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

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## Chapter 9. Human Right to Sanitation and the Inclusive Development Imperative

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### 9.1 REVISITING THE RESEARCH QUESTIONS

If the human right to sanitation (HRS) is incorporated within the human right to water, it will not get the special attention it needs for meaningful implementation (see 1.3.1). It is implied from the International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR). It is also increasingly recognised in other legal instruments and political declarations at various levels of governance, both expressly and implicitly, as illustrated in Chapters 5 and 8. Nonetheless, over 4 billion people around the world lack access to safely managed sanitation facilities due to reasons that are not confined to sanitation laws and policy frameworks. Rather, the drivers of poor sanitation services also include economic, environmental and social factors that may affect access to sanitation services either directly or indirectly. Further, there are parallel sanitation governance principles operating alongside the HRS norm. In order to ensure that the HRS is not just rhetoric, especially for the people living without access to safely managed sanitation facilities, it is therefore important to go beyond a traditional legal analysis and explore the performance of the HRS and the drivers (see 3.4) which affect access to sanitation in practise; that is what I have attempted in this thesis. Given the potential contradictions between the HRS and other non-human rights instruments, including principles, for sanitation governance, as evident from the case study, it is also important for sanitation governance to be guided by an overarching norm that ensures universal access to sanitation without compromising on environmental sustainability. For this purpose, I selected inclusive development (ID) as the overarching norm for my analysis in this thesis, and my main research question is: *How can the human right to sanitation be interpreted and implemented to promote inclusive development?* I answer the main question based on my research findings on the five research questions already addressed in the previous Chapters:

- (i) What are the drivers of poor sanitation services and how are these currently being addressed in sanitation governance frameworks?
- (ii) How has the human right to sanitation evolved across different levels of governance, from international to local; how do the human right to sanitation principles address the drivers?

- (iii) Which humanitarian law and any other non-human rights instruments, including principles and indicators, for sanitation governance promote the progressive realisation of the human right to sanitation, through addressing the drivers of poor sanitation services?
- (iv) How does legal pluralism operate in sanitation governance, with the implementation of the human right to sanitation, alongside non-human rights instruments and principles?
- (v) How can the human right to sanitation institution be redesigned to advance ID outcomes across multiple levels of governance?

## **9.2 ADDRESSING THE DRIVERS OF POOR SANITATION SERVICES**

This section partly cumulates the findings on the first three sub-research questions to show that the HRS does not currently address the main economic, social and environmental drivers of poor sanitation services. However, it is critical for the HRS to address these drivers because the problem of poor sanitation services is not a purely legal issue but arises from a combination of factors within the economy, the physical environment and society generally (see 3.4). The analysis in Chapter 3 highlighted twenty-six economic, environmental and social drivers, but the HRS potentially addresses sixteen drivers that are linked to poverty and discriminatory practices. It does this only in a formal legal sense, by obliging States, as the primary duty bearers, to respect, protect and fulfil the HRS for the unserved and underserved population within their jurisdictions while also supporting the fulfilment of the right for populations outside their jurisdictions. For instance, with increasing population and other anthropogenic factors creating pollution and exacerbate water scarcity, governance instruments enshrining HRS principles like sustainability and safety impose an obligation on duty bearers to avoid causing pollution and water scarcity (relevant to people who rely on wet sanitation systems). However, this addresses the drivers only to a limited extent because the HRS is mainly anthropocentric and does not sufficiently address sustainability and safety from an ecocentric perspective (Feris, 2015). This approach has practical limitations, and does not address important environmental drivers (challenging or inaccessible topography, natural disasters, high temperatures/turbidity in source water and climate variability and change), and partially addresses economic drivers (excluding discounting the future, preference distortion, risk aversion), and social drivers (excluding space constraints, insecurity, conflicts and poor social cohesion, mass migration/urbanisation) which affect the poor, marginalised and vulnerable populations lacking the resources to address these drivers privately.

The HRS, rooted as it is in the ICESCR, mainly focuses on economic and social (including political) drivers, as reflected in the HRS instruments, including the principles, examined in Chapter 5. For instance, while the HRS requires affordable access to sanitation services and this can be achieved through progressive pricing, the HRS neither specifies the threshold for affordability nor requires States to provide free sanitation services for the poor. The case study (Chapter 8) further illustrated the tensions between affordability of sanitation services for the poor and neo-liberal policies (like cost recovery) where there is no efficient system of cross-subsidies in place. Hence, the HRS as currently formulated does not sufficiently address the environmental drivers of poor sanitation services, and it only addresses the economic and social drivers to a limited extent (Interviewee 44, July 24, 2014). Table 9.1 illustrates the impact of the HRS principles and non-HR principles on the drivers and the outstanding drivers that are not addressed by the principles.

The HRS is very important for addressing drivers that are linked to poverty, vulnerability and marginalisation among individuals and households and offers mechanisms for legal redress for those whose basic sanitation needs are not being met. This makes it important for the HRS to be expressly recognised in national laws and policy documents, for the benefit of the local population (see 9.3.1). The drivers affect individuals and households in formal and informal settings, and humanitarian situations who generally lack the capacity to invest in sanitation infrastructure, and therefore require the support of the State and/or humanitarian actors (in the case of humanitarian situations) in order to realise their right. Hence, the HRS framework can be more effective against the drivers by adopting a comprehensive response to the various causes and forms of discriminatory practices which may include poverty and additional factors that may vary from one setting to another. In addition to the HRS, there are principles for humanitarian assistance and environment and water management that can address some of the drivers to some extent as illustrated in Chapters 6, 7 and 8. Technology is also very important for countering environmental drivers (like challenging topography and high temperatures and turbidity in source water), and social drivers (like weak power infrastructure and space constraints). Urban planning and demographic policies may also be crucial for addressing the social drivers. This means that in order to address the drivers of poor sanitation services, the HRS framework needs to be redesigned to also include or take into account a variety of instruments and principles for addressing the outstanding drivers and this may require complementary non-human rights instruments, including technology, as illustrated in the case study chapter (see 8.6). Hence, redesigning the HRS to be more

effective for addressing a wider variety of drivers has implications for the definition of the HRS and pluralism in sanitation governance.

Table 9.1 Impact of the human right to sanitation and other principles on the drivers of poor sanitation services

Drivers		Impact of the Principles			
		HRS (see 5.6)	Humanitarian Assistance (see 6.6)	Non-human Rights (see 7.4)	Case Study (see 8.5)
<i>DIRECT</i>					
Env.	Challenging or inaccessible topography	-	-	-	-
	High temperatures/high turbidity in source water	-	-	+	-
	Natural hazards	-	-	+	-
	Pollution/water scarcity	+	+	+	+
Eco.	Discounting the future, especially among poor people	-	-	+	-
	Household poverty	+	-	+	+
	Inefficient tariff collection system	+	-	+	+
	Preference distortion affecting WTP	-	-	+	-
	Risk aversion	-	-	-	+
	Unaffordable tariffs & connection fees	+	-	+	+
Soc.	Distance to the facility	+	+	+	+
	Epileptic power supply	-	-	-	-
	Space constraints	-	-	-	-
	Tenure insecurity	++	-	+	+
	Non-acceptance of sanitation facility based on culture	+	+	+	+
	Negative cultural practices	+	+	+	+
	Exclusion of minorities from accessing services	++	+	+	+
	Poor maintenance culture/improper use of facilities	+	+	+	+
	Nonchalance	+	-	+	+
<i>INDIRECT</i>					
Env.	Climate variability/change	-	-	+	-
Eco.	Insufficient/poorly targeted funds	+	+	+	+
	Huge foreign debts that limit public spending	+	-	-	-
	Sanctions affecting the sanitation sector	+	-	-	-
	National poverty	+	+	+	+
Soc.	Population density/growth	-	-	-	+
	Low awareness about sanitation	+	+	-	+
	Mass migration	-	-	-	-
	Insecurity, conflicts and poor social cohesion	-	+	-	-
	Uncontrolled urbanisation	-	-	-	+
Env. = Environmental; Eco. = Economic; Soc. = Social - = Driver is not addressed by the principles; + = Driver is partially addressed by the principles ++ = Driver is fully addressed by principles					

### 9.3 GOING BEYOND THE CURRENT STATE OF THE LAW

This section expands on the current legal conception of the HRS in view of the limitations of the right in addressing the drivers (see 9.2). It expands on the emergence of the HRS as a distinct right (see 9.3.1), the meaning of the right (see 9.3.2), the economic nature of sanitation goods and services as it affects the implementation of the HRS (see 9.3.3), and the indicators for measuring the performance of the HRS (see 9.3.4).

#### 9.3.1 Emergence of Sanitation as Distinct Human Right

My first argument is that sanitation has emerged as a distinct human right, at least in international law. This is because it can be implied from the ICESCR and it is expressly recognised and supported by various international law instruments. Chapter 1 of this thesis shows that although sanitation is historically linked to water quality, there are strong arguments for and against delinking the human right to sanitation from the human right to water (see 1.2.2). Chapter 5 showed three approaches to recognising the HRS in international law: (a) as an implied right linked to express International Covenant on Social and Cultural Right 1966 (ICESCR) provisions like the rights to health and adequate standard of living, (b) as an implied right necessary for ensuring water quality and the realisation of the human right to water, and (c) as an independent right with a legal basis in the ICESCR. It also showed alternative interpretations of the HRS at the international and national levels, with examples from Guinea Bissau, South Africa and the United Kingdom.

There are three advantages of formal recognition. First, the human rights framing creates an unarguable narrative with legal appeal which can be a useful tool for lobbyists, and gives more weight to legal arguments for enforcement or redress in case of violations especially when the right is formally recognised in hard law sources like national constitutions.<sup>285</sup> Although as stated by the High Court of South Africa in the case of *Mandla Bushula v Ukhahlamba District Municipality*,<sup>286</sup> socio-economic rights (issuing from the ICESCR, 1966 which is the main legal basis for the recognition of the HRS in international and national legal frameworks) do not entitle rightsholders to immediate access to core services, they oblige the State to take reasonable measures for progressive realisation of HRS norms and immediate fulfilment of HRS core obligations using the maximum available resources (see 4.4.1, 4.4.2, 5.3.1, 5.4.3, 5.4.5 and 5.5.1). The ICESCR prohibits denying people access to the

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<sup>285</sup> Interviewees 29, 32, 34, 37 and 42.

<sup>286</sup> [2012] High Court (Eastern Cape Division) 2200/09, [2012] ZAECGHC 1.

Covenant rights due to their land tenure status, and this is important to protect people living in informal settlements, for instance (see 5.2.3). Second, the human rights framework sends a strong message for global attention to the sanitation crisis and introduces new actors that can both pressure States and provide support for progressive realisation.<sup>287</sup> For instance, as part of the human rights framework, international organisations like the WSSCC and various NGOs introduce more avenues for funding and technical support, information, private public partnerships, and technological innovation. Third, the HRS potentially improves the quality of life of the billions of people without access through its binding immediate and continuous obligations, especially vulnerable and marginalised people.<sup>288</sup> Hence, people living in otherwise ‘less visible’ conditions (like informal settlements and protracted crisis or humanitarian situations) may be empowered through the formal recognition of the HRS to seek judicial redress in case of actual or threatened violation of the right.

Chapter 8, the case study chapter, specifically demonstrated that in the absence of express recognition of the HRS in domestic laws, there are at least two alternative approaches for recognising the HRS within the domestic legal framework, namely: (a) as an implied right based on obligations imposed by international law and supported by the national legal framework in recognition of State sovereignty; and (b) as an implied right based on related economic, social and cultural rights that are expressly contained in national legislations. Taking a cue from the right to water, independent recognition causes weak enforcement and poor development of the normative aspects of the right (Obani & Gupta 2015). The case study showed three limitations of the implied recognition of the HRS: (a) fragmentation in sanitation governance, especially in urban areas, (b) lack of shared meaning about the HRS among actors, and (c) incoherence in the implementation of sanitation governance principles, sometimes leading to contradictory outcomes. The case study also illustrated how three theoretical arguments in support of the continued combination of the human rights to sanitation and water, namely, that the combination: elevates the HRS in the development agenda,<sup>289</sup> improves water quality,<sup>290</sup> and provides the water needed for sanitation and hygiene purposes,<sup>291</sup> fail. This is largely because wet sanitation systems are not suited to the local context due to drivers like pollution, drought, natural hazards and epileptic power supply affecting the operation of water pumps. There are also equity issues resulting from

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<sup>287</sup> Interviewees 23, 25, 26, 27, 28, 30, 35, 37, 39 and 40.

<sup>288</sup> Interviewees 24, 31, 33 and 39.

<sup>289</sup> Interviewees 1 and 11.

<sup>290</sup> Interviewee 2.

<sup>291</sup> Interviewees 10 and 11.

trade practices like virtual water transfers which can create water stress for poorer exporters (Wang et al., 2014) and reduce availability for low price local personal and domestic sanitation needs among people who rely on wet sanitation systems (Feng et al., 2012); these issues are also not currently fully addressed by the sanitation governance framework and requires support through non-sanitation policies and governance frameworks.

Hence, I argue that if the HRS is to be meaningfully implemented, it needs to be expressly recognised as an independent right at different levels of governance, in order to facilitate further development of the normative aspects and clarity in implementation. Hence, if the HRS is to be successfully implemented, this could require:

- (a) formulating a legal interpretation of the human right to sanitation, perhaps through a UN Human Rights Council Resolution, which clearly defines the scope and content of the right, as well as the role of various stakeholders in ensuring progressive realisation;
- (b) recognising an independent human right to sanitation within national frameworks and the resolution of rules incoherence between the human rights principles and other existing sanitation governance principles, and the development agenda generally; and
- (c) strengthening the synergies between the HRS and other aspects of law and development policy in order to counteract the negative taboo and other cultural drivers that are unique to sanitation.

### **9.3.2 Deconstructing the Meaning of the Human Right to Sanitation**

My second argument stems from the fact that the HRS presupposes a clear understanding of the meaning of sanitation which is not the case in practise. Beyond excreta containment, there seems to be few similarities in the meaning of sanitation adopted by various stakeholders. Rather, the lack of synergy between human rights scholars, other sanitation experts, policymakers and technocrats has resulted in the development of parallel definitions of sanitation without a common understanding of what the terms used mean (see Chapters 3, 5, 6 and 7).

Chapters 3 and the case study (Chapter 8) already highlighted contestations in the meaning of sanitation which make the implementation of the HRS complex. The definitions range from simply ‘sanitation’ as mentioned under the Sustainable Development Goals Target 6.2, through ‘basic sanitation’, ‘improved sanitation’, or ‘environmental sanitation’. At the micro-level, there is also little convergence in the usage of each of these terms by stakeholders as



shown in the case study. There is also a prevalence of technocratic approaches to defining sanitation and sanitation service levels based on access to various technologies for excreta management, for instance (see 3.5), and the individualistic nature of the HRS appears more amenable to the narrow definition of basic sanitation or simply access to toilets for personal sanitation and hygiene needs. Conversely, international humanitarian law framework for WASH integrates water supply, excreta disposal, vector control, solid waste management, and drainage. States also interpret the HRS differently (see 5.3) and this affects the nature of their obligations for the fulfilment of the HRS both within their immediate jurisdiction and extraterritorially. Where national policies prioritise the safe collection, removal, disposal or purification of human excreta, domestic wastewater and sewage from households, including provision to informal settlements, as is the case with the Water Services Act 108 of 1997 (South Africa), this is more likely to support ID than a policy which focuses on a system for the treatment and disposal or reuse of human sewage and associated hygiene but does not require the collection and transport of human waste and also allows for cost recovery without equal emphasis on instruments that ensure access for the poor and other vulnerable group, for instance the UK's Sanitation Statement (see 5.2). Thus, national and local strategies may be at odds with the international HRS norms, thereby resulting in HRS violations (see 5.6 and 8.5). Similarly, in humanitarian situations, the lack of shared meanings between human rights actors and international humanitarian actors also increases the likelihood of HRS violations despite increase in sanitation coverage (see 6.6).

Further, within the Nigeria case study, national policies like the National Policy on Water Sanitation Policy 2004 and the National Environmental Sanitation Policy 2005 either define sanitation narrowly or broadly, influenced by external partners. Nonetheless, based on the predominantly technocratic definition of improved sanitation among key stakeholders involved in sanitation interventions, sanitation studies and statistics in Nigeria have been focused on either household access to excreta containment, hand washing and in some cases vector control, in rural and urban areas, or access to sanitation facilities in schools. My analysis shows that a technocratic definition of sanitation which narrowly focuses on a predefined set of technologies or limited sanitation components, rather than ensuring a sustainable sanitation system, puts the social, relational and ecological components of ID at risk (see 3.5, 4.4, 4.5, 5.5, 5.6, 6.6 and 8.5). The divergent interpretations of the HRS also reduce its normative value and require clearly defined indicators for measuring violations at

multiple levels of governance, to avoid the paradox of social, relational and ecological exclusion following the recognition of the HRS by stakeholders.

In order to advance ID, the definition of the HRS could build on the strengths of broad definitions of sanitation, like the WSSD's (see 3.2) and the conceptions of environmental sanitation that were encountered in the case study (see 8.2.4), to expand the definition proffered by Catarina de Albuquerque (former Independent Expert, and former Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation from 2008-2014), and reinforce the relevance of the HRS for addressing the drivers of poor sanitation services. The HRS principles may also be expanded by incorporating elements of sanitation governance from other fields, as illustrated in Box 9.1. Clearly the needs will be different in different contexts and to address these different needs would require a space for contextual elaboration through participatory instruments like a functional sanitation ladder (see Figure 3.2), other complementary rights regimes, and non-HR policies which advance social organisation, local justice struggles, and the renegotiation of state-citizen relations. It is therefore important for human rights scholars to clearly define the HRS to include not only legal norms but also to reflect the following elements at a minimum:

- (a) define the scope of sanitation services to include both private and public spaces and humanitarian situations, in view of the importance of sanitary conditions outside the household in relation to human wellbeing and the integrity of ecosystems;
- (b) emphasize equitable access to sanitation services, sustainable financing and participatory governance approaches; and
- (c) integrate all the services required to ensure the safe management of wastewater, solid waste, stormwater, and all other waste streams, including containment, collection, transportation (including sewerage networks), treatment and disposal or reuse, as relevant, through environmentally sustainable instruments.

### **9.3.3 Establishing the Economic Characteristics of Sanitation Goods and Services**

My third argument centres on the divergent understandings of the economic nature of sanitation which has inadvertently increased emphasis on neo-liberal policies for sanitation marketing and enabled a predominantly technocratic response to sanitation problems, thereby denying access to the poor and vulnerable and marginalised people. The literature describes sanitation as a public, private, and/or merit good (see 3.3), while the classification of water as an economic good in policy documents also affects sanitation users who rely on wet systems.

A public good presents a collective action problem because it is both non-excludable and non-rivalrous, while a private good is both excludable and rivalrous, and merit goods are goods that may be provided by the State directly or through a system of incentives to counter the inherent preference distortion which affects private investments. My analysis shows that while sanitation taken as a whole presents user-distortion problems because of the availability of unhygienic (but seemingly free) alternatives like open defecation, the various components of sanitation infrastructure may be further classified as public, common, toll or private goods (see 3.3). Although the rich users may be able to afford the necessary investments for private sanitation goods like toilets connected to sewage systems, vulnerable people like residents in informal settlements generally lack the (legal) capacity and financial or technical resources to make similar investments. The provision of public sanitation goods like sewer networks also demands the intervention of the State. Conversely, the privatisation of sanitation services in poor countries with weak regulatory systems also exacerbates inequities in access where full cost recovery is emphasized without legal protections for the users. This is because the governance of sanitation goods as purely private goods hinders poor households from assessing sanitation, just as the commodification of sanitation technology would hinder poor households and countries from assessing sanitation technology which they may need.

In the case study, national policies on sanitation are influenced by external partners to recognise sanitation as an economic good while the local people mainly accentuate the public good nature of sanitation and the need for State provision or regulation of non-state providers to ensure equitable access, at the very least (see 8.2). The commercialisation of low cost but limited sanitation services for the poor externalizes environmental pollution and limits the future access to clean water and environmental sustainability. The provision of more sophisticated technology for the rich improves access without reducing inequities in coverage and may also externalise negative ecological impacts (see 8.5). These are some examples of how the economic classification of sanitation goods can either create or exacerbate the drivers of poor sanitation services (see 3.4). I therefore argue that in the light of the negative externalities of poor access to sanitation services (see 1.2) and how these are capable of affecting users and non-users, as well as the environment, sanitation goods and services could be primarily regulated as public good to promote the human right. Although the HRS does not dictate any economic model for the provision of sanitation, the public goods nature of sanitation eschews full reliance on neo-liberal economic instruments to ensure universal access. The complexity of classifying sanitation as an economic good mirrors the pluralistic

foundations of sanitation governance and the interactions between different principles (including the HR and neo-liberal principles). In order to advance a public goods discourse, sanitation policies and programming could as a minimum:

- (a) delink the provision of sanitation services and universal service coverage from legal ownership and property rights in order to minimise negative externalities from non-users;
- (b) target sanitation governance instruments to ensure service expansion and universal access, with a focus on the poor, vulnerable and marginalised populations within the society. This may be achieved through a combination of instruments like free access to basic sanitation services in informal settlements (see 5.4.1) and cross subsidies for poor users (see 5.4.2), rather than restricting service coverage and subsidies to formal settlements like I recorded in the case study (see 8.4). Nonetheless, an important instrument that emerged from the case study is the use of financial palliatives to bridge the shortfalls in tariff collection in informal settlements in the short term, to encourage service provision by the private sector; and
- (c) prioritise access to sanitation as an immediate survival need in humanitarian situations and deemphasize cost recovery from victims living in humanitarian situations especially during the immediate aftermath of an emergency or other forms of disasters which affect human livelihoods.

### **9.3.4 Indicators for Measuring and Evaluating the Performance of the Human Right to Sanitation**

This section builds on the literature review chapters and case study to propose indicators that can be adapted by local stakeholders, for monitoring compliance with the HRS at the national and sub-national levels of governance. It therefore builds on my findings in response to the question of: Which (human right to sanitation), humanitarian law and any other non-human rights principles, instruments and indicators for sanitation governance promote the progressive realisation of the HRS, through addressing the drivers of poor sanitation services? First the section provides an overview of the indicators I am proposing for monitoring compliance with the HRS (see 10.4.1), then it recommends how to adapt this proposal at the national and sub-national levels for developing countries with nascent structures for monitoring the HRS, using the outcome of my sector analysis in the case study as an example without intending to be prescriptive (see 10.4.2)

***Methodology for developing the proposed indicators***

I followed three steps in formulating the indicators which I propose below. First, I identified 13 principles of the HRS in Chapter 5. I regard these principles as the attributes of the HRS for the purpose of developing the indicators which I propose. Next, I elaborated on the specific content of each of the principles in practical terms, drawing from additional complementary principles which I encountered in the literature and my case study (see Table 9.2). Third, I evaluated the existing indicators used either directly or indirectly to measure access to sanitation<sup>292</sup> and the development of indicators for the human right to water and sanitation by scholars, in order to determine their relevance for monitoring compliance with the elaborated HRS principles (see Table 10.2). This was a helpful starting point because sanitation already exists as an indicator for some other related economic, social and cultural rights, like health and adequate housing, with more advanced monitoring processes. In the process, I realised that some aspects of the HRS principles require contextual information which cannot be translated into percentages *per se* (like compliance with procedural and substantive safeguards that need to be met to justify service disconnections). Hence, my proposal includes a mix of qualitative and quantitative indicators. I cluster the indicators into three types below: structural, process, and outcome indicators, in order to reflect the tripartite obligations (respect, protect and fulfil) imposed by the HRS on States and relevant non-State actors.

Although indicators are critical at every stage of the lifecycle of policies, from formulation through legitimisation, implementation, evaluation and change, my preoccupation is with the implementation stage or compliance, given that the HRS is now widely recognised in formal and informal legal orders at multiple levels of governance (see Chapters 5, 6, 7 and 8). Nonetheless, the inclusion of the HRS and the prioritization of vulnerable groups in the legal framework may be a deceptive indicator of progress where the inclusion of the HRS in the law does not translate into improved services for rightsholders, including the poor, vulnerable and marginalized individuals and groups.

The potentials of the HRS may not be achieved despite formal recognition of the right in the legal framework, for a number of reasons. First, the fragmentation of responsibility for

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<sup>292</sup> This refers to the indicators covered in Chapter 5 that are already in use by human rights bodies like the Office of the United Nations High Commissioner for Human Rights (OHCHR), and international development actors like the UN-Water Global Analysis and Assessment of Sanitation and Drinking-Water (GLASS) and the post-2015 World Health Organization and UNICEF Joint Monitoring Programme (JMP) for monitoring the Sustainable Development Goals indicators for sanitation.

sanitation between government ministries, departments, and agencies, and the resulting poor monitoring and enforcement hampers the implementation of the HRS at the national and sub-national levels (COHRE et al., 2008). Second, there is also the problem of legality and non-prioritisation of *informal settlements* in service expansion plans (COHRE et al., 2008; Katukiza et al., 2012). Third, the local and national sanitation sector may be too weak to provide the necessary leadership and support for sustainable services (COHRE et al., 2008). Fourth, non-sanitation policies such as prohibitive zoning policies may prevent the necessary investment in sanitation infrastructure, irrespective of the recognition of the HRS in the relevant legal frameworks (Solo et al., 1993). Fifth, even where the necessary investments are made, it is often on an ad hoc basis, subject to the availability of funds or even actual political will without promoting any clearly defined and detailed overarching long-term strategy (Parkinson et al., 1998). Sixth, tenure insecurity and the underlying power issues especially where service providers are not legally obliged to extend their coverage to people without legal title to their land indirectly limit household investment in and/or access to sanitation infrastructure and force the poor to rely on often unregulated and more expensive informal services for their basic needs in informal settlements (Chaplin, 1999, 2011; Scott et al., 2013). Seventh, in the context of emergencies and humanitarian situations, lack of a rapid assessment mechanism generally limits the ability of humanitarian organisations to provide high quality responses locally (Veeramany et al., 2016; Zakari et al., 2015).

Additionally, in the light of the prevailing drivers, monitoring financial flows and other resources dedicated to the vulnerable, inequities reduction, budgetary strategies, direct and indirect discrimination, and monitoring the proportion of the targeted population that was extended sustainable access are some aspects of the HRS principles which could require quantifiable indicators in addition to the formal recognition of the HRS in the legal framework. The number of vulnerable people who effectively participate in the sanitation governance process, and who are aware and capable of accessing mechanisms for complaining about sanitation services and the justiciability of the HRS also creates a clearer indication of progress towards the HRS (de Albuquerque, 2014).

Some authors have previously proposed the adaptation of existing monitoring mechanisms, like the JMP-post 2015 under the Sustainable Development Goals framework and/or the GLAAS reporting mechanism, in order to monitor the realisation of the human right to water and sanitation (Baquero et al., 2015; Giné-Garriga et al., 2017; Meier et al., 2017). While the existing platforms and supporting literature offer a pool of viable indicators that are

technically sound and would enjoy a high level of national coverage with frequent updates, they do not sufficiently capture the unique aspects of HRS principles that are different from the human right to water. I also supplement the foregoing with additional information that is not sufficiently captured in the existing mechanisms for monitoring assess to sanitation or the proposed indicators in the scholarly literature (including an extended analysis of the direct and indirect drivers of poor sanitation services, the underlying attitudes of the stakeholders towards the HRS uncovered in the case study, a legal pluralism diagnostics of rules incoherence at different levels of governance).

The indicators for acceptability, accessibility, accountability, affordability, availability, dignity, extra-territorial obligations, safety and sustainability emerge from the literature review and content analysis and inductive analysis of the HRS framework. The remaining indicators are selected from the existing human development monitoring frameworks: (a) Gini coefficient which ordinarily measures the disparity in the distribution of income among individuals or households within a country from a perfectly equal distribution (represented by a value of 0) to absolute inequality (represented by a value of 100), with 40 as the threshold adopted by the United Nations Human Settlements Programme, could serve as a proxy indicator of fair distribution of resources to counter direct economic drivers like household poverty; (b) Human Development Index (HDI), a composite index that measures life expectancy, education and per capita income which are some of the real life issues affected by poor sanitation services (see Section 1.2); (c) The Economists Intelligence Unit Democracy Index, a composite index that measures participation in electoral process and pluralism, civil liberties, the functioning of government, political participation and political culture from around 167 countries across the world and thereby serves as a proxy indicator of participation in democratic processes which is important for realizing the HRS; and (d) the World Justice Project Rule of Law Index, which ordinarily scores and ranks the rule of law in different countries based on eight factors, including: constraints on government powers, absence of corruption, open government, fundamental rights, order and security, regulatory enforcement, civil justice, and criminal justice, can serve as a proxy indicator of HRS principles especially the rule of law.

#### ***Structural, process, threshold and outcome indicators***

Following the methodology I have outlined, I propose a fuller set of indicators in this thesis that allow the measurement of structures (environmental factors or resources invested and the qualities of the affected population), processes (the approaches adopted), outputs (quantity or

quality of goods and services produced and the efficiency of the production process) and outcomes (impact of the outputs) indicators. Without intending to be prescriptive, I also propose threshold indicators that can individually serve as a quick signal of poor compliance with the HRS principles and the exclusion of disadvantaged rightsholders within a given reporting period, for instance in the past year. Further, I deliberately cluster the indicators to enhance their use for evaluating: (a) general commitment of (State and non-State) duty bearers to realising human rights standards through structural indicators, (b) measures taken including instruments for translating the commitment into policies and interventions through process indicators, and (c) the impact of the measures and instruments on the un-served and underserved population through outcome indicators.

To ensure a viable number of indicators, I propose one cross-cutting structural indicator for the HRS, and one process and one outcome indicator for each of the thirteen HRS principles (see Table 9.2). The structural indicator is: recognition of the human right to sanitation and the prioritisation of vulnerable groups in the legal framework. This indicator can be measured through the GLAAS reporting mechanism. The remaining indicators are drawn from the literature and the Sustainable Development Goal (SDG) framework. I found the SDG indicators to be especially relevant for monitoring availability (through SDG Targets 6.2.1), extra-territorial obligations (Target 6.5.2, 6.a.1), participation (6.b.1), safety (Target 6.3.1) and sustainability (Target 6.6.1). The integration of indicators from the GLAAS and SDG framework improves the monitoring of access to sanitation in at least two ways. First, the GLAAS and SDG indicators are technically sound and (will) enjoy a high level of national coverage with frequent updates. Second, the wider set of indicators proposed for the HRS in this thesis would also enrich the monitoring of access to sanitation at the micro level, from a predominantly relational perspective rather than relying on averages.



Table 9.2 Proposed process and outcome indicators for the human right to sanitation

PRINCIPLES	PROCESS INDICATORS	THRESHOLD INDICATORS	OUTCOME INDICATORS
<b>Acceptability</b>	Involvement of disadvantaged rightsholders* in the choice, design & implementation of sanitation interventions	80% of disadvantaged rightsholders assured of complete privacy, comfort and dignity <sup>a, b, d</sup>	100% increase in the proportion of sanitation facilities that are adaptable to the special needs of disadvantaged rightsholders, compared to advantaged rightsholders
<b>Accessibility</b>	Design, operation & maintenance of sanitation facilities for full access by disadvantaged rightsholders	80% increase in favour of disadvantaged rightsholders <sup>a, b, d</sup>	100% increase in the proportion of sanitation facilities that are accessible for safe use at all times of the day and night
<b>Accountability</b>	Strong legal framework established for the justiciability of the HRS	80% increase in favour of disadvantaged rightsholders (adapting the World Justice Project Rule of Law Index score $\geq 8.0$ corresponding to respect for the rule of law) <sup>k</sup>	100% increase in the number of disadvantaged rightsholders whose sanitation services-related complaints were resolved, compared to advantaged rightsholders
<b>Affordability</b>	Allocation of 0.5% - 1.5% of GDP to implement the HRS for disadvantaged rightsholders	$\leq 3\%$ of household income for disadvantaged rightsholders <sup>g, h</sup>	Maximum expenditure of 3% of household income on basic sanitation needs for the disadvantaged rightsholders
<b>Availability</b>	Safely managed sanitation services available for use by disadvantaged rightsholders	100% increase in access to basic sanitation (see 3.2) in favour of disadvantaged rightsholders	100% increase in access to safely managed sanitation facilities in favour of disadvantaged rightsholders
<b>Equality &amp; non-discrimination</b>	Financial flows committed to realising the HRS for disadvantaged rightsholders	Maximum Gini coefficient of $\leq 40$ in the distribution of resources for sanitation for the advantaged and the disadvantaged rightsholders <sup>c, j</sup>	Maximum Gini coefficient of $\leq 40$ in the distribution of resources for sanitation for the advantaged & the disadvantaged rightsholders
<b>Extra-territorial obligation</b>	HRS mainstreamed in international policies & the development agenda	80% increase in the proportion of development finance dedicated to implementing the HRS in poor States <sup>a, b, d</sup>	100% increase in the proportion of development finance dedicated to implementing the HRS in poor States
<b>Participation</b>	Effective participatory mechanisms designed for sanitation governance	80% increase in favour of disadvantaged rightsholders (adapting Economist Intelligence Unit's Democracy Index score $\geq 8.0$ for "full democracy") <sup>f</sup>	100% increase in the participation of disadvantaged rightsholders involved in local sanitation governance, compared to advantaged rightsholders
<b>Safety</b>	Assessment mechanisms designed to ensure the resilience & integrity of sanitation facilities used by disadvantaged rightsholders	0% morbidity and mortality <sup>a, b, d</sup>	Proportion of disadvantaged rightsholders using safely managed sanitation and hygiene services; 0% morbidity & mortality from the use of sanitation facilities

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Table 9.2 Proposed Process and outcome indicators for the human right to sanitation (continued)

PRINCIPLES	PROCESS INDICATORS	THRESHOLD INDICATORS	OUTCOME INDICATORS
<b>Sustainability</b>	Safe and sustainable access to sanitation facilities extended to disadvantaged rightsholders	80% of facilities still in use; Maximum atmospheric CO <sub>2</sub> concentration from the facilities = 350 ppm <sup>b, d, e</sup>	100% of facilities still in use; 100% of wastewater and waste safely treated
<b>Transparency &amp; empowerment</b>	Disadvantaged rightsholders and civil society included in the HRS monitoring processes	70% increase in favour of disadvantaged rightsholders (adapting the Human Development Index score $\geq 0.7$ for “high human development”) <sup>i</sup>	100% increase in the proportion of disadvantaged rightsholders that influence sanitation governance processes, compared to advantaged rightsholders

Indicators shaded grey can be monitored through adapting the SDG framework to meet the criteria of the relevant HRS principles (see Table 10.2)

\*Disadvantaged rightsholders refer to rightsholders who cannot fully enjoy their rights as a result of poverty, marginalisation or some other form of vulnerability

**Key references:**

**a - Baquero et al., 2015; b - de Albuquerque, 2014; c - Meier et al., 2017; d – Sphere Project, 2011; e – Steffen et al., 2015; f - The Economist Intelligence Unit, 2017; g - UN, 2012; h – UNDP, 2006; i – UNDP, 2016; j - UN-Habitat, 2016; k - World Justice Project, 2016**

***Developing Local Indicators: Nigeria case study***

Within Nigeria, the indicators commonly used by external partners and local policymakers and technocrats neither sufficiently monitors the components of sanitation and principles outlined in national sanitation priorities nor do they sufficiently monitor the attributes of the HRS (see 8.4.3). Hence, there are two main gaps in the use of indicators for monitoring compliance with the HRS in Nigeria, in the areas of: (a) poorly reflecting the wide range of HRS principles and national principles for sanitation governance within the national policies, and (b) poorly integrating the wide range of sanitation components recognised in domestic policies.

To address these gaps, I suggest three main strategies as a starting point. Below, I break these strategies into practical action points which largely reiterate each other, for ease of implementation.

- (a) Revising the national sanitation policy, delinked from water, and based on broad consultations involving regulators, service providers, financial organisations, NGOs and community-based organisations, scholars, and rightsholders, with a view to mainstreaming the HRS principles and ID as a guiding norm for the national

sanitation framework. Some of the aspects that may be considered for revision in the policy include:

- i. Moving from the current predominantly technocratic approach to defining sanitation and sanitation components to a broader functional approach that addresses the social, relational, and ecological dimensions of sanitation;
  - ii. Defining the economic character of sanitation to prioritise its public goods aspects and address the preference distortions associated with merit goods and reorienting all stakeholders accordingly;
  - iii. Mainstreaming environmental sustainability in the sanitation governance framework;
  - iv. Developing quantitative goals for universal provision of sanitation services, service standards, targets, and financing plans that are based on a sanitation needs assessment, with evaluation processes that involve the participation of the rightsholders;
  - v. Formulating sanitation governance instruments that promote equitable access and the HRS standards, with the necessary adaptations to suit local geological, social, political and economic contexts. This requires the adaptation of locally available knowledge and technologies, enabled by decentralization and subsidiarity, and appropriate top-down and bottom-up accountability mechanisms;
  - vi. Capacity building for rightsholders and duty bearers, and establishing mechanisms for access to justice to ensure the full protection of the HRS for the poorest, most vulnerable and marginalised.
- (b) Streamlining all service contracts, and agreements with both the State, rightsholders and internal and external partners within the sanitation sector with the HRS standard and indicators, while reflecting local geological differences and service needs and ensuring transparency of the contracts. At a minimum, this would require institutionalising operational overlaps/mutual support between the HRS and existing legal orders and resolving any existing conflicts through:
- i. Codifying the HRS principles in the national constitution, and laws and policy framework for sanitation governance;
  - ii. Establishing strong top-down and bottom-up accountability mechanisms, with consent rules and mutual exchange of knowledge in participatory processes to address accommodation and indifference;

- iii. Legal protection of universal access to basic services, with progressive pricing, cross-subsidies, etc. rather than instruments that create a perverse incentive for poor sanitation and hygiene habits such as subsidies for formal areas irrespective of the economic status and capability of users or the exclusion of informal settlements which makes the residents which hampers ID.
- (c) Restructuring the sanitation governance architecture and educating all stakeholders on the implications of the sanitation policy revision for their operations. For a start, the process could involve:
- i. Promoting cooperation, knowledge transfer, co-budgeting and exchange of resources, including manpower, between the various government agencies involved in the sanitation sector;
  - ii. Restructuring the national sanitation policies to extend beyond a focus on big infrastructure for the provision of wastewater and waste management services and include the provision of decentralised infrastructure for the use of vulnerable groups;
  - iii. Establishing accessible mechanisms for the resolution of disputes over sanitation services and remedies for violations of the HRS.

The indicators suggested for the international level can also be adapted as a starting point for developing appropriate indicators for the HRS at the national and sub-national levels, through participatory approaches that involve policymakers, technocrats, financial institutions, NGOs and CBOs, rightsholders including households and individuals, and any key stakeholder whose operations affect the realisation of the HRS in any way. At the national and provincial levels, the National Task Group for Sanitation and the State Task Group for Sanitation respectively offer structures that can be leveraged on for effectively coordinating the participation of the rightsholders and duty bearers to determine sanitation service targets based on the HRS principles, and select appropriate indicators for monitoring compliance across multiple levels of governance.

#### **9.4 CONTRADICTIONS AND INCOHERENCE FROM PLURALITY IN SANITATION GOVERNANCE**

This section addresses the fourth sub-research question on legal pluralism in sanitation governance, relying on the four heuristic types of legal pluralism developed by Bavinck and

Gupta (2014), which capture the quality and intensity of the relationships between legal systems (see 2.4.2). My consideration of the drivers and the HRS institution in the previous sections shows that the HRS encounters multiple discourses, interpretations and legal principles operating simultaneously at each level of governance, and there is need to understand the resulting legal pluralism relation as a first step towards achieving integration and complementarity for mutual support between HRS and other related discourses/principles affecting sanitation. The section builds on the competition, indifference and accommodation outlined in Table 9.3 to discuss two indications of contradictions (see 9.4.1) and four indications of incoherence (see 9.4.2) that were significant from my analysis of legal pluralism in the thesis (see 5.6.3, 6.6.3, 7.4.3 and 8.5.3).

Table 9.3 Types of legal pluralism relationship between different rules in sanitation governance

	<b>Type of Relationship</b>			
	Competition	Indifference	Accommodation	Mutual Support
<b>International human rights law</b>	The ICESCR requires States to apply maximum available resources for HR implementation but it does not clarify how much of the resources may be allocated to the HRS as a basic necessity	Where the HRS is recognised in international law instruments, like the CEDAW and CRC, without being captured or implemented in the national legal system	Where the right to participation, included in the ICESCR, is used to try to encourage the rightsholders to participate in the policy process and contribute their unique perspectives on the prospects and challenges for realising their HRS	Where the decisions of international courts expand on the meaning and principles of the HRS, in consonance with the ICESCR and other international law instruments recognising the right
<b>International humanitarian law</b>	Where sanitation facilities are destroyed as a military necessity	Where the HRS principles like accountability are captured in the humanitarian framework but humanitarian situations continue to be governed as an exception to the application of human rights principles	Where efforts are made to incorporate the HRS principles in the domestic humanitarian framework	When the humanitarian framework adopts a broad definition of sanitation which integrates environmental sustainability and thereby enhances the HRS

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Table 9.3 Types of legal pluralism relationship between different rules in sanitation governance (continued)

	<b>Type of Relationship</b>			
	Competition	Indifference	Accommodation	Mutual Support
<b>International environmental law &amp; development</b>	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	Where the law and policy framework captures HRS principles but excludes low cost and shared sanitation facilities needed, for instance under the MDGs where shared facilities were strictly considered unimproved	Where environmental laws and development policies adopt participatory approaches to try to encourage the local stakeholders to engage with the policy process, for instance through the SDGs sanitation ladder	Where non-human rights instruments like the UNECE Water Protocol contain obligations for 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
<b>National laws and policies (Nigeria)</b>	The NWRP does not expressly recognise human sanitation and hygiene needs as a priority use of water, and it contains neo-liberal principles like cost recovery which can lead to the exclusion of poor and vulnerable rightsholders who cannot afford to pay for their basic needs without a subsidy	The 1999 Constitution does not expressly guarantee the HRS within the national legal system, although it grants the right to enter property in order to ensure public sewage services	The NWSP and the NWRP contain the participation principle to try to involve users, and all other stakeholders in the sanitation governance process, including the private sector	International quasi-judicial bodies and courts have upheld the socio-economic rights of citizens, whereas the rights may be non-justiciable based on the constitutional law but are supported by national laws

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Table 9.3 Types of legal pluralism relationship between different rules in sanitation governance (continued)

	<b>Type of Relationship</b>			
	Competition	Indifference	Accommodation	Mutual Support
<b>Local laws and policies</b>	Where some states regulators exclude informal settlements from accessing public sanitation services, and criminalise the informal sanitation services (see 8.5.1 and 8.5.2)	Where the sanitation laws, and strategies and programmes at the sub-national levels do not capture the HRS	Where sanitation programmes, like the CLTS, try to encourage local ownership and management of sanitation facilities, with support for the effective participation of the local population (see 8.5.2)	Where sanitation laws, like the Sanitation and Pollution Management Law (Edo State), regulate open defecation and require operators of commercial buildings to provide public toilets (see 8.5.2)

Source: The table builds on Table 2 in Obani & Gupta, 2014b

#### 9.4.1 Contradictions

Two contradictions emerge from implementing the HRS within frameworks that simultaneously recognize water as an economic good, and excluding vulnerable and marginalised groups like informal settlements from assessing sanitation services. Considering the first contradiction, the recognition of water as an economic good is significant for realizing the HRS for two main reasons, namely, the literature review, content analysis and the case study showed that: (a) sanitation is still closely linked to water quality across multiple levels of governance, and (b) water is critical for many personal sanitation and hygiene processes although on-site dry sanitation systems may sometimes be more viable than wet sanitation systems. At the international level, the four Guiding Principles on Water and Development contained in the Dublin Statement complement the HRS participation principle and the need for equality and non-discrimination against women in the governance of water and sanitation to some extent, but contradictions arise during implementation as a result of plurality. The recognition of water as an economic good has been widely adopted in support of the commodification of water and related sanitation services, while the human rights construct has been the basis for movements to counter the predominant neo-liberal basis underlying commodification and various forms of water and sanitation sector reform involving the private sector in many developing

countries (Bakker, 2007; Barlow, 2009). Nonetheless, the economic good principle is not recognized in any of the UN resolutions recognizing the HRS either linked to the right to water or as an independent right. Rather the resolutions mostly urge States and international organisations to commit financial resources to the realisation of the right without clarifying the contradictions between the human right and the dominant neo-liberal underpinnings of sanitation sector reforms in the developing countries where the majority of people without access to sanitation currently live. The case study also practically illustrated the tensions that arise from recognising the human rights to sanitation and the economic good principle simultaneously; many actors at the national and sub-national levels were inclined to adopt the economic good principle and pursue cost recovery without instruments to ensure that the HRS was not violated for the poor and other vulnerable group, as a result of inability to pay.

The second contradiction is a practical one that occurs where inequities in accessing sanitation services are perpetuated by sanitation governance policies, resulting in retrogression in realising the HRS. The literature review and content analysis showed that the HRS principles are predominantly social and relational but do not guarantee the protection of vulnerable and marginalised groups due to *de facto* and *de jure* practices, such as the exclusion of informal settlements from accessing sanitation networks. At the international level, the UN resolutions recognising the HRS mainly expound on the need to ensure the realisation of the HRS for vulnerable and marginalised groups like women and girls, especially, but do not directly address the issue of tenure insecurity or the status of informal settlements. In the absence of an international treaty protecting the rights of residents of informal settlements, similar to the treaties on the rights of the child, elimination of discrimination against women and the protection of persons living with disabilities, the tensions between the HRS and the exclusion of informal settlements through overt and covert discriminatory practices requires legal clarification. The recognition of the rights to housing and adequate standard of living may not suffice, especially in developing countries where the provision of housing is still largely considered a private responsibility borne by the population and subject to the availability of private finance. The case study further illustrated that even where there is no *de facto* exclusion of informal settlements from accessing formal sanitation services, structural factors and the prevailing neo-liberal discourse serve to exclude the informal settlements



without deliberate instruments like financial palliatives and mandating service expansion to informal settlements.

#### **9.4.2 Incoherence**

Four areas of incoherence emerge in relation to: (a) defining the human right to sanitation; (b) implementing the principles; (c) designing the approaches for implementing the HRS; and (d) the economic aspects of the HRS. First, there is no coherence in the definition of the HRS across the different levels of governance. While at the international level, the UN resolutions recognising the HRS often adopt the definition proffered by the former Special Rapporteur (see 3.2), the various sources of the HRS including supporting treaties, like the Convention on the Elimination of All Forms of Discrimination Against Women 1979 (CEDAW) and the Convention on the Rights of the Child 1989 (CRC), use different terms including ‘sanitation’, ‘adequate sanitation’, ‘improved sanitation’ and ‘environmental sanitation’ without sufficient conceptual clarification of the meaning of the terms used. Nonetheless, the definition by the former Special Rapporteur has been criticised for its limited consideration of environmental sustainability (Feris, 2015). The case study also illustrated the incoherence in the meaning of the HRS as different domestic actors adopted different terms in connection with operationalizing the HRS, largely influenced by external actors, especially donors. The predominant use of ‘improved sanitation’ by domestic actors in the cause study was also inconsistent with the broad stipulation of the components of sanitation in domestic policies, as well as the perception of users as revealed by the households survey. This resulted in a high level of indifference and in some cases strong opposition to national sanitation instruments and non-compliance by members of the public, compounded by the low monitoring and enforcement capacity of the relevant regulatory agencies.

Second, the HRS framework does not stipulate any economic model or a finite list of instruments through which its principles are to be operationalized. As a result of this, the implementation of the HRS depends on how the principles are interpreted by actors at different levels of governance. At the international level, the HRS has been significantly influenced by dominant development programmes for improving access to sanitation such as the Millennium Development Goals (MDG) sanitation target that was focused on halving the number of people without access to sanitation by 2015. Nonetheless, the 2030-bound SDG water and sanitation goal complements the HRS with indicators as well and a monitoring process that could either directly monitor progress on the realisation of HRS principles like

availability (Targets 6.1.1, 6.3.1, 6.4.1, 6.4.2), participation (6.b.1), extra-territoriality and cooperation (Target 6.5.2, 6.a.1); complementary principles like integrated water resources management (Target 6.5.1); or the state of drivers of poor sanitation services like pollution or water scarcity (Target 6.6.1) (see generally 10.4.1). The other SDGs can also be broadly construed to either address the related drivers of poor sanitation services and/or offer instruments and indicators that can enhance the realisation of the HRS, thereby promoting mutual support between the SDGs and the HRS (see Table 10.5). The case study showed that actors at the national and sub-national levels often conflated the language and principles of international development programmes like the MDGs with adopting the HRS in practise. This, combined with the dominant influence of external actors, resulted in the monitoring of access to sanitation in terms of access to toilets and the rates of progress in urban and rural areas only. Whereas, the HRS would require disaggregating the relevant data to show the progress in access for all vulnerable groups within any given context, like the poor, women, girls, children and people living in informal settlements. Further, private service providers would only extend sanitation services within formal areas, thereby exacerbating the inequities between formal settlements and informal settlements, for instance, except the government offered financial palliatives targeting the informal settlements.

Third, there is incoherence in the approaches to recognising and implementing the HRS across multiple levels of governance. At the international level, the literature review and content analysis showed three main approaches to recognising the human right to sanitation, namely: (a) as an implied right relevant for the realisation of other economic, social and cultural rights, (b) as a combined right linked with the right to water, and (c) as an independent right (Obani & Gupta, 2015). The implied recognition of the HRS in human rights treaties that are of limited scope either *ratione loci* or *ratione personae* like the CEDAW, the CRC and the Convention on the Rights of Persons with Disabilities 2006 (CRPD) has nonetheless resulted in fragmentation and incoherence in the normative framework of the HRS (Obani & Gupta, 2015; 2016a). For instance, the CEDAW imposes an obligation on States to ensure the right of women in rural areas to an adequate standard of living, including sanitation and water.<sup>293</sup> Though this falls short of recognising the right to sanitation for all women, especially those living in vulnerable conditions in (non-rural) formal settlements, informal settlements, and emergency situations, the CEDAW significantly recognises the right to sanitation without linking it to water. The CRC obliges

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<sup>293</sup> CEDAW, article 14(2)(h)

State parties to conduct hygiene and environmental sanitation education as a measure to promote the right of a child to the “highest attainable standard of health”.<sup>294</sup> The CRC provision relating to environmental sanitation presumably requires more than excreta removal as conceived by the concept of basic sanitation. In this regard, it is broader than most other treaty provisions on the HRS. Although the CRC only obliges States to provide sanitation education rather than sanitation services, the treaty is also remarkable because it again does not recognise the HRS in direct connection with water, which it also guarantees as a right.<sup>295</sup>

This raises the question of whether there is need for an international treaty recognising the HRS universally, without any restrictions either *ratione loci* or *ratione personae* (see 9.3.1). While such a treaty would unequivocally clarify the legal basis for the HRS in international law, the process of making treaties is highly political and there is limited evidence that treaties automatically improve human rights conditions within State Parties (see for instance, Magesan, 2013). The case study also showed how the HRS can be recognised in the constitution, laws, policies or regulations within the domestic legal framework. Each of these legal instruments can have complementary legal status where for instance the national policy constitution guarantees the HRS; enabling laws are passed to specify the standards for fulfilling the right based on the HRS principles; the regulator passes a regulation outlining how the HRS will be implemented through their operations; and national policy generally conveys the plan of action of the government for the realisation of the HRS. It is however important to expressly provide for the HRS in the constitution, which is the *grund norm* in many jurisdictions, or in a higher level legal norm like a sanitation law to ensure that the right is justiciable.

The HRS is also internally focused and poorly integrated with other areas of law and development; this creates incoherence in practice, as illustrated in Chapters 6, 7 and 8. For instance, despite the participation norm, contracts and arbitration terms for sanitation services are often still secretly negotiated between the government and its private partners or international organisations without the participation of the intended beneficiaries (Barlow, 2009). As a result, Bilateral Investment Treaties (BITs) and the arbitral awards of the International Centre for Settlement of Investment Disputes (ICSID) over service contracts in developing countries have sometimes worked against the fulfilment of human rights obligations either directly through stabilisation clauses that prevent new laws or necessary

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<sup>294</sup> Convention on the Rights of the Child 1989 (CRC).

<sup>295</sup> CRC, articles 24(1) & 24(2)(c)

amendments to the existing legal framework, or indirectly by preventing the States' direct investment in service provision due to indemnities (Thielbörger, 2009).

Fourth, the literature review, content analysis and case study showed that there is incoherence in the funding of sanitation services and this affects the availability of resources for realising the HRS across multiple levels of governance. At the international level, although the eThekwini commitment was made since 2008 by African States, to invest 0.5% of their respective GDPs in the sanitation and hygiene sector, only Equatorial Guinea was reported to be on track while the other African countries were mostly off track in the spending commitments for sanitation. The poor funding of the sector in developing countries may be attributed to four factors, including: (a) low government investment which may be motivated by the perception that the sector is of interest to donors and therefore requires less domestic investment; (b) shortfalls in implementation caused by delays in donor funding or absorptive capacity by government agencies; (c) low donor spending on the maintenance of existing infrastructure and a perceived preference for capital investment in new projects, and (d) fiscal constraints by government and donor agencies (Martin & Watts, 2013). The case study also showed indications of poor funding of urban sanitation compared to rural sanitation, partly as a result of donor interest in rural sanitation; lack of accessibility of data on budgeted and actual spending due to fragmentation and budgeting practices; and low spending on sanitation by donors and the government compared to spending on water. This implies that despite the obligation on States and international organisations to commit financial resources to the sanitation, the sector is still poorly funded and there are no strong indications of improvements by actors across multiple levels of governance.

Nonetheless, the complex nature of the sanitation problem (see 10.2) and the limits of human rights principles for sanitation governance in addressing the drivers (see 10.3) require a multi-disciplinary and multi-dimensional governance framework that spans beyond the present confines of the human rights construct. For instance, there are non-human rights principles which can potentially address some of the main environmental drivers of poor sanitation services and in many other ways augment the HRS framework. Additionally, given the contextual nature of the drivers and the need for localised solutions, it may be necessary to adopt divergent principles in sanitation governance at different levels of governance and in different locations. The pluralistic nature of sanitation governance therefore offers potential for strengthening the HRS framework. To achieve this, it is necessary to: (a) mainstream an overarching norm like ID that can provide a standard for addressing social, economic and

environmental priorities through sanitation governance processes and instruments, (b) resolve definitional issues and contradictions in the design of instruments and implementation of the HRS in line with the prevailing drivers and overarching norm, building on the existing knowledge on sanitation produced by various disciplines, and (c) expand the obligations of non-State actors involved in the sanitation sector based on the HRS standards. If the HRS is to be meaningfully implemented, sanitation interventions could be evidence-based and informed by assessments that cover the following at a minimum:

- (a) identify the existing sanitation governance instruments and their outcomes for different un-served and underserved segments of the population;
- (b) identify the different causes of vulnerability and/or exclusion as these may require different policy measures even where they intersect;
- (c) analyse the impact of governance instruments from other sectors on individuals and households without access to sanitation services;
- (d) identify additional instruments to reduce the inequities in access to sanitation for the un-served and underserved segments of the population, and
- (e) analyse the impact of the instruments on the different causes of vulnerability/exclusion, in order to avoid contradictory outcomes.

## **9.5 RECOMMENDATIONS FOR INTERPRETING AND IMPLEMENTING THE HUMAN RIGHT TO SANITATION**

Building on the foregoing conclusions and answers to the research questions, this section makes the following recommendations for HRS interpretation and implementation in order to address the overarching research question for this thesis: *How can the human right to sanitation be interpreted and implemented to promote inclusive development?*

Legal scholars tend to interpret the HRS through a purely legal sense and canvas for recognition and enforcement of the right, in order to progressively realise universal access to basic sanitation services. As stated by Meier et al. (2017:3), “[H]uman rights offer a universal framework to advance justice in water and sanitation policy. Rather than viewing safe drinking water and adequate sanitation as only basic needs, human rights implicate specific responsibilities to realize water and sanitation as legal entitlements.” This can improve the accountability of States (to the rightsholders) and ensure sanitation service expansion in accordance with the social, economic and environmental criteria that are necessary for human wellbeing. However, a purely legalistic approach does not address the wide range of

economic, environmental and social drivers of poor sanitation (see 9.2), and is complex to frame in the context of populations that rely on decentralised sanitation solutions (perhaps due to the failure of public utilities in low-income countries) (see 8.2) and non-State actors who support the local sanitation governance process (for instance during humanitarian crisis) (see 6.6).

Sanitation is a public good and the HRS can be strengthened through a broad interpretation that is situated within the broader scope of environmental justice, nature rights and the public goods discourse (as discussed in 9.3.2), and an expanded implementation of the eleven HRS principles discussed in this thesis (building on Box 9.1). The expansion of the HRS framework through complementary non-HRS instruments, including principles, as proposed in this thesis can address the drivers of poor sanitation services and strengthen the social, relational and ecological dimensions of ID in the process where universal access to sanitation is pursued within ecological limits and disadvantaged rightsholders are provided the necessary support to enable them enjoy the right. For instance, internally displaced persons and refugees need to be afforded the necessary support to live in dignity, especially where the host country can afford to provide basic sanitation with international support. Similarly, to protect people living in informal settlements, their access to sanitation needs to be distinguished from land rights issues, because human rights are inherent and would otherwise be violated if it is made dependent on the legal status or the relationship between the individual and the State.

**Box 9.1 Elaborating the human right to sanitation through human rights and non-human rights principles**

1. Acceptability
  - Design facilities to match the users' needs and preferences within ecological limits
  - Eliminate taboo and discriminatory practices against vulnerable groups like discrimination against women and girls during menstruation
  - Educate users on the harmful effects of negative attitudes and practices concerning sanitation through capacity building and awareness
2. Accessibility
  - Situate sanitation facilities in safe places that are easy to reach, within the immediate vicinity of users or as close to the users as possible, to avoid causing harm
  - Design sanitation facilities for easy use by everyone, including people with special needs
  - Ensure that pathways to the facilities that are located outside the household are well lit and safe
  - Ensure that menstrual hygiene and other needs of vulnerable groups are reflected in the design of sanitation services
3. Accountability
  - Clarify the roles of stakeholders in the sanitation sector and how they intersect
  - Establish mechanisms for monitoring the operations of duty bearers and the impacts on rightsholders for instance by establishing safeguards against service disconnections and monitoring compliance with service standards
  - Ensure accessible and independent review mechanisms are available to aggrieved rightsholders
  - Compensate aggrieved rightsholders and prevent retrogression
4. Affordability
  - Explore cost-effective alternatives to ensure that the direct and indirect costs of sanitation services neither exceed 3% of household income nor interfere with other basic needs like food and shelter
  - Establish mechanisms to cover the cost of sanitation for the poor, people living in humanitarian situations and other vulnerable groups that cannot otherwise afford the cost of their basic sanitation needs, like cross-subsidies funded through the polluter-pays principle and prevention principle involving corporations
  - Provide flexible payment options, like payments in kind or instalment cash transfers, based on need in order to ameliorate the effect of the economic good principle on the poor
  - Establish legal safeguards against service disconnections for people who genuinely cannot afford to pay for their basic sanitation needs
5. Availability
  - Ensure a sufficient number of facilities in households (including those in informal settlements) and public places, in order to avoid long waiting times
  - Expand sanitation services to include collection, transport, treatment, disposal and/or reuse of human excreta and other waste streams that affect human wellbeing
  - Ensure functional sanitation services in the households and everywhere people spend a considerable amount of time
  - Tailor services to meet special needs of all categories of users, to ensure universal access, irrespective of tenure security and other legal restrictions

(continued on next page)

Box 9.1 Elaborating the human right to sanitation through human rights and non-human rights principles (continued)

6. Equality and non-discrimination
  - Investigate all the forms of inequality *de facto* and *de jure* and ensure that the procedures or instruments for addressing inequality do not further stigmatize users
  - Decriminalise service provision in informal settlements and expand the sanitation policy process to include all social contexts, including humanitarian situations, and urban and rural areas
  - Develop mechanisms for addressing the various causes of inequality and reducing the disparities in access to sanitation among disadvantaged groups
  - May require differentiated support, such as affirmative action, to reduce existing inequality
7. Extra-territorial obligation
  - Respect, protect and fulfil the HRS both within their territories and extra-territorially
  - Prevent third parties within their control from violating the HRS extra-territorially, based on the attribution of State responsibility for the conduct of non-State actors
  - Prioritise the HRS in humanitarian assistance, trade and other international affairs
  - Provide effective mechanisms for accountability in the discharge of extraterritorial obligations
8. Participation
  - Establish mechanisms for full, free and meaningful participation for everyone affected by decisions about sanitation services
  - Include consent rules in participatory mechanism (to guard against ) to foster mutual exchange of knowledge and tackle accommodation
  - Inform everyone about the participatory mechanism and how they operate and eliminate the barriers to accessing the mechanisms
  - Involve local stakeholders in the decision making process including the designing sanitation programs, indicators and other processes for operationalizing the HRS
9. Safety
  - Ensure that the design of sanitation facilities promotes the safety of users
  - Promote hygienic maintenance of the facilities
  - Ensure that sanitation facilities protect the environment from pollution or contamination by waste using principles like prevention and precaution
  - Educate users on the correct means of using and hygienically maintaining the facilities
10. Sustainability
  - Prioritise sanitation in disaster risk management and humanitarian assistance
  - Integrate environmental sustainability in sanitation planning and programmes and minimise harmful environmental impact from sanitation services
  - Design services to be resilient enough to meet both the present needs and the needs of the future generation
  - Ensure local knowledge about how to operate and maintain sanitation facilities through capacity building in order to ensure the sustainability of the existing services
11. Transparency and access to information
  - Inform rightsholders about their HRS and related enforcement mechanisms through the local languages and common communication media
  - Provide open access to information about sanitation services
  - Ensure that mechanism for accessing information and enforcing the HRS are both physically and economically accessible for all
  - Strengthen the capacity of the population to access and use the available information through capacity building

The broad interpretation of the HRS and implementation alongside other complementary discourses imposes wider obligations on States and other stakeholders whose operations



affect the realisation of the HRS (beyond the traditional ambit of respect, protect, and fulfil). This provides an opportunity to cooperation between the State and stakeholders, including human rights practitioners and other members of the epistemic community, to integrate solutions from different fields for tackling the diverse drivers of poor sanitation services. However, the resulting plurality may link the HRS with contradictory and incoherent rules that compound HRS implementation, if left unaddressed (see 5.6.3, 6.6.3, 7.4.3, 8.6.3 and 9.4). There are tools for strengthening the positive outcomes as discussed in this thesis. Further, pluralism makes it essential to develop indicators (building on Table 9.1) for an objective assessment of progressive realisation and enhanced accountability in the HRS implementation process. Without the foregoing, the formal recognition of the HRS would remain tokenistic at best without translating into progressive realisation of universal access to safely managed, accessible, acceptable and affordable sanitation services, and a participatory governance process that empowers the poorest, most vulnerable and marginalised rightsholders.

## **9.6 REFLECTIONS ON METHODS**

I adopted a multi-disciplinary perspective (using both legal and social science research methods) because the rules, decision-making processes, and programs that define acceptable sanitation standards, allot roles to key actors for achieving the standards, and steer interactions among the actors stem from law and many other disciplines (including the social sciences, physical sciences and engineering). I also integrated both legal and non-legal publications to present the current state of knowledge on HRS governance and built upon current research on the evolution of the legal framework for the HRS by identifying relationships of indifference, competition, accommodation, and mutual support in the legal framework across multiple levels of governance. As a result, I was able to reach beyond current legal research by combining quantitative and qualitative methods (from law and social sciences) to evaluate the HRS framework against the drivers of poor sanitation services and the need for ID, proffering recommendations for redesigning HRS instruments, where necessary.

Adopting ID as an overarching norm (rather than sustainable development, which is often operationalized by prioritising economic growth over social and ecological sustainability) enriched my analysis of the ecological dimension of the HRS that is otherwise poorly addressed within a narrowly defined HRS framework (Feris, 2015). Combining these

methods allowed me to gain useful knowledge from both legal authorities and sources from other disciplines (like international relations, governance, natural sciences, and economics) that were relevant for addressing my research questions. Nonetheless, in the process of combining the various methods I drew on my knowledge of the types of legal authorities to determine the weight I attached to primary, secondary, mandatory and persuasive legal authorities in my analysis. My reflections on HR law also made me realise that the relational dimension of ID needs to be strengthened through prioritising disadvantaged individuals and groups rather than de-emphasising the differences between the haves and the have-nots in the development process.

There are some key areas in which my methodology can be strengthened for future research. To start with, I had to rely on some unofficial translations of laws, policy documents and case reports that were not written in English Language originally because the official English translations were not accessible. Second, although I set out to conduct household surveys in three contexts (formal and informal settlements, and humanitarian situations), I was only able to cover the formal context due to legal and political issues, and personal safety concerns that I encountered in the field when trying to access informal settlements. The potential respondents in the internally displaced persons' camps which I visited were also not accessible because of a number of factors including physical and psychological vulnerability, and other personal considerations which they may not have disclosed. Consequently, I relied on experts and other stakeholders as well as literature review and content analysis but could not get the direct input of households in informal settlements and humanitarian situations. Third, I encountered difficulties in tracking sanitation spending due to the variety of actors, definitions and interventions encountered in the sanitation governance process. As a result, I could not provide a big-picture analysis of the actual spending on sanitation by different actors across multiple levels of governance even though this would have strengthened my analysis further. Fourth, I compiled a rich set of HRS (structural, process, threshold and outcome) indicators, by drawing from otherwise distinct disciplines to support the assessment of the HRS. The development of indicators for the HRS can be further enriched through strengthening local democratic processes to adapt the indicators that I have proposed in this thesis to local circumstances. Finally, the reliability of my research outcomes and recommendations can be reinforced by further studies involving multiple researchers from various disciplines, with additional systematically designed multi-level case studies and ethnographic research to validate official reports, where possible.

Nonetheless, I had the privilege of discussing my methodology with other researchers from multiple disciplines during the course of my PhD, including law, engineering, political science, environmental science and anthropology. I also received feedback from reviewers who assessed the journal articles and book chapters that I published on the basis of my PhD. I was able to adapt my methodology using all the feedback I received and they were generally positive that combining the methods the way I did enhanced the understanding of the HRS and the instruments for addressing the drivers of poor sanitation for both lawyers and non-lawyers involved in sanitation governance. I found that addressing the non-legal aspects of the HRS implementation process, which are usually not covered in a pure law research, also made the non-lawyers more interested in exploring HRS instruments and synergies with human rights practitioners. Hence, I hope that other researchers can build on these methods to improve multi-disciplinary learning and mutual support between the HRS and other disciplines working on sanitation governance. I also hope that future reports of the Special Rapporteur on the human rights to safe drinking water and sanitation can explore the impact of the HRS on both direct and indirect economic, environmental and social drivers that have not previously been addressed by the human rights assessment, as well as the development of measurable process, threshold and outcome indicators, as discussed in this thesis.

### **9.7 RECOMMENDATIONS FOR FURTHER RESEARCH**

Based on my research experience, findings and reflection, I have identified the following five gaps for further research:

- (a) investigating the political economy of sanitation at multiple levels of governance, from the international to the local, in order to demine an affordable rate for users in different social contexts and wealth quintiles;
- (b) linking the HRS to the food, water, and energy nexus discourse;
- (c) investigating effective instruments for affordability and accountability of sanitation in humanitarian situations;
- (d) analysing the economic aspects of ID components in sanitation policy and programming; and
- (e) evaluating the import of power politics for HRS interpretation and implementation across multiple levels of governance.