

Article

# The Decentered Construction of Global Rights: Lessons from the Human Rights to Water and Sanitation

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**Abstract:** Families in Flint, Michigan, protesting lead in their water, indigenous groups in the Amazon asserting control over their rivers, slum dwellers in India worried about disconnection or demanding cities bring potable water to their neighborhoods, an entire city in South Africa worried about the day when they will run out of water altogether—all these and many more have claimed the human right to water as the vehicle to express their demands. Where does this right come from, and how is its meaning constructed? In this article, we show that, in sociolegal terms, the global right to water, as are many others, is constructed out of the myriad struggles and claims of people who feel the lack of something that is essential to a dignified existence, and who cannot obtain an adequate response from their immediate political and legal environment. They do so in loose conversation with, but relatively unconstrained by, the meanings that are being constructed by the international and domestic legal experts who work on formal legal texts. We draw on research carried out around the world by a team of scholars whose articles are included in this Special Issue of the journal to illustrate the decentered construction of the right to water.

**Keywords:** human right to water and sanitation; global rights; human rights; evolution of rights; construction of rights; norm diffusion; Latin America; South Asia; Europe; Africa; USA



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## 1. Introduction

We were part of a group of researchers looking at the development of the human right to water in the aftermath of the 2010 recognition by the UN General Assembly of access to water and sanitation as a human right. The researchers, from Europe, Africa, Latin America, South Asia, and the US, carried out research across these regions exploring how various groups were using the human right to water to address their own felt needs, in their own political context. We draw lessons from this body of research to make a few points that we think are important correctives to general assumptions in the literature about how global human rights do, or ought to, arise and evolve. We argue that the process of building a global human right is radically decentered—that is, it takes place in many different spaces beyond those we often consider the centers of international legal development, with only tenuous and episodic connections to those centers. This is true not only in terms of the actors involved, but also for the production of meanings that give a right its content.

Using the human right to water as a case study, we show that multiple actors—even those we do not typically consider “legal” actors—at various levels are involved in the process of norm development. Of course, international legal actors and bodies, such as norm entrepreneurs and the UN General Assembly, all make claims about the existence and meaning of the right. However, so do constitution-makers and national and local

legislators, constitutional court justices and trial court judges, interest groups, street-level activists and indigenous groups, corporations, and bureaucrats. Moreover, social actors often pursue a version of the right that is in direct defiance of the content of the right as defined by more narrowly legal actors, such as judges or legal scholars. These competing meanings arise out of the felt needs of particular communities or interest groups, and novel articulations of the right are especially likely to appear when existing legal frameworks do not meet the needs of the rights-claimants. In a very real sense, activists adjust the right to match the shape of their claim, rather than molding their claim to the contours of the right.

In this article, we first briefly describe the collected papers, and point out the insights they offer into the variety of venues in which the meaning and scope of the right to water has been contested, the actors involved, and the immediate politics of establishing, interpreting, and applying the right to water. The following section offers a more abstract account of the way in which we believe global rights emerge. The third section uses the articles from this Special Issue to go into more detail on the emergence of the right in different fields—the legal, political, bureaucratic, and social fields. The Conclusion then offers some final reflections on what we have learned.

## 2. The Articles in This Special Issue

Mathea Loen and Siri Gloppen examine the process that led to the incorporation of the right to water into the constitutions of Kenya (in 2010) and Slovenia (2016) [1]. They show that, although international actors and experts were present in these processes, the driving force came from domestic political actors, who are pursuing their own interests, and negotiating within their own constraints. The shape of the right thus ultimately reflects domestic interests and constraints, rather than international norm development.

Similarly, Lara Côrtes, Camila Gianella, Angela M. Páez, and Catalina Vallejo Piedrahíta review the constitution-making efforts in Brazil, Colombia, and Peru that sought to incorporate the right to water into those constitutions [2]. Again, they find not only that the content of the right depends on locally felt needs, and on the push and pull of politics in each context, but that the expectation of a right's bindingness—the extent to which it will actually constrain the actions of corporations and politicians—affects the likelihood that it will be incorporated at all. Peru adopted a freestanding right to water in its constitution, at the urging of groups that wanted to prioritize human access to potable water over livestock and agricultural uses. Meanwhile, neither Brazil nor Colombia adopted the right into their foundational texts, but the Constitutional Court in Colombia has established such a right anyway, while the lower courts (rather than the highest constitutional tribunal) in Brazil routinely intervene to prevent disconnections. This paper puts together research on constitutional drafting and judicial interpretation and enforcement to show how different opportunity structures and constraints shape the contours of the right in each country.

A paper by Namita Wahi on the judicial construction of the right to water in India continues this line of inquiry [3]. Wahi argues that the right to water in India has been developed by local actors “oblivious” to the way in which international activists have framed the right. Moreover, the right has been articulated differently by, and has operated differently for, two different marginalized groups, the Dalits and the Adivasis. For Dalits in India, the right to water is a part of their constitutional and statutory right against caste discrimination and untouchability, as they have been historically denied access to shared water sources by other caste groups. They have, however, successfully mobilized constitutional rights, and civil and criminal law remedies against this form of discrimination. For Adivasi indigenous groups, the right to water is inextricably tied in to their traditional rights to land, forests, and water sources. Their right to water claims has been asserted in the face of a disproportionately high threat of displacement on account of dams, irrigation projects, and other development projects, but this has been far less effective in providing judicial remedies.

In Brazil, Lara Côrtes and Ana Côrtes show the lower courts have been the ones primarily in charge of developing the right to water [4]. Most of the cases in which

the courts have recognized the right to water have involved two quite different claims. The greatest number, mostly stemming from a single catastrophic environmental disaster, assesses damages to people harmed by the contamination or interruption of the water supply on which people rely. The second greatest number imposes a duty to restore the water supply to people who have been disconnected.

Crucially for our argument, just as it is not always the constitutional drafters or the highest constitutional court that are empowered to declare and give meaning to the right, it soon becomes clear that legal actors, in general, do not always have the final word on the meaning of the right.

Arkaja Singh argues that slum residents in the major cities ignore the restrictive, pro-formal property rights, the version of the right that has emerged in the courts [5]. They take their claims, instead, to the municipal bureaucracies, where technocrats build a structure of access rights that rests on the inescapable normative foundation that everyone has the right to access the water they need for their daily needs. Although they work with engineering tools and concepts, and water service rules, the floor is set by the right itself, however poorly defined it might be. The same dynamic can be observed in South Africa. Jackie Dugard examines the “Zero Day” water crisis in Cape Town, South Africa—the run up to the day when the city was projected to run entirely out of water [6]. She shows how much the meaning of the right to water is informed by the immediate context out of which the claims arise. Even the legal tools deployed are conditional on the place and the need being addressed. Ironically, for example, some of the concepts used to ration water provided to the poor were deployed instead to restrict consumption by the wealthy, in order to make water use more sustainable. “Water justice” and “water governance” became the key phrases, but again, they are framed against a general principle that water is a fundamental human need. Here, it is claimants, environmental activists, and city officials who decide what the right to water will mean.

Even in the United States, a notoriously inhospitable political context for international human rights, social activists are at work building the meaning of the right to water. Sabrina Kozikis and Inga Winkler contributed an in-depth case study of the way in which social activists have deployed human rights language to challenge racially structured injustices in access to potable drinking water in the United States, specifically in California’s Central Valley, Flint and Detroit, Michigan, and Appalachia [7]. They show how advocates seize on water rights language to challenge legal and regulatory regimes that deny them adequate access to clean water, or that have already harmed them and their children. As in India, they do so in defiance of the edicts of judges and other legal actors, who insist the right does not have any binding force and cannot ground their claims.

In the final article of this Special Issue, Christopher M. Faulkner, Joshua E. Lambert, Bruce M. Wilson, and Matthew S. Faulkner [8] use methodological advances in natural language processing and machine learning to examine the universe of peer-reviewed research on the human right to water and sanitation for the thirty-year period from 1990 to 2020. The article’s findings help water researchers and practitioners “make sense” of the explosion of published research related to the human right to water and sanitation. In the decade after 2010, and coinciding with formal international recognition of the human right to water and sanitation, peer-reviewed research grew exponentially with almost three-quarters of all peer-reviewed articles being published between 2010 and 2020. Faulkner et al. also reveal the increasingly multi- and interdisciplinary nature of scholarship on HRtWS where legal scholars, for example, are increasingly likely to work in teams with engineers, political scientists, and/or geographers.

This collection of papers provides a rich resource for understanding how global rights are constructed more clearly, from a sociolegal perspective. In what follows, we elaborate on the details of our argument. We will explore the implications of this research for how we understand the source, meaning, and binding nature of rights. Moreover, we will show the implications of this new understanding for some of the critiques of rights—that they flatten local demands into straightjackets developed outside each context, or constrain activists

to denatured understandings of their own needs and claims. In contrast, we argue that, certainly from a sociolegal perspective, it is not the rights or the international actors or even the national courts that play the role of Procrustes to the activists' traveler, cutting off the parts that do not fit their accepted formulation of rights. However, it is rather vice versa: Locally rooted activists and communities most often seek, with admittedly varying degrees of success, to stretch or trim the right to fit their own needs.

In the next section, we describe the emergence of global rights and engage with the existing literature on the construction of legality. In section three, we illustrate these claims in different fields using the body of research collected in this Special Issue.

### 3. How Global Rights Emerge and Acquire Meaning

The International Covenant on Economic, Social, and Cultural Rights (ICESCR) left water out of the article, specifying a right to "food, clothing and housing". However, since that moment, a great deal of political and intellectual energy has gone into defining the right to water and enshrining it in law and among scholars investigating the impact of the new human right to water and sanitation [8]. General Comment 15 to the ICESCR (adopted in 2003) argued that the Human Right to Water and Sanitation (the HRtWS) was implicit in the ICESCR, stating, "everyone is entitled to have access to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic use [9]". Seven years later, in 2010, the General Assembly of the United Nations "Recognize[d] the right to safe and clean drinking water and sanitation as a human right that is essential for the full enjoyment of life and all human rights [10]". This statement was reinforced in 2015 by the General Assembly [11].

For some, this resolution was the critical moment in the struggle for water rights. On 16 July 2010, in the lead up to the General Assembly vote on this measure, Mikhail Gorbachev published an op-ed in the New York Times arguing that passing the resolution "is crucial to the ongoing struggle to save . . . lives [12]". As proof, he pointed to the fact that "Developing countries that have incorporated the right to water in their legislation, like Senegal and South Africa, have been more effective in providing safe water than many of their neighbors". A report at the time quotes a statement by the Board Chair and Executive Director of Food and Water Watch as saying the declaration is "a crucial first step to providing clean water and sanitation to all", and "an amazing and surprising victory for water justice" [13]. In this reading, the official recognition of the HRtWS is perhaps the most powerful act along the way to addressing the human need for water and sanitation.

At the same time, we could easily be skeptical of the value of the resolution. Does anyone truly disagree that water is essential for life itself? What possibly could a General Assembly resolution add to this awareness? Surely any failure to provide adequate access to water and sanitation is not due to a misapprehension of its importance. This back and forth about the efficacy of the right to water is just one facet of the larger debate about the effectiveness of international law in general and human rights law in particular. Scholars such as Susan Marks and Samuel Moyn have argued, respectively, that human rights have been either complicit in the neoliberal project, which has produced many of the conditions they deplore [14], or helpless in the face of it [15]. Eric Posner has argued that human rights can actually be hindrances to a more developmentalist approach that would effectively address the conditions [16,17]. On the other side of the argument are scholars such as Kathryn Sikkink, who point to a number of improvements in the human condition and credit human rights law and the human rights movement for those improvements [18,19].

In many ways, however, we feel the critiques are at least partly if not wholly misplaced, because they are overly focused on a purely legal and international-centric vision of how rights such as the right to water are constructed and actually work. Before we answer the efficacy question, then, we have to answer more fundamental ones: What does the global sociolegal construction of a right actually look like? How does the right become lived reality through political action? To answer these questions is, at the same time, to answer the question of whether (and how) the right "works." In our answer,

we draw on secondary literature, and on the fieldwork and experience of a group of researchers who have been examining mobilization and change around the human right to water and sanitation in Brazil, Colombia, Costa Rica [20], India, Kenya, Peru, Slovenia, South Africa, Turkey [21], and the United States [22–24]. Our approach is congruent with that of Eckert et al., who argue that law is socially constituted in a dialectical process of norm diffusion and adaptation that can lead to unpredictable results [25,26]. However, our conception of the process emphasizes the importance of local sites of norm creation, rather than mere adaptation. Our account depends much more on a notion of “rights at work”, in the tradition of James McCann’s scholarship [27], but, because we do not focus on one context alone, we call attention to the multiplicity of meanings that can be constructed out of a relatively vague and open-ended right.

One may object that whatever we might say about the right to water itself is likely not to be very informative about how other rights are constructed. Loen and Gloppen, and Dugard, in this Special Issue, note that the right to water is complex and lies exactly at the intersection of service delivery, technical provision, and administration [1,6]. Others have argued that the right to water is, with respect to its development, *sui generis*. Madeline Baer argues that the adoption of the human right to water and sanitation was different from historical patterns of international human rights adoption: It was adopted from below, against opposition from international actors, and largely took place “outside the human rights regime and without the active involvement of traditional rights gatekeepers [28]”. We believe this distinction concerning the creation of the human right to water and sanitation is somewhat overblown. The Loen and Gloppen article in this Special Issue shows, among other things, the participation of these traditional gatekeepers even in the domestic context [1]. At the same time, it seems obvious that all rights are subject to resistance and contestation and the construction of localized meanings [29], and—this is the point of this article—all rights involve many actors beyond the “traditional rights gatekeepers.”

Moreover, in a point we will return to later on, all rights involve some degree of bureaucratic governance—even the classically negative right to free speech, for instance, is processed through regulatory agencies, communications licensing, local government permitting, judicial boundary-setting, and, of course, a host of private actors who own the main outlets for speaking into the public square whether this be traditional media or social media [30]. In short, while the right to water may well be at the relatively high end of the spectrum for technocratic and governmental involvement, public and private cooperation, and state financing, it is by no means unique. The discussion that follows is, therefore, relevant to the development of many if not most rights.

How does a global right develop, then? Far from being a unified, instantly efficacious (or uniformly ineffective) edifice built by international legal actors, global rights as sociolegal constructions emerge from a loosely connected, decentered process of appropriation and deployment of the language of rights in various political struggles. Global rights, in this view, emerge from felt human needs in all different contexts, as activists explore different ways of articulating their demands. The emergence of a right in sociolegal terms runs parallel to formal legal developments in either international or domestic law-making spaces; and it is influenced to very different degrees in different places by those developments. Rhetorical and political uses of the language of rights interact with the language of formal legal rights, each informing and influencing the other. The result is a much more variegated process of norm creation, which leads to rights having very different meanings and binding effects in different places. Indeed, the same right might have a different meaning for different actors, in the context of different struggles, in the same political and geographic space. Although the right to water may be a paradigmatic example, we believe this decentered, disaggregated process describes, to one degree or another, the emergence of all the rights in our global repertoire.

The articles collected in this Special Issue of the journal illustrate this claim, demonstrating the variety of ways in which the right to water has been deployed to date in multiple contexts by multiple actors. This collection follows the development of consider-

able literature on the right to water, which we also review here. Faulkner et al. use natural language process and machine learning to systematically explore the evolution and topical trends in the academic literature on the human rights to water and sanitation over the past three decades [8]. They identify the scale of the growth in peer-reviewed publications and the pattern of the discourse on the HRtWS and how it changed over time. They note that since the creation of the HRtWS in 2010, research and publications on issues of “Water Security and Supply” became the most frequent topic, although other key areas, including research related to climate and water access, also grew significantly after 2010. The study also reveals areas that require more attention including “Water and Health” especially during the ongoing COVID-19 pandemic since access to safe water and sanitation is closely linked to beneficial health outcomes. The study also confirms that Schiel et al. reveal a paucity of scholarship on the impact of the Human Right to Sanitation [23].

Scholars have explored various aspects of both the bottom-up and top-down components of the process of developing a global norm. De Sousa Santos and Rodriguez Garavito, for example, speak of “counter-hegemonic globalization”, one of the aspects that involve the deployment of law in what they call “subaltern cosmopolitan legality [31]”. They describe a bottom-up process of resistance by subordinate actors who are pushing back against elite cosmopolitan legality. Meanwhile, analyses of “vernacularization” suggest a top-down movement of rights from the international sphere into the domestic, marked by different degrees of adaptation along the way [29,32]. Similarly, analyses of diffusion describe processes in which a set of actors carry ideas or innovations from one country to another in a relatively linear manner, without too much transformation along the way [33,34]. In each of these models, we could, in theory, trace an idea from its starting point through a series of processes to its final destination in a given context. The focus is on a linear process that transmits a norm, a right, a package of innovations, a set of ideas, from one place to another, with perhaps some marginal modifications along the way, but always centered on a core meaning or set of meanings.

In contrast, this collection of articles makes it clear that the development of a global right should not be understood solely as a unidirectional pattern of international development by global legal elites, and a subsequent top-down vernacularization; or as a process of norm development in the global center, with subsequent diffusion to the periphery; or as subaltern resistance from below; or even as a linear diffusion process of any sort, whether coming from the global north or the global south, that spreads a legal rule from one place to another in a traceable way. The development of a global “right” will, in fact, have elements of all of these, but it will also go beyond them, allowing for what we have called the decentered construction of the right: Multiple uncoordinated processes of norm creation coming out of a myriad of norm-creating spaces, only loosely informed, if at all, by the meanings invested in the norms by other actors in other spaces.

This process is most definitely not the exclusive domain of lawyers, legislators, or international actors. The global social construction of a legal right is a process in which the conventionally powerful and the conventionally powerless both have a hand; it is a construction by the North and the South, by globalized elites, and by thoroughly local subordinate actors. The common thread is a claim subjectively experienced as one for (a) a fundamental human need, that is (b) under some threat, and that (c) cannot be defended or asserted without breaking through ordinary social, economic, or political interactions. Invoking a right is a signal that the claimants feel a need for extraordinary *procedures*, as much as it is a signal that the thing to be protected is extraordinarily important. Rights claims, in effect, are demands to be heard and given agency in making the important decisions that affect some fundamental good that is under threat or missing altogether [35]. For the claimants, the structure and limitations of the legal right are something to be decided along the way, *with the participation of the claimants*, not something to be adopted from international or domestic formal norm-creators. It is, as much as anything substantive and specific, “the right to be taken seriously [36]”.

Depending on the right in question—and especially when it is a right as simultaneously intuitively appealing and indeterminate as “the right to water”—we should expect as much of the development to take place in the space of social norms as in the space of formal lawmaking. The interaction of these multiple norms will be relatively chaotic. The claims made by different actors under the same rubric may well be mutually inconsistent. The final outcome—whose conception of the norm dominates, the possibilities and limitations of the norms, the bindingness of the norms in different arenas—is indeterminate. For these reasons, the meaning of a right will inevitably vary from one place to another. This is especially true initially, as a given right may, over time, become somewhat more determinate once expectations converge around a basic set of demands, and certain other demands are ruled out (on this last point, see Dugard, in this collection [6]).

If this is true, then it is often important to map the spaces in which and the actors by whom the right is being constructed. This parameter responds to a classic analysis of opportunity structures. Groups pressing certain rights claims will privilege the spaces where they believe they are most likely to succeed, and where their expertise leads them. In terms of their political geography, these spaces may be at the local, national, or international level, and there may be movement across these levels as advocacy demands. In terms of their relationship to the law, they may be strictly legal (courts, primarily, but also international human rights bodies), political (legislatures, international organizations, other rule-making bodies), technocratic (bureaucracies, privatized providers), or social; and again, the different spaces will interact with each other. Importantly, these are not merely the spaces in which claims are being disputed in light of norms with a pre-set meaning; it is the meaning of the norms themselves that is often at stake. The shift to a new venue is often a response to a constraining meaning developed in the original one—so, for instance, activists who find the legal construction of the right too limited will take their claims to the streets or the halls of the bureaucracy. The first step in mapping the social construction of a right, then, is exploring the spaces in which the meaning of the right is being contested and constructed, deployed and resisted.

Although largely neglected by the literature, we wish to highlight that the right to water is also being constructed in the third space we identify above, the technocratic or expert space. Several papers in this issue point to the bureaucratic space, such as Singh [5], Cortes and Cortes [4], and Dugard [6]. This is a space that is generally inhospitable to rights claims, unless they can be safely formulated, but that interacts closely and frequently with the other spaces. Bureaucratic rule-making and decision-making have a number of tensions within it that shape the realization of the right: Tension among technocrats; between them and the political actors to which they often respond; and between them and the frontlines, where we find an interface between the social and the political. It is in some ways legal, in that it produces binding regulations, but also purely administrative, in that it is charged with bringing the right to ground (laying pipes, for example, in the case of water rights), and even judicial, in that it often adjudicates claims made by users, and in the process determines who does and who does not have a valid claim of right. Any analysis of the process by which a right acquires meaning and produces actual outcomes cannot afford to neglect the technocratic, bureaucratic space that is in frontline interaction with the social.

Many of the court cases pertaining to the right to water originate in this space. Right to water claims often emerge in response to the typical service delivery issues, such as the failure to provide individualized household connections, temporary shutdowns and supply faults, and disconnections against non-payment of bills. In fact, the presence of a large number of individual service-related claims might merely indicate the existence of a legal-institutional framework for the delivery of water as a consumer service (and connectedly, the presence of water companies to provide this service) [4]. As a daily matter, then, the decisions made in these spaces bump up against internalized understandings of the right to water.

For these reasons, it should be no surprise that courts in Brazil are able to recognize the existence of the right to water even without a free-standing constitutional right to water.

The regional diffusion of right to water discourse helps, of course, but so does a widely felt sense that water can never be entirely commodified into a consumer service. Right to water claims come from the poor, informal settlement residents, and historically disadvantaged communities. At times, it appears as if courts have to choose between the governance framework and a human rights framework. The rights of companies are structured by legal and regulatory processes within a logic of service delivery, but these may yet have to contend with vulnerable peoples' claims for human dignity and justice. Whatever the immediate source of the claim, the right to water seems both necessary for the continuing legitimacy of the legal-institutional framework—that is, the latter is evaluated in terms of its contribution to the former—and a counterpoint to its excesses, setting the boundaries for the operation of lower order laws. The interaction between the two frameworks will ultimately determine the content of the right in a given space.

All these processes of norm creation will be animated and held together by a common element that defines them—a shared felt human need. Sometimes this felt need will be more abstract, such as the need for freedom to express one's identity, or context-specific, such as the need for dignified work. Sometimes the need will be for a service such as healthcare; or for a very concrete good, as in the case that we examine here, for water. However, the demands surrounding this common element, and the ways to satisfy the felt need, will most often be radically different in different contexts. In this sense, the creation of a right is, in sociolegal terms, the creation of a shell into which different actors can pour meaning, in response to the dynamics of their economic, social, and political environment.

Because legal claims often derive their authority from the nature of the lawmaker and the propriety of the lawmaking process, this decentered, mutually competing process of norm creation means that the authority of the claim will also be contested. Far from being an automatic trump card, the "bindingness" of the claim of right will depend on how it is constructed in a particular legal, social, or political space. It may be that a right understood in a particular way, with a certain reach and certain limitations, will be binding in a legal context, while a very different—perhaps more capacious, perhaps more restricted—understanding of that right will be "binding" in social and political terms. This is a central point of Dugard's contribution to this collection, on water rights claims in South Africa. That is, when it comes to its use in political mobilization and social discourse, a right may well shed many of the attributes and limitations that are so carefully built into it by academics, lawmakers, and even judicial interpreters, and may acquire new ones.

In those cases, a right might be "binding"—because no sane politician would oppose it, or because it successfully draws people into the streets or into the ballot box—to an extent and in a way that is quite different from how it is "binding" in a court of law, just as it may be different from one court to the next. A socially constructed right may be efficacious because it affects the legally binding decisions of authoritative actors, or because it changes dominant social norms and thus affects the decisions of many individuals, or because it reshapes the political action of particular groups. It should be no surprise to any scholar of law and society that the latter two avenues may well be the most effective—and thus authoritative and binding, in a very real sense—of the three.

Given levels of non-compliance with court decisions, whether international and domestic, with constitutional provisions and treaties alike, with government programs as much as with legislation, to evaluate the bindingness of the right we must seek to measure the efficacy of the invocation of a claim of right. As Maravall and Przeworski put it, "To be able to say 'This will never happen because the logging interests oppose it' is as good a base for predicting what the government will do as a constitutional provision against takings [37]". Similarly, to say the government will provide water because it would be political suicide not to, is as good a base—indeed, a better one—for predicting the realization of the right to drinking water as the adoption of a General Assembly Resolution or a constitutional amendment.

This calls us to an analysis akin to what Brinks, Levitsky, and Murillo prescribe for determining the strength or weakness of an institution: The challenge is to determine

the extent to which invoking or internalizing the right has causal efficacy in changing behavior, either through enforcement or more voluntary forms of compliance [38,39]. Sometimes this is straightforward. We can see courts in Colombia and elsewhere imposing the right and ordering compliance, and we can see the effects of those decisions. However, the collection of papers in this issue demonstrates that the widely internalized, if mostly undefined, notion that everyone has “the right to water” can serve as a foundation upon which other constructs will rest, such as water governance or water justice in Cape Town, or bureaucratic processes that structure water provision. The right sets a floor, or creates the inescapable need, and in this sense is binding, even though it will require further normative development to determine the precise contours of what people or communities will ultimately receive. In these cases, it is more difficult to disentangle the efficacy of the right itself, as opposed to adjacent normative claims such as water justice, equality, or the right to dignified housing.

If the process is radically decentered, arises out of a multiplicity of claims, and produces often inconsistent versions of the same “right” in different contexts, what can we say about it that is systematic and true to the whole? What do all rights claims have in common, if anything? First, we believe the appeal to a claim of right has a common foundation across all these differences: The appeal to rights is grounded in the sense that there is something fundamental to human existence that is at stake and is threatened by conventional power dynamics in that context. That is, the group asserting the claim seeks to protect something that is perceived as a core value, on which many other things depend, and which is fundamental to human dignity. Crucially, they seek either to preserve the status quo in regard to this value from a perceived threat coming from economic, social, or political changes, or to establish a new status quo that challenges existing economic, social, or political structures. The language of rights and the appeal to an international right in particular serves to ground the claim in something that is outside the immediate legal and political context.

This is a more general response to a more general version of the question posed by de Sousa Santos and Rodriguez-Garavito in their volume. “Who needs cosmopolitanism? The answer is straightforward: whoever is a victim of local intolerance and discrimination needs cross-border tolerance and support; whoever lives in misery in a world of wealth needs cosmopolitan solidarity; whoever is a non- or second-class citizen of a country or the world needs an alternative conception of national and global citizenship [40]”. Similarly, who needs rights? Whoever feels they need a stronger hand in negotiating their political, economic, and social context in order to protect a threatened fundamental good. Elites turn to rights when they feel their hold on power slipping and they perceive a need to guard against social, political, or economic change [41]. Politically marginalized groups turn to rights when they feel mechanisms of democratic representation are ignoring their demands [42]. In general, it is clear that people on the margins of society turn to rights when they feel their full humanity is not being recognized. Economically vulnerable people turn to rights when market interactions threaten to deprive them of fundamental needs, such as when the anti-privatization movement seized on the right to water. Whether the claims would stand up to legal scrutiny in a court of law or in academic debate is a secondary consideration, something to be constructed through political struggle, perhaps. The appeal to rights is simply a claim to normative precedence: Our claim to clean drinking water supersedes your arguments about fiscal sustainability, your claim to economic development goals, and your contractual entitlements.

As Rajagopal notes, “the outcomes of social movements’ engagements with the law are highly uncertain in terms of their impact either on law or on the movements themselves” [43]. Our account overlaps significantly with this account of counter-hegemonic globalization and its indeterminacy, but he is much more concerned than we are about the extent to which “the languages” of law and social movements “collide, producing moments of incompatibility that cannot be easily resolved”. This, and the related critique of rights as depoliticizing, demobilizing, and denaturing social demands, assume that social

movements internalize and incorporate the limitations of the explicitly legal language and mechanisms of rights when they assert them. Sieder notes that “juridification has been understood as a form of legal framing, whereby through the process of claiming rights people come to see themselves as legal subjects” [26] (p. 2). By identifying as legal subjects, participants in this bottom-up process are liable to be disciplined by “courts or other agents, such as NGOs or international organizations” who “demand certain standards of legal and organizational ‘legibility’ from subjects [44]” (Sieder, pp. 2–3, describing a position found in the literature).

Turning this on its head, we argue that people are making their demands legible through the lens of rights, without necessarily subjecting themselves to that disciplining process. Indeed, whether the process limits their political imagination is, in our view, exactly what is at stake. Sieder highlights that “formal law is just one sphere of action in political struggles and . . . the imaginaries of justice of different individuals and groups rarely coincide entirely with the way justice is framed in legal terms, even by the NGOs and activist networks who litigate cases on behalf of the marginalized and dispossessed [26] (p. 4)”. Whether it is African Americans claiming a human right to potable drinking water in the United States; an indigenous group claiming a right to control the flow of river water in their territory in Colombia or Peru; or a neighborhood claiming priority of household drinking water over water for “economic development”; the demands are often immodest, open-ended, unstructured, and in excess of what a legal analysis would support.

Of course, felt needs do not always lead directly to rights claims, and even more so, to an assertion of a novel right. The article by Cortes and Cortes, in this issue, shows that it is not always the neediest regions in a country that have the highest number of legal claims [4]. In South Africa, there are long-standing problems with access to drinking water, and yet there is little contestation [6]; while in India, there is systemic deprivation for urban informal settlements [5], and amongst historically disadvantaged groups [3] that are not contested in right to water terms. We have extensive literature that shows that legal mobilization depends on many factors—such as the resources of litigants [45], the receptivity of the courts [46], and other factors. The choice of strategy is not a straightforward function of a felt need, but is dependent also on claimants’ resources, and the opportunity structure they confront. Occasionally, the sociolegal construction of a right will rule out certain types of claims—at least for a time, at least in a particular context.

However, the meaning of a right is not static. A novel claim of right—a claim that uses the language of rights to present new demands, or old demands in new language—is a signal that more pedestrian, more accessible alternatives are not available, and may well seek to transform settled meanings. A new claim to the right to water—as in Flint, or in constitutional amendments in Peru, or rights-based litigation in India—highlights the insufficiency of the existing legal framework for addressing the needs that trigger the demand. This is especially true when we see rights language in a context in which we would not expect it, such as in the United States, which has a legal field that is inhospitable to claims grounded in international human rights.

Given what we have said so far about indeterminacy and the multiplicity of meanings and expressions that can fall under the label of “right to water”, how might we delimit one claim of right from another? What makes this claim a “right to water” claim, if its boundaries are so fuzzy that they can accommodate a demand for potable water from a tap for a household, and a territorially and culturally based claim to sovereignty over the waters of a river? In assembling this collection of essays, we have largely taken people at their word: If they claim the right to water, using that or equivalent language, then we have included the claim. In many ways, adopting a sociolegal approach to understanding the emergence and significance of the right compels this criterion. The question we are addressing, quite simply, is what do people understand by the right to water? In what follows, we answer this question, drawing on the contributions to this edition of the journal.

The development of the “right to water”, as explored in the various articles that make up this collection, followed the pattern we have laid out here. The right emerged from

domestic and international norm-making spaces, from the informal and the formal, picking up normative weight and a multiplicity of meanings along the way. Early on, it was formalized in constitutions, in the service of domestic anti-privatization efforts, which then (partially) informed the drafting of General Comment 15 in 2002. More recently, the UN General Assembly threw a resolution into the mix, raising the profile of the international component but focusing more on access than ownership. International legal language shapes but does not dictate the content of subsequent domestic constitutions, each of which addresses a particular domestic reality and is, in turn, shaped by a domestic set of power relations, and by the preexisting infraconstitutional norms of that place [1,2]. In countries without an explicit constitutional right, courts and judges add their own contributions to the meaning and legal texture of the right to water [3–5].

Not all the development takes place in legal spaces and texts. From the informal spaces, social movements lay claim to the language of rights to address injustice and exclusion, building new layers of meaning and obligation [7]. Indigenous groups add a thread of collective cultural and territorial rights to control and protect rivers [47], while urban groups attach the right to demands for equality and water justice [6], dignified living conditions, and potable water provision [5], and environmental justice [3]. The result of all this is a tapestry of meaning, multivalent although not fully indeterminate, that underpins varied legal and political strategies and seeks to give normative force to claims made in different contexts by different groups.

In summary, this section lays out the basic features of the socio-legal construction of a right. We argue that the process by which rights are created and acquire meaning far exceeds the activities of a relatively small group of privileged legal actors at the center of the international arena or constitutional processes. In fact, the conventionally powerless—marginalized groups, peripheral countries, protesters, bureaucrats—can all contribute as much to the content and bindingness of the right as scholars and lawyers in Geneva or London, or distinguished statesmen in the halls of constituent assemblies. These groups turn to the language of rights to signal that there is something at stake that is essential to their dignity and survival, something that is being denied or threatened by the ordinary social, political, and legal processes of their context. They reach for rights to ground their claim in something that exceeds what their immediate political community is willing to provide. Rather than the right constraining demands to what legal experts sanction as the proper extension of the right, very often the felt needs shape the right and give it new meaning. In this way, the same right can come to have very different meanings in different communities around the world. The next section of this article explores how these contexts shape the claims that are made.

#### **4. Rights at Work in Different Fields**

##### *4.1. Claims Asserted in the Social Field*

The most cursory look at what is happening around the world demonstrates that not all claims for the right to water are litigated in court. Social mobilization has been frequently and effectively used to make claims against water management and resource privatization, and to secure access to a minimum core of water and the self-determination and prior consultation rights of indigenous peoples, as well as in disputes over the contamination and exploitation of water sources. In this edition of the journal, we see this most clearly in the article by Kozikis and Winkler, on social mobilization in the United States, but also in the article by Singh, which describes the interaction between urban residents and municipal technocrats in India [5,7].

In contrast to claims that rights-claiming denatures the original demand by imposing meanings from above, it is clear that this process is often independent and openly defiant of attempts by conventionally authoritative actors to give it meaning, or to circumscribe it. For example, the article by Kozikis and Winkler examines the protests against the lack of access to clean drinking water in the United States [7]. The authors show first that even in one of the wealthiest countries in the world, significant water access crises

exist where the population is unable to realize their human right to water and access clean, affordable drinking water. These crises result from water contamination, price gouging, and water shut-offs compounded by crumbling infrastructure, in communities marginalized by racism and government neglect. In material terms, the demands arise from the communities' sense that they are being actively harmed by local governments that disregard their most basic human needs. In political terms, the turn to rights language is in part driven by the unresponsiveness of the local government and water agencies, and the absence of an adequate alternative legal language to express their demands.

The United States is a particularly unlikely place for a human rights-based campaign to arise. The country generally does not consider itself bound by many international human rights laws and guarantees. It has never incorporated social and economic rights into its constitution, and legal actors often express skepticism regarding such rights. Indeed, in the cases that Kozikis and Winkler examine, the courts regularly rejected plaintiffs' arguments based on a right to water. Yet, even in such a hostile legal environment, grassroots human right to water movements emerged, and employed human rights approaches to a significant effect. While not "binding" in a legal sense, these groups found that the right to water had causal efficacy in different arenas. Human rights language was highly effective in animating and mobilizing mass street demonstrations; coupled with more cooperative approaches, it informed appeals to lawmakers and shaped concrete proposals and plans; and on signs and slogans and in journalistic accounts, it brought public awareness to the gravity of the situation and pushed back on conventional understandings of water as a mere commodity. The claim to a right to water universalized the demand, drawing a bridge from the experience of a particular marginalized group to the rest of the political community.

#### 4.2. *Claims Asserted in the Bureaucratic Field*

When we look at the realization of the right in cities, in particular, it becomes clear that the central actors are often the water agency bureaucrats; the public utility and private water company officials who evaluate the economic viability of different arrangements; and even the engineers that design and implement water and sanitation systems. We cannot neglect either the internal dynamics of this space, or the ways in which it interacts with public officials on the one hand, and the public on the other.

Multiple constructions and competing mobilizations of the "right" may not be mutually reinforcing in that the actors who mobilize the idea of rights do so in aid of their own struggles and causes, without necessarily building up to a coherent vision of a right. In fact, they may even reformulate the language and content of the right in such a way as to empower them in their local struggle for well-being. Illegal squatters in India focus their efforts on the 'everyday reality' of municipal administration, choosing to work within a framework that grants them a lesser claim on the city water supply, instead of seeking redress and recognition of a more comprehensive right to water from the courts [5]. This is because the former serves to secure their claims to tenure and location *along with* improving claims to drinking water.

A neoliberal state might prefer a formulation of the right to water—one that reinforces, say, the provision of potable water and sewerage to formal, duly titled, neighborhoods—that is consistent with its power to relocate and resettle the illegal squatters, and to reorganize and clean up water service operations. The right to water formulation offered by the Indian courts is in line with the idea. For this reason, claimants view the municipality as a more congenial space, although not one that offers ready-made success. The municipal process is full of uncertainty and requires the poor and marginalized to be able to mobilize both procedure and politics, for they must negotiate with competing actors and visions, with other competing claims in the making, and within other already-established rule-frameworks.

This pushes the debate about the content of the right to water into a bureaucratic space that is more concerned with technical than legal concepts, with possibilities than with aspirations. However, the right to water provides a backdrop for the debate, as the

entire discussion in bureaucratic spaces is premised on the notion that people must have access to water.

We do not wish to leave the impression that these claims are always successful, that they add up to a legally coherent jurisprudence of the right to water, or even that the emerging meanings are always enabling of claims to more access to water. In her paper in this Special Issue, Dugard asks why there are relatively few cases in South African courts, and especially in the constitutional court, that relate directly to the right to water at all, in spite of the existence of a constitutional right to water [6]. Water-related problems persist, and so do opportunity structures that allow for contestations around socio-economic rights, but she argues that expectations around the meaning and scope of the right have been settled in a way that puts the problem of intense inequality (in society, and in relation to water) off-limits in legal terms. In her investigation of the right to water in the context of Cape Town's Day Zero crisis, Dugard finds that 'water governance' was the dominant framing through which various interlocutors viewed a looming climatic crisis in which running out of water was a very real (although ultimately averted) possibility. Hardly anyone invoked the right to water, but water justice, and the lack of it, seemed to be of continuing relevance in how people made sense of the situation.

The fact that the crisis forced wealthy people to face the same situation that the poor lived with every day was not lost on anyone, and it was interesting that "water management devices" (which reduced water supply to a trickle to limit revenue loss in low-income areas) were deployed for the first time in high-income areas to limit consumption to quantities comparable to what poor households accessed as "free basic water". These techniques were first developed to restrict poor people's claims on water, and in previous legal challenges, they were deemed to be constitutional. There are some signs for the future in this narrative, with the possibility of claims for water justice becoming increasingly relevant as climate change sets limits on economic rationality and water governance in the management of resources and supply systems. Paradoxically, then, the right to water might come to justify limiting access, in order to ensure sustainability and water justice.

#### *4.3. Claims Asserted in the Political Field*

Similarly, new rights often become the rhetorical currency with which old postures are attacked and new demands are posed in the political arena, in places in which human rights rhetoric has a great deal of political purchase. In Peru, for instance, the language of human rights gained currency in the aftermath of an insurgency, repression, and a successful transitional justice effort. As a result, the right to water was easily adopted into the national constitution, and is now a legitimate basis for claims to access to piped water, within the context of "the existing legal and institutional frameworks for water protection [2]". However, its political efficacy was partly conditioned on its perceived legal inefficacy, in that the interests most opposed to a universal right to piped water assumed the legal system would not be an effective mechanism for enforcing the right. In Peru, then, the right to water was more "binding" in the political than in the legal field.

In contrast, where human rights are seen as a foreign imposition, rights talk is noticeably absent from the corridors of power—oddly, the case here is the United States. As much as the right was efficacious in the social field, the language of human rights is not the principal frame used in either the national or the state legislatures in the United States. As much as the language of human rights has gained currency among activists of various sorts, neither courts nor politicians are willing to embrace it.

#### *4.4. Claims Made in the Legal Field—Constitution-Making and Judicial Construction*

##### *4.4.1. Constitution-Making*

The examination by Loen and Gloppen of constitution-making in Kenya and Slovakia [1], and by Cortes, Gianella, Paez, and Vallejo of constitution-making in Brazil, Colombia, and Peru [2], shed considerable light on the development of the right in constitutional texts. Collectively, these articles demonstrate that, even in the highly formalized

world of constitution-making, the right to water can take on very different meanings in different places, in response to different felt needs and institutional contexts. They show that, for all their visibility, international actors typically take a back seat to domestic actors and local power dynamics when it comes to specifying the content of a right in a particular constitution for a particular place. Cortes, Gianella, Paez, and Vallejo, in particular, show how constitutionalization can be a protective response when longstanding arrangements that had earlier been simply a matter of ordinary legislation come under threat [2]. These articles put local politics at the center of the evolving development of the right to water.

It is sometimes easy to imagine the diffusion of rights into constitutional texts as a mostly unexamined process of simply adopting whatever rights are currently in fashion, perhaps at the urging of international norm developers. In contrast, Loen and Gloppen and Cortes, Gianella, Paez, and Vallejo demonstrate that the introduction of the right to water into domestic constitutional texts responded primarily to a domestically driven calculus, and was shaped by the struggles that prevailed in each country [1,2].

In terms of the meaning of the right, there was clearly a cooperative effort early on between international actors on the one hand and constitution drafters in Bolivia, Uruguay, Ecuador, and elsewhere on the other, in a first push to use the right to water as an anti-privatization tool [2]. However, by the time it is incorporated into the Peruvian constitution, the right to water is not at all doing that anti-privatization work, focusing simply on extending access to piped water to individual households, however supplied. In fact, in Kenya, the right to (access) water and the privatization of supply are seen as going hand in hand [1]; and in India, the courts' interpretation of the right to water has a similarly privatizing intent, aiding in the displacement of informal settlements in favor of supplying water to titled properties in formal neighborhoods [5]. In some contexts, then, the anti-privatization right to water becomes instead an ally of neoliberal efforts to privatize supply.

Furthermore, domestic politics are also never absent from this process. In Peru, it is clear that the right can more easily be adopted because the weak enforcement structure reduces opposition [2]; in Kenya, although international actors and examples play a role, local actors dominate the actual process of negotiating and drafting the document; and in Slovenia local actors and grassroots efforts dominate the politics of constitutional amendment [1]. Meanwhile, in Brazil and Colombia, the right fails to be adopted precisely because it is expected to be too costly and constraining for the dominant power players [2]. Far from simply responding to global fads, Loen and Gloppen say that in Kenya "including the right to water in the constitution responds to a colonial past and the country's subsequent economic and political history and reflects a determination to reduce poverty and inequality through development" [1]. We could say something similar about all the countries whose constitutional processes are described in the papers included in this Special Issue: The decision to adopt the right to water responds to each country's past and its political economy, and will take on a meaning that responds to that country's dominant political project.

#### 4.4.2. Judicial Construction

However, the process of infusing meaning into a constitutional right only begins with the drafting of the text and is developed in much more detail subsequently through judicial interpretation. If a country's political economy and institutional context informs the initial drafting of the constitution, it is clearly dominant in the subsequent judicialization of the right, as illustrated in this collection in the articles by Wahi on India and Cortes and Cortes on Brazil [3,4]. There was, in fact, no free-standing constitutional right to water in India or Brazil, but that did not hold back the petitioners who claimed this right, or the courts who were able to find this right from existing constitutional rights. What the petitioners asked for, and the outcomes of judicial processes, were, however, shaped by what was possible in the given political economy and institutional contexts. This is not to say the gains of judicial construction are irrelevant, for judges and courts can provide practical and symbolic meaning to rights claims.

Judicial recognition of the right to water in Brazil built on regional normative developments and a national framework of rights that was supportive of the right to water. It also derived relevance, immediacy, and specification from the existence of regulatory and service delivery frameworks, and institutional paraphernalia of water privatization. This is the space in which Brazil's regional courts provided consumer protection, and protection against disconnections to indigent litigants. In India, there was a political dynamic in the Supreme Court's rush to become the people's court, which provided the opportunity for petitioners to formulate their right to water claims. In these cases, we see the advancing of claims for social justice, environmental rights, protection against displacement, and indeed the right to drinking water.

The effect of a right on strategies in the legal field will depend on a more traditional legal opportunity structure analysis—what is the legal status of the right, how receptive are the courts, what is the claimants' organizational capacity relative to the demands of the judicial structure? However, not all of these claims are successful, and the gains that petitioners make on the ground remain uncertain. The fact of mobilizing a court with these claims reflects perhaps the lack of other options, such as in indigenous people's struggles against displacement. More hopefully, it could also be that the right to water helps provide a recognizable legal identity to their situation and helps provide an organizing logic to their claims for recognition and justice.

In addition to working within one or more of these fields, claimants may operate within different political geographies. "Whilst processes of judicialization for the most part occur in national courts, the overlapping and multi-scalar nature of global legal pluralism is a defining feature of contemporary forms of juridification: the contractual rights and obligations of states and global financial capital are routinely fought out in the courts and arbitration tribunals of London, Geneva and New York rather than in state courts, whilst those seeking redress for gross violations of human rights often simultaneously pursue their claims in national, regional and international forums [26]".

This section shows that, following the logic of opportunity structures, rights claims migrate to the social or bureaucratic fields when the legal and political fields are inhospitable; similarly, they emerge as legal or political claims when they are likely to gain a positive reception there. The case studies validate many of the observations made in Section 2: That rights are more likely to be taken than granted, and that claimants often construct the meaning of the right in open defiance of the opinions of experts in international or constitutional law. We see some evidence that rights can be binding because of their efficacy in creating negative consequences for the relevant actors, and not so much because legal actors are willing to issue commands backed by the power of the state. The richness of the case studies is, in large measure, due to the multiplicity of meanings, actors, venues, and demands that can be found wherever the right to water is claimed.

## 5. Conclusions

What the various articles in this Special Issue illustrate through their detailed studies is that no one owns the process of building the meaning of human rights or how they are animated; the creation of the Human Right to Water and Sanitation provides an excellent example of a decentered construction of rights. That is, rights arise when something fundamental is threatened or missing and people need a language to express that deep need to draw attention to the issue.

As many cases show, the claim of new rights (or established ones) tends to arise when harmed parties are unable to receive redress from the existing political context; adequate responses from bureaucrats, politicians, judicial personnel are not forthcoming. In these contexts, rights can develop multiple meanings depending on the context in which they are used, and these rights claims, because they are frequently coming from the bottom up, are not necessarily used in the same way in different contexts and/or have the same meaning. The case studies illustrate that the use of the Human Right to Water developed different meanings in legal, social, political, and bureaucratic spaces, at the international,

national, and local levels. The case studies also bring to the forefront the complexity of rights claiming, even in cases where an international human right has been established. How those rights are filtered down and implemented to the national and even subnational level is shaped by numerous processes that include a host of variables, different in each context—available resources of those who are in need of protection, political and legal opportunity structures, political allies, governmental priorities, institutional structures such as the locus of the relevant decision making, and so on. This web of factors, once untangled, can better account for the extent to which specific rights exist, how they are animated, and the extent to which they are enforced in different international, national, and subnational contexts.

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