

# Legal pluralism in the area of human rights: water and sanitation

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Access to clean drinking water and adequate sanitation and hygiene facilities is crucial to achieving social and environmental sustainability. We examine the global human water and sanitation right from a legal pluralism perspective to see if it is indifferent to, competes with, accommodates, or is mutually supportive of national laws and local customs. The paper concludes that legal pluralism in the area of human rights is a multilevel process operating at different levels of governance. Therefore, the effective implementation of international human rights depends on the nature of the relationship with existing regional, national and customary laws. After a legal pluralism diagnosis has been conducted for a specific region, there may be specific tools to deal with the related challenges.

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## Introduction

As part of this special issue on legal pluralism and aquatic resources, this paper focuses on access to potable water and sanitation services. Although access to water and sanitation is a human right recognized in various international [1,2] and national policies, there are still over 748 million people without access to safe drinking water and 2.5 billion people who use unimproved sanitation facilities mostly living in poor regions [3]. This negatively affects environmental, social, and economic sustainability

[4,5,6]. The legal pluralism framework allows us to understand the challenges facing the implementation of the human right to water and sanitation (HRWS).

Legal pluralism is ‘the co-existence *de jure* or *de facto* of different normative legal orders within the same geographical and temporal space’ [7<sup>\*\*</sup>]. Resulting from historical evolution [8], legal pluralism can occur in any state [9] or jurisdiction [10,11]. The literature covers various forms and operations of legal pluralism in different contexts [12,13], and development challenges [14]. The evolution of legal pluralism in the human rights field ‘may reflect a pragmatic response to resource or other constraints that are perceived to impede a population’s right of access to justice’ [7<sup>\*\*</sup>]. This occurs where non-state informal or traditional justice systems operate in addition to formal human rights systems [15]. Three publications on legal pluralism and human rights are significant. First, the International Council on Human Rights Policy’s (ICHRP) 2009 report analyses the compatibility of international human rights standards with other formal and informal law [9,16]. Second, a review article [17] raises three unresolved issues in the ICHR: (a) how to manage competition between human rights and existing legal orders; (b) the role of States in, and the political process for, managing such competition; and (c) the importance of recognizing individual rights to resolving the conflict. Third, Quane [7<sup>\*\*</sup>] advocates disaggregating the various forms of legal pluralism and analyzing their compatibility with international human rights law [7<sup>\*\*</sup>].

The scientific literature recognizes two types of legal pluralism, *de jure* and *de facto*. The former recognizes co-existing multiple legal orders and their linkages in order to enhance the efficiency and effectiveness of the formal justice system [7]. The latter implies that the state does not recognize non-state or informal legal orders, but may implicitly allow their operation [7,18]. This paper goes further to differentiate between horizontal and vertical legal pluralism. Horizontal legal pluralism means different legal rules that apply to the same level of governance. Vertical legal pluralism, on the other hand, signifies different legal rules that apply across multiple levels of governance.

The paper analyses the challenges to implementing the HRWS through a legal pluralism lens, departing from the conventional focus on pre-existing rules to investigate also the underlying discourses that legitimise the rules [19,20]. It argues that a key challenge of modern legal

pluralism is the competing discourses and how these influence the adoption of rules on managing fresh water resources at multiple levels of governance [21\*\*]. Through an in-depth review of relevant scientific literature and policy documents, and applying the conceptual framework presented by Bavinck and Gupta (in this issue) this paper identifies four types of legal pluralism relationships: indifference, competition, accommodation, and mutual support, and analyses their implications for implementing the HRWS.

### Relevant discourses in fresh water governance

Economic, social, cultural, and political discourses on fresh water governance influence the application of the HRWS. The discourses are themselves influenced by factors such as climate, extreme variability in the availability of water resources, geography, and water uses [22]. The co-existence of different discourses helps frame legal orders, and creates a situation of legal pluralism at different levels of governance. This is particularly evident when customary rules influenced by religious laws such as the Hadiths of Islam come in conflict with colonial and post-colonial laws and modern discourses [7].

In this regard, under European Law, the two principal systems: civil law and common law regulated the abstraction and use of water from natural sources to ensure orderly allocation and sustainable use. Under both systems, the right to use water derived from use or ownership of land adjacent to water courses. Civil law, sometimes described as Romano-Germanic [22], had limited private ownership of water; water was classified as open for use subject to regulation to avoid over-exploitation [23]. Roman water law permitted the use of public streams and rivers by all who had access to them, but the government retained the right to regulate the use [24].

The common law system originating from England on the other hand had two key principles: riparianism and prior appropriation. During the industrial revolution in England, water resources played a central role in economic development. Riparianism entitled the water riparian rights to the ordinary use of the water flowing in the watercourse for domestic purposes, and reasonable use for any other purpose which did not interfere with the rights of other users, subject to certain restrictions [25]. This doctrine spread to many former British colonies. However, practical limitations in arid places such as the Western US led to the adoption of prior appropriation [22]. Prior appropriation is linked to the practise of miners on federal public lands who assigned the best rights to the first water users in the same way that the mining rights were accorded to those who first discovered the ore deposits [22]. The occurrence of the mining activities on federal public lands instead of private lands precluded the application of the riparian principle [22].

Modern discourses include equity and priority of use; water as an economic good and pricing of water resources; the Millennium Development Goals (MDGs) aimed at halving the human population without access to improved drinking water and sanitation facilities; water as a source of ecosystem services; water as a political good and the securitization of water resources; protection of water as a heritage of humankind; and water as a free gift of God [26\*\*,27].

### Horizontal legal pluralism at international level

Early discourses pertaining to access include the right to water for drinking, priority of use and water as a gift of God which emerged from Islamic water law [28]. The concept of priority of use is included also in the 1997 UN Watercourses Convention, Article 10, where in the case of a conflict between uses of water resources, 'special regard' must be 'given to the requirements of vital human needs' [29].

The MDG [30,31] target on water and sanitation aims to at least halve the number of people without access by 2015, using 1990 as the baseline year [32]. Although by 2010, 89 percent of the global population had already gained access to improved drinking water sources, the quality and reliability of services, and inequity in the distribution of access are still major concerns [33].

The recognition of water and sanitation as human rights in international law, reaffirmed by the UNGA [1] and the UNHRC [2], respectively in 2010, also adds to horizontal legal pluralism. The HRWS is often either derived from the International Covenant on Civil and Political Right (ICCPR) [34] based on the right to life; or the International Covenant on Economic, Social, and Cultural Rights (ICESCR) [35] with reference to the right to an adequate standard of living, for instance [36]. In addition to affordability, other normative contents of the HRWS are safety, accessibility, and acceptability [37]. States are required to respect, protect, and fulfil the HRWS within their jurisdictions; and to desist from interfering with the realisation of the right in other jurisdictions [37]. There is no consensus on whether a derived right is an independent right under international law [36,38]. Though the sources of the HRWS are largely fragmented, evidence of State practise combined with a sense of legal obligation on the part of States (*opinio juris*), shows that the HRWS has evolved into becoming a part of customary international law [36,39,40].

In addition to the above three discourses and related rules on access to water and sanitation services, there are other discourses and related rules that may impact on the HRWS. The historical discourse of sharing water between users has emerged through the equity principles in international water law which govern the allocation of trans-boundary water resources among countries [41\*\*,42\*\*].

The dependence of the population on the water is an important criterion for allocating water use under the UN Watercourses Convention [29].

With the increasing dominance of neo-liberalism since the early 1990s, water was also framed as an economic good in the influential 1992 Dublin Statement on Water [43]. This set in motion the process of operationalising the concept through changing rules to allow private sector participation in water and sanitation service delivery in many countries [44\*]. Some water and sanitation rights activists argue that the liberalisation of services negatively affects the access of poor people [45], and antagonises advocates of water as a free gift of God except when it can be appropriately framed. Others see water as a human heritage and imbue the governance rules with cultural, social, and ecological values [46]. This is evident in some Latin American contexts and Australia. The supranational European Union Water Framework Directive (EU WFD) encourages pricing and cost recovery, even though it states that water is not a commercial product like any other, but a heritage that must be protected, defended and treated as such [47].

Some argue that water is a political good [48]. Politics determines who gets what, when and where; water is vital for development; States are therefore unlikely to relinquish control over the allocation of water access. Closely related to this is the discourse of water security which emerged in the 1990s [49]. Water is increasingly playing a strategic role in national security, and development and foreign policy for countries in the arid Middle East region, and even the United States since the terrorist attacks of 2001 [5]. Water is also considered a social and cultural good [50].

Ecosystem services broaden the definition of environmental benefits under Integrated Water Resources Management (IWRM) [51,52,53]. The framing of water as a source of ecosystem services includes access to safe drinking water and adequate sanitation that does not contaminate the ecosystem (e.g. no open defecation). This may come at a price to consumers for the associated opportunity cost and the value obtained from their use of water for drinking and sanitation. In relation to valuing the ecosystem services derived from water, users generally exhibit different preferences for services from alternative types of water bodies but show a high willingness to pay for a good level of water quality, taste and odour [54]. However, the HRWS requires that the price of water and sanitation must be affordable [55].

Public participation [56] is another relevant principle that affects HRWS. It is embodied in many water management laws. South Africa's National Water Act, 1998, for instance, provides for stakeholder participation in water management through Catchment Management Forums (CMF) to

counter the challenges of the historically centralized planning and delivery of water services. Similarly, the Revised Protocol on Shared Watercourses in the Southern African Development Community fosters 'closer cooperation for judicious, sustainable and co-ordinated management, protection and utilisation of shared watercourses', and advances regional integration and poverty alleviation [57]. Public participation promotes the resolution of conflicts between the HRWS and pre-existing discourses/rules through interactions among stakeholders [58].

Although the HRWS is a combined right, its two components, water and sanitation, have different practical implications in various jurisdictions. For instance, the discourses on equity and priority of use, religious rules on the right to water, and the protection of water as a heritage do not directly extend to access to sanitation. Nonetheless, water and sanitation are similar in many ways, including their relevance to human dignity; both are interdependent services [59]. The ensuing discussion about the discourses/rules applicable to freshwater governance therefore encompasses both water and sanitation governance.

#### **Linking different discourses/rules with existing legal orders**

This section analyzes the links between some of the discourses/rules and the existing legal orders. Equitable utilisation and participation are rules of the UN Watercourses Convention (Articles 5 and 6), which entered into force in August 2014 [29]. The equity principle is indifferent to the HRWS when both co-exist but neither is actively implemented. However, when one is implemented and the other gets compromised in the process, this leads to competition. For instance, focusing on the geography, hydrographic, hydrology, climate, ecology, and other factors of a natural character; social and economic needs of the watercourse States concerned; the population dependent on the watercourse; existing and potential uses of the watercourse and other relevant factors specified in Article 6 of the Convention might compromise the implementation of the HRWS. There is also very strong competition between the HRWS and the notion that no use of water should have priority over other uses (UN Watercourses Convention Article 10).

Water as an economic good and the related practices of private sector participation and full price recovery which are incorporated into legally binding contracts significantly competes with the HRWS, particularly by violating affordability especially for the poor. The MDGs however paved the way to making the adoption of the HRWS possible and both are mutually supportive [60]. But in the short-term, the partial nature of the MDG targets breaches the HRWS obligations with respect to the other 'half' [61]. Nonetheless, the HRWS is also subject to progressive realisation like other ICESCR rights [35].

The discourse of water as a heritage together with conservation and protection rules, and the discourse of ecosystem services which also leads to specific rules for the protection of water resources affects the implementation of the HRWS. Although the EU WFD and the 1992 UNECE Convention on the Protection and Use of Transboundary Watercourses and International Lakes (UNECE Water Convention) do not explicitly deal with HRWS, the former focuses on water as a heritage while the latter focuses on minimising international impacts and its 1997 Protocol covers human health aspects [62].

### Relationship between HRWS and other discourses at multiple levels

This section assesses legal pluralism resulting from the implementation of the HRWS at the regional, national, and local levels using some of the discourses/rules which inform formal and informal legal orders. The analysis is focused on four types of relationships that might result from the existence of the HRWS with pre-existing formal and informal legal orders (see Table 1). Indifference is a weak type of legal pluralism that arises where there is no operational overlap between the HRWS and the different discourses/rules which inform both the formal and informal legal orders for fresh water governance at any level of governance within any given jurisdiction.

Competition is a strong type of legal pluralism that exists where there is competition for power between the HRWS and other discourses/rules which inform both the formal and informal legal orders for fresh water governance at any level of governance. Tensions arise from the competition between the HRWS and various discourses/rules that operate at the same level. Accommodation is a weak type of legal pluralism in which the HRWS is recognized in addition to other discourses/rules which inform both the formal and informal legal orders for fresh water governance at any level of governance within any given jurisdiction. However, the human rights requirements such as accessibility, acceptability, sufficiency, and safety, have not been fully institutionalised within and across the different levels of governance. Mutual support is a strong

type of legal pluralism resulting from express operational overlaps and support between the HRWS and the different discourses/rules which inform both the formal and informal legal orders for fresh water governance at any level of governance within any given jurisdiction. The outcome is a positive and enabling legal and policy environment for freshwater governance within a given jurisdiction. Although the discourses/rules may theoretically apply to similar levels of fresh water governance like the HRWS, in practice they operate at different levels (see Table 2).

At the international level, the HRWS as adopted in 2010 thus faces the challenge that there are multiple legal principles operating simultaneously in different jurisdictions. An awareness of horizontal legal pluralism in the area of the HRWS is a first step towards understanding how the implementation challenge can be resolved. A second step is realizing that there is a strong distinction between the HRW and the HRS not just in substantive terms but also in terms of how these are treated at other levels of governance. A number of alternatives exist to move towards a singular system of water rights. Table 3 develops some alternatives for implementing these two steps and moving towards a singular system of water rights. Such a singular system is arguably necessary to achieve the implementation of the HRWS.

Discourses lead to legal rules at different levels of governance. It is necessary to limit the exercise of legislative powers to the lowest level of governance where it would be the most effective, applying the principle of subsidiarity [16]. This would enhance stakeholders' participation and shared responsibility, and reduce boycott strategies [63]. For instance, at the global level, subsidiarity would ensure that global institutions do not exceed the limits 'of what is strictly necessary to achieve the objectives previously agreed with local communities, might avoid the imposition of unnecessary legal rules and practices stemming from foreign legal cultures' [14]. Subsidiarity also plays out in mutual recognition regimes involving global actors, and conditions [64,65] and other

**Table 1**

#### Types of relation between the HRWS and other rules

##### *Type I: Indifference*

Water rights regulate water use and abstraction from natural sources for sustainability, but are indifferent to the HRWS which covers access to and use of water for drinking and sanitation. The relationship may become one of competition for indigenous people who are deprived of land use and water rights

##### *Type III: Accommodation*

Participation principle when implemented along with the HRWS allows for accommodating various stakeholders' views in the implementation process

##### *Type II: Competition*

Water as an economic good competes with the HRWS, when people are unable to afford the latter and are excluded as a result

##### *Type IV: Mutual support*

MDGs have elevated the issue helped the HRWS by putting the issue on the global agenda and developing an institutional implementation framework, even if it did not go far enough

**Table 2**

**The implementation of the HRWS at different levels of government**

	International	Regional	National	Local
Indifference	HRWS is not expressly listed as a factor relevant to equitable and reasonable utilisation in Article 6 of the UN Watercourses Convention but it imposes obligations on States	HRWS is excluded from the UNECE Water Convention/Protocol, EU WFD but it can co-exist with their health rules and heritage discourse respectively	HRWS is included in many national laws (e.g. Netherlands, Canada, UK) that did not support the adoption of the right during the UNGA in 2010	HRWS is increasingly being adopted in national laws but not integrated into customary water law systems which mainly consist of the established laws, practices, and customs
Competition	The 'no priority of use' in Article 10 of the UN Watercourses Convention competes with the HRWS by removing the priority of access to water for drinking and sanitation	Where organisations such as the African Development Bank promote price recovery for water and sanitation services, this may compete with the HRWS	Some national laws require price recovery for water services, while also recognizing access to water as a human right, for example, Ghana	Denying indigenous people their customary rights to land and water resources without alternative sources of water supply may inhibit the HRWS
Accommodation	The duty of States to prevent significant harm to others when utilising international watercourses in their territories (UN Watercourses Convention, Article 7) accommodates the duty to refrain from interfering with the realisation of the HRWS in other territories	The SADC Revised Protocol provision for watercourses States to participate in the equitable and reasonable use of shared watercourses accommodates access to shared watercourses for the realisation of the HRWS	When national laws include participatory approaches in their water resources management framework, this may facilitate the resolution of conflicts between the HRWS and pre-existing discourses and rules	Institutionalising public participation in the local water resources management practices might address conflicts resulting from the implementation of the HRWS
Mutual support	Protecting and preserving the marine environment and ecosystems (Part IV of the UN Watercourses Convention) could minimise water pollution due to poor sanitation including open defecation	The UNECE Protocol contains obligations for water supply and sanitation	Some national constitutions expressly recognize the HRWS, for example, South Africa, and Uruguay	Some local laws support free access to basic water and sanitation services, for example, the City of Johannesburg's free basic water policy for 25 l per person per day

forms of arrangements for the recognition of domestic laws and policies [16]. This supports the compatibility of legal pluralism and human rights, such as the HRWS, by: (a) offering an analytical basis for understanding the disparities in the current structure of international human

rights law; (b) granting states discretion to interpret international human rights provisions and ensuring progressive realisation of social and economic rights; and (c) promoting international cooperation and assistance for the realisation of international human rights [66].

**Table 3**

**Towards addressing the legal pluralism challenges in implementing the HRWS**

Quality/intensity	Weak relations	Strong relations
Contrary	<p><i>Type 1: Indifference</i></p> <ul style="list-style-type: none"> <li>Establish reporting and monitoring systems to verify the progressive realisation of the HRWS</li> <li>Establish equitable mechanisms for financing service provision and use, to ensure access for the poor</li> <li>Where cultural practices and social norms inhibit the HRWS, establish local education programmes</li> </ul>	<p><i>Type 2: Competition</i></p> <ul style="list-style-type: none"> <li>Ensure a system of a guaranteed minimum use of water followed by progressive pricing for further water use. Cross-subsidize the use of sanitation facilities by the poor</li> <li>Assist the right holders in the use of the complaint procedure under the ICCPR and ICESR</li> </ul>
Affirmative	<p><i>Type 3: Accommodation</i></p> <ul style="list-style-type: none"> <li>Consultations should include consent rules to ensure application of the outcomes reached</li> <li>Participation should be designed to foster mutual exchanges of knowledge rather than being merely symbolic or a medium for manipulation</li> </ul>	<p><i>Type 4: Mutual support</i></p> <ul style="list-style-type: none"> <li>Promote greater coherence between UN agencies on the issue of the HRWS</li> <li>Promote the express recognition of the HRWS in regional water agreements, and national water constitutions</li> </ul>

## Conclusion

The HRWS has attained the status of an international customary norm as a result of state practice and *opinio juris*. This paper has examined the position of HRWS from the perspective of legal pluralism. It argues that a legal pluralism perspective highlights the possible impediments to the implementation of the HRWS. Furthermore, it proffers insights on how the impediments may be mitigated to promote sustainability. The paper first examines how some of the dominant discourses have shaped the rules of access to freshwater. It highlights four types of relationships that could result from a situation of legal pluralism where the HRWS interacts with pre-existing discourses/rules: indifference, competition, accommodation, and mutual support. It also identifies the equitable use and human rights discourses as being indifferent when neither is effectively implemented and competitive when the six elements of equitable use leave only little room for meeting the HRWS obligations. The economic good discourse is also identified as being competitive, while the participation principle is accommodating, and the MDGs and ecosystems discourses are mutually supportive.

Legal pluralism in the area of HRWS is a multilevel process operating at the global, regional, national and local levels. This shows that the effective implementation of the HRWS particularly depends on the type of relationship with pre-existing discourses at the different levels of government. Furthermore, although the human rights discourse similarly applies to water and sanitation at the global level, apart from the discourses relating to MDGs and ecosystem services, the impacts of other discourses may differ in relation to sanitation, particularly at the national and local levels. It is therefore important that the differences between access to water and sanitation are sufficiently addressed, and the impacts of the various discourses are effectively linked to both the water, sanitation, and hygiene components of the combined HRWS. This will ensure that environmental impacts are taken care of, and the quality of water supply is not affected by poor sanitation and hygiene.

Once a legal pluralism diagnosis can be made for a specific geographical region, there may be specific tools to deal with these challenges. These include establishing reporting and monitoring systems; developing creative finance mechanisms and education programmes; institutionalising the principle of subsidiarity in order to tackle indifference where appropriate; and guaranteeing a system of minimum use, progressive pricing, and cross-subsidies for the use of sanitation facilities by the poor, and promoting the use of complaints procedures under the international human rights system. There is also a need for consent rules in consultations and designing participation to foster mutual exchange of knowledge in order to tackle accommodation; promotion of greater coherence between UN

agencies on the issue of the implementation of the HRWS; and advocating the inclusion of the HRWS as a legal right in regional, national, and local water laws and agreements, to ensure justiciability. This implies that the state obligation for the realisation of the HRWS in a situation of legal pluralism should extend beyond the traditional ambit of respect, protect, and fulfil to reconciling competition with other discourses, addressing situations of indifference, and moving from passive accommodation to a position of mutual support.

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