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Realisation of the Fundamental Right to Water in Rural Areas: Implications of the Evolving Policy Framework for Drinking Water

PHILIPPE CULLET

The fundamental right to water in rural areas is well-established in India, but the actual content of this right has not been elaborated upon in judicial decisions. There is no general drinking water legislation that would provide this missing content. This analysis of various initiatives taken by the government for rural drinking water supply finds that these initiatives do not amount to a comprehensive binding legal framework covering all the main aspects of the fundamental right to water.

The fundamental right to water is well-established, having been recognised by the Supreme Court for a number of years. Yet, there is little substance to the right beyond its formal recognition. The case law is not particularly detailed with regard to the content of the right and Parliament has never adopted any framework for drinking water legislation that would provide content and specificity to this fundamental human right.

In legal terms, there is little beyond a formal recognition of the fundamental right to water. Yet, this does not reflect its importance in practice. Indeed, the crucial importance of water for survival has led the union and state governments to take a number of policy initiatives over the past several decades that amount at least in part to attempts to foster the realisation of the right.

Since the mid-1990s, the law and policy framework concerning drinking water has dramatically evolved. On the one hand, the 73rd Amendment to the Constitution has provided for a significant devolution of competences to panchayats. A number of states have accordingly amended their panchayat legislation. On the other hand, the policy framework governing drinking water supply at the union level has evolved in ways that reflect in part the constitutional amendments and mostly a series of policy reforms known as water sector reforms.

The fact that not all ongoing reforms derive from the same premise implies that they do not necessarily all propose the same solutions to identified problems. This is not problematic in itself, but requires close scrutiny. Indeed, the essence of the legal framework is to be organised in a certain way that puts, for instance, constitutional principles and fundamental rights above other rules and norms. Thus, any reform programme must be seen in the light of its contribution to the realisation of constitutional principles. In the context of drinking water in rural areas, it is unclear that all ongoing reforms pull in a direction that directly contributes to the realisation of constitutional objectives.

1 Drinking Water Regulation

The Constitution does not specifically include a fundamental human right to water. This does not, however, imply that the right is not recognised. Indeed, as Gleick already argued more than a decade ago, concerning the international legal framework, if water is not considered to be part of the rights protected, this “would mean that there is no right to the single most important resource necessary to satisfy the human rights more explicitly guaranteed by the world’s primary human rights declarations and covenants” (Gleick 1999).

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In any case, a number of judicial pronouncements have made it clear that the right exists in India. First, the Supreme Court has repeatedly derived a fundamental right to water from the right to life.¹ It sees the unavailability of drinking water to all citizens as constituting a violation of UN human rights instruments and the right to life under the Constitution.²

Second, courts have also derived the fundamental right to water from Article 47 of the Constitution. In the Hamid Khan case, the complaint focused on the health consequences of the supply of water with excessive fluoride content. The high court found that under Article 47 the state has a duty “towards every citizen of India to provide pure drinking water”.³

Third, courts have found on repeated occasions that the fundamental right to water includes a duty on the part of the state to provide water. This was, for instance, the case in the Hamid Khan decision mentioned in the previous paragraph. The same position has been restated in strong terms a few years ago in *Vishala Kochi Kudivella Samarkshana Samithi vs State of Kerala* where the high court found that

[w]e have no hesitation to hold that failure of the State to provide safe drinking water to the citizens in adequate quantities would amount to a violation of the fundamental right to life enshrined in Article 21 of the Constitution of India and would be a violation of human rights. Therefore, every Government, which has it priorities right, should give foremost importance to providing safe drinking water even at the cost of other development programmes. Nothing shall stand in its way whether it is lack of funds or other infrastructure. Ways and means have to be found out at all costs with utmost expediency instead of restricting action in that regard to mere lip service.⁴

The cases mentioned above confirm that the right is well-established. Yet, the actual content of the right has not been elaborated upon in judicial decisions. Further, there is no general drinking water legislation that would provide this missing content. As analysed in the next subsection, this is not to say that no initiative has been taken concerning rural drinking water supply but these initiatives do not amount to a comprehensive binding legal framework covering all the main aspects of the fundamental right to water.

2 Law and Policy Framework

Drinking water is acknowledged as the primary concern in the water sector. Yet, in legal terms, this is mostly visible through the recognition of the fundamental right to water analysed in the previous subsection. Indeed, there is no framework for drinking water law to complement the recognition of the fundamental right to water, and as a result, there is neither any general set of principles that apply to drinking water supply throughout the country nor specific rules giving content to the fundamental right to water.⁵

The absence of a broad-based drinking water legislation is a serious concern. Yet, the vital importance of drinking water supply in rural areas has ensured that the union and state governments have given it a significant attention. Over time, a patchwork of general policy instruments, quality standards and panchayat laws has developed. This has constituted the framework within which the provision of drinking water has been organised in rural areas.

First, at the union level, several policy initiatives have been taken even though the main responsibility for drinking water supply rests in principle with states. The main instrument from 1972 to 2009 was the Accelerated Rural Water Supply Programme (ARWSP). The ARWSP Guidelines first introduced in 1972 provided for a number of years the core framework used by the Rajiv Gandhi National Drinking Water Mission in ensuring the provision of drinking water to all habitations in the country.⁶ They included a number of key elements:

- They first defined different levels of coverage in terms of quantity. Non-covered habitations were defined as having access to less than 10 litres per capita per day (lpcd). Partially covered habitations were those having access to 10 to 40 lpcd. Covered habitations were defined as having access to 40 lpcd. The figure of 40 lpcd was used to determine the minimum level of coverage necessary to define a habitation as covered was identified through an amalgamation of figures for different basic minimum water uses: three litres for drinking, five litres for cooking, 15 litres for bathing, seven litres for washing utensils and the house and 10 litres for ablutions.
- The guidelines further specified that the source of water had to be within 1.6 km or 100 metre elevation in mountain areas. The water was not to be affected by quality problems even though no specific standards for determining quality were included. Another criterion was that a given public source of water, such as a handpump was not to be used to serve more than 250 people.
- The guidelines also acknowledged the direct link between drinking water for human beings and water for cattle. Consequently, in a certain number of states, especially affected by drought, the guidelines mandated that an additional 30 lpcd should be provided for cattle.
- The minimum level of 40 lpcd was acknowledged as a minimum level of coverage which should be increased over time. Thus, in states where all habitations had been covered at the level of 40 lpcd, the Government of India had already approved that the next level of service should be 55 lpcd within 500 metres of the house or 50 metre elevation in mountain areas.

Second, the union has attempted to introduce various quality standards for drinking water supply. These include the Bureau of Indian Standards Water Quality Standards IS:10500, 1991 and the Manual on Water Supply and Treatment issued by the Central Public Health and Environmental Engineering Organisation.⁷ While these are in principle applicable countrywide, the absence of any legislation directly referring to these standards means that to date their legal status is partly inchoate.

Third, various states have adopted legislation that gives panchayats control over water supply at the local level. Different formulations are used and different acts give a different set of competences to panchayats. There is nevertheless broad agreement among panchayat acts in giving control to panchayats over drinking water supply at the local level.⁸ Some acts are more detailed than others. Some specify the kind of activities that panchayats can engage in, such as constructing, repairing and maintaining tanks or wells, streams and watercourses and specify their powers, such as the capacity to contract someone for water supply.⁹ While panchayat acts are not detailed with regard to water supply rights

and obligations of the panchayats, they provide a general binding framework within which all water supply at the local level must be organised.

Domestic Water Supply

The framework for water supply in rural areas has been progressively evolving over time. The legal context got a significant boost following the 73rd Constitutional Amendment and the adoption or amendment of a number of panchayat laws that now specifically refer to water supply. At the same time, drinking water supply in rural areas has never been framed within a general legal context, giving it overall direction and specificity. It is in large part this lack of legal context which has allowed for tremendous policy changes over the past decade. These reforms have neither directly touched any existing laws nor introduced any new norms, but their impact has been immense, partly because the policy reforms adopted at the union level come with significant financial incentives for states to adopt them.

The first harbinger of the reforms was a pilot project sponsored by the World Bank, whose principles were adopted in the Swajaldhara Guidelines, 2002. The latter were used as a template for reforms which eventually led to a complete rethinking of the existing policy framework, leading to the disbanding of the ARWSP and the adoption of an entirely new set of guidelines in the context of the National Rural Drinking Water Programme (NRDWP).

3 The Swajaldhara Guidelines

The Uttar Pradesh Rural Water Supply and Environmental Sanitation Project (Swajal project), which was a pilot project funded by the World Bank starting in 1996, was one of the important drivers of change in the rural drinking water sector. The Swajal project was based around a string of important policy propositions. It sought to introduce a demand-driven approach to replace the supply-driven approach deemed to result in "inefficient service delivery and poor quality of construction".¹⁰ Swajal thus, sought to introduce participation by "users" allowing them to determine their own contributions to the scheme and to manage operation and maintenance. This participation was not a part of the decentralisation agenda introduced with the 73rd Constitutional Amendment but rather promoted people's control over schemes at the local level, while introducing new obligations and responsibilities that villagers need to shoulder.

Another new principle under Swajal was cost recovery under which villagers were asked to shoulder 10% of the capital costs of new projects and the full costs of the operation and the maintenance of those schemes. The ultimate rationale of the principle of cost recovery is that all projects should be fully self-sufficient. However, at the outset, project proponents determined that the full cost recovery should only be imposed with regard to operation and maintenance. This was linked to the perception that there would be sufficient "demand" for this service, while poverty might preclude demand for new expensive schemes in favour of maintaining or repairing existing infrastructure.

The Swajal project and related initiatives taken in the late 1990s were generally assessed positively by policymakers. This led to the formulation of the Swajaldhara Guidelines which

extended during the Tenth Plan the key principles of the Swajal project to the whole country. Twenty per cent of funds allocated to the ARWSP were directed to reform projects under the Swajaldhara Guidelines during this period.

The Ministry of Rural Development spearheaded the introduction of Swajaldhara through the adoption of the Guidelines on Swajaldhara (MORD 2002). Their conceptual background was directly derived from the Swajal project. The guidelines were premised on the fact that the understanding of water as a social right was misplaced and that it should rather be seen as a socio-economic good (ibid, s 1 (1)). Further, the guidelines were based on an understanding that the delivery of the social right by the government did not sufficiently taken into account the preferences of users and was ineffective in ensuring the carrying out of operation and maintenance activities. This, thus, called for a demand-led approach. The link between the demand-led approach and the new conception of water as an economic good is succinctly brought together where the guidelines argue that the idea of demand-driven system is to take into account the preferences of users "where users get the service they want and are willing to pay for" (ibid, s 1 (2)). The imposition of full cost recovery of operations and maintenance and replacement costs on the communities was expected to generate a sense of ownership and ensure the financial viability of the schemes.

The Swajaldhara principles were remarkably similar to the ones introduced under the Swajal project (ibid, s 3(1)). First, Swajaldhara provided for the adoption of a demand-led approach that includes participation of the community from the choice of the drinking water scheme up to its implementation. Second, the guidelines sought a form of decentralisation and requested that drinking water assets should be owned by the relevant panchayat and that the communities should have the power to plan, implement and operate all drinking water schemes. Third, the participation and decentralisation elements were brought together in the context of the financial principles which were a compromised version of full cost recovery. Thus, while users were to bear the entire responsibility for the operation and maintenance of drinking water schemes, their contribution to capital costs was limited. In practice, this was first set at 10% for a service level of 40 lpcd, but in a number of situations, this percentage was exceeded. Under Swajaldhara, at least half of the 10% contribution had to be in cash, a significant increase over the 2% under the Swajal project. Exceptions were, for instance, provided for scheduled tribe areas, where the cash contribution was first reduced to one quarter of the community contribution.¹¹ Subsequently, in 2006, an amendment to the guidelines provided that the contribution in the case of villages where scheduled castes and scheduled tribes constituted more than half of all habitations could be in any form without any stipulation of a contribution in cash.¹² Fourth, from an institutional perspective, one of the consequences of a demand-led perspective is the rethinking of the role of the government. The guidelines here specifically provided that the aim was to shift the government's role from "direct service delivery" to only supporting a limited number of activities such as planning, policy formulation, monitoring and evaluation.

4 National Rural Drinking Water Programme

The experience gathered during the Tenth Plan led the government to suggest an entirely new framework for rural drinking water supply. The need for further changes after the introduction of the Swajaldhara Guidelines can be explained by a variety of factors. In general, the implementation of the reforms has been fraught with difficulties and setbacks. From the government side, the first difficulty was that government agencies engaged in the implementation of drinking water supply policy frameworks were not necessarily particularly keen on the changes that saw them having to hand over some of the power they had enjoyed earlier. At the same time, some of the reform principles seem to have been found to be politically unappealing for state governments. For instance, in Badwani district of Madhya Pradesh, villages that were implementing Swajaldhara projects did not actually follow the Swajaldhara principles. This is not particularly surprising, given the imposition of a part of capital costs on villagers, something that was never likely to be politically appealing, given the central place of drinking water in rural life. The overall assessment of the Swajaldhara years was thus at best mixed and this explains why between 2007 and 2009 significant policy uncertainty underlined the future of reforms in the Eleventh Plan. From the point of view of external assessments, the limited independent work done concerning the implementation of the Swajaldhara scheme showed that there were serious concerns with the proposed reform principles (Sampat 2007).

The above assessments seem to lead naturally to the conclusion that a new framework was necessary. This is indeed what the government decided to do for the Eleventh Plan. In fact, in a bid to demarcate the new policy principles from earlier reforms, the policy instrument has been given a new name and is now known as the NRDWP.¹³ Yet, even though the new framework seeks to demarcate itself both from the ARWSP and from the reforms initiated through the Swajaldhara Guidelines, the first version of the new programme argued that “[i]n order not to lose any time, States/UTs (union territories) shall initiate activities for universalisation of the sector reforms/Swajaldhara principles”.¹⁴

The new NRDWP brings a number of key changes to the policy framework for drinking water supply in rural areas. At the broadest level it emphasises the need to conceive drinking water supply in a wider context. Thus, it makes a much more direct link with sanitation than was the case earlier. Further, it proposes links further afield with health policy and even with the Mahatma Gandhi National Rural Employment Guarantee Scheme.

The NRDWP is a relatively comprehensive document whose full analysis is not the object of this section. Instead, the following subsections focus on certain aspects that are specifically relevant in the context of this article.

Water as a Basic Need and a Public Good: The NRDWP sees water as a “public good” that everyone can demand and as a “basic need”.¹⁵ At the broadest level, this does not seem controversial. From a legal point of view, however, this is revealing of the overall orientation of the NRDWP.

The recognition of water as a public good is interesting but does not fit within the existing legal framework. Indeed, the

Supreme Court has repeatedly stated that water is a “public trust”.¹⁶ This specifically rests on the basis that water is of such importance to people that “it would be wholly unjustified to make [it] a subject of private ownership” (ibid, para 25). The Court further specified that the government was supposed to protect water for the enjoyment of the general public rather than allow its use for commercial purpose. Water being a public trust can thus not be a good, even in its characterisation as “public”.

The second understanding of water under the NRDWP is that it is a basic need. In a general sense, the fulfilment of basic water needs contributes to the realisation of the fundamental right to water or at least its core content. Yet, from a legal perspective, the notion of basic needs is different from that of a fundamental right. In other words, legal instruments that choose to speak the language of basic needs do not speak the language of fundamental rights.

In terms of basic principles, the striking aspect of the NRDWP is thus that it ignores both the basic principle of water law concerning control over water and the existence of the fundamental human right to water. This could be simply an oversight and an inappropriate choice of language from a legal point of view. The fact that the NRDWP consciously evacuates the language of fundamental rights is, however, confirmed by a comparison of the two different versions put out, respectively in 2009 and in 2010. Indeed, the 2009 version, using a formulation reminiscent of the Dublin Statement,¹⁷ specified that water is a “socio-economic good and demand for basic drinking water needs is a fundamental right”.¹⁸ While this formulation does not amount to a recognition of the human right to water, since it frames a fundamental right within a specific understanding of water (socio-economic good), it has at least the merit of speaking the language of fundamental rights. Further, the 2009 version also recognised as one of its basic principles that the commodification of water was problematic because it shifts the focus away from the “human rights (sic) to water for livelihood”.¹⁹ Both the reference to a “fundamental right” and to a “human right” have been expunged from the latest version of the NRDWP, thus, confirming a decision not to conceive drinking water supply within the context of fundamental rights.

From an Individual Entitlement to Household Drinking Water Security: The NRDWP goes further than simply evacuating the language of fundamental rights. In fact, it operates a complete u-turn on the policy followed since the 1970s by suggesting that measuring the realisation of the fundamental right to water in terms of a quantity of water per capita per day is inappropriate.²⁰ The NRDWP suggests moving from a fixed minimum to the concept of drinking water security.

Drinking water security is not given a specific definition, but it is clearly opposed to the per capita norm followed earlier. Indeed, the NRDWP specifically states, it is necessary to “move *ahead* from the conventional norms of lpcd norms to ensure drinking water security for all in the community” (ibid, s 4, emphasis added). The basic unit now considered is the household. The NRDWP premises the shift from the individual to the household on the fact that “[a] verage per capita availability may not necessarily mean assured

access to potable drinking water to all sections of the population in the habitation” (ibid, s 9(1)). It does not, however, explain how the shifts ensure better coverage in a given habitation.

The new framework is startling from a fundamental rights perspective. The key concern is that the focus on the individual makes way for a focus on the household. In addition, the foreword to the guidelines specifically indicates that “norms and guidelines need to be flexible”, and further states that, flexibility is preferable to the “adoption of universal norms and standards” (ibid: iv). This makes sense in terms of giving panchayats the scope to manage drinking water in the way most suited to local conditions. However, in terms of broad regulation, this does not fit within a fundamental right framework that is essentially based on ensuring the exact same realisation of the right (at least its “core” content) to everyone.

Sustainability and Drinking Water Security: One of the key notions underlying drinking water security is the “sustainability” of water supply. This is significant because sustainability is intrinsically linked to equity and has the potential to foster an understanding of drinking water security that contributes to the realisation of the fundamental right to water.

The main text of the NRDWP does not define sustainability, but an annex on sustainability provides interesting insights. The starting point is the notion of sustainable development expounded in the report of the World Commission on Environment and Development (Brundtland Commission).²¹ According to the Brundtland Commission, sustainable development is the development that meets today’s needs without compromising future generations’ options. One of the key tenets of the definition is the need to give an “overriding priority” to the essential needs of the world’s poor (ibid: 54).

The understanding of sustainability propounded under the NRDWP is fundamentally different from that of the Brundtland Commission. It emphasises four components: source, system, financial and finally social and environmental sustainability.²² The focus is on ensuring availability of water – and not access (source sustainability), on optimising the cost of production of water and capacity-building (system sustainability), on cost recovery of “at least” 50% (financial sustainability) and on “[p]roper reject management and involvement of all key stakeholders” (social and environmental sustainability) (ibid: Annexure II, s 2).

The above definitions fall within a context, where there is no generally agreed definition of sustainable development in either Indian law or international law. Yet, the NRDWP frames its understanding of sustainability in the context of the Brundtland Commission’s report. In doing so, it acknowledges that sustainability first evolved from an environmental perspective and gave utmost priority to the poor.²³ It is, thus, surprising to find that “social and environmental sustainability” is the fourth and last component of the definition. In addition, the NRDWP frames the environmental dimension of sustainability in an extremely narrow framework focused on waste management. On the whole, the sustainability dimension of drinking water security as expounded in the NRDWP fails to provide a basis for fostering the realisation of the fundamental right to water.

Centralisation within Decentralisation: The NRDWP puts a new emphasis on the need for infrastructure that provides water from outside a given village through a grid fed by pipelines or other means of connecting major water sources.²⁴ Alongside the focus on conjunctive use of surface and groundwater and reliance on multiple sources of water, a grid can make an important contribution to the provision of water. It could also lead to more equity among regions since everyone could in principle be provided the same amount of clean water regardless of their geographical location. This would constitute a major step forward in ensuring that the fundamental right to water is realised in the same way for everyone.

At the same time, this is a momentous change from reliance on local sources of water and should be integrated in a much broader policy discussion. Indeed, from the point of the principles and concepts being proposed, there is a tension or maybe even an opposition between the move to foster decentralisation and participation and the move towards having a grid covering all villages. The latter will be a definition, imply a new level of centralisation which has, in fact, never been present in rural drinking water supply until now. This may be a positive factor to the extent that the whole new framework is conceived with appropriate safeguards and accountability. It cannot, however, be introduced under the guise of participation and decentralisation and the two streams, thus, need to be clearly distinguished. Further, in a context where other legal instruments such as infrastructure acts specifically call for private sector participation in water supply infrastructure,²⁵ it is imperative to have a full debate on the consequences of the establishment of a grid.

Realisation of the Fundamental Right: The past 15 years have been momentous in terms of the evolution of the law and policy framework concerning drinking water. The existence of the human right to water in India has been confirmed on various occasions and in different contexts by the courts. While courts have not developed the content of the right in detail, there is today no doubt that the right is part of everyone’s fundamental rights in India. Beyond this in-principle recognition, there is a very little legislation that confirms and expands the general right thus recognised. Yet, the union government took a number of policy measures over the years that constituted steps towards the realisation of this fundamental right. In particular, the ARWSP established a framework for providing water in rural areas that was both bold and significant. The decision to put the minimum quantity of water constituting, the lowest threshold towards the realisation of the fundamental right at 40 lpcd already in the 1970s reflected a very good understanding of the challenges involved in the short- and long-term realisation of the right.

As a result of these different laws and policy measures, significant steps had been taken towards the realisation of the core content of the human right to water for a great number of people by the end of the century. This was far from adequate since millions of people were still not provided with adequate and sufficient water, but the direction had been broadly very much in the right direction. In this sense, there was progress towards the progressive realisation of this right.

The reforms undertaken over the past decade have in principle not affected the basic content of the human right to water. However, there has been a major shift in the policy framework concerning drinking water supply in rural areas that is not without an impact on the realisation of the fundamental right. The paradigm shift that has been implemented progressively over the past decade has led, for instance, to a focus on demand-led rather than supply-led schemes and an emphasis on efficiency rather than equity. The focus has also been on conceiving water as a socio-economic good rather than a social right. The latest changes in the policy framework have further sought to move away from conceiving water provision as an individual entitlement that could be measured in terms of certain benchmarks such as a minimum quantity per person per day in favour of the vaguer concept of drinking water security that only considers entities from the household up.

The place of reforms within the context of the fundamental right to water can be considered from two different perspectives. On the one hand, the reforms do not specifically seek to negate the human right to water. It is thus possible to expect that ongoing reforms simply constitute a different way to realise the human right to water. On the other hand, reforms have specifically sought to move away from a social right and fundamental right perspective and have introduced concepts that can be understood as regressive from a fundamental rights point of view.

The perspective that sees no contradiction between the human right to water and ongoing policy reforms can be pursued up to a certain point. It is guided by the idea that law and policy do not necessarily evolve in a coordinated fashion. This is not inappropriate to the extent that policy instruments remain subordinated to law. In practice, the tendency in the water sector over the past decade to emphasise the primacy of policy instruments as providing the key lineaments of the framework governing the water sector has tended to eclipse the hierarchically superior position of law.

In general, the primacy of fundamental rights is well-established and undisputed. Yet, in a context, where the content of the fundamental right to water has not been clearly determined by the courts, the question of its possible content remains under discussion. Given the absence of specificity, the move from an understanding of the right that includes the provision of free water infrastructure to a right that is restricted to a right to access water in a context which emphasises the need for participation by all individuals is not remarkable. In other words, from a theoretical perspective, a different understanding of the right has evolved over the past decade through policy instruments but the broad parameters guiding the earlier and the new policy can at a general level probably both be justified under a fundamental rights perspective.

The idea that different policy perspectives can support the realisation of a given fundamental right is unproblematic. Further considerations, however, need to be brought into the analysis. Indeed, the flexibility that governments have in the means they choose to realise human rights is limited, as indicated by the following two points:

First, it is now widely acknowledged that any measures to foster the realisation of a fundamental right must focus on the situation

of the poorest in priority, thereby contributing to the overall realisation of the right but starting from the people who are most disadvantaged in this regard.²⁶ In this context, the experience with the reforms over the past decade does not indicate that the policy framework is either geared towards a focus on the most disadvantaged or able to preferentially foster the realisation of the right for the most marginalised (Cullet 2009). This is related to the emphasis on the need for individuals to pay either the costs of running the infrastructure, providing access to water or/and part of the costs of any new infrastructure. The implementation of ongoing reforms seems to have the impact of bypassing the poorest because of the emphasis on money as the primary driver of better access. In effect, it is first, the richer members of any given community who get additional water supply, and generally, people who can afford it. In the case of piped supply, where community taps are part of the planning, they tend to be closed off early on by the locals running the scheme, usually because of non-payment of related charges (ibid: 50). This is problematic because even if the poor do not suffer from the new measures put in place, they do not benefit from them. Additionally, in the long-term, the poor will be affected when the maintenance of their existing sources of water supply is sidelined in favour of maintenance of the newer infrastructure created under the ongoing reforms. Second, whereas the government has the choice of the policy measures it wants to implement to foster the realisation of fundamental rights, this must be undertaken in the existing rights framework. This framework happens at present to focus mostly on individual entitlements. In this context, the move away from an individual entitlement that is measured in terms of a minimum quantity of water in favour of a non-quantified standard applying at no smaller a unit than the household is a step away from the existing fundamental rights framework. Leaving aside the possibility to have a collective right to water, something that no country seems to have considered yet, the move away from an individual entitlement in favour of a collective notion has already been seen to lead to inappropriate results in South Africa in the context of the free water policy.²⁷ In this case, it is the poorer households that suffer because they are often the biggest, at least in part because more people cohabit in a smaller space than wealthier households. As a result, they lose out in the case of any household-based measure which goes against the idea of preferentially alleviating the situation of the least well-off first (Smith 2006).

The overall outcome of the reforms is to foster better water supply to parts of rural communities. The focus of the reforms on availability of money as the yardstick that drives better access ends up making the new policies an instrument favouring the richer members of a given community over the poorer ones. This is problematic in the context of the realisation of fundamental rights and the focus on poverty eradication where the situation of the poorest is the most important issue to address. In addition, the move away from an individual entitlement tends to dilute the content of the right without helping the poorest households.

The more general problem that emerges is that the policy framework for reforms effectively pays only lip service to fundamental rights. The constructive interpretation suggested above

that sees reforms as proposing a different way to realise the human right to water goes in fact further than what the reforms themselves seek to do. Indeed, the move away from a social right towards conceiving water as an economic good is a direct reflection of the conception of water proposed since the 1992 Dublin Statement that first conceived of the human right to water as a subsidiary element of water as an economic good. At the national level, there is no doubt that fundamental rights are not subordinated to

anything else. The Dublin Statement, that is not even a piece of soft law endorsed by the UN, has no bearing on what states must do at the national level. The only thing that matters in this context is the respect for the constitutional framework. This happens to mandate that fundamental rights prevail over other rights. There is, thus, a need to reconceive ongoing reforms so that they fit within the fundamental right to water framework rather than the other way round.

NOTES

- 1 E.g. *Subhash Kumar vs State of Bihar*, AIR 1991 SC 420 (Supreme Court of India, 1991).
- 2 *Narmada Bachao Andolan vs Union of India*, AIR 2000 SC 3751 (Supreme Court of India, 2000).
- 3 *Hamid Khan vs State of Madhya Pradesh*, AIR 1997 MP 191 (Madhya Pradesh High Court, 1996), para 6.
- 4 *Vishala Kochi Kudivella Samarkshana Samithi vs State of Kerala*, 2006 (1) KLT 919 (High Court of Kerala, 2006), para 3.
- 5 The only proposal for a drinking water focused legislation at the union level is limited to certain issues linked to water quality and would not constitute a comprehensive drinking water legislation if it is adopted. See Department of Drinking Water Supply, Draft Guidelines for Preparation of Legislation for Framing Drinking Water Regulations (2007).
- 6 Government of India, Accelerated Rural Water Supply Programme Guidelines (1999-2000) (ARWSP Guidelines).
- 7 Bureau Indian Standards Specifications for Drinking Water (BIS Specification 10500), 1991 and Central Public Health and Environmental Engineering Organisation, Manual on Water Supply and Treatment (New Delhi: Ministry of Urban Development, 3rd ed. 1999).
- 8 E.g. Himachal Pradesh Panchayati Raj Act, 1994, s 11(2).
- 9 E.g. Karnataka Panchayati Raj Act, 1993, s 77.
- 10 World Bank, Staff Appraisal Report – Uttar Pradesh Rural Water Supply and Environmental Sanitation Project (Report No 15516-IN, 1996).
- 11 Lok Sabha, “Unstarred Question No 2451”, Swajaldhara Yojana, answered by minister of state in the Ministry of Rural Development (A Narendra) on 18 March 2005.
- 12 Government of India, Department of Drinking Water Supply, Office Memorandum – Amendment to Swajaldhara Guidelines, Doc No W-11021/2/2003-TM.IV (SW), 15 May 2006.
- 13 Department of Drinking Water Supply, National Rural Drinking Water Programme – Movement Towards Ensuring People’s Drinking Water Security in Rural India – Framework for Implementation (2010) (hereafter NRDWP 2010).
- 14 Department of Drinking Water Supply, National Rural Drinking Water Programme – Movement Towards Ensuring People’s Drinking Water Security in Rural India – Framework for Implementation 2009-2012 (2009) 45 (hereafter NRDWP 2009). This paragraph does not figure anymore in the 2010 version of this document.
- 15 NRDWP 2010, s 2.
- 16 *M C Mehta vs Kamal Nath* (1997) 1 SCC 388 (Supreme Court, 1996).
- 17 Dublin Statement on Water and Sustainable Development, International Conference on Water and the Environment, Dublin, 31 January 1992, principle 4.
- 18 NRDWP 2009, s 12(1).
- 19 NRDWP 2009 s 2.
- 20 Note that at the same time the guidelines indicate that the overall goal is to “provide every rural person with adequate safe water for drinking, cooking and other domestic basic needs”. NRDWP 2010, s 1.
- 21 Report of the World Commission on Environment and Development, Our Common Future, UN Doc A/42/427 (1987).
- 22 NRDWP 2010, Annexure II: Guideline for Implementation of Sustainability – Swajaldhara Project.
- 23 Report of the World Commission on Environment and Development.
- 24 NRDWP 2010, s 6.
- 25 E.g. Gujarat Infrastructure Development Act, 1999.
- 26 This is in fact what the Brundtland Commission called for in its definition of sustainability.
- 27 South Africa, Regulations Relating to Compulsory National Standards and Measures to Conserve Water 2001, s 3.

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