been vital for the inclusion of rights to water and sanitation in the Kenyan constitution, such as the NGOs Kituo Cha Sheria and Shelter Forum, a representative from the ICJ and the Kenya Human Rights Commission. One of the most prominent actors is the South African Human Rights advocate Geoff Budlender. He was invited to the workshop to provide the CKRC and Standing Committee on Human Rights knowledge and experience from the South African constitution. He offered detailed insights into how the South African constitution provides routines for promoting and securing human rights, allocate resources for progressive realisation of human rights, and how affirmative actions have been utilised to protect marginalised and vulnerable groups. He emphasised the importance of human rights in international documents:

The international community has long realized that for our inherent dignity and right to life to be respected the material conditions of our lives must be such that it is possible. [...] That is recognized from long ago in 1948 by the Universal Declaration of Human Rights which deals very explicitly with the conditions of life, deals very explicitly with the need for matters such as inadequate standards of living including food, clothing, housing, medical care and social services.

And how South Africa found inspiration for their constitution in international documents:

In South Africa what we did was we followed the structure of the international covenant on economic, social and cultural rights. We said we would have a general statement of the rights followed by the description of the duties. You have got in the park copy of our bill of rights and you turn later to section 26 of that you will see the housing right, which explains how we have tried to deal with it. Let me turn to that. Section 26 I of our bill of rights of our Constitution contains a general statement of the right. Everyone has the right to have access to adequate housing, it is a fundamental right, which everyone has to have access to adequate housing, and it is the general statement of the right.

Budlender also speaks highly of the South African Human Rights Commission and argues that this institution can, if funded adequately, be a very effective mechanism in holding the Government accountable. It is, indeed, the “duty of the state to respect the rights, the duty of the state to protect the rights and the duty of the state to fulfil the right”.

Another interesting visitor is the then-Special Rapporteur on the Right to Housing, Mr. Miloon Kothari. He argues for the international legal basis of the right to housing, and that there are state obligations “that emerge from the legal recognition of the right”. The legal basis of the right to adequate housing is emphasised in the ICESCR, CEDAW and the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD). Most importantly, he states that

all countries that have ratified, set a covenant on the economic, social and cultural rights a[nd] the conventional rights of the child, effectively have obligations not to undertake any steps either bilaterally or multi-laterally which would comprise other countries from implementing their obligations on these instruments, particularly their obligations to vulnerable communities. So I think a bill of rights or any kind of formulations in a sense have to be conscious of this and act as a corrective.

Moreover, in order to implement the non-discrimination, Kothari presents a number of state obligations which includes to

Ensure that policies programs and budgetary and financial allocations are carried out in good faith to promote equal access to civic services essential to the realization of adequate housing including affordable water, sanitation, electricity and repeal policies and programs that promote discriminatory access.

During this session, the right to water was also discussed more explicitly, albeit together with the rights to food and health. The discussion of these three rights was led by professor Chris Maina Peter from the University of Dar-es-Salaam. He emphasised that the right to water, the right to food and the right to health is enshrined in the Universal Declaration on Human Rights and the ICESCR of 1966. However, the covenant is lacking formulations that make these rights enforceable. After addressing the number of people that live without sufficient and adequate water and sanitation, he stated that

Mr. Chairman I gave th[e] statistics purposely to inform lawyers that the question of food, water and health is not a legal issue. [...] Th[e] statistics were for that matter, that we can no longer afford to live the question of the right to food and the question of right to water to the whips of the Government, which is at the State house. Mr. Chairman am saying that these rights need to be entrenched in the bill of rights, and we shall be discussing entrenchment as rights in the[ir] own right. As I say that, I don't think treading a completely virgin land, that in other jurisdiction these rights are already being taken care of, we were told this morning about the question in South Africa.

6.3 Discussion

6.3.1 *Political Disagreement and Instability*

Writing a new constitution took much longer than first planned as it was obstructed by the government, political deadlock and violent outbreaks in the country. Political disagreement and inability among parties to cooperate initially challenged the appointment of review commissioners (Cottrell and Ghai 2007, 5; Kindiki 2007, 154). As a reaction to this deadlock, an abundance of civil society organisations, religious organisations and political opposition parties united in a common social movement to write an alternative constitution. This social movement, the Ufungamano Initiative, was going to become very important for the constitution-making process, and I elaborate more on this in the next section.

The first draft constitution was ready in 2002, and was, according to Cottrell and Ghai, “biased towards democracy, rights and social justice, and seemed – to judge by press reactions and casual conversation at the time – to be overwhelmingly endorsed by the people” (2007, 1;7). The draft had extensive support from the people and could have been accepted had the referendum been held at this time and was adopted at the NCC in 2004. However, the 2002 general election led to a power turnover, and the newly elected president Kibaki made a massive turnaround in his view of the Bomas draft (Cottrell and Ghai 2007, 1-2). President Kibaki, who had been a strong advocate for the Bomas draft before the elections, now set out to sabotage it, and the review process was once again disrupted.

The courts ordered a referendum on the adoption of the Bomas Draft as a new constitution, but before the referendum was held, the president and his collaborators made sure that the draft was amended. The most important difference between the two drafts was the change from a parliamentary to a presidential system. The Wako draft also differed in the Bill of Rights (Chitere et al. 2006, 1). However, as I illustrated in section 6.2.2, the right to water and sanitation persisted in the draft changes. A referendum in 2005 concluded in a rejection of the Proposed New Constitution. Cottrell and Ghai argue that “the referendum was a triumph for the democratic will” (2007, 16). The people were not satisfied with neither the constitution making process nor the government on a general basis.

After the post-election violence in 2007, the National Accord and Reconciliation Act was enacted, and the constitution was amended to provide the office of Prime Minister, which split the power between Odinga and Kibaki. The CoE was appointed to identify issues that were agreed upon and contentious issues, and then make recommendations to the Parliamentary

Select Committee on how to resolve these contentious issues. The draft resolutions presented in table 15 suggests that certain fractions of the political elite were not concerned with human rights, and specifically the rights to water and sanitation. The argument of elite learning and socialisation mechanisms among the political elite is thus weakened.

6.3.2 Civil Society and Public Participation

The constitutional review process in Kenya was characterised by civic participation. As mentioned in the previous section, a social movement working on an alternative constitution commenced after the failure of government and political parties to appoint the commission for constitutional review. This social movement, Ufungamano Initiative (hereafter UI), “was a group brought together by their opposition to Moi’s ways (Mati 2012, 71). The UI was a loosely constructed movement primarily initiated by two women from Kenya Women Political Caucus and led by religious leaders. UI consisted of organisations and smaller movements from a broad geographical area and across ethnic identities, religious affiliations and cultures (Mati 2012, 71-72; Murigu 2003, 10).

Inspired and pressured by the UI’s engagement, the government realised that there was a need for more popular participation, and law scholar Professor Yash Ghai was appointed to lead the commission’s process. He became an inevitable actor in enabling popular participation (Mati 2012, 75; 79). In 2001, UI’ and the Review Commission joined forces to make a combined commission. In June 2001, the two groups merged and following a subsequent amendment of the Act, twelve commissioners from the UI group were brought on board (Kindiki 2007, 154).

From what we have seen about the government’s reluctance to adopt a new constitution, we can probably assign a lot of the honour of the new constitution to the civil society organisations, NGOs and individuals who fought for, and contributed to the draft. As to the inclusion of the rights to water and sanitation, we have also seen that these articles have prevailed through the whole process and it is harder to grant one particular actor the credit of this.

The evidence I do have suggests that there are civil society actors that do indeed emphasise the importance of the right to water and sanitation. It is also viable to think that these civil society actors may be a part of larger human rights advocacy networks. There were eight water-related organisations in Kenya registered in the Union of International Associations

(Union of International Associations n.d), and just because I was unable to identify them in the documents from the writing process, does not mean that they have not been advocating for the rights to water and sanitation in the constitution. Based on this analysis, I claim that it is a ‘straw-in-the-wind’-argument. Studying these water organisations more thoroughly can probably reveal what role they played in mobilising around the rights to water and sanitation in the constitution.

6.3.3 Socialisation and the Role of South Africa

The South African constitution from 1996 is seen as one of the most progressive constitutions when it comes to socio-economic rights (Mubangizi 2006, 2). The colonial and apartheid eras in South Africa had been characterised by inequality in several aspects of the society. Thus, the constitution was to facilitate ‘transformation’ in both the political, social and economic sense (Liebenberg and Goldblatt 2007, 338), and to “improve the quality of life of all citizens and free the potential of each person”⁷³. The significance of the South African constitution is the enshrinement of socio-economic rights in section 26(1) and 27(1), of which the latter includes the right to sufficient food and water. “The particular significance of these rights is grounded in the fact that they guarantee everyone the right of access not only to important components of an adequate standard of living but also to things that are ordinarily regarded as basic necessities of life” (Mubangizi 2006, 5).

South African human rights activist Geoff Budlender took part in the discussion on human rights in the Kenyan constitution, along with the Special Rapporteur on the right to adequate housing, Tanzanian professor Chris Maina Peter, and representatives from a number of NGOs and international institutions. They spoke about human rights, the right to water and sanitation, the state’s obligations to provide these and other socio-economic rights, and they referred to the international legal basis of these rights. Evidently, mechanisms of socialisation and persuasion were at work during the meeting. In addition, the CKRC travelled to other countries to conduct studies on constitutional and socio-political issues and consult among experts. The countries they travelled to included Rwanda, Germany, Tanzania, Ghana, South Africa, Uganda and Ethiopia, of which the latter three have constitutionalised the right to water. Germany has been cooperating with Kenya on a water sector reform and the German

⁷³ South African Constitution, Preamble.

development agency, Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ), has played an important role in this bilateral cooperation.

Finnemore and Sikkink's account for norms' life cycles includes a tipping point which enables norm cascade. This happens either when a critical number of states or a critical state have adopted the new norm. Arguably, South Africa is critical to the adoption of socio-economic rights. The analysis in section 6.2 suggests that South Africa has been a critical state. In the case of Kenya and the human right to water and sanitation, it can be argued that a combination of norm adoption from a critical mass and South Africa as a critical state had a great influence during the constitutional review process. This notion also receives support in informal conversations with experts, thus passing the Hoops-test of certain, but non-unique evidence.

6.3.4 From Economic Discourse to Human Rights Discourse

Kenya belongs to the large group of African countries with a colonial history. The British Commonwealth ruled Kenya from 1920 to 1963 with the same capitalist economic politics as elsewhere. After becoming independent, Kenya kept their liberal economy and since then the annual percentage of GDP per capita growth averages to 1.49 per cent (The World Bank 2020). The low economic growth has thus had consequences regarding development and living standards, and Kenya has been subject to the Structural Adjustment Programs (SAP) of IMF and the World Bank to manage their loans (Willett 2015, 42). During the 1970s, Kenya followed the international norm development towards a more need-based approach to water, and the government started to make changes in the national water policy. However, low government funding, poor management of utilities, mismanagement of funds combined with rising water demand and public health crises vanquished the water service performance.

Thus, in line with the neo-liberal discourse and the requirements for SAP⁷⁴, the government launched the 1999 Sessional Paper No. 1 which opened up for private sector participation and the Water Act of 2002 in which water is commodified. This, and the creation of the Integrated Water Resource Management, which was based on the Dublin Principles, caused a shift towards a demand-driven approach (Kameri-Mbote and Kariuki 2015, 98). Thus,

⁷⁴ The conditions set by the IMF and World Bank include deregulating markets, devaluing currency, liberalising trade, privatising natural resources and making cuts in social spending (Willett 2015, 42; Glenn 2008, 224).

water has been one of the natural resources that has been perceived as an economic good, and the water sector has been managed in a manner that would create revenue in other sectors (Kameri-Mbote and Kariuki 2015, 97).

Although the 1999 Sessional Paper No. 1 and the Water Act of 2002 follow neo-liberal water discourse, they also contain elements of rights discourse (Kameri-Mbote and Kariuki 2015, 100). The Water Act states, for example, that when issuing permits efficient and beneficial use of water in the public interest should be taken into account⁷⁵. The Water Resource Management Authority is responsible for monitoring national water management, providing permits for water use and regulating the protection and conservation of water sources (Kanda and Kimokoti 2013, 33; Sammy 2004, 7). Finally, the Constitution of Kenya and the documents around the writing of the constitution are characterised by human rights discourse, and discourse which suggests that water and sanitation are regarded as rights, and even human rights.

⁷⁵ Kenya Water Act 2002, 30.1(a)

CHAPTER 7 CONCLUSION

7.1 Summary

I illustrate in this thesis that there has been a shift in the discourse at the international level regarding water and sanitation. International documents, declarations and treaties focus more on water and sanitation as human rights over time, which suggests that there has been a norm development. The constitutional language has changed somewhat – the earliest constitutions do not use human rights language to the same extent as later constitutions. It is fair to assume that this is, at least in part, a consequence of the international norm development. The inclusion of sanitation at the national level from 2004 and onwards is maybe an even stronger evidence of the link between the national and international level. Hypothesis one is strengthened.

The second hypothesis was examined through a case study of the Kenyan constitution making process. I justified the case selection both theoretically and pragmatically. Theoretically, Kenya fits well as a viable case for norm diffusion. Pragmatically, the availability of data from the constitution writing is a huge benefit. However, there are aspects implying that Kenya should not be used as a case. The Kenyan Constitution was a completely new document, which is different from amending an already existing constitution. As the data material also shows, the debates and discussions around those two articles practically disappear among other topics. Moreover, the analysis of the drafts shows that the articles have been present during the whole period, albeit in different forms. Although the drafts have changed over years, the idea of including rights to water and sanitation had been there from very early on.

The documents from the constitution making process offer some insight into the emergence of the rights to water and sanitation in Kenya. I find support for hypothesis two: the change in water- and sanitation language at national level is caused by norm diffusion. However, a more thorough analysis implies that the norm did not just come from the international level, but also from the South African constitution, local and regional water movements and other bilateral interactions. I find that the South African constitution and experience has been an important factor in the drafting. As the South African constitution also includes the right to water, I assume that some of the norm diffusion came from them. This does not reject the notion of international norm diffusion, rather it compliments it and makes an even stronger argument for socialisation and persuasion mechanisms.

When starting this project, the idea of studying norms and the interdependence between the international and national level seemed like one that would yield results in terms of an abundance of data, new and exciting inferences, and conclusions based on rigorous evidence about how the right to water and sanitation has become a universal human right. In hindsight, studying and understanding how norms are created, diffused and institutionalised across a global world with a number of actors whose actions are difficult to track and evaluate, is a very difficult task.

7.2 Implications

The human rights to water and sanitation have emerged as “new” human rights during the past decades. Subsequently, more and more countries have adopted these rights in their constitutions. The consequences are still equivocal, constitutionalising water- and sanitation rights do not necessarily generate changes in access as governments are still unable to provide access to water and sanitation for their citizens. Latin-American countries with HRtWS language in their constitution are actually performing worse in providing water than neighbouring countries Chile and Costa Rica, which do not have HRtWS in their constitutions. Does this suggest that constitutionalising rights to water and sanitation is pointless and without effect? Maybe – social-economic rights have traditionally been perceived as non-justiciable rights (Christiansen 2007), but the available resources a government has must also be taken into consideration.

The Human Rights Council and United Nations General Assembly have played important roles in the HRtWS movement. They have provided platforms facilitating cooperation, debates and discussions for the water justice movement. However, the norm cascade cannot be attributed to these international organisations alone. The water justice movement consists of local and regional actors, NGOs and states. The movement works internationally, locally and transnationally, and thus enables norm diffusion from the top down and bottom up.

The constitution making process in Kenya was influenced by the regional and international developments that occurred around it, and its own country’s history. The focus on affirmative actions and protection of the marginalised and poor are evidence of this. During the whole drafting period, the rights to water and sanitation were in the wind. Evidently,

constitutions are not just legal foundations to guide the future, but also reflections of a country's history and the developments and issues in the contemporary world.

7.3 Further Research

The human rights to water and sanitation is a topic that deserves scholarly attention. As I pointed out in the introduction, developments of 'new' human rights provide excellent study objects for scholars in several scientific fields. The existing literature on the HRtWS is dominated by legal and anthropological approaches. I argue that an interdisciplinary approach will yield fruitful encounters of the rights. It will provide an understanding of both the legal basis and development of the rights, and the bigger picture on how the rights manifest in societies and have consequences for provision and access. There are alternative routes for the HRtWS to empower nationally, such as development of jurisprudence or policy. I have only studied a fraction of this wide and encompassing topic.

To get a deeper understanding of the constitution making process in Kenya and the inclusion of the rights to water and sanitation, interviews can be held with the authors of the initial (Bomas) draft. Moreover, I believe research on the water movement and advocacy networks can provide general insights into how these actors work to mobilise around issues of concern. New constitutions or amendments with the rights to water and sanitation would be interesting cases through which these movements can be studied.

This thesis has shown the importance of studying human rights and international cooperation from more than one perspective. The variety of analytical tools have contributed to explain constitutionalisation of the human rights to water and sanitation in different ways, as well as overcome limitations on data availability and quality. I hope this will inspire other scholars to adopt a holistic approach when studying norms and human rights, and that this will yield better understandings in the future.

LITERATURE

- Adler, Emanuel. 1997. "Seizing the Middle Ground: Constructivism in World Politics." *European Journal of International Relations* 3 (3): 319-363.
- Albert, Richard. 2014. "The Structure of Constitutional Amendment Rules." *Wake Forest Law Review* 49 (4): 913-976.
- Baer, Madeline. 2017a. "The human right to water and sanitation: champions and challengers in the fight for new rights acceptance." In *Expanding human rights: 21st century norms and governance*, edited by Alison Brysk and Michael Stohl, 94-114. Cheltenham: Edward Elgar.
- . 2017b. *Stemming the Tide: Human Rights and Water Policy in a Neoliberal World*. New York: Oxford University Press.
- Baer, Madeline, and Andrea Gerlak. 2015. "Implementing the human right to water and sanitation: a study of global and local discourses." *Third World Quarterly* 36 (8): 1527-1545. <https://doi.org/10.1080/01436597.2015.1043993>.
- Barnett, Michael N., and Martha Finnemore. 1999. "The Politics, Power and Pathologies of International Organizations." *International Organization* 53 (4): 699-732. <https://doi.org/https://doi.org/10.1162/002081899551048>.
- Bennett, Andrew, and Jeffrey Checkel. 2015. *Process Tracing: From Metaphor to Analytical Tool*. Cambridge: Cambridge University Press.
- Bond, Patrick. 2008. "Macrodynamics of Globalisation, Uneven Development and the Commodification of Water." *Law, Social Justice and Global Development* 1: 1-16.
- Brady, Henry E. 2008. *Causation and Explanation in Social Science*, ed Janet M. Box-Steffensmeier, Henry E. Brady and David Collier: The Oxford Handbook of Political Methodology.
- Brinks, Daniel M., Varun Gauri, and Kyle Shen. 2015. "Social Rights Constitutionalism: Negotiating the Tension Between the Universal and the Particular." *Annual Review of Law and Social Science* 11: 289-308. <https://doi.org/10.1146/annurev-lawsocsci-110413-030654>.
- Brounéus, Karen. 2011. "In-depth Interviewing: The process, skill and ethics of interviews in peace research." In *Understanding Peace Research: Methods and Challenges*, edited by K. Höglund and M. Öberg, 130-145. London & New York: Routledge.
- Brown, Colin, Priscila Neves-Silva, and Léo Heller. 2016. "The human right to water and sanitation: a new perspective for public policies." *Ciência & Saúde Coletiva* 21: 661-670. http://www.scielo.br/scielo.php?script=sci_arttext&pid=S1413-81232016000300661&nrm=iso.
- Checkel, Jeffrey T. 1999. "Norms, Institutions, and National Identity in Contemporary Europe." *International Studies Quarterly* 43 (1): 83-114. <https://doi.org/http://www.jstor.org/stable/2600966>.
- . 2001. "Why Comply? Social Learning and European Identity Change." *International Organization* 55 (3): 553-588. <https://doi.org/10.1162/00208180152507551>. <https://www.cambridge.org/core/article/why-comply-social-learning-and-european-identity-change/6E1454464EF737A2137B29F90E8AFF51>.
- Chilton, Paul. 2004. *Analysing Political Discourse : Theory and Practice*. London, UNITED KINGDOM: Routledge.
- Chitere, Preston, Ludeki Chweya, Japhet Masya, Arne Tostensen, and Kamotho Waiganjo. 2006. *Kenya Constitutional Documents: A Comparative Analysis*. Chr. Michelsen Institute (Bergen, Norway). <https://www.cmi.no/publications/file/2367-kenya-constitutional-documents.pdf>.

- Christiansen, Eric C. 2007. "Adjudicating Non-Justiciable Rights: Socio-Economic Rights and the South African Constitutional Court." *Columbia Human Rights Law Review* 38 (2): 321-386.
<https://heinonline.org/HOL/Page?handle=hein.journals/colhr38&collection=journals&id=327&startid=&endid=392>.
- Committee on Economic, Social and Cultural Rights, . n.d. "Membership." United Nations. Accessed January 9.
<https://www.ohchr.org/EN/HRBodies/CESCR/Pages/Membership.aspx>.
- Comparative Constitution Project. n.d. "Constituteproject."
<https://www.constituteproject.org/search?lang=en>.
- Coppedge, Michael, John Gerring, Carl Henrik Knutsen, Staffan I. Lindberg, Jan Teorell, David Altman, Michael Bernhard, M. Steven Fish, Adam Glynn, Allen Hicken, Anna Lührmann, Kyle L. Marquardt, Kelly McMann, Pamela Paxton, Daniel Pemstein, Brigitte Seim, Rachel Sigman, Svend-Erik Skaaning, Jeffrey Staton, Agnes Cornell, Lisa Gastaldi, Haakon Gjerløw, Valeriya Mechkova, Johannes von Römer, Aksel Sundström, Eitan Tzelgov, Luca Uberti, Yi-ting Wang, Tore Wig, and Daniel Ziblatt. 2020. V-Dem Codebook v10. edited by Varieties of Democracy (V-Dem) Project.
- Coppedge, Michael, John Gerring, Carl Henrik Knutsen, Staffan I. Lindberg, Jan Teorell, David Altman, Michael Bernhard, M. Steven Fish, Adam Glynn, Allen Hicken, Anna Lührmann, Kyle L. Marquardt, Kelly McMann, Pamela Paxton, Daniel Pemstein, Brigitte Seim, Rachel Sigman, Svend-Erik Skaaning, Jeffrey Staton, Steven Wilson, Agnes Cornell, Nazifa Alizada, Lisa Gastaldi, Haakon Gjerløw, Garry Hindle, Nina Ilchenko, Laura Maxwell, Valeriya Mechkova, Juraj Medzihorsky, Johannes von Römer, Aksel Sundström, Eitan Tzelgov, Yi-ting Wang, Tore Wig, and Daniel Ziblatt. 2020. V-Dem [Country-Year/Country-Date] Dataset v10. edited by Varieties of Democracy (V-Dem) Project.
- Cortell, Andrew P., and Davis Jr., James W. 2000. "Understanding the Domestic Impact of International Norms: A Research Agenda." *International Studies Association* 2 (1): 65-87. <https://www.jstor.org/stable/3186439>.
- Cottrell, Jill, and Yash Ghai. 2007. "Constitution Making and Democratization in Kenya (2000–2005)." *Democratization* 14 (1): 1-25.
<https://doi.org/10.1080/13510340601024272>.
- Coveney, Joseph. 2008. "FIRTHLOGIT: Stata module to calculate bias reduction in logistic regression." *Statistical Software Components*.
- Curry, James M. 2017. "In-Depth Qualitative Research and the Study of American Political Institutions." *Political Science & Politics* 50 (1): 114-120.
<https://doi.org/10.1017/S1049096516002262>.
- Dahl, Robert A. 1971. *Polyarchy. Participation and Opposition*. New Haven: Yale University Press.
- Dougherty, Christopher. 2016. *Introduction to Econometrics*. 5 ed. Oxford: Oxford University Press.
- Ekeløve-Slydal, Gunnar M. 2014. "Hva er menneskerettigheter?" In *Menneskerettigheter: En innføring*, edited by Gunnar M. Ekeløve-Slydal, 15-42. Oslo: Humanist Forlag.
- Elkins, Zachary, Tom Ginsburg, and Beth Simmons. 2013. "Getting to Rights: Treaty Ratification, Constitutional Convergence, and Human Rights Practice." *Harvard International Law Journal* 54 (1): 61-96.
- Fairclough, Norman. 2012. "Critical discourse analysis." *International Advances in Engineering and Technology (IAET)* 7: 452-487.
- Fearon, James D., and David D. Laitin. 2008. "Integrating Qualitative and Quantitative Methods." In *The Oxford Handbook of Political Methodology*, edited by Janet M.

- Steffensmeier, Henry E. Brady and David Collier, 757-776. Oxford Handbooks Online.
- Finch, W. Holmes, Jocelyn E. Bolin, and Ken Kelley. 2014. *Multilevel Modeling Using R*. London: Chapman & Hall.
- Finnemore, Martha. 1993. "Organizations as Teachers of Norms: The United Nations Educational, Scientific, and Cultural Organization and Science Policy." *International Organization* 47 (4): 565-597.
- Finnemore, Martha, and Kathryn Sikkink. 1998. "International Norm Dynamics and Political Change." *International Organization* 52 (4): 887-917.
<http://www.jstor.org/stable/2601361>.
- General Assembly. 2010. Resolution adopted by the General Assembly on 28 July 2010 [without reference to a Main Committee (A/64/L.63/Rev.1 and Add.1)] 64/292. The human right to water and sanitation.
- Gerring, John. 2012. *Social Science Methodology: A Unified Framework*. 2nd ed. Cambridge: Cambridge University Press.
- Giddens, Anthony. 1990. *The Consequences of Modernity*. Stanford: Stanford University Press.
- Ginsburg, Tom, and James Melton. 2015. "Does the constitutional amendment rule matter at all? Amendment cultures and the challenges of measuring amendment difficulty." *International Journal of Constitutional Law* 13 (3): 686-713.
<https://doi.org/https://doi.org/10.1093/icon/mov041>.
- Glenn, John. 2008. "Global Governance and the Democratic Deficit: stifling the voice of the South." *Third World Quarterly* 29 (2): 217-238.
<https://doi.org/10.1080/01436590701806798>.
- Goertz, Gary. 2016. "Multimethod Research." *Security Studies* 25 (1): 3-24.
- Goodin, Robert E., James G. March, and Johan P. Olsen. 2013. *The Logic of Appropriateness*. Oxford University Press.
- Greenland, Sander, Mohammad Ali Mansournia, and Douglas G. Altman. 2016. "Sparse data bias: a problem hiding in plain sight." *BMJ* 352: i1981.
<https://doi.org/10.1136/bmj.i1981>.
<http://www.bmj.com/content/352/bmj.i1981.abstract>.
- Grobe, Christian. 2010. "The power of words: Argumentative persuasion in international negotiations." *European Journal of International Relations* 16 (1): 5-29.
<https://doi.org/https://doi.org/10.1177/1354066109343989>.
- Grønmo, Sigmund. 2004. *Samfunnsvitenskapelige metoder*. Bergen: Fagbokforlaget.
- Gupta, Joyeeta, Rhodante Ahlers, and Lawal Ahmed. 2010. "The Human Right to Water: Moving Towards Consensus in a Fragmented World." *Review of European Community & International Environmental Law* 19 (3): 294-305.
- Johnson, James. 2006. "Consequences of Positivism." *Comparative Political Studies* 39 (2): 224-252. <https://doi.org/10.1177/0010414005282982>.
- Kameri-Mbote, Patricia, and Francis Kariuki. 2015. "Human Rights, Gender and Water in Kenya." In *Water is Life: Women's Human Rights in National and Local Water Governance in Southern and Eastern Africa*, edited by Anne Hellum, 81-117. Harare: Weaver Press.
- Kanda, Edwin Kimutai, and Susan Kimokoti. 2013. "The Water Act 2002 and The Constitution of Kenya 2010: Coherence and Conflicts Towards Implementation." *International Journal of Disaster Management and Risk Reduction* 5 (3): 31-40.
- Katiba Institute. n.d. "Katiba Digital Resource Database." Accessed 18. November 2019.
<http://www.katibainstitute.org/Archives/>.

- Keck, Margaret E., and Kathryn Sikkink. 1998. *Activists Beyond Borders: Advocacy Networks in International Politics*. Ithaca: Cornell University Press.
- Kindiki, Kithure. 2007. "The Emerging Jurisprudence on Kenya's Constitutional Review Law." *Kenya Law Review* 1 (153): 153-187.
- King, Gary, Robert O. Keohane, and Sidney Verba. 1994. *Designing Social Inquiry*. New Jersey: Princeton University Press.
- Klopp, Jaqueline M. 2009. "Kenya's Unfinished Agendas." *Journal of International Affairs* 62 (2): 143-ix. <https://search-proquest-com.pva.uib.no/docview/220714854?accountid=8579>.
- Kuehn, David. 2013. "Combining Game Theory Models and Process Tracing: Potentials and Limits." *European Political Science* 13 (1): 52-63.
- Kwartler, Ted. 2017. *Text Mining in Practice with R*. Wiley Online Library: John Wiley & Sons Ltd.
- Langford, Malcolm. 2005. "The United Nations Concept of Water as a Human Right: A New Paradigm for Old Problems?" *International Journal of Water Resources Development* 21 (2): 273-282. <https://doi.org/10.1080/07900620500035887>.
- Langford, Malcolm, and Inga Winkler. 2014. "Muddying the Water? Assessing Targetbased Approaches in Development Cooperation for Water and Sanitation." *Journal of Human Development and Capabilities: A Multi-Disciplinary Journal for People-Centered Development* 15 (2-3): 247-260. <https://doi.org/10.1080/19452829.2014.896321>.
- Liebenberg, Sandra, and Beth Goldblatt. 2007. "The Interrelationship Between Equality and Socio-Economic Rights Under South Africa's Transformative Constitution." *South African Journal on Human Rights* 23 (2): 335-361. <https://doi.org/10.1080/19962126.2007.11864918>.
- Lieberman, Evan S. 2015. "Nested analysis: toward the integration of comparative-historical analysis with other social science methods." In *Advances in Comparative-Historical Analysis*, edited by James Mahoney, 240-263. Cambridge: Cambridge University Press.
- Lijphart, Arend. 2012. *Patterns of Democracy*. 2. edition ed. London: Yale University Press.
- Mati, Jacob Mwachii. 2012. "Social Movements and Socio-Political Change in Africa: The Ufungamano Initiative and Kenyan Constitutional Reform Struggles (1999-2005)." *Voluntas: International Journal of Voluntary and Nonprofit Organizations* 23 (1): 63-84. <https://doi.org/10.1007/s11266-011-9241-1>.
- Merry, Sally Engle. 2005. *Human Rights and Gender Violence: Translating International Law into Local Justice*. Chicago Series in Law and Society. Chicago: University of Chicago Press.
- Mubangizi, John Cantius. 2006. "The Constitutional Protection of Socio-Economic Rights in Selected African Countries: A Comparative Evaluation." *African Journal of Legal Studies* 2 (1): 1-19.
- textreuse: Detect Text Reuse and Document Similarity.
- Murigu, Yussuf M.K. 2003. "The Ufungamano initiative in Kenya." *WAJIBU* 18 (3): 10-11. https://hdl.handle.net/10520/AJA10169717_1330.
- Murray, Adrian, and Susan Spronk. 2019. "Don't spend more, spend better." In *Better Spending for Localizing Sustainable Development Goals: Examples from the Field*, edited by Fayyaz Baqir, Nipa Banerjee and Sanni Yaya, 201-214. New York: Routledge.
- OHCHR. 2007. "OHCHR study on human rights obligations related to equitable access to safe drinking water and sanitation." United Nations Human Rights Office of the High Commissioner. Accessed 22 June.

- <https://www.ohchr.org/EN/Issues/WaterAndSanitation/StudyWater/Pages/OHCHRStudyWaterIndex.aspx>.
- . n.d-a. "Country visits." UN Water. Accessed 27 January. [ohchr.org/EN/Issues/WaterAndSanitation/SRWater/Pages/CountryVisits.aspx](https://www.ohchr.org/EN/Issues/WaterAndSanitation/SRWater/Pages/CountryVisits.aspx).
- . n.d-b. "Special Rapporteur on the human rights to safe drinking water and sanitation." Accessed 27.05.2020. <https://www.ohchr.org/EN/Issues/WaterAndSanitation/SRWater/Pages/SRWaterIndex.aspx>.
- Park, Susan. 2006. "Theorizing Norm Diffusion Within International Organizations." *International Politics* 43: 342-361. <https://doi.org/10.1057/palgrave.ip.8800149>.
- Personal Communication. 2020. "Interview 1." 03.03.2020.
- Ragin, Charles C. 1987. *The Comparative Method: Moving Beyond Qualitative and Quantitative Strategies*. Berkeley: University of California Press.
- Ramos, Juan. 2003. "Using TF-IDF to Determine Word Relevance in Document Queries."
- Razzaque, Jona. 2004. "Trading Water: The Human Factor." *Review of European Community & International Environmental Law* 13 (1): 15-26. <https://doi.org/https://doi.org/10.1111/j.1467-9388.2004.00380.x>.
- Risse, Thomas, Steve C Ropp, and Kathryn Sikkink, eds. 1999. *The Power of Human Rights*. Cambridge: Cambridge University Press.
- Robbins, Peter T. 2003. "Transnational Corporations and the Discourse of Water Privatization." *Journal of International Development* 15: 1073-1082. <https://doi.org/10.1002/jid.1054>.
- Rohlfing, Ingo. 2008. "What You See and What You Get: Pitfalls and Principles of Nested Analysis in Comparative Research." *Comparative Political Studies* 41 (11): 1492-1514. <https://doi.org/10.1177/0010414007308019>.
- Sammy, Wambua. 2004. *Water Privatization in Kenya*. Heinrich-Böll-Stiftung (Berlin, Germany: Heinrich Böll Foundation). https://www.boell.de/sites/default/files/assets/boell.de/images/download_de/internationalpolitik/GIP8.pdf.
- Sartori, Giovanni. 1970. "Concept Misformation in Comparative Politics." *The American Political Science Review* 64 (4): 1033-1053. <https://doi.org/10.2307/1958356>.
- Schutter, Oliver de. 2014. *International human rights law: cases, materials, commentary*. Cambridge: Cambridge University Press.
- Shiel, Rebecca, Malcolm Langford, and Bruce Wilson. 2020. "Does it Matter? Constitutionalisation, Democratic Governance and the Right to Water." *Water* 12. <https://doi.org/10.3390/w12020350>.
- Sikkink, Kathryn. 1993. "The Power of Principled Ideas: Human Rights Policies in the United States and Europe." In *Ideas and Foreign Policy: Beliefs, Institutions, and Political Change*, edited by J. Goldstein and R.O. Keohane, 139-170. Ithaca: Cornell University Press.
- Simmons, Beth. 2013. "From Ratification to Compliance: Quantitative Evidence on the Spiral Model." In *The Persistent Power of Human Rights: From Commitment to Compliance*, edited by Stephen Ropp and Kathryn Sikkink Thomas Risse. Cambridge: Cambridge University Press.
- Spencer, Liz, Jane Ritchie, Rachel Ormston, William O'Connor, and Matt Barnard. 2014. "Analysis: Principles and Processes." In *Qualitative Research Practice*, edited by Jane Ritchie, Jane Lewis, Carol McNaughton Nicholls and Rachel Ormston, 269-293. London: SAGE Publications Ltd.

- Thakur, Ramesh. 2010. "Law, Legitimacy and United Nations." *Melbourne Journal of International Law* 11 (1): 1-26.
<https://heinonline.org/HOL/P?h=hein.journals/meljil11&i=11>.
- The World Bank. 2020. "GDP per capita growth (annual %) - Kenya." The World Bank. Accessed 27 June.
<https://data.worldbank.org/indicator/NY.GDP.PCAP.KD.ZG?locations=KE>.
- Thielbörger, Pierre. 2014. *The Right(s) to Water: The Multi-Level Governance of a Unique Human Right*. Germany: Springer-Verlag Berlin Heidelberg.
- UN Water. n.d. "Monitor and Report." <https://www.unwater.org/what-we-do/monitor-and-report/>.
- Union of International Associations. n.d. Open Yearbook - Yearbook of International Organizations (YBIO). <https://uia.org/ybio>.
- United Nations. 2017. United Nations Digital Library.
- . n.d-a. "GOAL 7: ENSURE ENVIRONMENTAL SUSTAINABILITY." Accessed 15. October 2019. <https://www.un.org/millenniumgoals/environ.shtml>.
- . n.d-b. "Status as at: 01-07-2020 Chapter IV Human Rights 3. International Covenant on Economic, Social and Cultural Rights." treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-3&chapter=4&clang=_en.
- United Nations General Assembly. 2010. "General Assembly Adopts Resolution Recognizing Access to Clean Water, Sanitation as Human Rights by Recorded Vote of 112 in Favour, None against, 41 Abstentions." Accessed 10 August.
[un.org/press/en/2010/ga10967.doc.htm](https://www.un.org/press/en/2010/ga10967.doc.htm).
- Van Evera, Stephen. 1997. *Guide to Methods for Students of Political Science*. eBook 2016 ed. Ithaca: Cornell University Press.
- Wendt, Alexander. 1992. "Anarchy is what States Make of it: The Social Construction of Power Politics." *International Organization* 46 (2): 391-425.
https://www.jstor.org/stable/2706858#metadata_info_tab_contents.
- Willett, Jennifer L. 2015. "The Slow Violence of Climate Change in Poor Rural Kenyan Communities: "Water is life. Water is everything."." *Contemporary Rural Social Work Journal* 7 (1): 39-55.
- Winkler, Inga. 2012. *The Human Right to Water: Significance, Legal Status and Implications for Water Allocation*. Oxford and Portland, Oregon: Hart Publishing.
- . 2016. "The Human Right to Sanitation." *University of Pennsylvania Journal of International Law* 37 (4): 1331-1406.
- Yeo, Alice, Robin Legard, Jill Keegan, Kit Ward, Carol McNaughton Nicholls, and Jane Lewis. 2014. "In-depth Interviews." In *Qualitative Research Practice*, edited by Jane Ritchie, Jane Lewis, Carol McNaughton Nicholls and Rachel Ormston, 177-210. London: SAGE Publications Ltd.

APPENDIX

1 Constitutional paragraphs on the HRtWS

<i>Africa</i>	
Ethiopia	ART. 90-1 <i>“To the extent the country's resources permit, policies shall aim to provide all Ethiopians access to public health and education, clean water, housing, food and social security”</i>
Uganda	Art. XIV <i>“The State shall endeavour to fulfil the fundamental rights of all Ugandans (...) and shall, in particular, ensure that- b) all Ugandans enjoy rights and opportunities and access to education, health services, clean and safe water (...)”</i>
Gambia	Art. 216-4 <i>“The State shall endeavour to facilitate equal access to clean and safe water, adequate health and medical services, habitable shelter, sufficient food and security to all persons”</i>
South Africa	Art. 27-1 <i>“Everyone has the right to have access to (...) b) sufficient food and water;”</i> Art. 27-2 <i>“The state must (...) achieve the progressive realisation of each of these rights”</i>
Democratic Republic of Congo	Art. 48 <i>“The right to decent housing, the right of access to drinking water and to electric energy are guaranteed”</i>
Kenya	Art. 43 <i>“Every person has the right (...) b) to accessible and adequate housing, and to reasonable standards of sanitation; (...) d) to clean and safe water in adequate quantities”</i>
Niger	Art. 12 <i>“Each one has the right to life, to health, to physical and moral integrity, to a healthy and sufficient food supply [alimentation], to potable water, to education and instruction in the conditions specified by the law”</i>
Morocco	Art. 31 <i>“The State, the public establishments and the territorial collectivities work for the mobilization of all the means available to facilitate the equal access of the citizens (...) to conditions that permit their enjoyment of the right: (...) to the access to water and to a healthy environment”</i>
Somalia	Art. 27-1 <i>“Every person has the right to clean potable water”</i>
Zimbabwe	Art. 77 <i>“Every person has the right to- a) safe, clean and potable water (...)”</i>
Egypt	Art. 79 <i>“Each citizen has the right to healthy, sufficient amounts of food and clean water (...)”</i>
Tunisia	Art. 44 <i>“The right to water shall be guaranteed”</i>
Yemen	Art. 102 <i>“Everyone has the right to clean water in sufficient volumes and the State shall be committed to take the necessary measures to guarantee this right”</i> Art. 103 <i>“Every citizen has the right to housing and sanitation”</i>
Libya	Art. 56 <i>“The State shall guarantee to citizens the right to safe and adequate drink and food and shall formulate the necessary policies to achieve water and food security”</i>
<i>Americas</i>	
Panama	Art.118 <i>“The State has the fundamental obligation to guarantee that its population lives in a healthy environment, free of contamination (pollution), and where air, water, and foodstuffs satisfy the requirements for proper development of human life”</i>
Uruguay	Art. 47

	<i>“Water is a natural resource essential for life. The access to potable water and the access to sanitation, constitute fundamental human rights”</i>
Colombia	<p>Art. 356 <i>“The resources (...) shall be earmarked for the (...) public services concerning drinking water and basic sanitation in the home (...)”</i></p> <p>Art. 366 <i>“The general well-being and improvement of the population’s quality of life are social purposes of the State. A basic objective of their activity shall be to address the unfulfilled public health, educational, environmental, and drinking water needs of those affected”</i></p>
Nicaragua	<p>Art. 105 <i>“It is the obligation of the State to promote, facilitate, and regulate the provision of basic public services of energy, communications, water, transportation, road infrastructure, ports, and airports to the people, and access to these is their inalienable right. Private investments and their modalities and the concessions of exploitation to private individuals in these areas shall be regulated by law in each case”</i></p>
Ecuador	<p>Art. 3 <i>“The State’s prime duties are:</i> <i>1. Guaranteeing without any discrimination whatsoever the true possession of the rights set forth in the Constitution and in international instruments, especially the rights to education, health, food, social security and water for its inhabitants”</i></p> <p>Art. 12 <i>“The human right to water is essential and cannot be waived. Water constitutes a national strategic asset for use by the public and it is unalienable, not subject to a statute of limitations, immune from seizure and essential for life”</i></p> <p>Art. 32 <i>“Health is a right guaranteed by the State and whose fulfillment is linked to the exercise of other rights, among which the right to water, food, education, sports, work, social security, healthy environments and others that support the good way of living”</i></p> <p>Art. 66 <i>“The following rights of persons are recognized and guaranteed: (...) 2. The right to a decent life that ensures health, food and nutrition, clean water, housing, environmental sanitation, education, work, employment, rest and leisure, sports, clothing, social security and other necessary social services”</i></p>
Bolivia	<p>PREAMBLE <i>“(…) A State based on respect and equality for all, (...) where the search for a good life predominates; (...) and on collective coexistence with access to water, work, education, health and housing for all”</i></p> <p>Art. 16-I <i>“Every person has the right to water and food”</i></p> <p>ARTICLE 20 <i>I. Every person has the right to universal and equitable access to basic services of potable water, sewer systems (...) III. Access to water and sewer systems are human rights, neither are the object of concession or privatization, and are subject to a regimen of licensing and registration, in accordance with the law.</i></p> <p>ARTICLE 373-I <i>“Water constitutes a fundamental right for life, within the framework of the sovereignty of the people. The State shall promote the use and access to water on the basis of principles of solidarity, complementariness, reciprocity, equity, diversity and sustainability”</i></p> <p>ARTICLE 374-I <i>“The State shall protect and guarantee the priority use of water for life. It is the duty of the State to manage, regulate, protect and plan the adequate and sustainable use of water resources, with social participation, guaranteeing access to water for all the habitants. The law shall establish the conditions and limitations of all the uses”</i></p>
Honduras	<p>ARTICLE 145 <i>“The right to the protection of one’s health is hereby recognized. (...) Consequently, access to water and sanitation are declared to be a human right. Their enjoyment and use shall be equitable with preference to human consumption. Therefore, the preservation of sources of water is guaranteed such that they shall not put life and public health at risk. The activities of the State and of public and private entities shall be subject to this provision. The law shall regulate this subject”</i></p>

Dominican Republic	<p>Art. 15 <i>“Water (...) is essential for life. Human consumption of water takes priority over any other use. The State shall promote the planning and implementation of effective policies for the protection of the water resources of the Nation”</i></p> <p>Art. 61 <i>“All persons have the right to integral health. Consequently: 1) The State should safeguard the protection of the health of all persons, access to potable water, improvement of nutrition, sanitation services, hygienic conditions, environmental cleanliness, as well as procure means for the prevention and treatment of all sicknesses, ensuring access to quality medication and giving medical and hospital assistance for free to those who need it”</i></p>
Mexico	<p>Art. 4 <i>“(...) Any person has the right of access, provision and drainage of water for personal and domestic consumption in a sufficient, healthy, acceptable and affordable manner”</i></p>
Peru	<p>Art. 7-a <i>“The State recognises the universal and progressive right of every person to access potable water. It guarantees this right by prioritising human consumption over other uses. The state promotes sustainable water management, which is recognised as an essential natural resource, and as such, constitute a public good and part of the nation. These rights are inalienable and imprescriptible”</i> (unofficial (my) translation)</p>
Cuba	<p>Art. 76 <i>“All people have the right to water. The State works to guarantee access to potable water and to its sanitation, with the required compensation and rational use”</i></p>
<i>Asia</i>	
Maldives	<p>Art. 23 <i>“Every citizen has the following rights pursuant to this Constitution, and the State undertakes to achieve the progressive realisation of these rights by reasonable measures within its ability and resources: a) adequate and nutritious food and clean water; f) the establishment of a sewage system of a reasonably adequate standard on every inhabited island”</i></p>
Nepal	<p>Art. 35-4 <i>“Each citizen shall have the right to access to clean water and hygiene.”</i></p>
<i>Oceania</i>	
Fiji	<p>Art. 36-1 <i>“The State must take reasonable measures within its available resources to achieve the progressive realisation of the right of every person to be free from hunger, to have adequate food of acceptable quality and to clean and safe water in adequate quantities”</i></p>
<i>Europe</i>	
Hungary	<p>Art. XX <i>“1. Everyone shall have the right to physical and mental health. 2. Hungary shall promote the effective application of the right referred to in Paragraph (1) (...) by ensuring access to healthy food and drinking water, by organising safety at work and healthcare provision, by supporting sports and regular physical exercise, as well as by ensuring the protection of the environment”</i></p>
Iceland	<p>Art. 33. <i>“Iceland’s nature is the foundation of life in the country. Everyone is under obligation to respect it and protect it. Everyone shall by law be ensured the right to a healthy environment, fresh water, clean air and unspoiled nature. This means maintenance of life and land and protection of sites of natural interest, unpopulated wilderness, vegetation and soil. Previous damage shall be repaired to the extent possible”</i></p>
Slovenia	<p>Art. 70A. <i>“Everyone has the right to drinking water. Water resources shall be a public good managed by the state. As a priority and in a sustainable manner, water resources shall be used to supply the population with drinking water and water for household use and in this respect shall not be a market commodity. The supply of the population with drinking water and water for household use shall be ensured by the state directly through self-governing local communities and on a not-for-profit basis”</i></p>

2 Coding of Language in Constitutional Paragraphs

<i>Country</i>	<i>Human right</i>	<i>Right</i>	<i>Sanitation</i>	<i>State obligation</i>	<i>Other right</i>
Ethiopia	0	0	0	1	0
Uganda	1	1	0	1	0
Gambia	0	0	0	1	0
South Africa	0	1	0	1	0
Panama	0	0	0	1	0
Uruguay	1	0	1	1	0
Colombia	0	0	1	1	0
Congo (Democratic republic of)	0	1	0	0	0
Ecuador	1	1	0	1	1
Maldives	0	1	1	1	0
Bolivia	1	1	1	1	1
Kenya	0	1	1	1	1
Niger	0	1	0	0	0
Hungary	0	1	0	0	1
Iceland	0	1	0	0	0
Morocco	0	1	0	1	0
Somalia	0	1	0	0	0
Fiji	0	1	0	1	0
Honduras	1	0	1	0	1
Zimbabwe	0	1	0	1	0
Egypt	0	1	0	0	0
Tunisia	0	1	0	1	0
Dominican Republic	1	0	1	1	1
Mexico	0	1	0	1	0
Nepal	0	1	1	0	1
Yemen	0	1	1	1	0
Libya	0	1	0	1	0
Slovenia	0	1	0	1	0
Peru	1	0	0	0	0
Cuba	0	1	1	1	0
<i>Total</i>	7	22	10	21	7

3 Coding Scheme for the Kenyan Constitution-making Documents

<i>Variable</i>	<i>Coding</i>
<i>Date</i>	Date
<i>Type of document</i>	Constitution (drafts and old constitution included)
	Paper
	Report
	Working document
<i>Present actors or author of document</i>	CKCR
	State actors
	Committee of Experts
	Special and topical committees
	Politicians and parliamentarians
	NGOs and CSOs
<i>Water</i>	NGOs or civil society organisations
	Private persons, the people
	Representatives of groups in society
	Professionals
NA	Scholars, academics, professionals
<i>Water</i>	Not applicable
	Yes
<i>Sanitation</i>	No
	Yes
<i>Water and sanitation – categories</i>	No
	Right / human right
	Minorities, marginalised groups (women, children, pastoralists, informal settlers)
	Persons held in custody
	Responsibility for provision
	Low income groups
	Custody
	Natural resources and environment
	Inequality (geographical, social, in access)
	Health
	Provision
<i>International level</i>	No
	Yes, respect international laws and norms
	Yes, implement and vernacularise international laws and norms
<i>NGOs or civil society actors</i>	Names of the NGOs and civil society actors
<i>Language</i>	English
	Swahili

4 Variable Overview for Penalised Maximum Likelihood Models

Variable	Values	Source
Visit from the Special Rapporteur	0 = No visit 1 = Visit	OHCHR (n.d-a)
CESCR Member	0 = Not member 1 = Member	Committee on Economic (n.d)
Vote in General Assembly	0 = Abstained 1 = Absent 2 = Vote in favour	United Nations General Assembly (2010)
	<i>Question:</i> Are major CSOs routinely consulted by policymakers; how large is the involvement of people in CSOs; are women prevented from participating; and is legislative candidate nomination within party organization highly decentralized or made through party primaries?	Varieties of Democracy Dataset
Civil society participation	<i>Scale:</i> Interval, from low to high (0-1). <i>Source(s):</i> v2pscnslnl v2cscnsult v2csprtcpt v2csgender <i>Aggregation:</i> The index is formed by taking the point estimates from a Bayesian factor analysis model of the indicators for candidate selection — national/local (v2pscnslnl), CSO consultation (v2cscnsult), CSO participatory environment (v2csprtcpt), and CSO women participation (v2csgender).	Coppedge, Gerring, Knutsen, Lindberg, Teorell, Altman, Bernhard, Fish, Glynn, Hicken, Lührmann, Marquardt, McMann, Paxton, Pemstein, Seim, Sigman, Skaaning, Staton, Wilson, et al. (2020)
	<i>Question:</i> To what extent is the electoral principle of democracy achieved?	Varieties of Democracy Dataset
Democracy (Multiplicative polyarchy index)	<i>Scale:</i> Interval, from low to high (0-1). <i>Source(s):</i> v2x_frassoc_thick v2x_suffr v2xel_frefair v2x_elecoff v2x_freexp_altinf <i>Aggregation:</i> The electoral component index is operationalized as a chain defined by its weakest link. Specifically, the index is formed by multiplying indices measuring freedom of association thick (v2x_frassoc_thick), clean elections (v2xel_frefair), freedom	Coppedge, Gerring, Knutsen, Lindberg, Teorell, Altman, Bernhard, Fish, Glynn, Hicken, Lührmann, Marquardt, McMann, Paxton, Pemstein, Seim, Sigman, Skaaning, Staton, Wilson, et al. (2020)

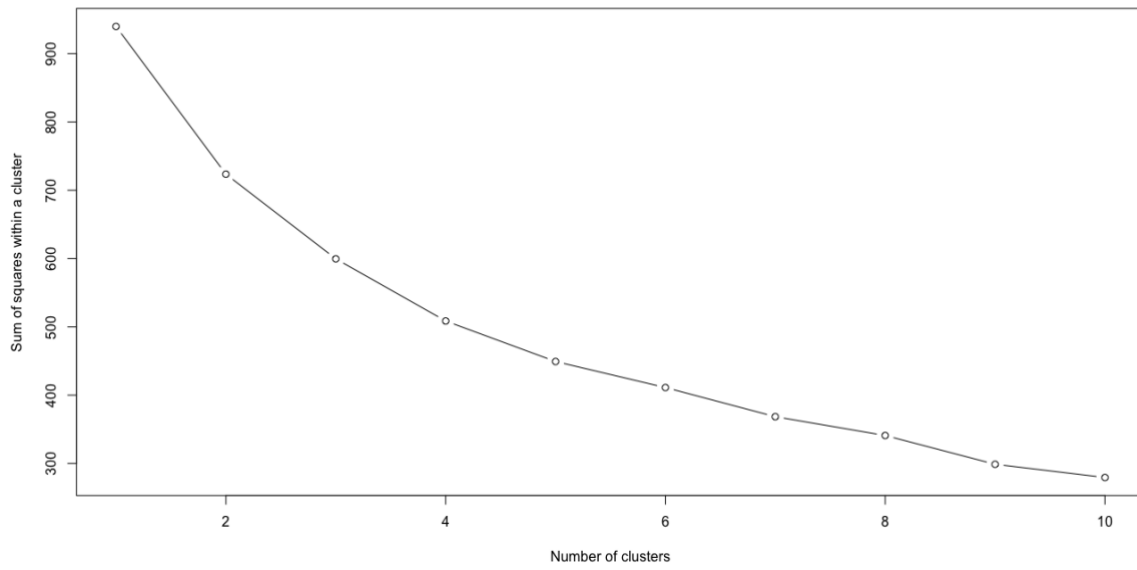
of expression (v2x_freexp_alt-inf),
elected executive (v2x_elecoff), and
suffrage (v2x_suffr), or
v2x_mpi = v2x_frassoc_thick *
v2xel_frefair * v2x_freexp_altinf *
v2x_elecoff * v2x_suff

ICESCR
Signatory
Part

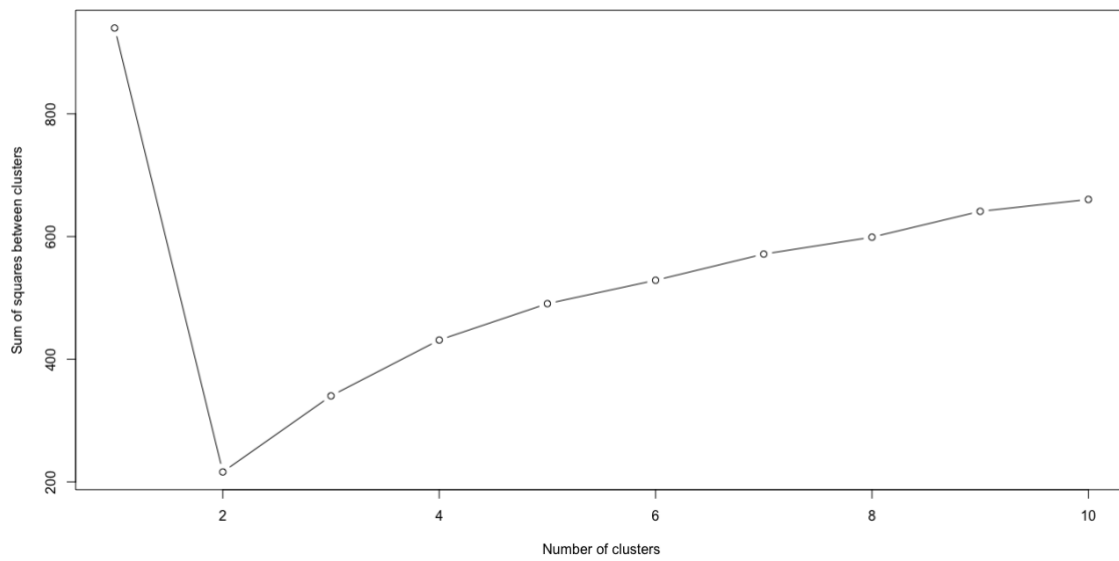
0 = Not signatory part
1 = Signatory part

(United Nations n.d-b)

5a Sum of squares within clusters



5b Sum of squares between clusters



6 Result from Cluster Analysis

<i>Cluster 1</i>	<i>Cluster 2</i>	<i>Cluster 3</i>		
<i>Top 10 words</i>	<i>Top 10 words</i>	<i>Top 10 words</i>		
Water	Water	Water		
Right	Shall	Right		
Rights	State	Shall		
Social	Access	Access		
Education	Use	State		
Food	Right	Clean		
Health	Life	Food		
Security	Resources	Health		
Life	Drinking	Adequate		
Work	Basis	Every		
<i>Countries</i>	<i>Countries</i>	<i>Countries</i>		
Ecuador	Bolivia	Colombia	Hungary	Panama
	Slovenia	Cuba	Iceland	Peru
		Dominican Republic	Kenya	Somalia
		DR Congo	Libya	South Africa
		Egypt	Maldives	Tunisia
		Zimbabwe	Mexico	Uganda
		Ethiopia	Morocco	Uruguay
		Fiji	Nepal	Yemen
		Gambia	Nicaragua	
		Honduras	Niger	

7 Full similarity analysis

	<i>bolivia</i>	<i>colombia</i>	<i>cuba</i>	<i>dominican republic</i>	<i>dr congo</i>	<i>ecuador</i>	<i>egypt</i>	<i>ethiopia</i>	<i>fiji</i>	<i>gambia</i>	<i>honduras</i>	<i>hungary</i>	<i>iceland</i>
<i>bolivia</i>		0	0.010	0.015	0.005	0.012	0.011	0	0	0.005	0.020	0.009	0.004
<i>colombia</i>			0	0	0.032	0	0	0	0	0	0	0	0
<i>cuba</i>				0.034	0.051	0.011	0.028	0	0	0	0.010	0.025	0.011
<i>dominican republic</i>					0.009	0.012	0.009	0	0	0.008	0.011	0.047	0.006
<i>dr congo</i>						0.006	0.037	0	0.018	0	0.011	0.014	0.013
<i>ecuador</i>							0.006	0.005	0	0	0.009	0.005	0.009
<i>egypt</i>								0	0	0	0.011	0.014	0.013
<i>ethiopia</i>									0	0	0	0	0.011
<i>fiji</i>										0.048	0	0.010	0
<i>gambia</i>											0	0	0
<i>honduras</i>												0.015	0.007
<i>hungary</i>													0.008

	<i>kenya</i>	<i>libya</i>	<i>maldives</i>	<i>mexico</i>	<i>morocco</i>	<i>nepal</i>	<i>nicaragua</i>	<i>niger</i>	<i>panama</i>	<i>peru</i>	<i>2200A/XXI</i>	<i>34/180</i>	<i>44/25</i>
bolivia	0.015	0.015	0	0.015	0.019	0.005	0.017	0.010	0	0	0.002	0.001	0.002
colombia	0	0	0	0	0	0	0	0	0	0	0	0	0
cuba	0	0.020	0	0	0.030	0.059	0	0.035	0	0	0.001	0.0003	0.0003
dominican republic	0	0.017	0	0	0.007	0.019	0	0.015	0	0.007	0.002	0.001	0.002
dr congo	0	0.025	0	0.054	0.035	0.038	0	0.020	0	0	0.001	0.001	0.001
ecuador	0	0.005	0.005	0	0.005	0.006	0	0.005	0	0	0.003	0.002	0.001
egypt	0.029	0.028	0.049	0.029	0.019	0.045	0	0.045	0	0	0.0003	0.0003	0.0003
ethiopia	0	0	0	0	0	0	0	0	0	0	0	0	0
fiji	0.103	0	0.070	0.016	0.012	0	0	0	0	0.032	0.002	0.001	0.001
gambia	0.065	0.020	0	0	0	0.029	0	0	0	0	0	0.0003	0.0002
honduras	0	0.010	0	0	0.034	0.011	0.007	0.009	0	0	0.002	0.001	0.001
hungary	0	0.012	0	0	0.020	0.045	0	0.022	0	0	0.004	0.001	0.002
iceland	0	0.011	0	0	0.029	0.013	0	0.021	0.010	0	0.001	0.0003	0.001
kenya		0	0	0.044	0	0	0	0.018	0	0	0.0003	0	0.0002
libya			0	0	0.015	0.029	0	0.017	0	0	0.0003	0.0003	0.0002
maldives				0	0	0	0	0	0	0	0.001	0.0003	0.001
mexico					0	0	0	0.018	0	0	0.0003	0.0003	0.001
morocco						0.019	0	0.027	0.013	0	0.001	0.001	0.001
nepal							0	0.023	0	0	0.001	0.0003	0.001
nicaragua								0	0	0	0.001	0.0003	0.001
niger									0.014	0	0.0003	0.0003	0.001

panama	0	0.0003	0	0.0002
peru		0.0003	0	0.0003
2200A/XX I			0.056	0.071
34/180				0.095

	<i>55/2</i>	<i>61/106</i>	<i>64/292</i>	<i>CAB/LEG/ 24.9/49</i>	<i>E/C/12/ 2002/11</i>	<i>slovenia</i>	<i>somalia</i>	<i>south africa</i>	<i>tunisia</i>	<i>uganda</i>	<i>uruguay</i>	<i>yemen</i>	<i>zimbabwe</i>
bolivia	0.002	0.002	0.006	0.003	0.003	0.008	0.022	0.010	0.011	0.010	0	0.015	0.022
colombia	0	0	0.001	0	0.0001	0.023	0	0	0	0	0	0	0
cuba	0.001	0.0002	0.002	0.0004	0.0004	0.010	0.032	0.043	0.071	0	0.073	0.019	0.029
dominican republic	0.002	0.001	0.004	0.001	0.001	0.006	0.010	0.008	0.010	0.008	0.026	0.016	0.009
dr congo	0.001	0.0002	0.002	0.0004	0.001	0.035	0.045	0.026	0.050	0	0	0.022	0.040
ecuador	0.0003	0.002	0.005	0.002	0.002	0.013	0.006	0.006	0.012	0.005	0.006	0.005	0.012
egypt	0.0003	0.0001	0.001	0.0004	0.0001	0.024	0.118	0.061	0.062	0	0	0.077	0.100
ethiopia	0	0.0001	0	0.0004	0	0	0	0	0	0	0	0	0
fiji	0.001	0.0004	0	0.0004	0.001	0	0	0.068	0	0.028	0	0	0
gambia	0.0003	0.0001	0	0.0002	0.0003	0	0	0.021	0	0.094	0	0.019	0
honduras	0.001	0.001	0.006	0.002	0.001	0.014	0.012	0.010	0.012	0	0	0.009	0.011
hungary	0.002	0.001	0.003	0.002	0.001	0.008	0.016	0.013	0.016	0	0	0.011	0.015
iceland	0.001	0.0002	0.003	0.001	0.001	0.007	0.014	0.011	0.014	0	0	0.011	0.027
kenya	0	0.0001	0	0.0002	0.0004	0.011	0.107	0.022	0	0.036	0	0.019	0.097
libya	0.0003	0.0002	0.003	0.0002	0.0001	0.010	0.032	0.021	0.034	0.018	0	0.038	0.029
maldives	0	0.0002	0	0.0004	0.0001	0	0	0.056	0	0	0	0.038	0
mexico	0.0003	0.0001	0	0.0004	0.001	0.011	0.071	0.022	0	0	0	0.019	0.065
morocco	0.001	0.001	0.002	0.001	0.001	0.009	0.020	0.015	0.021	0	0.016	0.014	0.019
nepal	0.001	0.0005	0.002	0.001	0.0001	0.012	0.059	0.030	0.067	0	0	0.051	0.050
nicaragua	0	0.0004	0.001	0.001	0.001	0	0	0	0	0.011	0	0	0
niger	0.0003	0.0002	0.001	0.001	0.0004	0.019	0.051	0.036	0.026	0	0.019	0.032	0.048

panama	0	0.0001	0	0	0.0001	0	0	0	0	0	0	0	0
peru	0	0.0001	0	0	0.0004	0.008	0	0	0	0	0	0	0
2200A/XXI	0.017	0.050	0.012	0.042	0.021	0.001	0.0003	0.001	0.0003	0.0003	0.0003	0.0003	0.0003
34/180	0.023	0.085	0.012	0.048	0.017	0.001	0.0003	0.001	0.0003	0	0.0003	0.0003	0.0003
44/25	0.016	0.108	0.010	0.166	0.023	0.001	0.0003	0.001	0.0002	0.002	0.0002	0.001	0.0003
55/2		0.019	0.029	0.017	0.019	0.0003	0.0003	0.001	0.0003	0.001	0	0.0003	0.0003
61/106			0.013	0.051	0.025	0.001	0.0001	0.0005	0.0001	0.0002	0	0.0005	0.0001
64/292				0.010	0.021	0.002	0.001	0.002	0.002	0.001	0	0.001	0.001
CAB/LEG/ 24.9/49					0.019	0.002	0.0004	0.001	0.0002	0.001	0	0.001	0.0004
E/C/12/ 2002/11						0.001	0.0001	0.0004	0.0003	0.0003	0.0003	0.001	0.0003
slovenia							0.026	0.033	0.013	0	0	0.030	0.025
somalia								0.071	0.091	0	0	0.088	0.308
south africa									0.037	0	0	0.060	0.065
tunisia										0	0	0.029	0.071
uganda											0	0.016	0
uruguay												0	0
yemen													0.053

8 Penalised Maximum Likelihood Models with Likelihoods and P-values

	Model 1		Model 2		Model 3		Model 4		Model 5	
	No language		State Obligation Language		Right Language		Human Right Language		Sanitation Language	
	()	p-value	()	p-value	()	p-value	()	p-value	()	p-value
SR Visit (0,1)	-1.582 (0.286)	0.000	-2.600 (1.441)	0.071	2.325 (0.335)	0.000	1.151 (0.419)	0.006	1.296 (0.356)	0.000
CESCR Member (0,1)	0.520 (0.252)	0.039	0.714 (0.326)	0.028	-1.074 (0.375)	0.004	-0.272 (0.428)	0.525	0.062 (0.308)	0.842
Vote in General Assembly (0-2)	-2.130 (0.086)	0.000	1.054 (0.122)	0.000	2.379 (0.150)	0.000	2.093 (0.169)	0.000	2.080 (0.162)	0.000
CS Participation (0-1)	-2.428 (0.461)	0.000	-3.498 (0.756)	0.000	2.739 (0.584)	0.000	6.269 (0.923)	0.000	-0.310 (0.643)	0.629
ICESCR Signature (0,1)	-0.104 (0.169)	0.537	-0.0185 (0.276)	0.947	0.118 (0.209)	0.572	0.172 (0.247)	0.486	0.564 (0.230)	0.014
Democracy (0-1)	2.331 (0.383)	0.000	1.429 (0.707)	0.043	-2.841 (0.482)	0.000	-2.880 (0.551)	0.000	-0.660 (0.540)	0.222
Constant	5.103 (0.303)	0.000	-2.927 (0.324)	0.000	-6.713 (0.451)	0.000	-9.449 (0.718)	0.000	-5.585 (0.452)	0.000
Log likelihood Penalised ML Models	-645.203		-311.139		-382.120		-276.483		-327.405	