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Strengthening the human right to sanitation as an instrument for inclusive development

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Chapter 7. Non-human Rights Principles for Sanitation Governance

7.1 INTRODUCTION

Besides human rights and humanitarian principles, there are other principles for sanitation governance. This chapter focuses on these other principles since: (a) the HRS framework does not sufficiently address all the drivers of poor sanitation services; (b) other frameworks influence national sanitation governance; and (c) there is need to investigate the fit between the HRS and other frameworks which generally stem from other discourses. It examines: (a) how and under what circumstances can non-human rights frameworks for sanitation governance promote the HRS and ID outcomes? (b) How does an understanding of the incoherence between the HRS and non-human rights frameworks for sanitation governance, using legal pluralism theory (see 2.4.2), affect the design of sanitation governance frameworks? The chapter first discusses the other principles (see 7.2), analyses the instruments through which the principles are operationalised (see 7.3), assesses how these principles address the drivers of poor domestic sanitation services (see 7.4.1) and the consequent impact on inclusive development (ID) (see 7.4.2) and legal pluralism (see 7.4.3), before presenting the inferences (see 7.5).

7.2 NON-HUMAN RIGHTS PRINCIPLES FOR SANITATION GOVERNANCE

This section assesses other principles of sanitation governance (see Table 7.1). I group the based on my conceptual framework, and they mainly fall under two categories: (a) social (see 7.2.1), and (c) environmental principles (see 7.2.2).

7.2.1 Social

There are three social principles for sanitation governance: (a) capacity building, (b) poverty eradication and equality, and (c) subsidiarity.

Capacity building

The capacity building principle is contained in the Rio Declaration (1992: principle 9) and the SDGs.¹⁵⁴ Capacity building is the process through which communities, groups and organisations acquire the technical and administrative skills which they need to enable them to participate maximally in governance processes to whatever level they may desire (National

¹⁵⁴ See Goals 6, 13 and 17.

Research Council [NRC], 2006). The origins of capacity building is linked to the neo-liberal aversion of dependence on external aid and support for individual agency as a means of promoting social development; the attraction is the potential to empower marginalised people through organised trainings to effectively participate in governance and adapt to social change while reducing the pressure on the government and international donors to continue to administer local development programmes (Kenny & Clarke, 2010). This paradigm however ignores the fact that some communities fail to develop not due to lack of capacity but as a result of structural, political and resource drivers that impede their development (Kenny & Clarke, 2010). Conversely, an asset-based approach to capacity building starts from the premise that the target population have existing capacities which can be harnessed for social development (Eade, 1997).

Applied to the HRS, capacity building requires: (a) an understanding of the local capacities and how these can be harnessed for the realisation of the HRS; (b) knowledge exchange between users and other stakeholders in the sanitation sector, to improve coproduction and local solutions for sanitation; and (c) addressing gender inequality and equipping the vulnerable and marginalised with opportunities for meaningful participate in sanitation governance.

Poverty eradication and equity

Poverty eradication and equity is enshrined in the Rio Declaration (1992: principles 5, 6) and the SDGs.¹⁵⁵ Poverty (see 3.4) is a multi-dimensional concept that encompasses a lack of basic necessities, low health and academic outcomes, and various forms of vulnerability, exposure to risks, and marginalization (Daemane 2014). Thus poverty is not just material deprivation measured through income or consumption levels but also in terms of productive employment (sustainable livelihoods approach), participation in social life (social and relational inclusion), and the agency of individuals in promoting social development (capabilities approach). Poverty implies inequities in access to assets, resources, and opportunities for participation in markets and governance processes, and often has a gender perspective (Reddy & Moletsane, 2009; UN Chronicle, 1996). Consequently, poverty eradication and equity require deliberate efforts to reduce the inequities in human development especially by reducing the disparities in access to assets and resources for human wellbeing and enhancing the opportunities for public participation among the impoverished. Poverty eradication in developing countries is mainly funded through domestic

¹⁵⁵ See Goals 1 and 7.

resources (like taxes and export-earnings) but with stagnating or declining tax-to-GDP ratios in many developing countries and aid fatigue in industrialised countries (Gupta & van der Grijp, 2010), developing countries need to (be supported to) develop their tax capacities (Chowdhury, 2016; World Bank Group, 2014). Applied to the HRS, this principle requires well-targeted pro-poor instruments like cross-subsidies (see 5.5.2 and 5.7.2), access to assets and mechanisms for the meaningful participation of the vulnerable and marginalised in sanitation governance, within ecological limits, in the interest of ID (see dos Santos & Gupta, 2017 for details).

Subsidiarity

The principle of subsidiarity (Rio Declaration 1992: principle 10; Treaty on European Union, 2012, article 5) requires decisions to be taken at the lowest possible level.¹⁵⁶ It further requires the higher-level entity to: (a) directly maintain the public good; (b) provide the necessary support (monitoring, regulating and coordinating) for individuals and associations (*subsidium*) to contribute to the common good through their free initiative; and (c) refrain from interfering with the activities of the lower-level entities which do not undermine the common good (Martini & Spataro, 2016; Murphy, 1999). Subsidiarity presumes that it is inefficient to burden the State with local concerns, and human development “depends crucially on freedom for individual self-direction and for the self-government of voluntary associations and that human beings flourish best through their own personal and cooperative initiatives rather than as the passive consumers or beneficiaries of the initiatives of others” (Murphy 1999, p.887). Subsidiarity is reflected in cultural relativism (under HR law), which enables national bodies to determine how to implement a right based on their unique local circumstances though this does not permit deviations from a peremptory norm (see 4.2.1), and the devolution of State powers (among different levels of government) (Arden, 2015; Barber & Ekins, 2016). Subsidiarity requires that while the public good aspects of sanitation is maintained and supported by the state, relevant decisions are made at the lowest level of governance to promote free initiative and innovation in addressing the problems in a contextually relevant manner (Obani & Gupta, 2014b). Like other principles, it is influenced by political considerations which may undermine its regulatory efficacy (Craig, 2012).

¹⁵⁶ The Bonn Recommendations 2001 also advocates water management at the lowest possible level and the decentralisation of responsibilities for water and other services to local governments.

7.2.2 Environmental

This section discusses three relevant environmental principles.

Polluter-pays principle

The polluter-pays principle (Rio Declaration 1992: principles 13 and 16; UNECE Convention 1992, article 5) requires the polluter to internalize the external costs arising from the pollution (de Sadeleer, 2002).¹⁵⁷ The polluter-pays principle precludes the repetition of environmental degradation (de Sadeleer, 2002). In relation to the HRS, the polluter-pays principle can promote equitable access and the funding of sanitation services by ensuring that the external costs of pollution (including the cost of waste management) are fully internalized by those who produce waste or in other ways pollute the environment. In theory, this could mean that businesses or individuals who pollute the environment have to pay for the clean-up costs, thereby minimising environmental degradation. Nonetheless, the polluter-pays principle may impose a huge burden on the poor, where it is coupled with full cost-recovery, except they are guaranteed basic services at an affordable rate through regulatory and economic HRS instruments (see 5.4.1 and 5.4.2).

Precautionary principle

The precautionary principle (Rio Declaration, 1992: principle 15) requires that even where the causality between A and B is uncertain, if B happens and is irreversible, this is a reason to take precautionary action (Aven 2011). “If there is (1) a threat, which is (2) uncertain, then (3) some kind of action (4) is mandatory” (Sandin 1999:891; Sandin et al. 2002). The principle may be applied based on: (a) considerations of irreversible damage and cost effectiveness, (b) any threat to health or the environment irrespective of cost-benefit considerations, and (c) additional considerations like personal experiences in the evaluation of risks (de Sadeleer 2002; Fisher 2002; Sheng et al. 2015). While the principle may stifle development (Sunstein, 2003), it can enable the adoption of safer techniques and procedures.¹⁵⁸

Applied to the HRS, it calls for improving the safety of sanitation infrastructure and technologies to reduce its harmful impacts on humans and the environment; This principle reinforces the public goods characteristic of sanitation (see 3.3) where the threats of poor

¹⁵⁷ See generally OECD Recommendation on the Implementation of the Polluter Pays Principle 1974, C(74)223.

¹⁵⁸ See European Commission White Paper on Strategy for a New Chemicals Policy, COM (2001).

sanitation services to human health or the environment spur universal service provision irrespective of cost-benefit considerations, and make the State the primary duty bearer.

Table 7.1 Legal status of the non-human rights principles that are relevant for sanitation governance

Non-HR Principles	Source Documents	Legal Status
Capacity building	1992 Rio Declaration	Emerging
Equity	1992 Rio Declaration	Established in treaties and soft law
Polluter-pays Principle	1972 European Program of Action on the Environment 1972 OECD Council Recommendation on Guiding Principles Concerning the International Economic Aspects of Environmental Policies 1992 UNECE Water Convention 1992 Rio Declaration	Established in treaties and soft law
Poverty Eradication	1992 Rio Declaration	Emerging
Precautionary Principle	1992 Rio Declaration	Established in treaties and soft law
Prevention Principle	1972 Stockholm Declaration 1979 LRATP Convention 1985 Vienna Convention for the Protection of the Ozone Layer 1992 CBD 1992 Rio Declaration Preambles of the UNFCCC1997 UN Watercourses	Established custom, also in treaties and soft law
Subsidiarity	EU law generally	Established in treaties and soft law

Source: Compiled by the author, based on Arden, 2015; Craig, 2012; Daemane, 2014; de Sadeleer, 2002; Gupta & van der Grijp, 2010; Kenny & Clarke, 2010; Sheng et al., 2015

Prevention principle

The prevention principle¹⁵⁹ requires States to apply due diligence to prevent harm but does not make every transboundary harm automatically unlawful (de Sadeleer, 2002; Sheng et al., 2015). It may also require States to: “... co-operate in a spirit of global partnership to

¹⁵⁹ The prevention principle has been upheld in a number of decided cases concerning a mediated type of environmental damage like the *Trail Smelter Case (United States v. Canada)*, Arbitration, 1938 and 1941 Decisions, UNRIAA, vol. III, 1941, pp. 1905–1982, and the *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, ICJ Reports 2010, pp. 14–107. A mediated type of environmental damage is “damage from an ‘agent’ delivered from the territory of one state to that of another through a shared physical medium (air, water) abutting the two states, whether or not in conjunction with an alteration in the condition of that medium (such as the poisoning, or change in the natural course, of a river)” (Zahar, 2014, p.225). In other cases, like the *Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*, Judgment, ICJ Reports 1997, pp. 7–84, and *In the Arbitration Regarding the Iron Rhine (‘Ijzeren Rijn’) Railway (Belgium v. Netherlands)*, Award of 2005, Permanent Court of Arbitration, UNRIAA, vol. XXVII, 1941, pp. 35–125, the prevention principle was applied to stop development activities that were expected to cause immediate and geographically confined damage to the environment of a neighbouring State. The principle has also been proposed for wider application to cumulative environmental damage, like climate change (Mayer 2015; cf. Zahar 2014).

conserve, protect and restore the health and integrity of the Earth's ecosystem" as stated in the Rio Declaration 1992, Principle 7 (see Hayat & Gupta (2016) for a general discussion of the kinds of freshwater and the related ecosystem services for human wellbeing).

Applying the prevention principle to the HRS would reinforce the need to use the Best Available Techniques (BAT) for sanitation. The BAT is the "most effective and advanced stage in the development activities and their methods of operation."¹⁶⁰

7.3 NON-HUMAN RIGHTS INSTRUMENTS FOR SANITATION GOVERNANCE

This section classifies the existing most commonly used non-HR instruments for sanitation governance as regulatory (see 7.3.1), economic (see 7.3.2), management (see 7.3.3), and suasive (see 7.3.4). Technologies are also an important instrument for sanitation governance (see 3.5) but are not discussed here.

7.3.1 Regulatory

Prioritisation of sanitation and hygiene in licensing exemptions and permissible use of water

The prioritisation of sanitation and hygiene in licensing exemptions and permissible uses of water improves access to water resources for sanitation and hygiene purposes. Many of the licensing provisions in national laws relates to the permissible uses of water. While some national laws generally permit the abstraction of water from public sources as a common pool resource for the purpose of meeting individual and domestic needs, without need for a license,¹⁶¹ others exempt additional domestic uses like water for livestock¹⁶² and irrigation of domestic gardens;¹⁶³ and water for fire fighting during emergencies.¹⁶⁴ Some laws further rank the permissible socio-economic uses of water, with human consumption (drinking water and presumably sanitation and hygiene needs) as the top priority. For instance, in Peru, the Water Resources Act 2009 prioritises human need as primary uses of water, over other uses.¹⁶⁵

¹⁶⁰ European Union Directive 2008/1/C Official Journal of the EU, 2008, p. 4. See also Stockholm Convention on Persistent Organic Pollutants, 2001.

¹⁶¹ Cape Verde, *Water Code, Law No.41/III/84*, as amended by Decree No. 5/99 (unofficial translation), article 61; Tanzania, *The Water Utilization (Control and Regulations) Act*, 1974, as revised 1993, section 10.

¹⁶² Zambia, *Water Act*, 1949, sections 2 & 8; Zimbabwe, *Water Act 1998*, Preliminary.

¹⁶³ Cambodia, Law on Water Resources Management of the Kingdom of Cambodia 2007, Article 11; Guinea Bissau, *Water Code, Law No. 5-A/92* (Unofficial translation), Article 7; Swaziland, *Water Act, Act No. 7 of 2003*, Interpretation; Angola, *Water Act*, 21 June 2002 (unofficial translation), articles 10(2), 22, 23.

¹⁶⁴ South Africa, *National Water Act, Act 36 of 1998*, sections 4(1) and 22(1)(a)(i), Schedule 1 and Item 2 of Schedule 3. See also, Uganda, *The Water Statute, Statute No. 9 of 1995*, section 7(1)(2).

¹⁶⁵ Peru, *Water Resources Act*, June 2009 (Unofficial translation), articles 35 and 36. See also, Central African Republic, *Water Code 2006; LAW No 06.001 of 12 April 2006* (unofficial translation), article 44; Chad,

7.3.2 Economic

This section discusses two economic instruments.

Microfinance

Microfinance could provide loans for sanitation to people where beneficiaries save small amounts of money to finance their own sanitation investments or access micro credit (Mader, 2012). It is hinged in the need for the State to restrict its functions to regulation, national defence, and international policy while leaving other functions (including the provision of public goods) to “a social-consciousness-driven private sector” (Yunus, 2003, p.204). Microfinance is a private business model which further requires users to fully appreciate and internalise the costs of sanitation to be effective (Mader, 2012; Mehta, 2008); the extent of internalisation required of users for microfinance to be effective runs counter to the inherent multi-dimensional economic (public, private and merit goods) properties of sanitation (see 3.3). Microfinance is ill-suited to improving access to sanitation goods and services for the poor where: (a) poor households are excluded from the benefits of privatised sanitation services; (b) political elites interfere with the sanitation projects for their own benefits; (c) public funding is insufficient to provide the common good or network components of sanitation services, and (d) sanitation marketing mainly focuses on public health gains rather than capitalising on the extraneous incentives for households’ sanitation investments, such as social status (Mader, 2012).

Public-private partnerships

Public-private partnership (PPP) includes a wide variety of relationships between the State or public sector entities and private actors, with the purpose of collaborating to implement an agreed policy objective on the basis of their individual agenda (Jamali, 2004), while the State retains regulatory control (Baud, 2004). The individual agenda for public actors may be the provision of public goods, and for the private actors it may be profit making. Whereas PPPs

Water Code, Law 016/PR of 18 August 1999 (unofficial translation), articles 149 & 150; Benin, Water Code, Law No. 87-016 of 21 September 1987 (unofficial translation), article 54; Burundi, Government Decree No. 1/41 of 26 November 1992 on the establishment and organisation of the public water domain (unofficial translation), articles 1 & 14; Cape Verde, Water Code, Law No.41/II/84, as amended by Decree No. 5/99 (unofficial translation), articles 58(a) & 59; Ethiopia, Ethiopian Water Resources Management Proclamation, Proclamation No.197/2000, article 7(1); Guinea, Water Code, Law No. L/94/005/CTRN of 14 February 1994 (unofficial translation), article 20; Lesotho, Water Act, 2008, articles 5(2) & 13(2)(a); Madagascar, Decree No. 2003-941 concerning monitoring of water resources, control of water destined for human consumption and priorities of access to water resources (unofficial translation), articles 1 & 2; Mauritania, Water Code, Law No. 2005-030 (unofficial translation), article 5(1)(2); Senegal, Water Code, Law No. 81-13, 1981 (unofficial translation), articles 75&76. See also Guyana, Water and Sewerage Act, 2002, article 25(a)(d).

is sometimes used loosely to describe liberalization, private sector participation, and privatization (Felsing, 2010; Sovacool, 2013), each of these types of market reforms has distinct targets and policy implications (Bakker, 2007). The attractions of PPP include improvements in access and quality of services, transfer of technology and skills from the private sector to the public sector, and increased operational efficiency of the public sector (Marin, 2009). The pro-poor public-private partnership (5P) model recently emerged to ensure service provision to the poor who are often considered a business risk under the traditional PPPs and excluded from service delivery (Sovacool, 2013). The model is built on inclusive partnerships with users, the private sector, and other partners like NGOs, CBOs, development banks, co-operative organisations and philanthropists (United Nations Development Program [UNDP], 2011); it thereby merges profit making with social objectives and ensures the participation of the affected population (Mukherjee, 2005).

7.3.3 Management

This section discusses management instruments grouped into two categories, based on the lead actors/stakeholders involved in the implementation: (a) child-led participatory approaches, and (b) community-led participatory approaches.

Child-led approaches

Child-led approaches harness the capabilities of children in the process of co-producing sanitation goods and services for children and their communities. One example is the child-to-child (CtC) which facilitates an understanding of hygiene among children and enables them to identify health and development priorities through active learning, by gathering information on sanitation, taking necessary action, and sharing their knowledge with the wider community (WaterAid, 2013). A second example is the School-Led Total Sanitation (SLTS) which is similar to CtC but specifically focused on educating school children about sanitation and hygiene and encouraging them to spread the knowledge in their homes and communities (Wicken, Verhagen, Sijbesma, Da Silva & Ryan, 2008). The advantages of SLTS include that schools may have better access to funding from the government or other donors, which can be used for SLTS programmes, the rate of progress is fast and the outcomes are sustainable because of children as the lead change agents (WaterAid, 2013; Wicken et al., 2008). There are three main phases involved in child-led management approaches: (a) ignition, which involves training children on sanitation and hygiene, mapping the community and exploring the sanitation cycle; (b) triggering, during which children work

in groups to trigger their schools or communities to take action on sanitation and end open defecation; and (c) post-triggering, when the children are expected to monitor and follow-up the triggered schools and communities, to ensure continuity. Child-led approaches raise concerns for the protection of children from overexploitation or overworking as sanitation change (WaterAid, 2013).

Community-led approaches

Community-led approaches harness the capabilities of communities in the process of co-producing the sanitation goods and services. One example is community management which is the collective ownership and management of infrastructure or facilities for sanitation service delivery by community-based organisations or neighbourhood groups. This is appropriate for labour-intensive operations, and fosters skills acquisition, capacity building, income generation, and a strong sense of community ownership of facilities, requires close-knit community structure and coordination to be successful, and may be unsuitable for sanitation infrastructure or services which require specialised skills without special training of the community members in charge (WaterAid, 2013).

A second example is the community health club (CHC), a voluntary and free community-based membership organisation aimed at improving community health through encouraging the members to practise what they have learned using home assignments and monitored home visits (Waterkeyn & Cairncross, 2005).

A third approach is the participatory hygiene and sanitation transformation (PHAST) which involves using the local languages, situations, and perceptions to promote awareness of the sanitation situation within a community, and empowering the community to develop and implement their own plans to improve services (Malebo et al., 2012; Wicken et al., 2008).

A fourth approach that has gained a lot of ground as an alternative to subsidies (see 5.4.2) is the community-led total sanitation (CLTS) which enables communities (especially in rural areas) to recognise the problem of open defecation and take positive steps to become open defecation free (ODF), through community mapping, walks, and the use of the equivalent of the word 'shit' in the local language to create disgust for open defecation (Harvey, 2011; Kar, 2003; Kar & Milward, 2011; Kar & Pasteur, 2005). This requires skilled facilitators to conduct triggering exercises in communities, strong local institutional capacity, and moving beyond the preoccupation with "open defecators" to also tackle complex issues of power and politics in sanitation governance (Bardosh, 2015; Galvin, 2015). Although CLTS has been

successful in Asia and parts of Africa (Kar & Milward, 2011), communities with prior subsidies have been less responsive to it (WaterAid, 2013).

7.3.4 Suasive

This section discusses four suasive instruments.

Sustainable development goals and other voluntary assessment and reporting mechanisms

The Sustainable Development Goals (SDGs) offers an international framework of a (water and) sanitation goal, targets and indicators, and the Joint Monitoring Programme process for monitoring and reporting progressive realisation of universal access to safely managed sanitation services (see 3.2). The recently released SDGs assessment report, coming two years after the SDGs implementation process commenced, does not report on the SDGs sanitation indicator, that is, the proportion of population using safely managed sanitation services, including a hand-washing facility with soap and water. Rather, it falls back to the MDGs terminology and uses a threshold of 30% to produce global estimates of safely managed services, which is lower than 50% that was used to report on improved facilities in the previous JMP reports; this report also uses 50% as the threshold for global estimates of basic services and states that “[I]n 2015, 2.9 billion people (39% of the global population) used a ‘safely managed’ sanitation service - a basic facility that safely disposed of human waste” (United Nations [UN], 2017, p.6). The lower estimate for safely managed services means that the estimates will be less robust than under the previous JMP reports for improved facilities, under the Millennium Development Goals framework. The 2017 report also does not cover all the indicators, for instance affordability which is an important synergy between the SDGs and the HRS (see 5.3.1).

Three other voluntary assessment mechanisms are: (a) the public expenditure review from the perspective of the water and sanitation sector guidance notes which offers guidelines for analysing the allocation of public funds to the water and sanitation sector (WaterAid, 2013); (b) the Methodology for Participatory Assessments which assesses the link between sustainability, demand-responsiveness, and gender and poverty sensitivity (Dayal, van Wijk, & Mukherjee, 2000); and (c) the Tracking Financing to Drinking Water, Sanitation and Hygiene, which aims to develop and implement a global methodology for tracking WASH financing at the national level, improve national and global systems for collecting and analysing financial flows for the WASH sector (World Health Organization [WHO] & UN-Water, 2015). These three reflect fewer HRS principles than the SDGs.

Education, training and advocacy

Education, training and advocacy materials, like posters, stickers, and other memorabilia, are designed to improve sanitation and hygiene awareness and elevate the global sanitation crisis in the political and development agenda. An example is the ‘Sanitation Resources for Media’, offering infographics, facts, figures, press releases, feature stories, blogs and other practical resources, for use by media professionals in sanitation training and advocacy (The World Bank, 2014; WaterAid, 2013).

Other examples include: (a) Saniya, a hygiene communication campaign focused on improving good practices like hand washing after contact with faeces through home visits, theatre groups, radio programmes, and similar media (WaterAid, 2013); (b) the Menstrual Hygiene Management Knowledge Space (MeHMKS), offering resources for menstrual hygiene training, advocacy and enhanced research strategies (WaterAid, 2013); (c) SaniFOAM, a framework for analysing the determinants of sanitation behaviours classified into three categories: Opportunity, Ability and Motivation, while the F stands for Focus, in order to transform poor sanitation practices (Devine 2010); (d) Self-esteem Associative Strength Resourcefulness Action Planning Responsibility (SARAR), built on strengthening self-esteem, associative strength, resourcefulness, action planning, and a sense of responsibility among local people, to enable them think critically about their sanitation challenges and employ their creative abilities in planning, problem-solving, and evaluation (WaterAid, 2013); (e) Technical Notes for WASH in Emergencies, which consists of illustrated notes providing practical, evidence-based recommendations on 15 key issues relevant for immediate and medium-term WASH interventions in emergency situations, whether caused by natural or human-induced factors (Water Engineering Development Centre [WEDC], 2013).

Sanitation networks

Sanitation networks exist that provide a platform for collective action by private actors. Examples are: (a) WASH Journalist Networks which promotes policy changes and accountability of key stakeholders through media advocacy; (b) Women Leaders for WASH which consists of prominent women from different fields of endeavours with the aim of advocating for improved WASH services, both as individual women and as representatives of the broader constituency they represent; and (c) World Business Council for Sustainable Development (WBCSD) whose members (as well as non-members who have signed up to the

WBCSD WASH Pledge) are committed to providing all employees in all the premises that they directly control with access to safe WASH services (The World Bank, 2014).

Sanitation safety planning manual and technical guidelines

Sanitation safety planning and technical guidelines promote the safe construction, operation, maintenance and repair of sanitation infrastructure. An example is the World Health Organization (WHO) Sanitation Safety Planning Manual which offers a step by step description of how to implement the guidelines for the safe use of excreta, greywater and wastewater, while the standards and guidance for WASH in healthcare facilities provides guidelines for safe, efficient, and environmentally sound methods for the handling and disposal of healthcare wastes in emergency situations and normal settings (World Health Organization [WHO], 2016). Another example is the WHO Guidelines on Sanitation and Health that is designed to raise awareness on sanitation and hygiene especially, which offers a normative basis for sanitation interventions, summarises effective sanitation interventions and provides recommendations for sanitation policy and programme implementation (Sanitation Guidelines, n.d.). At the national and sub-national levels, there are also norms for the safe planning, design, construction, operation and maintenance of sanitation facilities which may not be mandatory except where they are included in the terms of a service contract (see 3.5.5) or in regulatory instruments (see 8.4.2).

7.4 NON-HUMAN RIGHTS FRAMEWORKS, DRIVERS, INCLUSIVE DEVELOPMENT AND LEGAL PLURALISM

This section analyses whether non-HR principles and instruments can address the drivers of poor sanitation services (see 7.4.1) and the implications for inclusive development (see 7.4.2) and legal pluralism (see 7.4.3).

7.4.1 Non-human Rights Frameworks and Drivers

The non-HR principles address twelve direct and four indirect drivers of poor sanitation services, as illustrated in Tables 7.2 and 7.3, respectively.

Principles for addressing the direct drivers

Capacity building, especially when integrated in suasive instruments for education and training on the importance of good sanitation practices and combined with pro-poor instruments, addresses preference distortion, discounting the future, inefficiencies in the tariff system by improving the capacity of the collectors, the exclusion of minorities, non-

acceptance, negative social practices affecting access to sanitation and poor maintenance as a result of inadequate local capacity (see 7.2.1). Subsidiarity also improves knowledge and participation in the sanitation governance process, and can be used to empower minorities and other marginalised groups (see 7.2.1). Poverty eradication and equity address household poverty, unaffordable tariffs and connection fees, exclusion of poor users and distance to the facility by empowering the poor with the necessary resources to invest in household sanitation services and ensuring that the available resources for sanitation are distributed in an equitable manner; for instance, this may be achieved through the use of targeted subsidies for the construction of sanitation facilities (Guiteras et al., 2015). Poverty eradication and equity also address tenure insecurity especially where households are unable to regularise their land titles due to poverty or where informal settlements are excluded from accessing basic services due to their socio-legal status (Dagdeviren & Robertson, 2009; Murthy, 2012). Further, environmental principles like precaution, prevention and polluter-pays address pollution and water scarcity when environmental sustainability is prioritised in the sanitation governance process (de Sadeleer, 2002; Holden et al., 2016). I elaborate on addressing the remaining five direct drivers which are not covered by humanitarian assistance and protection principles (including risk aversion, space constraints, a challenging or inaccessible topography, high temperatures and turbidity in source waters and natural hazard), *vis-à-vis* HRS principles, in Chapter 9.

Table 7.2 Non-human rights principles and instruments for addressing the direct drivers of poor domestic sanitation services

Direct Drivers (see 3.4)	Details of Drivers (see 3.4)	Non-human Rights Principles for Addressing the Drivers (see 7.2)
Economic	Discounting the future	Capacity building
	Household poverty	Poverty eradication and equity
	Preference distortion	Capacity building
	Inefficient tariff collection system	Capacity building Poverty eradication and equity Subsidiarity
	Unaffordable tariffs & connection fees	Poverty eradication and equity
Social	Distance to the facility	Poverty eradication and equity
	Exclusion of minorities	Capacity building Subsidiarity Poverty eradication and equity
	Non-acceptance of sanitation facility	Capacity building Subsidiarity
	Negative cultural practices	Capacity building Subsidiarity
	Poor maintenance culture/ improper use of facilities	Capacity building Subsidiarity
	Tenure insecurity	Poverty eradication and equality
Environmental	Pollution/water scarcity	Precautionary principle Pollution prevention Polluter-pays principle

Source: Compiled by the author, based on Akpabio, 2012; Dagdeviren & Robertson, 2009; de Sadeleer, 2002; Ersel, 2015; Evans et al., 2009; Mader, 2012; Mathew et al., 2009; Poulos & Whittington, 2000; USAID Egypt, 2015

Principles for addressing the indirect drivers

Capacity building, poverty eradication and equity and subsidiarity can address economic drivers like insufficient or poorly targeted funds and inefficient tariff collection system, by harnessing the capacities of the poor, improving their access to assets and resources for sanitation and other basic needs, and improving their participation in the governance process, respectively (COHRE et al., 2008; Kenny & Clarke, 2010; USAID Egypt, 2015). Capacity building can also address national poverty, where local resources, including knowledge and skills, are adapted to meet the sanitation needs of the population rather than relying on predetermined technocratic solutions that may be unaffordable given the national GDP (Zorn & Shamseldin, 2015).

Further, capacity building and subsidiarity can be integrated in suasive instruments for education and training to improve good sanitation practices and enhance the participation of vulnerable and marginalised members (see 7.2.1). DRM can address adaptation to environmental drivers like weather variability, natural hazards, and high temperatures/high turbidity in source water particularly when it is pursued through participatory approaches that involve the affected communities in the disaster risk planning and implementation processes (Vietnam Red Cross, 2011; Samaddar et al., 2017). Further, the precautionary principle obliges States to promote local capacity for climate change adaptation and mitigation measures, even in the face of scientific uncertainties over some aspects of climate change impacts (de Sadeleer, 2002; Holden et al., 2016; Kenny & Clarke, 2010). I further elaborate on addressing the remaining five indirect drivers which are not covered by humanitarian assistance and protection principles (including huge foreign debts; sanctions; insecurity, conflicts and poor social cohesion; mass migration/urbanisation; and population density/growth), *vis-à-vis* HRS principles, in Chapter 9 (see 9.2).

Table 7.3 Non-human rights principles and instruments for addressing the indirect drivers of poor domestic sanitation services

Indirect Drivers (see 3.4)	Details of Drivers (see 3.4)	Non-human Rights Principles for Addressing the Drivers (see 7.2)
Economic	Insufficient/poorly targeted funds	Capacity building Poverty eradication and equity Subsidiarity
	National poverty	Capacity building
Social	Low awareness about sanitation	Capacity building Subsidiarity
Environmental	Climate variability and change	Capacity building Precautionary principle

Source: Akpabio, 2012; de Sadeleer, 2002; Vietnam Red Cross, 2011; Kenny & Clarke, 2010; Munamati et al., 2016; Zorn & Shamseldin, 2015

7.4.2 Non-human Rights Frameworks and Inclusive Development

The implementation of the non-HR principles (see 7.2) and instruments (see 7.3) for sanitation governance in different country contexts can lead to different outcomes for IDID (i.e. see different results in different quadrants of Figure 7.1). Figure 7.1 illustrates how microfinance loans for sanitation services can either promote ID (Q4 in Figure 7.1) or exacerbate one or more forms of exclusion (Q1-Q3 in Figure 7.1); the outcome depends on

whether or not the loans are offered to the poor, marginalised and vulnerable, the borrowers can pay back, and the funded services integrate environmental sustainability. Figure 7.1 also illustrates that indicators which disaggregate data on access to resources and sanitation services based on vulnerability will enhance inclusion better than indicators which only portray the average level of access.

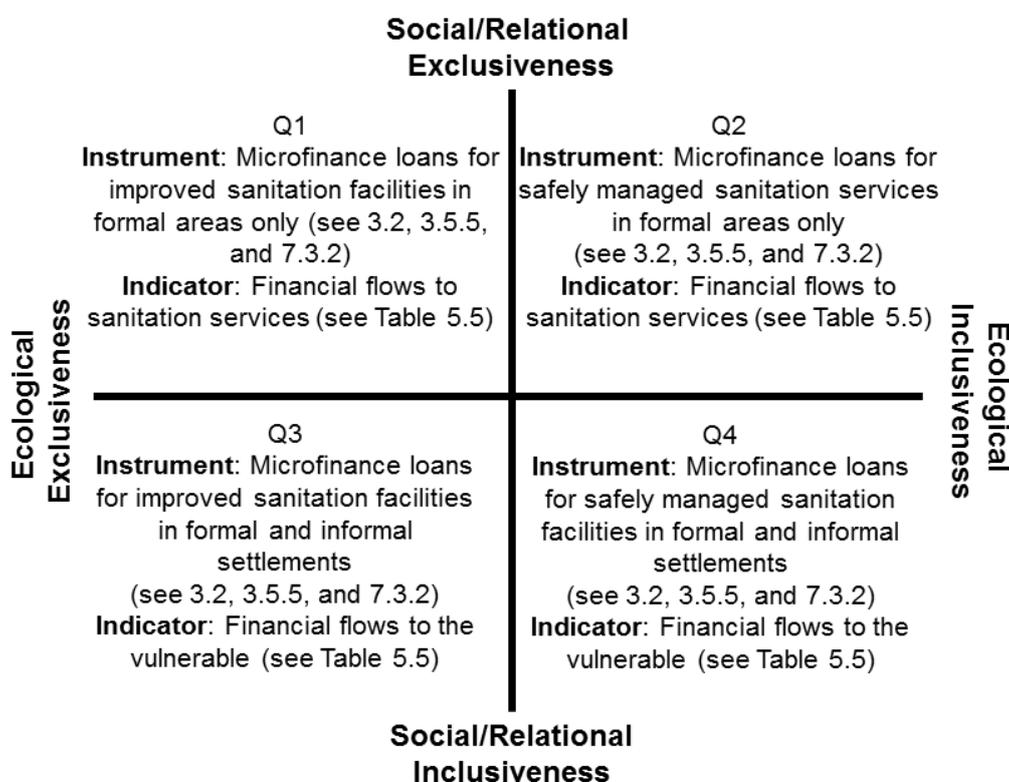


Figure 7.1 Assessing microfinance loans for sanitation services for inclusive development
Social and relational inclusion

Regulatory instruments like the prioritisation of sanitation and hygiene in licensing exemptions and permissible uses of water (see 7.3.1) improve access to water resources for sanitation and related human development benefits, thereby advancing social and relational equity. Economic instruments and market-based approaches provide options for sanitation cost recovery and financial sustainability of service provision to the poor (Jenkins and Scott 2007), and may also be used to promote positive sanitation practices and sanitation services (Evans et al., 2014). At the individual and community level, economic instruments are mainly applicable in stable conditions (for instance within the context of formal and informal settlements) but there is a growing interest in providing people living in humanitarian

situations with non-food items like sanitation and hygiene materials through economic instruments like cash transfers and market based programming that can stimulate the recovery of the local markets (Albu, 2010; Martin-Simpson, Parkinson & Katsou, 2017). However, where economic instruments are poorly targeted (WaterAid, 2015) or solely focused on full cost recovery, this may exclude people who are unable to afford the cost of sanitation services from accessing them, leading to negative externalities for the wider population and the environment (Barlow, 2009; Mader, 2012; Sovacool, 2013). Practices like promoting conspicuous consumption and assaulting the dignity of non-users which commonly occur in sanitation marketing also affect human wellbeing and exacerbate inequalities (Barrington et al., 2017).

Management instruments provide users with an opportunity to participate in the sanitation governance process; through active participation, the users can communicate their unique preferences and challenges to the relevant stakeholders, in order to inform better sanitation policy and interventions and lead to sustainable outcomes (Malebo et al., 2012; Samaddar et al., 2017; Wicken et al., 2008). The participation of the local population can uncover local traditions and practices which may be adapted at low cost to address poor sanitation (McGranahan, 2013). However, participatory approaches without human rights safeguards can be subject to the power structures in communities and still exclude the marginalised and vulnerable who do not participate in the political/policy making process, like residents in informal settlements.

Suasive instruments are useful for creating a learning effect and influencing policy direction and character of actors from the international to the local levels of governance, but they generally lack legal force and require the voluntary compliance of actors. Hence, suasive instruments may need to be supported with regulatory instruments (for instance, mandatory technical guidelines for sanitation safety) to enhance compliance (Majoor & Schwartz, 2015). Suasive instruments also require affordable technology to promote upscaling (Gross & Günther, 2014), and continual monitoring for sustained behavioural changes (Mathew et al., 2009).

Ecological inclusion

Ecological inclusion requires the integration of environmental principles like disaster risk management, precaution, pollution prevention, polluter-pays and sustainable development, in order to operationalize a broad definition of sanitation (see 3.2 and 3.5.5) and meet human sanitation and hygiene needs within ecological limits (Feris, 2015; Holden et al., 2016). Though the SDGs mostly promote social and relational inclusion (Arts, 2017; Gupta & Vegelin, 2016), the SDGs 6 on water and sanitation particularly aims to ensure availability and sustainable management of sanitation services for everyone, safe drinking water, and safely managed water resources; this promotes ecological inclusion.

7.4.3 Non-human Rights Frameworks and Legal Pluralism

The interactions between the HRS and non-human rights frameworks may result in accommodation, competition, indifference, or mutual support (see Table 7.5).

Competition

Competition occurs where tensions between the HRS and non-human rights frameworks lead to HRS violations. For instance, where an insistence on full cost recovery results in a strict requirement for rightsholders to pay the full cost of their sanitation services, including waste treatment services, this may lead to the exclusion of the poorest who cannot afford the cost. Competition also results where the ‘no priority’ of use in Article 10 of the UN Watercourses Convention competes with the priority of human sanitation and drinking needs among water uses (Obani & Gupta, 2014b).

Indifference

Indifference occurs where although the HRS is captured in the non-human rights framework for sanitation governance, the framework does not prioritise access to sanitation for the poor, vulnerable and marginalised rightsholders. Indifference also results where the operationalization of environmental principles like precaution excludes low cost sanitation technologies and shared facilities which may be the more affordable and practical solution in densely populated informal settlements (see 3.5).

Accommodation

Accommodation occurs where efforts are made to adopt HRS principles (see 5.3) in non-human rights frameworks for sanitation governance. An example is where non-human rights principles promote the participation of the poor, vulnerable and marginalized individuals and

groups in sanitation governance. For instance, the sanitation ladder can be used to try to create an opportunity for local stakeholders to participate in the policy process and selection of sanitation technologies (see 3.5.5).

Mutual support

Mutual support exists where: (a) the precaution and pollution prevention principles promote a broad definition of sanitation, and the use of the best available technology for sanitation, irrespective of cost considerations; (b) the polluter-pays principle generates funds for cross-subsidies to enable poor people access sanitation services; and (c) protecting and preserving the marine environment and ecosystems (Part IV of the UN Watercourses Convention of 1997) promotes pollution prevention and the elimination of open defecation (Obani & Gupta, 2014b).

Table 7.4 Types of legal pluralism relationship which arise between the human right to sanitation and non-human rights principles

Legal Pluralism Relationship	Description of the Relationship
Competition	Where the polluter-pays principle results in the exclusion of the poor from accessing sanitation services due to their inability to pay; the ‘no priority’ of use in article 10 of the UN Watercourses Convention competes with the priority of human sanitation and drinking needs among water uses
Indifference	Where a non-human rights framework captures HRS principles but excludes low cost and shared sanitation facilities needed by vulnerable and marginalised rightsholders, for instance under the MDGs where shared facilities were strictly considered unimproved
Accommodation	Where the sanitation ladder is used to try to create an avenue for local stakeholders to participate in the policy process and selection of sanitation technology
Mutual Support	Where the polluter-pays principle generates funds for cross-subsidies to enable poor people access sanitation services; non-human rights instruments like the UNECE Water Protocol contain obligations for water supply and sanitation services; protecting and preserving the marine environment and ecosystems (Part IV of the UN Watercourses Convention) promotes pollution prevention and the elimination of open defecation

Source: Compiled by the author, based on Bavinck & Gupta, 2014; de Sadeleer, 2002; Heijnen et al., 2015a, 2015b; Klasing et al., 2011; Obani & Gupta, 2016; UN, 2017

7.5 INFERENCES

This chapter yields five inferences. First, the non-HR framework for sanitation governance offers seven (three social, four environmental) principles that mainly stem from environmental law (see 7.2). The environmental principles are increasingly recognized in international customary law *inter alia* (see Table 7.1). The social and relational principles are still emerging in international law but have gained wide acceptance in international development practice. Also, the non-HR framework significantly offers environmental principles which may be supportive of the predominantly social and relational principles of the HRS in practice.

Second, non-HR principles address eighteen drivers of poor sanitation services, which is more extensive than the HRS and the humanitarian frameworks. This potential mainly stems from the wide array of environmental principles that is lacking in the previously considered frameworks (see Chapters 5 and 6). Nonetheless, the non-HR principles that are devoid of a relational component (with the exception of poverty eradication and equity) may exacerbate inequities in access to sanitation and therefore need to be complemented with the HRS to reduce contradiction.

Third, because the non-HR principles stem from different normative foundations and have varying legal status in international law, there is a potential for trade-offs in the absence of rules to address incoherence or contradictions in the implementation process. For instance, the improvement of living standards based on the principles of capacity building and poverty eradication and equity could improve access to sanitation where household poverty is a driver, but undermine sustainable development in the absence of measures (like progressive pricing) to curb unsustainable human consumption patterns and environmental degradation. This makes it important to design sanitation governance instruments based on a good understanding of the drivers of poor sanitation services in each context, the interplay between the non-human rights principles, and the suitability of the principles for addressing each driver without undermining other principles.

Fourth, in addition to the internal rules incoherence in the implementation of non-HRS frameworks for sanitation governance, non-HR principles can result in improved access to sanitation, yet compound the drivers of poor sanitation services and even mask HRS violations. For instance, applying the requirement for sewerage treatment (which supports the HRS principle of safety) to the JMP definition of access to improved sanitation facilities

drastically reduces the estimate of people who had access to improved sanitation in 2010 from 4.3 billion as estimated by the JMP to 2.8 billion only (Baum et al., 2013).

Fifth, the effect of the non-HR framework on ID ultimately depends on the context and how they are used. Instruments focusing only on increasing coverage to sanitation services for the poor, for instance, without integrating environmental sustainability would fall within the top-left quadrant if they simultaneously increase equity (see Q1 in Figure 7.1) or the bottom-left quadrant if they simultaneously increase inequity due to failure to prioritise the poor (see Q2 in Figure 7.1). Similarly, economic instruments that are administered without consideration of social and relational inclusion may also be counterproductive for inclusive development (see Q3 in Figure 7.1). Management instruments that promote the participation of vulnerable people without the integration of environmental sustainability result in ecological exclusion, while those that integrate environmental sustainability promote ID (see Q4 in Figure 8.1).