

## The Human Right to Sanitation

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### 1 INTRODUCTION

Sanitation is not classically associated with the human rights lexicon. Removing and treating human excreta is generally associated with the discrete machinations of local service delivery, the technical concerns of health professionals or the occasional demands by environment advocates, not the somewhat lofty world of human rights. However, the scale and impact of the ‘global sanitation crisis’ gave impetus to demands for recognition of sanitation as a human right. The toll of poor sanitation in human development terms is monumental. The absence of sanitation facilities, together with the consequent pollution of water, is responsible for pervasive disease and death, chronic poverty and the creation of significant barriers to education and productive labour. Each day, approximately 1000 children are estimated to die from sanitation-related causes;<sup>1</sup> and the lack of sanitation accounts for 6 per cent of the global disease burden,<sup>2</sup> more than HIV/AIDS, malaria and tuberculosis combined.<sup>3</sup>

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<sup>1</sup> JMP, *Progress on Sanitation and Drinking Water: 2015 Update and MDG Assessment – Key Facts*, UNICEF and WHO, 2015.

<sup>2</sup> J. Bartram and S. Cairncross, ‘Hygiene, Sanitation, and Water: Forgotten Foundations of Health’, *PLoS Med*, Vol. 7, No. 11 (2010), pp. 1–9 at 1.

<sup>3</sup> *Ibid.*

By articulating access to sanitation as a human right, development practitioners, health workers, human rights activists and policymakers hope that the sanitation paradigm will be shifted away from one of charity to one of justice.<sup>4</sup> By framing sanitation as a matter of legal entitlement, access to sanitation is not simply understood as a policy option. Thus, whereas the inclusion of a sanitation target in the Millennium Development Goals (MDGs) in 2002, and strengthened in the Sustainable Development goals in 2015, represented an important global political commitment, there have been consistent calls to strengthen and reframe that pledge through the prism of human rights.<sup>5</sup> The slow progress on the sanitation target,<sup>6</sup> particularly for marginalised and low-income groups, has only emboldened these protagonists.<sup>7</sup>

This justice-oriented approach also seeks to challenge the myth of economic determinism: that the development of sanitation services would simply follow the path of rising economic growth. Despite rising national incomes across the developing world, the number of people without basic sanitation (approximately 2.6 billion) has been stubbornly persistent and has even risen in some countries.<sup>8</sup> This is despite the powerful economic arguments for sanitation. The benefits of having somewhere to defecate have been valued at nine times the cost of the investment in sanitation (in terms of improved health, savings in the household and health sector budgets and increased economic productivity).<sup>9</sup> Indeed, the consequences of failing to act can be immediate and dramatic: a cholera outbreak in Peru in 1991 killed 3000 people over a period of 15 months, costing the economy US \$770 million – more than the investment in water and sanitation during the entire preceding decade.<sup>10</sup> This disconnect with the growth trajectory demonstrates that access to sanitation is not inevitable; its existence is fundamentally a result of political choices. Framing sanitation as a human right represents therefore an attempt

<sup>4</sup> COHRE, UN-HABITAT, WaterAid and SDC, *Sanitation: A Human Rights Imperative* (Geneva: COHRE, 2008), p. 5.

<sup>5</sup> See UN OHCHR, *Claiming the MDGs: A Human Rights Approach* (Geneva, OHCHR, 2008); M. Langford, 'A Poverty of Rights: Six Ways to Fix the MDGs', *IDS Bulletin*, Vol. 41, No. 1 (2010), pp. 83–91.

<sup>6</sup> UN, *The Millennium Development Goals Report* (New York: United Nations, 2011).

<sup>7</sup> UNICEF, *Progress for Children: Achieving the MDGs with Equity*, Report No. 9 (New York: UNICEF, 2010).

<sup>8</sup> Bartram and Cairncross, 'Hygiene, Sanitation, and Water', p. 1.

<sup>9</sup> G. Hutton, L. Haller and J. Bartram, *Economic and Health Effects of Increasing Coverage of Low-Cost Household Drinking-Water Supply and Sanitation Interventions in Countries Off-Track to Meet MDG Target 10*, Background report to the UNDP Human Development Report 2006, World Health Organization, Geneva, 2007, p. 53. Also published as Human Development Report Office Occasional Paper 2006/33. WHO/SDE/WSH/07/05, p. 20.

<sup>10</sup> J. Bartram, 'Improving on Haves and Have-Nots', *Nature*, Vol. 452(2008), pp. 283–284, at 283.

to shift the calculus involved in those choices, by reshaping public attitudes and challenging decision-makers, the allocation of resources and the effectiveness of implementation.

The demand for sanitation to be treated as a human right has gained a considerable measure of success at the international level. In July 2010, the majority of the UN General Assembly recognised, along with water, ‘sanitation as a human right that is essential for the full enjoyment of life and all human rights’.<sup>11</sup> Three months later, the UN Human Rights Council affirmed the right,<sup>12</sup> while UN experts and committees have outlined some of its potential content. And in 2015, sanitation was recognised in a consensus vote by the General Assembly as a distinct and separate right.<sup>13</sup>

This trend towards legal recognition has not been confined to the global sphere. In the last decade, the right to sanitation has been incorporated in a number of constitutions (e.g. Uruguay, Kenya, Maldives), national laws (e.g. Algeria, Brazil, France) and national policy instruments (e.g. Ghana, Nepal, Bangladesh). It has also been regularly included in regional political declarations such as those from the South Asian Conference on Sanitation (Sacosan) (2008, 2011 and 2014), African Conference on Sanitation and Hygiene (AfricaSan) (2015), and Latin American Sanitation Conference (Latinosan) (2013 and 2016).

Without doubt, the right to sanitation has gained significant legitimacy. But it retains its critics and doubters.<sup>14</sup> Does sanitation meet the criteria of human rights in moral theory or in international law? Is it simply another instance of human rights inflation? Does this right have any meaningful content? Will it enhance existing political and practical tools in addressing the root causes of the sanitation crisis? Or is it a rhetorical device that will fuel unrealistic demands and distract attention from the more urgent task of extending access?

<sup>11</sup> UN General Assembly, *The Human Right to Water and Sanitation* (Sixty-fourth session, 2010) UN Doc A/64/L.63/Rev.1, para. 1.

<sup>12</sup> UN Human Rights Council, *Human Rights and Access to Safe Drinking Water and Sanitation* (Fifteenth session, 2010) UN Doc. A/HRC/15/L.14.

<sup>13</sup> *The Human Rights to Safe Drinking Water and Sanitation*, UN GA Resolution 707169, UN doc. A/C.3/70/L.55/Rev.1, para. 1.

<sup>14</sup> Similar but not identical doubts were raised with the human right to water: see, e.g. S. Tully, ‘A Human Right to Access Water? A Critique of General Comment No. 15’, *Netherlands Quarterly of Human Rights*, Vol. 23, No. 1 (2005), pp. 35–63; P. Anand, ‘Right to Water and Access to Water: An Assessment’, *Journal of International Development*, Vol. 19 (2007), pp. 511–526; R. D’Souza, ‘Liberal Theory, Human Rights and Water-Justice: Back to Square One?’, *Law, Social Justice and Global Development*, Vol. 11 (2008), available at [www2.warwick.ac.uk/fac/soc/law/elj/ldg/](http://www2.warwick.ac.uk/fac/soc/law/elj/ldg/) (accessed 4 April 2012).

This chapter sets out to examine these challenges. Section 2 examines whether sanitation can be justifiably recognised as a human right given the initial opposition of a significant number of States and the standpoints of some human rights theorists. While this opposition may appear minimal, the weight of arguments for and against a right can significantly affect its reception in practice.<sup>15</sup> Sections 3 and 4 ask how the boundaries and content of the right should be delineated, particularly on the grounds of their feasibility. In doing so, it delves for the first time into the literature concerning the identity of the right to sanitation: asking whether it is an individual, collective or hybrid right and what are the consequences of this? Section 5 examines why, how and when a right to sanitation may constitute an ally in efforts to ensure access to sanitation. In an illustrative manner, it focuses on four selected areas where the right to sanitation has been used, or advocated for, in practice: the MDGs and SDGs, the demands for participation and democratisation, service delivery in situations of contested land tenure, and legal mobilisation and other forms of accountability.

Before proceeding, it is helpful to define what we mean by sanitation. Sanitation is an amalgam of different elements – being more a process than a good. In defining sanitation, one commonly distinguishes between the place and facilities for an *individual* to urinate, defecate and practice menstrual hygiene and the *system* for the disposal and treatment of that waste. For example, WHO states that sanitation ‘generally refers to the provision of facilities and services for the safe disposal of human urine and faeces’, as well as the ‘maintenance of hygienic conditions, through services such as garbage collection and wastewater disposal’.<sup>16</sup>

However, this definition carries inbuilt normative expectations that should be made transparent. It assumes that the purpose of sanitation is primarily about personal, public and environmental health. As we shall see, this does not necessarily capture broader concerns in the human rights context about privacy and dignity or cultural acceptability. Thus, a sound definition from both a technical and human rights perspective, proposed here, might be that: *sanitation constitutes the ability to effectively access space and facilities (when-ever and wherever needed), that afford privacy, dignity and safety, in which to urinate, defecate and practice related hygiene, including menstrual hygiene,*

<sup>15</sup> See M. Langford, ‘Judging Resource Availability’, in J. Squires, M. Langford, and B. Thiele (eds.), *Road to a Remedy: Current Issues in Litigation of Economic, Social and Cultural Rights* (Sydney: AHRC and University of NSW Press, 2005), pp. 89–108, at 107–8.

<sup>16</sup> WHO, *Health Topics: Sanitation*, available at [www.who.int/topics/sanitation/en/](http://www.who.int/topics/sanitation/en/) (accessed 3 October 2011).

*in a culturally acceptable manner, which by virtue of their design, management and accompanying services protect the user, the locality (e.g. households, school, workplace, hospital or community) and wider population from the adverse consequences of contamination from the process.*<sup>17</sup>

## 2 SANITATION AS A HUMAN RIGHT

### 2.1 Moral Theory

The claim that access to sanitation constitutes a ‘human right’ may be perplexing. Like other social and economic rights, sanitation seems to fit awkwardly with classic naturalistic rights theories that emerged at the end of the Enlightenment period and continue to enjoy some currency. Drawing on the thinking of Locke, Cranston has argued that:

A human right, by definition, is something that no one, anywhere, may be deprived of without a grave affront to justice. There are certain actions that are never permissible, certain freedoms that should never be invaded, certain things that are sacred. . . Thus, the effect of a universal declaration that is overloaded with affirmations of economic and social rights is to push the political and civil rights out of the realm of the morally compelling into the twilight world of utopian aspirations.<sup>18</sup>

However, there may be different ways of viewing and justifying social rights in the naturalistic tradition. Indeed, Locke’s own theory was premised on a state

<sup>17</sup> The UN Special Rapporteur has provided a definition of sanitation that is infused with rights dimensions. However, it mixes a rights-based definition with the corresponding duties and the content of the right. She states that ‘sanitation can be defined as a system for the collection, transport, treatment and disposal or reuse of human excreta and associated hygiene. States must ensure without discrimination that everyone has physical and economic access to sanitation, in all spheres of life, which is safe, hygienic, secure, socially and culturally acceptable, provides privacy and ensures dignity’. See UN Human Rights Council, *Report of the Independent Expert on the Issue of Human Rights Obligations Related to Access to Safe Drinking Water and Sanitation, Catarina de Albuquerque* (Fifteenth session, 2010) UN Doc. A/HRC/12/24 (2009) para. 63. Our definition seeks to echo the articulation by the CESCR of the right to housing, with its emphasis on the basic underlying principles that shape the contours of the rights: ‘In the Committee’s view, the right to housing should not be interpreted in a narrow or restrictive sense which equates it with, for example, the shelter provided by merely having a roof over one’s head or views shelter exclusively as a commodity. Rather it should be seen as the right to live somewhere in security, peace and dignity’. UN Committee on Economic, Social and Cultural Rights, *General Comment 4, The Right to Adequate Housing*, (Sixth session, 1991), UN Doc. E/1992/23, annex III at 114 (1991), para. 7.

<sup>18</sup> M. Cranston, ‘Are There Any Human Rights?’, *Daedalus*, Vol. 112, No. 4 (1983), pp. 1–12.

of nature in which all human beings have an equality of power<sup>19</sup> (which presumes some pre-existing level of social rights),<sup>20</sup> and it has been conveniently forgotten that he included health and subsistence amongst the more repeated rights to life, liberty and property.<sup>21</sup> Indeed, some scholars have questioned the selective historical interpretation of naturalistic thinking on human rights.<sup>22</sup>

The idea of freedom has also been interpreted in broader terms such as in Sen's idea of capabilities: it is not merely freedom from interference<sup>23</sup> but also the 'opportunity to pursue our objectives'.<sup>24</sup> Whereas Sen has been cautious as to precisely which capabilities are essential, Nussbaum has listed ten essential capabilities, some of which cover implicitly a number of social rights.<sup>25</sup> Capabilities are not human rights, which are primarily 'ethical affirmations' of what is important,<sup>26</sup> but social rights do mesh well with 'an understanding the importance of advancing human capabilities'.<sup>27</sup>

Other theories take a different departure point than freedom. As Heard puts it, 'Human rights are a product of a philosophical debate that has raged

<sup>19</sup> J. Locke, *Two Treatises of Government* (5th edn., London: Thomas Tegg, 1823). Locke describes a state of 'perfect equality' where 'all the power and jurisdiction is reciprocal, no one having more than another' (Part II, para. 4).

<sup>20</sup> *Ibid.*, Part II, para. 7. Locke argues that everyone is 'born to all the same advantages of Nature'. But this assumption is difficult to sustain in a non-ideal world where individuals are born into households of different wealth, opportunity, geography and ethnicity and carry with them different markers of identity that can give rise to prejudice and discrimination.

<sup>21</sup> *Ibid.*, Part II, para. 6. 'The state of Nature has a law of Nature to govern it, which obliges every one, and reason, which is that law, teaches all mankind who will but consult it, that being all equal and independent, no one ought to harm another in his life, health, liberty or possessions'. 'As justice gives every man a title to the product of his honest industry, and the fair acquisitions of his ancestors descended to him; so charity gives every man a title to so much out of another's plenty, as will keep him from extreme want, where he has no means to subsist otherwise: and a man can no more justly make use of another's necessity, to force him to become his vassal, by withholding that relief, God requires him to afford to the wants of his brother'. *Ibid.*, Part I, para. 42.

<sup>22</sup> 'Contrary to widespread belief, welfare rights are not a twentieth century innovation, but are among the first rights ever to be claimed. When in the twelfth and thirteenth centuries our modern conception of a right first appeared, one of the earliest examples offered was the right of those in dire need to receive aid from those in surplus'. J. Griffin, *On Human Rights* (Oxford: Oxford University Press, 2008), p. 177.

<sup>23</sup> A. Sen, *The Idea of Justice* (Cambridge M.A.: Harvard University Press, 2009) p. 228.

<sup>24</sup> *Ibid.*

<sup>25</sup> They are 'Life, Bodily Health, Bodily Integrity, Senses, Imagination, and Thought, Emotions. Practical Reason, Affiliation, Other Species and Play'. See M. Nussbaum, *Women and Human Development: The Capabilities Approach* (Cambridge: Cambridge University Press, 2000).

<sup>26</sup> Sen, *The Idea of Justice*, p. 358. <sup>27</sup> *Ibid.*, p. 381.

for over two thousand years'.<sup>28</sup> Three other theories of human rights are worth mentioning here: agency, need and dignity. As to agency, Griffin's account draws on the notion of human rights that emerged at the end of the Enlightenment and argues that within it, we find an idea 'of a right we have simply in virtue of being human'<sup>29</sup> and that we often value 'human standing' and our 'personhood' more 'highly than even our happiness'.<sup>30</sup> He captures the idea of personhood as agency or, more precisely, *normative agency*:<sup>31</sup> the ability to deliberate, assess, choose and act. In order that agency is meaningful, a person must be 'capable' of choosing a path through life without control or domination by others (*autonomy*), with real choices (meaning a *minimum provision* of information, education, services and resources) and freedom to pursue what is worthwhile (*liberty*). Griffin does not discuss sanitation, but his discussion of the right to health (where he remains sceptical to maximalist demands for the highest attainable level) would provide room for such a basic element as sanitation.<sup>32</sup>

Needs-based approaches are often associated with social rights. In O'Manique's view, if X is necessary for survival, it is a right. However, while the 'belief that survival is good is virtually universal', it is not always immediately apparent what this entails.<sup>33</sup> Indeed, O'Manique develops his theory much beyond the notion of survival towards the full development of human potential making it difficult to use as an analytic frame. On first and literal glance, sanitation might be understood as a need but the key infrastructural and socially reflexive demands for sanitation fit awkwardly in a needs-based framework (e.g., toilets, privacy, environmental sanitation).

A more appealing approach may be to emphasise *dignity*. The notion of human dignity emerged separately from the idea of human rights, but since the end of the Second World War, human rights and human dignity 'have increasingly become fused'.<sup>34</sup> While the material dimension of both civil and

<sup>28</sup> A. Heard, 'Human Rights: Chimeras in Sheep's Clothing?', Simon Fraser University Online Working Paper, 1997, p. 2.

<sup>29</sup> *Ibid.*, p. 13. <sup>30</sup> *Ibid.*, pp. 32–33.

<sup>31</sup> This idea of agency could equally be an independent means of establishing human rights in a manner similar to capabilities. See A. Gewirth, *Reason and Morality* (Chicago: University of Chicago, 1978).

<sup>32</sup> 'On my account, we also have a right . . . to health care necessary for our functioning effectively as normative agents'. Griffin, *On Human Rights*, p. 208.

<sup>33</sup> J. O'Manique, 'Universal and Inalienable Human Rights: A Search for Foundations', *Human Rights Quarterly*, Vol. 12 (1990), pp. 465–485, at 437.

<sup>34</sup> J. Donnelly, *Human Dignity and Human Rights*, Working Paper, Swiss Initiative to Commemorate the 60th Anniversary of the UDHR, Protecting Dignity: An Agenda for Human Rights, June 2009.

social rights is important, it is not exclusive. It is the experience of humiliation, domination, powerlessness and debasement that makes us equally aggrieved. Dignity is a concept that can capture this sociological and psychological dimension. This idea of dignity and autonomy particularly resonates with the right to sanitation. The health implications of the lack of sanitation are of course profound, but issues of self-worth, privacy and equality are also prominent. After her appointment, the first UN Special Rapporteur on the human right to safe drinking water and sanitation stated that ‘being forced to defecate in public is an affront to human dignity’.<sup>35</sup> She argued that, ‘Dignity closely relates to self-respect, which is difficult to maintain when being forced to squat down in the open, with no respect for privacy, not having the opportunity to clean oneself after defecating and facing the constant threat of assault in such a vulnerable moment’.<sup>36</sup>

This link between sanitation and dignity is present in national political discourse. In South Africa, the bucket system for sanitation in many black townships has endured since the end of apartheid despite long-standing official targets for its eradication. Statements by politicians have emphasised the aspect of personal dignity: the previous President of South Africa stated that the government was on course to ‘put an end to this *dehumanising* system’<sup>37</sup> and the former Minister for Water Affairs and Forestry acknowledged that the ‘bucket system can only be described as *demeaning*’.<sup>38</sup> It has also been found in legal jurisprudence. In *Melnik v Ukraine*, the European Court of Human Rights found that the applicant’s conditions of detention, which included ‘unsatisfactory conditions of hygiene’, amounted to cruel and degrading treatment since not only caused considerable mental and physical suffering but were aimed at ‘diminishing his human dignity and arousing in him such feelings as to cause humiliation and debasement’.<sup>39</sup> Moreover, failure to address the personal dignity dimension of sanitation can multiply the negative effects on health. UNICEF has noted the problems women agricultural workers face as they wait

<sup>35</sup> ‘Investing in sanitation is investing in human dignity, says UN expert’, UN Press Release, 18 November 2008. Note that the UN Special Rapporteur was originally appointed as the Independent Expert on the issue of human rights obligations relating to access to safe drinking water and sanitation.

<sup>36</sup> *Report of the Special Rapporteur*, para. 57.

<sup>37</sup> ‘State of the Nation Address of the President of South Africa, Thabo Mbeki: Joint Sitting of Parliament’, 9 February 2007. Department for International Relations and Cooperation, Government of South Africa.

<sup>38</sup> L.B. Hendricks, Minister of Water Affairs and Forestry, Speech at Sundays River Valley Local Municipality, Eastern Cape, 13 December 2007 (emphasis added).

<sup>39</sup> Application no. 72286/01, judgment dated 28 March 2006, para. 110.



to defecate at night in privacy.<sup>40</sup> Children, and especially girl children, are also less likely to attend school if sanitation facilities are not available or are not separated by gender.<sup>41</sup>

## 2.2 International Law

An alternative approach is to look at developments in international law, that is, taking a legal positivist or politically deliberative approach. Bilder has gone as far as to say that a claim amounts to a human right if the General Assembly 'says it is'.<sup>42</sup> Philip Alston agreed but proposed a stricter set of procedures to ensure some quality control in pronouncements coming out of the General Assembly.<sup>43</sup> Whereas international law may not represent the definitive articulation of what human rights truly represent, the motivations of drafters being diverse and contradictory, it carries at least the imprimatur of the deliberation of all States in the world. Indeed, Beitz has discerned in contemporary international human rights law a relatively coherent moral theory.<sup>44</sup> According to him, human rights are 'requirements whose object is to protect *urgent* individual interests against certain predictable dangers' under 'typical circumstances of life in a *modern world* order composed of States' to which 'political institutions' must respond.<sup>45</sup> This formulation allows us to make sense of conditional, detailed and contemporary rights in international law, such as fair trial or trade union rights, or the right to sanitation.

Until very recently, it has been difficult to conclude with any degree of certainty that there is a freestanding right to sanitation in international law. However, there has been a range of international human rights as well as humanitarian law instruments<sup>46</sup> that explicitly protect and promote access

<sup>40</sup> See, e.g. Arlette Yepdujo and Christian Guerre, 'Introducing SanPlat latrines in Niger', *UNICEF WATERfront*, No. 13, December (1999), pp. 7–10, at 7.

<sup>41</sup> C. Jasper, T. Thi Le and J. Bartram, 'Water and Sanitation in Schools: A Systematic Review of Health and Educational Outcomes', *International Journal of Environmental Research and Public Health*, Vol. 9, No. 8 (2012), pp. 2772–2787.

<sup>42</sup> R. Bilder, 'Rethinking International Human Rights: Some Basic Questions', *Wisconsin Law Review*, No. 1 (1969), pp. 171–217, at 173. In 1984.

<sup>43</sup> P.- Alston, 'Conjuring Up New Human Rights: A Proposal for Quality Control' *American Journal of International Law* Vol. 78 (1984), pp. 607–621.

<sup>44</sup> C. Beitz, *The Idea of Human Rights* (Oxford: Oxford University Press, 2009). For the sake of brevity, we ignore in this discussion agreement-based theories of human rights.

<sup>45</sup> *Ibid.*, p. 109. Emphasis added.

<sup>46</sup> While formally outside human rights law, international humanitarian law strengthens many of these conclusions. The Geneva Convention (III) relative to the Treatment of Prisoners of War, 1949, provides that occupying powers are 'bound to take all sanitary measures necessary to ensure the cleanliness and healthfulness of camps and to prevent epidemics' and that article continues to specify in some detail the type of measures. See Article 29, Geneva Convention IV

to sanitation. This *integrative* approach is evident in Article 14(2)(h) of the Convention on the Elimination of All Forms of Discrimination against Women which explicitly obliges State parties to ensure that women in rural areas have the right to ‘enjoy adequate living conditions, particularly in relation to housing, *sanitation*, electricity and water supply, transport and communications’.<sup>47</sup> The Convention on the Rights of the Child provides a more expansive view. In implementing the right to health, States are required in Article 24(2) to take appropriate measures to combat the ‘dangers and risks of environmental pollution’ of water in combating disease and to ensure that everyone is ‘supported in the use of basic knowledge’ about hygiene and environmental sanitation.<sup>48</sup>

A number of social rights have also been interpreted by UN human rights treaty bodies to include access to sanitation. According to the Committee on Economic, Social and Cultural Rights (CESCR), the right to housing includes ‘sanitation and washing facilities’ and ‘site drainage’.<sup>49</sup> With regard to the right to health, the same Committee listed sanitation as one of the underlying determinants of health, and thus part of the right to health, on the basis of the drafting history of the Covenant and wide wording of the provision.<sup>50</sup> It is also viewed as a constitutive element in defining the availability, quality and accessibility of health. The UN Special Rapporteur on water and sanitation also demonstrates how sanitation is relevant to a wide range of human rights including education, work, decent working

on the Protection of Civilian Persons in Times of War, prisoners of war are to ‘shall have for their use, day and night, conveniences which conform to the rules of hygiene’ with separate sanitary facilities for women prisoners of war. Prisoners of war are also to be provided with sufficient water and soap for their ‘personal toilet’. The same treatment is required in relation to civilian internees (Article 89). Water resources and infrastructure, which would arguably include sewage treatment plants and potentially extended to include other sanitation facilities, must also be protected during armed conflict: See Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1977, Article 54; and Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 1977, Article 14.

<sup>47</sup> Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13, UN Doc A/34/46 (emphasis added).

<sup>48</sup> Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (emphasis added).

<sup>49</sup> Committee on Economic, Social and Cultural Rights, *General Comment 4, The Right to Adequate Housing* (Sixth session, 1991), UN Doc. E/1992/23, annex III at 114 (1991), para. 8(b).

<sup>50</sup> Committee on Economic, Social and Cultural Rights, *General Comment 14, The Right to the Highest Attainable Standard of Health* (Twenty-second session, 2000), UN Doc. E/C.12/2000/4 (2000), para. 4.

conditions, life, physical security, prohibition of inhuman or degrading treatment and equality of men and women.<sup>51</sup>

Sanitation was given some attention in the CESCR's General Comment No. 15 on the Right to Water.<sup>52</sup> The content of the right to water is said to include water for personal hygiene and sanitation. The Committee further emphasised that access to sanitation was both 'fundamental for human dignity and privacy' and a 'principal mechanism for protecting the quality of drinking water supplies and resources'.<sup>53</sup> The effective provision of sanitation was also articulated as a clear State responsibility: 'States parties have an obligation to progressively extend safe sanitation services, particularly to rural and deprived urban areas, taking into account the needs of women and children'. However, the integration of sanitation into the General Comment was criticised as being insufficient by some experts at the Day of General Discussion that preceded the General Comment's adoption.<sup>54</sup>

This interplay between sanitation and various social rights is particularly visible in national jurisprudence. The first Indian public interest case on social rights concerned sanitation. In the 1980 judgment of *Municipal Council, Ratlam v. Shri Vardhichand & Others*, the Supreme Court of India found that the failure of a municipality to provide toilets for informal settlements and drainage not only violated the Municipality Act but threatened human health and implicated human rights due to the assault on decency and dignity.<sup>55</sup> Moreover, in the first reported case that invoked the 2002 General Comment No. 15 on the Right to Water, sanitation was at the forefront. Provincial and municipal authorities in Argentina were found to have violated the rights to health and right to water by failing to prevent pollution of communal water sources, with the culprit being an under-maintained and overstretched sewage-treatment plant.<sup>56</sup>

Until 2010, the international recognition of a *freestanding* or independent right to sanitation – including as a co-right with water – was thin. The first instance of such a recognition was in the so-called Dublin Principles: 'it is vital

<sup>51</sup> *Report of the Special Rapporteur*, paras. 13–54. This will not be discussed in this chapter in detail but the jurisprudence and experience from other rights will be returned to in delineating the content of the right and the correlative duties in the next section.

<sup>52</sup> See the final outcome: Committee on Economic, Social and Cultural Rights, *General Comment 15, The Right to Water* (Twenty-ninth session, 2002), UN Doc. E/C.12/2002/11.

<sup>53</sup> *CESCR General Comment 15*, *ibid.*, para. 29.

<sup>54</sup> Committee on Economic, Social and Cultural Rights, *Preliminary Discussion of a Draft General Comment on the Rights to Water*, (Twenty-ninth Session), 27 November 2002 UN. Doc. E/C.12/2002/SR.46 (2002).

<sup>55</sup> *Municipal Council, Ratlam v. Shri Vardhichand & Ors* [1981] SCR (1) 97.

<sup>56</sup> *CEDHA v. Provincial State and Municipality of Córdoba* (AC).

to recognize first the basic right of all human beings to have access to clean water and *sanitation* at an affordable price'.<sup>57</sup> Two years later, 177 States at the 1994 Cairo Conference on Population and Development endorsed a Programme of Action that recognised that all individuals have the 'right to an adequate standard of living for themselves and their families, including adequate food, clothing, housing, water and *sanitation*'. The later UN-Habitat Global Plan of Action (1996) contains identical language,<sup>58</sup> but the Johannesburg Declaration (2002) is more circumspect and refers to dignity rather than rights.<sup>59</sup>

During the drafting of the General Comment No. 15 on the Right to Water, the CESCR was pressed by NGOs and international health experts to imply the right to sanitation along with water.<sup>60</sup> However, the Committee declined. It is difficult to speculate as to reasons why - they were not made public. Although, some Committee members have indicated that they did not believe there was sufficient international support in international law.<sup>61</sup> Nonetheless, the Committee's position gradually evolved. In its General Comment No. 19 of 2008, it appears to suggest that sanitation was a right on par with others in the Covenant.<sup>62</sup>

Ultimately, the Committee recognised a clear right to sanitation after political developments in the UN charter bodies. In 2001, a UN Sub-Commission on Human Rights Special Rapporteur drafted guidelines which began with the assertion that sanitation was 'unquestionably a human right' and go on to state that 'Everyone has the right to have access to adequate and safe sanitation that is conducive to the protection of public health and the environment'.<sup>63</sup> Little resulted from that but in 2006, a request from the

<sup>57</sup> International Conference on Water and the Environment: Development Issues for the 21st Century, 'Dublin Statement on Water and Sustainable Development', UN Doc. A/CONF.151/PC/112 (1992). Emphasis added. It was not a formal government declaration, but the statement was endorsed by international experts from a hundred countries. It is also a formal UN document.

<sup>58</sup> UN-Habitat, *The Habitat Agenda Goals and Principles, Commitments and the Global Plan of Action* (Nairobi: UN-Habitat, 1996), Istanbul, Turkey, para. 11.

<sup>59</sup> Adopted at the 17th plenary meeting of the World Summit on Sustainable Development, Johannesburg, South Africa, 4 September 2002.

<sup>60</sup> *Preliminary Discussion of a Draft General Comment*.

<sup>61</sup> Private conversations with the first-named author of this chapter.

<sup>62</sup> When discussing the coverage for certain social security benefits, it uses the language of rights in relation to sanitation: 'Family and child benefits, including cash benefits and social services, should be provided to families, without discrimination on prohibited grounds, and would ordinarily cover food, clothing, housing, water and sanitation, or other rights as appropriate'. Committee on Economic, Social and Cultural Rights, *General Comment No. 19, The Right to Social Security* (Thirty-ninth session, 2007), UN Doc. E/C.12/GC/19 (2008), para 6.

<sup>63</sup> The Guidelines are available at: UN Commission on Human Rights, *Final report of the Special Rapporteur on the Relationship between the Enjoyment of Economic, Social and*

newly formed Human Rights Council<sup>64</sup> led to a study by the UN High Commissioner for Human Rights which acknowledged that it was an open debate on whether water and sanitation were human rights but forcefully concluded that it was time to consider sanitation as a human right.<sup>65</sup> In 2009, the then UN Special Rapporteur on the human right to safe drinking water and sanitation in her report to the General Assembly came to a similar conclusion, noting ‘a trend towards recognition of such a distinct right’.<sup>66</sup>

The issue was finally resolved in 2010 when the UN General Assembly recognised ‘the right to safe and clean drinking water and sanitation as a human right that is essential for the full enjoyment of life and all human rights’.<sup>67</sup> However, a high number of States abstained from voting for the resolution: 122 voted in favour to none against, with 41 abstentions. The majority of abstaining States noted that their vote was not premised on substantive opposition or agnosticism. Rather it was procedural: the matter was also being handled by the UN Human Rights Council, and they felt it was premature for the General Assembly to take a vote.

Some States, however, were substantively opposed. For the United Kingdom, the problem with the resolution was the very inclusion of the right to sanitation:

The representative of the United Kingdom said her delegation had abstained for reasons of substance and procedure. Concerning substance, there was no sufficient legal basis for declaring or recognizing water or sanitation as freestanding human rights, nor was there evidence that they existed in customary law.<sup>68</sup>

This dissent was overcome in September 2010 when the UN Human Rights Council affirmed the recognition of the right to sanitation without the need to hold a vote.<sup>69</sup> The members of the Council included many States who had previously abstained in the General Assembly. This was followed in

*Cultural Rights and the Promotion of the Realization of the Right to Drinking Water Supply and Sanitation*, (Fifty-sixth session, 2004), UN Doc. E/CN.4/Sub.2/2004/20.

<sup>64</sup> Decision 2/104, *Human Rights and Access to Water*, 31st Meeting, 27 November 2006.

<sup>65</sup> UN Human Rights Council, *Report of the United Nations High Commissioner for Human Rights on the scope and content of the relevant human rights obligations related to equitable access to safe drinking water and sanitation under international human rights instruments* (Sixth session, 2007), UN Doc. A/HRC/6/3 (2007), para. 66.

<sup>66</sup> Report of the Special Rapporteur, para. 59.

<sup>67</sup> *The Human Right to Water and Sanitation*, para. 1.

<sup>68</sup> *General Assembly Adopts Resolution Recognizing Access to Clean Water, Sanitation*, UN Information Release, 28 July 2010.

<sup>69</sup> *Human Rights and Access to Safe Drinking Water and Sanitation*, Resolution.

2015 by a new General Assembly vote in which sanitation was recognised as a distinct right, which we discuss below.

The authoritative recognition by the General Assembly and the endorsement by the UN Human Rights Council appear to have settled the status of the right to sanitation in international law. Moreover, in the Human Rights Council (HRC) resolution, the legal foundations of the right were clearly established. Namely, that the right to sanitation was derived from the right to adequate standard of living and related to the right to health.<sup>70</sup> Simultaneously, the CESCR moved to declare that the right to sanitation could be derived from these rights in the ICESCR:

The Committee reaffirms that, since sanitation is fundamental for human survival and for leading a life in dignity, the right to sanitation is an essential component of the right to an adequate standard of living, enshrined in Article 11 of the International Covenant on Economic, Social and Cultural Rights. The right to sanitation is also integrally related, among other Covenant rights, to the right to health, as laid down in Article 12 paragraphs 1 and 2 (a), (b) and (c), the right to housing, in Article 11, as well as the right to water, which the Committee recognized in its General Comment No. 15.<sup>71</sup>

Interestingly, it chose not to update General Comment No. 15 (following the practice of the Human Rights Committee in light of new developments or case-based jurisprudence) but issued a separate document on the right to sanitation.

### 3 IDENTIFYING THE NATURE OF THE RIGHT

Unlike other human rights, the recognition of the right to sanitation was not significantly preceded or followed by a scholarship that sought to tease out its essential nature and relationship to other rights. This section tries to understand the nature of the right to sanitation: how does it relate to the right to water and is it an individual, collective or hybrid right?

#### 3.1 *A Co-Right with Water?*

One primary legal question until recently has been somewhat technical and linguistic. Is sanitation a stand-alone right or a co-right with water? What was

<sup>70</sup> *Human Rights and Access to Safe Drinking Water and Sanitation*, Resolution, para. 3.

<sup>71</sup> UN Committee on Economic, Social and Cultural Rights, *Statement on the Right to Sanitation*, (Forty-fifth sesión, 2010), UN Doc. E/C.12/2010/1, para. 7.

interesting (and concerning for some) about the recognition of the right to sanitation in international law was the use of a *singular* not a plural noun. Water and sanitation were referred to as a human right, not human rights, in all the legal instruments cited above. This suggested that sanitation is conceived as a co-right with water. Such a twinning seemed natural: water quality is largely dependent on the provision of sanitation (waterborne or dry), water and sanitation combine with good hygiene to provide a very effective health intervention, and the infrastructure and management for waterborne sanitation is usually twinned with water. It may have also made political sense: it is more feasible to recognise one rather than two ‘new’ rights.

Nonetheless, this approach was contested. The UN Special Rapporteur frequently referred to ‘rights’ to water and sanitation.<sup>72</sup> On account of its dignity dimensions, she emphasised that sanitation was a ‘distinct right’.<sup>73</sup> The CESCR did not take a clear position but noted that: ‘sanitation has distinct features which warrant its separate treatment from water in some respects. Although much of the world relies on waterborne sanitation, increasingly sanitation solutions which do not use water are being promoted and encouraged’.<sup>74</sup>

Objections went further. Environmentalists typically express the concern that the lumping of water and sanitation together in development (and now human rights) discourse promoted water-based solutions to sanitation. Some sanitation and human rights advocates worried that expressing sanitation as a co-right with water would also lead to the former being overshadowed in political commitments, funding or implementation.<sup>75</sup> Although the benefits from investing in sanitation are at least as considerable as investments in water, requirements for the water sector are easier to finance than requirements for the sanitation sector, which garners only 37 per cent of aid funding and an average of 20 per cent of government spending.<sup>76</sup> The CESCR has noted these extreme differences. In its concluding observations on Nepal’s periodic report, it noted that ‘29 per cent of the population has no access to

<sup>72</sup> *Report of the Special Rapporteur*.

<sup>73</sup> *Ibid.*, paras. 58–59: ‘One might argue that, because dignity pervades the issue of sanitation and sanitation cannot be entirely subsumed into any other existing human right, it should be considered a distinct human right’ (para. 58). For an extended argument on de-linking, see K. Ellis and L. Feris, ‘The Right to Sanitation: Time to Delink from the Right to Water’, *Human Rights Quarterly* Vol. 36 (2014), pp. 607–629.

<sup>74</sup> *Ibid.*

<sup>75</sup> In South Africa, local water services managers received directives from national government to meet the national water targets first and then concentrate on sanitation afterwards. Communication from local official to Malcolm Langford, 17 February 2009.

<sup>76</sup> UN-Water, *Global Annual Assessment of Sanitation and Drinking-Water (GLAAS)* (Geneva: WHO, 2010), pp. 28–29.

safe water, 90 per cent has no access to health services and 84 per cent has no access to sanitation'.<sup>77</sup> However, some recent evidence suggests that sanitation may not be so under-prioritised in comparison to water<sup>78</sup> and arguably both receive too little attention.

There are also a number of operational differences. Outside the domain of centralised sewerage systems, there is rarely a clearly assigned responsibility for direct provision of sanitation services. Similarly, governmental responsibilities towards sanitation are commonly distributed amongst different agencies, departments and ministries. Moreover, when water services fail, they tend to fail in a geographic area (e.g. a well with handpump or a centralised piped supply), thereby sparking public demand for improvement or replacement services. When sanitation services fail, they are more likely to fail by household (e.g. because of a full latrine pit or septic tank), so public demand for improvement may be more localised. Sanitation is also very much a process rather than a complete and actual good and possibly suffers from not playing the deep role that water does in many religions and societies in terms of water sharing and cultural practices.

These concerns eventually proved decisive. In November 2015, the General Assembly declared that 'human rights to safe drinking water and sanitation as components of the right to an adequate standard of living are essential for the full enjoyment of the right to life and all human rights'.<sup>79</sup> And, at the end of the day, it is not clear whether the linguistic construction of the right is decisive. The real challenge may be to articulate and emphasise sanitation as a right, and its constituent elements, rather than on dwelling on the semantic ontology. Analogies can perhaps be made with the civil right to 'freedom of thought, conscience and religion', as it is expressed in the International Covenant on Civil and Political Rights.<sup>80</sup> These three interests are sufficiently related so as to be placed naturally together even if they have clearly distinct characteristics.<sup>81</sup>

<sup>77</sup> CESCR, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Nepal* (Twenty-sixth sesión, 2001), UN Doc. 24/09/2001. E/C.12/1/Add.66, para. X.

<sup>78</sup> O. Cumming, M. Elliott, A. Overbo and J. Bartram, 'Does Global Progress on Sanitation Really Lag behind Water? An Analysis of Global Progress on Community- and Household-level Access to Safe Water and Sanitation', *PLoS ONE*, Vol. 9 no. 12 (2014): e114699.

<sup>79</sup> *The Human Rights to Safe Drinking Water and Sanitation*, UN GA Resolution 707169, UN doc. A/C.3/70/L.55/Rev.1, para. 1.

<sup>80</sup> International Covenant on Civil and Political Rights (adopted 19 December 1966, entered into force 3 March 1976) 999 UNTS 171, UN Doc. A/6316 (1966), Article 18.

<sup>81</sup> The UN Human Rights Committee has thus described the right as 'far-reaching and profound' since 'it encompasses freedom of thought on all matters, personal conviction and the commitment to religion or belief'. *General Comment 22, Article 18* (Forty-eighth session, 1993). *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc. HRI/GEN/1/Rev.1 at 35 (1994).



### 3.2 Individual, Group or Hybrid Right?

However, sanitation may diverge from water in a more important way, which raises different categorical questions. On closer inspection, the right to sanitation could be said to possess the features of a group right (like environmental health or peace) rather than an individual right. A group right has been defined as such:

[A] group of individuals has a collective right if their shared interest is sufficient to ground a duty in others, and if the interest of any single member of the group is insufficient by itself to ground that duty.<sup>82</sup>

Raz argues that a collective right can be identified when the three following conditions hold:

First, it exists because an aspect of the interest of human beings justifies holding some person(s) to be subject to a duty. Second, the interests in question are the interests of individuals as members of a group in a public good and the right is a right to that public good because it serves their interest as members of that group. Thirdly, the interest of no single member of that group in that public good is sufficient by itself to justify holding another person to be subject to a duty.<sup>83</sup>

Why might sanitation constitute this type of right? Sanitation is frequently promoted by health and development practitioners and policymakers on the basis of its *public health* benefits. As discussed, human faeces is the leading cause of water pollution and a major cause of preventable illnesses that can lead to death. Indeed, this collective dimension is clear when practitioners frequently express frustration with a lack of demand for it: ‘people need to be educated’, ‘people need to be made aware’ and so on.<sup>84</sup> If human rights are meant to spring from universal and basic demands, do we need to be educated to ask for them? Helped to demand them?

Thus, attention is not principally focused on *individual* access to a toilet or other modality; it is equally on the right of *all* people to *access* sanitation and the duty of all persons to *use* sanitation facilities so as to not infringe the rights

<sup>82</sup> P. Jones, ‘Group Rights’, in E.N. Zalta (ed.), *The Stanford Encyclopaedia of Philosophy* (Winter 2008 Edition), section 4, p. 9.

<sup>83</sup> J. Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1986), p. 208.

<sup>84</sup> This includes advocates within the human rights community: see *Report of the Special Rapporteur*, para. 68. The participatory dimension of the right is important since ‘achieving community ownership and dedication in order to bring about the required behavioural changes’. Whether individuals have a duty to practice safe sanitation is taken up by Inga Winkler, ‘The Human Right to Sanitation’, *University of Pennsylvania Journal of International Law*, Vol. 37, No. 4 (2016), pp. 1331–1406.

of others: this way, *everyone* will be protected from the *effects* of human excreta.<sup>85</sup> If we focus on the environmental and health benefits of sanitation, then our primary interest is public rather than personal. It is difficult to individualise in rights terms such a collective demand. Whereas almost all rights have a collective dimension (often in the means of implementation), they can be at least expressed in individual terms. In the case of sanitation, can one argue that a *single individual's* interest in sanitation services being universally provided would be sufficient to justify the creation of an entire sanitation system? This is different from water: one can clearly speak of a duty to ensure individuals have access to water on the basis of their individual interest.

Importantly, the idea of group rights has been challenged on many grounds. Some argue that it is impossible for groups to possess rights since groups are 'fictitious entities'<sup>86</sup> or that even if they are not, they cannot claim human rights since these are reserved for individuals.<sup>87</sup> Others require that rights claimants meet certain thresholds of normative agency (whether individual or institutional)<sup>88</sup> or that group rights may only be justifiable to the extent they are reducible to the rights of individuals.<sup>89</sup> To this are added the concerns that accepting group rights allows the translation of any public good into a human right, thus fuelling further human rights inflation.

One way of responding to this conceptual dilemma is to try and mount a case for sanitation on purely individual grounds. This could be done by turning to dignity: the denial or lack of individual access to sanitation is in and of itself an affront to individual human dignity. A lack of sanitation clearly raises issues of privacy, individual health, personal dignity as well as safety and equality. This impact at the personal level could be sufficient for arguing that sanitation is a human right. However, this only takes us so far. Dignity would

<sup>85</sup> In this sense, it is not surprising to see a movement for environmental sanitation which focuses not just on human excreta but developing sanitation systems that deal with all types of waste and which demands not just a collection point of excreta but also safe transport, treatment and disposal. See WHO, *What Is Environmental Sanitation?* (Geneva: WHO, 2002).

<sup>86</sup> J. Graff, 'Human Rights, Peoples, and the Right to Self-Determination', in J. Baker (ed.), *Group Rights* (Toronto: Toronto University Press, 1994), pp. 186–214, at 194.

<sup>87</sup> J. Donnelly, *Universal Rights in Theory and Practice* (2nd edn., Ithaca: Cornell University Press, 2002).

<sup>88</sup> C. Wellman, 'Liberalism, Communitarianism, and Group Rights', *Law and Philosophy*, Vol. 18, No. 1: 13–40 (1999). Although some would allow institutional, rather than collective entities, to possess rights on the grounds of their independent decision-making procedures. See *Stanford Encyclopaedia of Philosophy*, section 6, p. 17.

<sup>89</sup> 'Groups can have many concrete rights, as do individuals. But do they have a fundamental right to survive and flourish as do individuals? The answer depends on what view one takes on the sacredness of groups'. V. Haksar, 'Collective Rights and the Value of Groups', *Inquiry*, Vol. 41, No. 1, pp. 21–43, at 41.

ground a right to a private and safe place in which to urinate, defecate and manage menstruation; individual health concerns would also support the removal of that waste so as to avoid pollution. However, it would not support the treatment or transport of human waste in such a way as to avoid health effects for other individuals. In order to protect the dignity of an individual, different ways could be used to get rid of the waste that would not necessarily be in the interest of others. In the case of water, this puzzle does not arise: there is an individual interest in a system of supply and quality control as it will be consumed by the individual. Thus, the justification of a fully functioning system of sanitation and collective behavioural change cannot be fully grounded in individual interest in sanitation *per se*.<sup>90</sup>

Thus, we need to look for an alternative and complementary justification for the ‘collective dimensions’ of the right to sanitation. The best and the most pragmatic approach seems to transcend an individualist fixation with human rights. Group rights could be defended by recognition that some goods ‘are fundamental to human life and human well-being’ and that ‘if we ignore that fact, our conception of human rights will not match the reality of the human condition’.<sup>91</sup> In international human rights treaty law and declarations, we find broader group-based rights such as self-determination,<sup>92</sup> the benefits of scientific progress and its applications,<sup>93</sup> development<sup>94</sup> and indigenous peoples’ rights.<sup>95</sup> Moreover, behavioural change is often sought for the realisation of other rights: for example, we encourage or make compulsory voting to improve democracy; likewise primary education is made compulsory in human rights treaties. Thus, the right to sanitation appears more defensible if we downplay the theoretical difficulties of recognising a human right as solely an individual right and acknowledge that a right with strong

<sup>90</sup> Although it could be justified on an individual basis through other rights such as health or water – i.e. the *duty* to ensure access to sanitation in order that these rights are respected. But this starts from a right to water or health and *not* sanitation.

<sup>91</sup> *Stanford Encyclopaedia of Philosophy*, section 9, p. 21.

<sup>92</sup> International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 23 March 1976) 993 UNTS 3, UN Doc. A/6316(1966), Article 1 and ICCPR.

<sup>93</sup> ICESCR, Article 15.

<sup>94</sup> UN General Assembly, *Declaration on the Right to Development*, G.A. res. 41/128, UN Doc. A/41/53 (1986).

<sup>95</sup> Convention concerning Indigenous and Tribal Peoples in Independent Countries (ILO No. 169), 72 ILO Official Bull. 59, entered into force Sept. 5, 1991; UN General Assembly, *Declaration on the Rights of Indigenous Peoples*, G.A. Res. 61/295, UN Doc. A/RES/47/1 (2007).

collective or group dimensions is acceptable within the global human rights and international law framework.

Sanitation should be conceived therefore as a hybrid right, with individual and group components. It protects basic needs and dignity but also entails a focus on the broader right to a clean and health-supporting environment. While generally synergistic, there are both favourable and adverse interactions between these two categories. For example, extension of access to sanitation in households contributes to the realisation of the individual right, but it may support or infringe the collective dimension. This would depend on whether a population's exposure to hazardous faeces is reduced by the individual access to a toilet (e.g. by reduction in open defecation replaced with household latrines) or increased (e.g. when shared latrines are replaced by piped sewerage with no accompanying treatment of sewage produced). This rise in hazardous risks may be quite wide or very specific, for example, a move from open defecation to community-level sewerage may lead to a transportation of human waste from the environment of the sewered community into the environment of 'downstream' communities.

Interestingly, sanitation is framed as such a hybrid right in section 2 of the South African Water Services Act. The provision reads that everyone has 'the right of access to a basic water supply and the right to basic sanitation necessary to secure sufficient water and an environment not harmful to human health or well-being'. The purpose of the recognition of the right is not just individuals, but it extends also to the environmental protection that is important to the health and well-being of all people. Similar language is used in the UN Sub-Commission guidelines, which arguably go further since they aim to protect the environment generally and not just human health.<sup>96</sup> Thus, in our view, the conditions conducive to attaining both individual and collective/group benefits and for managing trade-offs between these two should be recognised.

#### 4 CONTENT AND OBLIGATIONS

It has been claimed that social rights are indeterminate since there 'is no universal and non-arbitrary standard for distinguishing need from luxury' and thus it is equally difficult to adduce what a minimum or adequate level of the rights may be.<sup>97</sup> Added to this are worries that it is difficult to identify who is

<sup>96</sup> Principle 1.2 states 'Everyone has the right to have access to adequate and safe sanitation that is conducive to the protection of public health and the environment'.

<sup>97</sup> D. Kelley, *A Life of One's Own: Individual Rights and the Welfare State* (Washington, D.C.: Cato Institute, 1998), p. 16.

the relevant duty bearer, that social rights are highly resource dependent and lack justiciable qualities and that their implementation is enormously complex and will necessarily interfere with the fulfilment of other rights. These concerns may be projected onto the right to sanitation, particularly when it has received little political, jurisprudential and scholarly attention. This potentially makes these questions more difficult to answer. This section examines whether it is possible to discern meaningful and feasible obligations and entitlements that would meet basic human rights criteria.

#### 4.1 Obligations

As discussed in Chapter 1, social rights have been critiqued on the basis that both the duty bearer and the duties pass unidentified: 'We normally regard claims or entitlements that nobody is obligated to respect and honour as null or void, indeed undefined' and that 'abstract rights to goods and services' fall squarely in this category.<sup>98</sup> The challenge of the indeterminateness of the responsible *actor* can be addressed in two ways. The first is to focus on those individuals or entities that are proximate or in a position to help, a long tradition in ethics and even natural rights thinking.<sup>99</sup> The second is to narrow the scope and confine duties to States for pragmatic and principled reasons, for example, the presumed social contract between a State and its citizens/residents.<sup>100</sup>

This latter approach is dominant in international human rights law, but the duties of other actors are increasingly receiving attention.<sup>101</sup> The human rights responsibilities of transnational corporations and intergovernmental organisations are subject to a rapidly growing body of international soft law,<sup>102</sup>

<sup>98</sup> O. O'Neill, 'The Dark Side of Human Rights', *International Affairs*, Vol. 81 (2005), pp. 427–439, at 430, 428.

<sup>99</sup> Griffin, *On Human Rights*; T. Pogge, *World Poverty and Human Rights: Cosmopolitan Responsibilities and Reforms* (2nd ed, Cambridge: Polity Press, 2008).

<sup>100</sup> T. Paine, *The Rights of Man* (New York: Penguin Books, 1985).

<sup>101</sup> For an overview of constitutional developments that place social rights obligations on private actors, see M. Langford, 'Justiciability of Social Rights: From Practice to Theory', in M. Langford (ed.), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge: Cambridge University Press, 2008), pp. 1–45. In armed conflict, non-state actors are bound to respect various fundamental interests, including the provision of sanitary facilities to prisoners and protection of sewerage works from attack

<sup>102</sup> See, for example, ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy in 1977 and the OECD Guidelines for Multinational Enterprises 1976 and revision in 2000 and 2011. See also UN Human Rights Council, *Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie*, (Seventeenth session, 2011) UN Doc. A/HRC/17/31 (2011).

with claims that some have hardened in customary international law.<sup>103</sup> These obligations tend to be characterised negatively, but there is some recognition that there may be more positive duties of ‘due diligence’ to ensure that the particular institution is not contributing to the denial or frustration of the achievement of human rights.<sup>104</sup> For example, private actors should not only provide adequate sanitation for their employees, patients, pupils and so on but also consider how they could contribute to the realisation of the right more broadly.<sup>105</sup> For reasons of space and the fact that the duties of States have been more firmly established in international law, we will devote our attention to them.

Up to the time of writing, no authoritative determination of the obligations of States in relation to a freestanding right to sanitation has been made in international law. In its 2010 statement, the CESCR simply expresses the view that the right to sanitation requires ‘full recognition by States parties in compliance with the human rights principles related to non-discrimination, gender equality, participation and accountability’.<sup>106</sup> However, the general scholarship and jurisprudence on economic, social and cultural rights is relatively developed and can be drawn upon.

The former UN Special Rapporteur attempted precisely that although there are a number of issues that remain unresolved. According to her, the duty of *respect* requires States to refrain from acts or measures that ‘threaten or deny individuals or communities existing access to sanitation’.<sup>107</sup> It may be difficult to imagine States willingly interfering with sanitation, but the issue often arises

<sup>103</sup> M. Darrow, *Between Light and Shadow: The World Bank, the International Monetary Fund and International Human Rights Law* (Oxford: Hart Publishing, 2003); O. De Schutter (ed.), *Transnational Corporations and Human Rights* (Oxford: Hart Publishing, 2006); S. Skogly, *The Human Rights Obligations of the World Bank and the IMF* (London: Cavendish Publishing, 2001).

<sup>104</sup> See generally O. De Schutter (ed.), *Transnational Corporations and Human Rights* (Oxford: Hart Publishing, 2006).

<sup>105</sup> For example, the UN Special Rapporteur on Right to Water and Sanitation has stated that, ‘While it is the obligation of the State to put into place the necessary regulations, providers also have responsibilities in the operation of services. As outlined above, they must exercise due diligence to become aware of, prevent and address adverse impacts on human rights. To meet this responsibility, service providers should take certain measures, such as ensuring that the water they provide is of safe quality, ensuring the regularity of supply, not discriminating in their operations, adopting fair procedures in cases of disconnections due to non-payment and refraining from disconnections when people are unable to pay and the disconnection would leave them without access to minimum essential levels of water’. UN Human Rights Council, *Report of the independent expert on the issue of human rights obligations related to access to safe drinking water and sanitation, Catarina de Albuquerque*, (Fourteenth session, 2010) UN Doc. A/HRC/15/31, para. 49.

<sup>106</sup> CESCR, Statement, para. 8. <sup>107</sup> *Report of the Special Rapporteur*, para. 64.

in the context of water disconnections – the denial of access to water renders waterborne sanitation impossible. In some cases, it is more direct. In many informal settlements and some rural areas, sanitation facilities are constructed separately, and there are often claims that forced evictions result in the destruction of sanitation facilities. It is possible to argue that demolition and denial of access would breach the right to sanitation unless there were exceptional circumstances,<sup>108</sup> due process<sup>109</sup> and the provision of alternatives.<sup>110</sup>

The duty to *protect* entails taking steps to ensure that non-State actors respect the right to sanitation. Where private actors have the opportunity to deliver sanitation services, the obligation to protect assumes particular relevance. If aspects of service provision are owned, managed or operated by the private sector, the State retains the duty to not only establish a regulatory framework but also maintain effective control in practice. Caution also needs to be exercised in the process of facilitating private sector involvement: in the development of frameworks for privatisation in the late 1990s, some governments/municipalities demonstrated a tendency to split the concessions, with the (fully or partly privatised) utility delivering (more profitable) water but not (more costly) sanitation. This raises the risk that sanitation will be deprioritised if the public sector is not expected to maintain an equivalent or improved service in the shadow of enhanced private sector participation.<sup>111</sup> Thus, if private sector service delivery can be justified and is desired, then States need

<sup>108</sup> See, for example, the articulation of this in Committee on Economic, Social and Cultural Rights, *General Comment 7, Forced evictions, and the right to adequate housing*, (Sixteenth session, 1997), UN Doc. E/1998/22, annex IV at 113 (1997).

<sup>109</sup> This has already been set out by the CESCR in General Comment No. 15 in relation to the Right to Water and would equally apply to a right to sanitation. Replacing water in paragraph 56 with sanitation, the duty would read as follows: ‘Before any action that interferes with an individual’s right to sanitation is carried out by the State party, or by any other third party, the relevant authorities must ensure that such actions are performed in a manner warranted by law, compatible with the Covenant, and that comprises: (a) opportunity for genuine consultation with those affected; (b) timely and full disclosure of information on the proposed measures; (c) reasonable notice of proposed actions; (d) legal recourse and remedies for those affected; and (e) legal assistance for obtaining legal remedies (see also General Comments No. 4 (1991) and No. 7 (1997)). Where such action is based on a person’s failure to pay for sanitation their capacity to pay must be taken into account. Under no circumstances shall an individual be deprived of the minimum essential level of sanitation’. *CESCR General Comment 15*.

<sup>110</sup> In the report by COHRE et al., this qualification is explicitly added: ‘Governments are obliged to refrain from preventing people from accessing sanitation, for example, by arbitrarily interfering with customary or traditional arrangements for sanitation, without providing adequate and culturally acceptable alternatives’, p. 27.

<sup>111</sup> For a discussion on this dilemma, see the chapter by Langford in this volume that directly discusses corporatisation of urban water services.

to establish the enabling environment that encourages companies to engage/ emerge and to manage their business in the public interest.<sup>112</sup> Moreover, in the case of right to sanitation, the duty to protect should also extend beyond legal and institutional regulation of private providers and treatment plants. It might target individuals and others that may cause physical harm: e.g., ensuring sufficient policing and street lighting where sanitation is not available within the home.

The *duty to fulfil* is often subject to the critique of excessive abstractness and lack of feasibility. The basic treaty obligation is to take steps using the maximum of available resources, towards the progressive realisation of the right to sanitation.<sup>113</sup> Drawing on the jurisprudence of the CESCR, the UN Special Rapporteur has stated that this means taking ‘deliberate, concrete and targeted steps’, thereby ‘moving as expeditiously and effectively as possible’ towards ‘ensuring access to safe, affordable and acceptable sanitation for all, which provides privacy and dignity’.<sup>114</sup> It would also mean ensuring that there is no retrogression in the realisation of the right to sanitation, for example, through permitting a deterioration of facilities and services or lowering relevant entitlements. Deliberate retrogressive measures are said to require very strong justification.<sup>115</sup>

Sometimes, this may involve choices as different dimensions come into conflict with each other. A State may provide a sewerage connection to a settlement and remove shared latrines, but if there is poor waste treatment, the collective dimension of the right may regress and the individual dimension as well, if those in the wider population are also negatively affected. Such effects could possibly be justified in the short term as part of the ‘growing pains’ of progressive realisation but not in the long term. Indeed, the worst affected by sewage outfalls tend to be those who are already disadvantaged, while more privileged groups often have the benefit of toilets and environmentally healthier localities.

<sup>112</sup> See also *Report of the Independent Expert*.

<sup>113</sup> See ICESCR, Article 2(1) and CRC, Article 4.

<sup>114</sup> *Report of the Special Rapporteur*, para. 64.

<sup>115</sup> Note that the Special Rapporteur paraphrases this obligation, perhaps in an unintentionally conservative manner. She opines that States must, ‘Carefully consider and justify any retrogressive measures’. The CESCR has stated though in relation to the right to water that: ‘There is a strong presumption that retrogressive measures taken in relation to the right to water are prohibited under the Covenant. If any deliberately retrogressive measures are taken, the State party has the burden of proving that they have been introduced after the most careful consideration of all alternatives and that they are duly justified by reference to the totality of the rights provided for in the Covenant in the context of the full use of the State party’s maximum available resources’. *CESCR General Comment 15*, para. 19.



In terms of the concrete steps to be taken, the Special Rapporteur has identified ‘creating an enabling environment’ for ‘hygiene promotion and education’, ‘immediately developing and adopting a national sanitation strategy and plan of action’ and ensuring ‘full participation’ of individuals and communities in the development and implementation of policy.<sup>116</sup> Developing such national plans may be a particularly effective way of mobilising resources and effort towards realising the right, but sufficient detail should be provided. For example, Kenya’s Second National Health Sector Strategic Plan (2006) set out a target to be reached by 2010 for 50 per cent of the population to have access to ‘good sanitation’ but was criticised for failing to set out any substantial measures to achieve progress on ‘basic sanitation’.<sup>117</sup>

States are responsible for also ensuring that ‘effective judicial or other appropriate remedies’ are available where there are ‘violations of human rights obligations related to sanitation’.<sup>118</sup> This last requirement has traditionally been controversial. It was assumed by many that social rights were not justiciable.<sup>119</sup> While this debate continues in different forms, national and international jurisprudence has demonstrated that all aspects of social rights are justiciable.<sup>120</sup> As we shall see in Section 4.4, the right to sanitation is no exception. Moreover, the CESCR has increasingly asked States to justify why they haven’t provided such remedies at the national level,<sup>121</sup> and the new Optional Protocol for the ICESCR would now presumably provide for claims concerning the right to sanitation.<sup>122</sup>

In addition to provision of remedies, there is the broader need for general monitoring and accountability: ‘States and other relevant actors should

<sup>116</sup> *Report of the Special Rapporteur*, paras. 64 and 66. This participatory dimension is discussed in more detail below in section 4.1

<sup>117</sup> See M. Katui Katua, A. Khalfan, M. Langford and M. Lüke, *Kenya-German Development Cooperation in the Water Sector, Assessment from a Human Rights Perspective* (Eschborn: GTZ, 2007), p. 29.

<sup>118</sup> *Ibid.*, para. 64.

<sup>119</sup> E. W. Vierdag, ‘The Legal Nature of the Rights Granted by the International Covenant on Economic, Social and Cultural Rights’, *Netherlands Yearbook of International Law*, Vol. IX (1978), pp. 69–105.

<sup>120</sup> See M. Langford (ed.), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge: Cambridge University Press, 2008); R. Gargarella, D. Pilar, and T. Roux, *Courts and Social Transformation in New Democracies: An Institutional Voice for the Poor?* (Aldershot/Burlington: Ashgate, 2006).

<sup>121</sup> CESCR, *General Comment 9, The Domestic Application of the Covenant* (Nineteenth session, 1998), UN Doc. E/C.12/1998/24 (1998).

<sup>122</sup> Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (adopted 10 December 2008, awaiting entry into force, UN General Assembly Resolution (Sixty third session, 2008), UN Doc A/RES/63/117 (2008).

monitor changes over time to gauge the effectiveness of interventions and the impact of policy reforms and investments' as well as 'establish effective, transparent and accessible monitoring and accountability mechanisms, with power to monitor and hold accountable all actors, both public and private'.<sup>123</sup> What is particularly worrying is that in many countries, not even the basic step of monitoring access to sanitation in a way that supports policy decisions has been achieved. For example, for a decade in Kenya, the Water Services Trust Fund (established in 2002) targeted those without adequate water and sanitation on the basis of the 1999 census. Civil society can of course be encouraged to complement this monitoring and include approaches such as report cards for sanitation service providers, as well as 'integrity pacts' to promote transparency and challenge corrupt practices.<sup>124</sup>

Moreover, and arguably, States have committed themselves to realise the right to sanitation universally, subject to their maximum available resources. Article 2(1) of the ICESCR provides that States are to realise the right through 'international assistance and cooperation'. The Special Rapporteur has emphasised that sanitation should be reflected in budgets for international assistance and cooperation' and that 'Development agencies should prioritize interventions in the sanitation sector and put the human rights obligations related to sanitation at the core of their projects'.<sup>125</sup>

Beyond this, and consistent with the Committee's jurisprudence, the Special Rapporteur demonstrates caution in articulating the obligations more specifically. In particular, she refrains from identifying the precise *speed* at which realisation must happen<sup>126</sup> likewise which dimensions of the right should be *prioritised* in sequence other than the demands of non-discrimination and equality. These requirements are to be politically decided upon at the national or international level as well as reviewed in national monitoring process, which can better take account of context.

Thus, the only named immediate and predetermined requirements in terms of result are those consistent with the Committee's jurisprudence.

<sup>123</sup> *Report of the Special Rapporteur*, p. 28.

<sup>124</sup> Integrity pacts are a method of corruption prevention in public tendering and contracting. The government agency and tendering companies make an agreement that they will abstain from bribery, collusion and other corrupt practices.

<sup>125</sup> *Ibid.*, paras. 81(d), (e).

<sup>126</sup> For a discussion of speed, see J. Luh, R. Cronk and J. Bartram, 'Assessing Progress towards Public Health, Human Rights and International Development Goals Using Frontier Analysis', *PLoS ONE*, Vol. 11, No. 1 doi: 10.1371/journal.pone.0147663; J. Luh, R. Baum, and J. Bartram, 'Equity in Water and Sanitation: Developing an Index to Measure Progressive Realization of the Human Right', *International Journal of Hygiene and Environmental Health*, No. 216 (2013), pp. 662–671.

States must 'ensure at least minimum essential levels of sanitation for all people' and that they 'are not discriminating against certain groups in providing access'.<sup>127</sup> In understanding what this may entail, we need to look further at the content of the right. This is potentially easier than some other rights (such as health care and social security) which are broader in scope, but the different demands for sanitation – particularly health and privacy/security – can make articulation more complicated and complicate resource allocation decisions under conditions of scarcity. For instance, it would be easy to reiterate the minimum necessary provisions for health – absence of disease transmission and the sufficiency to protect against such transmission – but this needs to be accompanied by commensurate provisions for the protection of broader dignity concerns.

#### 4.2 Content of the Right

In determining the content of the right to sanitation, much thinking can be borrowed from the interpretive development of other social rights, particularly water and health. However, caution should be exercised in using such templates. Despite attempts by some to standardise interpretation (e.g. through frameworks such as the AAAQ model: availability, accessibility, affordability and quality),<sup>128</sup> each right arguably possesses qualities that demand specific attention.<sup>129</sup> Moreover, there is a tension between trying to specify a content that is universal and contextually relevant and distinguishing between that which should be realised immediately and progressively within maximum available resources.

Returning to our definition that takes account of human rights, we said that:

Sanitation comprises the ability to effectively access space and facilities (whenever and wherever needed) that afford privacy, dignity and safety in which to urinate, defecate and practice related hygiene, including menstrual hygiene, in a culturally acceptable manner; and which by virtue of their design, management and/or accompany services protect the user, the locality (e.g., households, school, workplace or hospital) and wider population from the adverse consequences of contamination with the associated wastes.<sup>130</sup>

<sup>127</sup> Ibid., para. 67.

<sup>128</sup> See UN Commission on Human Rights, *Report of the Special Rapporteur Submitted in Accordance with Commission on Human Rights Resolution 1998/33*, Katarina Tomasevski, (Fifty-fifth session, 1999), UN DOC. E/CN.4/1999/49, paras. 51–56 (1999).

<sup>129</sup> See discussion on this point in M. Langford and J. A. King, 'Committee on Economic, Social and Cultural Rights: Past, Present and Future', in *Social Rights Jurisprudence* (n. 119), pp. 477–515.

<sup>130</sup> See Section 1 of this chapter.

The question, from the perspective of the right to sanitation, is how this translates into specific entitlements or at least a right imbued with some meaningful content?

The first question is what sort of sanitation system, services or facilities should be made *available*. In the emerging discussion on the right to sanitation, the focus is largely on the individual dimension of availability rather than the broader system of sanitation (including treatment) system.<sup>131</sup> For now we will concentrate on this dimension. The typical questions are what is the requisite level of technology? Or more precisely, what makes a ‘toilet’? Does everyone have the right to a flush toilet or a dry toilet with equivalent effect? Are ventilated pit latrines or community toilets acceptable in any case or only when there are insufficient resources? Does the right apply differently in rural and urban areas? And what would be acceptable as an immediate minimum and what should be left for attainment over time?

The answers to these questions are diverse. Many development agencies have favoured the use of ventilated pit latrines (VIPs): it is associated with lower water demand and maintenance and no need for cost recovery and revenue collection. However, some question the appropriateness of ‘dry systems’ for humid environments where, in fact, faecal matter does not easily dry, or in urban areas, where there is no space for VIPs. While pits can be dug deeper – if the water table is not too high – VIPs need periodic and frequent emptying in larger settlements, which often does not happen.<sup>132</sup> This suggests, leaving aside the issue of personal dignity, that such systems may *not* be as cost effective as assumed.<sup>133</sup>

The Special Rapporteur in her report does not seek to solve this debate. Instead, she emphatically leaves the issue open for deliberation, with different priorities for the short, medium and long term. She concludes that States are

<sup>131</sup> Contrast this with the way in which the CESCR addresses the need for a system of social security in *General Comment 19, The Right to Social Security* (art. 9) (Thirty-ninth session, 2007), UN Doc. E/C.12/GC/19 (2008). Indeed, there is thus a certain overlap in the discussion of *availability* and *physical accessibility*.

<sup>132</sup> In South Africa, Eales notes that, ‘VIPs are now called full-ups’ and that the government ‘under-estimated the scale of technical support required’. B. Amisi, P. Bond, D. Khumalo, and S. Nojizeza, ‘The Neoliberal Loo’, 18 February 2008, available at [www.greenleft.org.au/content/south-africa-neoliberal-loo](http://www.greenleft.org.au/content/south-africa-neoliberal-loo) (accessed 25 March 2017).

<sup>133</sup> The Special Rapporteur also recognises the practical problems of intermediate technologies: ‘Ensuring safe sanitation requires adequate hygiene promotion and education to encourage individuals to use toilets in a hygienic manner that respects the safety of others. Manual emptying of pit latrines is considered to be unsafe (as well as culturally unacceptable in many places, leading to stigmatization of those burdened with this task), meaning that mechanized alternatives that effectively prevent direct contact with human excreta should be used’. *Report of the Special Rapporteur*, para. 74.

‘not obliged to provide everyone with access to a sewerage system’ since ‘[h]uman rights law does not aim to dictate specific technology options, but instead calls for context-specific solutions’.<sup>134</sup> She proceeds to provide a definition of what should be made ‘available’, although in essence it concerns accessibility at the individual or household level. In her view, there must be sanitation facilities ‘within, or in the immediate vicinity, of each household, health or educational institution, public institutions and places, and the workplace’.<sup>135</sup> In addition, there must be a sufficient number of such facilities to avoid excessive waiting times.<sup>136</sup> The Special Rapporteur notes that ‘it is tempting to determine a specific minimum number of toilets’<sup>137</sup> but concedes that such specifications can be ‘counterproductive’. Instead, she emphasises context-based and participatory assessments at the community level, including attention to the needs of particular individuals with different needs.

In addressing the question of whether the full realisation of the right, an adequate level, would require a *toilet* in one’s *dwelling*, the UN Special Rapporteur answers negatively.<sup>138</sup> But she indicates that this is the direction a State must move as a proximate and safe facility is only an intermediate or minimum realisation of the right.<sup>139</sup> Thus, the question of the level of technology seems very much an open issue. Whereas it should be further clarified in public debate and contextual assessment, there is a danger that the UN Special Rapporteur has conflated here the definitions of sanitation and water. In borrowing the terms ‘proximity’ and ‘vicinity’ from General Comment No. 15 on the Right to Water, the issue of privacy and safety has been overlooked. These concerns seem to suggest that access to sanitation services in the home or very close vicinity deserve a higher priority. One of the authors of this paper has argued that:

The evidence base for the health gains from potential sanitation benchmarks remains appallingly weak. Public toilets may be considered a key intermediate step and a means to ensure at least some dignity and safety. But some speak of dangers, especially to women, of rape and assault; and poorly maintained facilities are themselves a danger to health.<sup>140</sup>

Personal dignity and freedom from harassment point in the direction of urgently making sanitation accessible within the home (and workplace, institution, etc.) unless a country’s resources or natural environment do not permit.<sup>141</sup> Indeed, the

<sup>134</sup> Ibid., para. 67.    <sup>135</sup> Ibid., para. 70.    <sup>136</sup> Ibid., para. 69.    <sup>137</sup> Ibid., para. 71.

<sup>138</sup> Ibid.    <sup>139</sup> Ibid.    <sup>140</sup> Bartram, ‘Improving on Haves and Have-Nots’, p. 284.

<sup>141</sup> In some situations, such as in slums or in peri-urban areas, where formal service provision is not yet possible, interim solutions, such as shared toilets or informal water vendors, may be a necessary standard of service until longer-term plans can be executed. These can also be the

Special Rapporteur seems to hint at this in her definition of cultural acceptability, as set out below. One practical solution to this problem in developing countries is the approach developed in the well-known Orangi Pilot Project (OPP). Households in informal settlements organised to provide low-cost, small-bore solutions for the local-/tertiary-level reticulation of sewage while simultaneously lobbying authorities to provide secondary and primary (trunk) sewerage.<sup>142</sup>

The UN Special Rapporteur is on steadier ground when she sets out various other substantive elements of the right: quality, physical accessibility, affordability and cultural acceptability. These echo articulations of the CESCR of other social rights and provide a useful and clear rights perspective on sanitation.

To meet the standard of *quality*, there is a focus both on the individual user and the affected collective. As to the first, ‘Sanitation facilities must be hygienically safe to use’ and also includes the facilities and water ‘for hand washing as well as menstrual hygiene, and anal and genital cleansing’ and ‘the hygienic disposal of menstrual products’. While these standards appear reasonable, they certainly represent a challenge, particularly in relation to menstrual hygiene and cleansing where many toilets around the world would not meet these standards. As to the collective dimension, quality is said to include ‘Regular cleaning, emptying of pits or other places that collect human excreta’ as well as ‘maintenance . . . for ensuring the sustainability of sanitation facilities and continued access’.<sup>143</sup> Indeed, some studies indicate that open defecation can be less dangerous for children than using school latrines that are not well maintained.<sup>144</sup>

In relation to the *physical accessibility*, the choice of technology obviously plays a key role as to where it will be placed, as discussed above. However, it is important to note the underlying ambition behind the Special Rapporteur’s definition of beyond home: it is to include ‘health or educational institutions,

most realistic affordable options for sanitation provision for those who do not have land tenure or space to build a household latrine. However, shared or public toilets may be contrary to human rights if they do not ensure safety and good hygiene or if they are not affordable. Access to a toilet in the home is preferable for reasons of dignity and privacy.

<sup>142</sup> A. Hassan, *Working with Communities* (Karachi: City Press, 2001), pp. 1–42, 159–166. The OPP model has been viewed as a model example of ‘coproduction’ that overcomes collective action problems as local communities and utilities focus on their comparative advantage:

G. McGranahan, ‘Realizing the Right to Sanitation in Deprived Urban Communities: Meeting the Challenges of Collective Action, Coproduction, Affordability, and Housing Tenure’, *World Development*, Vol. 68 (2015), 242–253.

<sup>143</sup> *Report of the Special Rapporteur*, para. 72.

<sup>144</sup> See, e.g., J. Kwiriringira, P. Atekyereza, C. Niwagaba, and I. Günther, ‘Descending the Sanitation Ladder in Urban Uganda: evidence from Kampala Slums’, *BMC Public Health*, Vol. 14 (2014), p. 624.

public institutions and places, and the workplace'.<sup>145</sup> Not all Western countries have attained this standard, and some high-income countries with poor public access to sanitation, such as France, have been recently working to address this, using the right to sanitation as justification for making access to public toilets in Paris free.<sup>146</sup>

Of equal importance is the nature of the physical accessibility. Here, a human rights perspective can be particularly useful. The Special Rapporteur states importantly that toilets 'must be reliable, including access at all times of day and night', and the 'location of sanitation facilities must ensure minimal risks to the physical security of users'.<sup>147</sup> She also mentions the needs of other groups such as persons with disabilities and older persons. This condition is particularly important given that development projects have often not taken account of the risk of violence against women and children in designing placement of sanitation facilities. The lack of integration of disability into governmental and development planning has long been criticised on this basis.<sup>148</sup> Estimates indicate that 5 to 10 per cent of the population in different countries had credible difficulty in use of sanitation facilities without universal access features.<sup>149</sup>

As to *affordability*, the Special Rapporteur states that States are also not obliged to provide 'sanitation free of charge' and this requirement only arises when people are genuinely unable to pay for the service.<sup>150</sup> Instead, 'access to sanitation facilities and services, including construction, emptying and maintenance of facilities, as well as treatment and disposal of faecal matter, must be available at a price that is affordable for all people without limiting their capacity to acquire other basic goods and services, including water, food, housing, health and education guaranteed by other human rights'. This is a classic formulation of economic accessibility in social rights jurisprudence, and as Smets shows elsewhere in his book, it may be possible to measure. However, ensuring that sanitation is affordable can mean paying attention to other factors than the general provision of 'water facilities' – such as particular charges for sewerage or the costs charged at separate sanitation facilities.

<sup>145</sup> *Report of the Special Rapporteur*, para. 75.

<sup>146</sup> UNECE-WHO, *No One Left Behind: Good Practices to Ensure Equitable Access to Water and Sanitation in the Pan-European Region*, February 2012.

<sup>147</sup> *Ibid.*

<sup>148</sup> M. Stein, C. McClain-Nhlapo and J. Lord, 'Disability Rights, the MDGs and Inclusive Development', in M. Langford, A. Sumner and A. Yamin (eds.), *Millennium Development Goals and Human Rights: Past, Present and Future* (Cambridge: Cambridge University Press, 2013), pp. 274–294.

<sup>149</sup> WHO, *World Report on Disability* (Geneva: WHO, 2011).

<sup>150</sup> *Report of the Special Rapporteur*, para. 67.

Lastly, it is said that sanitation facilities and services must be culturally acceptable. This may appear odd in a human rights document concerning universality but accessibility in practice requires attention to local conditions. As Singh has argued in this volume, sociocultural barriers can easily impede implementation. For example, latrines dug ‘for’ an indigenous community in Latin America were not used since in their cosmology; the closed underground is inhabited by one’s revered ancestors.<sup>151</sup> The Special Rapporteur states ‘Personal sanitation is still a highly sensitive issue across regions and cultures and differing perspectives about which sanitation solutions are acceptable must be taken into account regarding design, positioning and conditions for use of sanitation facilities. In many cultures, to be acceptable, construction of toilets will need to ensure privacy’.<sup>152</sup> For instance, the South African government has created a catalogue of sanitation technologies, which considers costs and appropriateness for a number of different contexts, including considering costs to the user.<sup>153</sup>

#### 4.3 Equality and Other Human Rights

The second immediate duty is that of guaranteeing non-discrimination in the realisation of the right to sanitation: see, for example, Article 2(2) of the ICESCR. This duty extends beyond a formalistic duty to refrain from explicitly distinguishing between groups on prohibited grounds of discrimination but actively seek to address the needs of groups characterised by those markers of distinction.<sup>154</sup> The Special Rapporteur has interpreted this substantive equality requirement to mean that States must ‘pay special attention to groups particularly vulnerable to exclusion and discrimination in relation to sanitation, including people living in poverty, sanitation workers, women, children, elderly persons, people with disabilities, people affected by health conditions, refugees and IDPs, and minority groups, among others’.<sup>155</sup>

<sup>151</sup> See WSP, *An Anthropological View of Sanitation Issues in Rural Bolivia. A Summary*, available at [www.wsp.org/sites/wsp.org/files/publications/2272007102015\\_ruralboliviaanthreview.pdf](http://www.wsp.org/sites/wsp.org/files/publications/2272007102015_ruralboliviaanthreview.pdf) (accessed 25 March 2017).

<sup>152</sup> *Ibid.*, paras. 70–80. These elements are also mentioned but not elaborated on in UN Sub-Commission on the Promotion and Protection of Human Rights, *Res. 2006/10, Promotion of the Realization of the Right to Drinking Water and Sanitation*, UN Doc. A/HRC/Sub.1/58/L11, adopting the *Draft Guidelines for the Realization of the Right to Drinking Water and Sanitation*, UN Doc. E/CN.4/Sub.2/2005/25, section 1.3.

<sup>153</sup> *Sanitation for a Healthy Nation: Sanitation Technology Options*, South Africa Department of Water Affairs and Forestry, February 2002.

<sup>154</sup> See CESCR, *General Comment 20, Non-Discrimination in Economic, Social and Cultural Rights* (Forty-Second Session, 2009), UN Doc. E/C.12/GC/20 (2009).

<sup>155</sup> *Report of the Special Rapporteur*, para. 65.



In doing so, States will often need to look at the intersection of the right to sanitation and other rights. Without adequate sanitation, the rights to water, health, education and housing are not realisable. It has been argued that girls, particularly after they reach puberty, are less likely to attend school if there is inadequate sanitation provision, including separate toilets for girls and boys. Although the evidence is equivocal due to methodological constraints.<sup>156</sup> School and other public or shared latrines must also ensure that all pupils, teachers and others are able to use the facilities, for example, making provision for those with physical disabilities. Further, it is increasingly recognised that school and other public latrines must ensure adequate facilities and space to ensure that women and girls can take care of the particular needs of menstruation.<sup>157</sup> Elderly, sick and intellectually disabled individuals may also require particular consideration when accessing sanitation.

Finally, for those who are living or working away from their homes, such as at the workplace, in hospitals, prisons or other institutions, where they are not able to take care of their own sanitation needs, the right to sanitation requires that this is made available, to ensure health, privacy and dignity.<sup>158</sup> There are real grounds for concern here. One report cites half the schools in Tajikistan being without water.<sup>159</sup> As to prisons, the European Committee for the Prevention of Torture, after a visit to Portuguese prisons in 2008, found the practice of 'defecating in a bucket in a confined space used as a living area to be degrading'.<sup>160</sup> Following this, the Portuguese prison authorities reportedly worked towards eliminating the practice.<sup>161</sup> Similarly in Fiji, a court found that lack of access to adequate sanitation in

<sup>156</sup> I. Birdthistle, K. Dickson, M. Freeman and L. Javidi, *What Impact Does the Provision of Separate Toilets for Girls at Schools Have on their Primary and Secondary School Enrolment, Attendance and Completion? A Systematic Review of the Evidence* (London: EPPI-Centre, Social Science Research Unit, Institute of Education, University of London, 2011). See also E. Oster and R. Thornton, 'Menstruation, Sanitary Products and School Attendance: Evidence from a Randomized Evaluation', *American Economic Journal: Applied Economics*, Vol. 3, No. 1 (2011), pp. 91–100.

<sup>157</sup> *Claiming the MDGs*.

<sup>158</sup> J. Bartram, R. Cronk, M. Montgomery, B. Gordon, M. Neira, E. Kelley and Y. Velleman, 'Lack of Toilets and Safe Water in Health-Care Facilities', *Bull World Health Organ*, April 2015 (editorial).

<sup>159</sup> UNDP, 'World Water Day: Situation critical for water supply and sanitation in Europe and Central Asia', News Release, 22 March 2011, available at <http://europeandcis.undp.org/home/show/707ADE83-F203-1EE9-BF3D08FC372EA619>.

<sup>160</sup> Council of Europe, *Report to the Portuguese Government on the Visit to Portugal Carried Out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 14 to 25 January 2008*, 19 March 2009.

<sup>161</sup> *Ibid.*

prisons constituted cruel, inhuman and degrading treatment under the Constitution as well as UN Standard Minimum Rules for the Treatment of Prisoners.<sup>162</sup>

#### 4.4 *Tensions between Sanitation and Other Human Rights*

In addition to the limitations of resources, the realisation of the right to sanitation may sometimes pose a challenge to claiming or implementing other rights, or vice versa. An example of the former is the management of piped sewerage, which often poses pollution risks for water resources and drinking water supplies.<sup>163</sup> In right to water litigation in Argentina, a court found a violation of the right to water and health due to provincial and municipal authorities failing to prevent pollution of communal water sources, caused by an under-maintained and overstretched sewage-treatment plant.<sup>164</sup> Arguably though, the order was beneficial from the perspective of the right to sanitation. The Court ordered the municipality to ‘adopt all of the measures necessary relative to the functioning of the [facility], in order to minimise the environmental impact caused’, and also ordered the authorities to create a financing mechanism by which funds would be made available to maintain the quality of sewerage services.<sup>165</sup>

Indeed, attempts to build sewage-treatment facilities are often challenged on the ground of property, environmental and housing rights. Most local communities tend to oppose the development of such facilities in their neighbourhoods. The result is that the land of poorer or disadvantaged communities, often with poor security of tenure, are targeted for building such works, with the presumption that resistance will be less. However, this raises the risk of violations of the right to housing. The issue has come to the fore in cases brought by communities to the World Bank Inspection Panel (WBIP), who complained that the building of environmental sanitation works, financed through the Bank, was resulting in their forced evictions.

<sup>162</sup> *Sailasa Naba and Others v. the State*, High Court of Fiji, No. HAC0012 of 2000L, 4 July 2001.

<sup>163</sup> The Special Rapporteur flags this issue as a possible duty under respect for the right to sanitation but it is really a question of ensuring other rights are not impacted: she says that ‘states must also ensure that the management of human excreta does not negatively impact on human rights’. *Report of the Special Rapporteur*, para. 64.

<sup>164</sup> *CEDHA v. Provincial State and Municipality of Córdoba (AC)*, 233. See R. Piccolotti, ‘The Right to Safe Drinking Water as a Human Right’, *Housing and ESC Rights Quarterly*, Vol. 1, No. 4 (2005), p. 1.

<sup>165</sup> Quoted in *ibid.* However, it is not clear if these services are available to the community.

In both instances, the WBIP found, to different degrees, that the World Bank management had not acted sufficiently to ensure compliance with the Bank's involuntary resettlement guidelines.<sup>166</sup>

Another tension concerns the rise of Community-Led Total Sanitation approaches and civil society monitoring of services, that put civil society empowerment at the centre of delivery mechanisms. These efforts have become essential aspects of ensuring that sanitation is understood not just as hardware but as a change in behaviour.

This is not to claim that Community-Led Total Sanitation methods are always in line with human rights standards. Their implementation, however, has been criticised from a human rights perspective – for example, shaming open defecation through extreme methods such as photographing people or throwing stones at them or singular instances of refusing to help prosecute cases of rape that occurred when women were defecating outside.<sup>167</sup> It can also be asked whether the focus of the development sector on Community-Led Total Sanitation is distracting attention from government responsibilities.

## 5 THE RIGHT TO SANITATION IN PRACTICE

The drive for recognition of the human right to sanitation has primarily come from development and health practitioners<sup>168</sup> and only partly from human rights organisations.<sup>169</sup> It has featured as part of a broader push for a general rights-based approach to sanitation. In doing so, practitioners have highlighted the instrumental benefits of a 'human rights approach to sanitation': 'holding to account those responsible' for facilitating access to sanitation, promoting 'information sharing and genuine participation in decision making', giving attention to 'vulnerable and marginalised groups', providing 'minimum' universal requirements and creating [a] rights-friendly framework for reforming

<sup>166</sup> See World Bank Inspection Panel, *GHANA: Second Urban Environmental Sanitation Project (UESP II) (IDA Credit No. 3889-GH)*, Report No. 47713 – GH, 13 March 2009; World Bank Inspection Panel, *Nigeria: Lagos Drainage and Sanitation Project (Credit No. 2517-UNI)*, Report and Recommendation on Request for Inspection.

<sup>167</sup> See J. Bartram, K. Charles, B. Evans, L. O'Hanlon, S. Pedley, 'Commentary on Community-Led Total Sanitation and Human Rights: Should the Right to Community-Wide Health Be Won at the Cost of Individual Rights?', *Journal of Water Health*, Vol. 10, No. 4 (2012), pp. 499–503.

<sup>168</sup> For example, WaterAid and Bread for the World, Freshwater Action Network, WSSCC, World Health Organisation and UN-HABITAT.

<sup>169</sup> For example, Centre on Housing Rights and Evictions and Amnesty International.

public policies and resource allocation.<sup>170</sup> Whereas these claims are often made in the context of development, they clearly have relevance in wealthier countries where sanitation is not universal, particularly amongst marginalised ethnic minorities, or where sewage contamination continues to impact the wider population.

Despite the increasing uptake of a rights-based approach to development amongst development practitioners and policymakers, it has been queried on various grounds. The practical critique is that the ‘tools’ offered by human rights do not add anything to the operational challenge of extending access<sup>171</sup> or that is premised on high levels of literacy amongst the general population and strong public institutions, such as courts and bureaucracies.<sup>172</sup> A more conservative critique is that it may increase conflict between users, delivery organisations and the governments,<sup>173</sup> inculcate a culture of dependency and unwillingness of users to participate in infrastructure development, management and payment<sup>174</sup> or add another layer of unwanted bureaucracy.

A different type of practical critique of human rights approaches is their alleged lack of transformative power.<sup>175</sup> They represent mere ‘pleas for human rights to be conferred by the state’ rather than an emancipatory and assertive politics of ‘rights to be fought for’ and defined in the struggle.<sup>176</sup> The result may be depoliticization of important political questions as strong moral claims

<sup>170</sup> *Sanitation: A Human Rights Imperative*, *ibid.*, p. 5.

<sup>171</sup> See overview of these criticisms in E. Filmer Wilson, ‘Human Rights-Based Approach to Development: The Right to Water’, *Netherlands Quarterly of Human Rights*, Vol. 23, No. 2 (June 2005), pp. 213–241; P. Uvin, *Human Rights and Development* (Sterling, VA: Kumarian Press, 2004).

<sup>172</sup> D. Banik, ‘Support for Human Rights-Based Development: Reflections on the Malawian Experience’, *The International Journal of Human Rights*, Vol. 14, No. 1 (2010), pp. 32–48.

<sup>173</sup> For example, the co-founder of Slum Dwellers International, Joel Bolnick, has resisted using rights-based approaches on the basis that ‘Public declarations have a habit of compromising our capacity to negotiate with and on behalf of organised shack dwellers’. J. Bolnick, ‘Slum-Friendly Approach: SDI Letter to the Witness in Response to Article by Ndivhuwo Wa Ha Mabaya’ (2009).

<sup>174</sup> See M. Ramphele, cited in P. Green, ‘100 Days, 11 Issues’, *Mail & Guardian*, 17 August 2009.

<sup>175</sup> See overview of the political conception of rights in M.-B. n. d. Dembour, ‘What Are Human Rights? Four Schools of Thought’, *Human Rights Quarterly*, Vol. 32, No. 1 (2010), pp. 1–20. See specific concerns on right to sanitation in McGranahan, ‘Realizing the Right to Sanitation’, section 6.

<sup>176</sup> M. Neocosmos, ‘Civil Society, Citizenship and the Politics of the (Im)possible: Rethinking Militancy in Africa Today’, *Interface: A Journal for and About Social Movements*, Vol. 1, No. 2, pp. 263–334, at 278.

are tempered in the process of legalisation, and these claims are further diluted as lawyers, bureaucrats or development elites fashion their meaning.<sup>177</sup>

Does the right to sanitation 'add value'? Can it provide linguistic, strategic and technical resources for communities, policymakers and practitioners? In 2011, the United Kingdom's Department for International Development (DFID) conducted a study on the impact of recognition of a right to sanitation in four countries.<sup>178</sup> It found that it was still too early to judge conclusively that the right to sanitation has made a difference but noted that 'Formal recognition' of the right 'can be an important accelerator if it is combined with a range of political drivers which build an enabling environment and support inclusive implementation towards rights fulfilment'.<sup>179</sup> Regional recognition has also created some effects. After the Third South Asian Conference on Sanitation, civil society organisations successfully lobbied governments to make more significant policy and fiscal commitments and prioritise vulnerable and marginalised groups. In Nepal, there is a Master Plan for Sanitation and Hygiene, and the budget dedicated to sanitation was doubled.<sup>180</sup> Bangladesh is carrying out a baseline study of access to sanitation, in order to better align their sanitation policy with need and excluded communities.<sup>181</sup>

This section seeks to take the analysis further by examining four particular areas of policy and practice: the MDGs, democratisation, challenging land tenure and legal mobilisation.

### 5.1 Development Goals

In the field of sanitation, the target-based Millennium Development Goals (MDGs) were ascendant in development thinking. The international target to 'halve the proportion of people living without access to basic sanitation by

<sup>177</sup> P. Bond, 'Macrodynamics of Globalisation, Uneven Urban Development and the Commodification of Water', *Law, Social Justice & Global Development Journal*, Vol. 1 (2008), pp. 1–14.

<sup>178</sup> S. Crawford and M. A. Brocklesby, *Assessing the Impact of a Right to Sanitation on Improving Levels of Access and Quality of Services: Summary*, DFID Draft Working Paper, April 2011.

<sup>179</sup> *Ibid.*, p. 3.

<sup>180</sup> 'South Asia/Nepal: Summary', WASHWatch, available at [www.washwatch.org/en/countries/nepal/summary/?declaration=SWANepal](http://www.washwatch.org/en/countries/nepal/summary/?declaration=SWANepal) (last accessed 4 April 2017). This website [www.washwatch.org](http://www.washwatch.org) also tracks whether countries are fulfilling their commitments to SacoSan and AfricaSan and so on.

<sup>181</sup> Bangladesh National Hygiene Baseline Survey Preliminary Report, International Centre for Diarrheal Diseases Research, Bangladesh (icddr,b) WaterAid Bangladesh, Policy Support Unit (PSU) Local Government Division Ministry of Local Government, Rural Development and Cooperatives Dhaka, Bangladesh, June 2014.

2015' was inserted in the agenda in 2002. From an initial global population of 5.3 billion in the MDG baseline year (1990), the MDG's framework required 'basic sanitation' rising from 54 per cent to 77 per cent (while keeping up with population growth).<sup>182</sup>

The MDG target certainly heightened awareness on the issue. It has been argued that the MDGs have possibly made their greatest contribution in the area of sanitation and maternal mortality as they highlighted previously and deeply neglected topics in international development.<sup>183</sup> Interviews with EU officials illustrated the particular way the target worked in practice. Through its ACP-EU Water Facility, the EU has supported water infrastructure and supply projects, particularly in rural areas and with a focus on the poorest of the poor. Yet, while partner governments readily and regularly sought support for water, EU officials stated that they used the existence of the sanitation target to encourage these governments to also apply for support on sanitation.<sup>184</sup>

However, sanitation remained one of the most 'off-track' MDG targets.<sup>185</sup> In Indonesia's 2008 MDG Report, the government acknowledged that sanitation was a low priority, and the World Bank estimated in 2008 that less than 1 per cent of the investment in sanitation needed to reach the sanitation target in Indonesia had been made.<sup>186</sup>

Moreover, the level of ambition in the target was disturbingly low. In seeking only to halve the proportion of persons without access, there was arguably a temptation for States to 'cherry-pick' the relatively well-off amongst the poor and ignore long-suffering and excluded minorities, informal settlements or remote rural areas. While cost-effectiveness may be a consideration for decision-making when there are difficult trade-offs in meeting human rights,<sup>187</sup> the MDG approach could encourage normatively problematic choices and disguise prejudices against particular groups.<sup>188</sup> Thus, there

<sup>182</sup> Bartram, 'Improving on Haves and Have-Nots'.

<sup>183</sup> See discussion in M. Langford, A. Sumner and A. Yamin (eds.), 'Introduction: Situating the Debate', in M. Langford, A. Sumner and A. Yamin (eds.), *Millennium Development Goals and Human Rights: Past, Present and Future* (Cambridge: Cambridge University Press, 2013), pp. 1–34.

<sup>184</sup> Interview with André Liebaert, Water policy officer, EuropeAid Unit C2, Brussels, 2 October 2012.

<sup>185</sup> United Nations, *The Millennium Development Goals Report* (New York: UN, 2011).

<sup>186</sup> *Economic Impacts of Sanitation in Indonesia: A Five Country Study Conducted in Cambodia, Indonesia, Lao PDR, the Philippines and Vietnam under the Economics of Sanitation Initiative*, World Bank Research Report, August 2008, p. 16.

<sup>187</sup> See D. Seymour and J. Pincus, 'Human Rights and Economics: The Conceptual Basis for Their Complementarity', *Development Policy Review*, Vol. 26, No. 4 (2008), pp. 387–405.

<sup>188</sup> For example, one World Bank official informed one of the authors, Langford, that in one African country, they explicitly prioritised on the basis of cost effectiveness.

was a demand that measurement capture progress on equality.<sup>189</sup> Proposals were made that the MDG and future targets be disaggregated by income quartiles, quintiles or deciles and a target added to capture progress on equality.<sup>190</sup> For instance, a country could only said to be ‘on-track’ for the *sanitation equality* target if there is progress in all income brackets or the lowest-income bracket(s). Alternatively, a proportionate reduction in the Gini coefficient for sanitation, a single index of inequality, could be required. However, if we move to a multiple ladder for progress on sanitation (and it is not reducible to a single index), then overlaying the equality measurement may prove too complicated. In this case, one option would have been to require progress on the ladder for the lowest-income group.

Whereas poor progress on the MDG target spurred initiatives such as the UN International Year of Sanitation in 2008 and the Sustainable Sanitation: Five Year Drive to 2015,<sup>191</sup> it has also strengthened calls for increasing a rights focus in the strategies for realisation of the MDG targets.<sup>192</sup> A rights-based approach offered a more fair and effective way of understanding, interpreting and setting targets, which was a subject of growing interest in discussions over a post-2015 development agenda.<sup>193</sup> The debate on the post-2015 development agenda was equally driven by a rights consciousness (although with varied success).<sup>194</sup>

In the resulting SDGs, sanitation was articulated as a single target as part of a new goal on water and sanitation:

By 2030, achieve access to adequate and equitable sanitation and hygiene for all and end open defecation, paying special attention to the needs of women and girls and those in vulnerable situations

<sup>189</sup> See, Luh, Cronk and Bartram, ‘Assessing Progress’.

<sup>190</sup> See discussion of different options in M. Langford, ‘Rethinking the Metrics of Progress: The Case of Water and Sanitation’, in M. Langford, A. Sumner and A. Yamin (eds.), *Millennium Development Goals and Human Rights: Past, Present and Future* (Cambridge: Cambridge University Press, 2013), pp. 461–483.

<sup>191</sup> ‘UN Secretary-General launches the “Sustainable Sanitation: Five-Year Drive to 2015”’, UN News Release, 21 June 2011.

<sup>192</sup> See, for example, *Claiming the MDGs; Pathway to Gender Equality: CEDAW, Beijing and the MDGs* (New York: UNIFEM, 2004).

<sup>193</sup> See overview in M. Langford, ‘Lost in Transformation? The Politics of the Sustainable Development Goals’, *Ethics and International Affairs*, Vol. 30, No. 2 (2016), pp. 167–176.

<sup>194</sup> Already there have been numerous meetings in different countries and thematic sectors, the gradual development of international campaigns and processes and a growing academic literature. For the first publications on the topic, see A. Sumner and M. Tiwari, *After 2015: International Development Policy at a Crossroads* (London: Palgrave Macmillan) and *MDGS and Beyond* (2009), Special Issue of *IDS Bulletin*, Vol. 41, No. 1 (2010).

The ambition of reaching full coverage by 2030 with a gendered perspective and focused on vulnerable groups seems very appropriate. However, it is still possible to be critical from a human rights perspective. First, the current indicator still relies on a binary form of measurement: 'Proportion of population using safely managed sanitation services, including a hand-washing facility with soap and water.' The formula for measurement regards every human as either 'having' or 'not having' these key amenities, which is 'simple, robust and easy to present' but is plagued by significant weaknesses.<sup>195</sup> It provides no significant motivation for countries near the top or the bottom of the international spectrum to tackle their sanitation. For example, a traditional pit latrine with an earth floor does not score in global monitoring since it lacks a solid floor slab; but such a latrine is ranked as 'improved' by national authorities in Zimbabwe.<sup>196</sup>

The pass-fail criterion is a straightjacket that alienates worthwhile efforts and fails to recognise progressive realisation<sup>197</sup> and does not reward acceleration in efforts.<sup>198</sup> Monitoring standards need to recognise not only a latrine at home but also successful efforts to make shared or even public facilities work in fast-growing, peri-urban areas as part of progressive realisation. Overall, there should be a sequence of benchmarks reflecting individual steps and potentially different routes to improvement.<sup>199</sup> WHO and UNICEF showed in 2008 that moving beyond the simple haves and have-nots categorisation reveals progress at lower levels of the ladder.<sup>200</sup> For example, open defecation was declining in all regions (24 to 18 per cent) and rapidly in sub-Saharan Africa (36 to 28 per cent).<sup>201</sup> Half of decline captured was in the rise of shared facilities, although there are questions about degree of adequacy and of sustainability with overloaded pits.

Second, for wealthier and transition countries, the low ambition of the MDGs hid the lack of progress on fully meeting the right for all and penalises efforts by low-income countries.<sup>202</sup> The metric not only risked imposing a 'one-size-fits-all' standard across the world, it raised problems from a human

<sup>195</sup> Bartram, 'Improving on Haves and Have-Nots', p. 183. <sup>196</sup> Ibid.

<sup>197</sup> Bartram, 'Improving on Haves and Have-Nots'.

<sup>198</sup> See, for example, S. Fukuda-Parr and J. Greenstein, *How Should MDG Implementation Be Measured: Faster Progress or Meeting Targets?* (Brasilia: International Policy Centre for Inclusive Growth, 2010).

<sup>199</sup> Bartram, 'Improving on Haves and Have-Nots'.

<sup>200</sup> WHO and UNICEF, *Progress on Drinking Water and Sanitation: Special Focus on Sanitation* (Geneva: United Nations, 2008).

<sup>201</sup> Ibid.

<sup>202</sup> One of the authors of this chapter, Bartram, was challenged by a minister from one of the countries of the former Soviet Union, which needed to improve its drinking water and



rights perspective. States were only expected to *progressively realise* the rights within their *maximum available resources*. But setting one global standard for all lets middle- or high-income countries off the hook, while low-income countries may not be politically rewarded: Zambia, Cameroon and Mali increased improved sanitation by 27 to 29 per cent even though that doesn't meet target.<sup>203</sup> Research revealed that lower-income countries rate higher on MDG progress if outcomes were adjusted for a variety of capacity indicators.<sup>204</sup> While there were recommendations that the SDG targets should be adaptable to be relevant to all countries, this did not occur with the SDGs.<sup>205</sup> However, at least the final target requires all countries to meet a 100% target even if measured progress will not take account of starting points.

Third, the SDG indicators should have led to a better system that would have a firm grounding in health, well-being and livelihoods and evidence from public policy as well as human rights. This would include measuring access to a toilet in the home as a target and, more ambitiously, 'overlaying' evidence onto the sequence of benchmarks. The latter could be controversial and difficult to measure – for example, flush toilets would be marked down if they discharge untreated wastewater into a nearby river rather than to a treatment facility.<sup>206</sup> In fact, one study found that if we account for how much of the global population is lucky enough to have their sewage treated as a criteria for sanitation access, more than 3.5 billion people, or 52 per cent of the global population, live without basic sanitation 'security'.<sup>207</sup>

Fourth, additional indicators need to be considered. If sanitation protects health best when practised by all, one would need to not only record whether a household has sanitation but also the sanitation status of the surrounding community or 'sanitation catchment area'. Moreover, households are not the only place where people need to go to the toilet or wash their hands. An improved monitoring system will recognise that safe water and sanitation in schools, workplaces, hospitals, markets and other public places are also important.<sup>208</sup>

sanitation. It wanted to be part of the MDG effort but couldn't find a 'way in' because the definitions meant that it had little left to do.

<sup>203</sup> *Progress on Drinking Water and Sanitation*.

<sup>204</sup> E. Anderson and M. Langford (2013), *A Distorted Metric: The MDGs, Human Rights and Maximum Available Resources*, University of Oslo Faculty of Law Research Paper No. 2013-10, available at SSRN.

<sup>205</sup> A. Sumner and C. Melamed (2010), 'Introduction – The MDGs and Beyond: Pro-Poor Policy in a Changing World', *IDS Bulletin*, Vol. 41, No. 1, pp. 1–6.

<sup>206</sup> Bartram, 'Improving on Haves and Have-Nots'.

<sup>207</sup> R. Baum and J. Bartram, *Sanitation: A Global Estimate of Sewerage Connections without Treatment and the Resultant Impact on MDG Progress* (forthcoming).

<sup>208</sup> *Ibid.*

While the MDG targets for drinking water and sanitation represented a very limited ambition – seemingly leaving many millions without the most basic needs for health protection, dignity and development even if they are met – the SDGs are thus only a partial improvement in seeking to address these challenges. Improving targets through the prism of the right to sanitation would recognise progressive improvements relevant to a country's capacity and context, reflect the range of actions that contribute to health and well-being and better align with programming needed for stepwise improvements.

### 5.2 Democratisation of Sanitation

Inherent in the right to sanitation is a demand for participation and access to information. This not only calls for involvement in implementation but a role in macro, meso and micro policymaking and whether it be technical choices, priority setting, budgeting and tariff setting. The UN Special Rapporteur has stated that:

States are also obliged to ensure that concerned individuals and communities are informed and have access to information about sanitation and hygiene and are enabled to participate in all processes related to the planning, construction, maintenance and monitoring of sanitation services. Full participation, including representatives of all concerned groups is key to ensuring that sanitation solutions answer the actual needs of communities and are affordable, technically feasible, and culturally acceptable.<sup>209</sup>

The consequences of poor participation are not hard to find. In Southern Portugal, the German Government funded and constructed a large sewage-treatment plant, but it was only briefly used. It was built without adequate consultation with the relevant municipalities and without the necessary institutional and financial framework to ensure sustainability.<sup>210</sup>

Moreover, there is always the risk that even when they exist, participation processes are minimalised in practice: the involvement of users and affected groups occurs at the bottom of the participation ladder (passive involvement, information giving, consultation) rather than towards the top (functional, interactive, self-control/ownership).<sup>211</sup> Women or disadvantaged groups may be also

<sup>209</sup> *Report of the Special Rapporteur*, para. 66.

<sup>210</sup> Communication from Jaime Baptista, CEO of ERSAR, to Virginia Roaf (8 June 2011).

<sup>211</sup> See, for example, R. Jackson, 'Community Participation: Tools and Examples', Paper presented at the Management Planning Workshop for the Trans-Himalayan Protected Areas, Leh, Ladakh, 25–29 August 2000. One should be aware that human rights approaches can easily fall into such a trap if they are overly technical: McGranahan, 'Realizing the Right to Sanitation'.

excluded: 'Male dominated NGOs, trade unions and professional associations are unlikely to prioritize the gender interests of poor women.'<sup>212</sup> Thus, a genuine and full-throated human rights approach to participation emphasises the need to critically scrutinise the existing forms of participation<sup>213</sup> and ensure that processes help identify the underlying causes of the problem. A democratisation of development means creating the space to destabilise existing ideas and power relations and offer and cement alternatives. As Offenheiser and Holcombe argue:

Instead of focusing on creating an inventory of public goods or services that must be provided and then seeking to fill the deficit via foreign aid, the rights-based approach focuses on trying to identify the critical exclusionary mechanisms. What are those systemic obstacles that are standing in the way of people's ability to access opportunity and improve their own lives?<sup>214</sup>

Indeed, it is notable that modern public sanitation systems emerged on the back of political engagement. In 1849, John Snow identified that a cholera outbreak in London was caused by the seepage from a sewerage pit into groundwater used for a local water pump and not from contagion.<sup>215</sup> He encountered denial from the medical community and resistance from the political class on account of the fiscal implications. Significant campaigning led however to a closure of the water pump, the Public Health Act in 1852 and, with growing political pressure, the establishment of household waterborne sanitation systems and the 1866 Sanitation Act, which compelled local authorities to improve local conditions and remove health hazards.<sup>216</sup>

It is too early to judge how the right to sanitation will play a role in democratising and politicising in contemporary times. Some utilities and policymakers have attempted more genuine forms of participation. Drawing partly on the right to water, but also principles of general equity and water

<sup>212</sup> Mwero, cited in UN-HABITAT, *Not about Us Without Us: Working with Grassroots Organisations in the Land Field* (Nairobi: GLTN, 2009), p. 11.

<sup>213</sup> See *Claiming the MDGs*.

<sup>214</sup> R. Offenheiser and S. Holcombe, 'Challenges and Opportunities of Implementing a Rights-Based Approach to Development, an Oxfam Perspective', Paper presented to the Northern Relief and Development Conference, 2–4 July 2001, Balliol College, Oxford UK.

<sup>215</sup> J. Snow, *On the Mode of Communication of Cholera* (London: John Churchill, 1855).

<sup>216</sup> The municipalities became responsible also for the provision of sewers, water and street cleaning. The Act enforced the connection of all houses to a new main sewer; it set definite limits for the use of cellars as living rooms and established the definition of 'overcrowding'. Every town was to appoint sanitary inspectors, and the home secretary was empowered to take action where local authorities failed to do so. See M. Bloy, 'Victorian Legislation: A Timeline', *The Victorian Web*, available at [www.victorianweb.org/history/legisl.html](http://www.victorianweb.org/history/legisl.html) (last accessed 4 April 2017).

conservation, the Tamil Nadu Water Supply and Drainage Board in India embarked on a 'democratisation' project in 2004. This involved first addressing attitudes amongst public engineers and other staff, which was followed by establishing genuine participatory forums in which the other 'public' would jointly decide on priorities but also take responsibility and the consequences of those choices, including safe sanitation methods and practice.<sup>217</sup> The project revealed that that participation and access was hampered by discriminatory attitudes amongst engineers, other professionals and local communities. In order to ensure 'full inclusion', the concept of citizenship was introduced, which has reportedly resulted in a threefold increase in the number of officials visiting, taking note of and acting on the needs of women and Dalit communities.<sup>218</sup> In addition to large cost and water savings through the process, 65 per cent of all projects are in 2005 in villages where more than 50 per cent of the population are living below the poverty line.<sup>219</sup>

Court cases from South Africa also reveal the surprising potential political impact of the right to sanitation. The 2011 local government elections were labelled the 'Open Toilet' election. The Youth League of the ANC party politicised and publicised a largely neglected issue to their political advantage by focusing on unenclosed toilets in an informal settlement, Khayelitsha, in the City of Cape Town, controlled by the national opposition party, the Democratic Alliance. 'Politicians, journalists and the electorate seemed stunned by the sight of these open toilets' as matters of 'dignity and privacy, so central to South Africa's constitution, seemed to be rendered meaningless by images of toilets without walls'.<sup>220</sup> The intervention sparked multiple protests and counter-accusations from both parties, and the matter was eventually taken by residents to court. The Democratic Alliance then responded by launching a similar case against the ANC concerning Moqhaka in the Free State. The results was not only a national dialogue during the election campaign but a strong judgment (which was not appealed) upholding almost all claims of the applicants and significantly pushing the government policy further than it

<sup>217</sup> See V. Suresh and P. Prabhu, 'Democratisation of Water Management as Way to Reclaiming Public Water: The Tamil Nadu Experience', Transnational Institute (April 2007), available at [www.tni.org/sites/www.tni.org/archives/books/watertamilnadusuresh.pdf](http://www.tni.org/sites/www.tni.org/archives/books/watertamilnadusuresh.pdf) (accessed 19 October).

<sup>218</sup> V. Nayar, *Democratisation of Water Management – Nurturing Democratic Change: The Tamil Nadu Experience*, Symposium on Learning Alliances for Scaling Up Innovative approaches in the Water and Sanitation Sector, 7–9 June 2005, Delft, Netherlands. The term Dalit designates a group of people traditionally regarded as 'Untouchable', consisting of numerous 'lower' castes throughout South Asia.

<sup>219</sup> *Ibid.* <sup>220</sup> S. Robins, 'Toilets That Became Political Dynamite', *Cape Times*, 27 June 2011.

currently existed.<sup>221</sup> The Court decided that one toilet per five families during a slum upgrading process could not be justified under existing legislation and that unenclosed toilets provided on this basis violated constitutional safeguards which:

[M]ust provide for the safety and privacy of the users and be compliant with the fundamental rights guaranteed in the Constitution. Any housing development which does not provide for toilets with adequate privacy and safety would be inconsistent with s 26 of the Constitution and would be in violation of the constitutional rights to privacy and dignity.<sup>222</sup>

Media reports shortly afterwards indicated that the community began to gain access to enclosed toilets with one resident commenting that ‘This is what we fought for. It is our right to have these toilets covered’.<sup>223</sup> Robins notes though that the strategy was a double-edged sword: despite the important material and political impacts, the ‘politics of the spectacle also obscured the more mundane indignities, health hazards and forms of structural violence that millions of poor people have to endure on a daily basis’.<sup>224</sup>

### 5.3 Challenging Land Tenure Limitations

Considering sanitation as a human right requires that governments ensure that safe sanitation is available regardless of where a person lives, and regardless of their tenure status. This was affirmed by the CESCR in relation to water services and would equally apply to sanitation: ‘Deprived urban areas, including informal human settlements, and homeless persons, should have access to properly maintained water facilities. No household should be denied the right to water on the grounds of their housing or land status’.<sup>225</sup>

<sup>221</sup> *Beja and Others v. Premier of the Western Cape and Others* [2011] 3 All SA 401 (WCC) [2011] ZAWCHC 97, 21332/10 (29 April 2011).

<sup>222</sup> *Ibid.*, para. 143.

<sup>223</sup> J. Kiewietz and B. Jooste, ‘Residents Elated to Have Enclosed Toilets’, *IOL News*, 29 August 2011.

<sup>224</sup> Robins, ‘Toilets That Became Political Dynamite’. It should be noted that Justice Erasmus also criticised the two parties for politicising the toilet issue at the expense of community members and questioned the propriety of the conduct of the Youth League, the judgment itself stated: ‘What has become evident is that the [ANC Youth League] had a core function of promoting the interests of the City’s contractor. . . Not only was the [ANC Youth League] in the pocket of the contractor but his role undermined the principle of community participation’. *Beja v. Premier of the Western Cape*, para. 104.

<sup>225</sup> *CESCR General Comment 15*, para. 16(c).

However, the reality is that tenure status continues to strongly determine access to sanitation. UN-HABITAT estimated that there were 828 million urban slum dwellers in the world, which would grow to 889 million by 2020.<sup>226</sup> Service providers and relevant local authorities often use the ambiguous legal status of these households as an excuse to delay or even deny the provision of adequate sanitation services and, in some cases, are barred by law from servicing such areas. Likewise, in rural areas, communities may find their traditional right to live on their land is superseded by more formal ownership, or through policies that change the status of land by decree, such as by appointing a particular area as a game reserve, unsuitable for habitation by humans.<sup>227</sup>

In informal settlements, there are different ways to realise the right to sanitation. One obvious path gets at the root problem: upgrade settlements to some level of formal tenure. A few countries have dynamic and participatory slum upgrading programmes: Brazilian legislation allows slum dwellers themselves to initiate slum-upgrading processes themselves with the backing of administrative courts; Thailand has an independent housing agency that works with communities to upgrade their housing on the basis of a city-wide plan and matching funds. However, progress in slum upgrading is slow in most countries, and many projects are beset by public corruption and forced eviction of poorer residents.<sup>228</sup>

An alternative route is to claim rights to sanitation. Some countries, such as South Africa, have recognised in policy that all residents have a right to immediate basic sanitation including those living in informal settlements.<sup>229</sup> This customarily means establishing communal toilets as a first step although practice tends to vary considerably between communities.<sup>230</sup> In Bangladesh, the NGO Dushtha Shasthya Kendra (DSK) developed a dialogue between communities, the service providers and the local municipality in order to find a way of providing water and sanitation services to informal settlements in Dhaka. The tactic has been to avoid formal recognition of settlements as legal.<sup>231</sup> Although the risk of eviction remains, the

<sup>226</sup> UN-Habitat, *State of the World's Cities 2010/2011: Bridging the Urban Divide* (London: Earthscan, 2010), p. XII.

<sup>227</sup> See, for example, *Mosetlhanyane & Matsipane v. The Attorney General*, No. CACLB-074-10, Court of Appeal, Botswana, Judgment 27 January 2011.

<sup>228</sup> M. Langford, L. Quitzow and V. Roaf, *Human Rights and Slum-Upgrading: General Introduction and Compilation of Case Studies* (Geneva: Centre on Housing Rights and Evictions (COHRE), 2005).

<sup>229</sup> *Water and Sanitation Service Standard*, City of Cape Town (2008).

<sup>230</sup> See discussion of this in the Chapter 7 on South Africa in this volume.

<sup>231</sup> See S.I.A. Jinnah, *Case Study: Rights of Water Connections for Urban Slum Dwellers in Bangladesh*, WaterAid Bangladesh (March 2007).

dialogue has opened up a direct line of communication with service providers for residents and increasing basic access to water and sanitation services. In Kenya, the Nairobi Water Company has advised NGOs that it does not consider the lack of secure tenure an obstacle to provision as the settlements are situated on government lands: it aims to deliver kiosk-level services to all informal settlements within 10–15 years.<sup>232</sup>

#### 5.4 Legal Mobilisation

Whereas the right to sanitation has only been recognised recently in domestic and international law, it is possible to point to some specific instances of judicialisation. Given the increasing trend to adjudicate socio-economic rights, judicial remedies could form an important means of making States and other actors accountable for violations of the right.<sup>233</sup>

Many of the initial cases occurred in South Asia. As discussed above, the first Indian case on socio-economic rights, *Ratlam v. Shri Vardhichand*, concerned sanitation.<sup>234</sup> In other cases in India, High Courts have, in essence, constitutionalised statutory obligations, allowing petitioners to avail themselves of constitutional procedures and remedies in order to enforce local government responsibilities. For example, in *Rampal*, residents of Mandal in Rajasthan complained that untreated water drainage from other houses was accumulating with a possibility of epidemics. Bolstered by support from health bureaucrats, the Court directed the Municipal Board 'to remove the water and fifth collected in the chowk in Mundara Mohalla, Mandal by the construction of proper sewers and drains, so as to remove the cause of possible nuisance in the locality, within a period of three months'.<sup>235</sup>

In *Koolwal*, the High Court similarly relied on constitutional rights procedures and 'a right to know about the activities of the State', to address a petition concerning 'insanitation' in Jaipur city.<sup>236</sup> The Rajasthan Municipalities Act 1959 required every Board to make 'reasonable provisions', which

<sup>232</sup> Personal communication by GIZ official to Malcolm Langford, March 2010.

<sup>233</sup> See, for example, R. Gargarella, P. Domingo and T. Roux (eds.), *Courts and Social Transformation in New Democracies: An Institutional Voice for the Poor?* (Aldershot/Burlington: Ashgate, 2006); V. Gauri and D. Brinks, *Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World* (New York: Cambridge University Press, 2008).

<sup>234</sup> See discussion at footnote 49.

<sup>235</sup> *Rampal and Ors v. State of Rajasthan and Ors*, AIR1981Raj121 (4 September 1980), para. 6.

<sup>236</sup> *J.K. Koolwal v. State of Rajasthan and Ors*, AIR1988Raj2, 1987(1)WLN134 (19 September 1986), para. 2.

included ‘cleaning public streets, places and sewers’ and ‘removing filth, rubbish, night-soil, odour, or any other noxious or offensive matter from privies, latrines, urinals, cesspools or other common receptacles’.<sup>237</sup> The Court recognised that the Board had ‘taken some steps’ but found that the obligations had not ‘been implemented in full’, noting that the ‘problem of sanitation is very acute’ and a life ‘hazard’ for the citizens.<sup>238</sup> The municipality was directed to take sufficient actions within a period of six months and clean the entire city. A team of ‘five eminent advocates’ was also appointed as commissioners to follow-up and inspect the progress of implementation.<sup>239</sup> The municipality responded that the order was too onerous since it lacked resources, but the Court responded that it does not carry a duty ‘to see whether the funds are available or not’ when the duty is established in statutory law.<sup>240</sup>

However, if the concern is with the actual implementation and impact of the right, it is important to move beyond a simple focus on judicial outcomes. A mere judgment may strengthen the rule of law and the legal shadow of a right, but its broader and actual influence in practice is likely to vary according to context. Positive judgments may be poorly implemented or have negative consequences, while lost cases may catalyse significant impact.<sup>241</sup> If a political understanding is taken of litigation, the focus should be shifted to the different impacts that judgments can generate (whether material, political or attitudinal) and the conditions under which impact is maximised.

Let us take two examples. The first illustrates the importance of a responsive court. In *Human Rights Case No. 9* in Pakistan, the Karachi Administration Women’s Welfare Society (KAWWS) complained about deteriorating basic infrastructure: the use of open storm water drains for the disposal of sewage was hazardous and the breakdown of the sewer system was contaminating drinking water.<sup>242</sup> The Supreme Court regarded the matter as being of public importance under Article 184(3) of the Constitution and dispensed with the ordinary strict rules of procedure. A Commission was constituted by the Court to investigate the complaints, and it reported back that the petitioners’ claims were correct. The water and sewerage board and a housing society were identified as responsible, and the

<sup>237</sup> *Ibid.*, para. 5.   <sup>238</sup> *Ibid.*, paras. 8–9.   <sup>239</sup> *Ibid.*, para. 10.   <sup>240</sup> *Ibid.*

<sup>241</sup> J. Dugard and M. Langford, ‘Art or Science? Synthesising Lessons from Public Interest Litigation and the Dangers of Legal Determinism’, *South African Journal on Human Rights*, Vol. 27, No. 2 (2011), pp. 39–64; M. Langford, C. Rodríguez-Garavito, and J. Rossi (eds.), *Making it Stick: The Enforcement of Economic and Social Rights Judgments* (Cambridge: Cambridge University Press, 2017).

<sup>242</sup> *Human Rights Case No. 9 – K/1992*, Supreme Court of Pakistan, unreported judgment.



Court ordered them to start the necessary work to repair the water and sewerage pipes.<sup>243</sup> According to a report, the pipes were repaired in 1992/1993 and an underground reservoir for the area was built.<sup>244</sup> When the drinking water was contaminated again, the necessary repairs were also reportedly undertaken.

A recent case from South Africa illustrates how broader mobilisation can be more important than legal outcomes. The residents of Harry Gwala informal settlement, which lies to the east of Johannesburg, had spent two decades mobilising to have their settlement upgraded with no success and despite an agreement with the municipality.<sup>245</sup> In August 2006, the municipality eventually submitted a proposal to the provincial government for upgrading, but no decision had been taken. The residents turned to the High Court, which ordered the municipality to provide taps and refuse collection, after the parties had agreed on this during the proceedings. But it dismissed the claim for temporary sanitation and for high-mast lighting. The decision was appealed to the Constitutional Court on the grounds that the constitutional right of access to adequate housing included rights to basic sanitation and electricity.

It was this mere process that helped push the municipality to some action: in April 2009, the residents were offered one chemical toilet per ten families. In the court proceedings, the residents rejected this offer, arguing for one VIP per household (based on government standards). However, the Constitutional Court was not prepared to order this and instead directed the provincial government to take a final decision on slum upgrading application within 14 months.<sup>246</sup> The decision to upgrade Harry Gwala was again delayed although the delay is partly due to environmental impact

<sup>243</sup> Karachi Administration Employees Co-operative Housing Society and the Karachi Water and Sewerage Board (KWSB). During a later stage in the proceeding, the KWSB took over full responsibility.

<sup>244</sup> *Legal Resources for the Right to Water and Sanitation: International and National Standards* (2nd edn, Geneva: COHRE, 2008).

<sup>245</sup> See discussion of case in J. Dugard, 'Basic Services in Urban South Africa: Rights, Reality and Resistance' in M. Langford, B. Cousins, J. Dugard and T. Madlingozi (eds.), *Symbols or Substance? The Role and Impact of Socio-Economic Rights Strategies in South Africa* (Cambridge: Cambridge University Press, 2013), pp. 275–309.

<sup>246</sup> *Nokotyana & Ors. v. Ekurhuleni Municipality* 2010 (4) BCLR 312 (CC). Note that Court chose not to explicitly address whether there was a constitutional freestanding right to sanitation as it focused on the legislation. For critique of the decision, see S. Liebenberg, *Socio-Economic Rights: Adjudication Under a Transformative Constitution* (Claremont: Juta, 2010), pp. 455–456; S. Wilson and J. Dugard, 'Constitutional Jurisprudence: the First and Second Waves', in Langford et al. (eds.), *Socio-Economic Rights in South Africa*, *ibid.*, pp. 33–62, at 50–52.

assessments that a decision is repeatedly promised. Moreover, despite not being ordered to do so, the municipality provided more than one in ten toilets they had offered in court along with some high-mast lighting was also provided.<sup>247</sup> Other communities in surrounding East Rand area also viewed the decision as covering their settlements and used it in negotiations with municipalities.<sup>248</sup>

## 6 CONCLUSION

More than 150 years ago, a 'sanitary revolution' occurred in Europe as municipalities were pushed to make unprecedented investments in public drinking water and sanitation. The effect in controlling outbreaks of cholera, typhoid and other infectious diseases led to the *British Medical Journal*, after a 2007 survey, to crown sanitation as the most important medical advancement since 1840.<sup>249</sup> However, the consequences of poor sanitation across the world remain devastating. The UNDP has noted that diarrhoea has 'killed more children than all the people lost to armed conflict since the Second World War',<sup>250</sup> while even in wealthier countries, access is not universal.

Articulating sanitation as a human right offers an opportunity to highlight, support and legalise the continuing demands of this sanitation revolution. However, a human right to sanitation arguably offers more than just strengthening common demands for improved treatment and extended physical access from the sanitation sector. Fundamentally, it places the issue of equality at the centre of sanitation-related efforts: the most marginalised need to also benefit from access to sanitation facilities and the broader social and health benefits. It also brings a greater focus on dignity, focusing on demands such as privacy and security. Additionally, the focus on genuine participation, affordability and cultural acceptability brings into the foreground the need to ensure that sanitation systems are contextually appropriate, can be accessed and will actually be used in practice. This is not to say that articulating or enforcing this 'new' human right will provide a panacea for addressing the sanitation crisis. But as the examples demonstrate, under particular conditions, rights-based strategies to sanitation can make an important contribution.

<sup>247</sup> Dugard, 'Basic Services in Urban South Africa'.

<sup>248</sup> Interview with G. Moyo, Makuase Settlement, March 2011, by Malcolm Langford.

<sup>249</sup> *British Medical Journal*, No. 334, (2007), p. 111.2

<sup>250</sup> Human Development Report 1993, *Millennium Development Goals: A Compact among Nations to End Human Poverty* (New York: Oxford University Press, 2003), p. 9.

Moreover, our understanding of sanitation as a right remains nascent. This can be seen in our discussion of the justification and interpretation of the right – including many issues that have yet to receive any other scholarly attention. It is possible to justify sanitation as a human right in both moral and legal terms (at least at the international level). The initial demands for recognition of a right to sanitation also occurred in the context of the movement for the right to water. But the discussion in this chapter suggests that there may be very good grounds, technically and politically, for de-linking the two rights. Separating sanitation from water provides the opportunity for further detailed explanation of the content, perhaps with a new General Comment from the CESCR or update of General Comment No. 15. Our conclusion on this question is strengthened by our view that the right to sanitation possesses some particular collective features that require a partly different way of conceiving and implementing the right.